

CCASE:
UNITED STATES FUEL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED STATES FUEL COMPANY,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEST 84-40-R
Citation No. 2072262; 1/10/84

King No. 4 Mine

DECISION

Appearances: Timothy M. Biddle, Esq., and Rochelle M. Gunner, Esq., Crowell & Moring, Washington, D.C., for Contestant;
Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Fauver

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., U.S. Fuel contests a citation issued by the Secretary on January 10, 1984. The citation alleges that U.S. Fuel violated section 105(c)(3) of the Act by failing to comply with my December 15, 1983, order to reinstate Albert DiCaro.

The citation required abatement by January 13, 1984. U.S. Fuel filed this contest on January 11, and an expedited hearing was held on January 12.

At the hearing, I ordered a stay of enforcement of the citation pending further notice in this proceeding.

The parties have agreed that there are no issues of material fact and the case is appropriate for decision on the record.

ISSUE

The controlling issue is whether my December 15, 1983, order requiring reinstatement was enforceable by the Secretary (MSHA) on January 10, 1984.

BACKGROUND

On May 26, 1983, I issued a decision on liability in DiCaro v. United States Fuel Company, Docket No. WEST 82-113-D: (1) adjudicating that U.S. Fuel violated section 105(c) of the Act by discharging Mr. DiCaro and (2) holding the record open for further proceedings on issues of relief, such as back pay, attorney fees, and costs. A hearing was held on the relief issues, and on December 15, 1983, I issued a decision granting relief. The order part of the decision ordered U.S. Fuel to offer Mr. DiCaro reinstatement to his former position, provided he presented medical evidence that he was able to work as a miner. It also ordered the parties to attempt to stipulate certain back pay questions and, if they could not stipulate, to submit their respective proposed amounts to me not later than 20 days from the date of the decision. The order stated that I was retaining jurisdiction over the case for the 20-day period and "until a ruling on any counter-proposals filed in such period."

In early January 1984, Mr. DiCaro appeared at U.S. Fuel's offices in Utah, presented a medical statement of his fitness for duty, and requested reinstatement under my December 1983 order. U.S. Fuel refused, stating that it would not reinstate him unless the Commission in a final decision so ordered and that U.S. Fuel had directed counsel to seek review of my decisions (of May and December, 1983).

On January 10, 1984, a federal inspector appeared at U.S. Fuel's offices and issued Citation No. 2072262, the citation which is contested in this proceeding. The citation states:

By decision of Administrative Law Judge William Fauver of the Federal Mine Safety and Health Review Commission issued December 15, 1983, United States Fuel Company is required to offer employment to Albert DiCaro upon receipt of a medical release. The decision of Administrative Law Judge Fauver is effective upon issuance unless stayed by the Federal Mine Safety and Health Review Commission. The decision and order of relief constitute an order issued pursuant to section 109(c) of the Federal Mine Safety and Health Act of 1977, P.L. 91-173. United States Fuel is in violation of this order by failing to comply after Albert DiCaro submitted the necessary medical release stipulated in the order.

On January 10, 1984, the citation was modified as follows:

Citation No. 2072262 is hereby modified to reflect that a violation of section 105(c)(3) has occurred instead of section 109(c) as stated in the citation. Attorneys for the Department of Labor have also deemed that the citation be extended until January 13, 1984. Notice of the extension was also given to William Vrettos by phone.

STATUTORY PROVISIONS

Pertinent parts of the statute are as follows:

First, in section 113, which creates the Commission:

* * * * *

(c) The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this Act which shall meet the following standards for review:

(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

- (I) A finding or conclusion of material fact is not supported by substantial evidence.
- (II) A necessary legal conclusion is erroneous.
- (III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
- (IV) A substantial question of law, policy or discretion is involved.
- (V) A prejudicial error of procedure was committed.
 - (iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. 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.
 Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.
 (B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

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(The provisions of section 557(b) of title 5, United States Code, with regard to the review authority of the Commission are hereby expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

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Second, in section 106, which provides for judicial review:

Sec. 106. (a)(1) Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside.

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Finally, in section 105(c), the anti-discrimination section:

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(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory

rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or

interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

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OPINION

The statutory distinction between temporary and final reinstatement orders is significant in considering the issue here. Section 105(c)(2) provides that a temporary reinstatement order "shall order immediate reinstatement . . . pending final order on the complaint." In contrast, section 105(c)(3), which authorizes permanent reinstatement orders, states, "such order shall become final 30 days after its issuance." In addition, the Commission's Rules provide that an administrative law judge's temporary reinstatement order "shall be effective upon receipt or actual notice" (29 C.F.R. 2700.44(a)), but do not contain such a provision for a judge's order granting permanent reinstatement. [note, also, that in *Gooslin v. Kentucky Carbon Corp.*, 3 FMSHRC 1707, 1711 n. 5 (1981), in directing review of a judge's decision, the Commission specified that his temporary reinstatement order was to "remain in effect pending our decision" on review. This type provision does not appear in the Commission's review orders in cases in which the judge did not issue a temporary reinstatement order but, on the merits, did issue a permanent reinstatement order.

Considering the statutory language, and the Commission's rules and practices, I conclude that reference to an "order" of the Commission in section 105(c)(3) means a final order of the Commission and that an order of an administrative law judge does not become a final order of the Commission until 40 days have passed without the Commission ordering review of the judge's order. On the date of the citation, January 10, 1984, my order of December 15, 1983, was not a final order of the Commission because 40 days had not elapsed since its issuance. Also, since not even 30 days had elapsed since its issuance, even if "order" as used in section 105(c)(3) meant a judge's order (rather than a final order of the Commission, as I hold), the December, 1983 order had not become effective under section 105(c)(3).

CONCLUSIONS OF LAW

1. My order of December 15, 1983, was not a final order of the Commission as of January 10, 1984, and was not enforceable as of that date.

2. The Secretary's citation issued on January 10, 1984, is invalid because the December 15, 1983 order was not enforceable on January 10, 1984.

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ORDER

WHEREFORE IT IS ORDERED that Citation No. 2072262, issued and modified on January 10, 1984, is hereby VACATED.

William Fauver
Administrative Law Judge