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SOL (MSHA) & D.S. HAYNES V. DECONDOR COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID S. HAYNES, APPLICANT	DISCRIMINATION PROCEEDING Docket No. WEVA 89-31-D MORG CD 88-18
v.	Mine No. 6
DECONDOR COAL COMPANY, INC., RESPONDENT	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; David Morrison, Esq., Harry P. Waddell, Esq., Steptoe & Johnson, Clarksburg, West Virginia.

Before: Judge Weisberger

I.

On November 2, 1988, the Secretary, on behalf of David S. Haynes, filed an Application for Temporary Reinstatement, alleging, in essence, that the complaint of discharge filed by Haynes was not frivolous. On November 14, 1988, Respondent filed a statement alleging that there was reasonable cause for the discharge of the Applicant, and alleging further that the Applicant cannot be temporarily reinstated to his former position ". . . as the job is no longer available." In its Statement, Respondent also requested a hearing.

On November 15, 1988, the undersigned arranged a telephone conference call between Counsel for Applicant and Respondent's President in order to arrange a hearing date. At that time Respondent advised that it would be represented by Counsel. On November 17, 1988, in a conference telephone call with the undersigned and Counsel for both Parties, it was agreed that the Parties would confer for the purpose of discussing settlement, and in the event that no settlement would be reached, the matter was set for hearing on December 7, 1988, in Clarksburg, West Virginia. The matter was not settled, and was subsequently heard on December 7, 1988. At the hearing, the Applicant waived

his right to have a hearing within 10 days following receipt by the Chief Judge of the Request for Hearing. At the hearing, David Stanley Haynes, the Applicant, testified on his own behalf, and Jack Duane Hovatter, Johnny Paul Williams, and James Edward Martin testified for Respondent. At the conclusion of the hearing, Counsel for Applicant indicated she desired to file a Post Hearing Brief and the Applicant waived his right to have an Order issued in this matter within 5 days following the close of the hearing. It was ordered that Briefs were to be filed by Express Mail on December 16, 1988. Briefs were filed on December 19, 1988.

II.

The Applicant had filed a Complaint of Discrimination dated August 1, 1988, alleging, in essence, that on July 19, 1988, as shift foreman, he removed his men from working in the area designated by John Williams, the mine foreman, on the ground that the conditions therein were hazardous. The complaint further alleges that on July 20, 1988, Haynes explained to Williams that, in essence, he did not cut in the area as instructed, due to the nature of the conditions therein, and Williams in turn fired him.

Haynes, in essence, testified that he was employed by Respondent from May 14, 1988 to July 20, 1988, as the second shift (afternoon) foreman and miner helper. It was the testimony of Haynes that prior to commencing the shift on July 19, 1988, Williams told him, in essence, to set a water pump in the 3R back cut area as there was a lot of water which had accumulated, and then to mine the area as many times as he could. Haynes indicated that in the process of loading coal, the shuttle car cable, which he described as being in poor shape, was in mud and water and kept knocking out the power on the outside. He said that the pump was not working inasmuch as there was much mud in the dip, and it kept clogging up. He said that he was concerned about the danger to one of the miners of accidental electrocution. He indicated that such an accident could occur if a miner would come in contact with a transformer during the time the power was knocked out, and then remain in contact when the power was turned back on. Accordingly, Haynes stopped mining in the area and removed his men. He said that at the end of his shift he left a note for Williams to repair the cable and also indicated that the power kept knocking out.

Haynes indicated that at the beginning of the day shift the following day, Williams called him and asked him why he did not cut the 3R back cut, and Haynes explained that he tried, but that the power kept knocking out, and he was concerned that someone would get hurt, so he took the men out. Haynes said that in response Williams told him that he was finished and to get his clothes.

Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (The Act), in essence, provides that if the Secretary finds that a complaint of discrimination ". . . was not frivolously brought," the Commission upon application of the Secretary, ". . . shall order the immediate reinstatement of the miner. . . ." 29 C.F.R. 2700.44(c) provides, in essence, that at a hearing concerning an application for temporary reinstatement, the burden of proof is on the Secretary to establish that the complaint "is not frivolously brought."

It is the position of the Respondent that the Applicant cannot prevail in any action alleging a violation of section 105(c) of the Act, inasmuch as he failed to communicate to management his concern about hazardous working conditions on July 19, 1988. In this connection it is noted that Haynes did not communicate to any of his superiors on July 19, 1988, any of his safety concerns. Respondent thus argues that since Applicant cannot ultimately prevail in any section 105(c) action, it must be found that it has not been established that the complaint was not frivolously brought. I do not find merit to Respondent's argument. The legislative history of the Federal Mine Safety and Health Act of 1977, indicates that the language creating the right of a miner to be reinstated temporarily where his complaint of discrimination was not "frivolously brought," was first inserted in the Senate's version (S.717, 95th Congress, 1st Session 1977). The Report on the Senate Bill from the Committee on Human Resources (S.Rep. No. 95Ä181, 95th Cong., 1st Sess. (1977), in explaining the provisions of the Bill, indicates that the Secretary shall seek an Order of the Commission for temporary reinstatement when it determines that the complaint ". . . appears to have merit. . . ." (Reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)). [Hereinafter cited as 1977 Legislative History.] There is no further discussion in the legislative history of the Act of the meaning Congress intended to place on the term "was not frivolously brought." Clearly Congress intended this term to encompass its usual accepted meaning. In this connection, I note that Webster's New Collegiate Dictionary (1979 edition) defines frivolous as "1: of little weight or importance . . . ." The testimony of Haynes, not rebutted by Respondent, tends to establish that the complaint was brought to protest his being fired after he took action based on his perception of various safety hazards. I do find that in order to prevail, Applicant must establish no more than proving that his complaint is not of little weight or importance. Congress in enacting section 105(c)(2), supra, did not choose to use the term "substantial likelihood" of prevailing, which it used in section 105(b)(2)(B) as a precondition to the granting of

temporary relief from modification of an Order issued under section 104(c). Hence, Applicant does not have the burden of establishing here a likelihood of prevailing in any section 105(c) action. Respondent thus cannot defeat Applicant's case by establishing that he would not prevail in a 105(c) action.

Also, inasmuch as the scope of the hearing was limited, pursuant to 29 C.F.R 2700.44(c), to the issue of whether the complaint was frivolously brought, it is possible that the issue of notice to Respondent of the hazardous conditions, was not fully litigated. Nontheless, I observed the demeanor of both witnesses and found Haynes more credible in his testimony that, in the note to Williams, that he left at the end of the shift on July 19, 1988, he informed the latter to repair the cable, and also stated that the power kept knocking out. Also, Williams indicated that Haynes had told him in the telephone call Williams made to him on the morning of July 20, that the power was going out and the cable of the buggy was smoking. For all these reasons, I conclude that the Applicant has established that the complaint herein was "not frivolously brought."

III.

Pursuant to section 105(c)(2), supra, once it has been established that a complaint has not been frivolously brought, the "immediate reinstatement" of the miner shall be ordered pending final order on the complaint. It is Respondent's position that had Haynes not been fired on July 20, he would have been part of an economic lay off on July 30, 1988, and thus should not be reinstated, as it would put him in a better position then he would have been in had he not been discharged. In this connection, Jack Duane Hovatter, Respondent's superintendent and its secretary/treasurer, who owns the company with his two brothers, indicated that, in general, the Respondent was losing money in 1988. He said that in the second quarter of 1988 it lost $39,000, and in the third quarter of 1988 it made a profit of $10. Accordingly, in approximately March 1988, the midnight shift was eliminated, and two employees were laid off. He said that for about a year he and his brothers talked about eliminating the afternoon shift. Hovatter said that about July 1, 1988, it was decided to end that shift by July 30, 1988. He indicated that the lay off was accelerated to July 20, 1988, when Haynes, a shift foreman was fired and it was determined to be impractical to hire another shift foreman for less then 2 weeks until the contemplated lay off on July 31. Accordingly, on July 20, 1988, the afternoon shift was eliminated, and four employees were laid off and never recalled. The remaining five employees of the shift were transferred to the day shift. He indicated that Vernon Stone was transferred and not laid off because he was a miner operator, and his transfer allowed Williams, who had been working as a miner

operator on the day shift, to concentrate on his duties as a shift foreman. He also said that Danny Stone was transferred as he was a certified electrician, and there was only one electrician on the day shift and thus he could serve as a backup. Also, he said that Roger Haskill was transferred because he had experience running a bolter for 9 or 10 months. He also indicated that Charles Lucas was transferred because he had experience as a buggy operator, miner helper, and bolter operator, so he could replace other miners operating such equipment if they were absent from work. Further, he indicated that Gary Gerdridas was transferred as he was an EMT (Emergency Medical Technician), and inasmuch as the day section now had more than seven employees an EMT was required. It was his testimony, in essence, that Haynes would have been laid off July 31, and not transferred to the day section as he did not have any experience to qualify him for a position with the day shift. In this connection, he noted that the day shift already had a foreman, and he was not aware of Haynes' other work experience aside from the fact that he knew that he ran a miner for 1 day. I find Hovatter's testimony credible and conclude had Haynes not been fired on July 20, 1988, he would have been laid off on July 31, 1988, along with other members of his shift, and not reassigned to the day shift.

Based upon a review of the legislative history of the Act, it appears it was the intent of Congress in providing for temporary reinstatement where a complaint of discrimination is not frivolously brought, to protect miners from the adverse and chilling effect of loss of employment while discrimination charges are being investigated. (1977 Legislative History at 625, 1330, 1362.) Inasmuch as Haynes' job was eliminated due to a lay off necessitated by business reasons, I agree with Respondent that to have Haynes reinstated to his former job would put him in a better position then he would have been in had he not been fired. To grant such a benefit would be a windfall to Haynes and would clearly go beyond Congressional intent. However, I find the testimony of Haynes credible that he was hired originally as a miner's helper, and on a daily basis spelled the miner's operator at lunch time. I also find credible Haynes' testimony elicited upon cross-examination that from 1970 to 1975 he operated a roof bolter, shuttle car, and miner operator at another mine. Thus, I find that section 105(c)(2), supra, and section 2700.44, supra, will be effectuated by requiring Respondent to reinstate Haynes immediately, once it has a position available as shift foreman, roof bolter, miner operator, or shuttle car operator.

ORDER

It is hereby ORDERED that Respondent reinstate Applicant, immediately upon the availability of a position as either shift foreman, roof bolter, miner operator, or shuttle car operator. It is further ORDERED that the reinstatement shall remain in effect pending a final order by the Commission upon Applicant's Complaint of Discrimination.

Avram Weisberger
Administrative Law Judge