

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Ave. NW, Suite 520N
TELEPHONE: (202)434-9958 / FAX: (202)434-9949

May 30, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of LARRY ANDERSON,
Complainant,

v.

KALAMAZOO MATERIALS, INC., and
ROCK PROS USA LLC, and any and all
successors in interest,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEST 2023-0238
MSHA Case No. RM-MD-2023-05

Mine: Silver Bell
Mine ID: 02-02848

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Sullivan

This case is before me upon an Application for Temporary Reinstatement filed by the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), and 29 C.F.R. § 2700.45. On May 15, 2023, the Secretary filed the application on behalf of miner Larry Anderson (“Complainant”) seeking his reinstatement to his former position of Safety and Compliance Manager at the Silver Bell mine and other mines operated by Kalamazoo Materials, Inc., Rock Pros USA LLC, and any successors in interest. The certificate of service states that the application was served on Respondents by e-mail that same day. The application also satisfies the other procedural requirements of Commission Rule 45(b) in that, among other things, it timely “states the Secretary’s finding that the miner’s discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary’s reasons supporting his finding[,] and includes a copy of the miner’s complaint to the Secretary” 29 C.F.R. § 2700.45(b).¹

On May 25, 2023, the Respondents made a timely request for hearing in accordance with Commission Rule 45(c). Upon filing this request, the Respondents conveyed to the Court that the parties were engaged in good faith efforts to settle the temporary reinstatement matter. On May 26, 2023, the Secretary filed a Settlement Agreement and Joint Motion for Temporary Reinstatement. The terms of the agreement provide for the Complainant to receive economic reinstatement with Kalamazoo in lieu of immediately returning to work for Respondents.

¹ The Discrimination Complaint (“Complaint”) filed with the Secretary’s Mine Safety and Health Administration by the Complainant is dated February 1, 2023, thus well within 60 days of the Complainant’s January 23 termination of employment. *See* 30 U.S.C. § 815(c)(2).

Section 105(c)(1) of the Mine Act provides that “[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . .” 30 U.S.C. § 815(c)(1). In the application, as supported by his investigator’s affidavit (Exhibit B thereto), the following allegations of the Secretary establish the Complaint as having been not frivolously brought under sections 105(c)(1) and (2):

- (1) Complainant began work as a safety and compliance official for Kalamazoo Materials in June 2022.
- (2) In January 2023, Complainant made safety complaints to Respondents’ management. The Complaint references several emails with safety complaints that were sent to a Safety Manager, who was listed in the Complaint as responsible for discriminatory action.
- (3) Complainant also notified management of his selection to serve as a miners’ representative at several of the Respondents’ mines. The Complaint alleges that management told Complainant to “not speak with miners about their rights.” Application for Temporary Reinstatement (“App.”), Ex. A at 3.
- (4) Complainant was “discriminatorily terminated” on January 23, 2023. App. at 4.


I agree with the Secretary that the Complaint was “not frivolously brought” in this instance. See *Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (relying upon Mine Act legislative history and the Supreme Court’s treatment of a similar whistleblower protection provision to conclude that the “not frivolously brought” standard is the equivalent of a “reasonable cause to believe” standard and is met when a miner’s “complaint appears to have merit”).

In addition, I have reviewed the terms of the Agreement and find that they do not appear to reduce Complainant’s rights under section 105(c)(2). The Agreement shall remain on file in this proceeding. I reach no conclusion beyond that regarding the merits of the Complaint.

Finally, Section 105(c)(3) of the Act directs the Secretary to notify a complainant whether a section 105(c) violation occurred within 90 days of the filing of a complaint, which in this instance would have been no later than Tuesday, May 2, 2023. See 30 U.S.C. § 815(c)(3). The Secretary shall provide an update regarding the status of the Secretary’s investigation of the Complaint within seven days.

WHEREFORE, the Application is **GRANTED**, and it is **ORDERED** that reinstatement shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant, or such a case is brought and there is a final determination on it by decision, approval of settlement, or other order of this court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

WHEREFORE, the Secretary is further **ORDERED** to provide an update regarding the status of the Secretary's investigation of the Complaint no later than seven days from the date of this Order.


John T. Sullivan
Administrative Law Judge

Distribution (Electronic Mail):

Andrew M. Katz, U.S. Department of Labor, Office of the Solicitor, 350 South Figueroa Street, Suite 370, Los Angeles, CA 90071-1202, Katz.Andrew.M@dol.gov

Dana M. Svendsen, Perkins Coie LLP, 1900 Sixteenth Street, Suite 1400, Denver, CO 80202, (dsvendsen@perkinscoie.com)