FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 17, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CURTIS STAHL	:	
v.	:	Docket No. WEST 2000-145-DM
A&K EARTH MOVERS, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

INTERIM DECISION AND ORDER

BY THE COMMISSION:

On March 1, 2000, the Commission received from A&K Earth Movers, Inc. ("A&K") a petition for review and request for stay of Administrative Law Judge T. Todd Hodgdon's February 18, 2000, order temporarily reinstating Curtis Stahl, issued pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c). We grant A&K's petition for review and, for the reasons that follow, we affirm the judge's order.

On July 27, 1998, Stahl filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that he had been discharged from A&K on July 15, 1998, and alleging that the discharge was the result of his safety complaints. 22 FMSHRC 233, 233 (Feb. 2000) (ALJ). In his complaint, Stahl stated that, on several occasions during June and July, 1998, he complained to his employer about worn out brakes on a fuel truck. *Id.* at 234-35. Eventually, Stahl red-tagged the truck, taking it out of service. *Id.* at 234. On July 15, he was terminated. *Id.* at 235. When Stahl asked his employer why he was terminated, he was told that he "allowed both generators to run out of fuel last week and we just don't need any more trouble around here." *Id.*

On January 21, 2000, nineteen months after receiving Stahl's complaint, the Secretary applied to have Stahl temporarily reinstated. Appl. for Temp. Reinst. The matter proceeded to hearing before Judge Hodgdon pursuant to A&K's request. Responding to the allegations in Stahl's complaint, A&K presented testimony that Stahl did not communicate any safety complaints to his superiors, that he was terminated for reasons having nothing to do with his alleged protected activity, and that the decision to terminate Stahl was made a week before his first alleged safety complaint. 22 FMSHRC at 235.

The judge found that there was no dispute that Stahl's discharge constituted adverse action, and that employer knowledge of protected activity, hostility or animus towards the protected activity, and coincidence in time are all circumstantial indications of discriminatory intent under Commission case law. *Id.* at 236. In this regard, he noted Stahl's testimony that the company had knowledge of his safety complaints and that only eight days elapsed between those complaints and his termination. *Id.* Declining to resolve credibility disputes, the judge pointed out that, while "A&K's evidence indicates that it may well have a valid defense to Stahl's complaint," the company's evidence did not establish that the claim was frivolous. *Id.* at 237. Accordingly, the judge issued an order directing A&K to temporarily reinstate Stahl. *Id.*

In its petition, A&K claims that the judge erred in finding that the complaint was not frivolously brought because the Secretary failed to present evidence of employer animus towards Stahl's alleged protected activity. PDR at 8-10. A&K also maintains that the Secretary's nineteen-month delay in filing the application for temporary reinstatement prejudices the operator, and that the temporary reinstatement claim should be barred by the equitable doctrine of laches. *Id.* at 10. Finally, A&K requests that the Commission stay the judge's temporary reinstatement order pending the Commission's review of the judge's decision. *Id.* at 10-12.

The Secretary responds that substantial evidence supports the judge's decision ordering Stahl's temporary reinstatement. S. Resp. at 7-15. She also argues that A&K should not be permitted to raise its laches argument before the Commission because it failed to raise it before the judge, that the operator's laches argument is beyond the scope of temporary reinstatement proceedings, and that the operator's laches argument attempts to punish a miner for the Secretary's delay. *Id.* at 16-19. Finally the Secretary submits that the Commission should reject A&K's stay request. *Id.* at 19-24.

Initially, we conclude that A&K's laches argument has not been preserved for review. Below, the operator's attorney twice referenced the Secretary's nineteen-month delay in initiating temporary reinstatement proceedings. Tr. 5, 228. Otherwise, A&K did not discuss the Secretary's delay in initiating temporary reinstatement proceedings, let alone argue that laches barred the instant temporary reinstatement proceedings. Nor has A&K presented in its petition any reason for its failure to present its laches argument before the judge. Accordingly, we decline to reach the argument. 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.").

Nevertheless, we are troubled by the Secretary's nineteen-month delay in seeking Stahl's temporary reinstatement, and the Secretary's failure to explain this delay. A delay of this magnitude thwarts the entire purpose of the temporary reinstatement provision. To fully discharge our duties under section 105 of the Mine Act, we retain jurisdiction of this case for the limited purpose of obtaining from the Secretary a full and detailed explanation of this delay, including information on when Stahl's complaint first came to the attention of an attorney within the Department of Labor. *Cf. Daanen and Janssen, Inc.*, 19 FMSHRC 665, 666 (Apr. 1997)

(citing Unpublished Order at 2 (Feb. 5, 1997) directing Secretary to provide explanation of what was alleged to be a misrepresentation in a motion for an extension of time). We also note it does not appear that the Secretary has yet filed a discrimination complaint with the Commission. 22 FMSHRC at 233. We urge the Secretary to immediately act on Stahl's complaint if she has not already done so.

Turning to the judge's decision ordering Stahl's reinstatement, we note that "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999) and *Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993), *both quoting Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd,* 920 F.2d 738 (11th Cir. 1990). We apply the substantial evidence test in reviewing the judge's decision.[1] *Secretary of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000).

As stated by the judge, Stahl presented evidence that he engaged in protected activity when he allegedly made several complaints to his superiors about defective brakes on a fuel truck. 22 FMSHRC at 234, 236. It is undisputed that Stahl's discharge constituted adverse action. *Id.* at 236. Nor does A&K dispute that Stahl's termination occurred eight days after his final alleged complaint about the faulty brakes on the fuel truck (*id.* at 234, 236), from which an illegal motive could be inferred. *See Donovan ex rel. Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (holding that where two weeks had elapsed between the alleged protected activity and the miner's dismissal, "[t]he fact that the Company's adverse action . . . so closely followed the protected activity is itself evidence of an illicit motive").

In sum, the record contains evidence that A&K was aware of Stahl's safety complaints, and that only eight days elapsed between his last complaint and his discharge. A&K has presented evidence that Stahl made no safety complaints, that it had no knowledge of any safety complaints by Stahl, and that the decision to terminate him was made before the alleged complaints.[2] 22 FMSHRC at 235. However, as the judge correctly pointed out, the judge is not

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[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[2] Contrary to A&K's claim that "some evidence of [employer] hostility [towards the protected activity] must be presented in order to support an order for temporary reinstatement," (PDR at 8), we have never held that hostility is a prerequisite to a finding that a complaint is not

obligated to resolve testimonial conflicts in a temporary reinstatement decision. *Id.* at 236. The record evidence on the protected activity, adverse action, and a nexus between the two, constitutes substantial evidence in support of the judge's determination that the complaint was not frivolous.

Accordingly, the judge's order requiring the temporary reinstatement of Stahl is affirmed. We order Stahl's immediate temporary reinstatement, if he has not already been reinstated. We also order the Secretary to file with the Commission within 10 days from the date of this interim decision and order an explanation of the circumstances surrounding the protracted delay in bringing Stahl's temporary reinstatement application.[3]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

frivolous. Rather, such evidence is but one of several circumstantial indicia of discriminatory intent that may be offered to show that a complaint is not frivolous.

[3] We intimate no views as to the ultimate merits of the case. We deny the operator's request for a stay as moot.

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