

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 7 1994

SECRETARY OF LABOR, : TEMPORARY REINSTATEMENT PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. KENT 94-396-D
ON BEHALF OF : BARB CD 94-02
DANNY SHEPHERD, :
Complainant : Mine No. 1
: :
v. : :
: :
IRISHMAN ELKHORN COAL : :
COMPANY, : :
Respondent :

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

The Secretary has filed an application for Temporary Reinstatement pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), on behalf of Danny Shepherd. Shepherd was employed by the Irish Elkhorn Coal Company at its No. 1 Mine from September 30, 1993, until October 8, 1993, when he was discharged.

The Secretary's reinstatement application is supported by an affidavit of Lawrence M. Beeman, Chief, Office of Technical Compliance and Investigation for Coal Mine Safety and Health, Mine Safety and Health Administration. Beeman's affidavit alleges that Shepherd engaged in several protected activities, including his refusal to operate a continuous mining machine in an unsafe condition, his distribution of miners' rights booklets to mine personnel and his statements to miners that they did not have to work under various unsafe conditions.

The Secretary's application was served upon Billy R. Watson, general manager of the respondent, and attorney C. Graham Martin, on February 4, 1994. Commission Rule 45(c), 29 CFR. § 2700.45(c) in part provides: "Within ten days following receipt of the Secretary's application for temporary reinstatement, the person against who relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and,

if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

The Secretary's application was followed by a letter filed on February 22, 1994, requesting Shepherd's reinstatement in view of the respondent's failure to request a hearing in this matter. Therefore, Commission Rule 45(c) requires me to review the Secretary's application to determine if Shepherd's complaint has not been frivolously brought.

The "not frivolously brought" standard set forth in Section 105(c), 30 U.S.C. § 815(c), is satisfied when there is a reasonable cause to believe that the underlying discrimination complaint is meritorious. J. Walter Resources v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990). Thus, the Secretary must prevail on an application for temporary reinstatement if the facts supporting the application are not insubstantial or frivolous. Id. at 747. Beeman's affidavit submitted in support of the Secretary's application specifies alleged protected activities that are contemporaneous with Shepherd's employment termination which occurred on or about October 8, 1993. Consequently, I conclude that Shepherd's complaint is not clearly without merit or pretextual in nature. Therefore, I find that Shepherd's complaint has not been frivolously brought.

Accordingly, the Irishman Elkhorn Coal Company **IS ORDERED** to immediately reinstate Danny Shepherd to the position from which he was discharged on or about October 8, 1993, or, to an equivalent position, at the same rate of pay and with the equivalent benefits. Shepherd's entitlement to backpay and benefits shall be calculated from the date of this order.



Jerold Feldman
Administrative Law Judge
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Distribution:

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