

CCASE:
SOL (MSHA) V. CANADA COAL
DDATE:
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF GEORGE D. JUSTICE,
APPLICANT

APPLICATION FOR TEMPORARY
REINSTATEMENT

Docket No. KENT 82-111-D

v.

Case No. PIKE CD 82-10

CANADA COAL COMPANY, INC.,
RESPONDENT

No. 2 Mine

DECISION AND ORDER DENYING APPLICATION
FOR TEMPORARY REINSTATEMENT

On January 22, 1982, Mr. George D. Justice, purportedly a miner, filed a complaint of discharge with the Secretary of Labor, alleging that his discharge was in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act". More than four months later, on June 3, 1982, the Secretary filed an Application for Temporary Reinstatement on behalf of Mr. Justice under the provisions of section 105(c)(2) of the Act and Commission Rule 44(a), 29 C.F.R. 2700.44(a) (as amended)

Under amended Commission Rule 44(a), an application for temporary reinstatement must state the Secretary's finding that the miner's complaint of discrimination, discharge, or interference was not frivolously brought and must be accompanied by a copy of the miner's complaint, an affidavit setting forth the Secretary's reasons for his finding and proof of service upon the operator.

The application herein contains a finding by the Secretary that the miner's complaint was not frivolously brought, and is accompanied by proof of service upon the operator and a copy of what purports to be the miner's complaint. While the application is also accompanied by the affidavit of Michael Yanak, Jr., an employee of the Secretary (Mine Safety and Health Administration), that affidavit does not set forth the Secretary's "reasons" for his finding that the miner's complaint was not frivolously brought, as required by Commission Rule 44(a). A copy of the affidavit is attached hereto as Exhibit "A".

"Reasons" are essentially statements made to explain or justify an action or decision and which provide a rational and sufficient basis for such action or decision. See

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The American Heritage Dictionary of the English Language, Houghton Mifflin Co., 1976. The affidavit here at issue essentially sets forth only vague conflicting uncorroborated allegations. Considered as a whole, it cannot be said that the affidavit sets forth sufficient grounds to explain, justify, or provide a rational and sufficient basis for the Secretary's finding that the miner's complaint was not frivolously brought.

Accordingly, the Application for Temporary Reinstatement must be denied.

Gary Melick
Assistant Chief Administrative Law Judge

~FOOTNOTE-ONE

EXHIBIT "A"

A F F I D A V I T

Commonwealth of Virginia)

County of Arlington)

Michael Yanak, Jr., being first duly sworn, deposes and states:

1. I am a Mine Safety and Health Specialist on the staff of the Office of Technical Compliance and Special Investigation, Mine Safety and Health Administration, located at 4015 Wilson Boulevard, Arlington, Virginia 22203.

2. As a Mine Safety and Health Specialist, I had the responsibility of initially reviewing the report of investigation of the above-captioned matter.

3. My review of the report of investigation disclosed the following:

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(a) At all relevant times herein mentioned, Respondent Canada Coal Company, Inc., did business and operated the No. 2 Mine in the production of coal and therefore is an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 (Act).

(b) At all relevant times herein mentioned, Applicant George D. Justice, was employed by respondent as a mechanic, assigned to work at the subject No. 2 Mine and was a "miner" as defined in Section 3(g) of the Act.

(c) The subject No. 2 Mine located in or near Kimper, Pike County, Kentucky, is a "mine" as defined in Section 3(h)(1) of the Act, the products of which enter or affect commerce.

(d) Mr. Justice was hired by respondent in August 1981, and continued to work in respondent's employ until he was discharged on or about January 21, 1982.

(e) On or about January 21, 1982, Mr. Justice was working in the No. 2 section of the subject mine during the third shift. During the course of that shift, Mr. Justice required the need for a sanitary toilet.

(f) Mr. Justice alleges that he made a diligent search but was unable to locate a sanitary toilet on the No. 2 section of the subject mine. He therefore advised his immediate supervisor of that circumstance and requested transportation to the surface for the purpose of using the surface toilet facilities. His request was refused. Mr. Justice then repeated his request for transportation to the Company Safety Inspector. His request

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was refused. Mr. Justice then repeated his request for transportation to the Third Shift Mine Foreman. The Third Shift Mine Foreman arranged transportation to the surface for Mr. Justice.

(g) Once on the surface Mr. Justice was advised to remain there in order to await the General Superintendent. Thereafter, the General Superintendent discharged Mr. Justice, alleging that a sanitary toilet was available on the No. 2 section.

(h) On January 22, 1982, Mr. Justice timely filed a complaint of discharge with the Mine Safety and Health Administration alleging that his discharge was in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977.

5. Based upon the foregoing information the Secretary of Labor, through his authorized designees, determined that the complaint of discharge filed by George D. Justice was not frivolously brought.

Michael Yanak, Jr.

Taken, subscribed and sworn before me this 2nd day of June, 1982.

Catherine L. Falatko
Notary Public
My commission expires: Dec. 5, 1983