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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 ON BEHALF OF JOSEPH C. CULP, COMPLAINANT	DISCRIMINATION PROCEEDING  Docket No. WEST 91-108-D  DENV-CD-90-13
v.	Dutch Creek Mine
MID-CONTINENT RESOURCES, INC., RESPONDENT	

DECISION  
AND  
ORDER OF TEMPORARY REINSTATEMENT

Appearances: James B. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Complainant;  
Edward Mulhall, Jr., and Timothy A. Thulson, Esq.,  
DELANEY & BALCOMB, P.C., Glenwood Springs,  
Colorado,  
for Respondent.

Before: Judge Cetti

Statement of the Proceeding

On November 28, 1990, the Secretary of Labor (Secretary), pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 and Commission Rule 29 C.F.R. 2700.44(a), filed an application for an order requiring Respondent, Mid-Continent Resources, Inc., to reinstate Joseph C. Culp to his job as maintenance foreman at Mid-Continent Resources, Inc., Dutch Creek Mine, from which he was suspended from the payroll on August 23, 1990. The application stated that the Secretary found the complaint of discrimination indicating an adverse action of suspension and discharge is not frivolous. The application was accompanied by copies of the complaint filed by the Applicant and by an affidavit of Dennis M. Ryan of the Mine Safety and Health Review Administration asserting that Respondent suspended and later terminated Complainant and has failed to recall him, and concluding that the complaint filed by him is not frivolous. The application was accompanied by proof of notice to, and service on, Mid-Continent Resources, Inc., by express mail, return receipt requested, on November 28, 1990.

Respondent, within 10 days following receipt of the Secretary's application for temporary reinstatement, requested a hearing on the application pursuant to 29 C.F.R. 2700.44(b).

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On December 12, 1990, pursuant to Respondent's request, a hearing was held before the undersigned Commission Administrative Law Judge on the application for temporary reinstatement. The scope of the hearing is limited to the single issue before me which is whether Mr. Culp's complaint is frivolously brought. Oral and documentary evidence was presented and the matter was submitted for decision on this limited issue and a request for an Order of Temporary Reinstatement.

#### The Testimony

At the hearing, Complainant presented the testimony (approximately 240 pages of as yet to be transcribed) of the Complainant Joseph C. Culp and the testimony of Mr. Lee H. Smith, Supervisor of Coal Mine Safety and Health Inspectors located at Glenwood Springs, Colorado.

Undisputed evidence was presented that on August 16, 1990, carbon monoxide ranging from 500 PPM to 660 PPM "and climbing" was detected emanating from the 211 longwall gob. MSHA, on that date, August 16, 1990, issued 103(b) Order No. 358626 to "assure the safety of any person in the coal mine" until the source of the carbon monoxide was found and extinguished or otherwise controlled. The source was an unplanned ignition of methane in the 211 advancing longwall tailgate entry gob. The 103(k) order, with various amendments and modifications (Ex. R-2), was not terminated until November 5, 1990, when it was determined that the fire had been extinguished.

On August 18, 1990, a roaring fire with visible bright orange flames was first observed on top of the 211 longwall gob. Continuous unsuccessful attempts were made by Respondent to extinguish the fire with the use of water and dry chemicals.

On August 18, 1990, MSHA issued its 107(a) imminent danger Order No. 3583688 which continued in effect with various modifications (Ex. R-1) until terminated on September 27, 1990.

The Complainant, Joseph C. Culp, testified that he had worked as a coal miner in various mines for 10 years. On June 1, 1989, Respondent appointed Mr. Culp to the position of maintenance foreman in Respondent's Dutch Creek Mine. He continued working in that position until his suspension from the payroll on August 23, 1990, followed by his discharge from the payroll on October 15, 1990. His assigned work duties prior to the fire included work on the surface as well as work duties underground.

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Mr. Culp testified that approximately "20 percent of the time or less" he was assigned jobs involving work on the surface, such as work on the belt system and ventilation fans.

The last day Mr. Culp worked at the mine was September 22, 1990. At that time, MSHA was allowing only 25 miners at any one time to work underground in the mine. Bill Porter, the acting mine foreman, on September 22, 1990, assigned him to do maintenance work underground in support of the activity of the miners who were fighting the fire. Part of his work required him to be at the fresh air base.

Mr. Culp's maintenance superintendent, Mr. Tuck, was not underground on August 22, 1990, so Culp had to complete his shift underground before he was able to go to the surface and talk to Mr. Tuck. He told Mr. Tuck of his safety concerns as well as those of his wife's about being required to work underground during the mine fire. Mr. Culp said it was unsafe, that no one could guarantee that the mine is not going to blow up. Mr. Tuck told him that his wife (Mrs. Tuck) was also concerned; that he had seen the fire and that it "wasn't that bad." Mr. Culp did not believe that it wasn't bad, in view of the mine's past history of explosions. He knew of the 1981 explosion at the mine that killed 15 miners, including miners working outby the face as well as inby. Mr. Culp was concerned for his safety and believed anything could happen. He said he did not want to work underground while the mine fire burned. He asked to be assigned to any work above ground. He testified that there was work to be done above ground that he had done in the past and that he was able to do. Work on the surface was refused. Mr. Culp asked, as an alternative, to be allowed to go on vacation or to be laid off without pay until the mine fire was extinguished or until he could be assigned to work not requiring him to work underground while the fire continued. These alternative requests by Mr. Culp were refused. He was told that all vacations were canceled, except for employees already out of town, and that Respondent needed him to do underground maintenance work in support of the efforts of the miners fighting the underground fire. Mr. Culp told Mr. Tuck that he liked his job and that he did not want to quit. Mr. Tuck told him "I understand your concerns" and "you have to do what you have to do, and I have to do what I have to do."

Mr. Culp was scheduled to report to work the next morning, August 23, 1990. Early that morning, he called the mine and talked to the acting foreman Mr. Scott Jones, who told him the fire in the mine was continuing. Mr. Culp asked him to inform Mr. Tuck that he "reported off," which is the standard procedure required of a miner who is not coming in on a scheduled workday.

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Mr. Culp then got a phone call from Mr. Tuck. Mr. Culp reminded Mr. Tuck of what he told him in their talk at the end of the shift on August 22, 1990. Mr. Tuck acknowledged their talk but said, "You have to come to work or be terminated." Mr. Tuck indicated to him that all salaried employees were needed to fight the fire, that Mr. Culp's only alternatives were to work, quit, or be fired. Mr. Culp testified that he did not quit his job and, because of his concern for his safety, refused only underground work while the mine fire continued.

Mr. Tuck told Mr. Culp that he wanted him to talk to Mr. Myers, the Personnel Director. Mr. Culp talked to the Personnel Director and told him what the situation was and of his and his wife's safety concerns and that he did not want to quit. He asked for work on the surface while the fire inside the mine was continuing. Mr. Myers got back to him a few days later and told him he was suspended without pay as of August 22, 1990. Later he received the letter from Mr. Myers, dated September 4, 1990 (Ex. G-1), advising him that he was suspended from the payroll as of August 22, 1990, pending a hearing with management. On September 12, 1990, he had a hearing before Mr. M.J. Turnipseed, Respondent's Vice President of Operations. After the hearing, he received Mr. Turnipseed's letter dated October 11, 1990 (Ex. G-3), advising him that his (Mr. Culp's) actions "constituted a voluntary relinquishment of his position" and the severance of the employment relationship was to be effective October 15, 1990.

Mr. Lee A. Smith called by Complainant stated that since March 12, 1990, he has been the supervisory of the coal mine safety and health inspectors located at Glenwood Springs. He is familiar with the mine fire in question. The fire was under his jurisdiction, and he was one of the coal mine inspectors at the mine during the fire. He was aware of the 103(k) order issued August 16, 1990, and the 107(a) imminent danger order issued November 18, 1990. However, no Section 103(j) Order was ever issued. With respect to the mine fire, the Respondent would make proposals and MSHA would either approve the proposed plan or disapprove it. MSHA would either say "Yes" or "No." MSHA never supervised the fire-fighting efforts but was observing it. Respondent continued to be in control of the mine.

Mr. Lee Smith stated that when he observed the fire, the flame was bright orange, about 14.5 feet long, and 12 feet wide. Within a limited area in the 211 longwall gob, the fire moved around. Sometimes there was a single flame and at other times there were multiple flames.

Methane is an explosive gas. The mine had a history of liberating large quantities of methane gas and, in the past, has been and continues to be subject to an MSHA spot inspection every five working days under Section 103(c) of the Act. There have been three mine explosions in the past. The April 15, 1981, explosion resulted in the death of 15 miners, some outby the face area. The December 1986 explosion resulted in the death of nine miners. There was a third explosion which fortunately did not result in any deaths. Mr. Culp's safety concerns and belief that working underground in the mine was hazardous while the mine fire continued was a reasonable belief.

#### Documentary Evidence

The following documents were tendered by the Secretary on behalf of Complainant and received in evidence.

1. Exhibit G-1 is a copy of a letter dated September 4, 1990, by Respondent's Personnel Director advising Mr. Culp he was suspended from the payroll August 22, 1990, pending a hearing with management.

2. Exhibit G-2 is a copy of a letter dated September 7, 1990, notifying Mr. Culp of his hearing with management to be held September 12, 1990, regarding his suspension.

3. Exhibit G-3 is a copy of a letter dated October 11, 1990, by Respondent to Mr. Culp incorporating management's review of the evidence presented at the September 12, 1990, hearing.

4. Exhibit G-4 is a copy of a page from Respondent's "Salaried Employee Handbook" given to Mr. Culp stating

No employee will be required to work under conditions which he reasonably believes to be dangerous beyond the normal hazards inherent in underground mining.

5. Exhibit G-5 is a diagram showing a plan view of the location of the 211 longwall fire.

The following documents were tendered by Respondent and, except for Exhibit R-4, received into evidence.

1. Exhibit R-1 is MSHA's 107(a) Imminent Danger Order re the 211 longwall fire issued August 18, 1990, and its various modifications through September 27, 1990.

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2. Exhibit R-2 is MSHA's 103(k) Order issued August 16, 1990, and its various modifications through November 5, 1990.

3. Exhibit R-3 is Respondent's summaries of MSHA's 103(k) and 107(a) orders and their various modifications.

4. Exhibit R-4, marked for identification only, not received into evidence, consists of 200 loose pages entitled MSHA PERSONNEL AND ACTIVITY.

5. Exhibit R-5 is a chart prepared by Respondent showing, for the period August 16, 1990, to November 5, 1990, time lines relating to the 211 longwall fire and MSHA's 103(k) and 107(a) Orders and their modification.

#### DISCUSSION

Under 29 C.F.R. 2700.44(c) (1986), 30 U.S.C. 815(c)(2) the scope of a temporary reinstatement hearing is limited to a determination as to whether the miner's discriminatory complaint is frivolously brought. Secretary of Labor on behalf of Yale E. Hennessee v. Alamo Cement Company, 8 FMSHRC 1857-1858 (December 8, 1986).

Webster's New Collegiate Dictionary 1979 defines "frivolous" as follows:

1: of little weight or importance

2 a: lacking in seriousness; irresponsibly self-indulgent

b: marked by unbecoming levity

Black's Law Dictionary; Revised Fifth Edition, 1979, defines the term "frivolous" and "frivolous appeal" as follows:

Frivolous. Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. Frivolous appeal. One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.

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I have carefully reviewed and considered the testimony of Mr. Joseph C. Culp and Mr. Lee A. Smith summarized above and the documentary evidence. I find that the record clearly raises a non-frivolous issue as to whether Mr. Culp's discharge was in violation of the Mine Act. I credit Mr. Culp's testimony, as well as the testimony of Mr. Lee Smith. A viable issue was raised as to whether Mr. Culp's refusal to work underground while the 211 longwall gob fire continued to burn was based in part on Mr. Culp's reasonable good faith belief that such work was hazardous or that it exposed him to the danger of serious injury or death.

Mr. Culp's complaint is not frivolously brought. The Secretary on behalf of Mr. Culp has carried its burden of proof. The application for temporary reinstatement should be granted.

#### FINDINGS AND CONCLUSIONS

1. At all relevant times Respondent, Mid-Continent Resources, Inc., did business and operated its Dutch Creek Mine in the production of coal and therefore is an operator within the meaning of Section 3(d) of the Act;

2. At all relevant times Joseph C. Culp was employed by Respondent as maintenance foreman at Respondent's Dutch Creek Mine, and was a miner, as defined by Section 3(g) of the Act;

3. Respondent's Dutch Creek Mine, located near Redstone, Pitkin County, Colorado, is a mine, as defined in Section 3(h) of the Act, the products of which affect commerce;

4. On August 22, 1990, Joseph C. Culp had complained to Respondent about unsafe mining conditions and practices at the Dutch Creek Mine, specifically being required to work underground during a mine fire, and asked to be assigned to work at the surface until the mine fire was extinguished;

5. Respondent, through its maintenance superintendent and mine foreman, Robert E. Tuck, was unresponsive to these safety complaints and, in fact, stated that it was "not all that bad";

6. Mr. Culp's requests for an alternative to working underground in the mine while the mine fire continued, such as working on the surface, vacation, temporary layoff without pay, were all refused by Respondent.

7. On August 23, 1990, Joseph C. Culp was suspended from the company payroll. He later received written notice from Mid-Continent that his employment with Respondent was terminated on October 15, 1990;



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8. Based on the evidence presented at the hearing and the record as a whole, I find that a "viable issue" was raised as to whether Mr. Culp's refusal to work underground in the mine that preceded his discharge, was based in part on his reasonable good faith belief that working underground in the Dutch Creek Mine while the mine fire continued would expose him to an injury, danger, and hazard.

ORDER

The application for an order of temporary reinstatement of Mr. Joseph C. Culp is GRANTED. Respondent is ORDERED to immediately reinstate Mr. Culp to his position as maintenance foreman, from which position he was discharged, at the same rate of pay, and with the same or equivalent duties assigned to him immediately prior to his discharge.

As previously stated in the body of this decision, the scope of this temporary reinstatement hearing is limited to my determination as to whether Mr. Culp's discrimination complaint is frivolously brought. The respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits of any discrimination complaint filed. The parties will be notified further as to the time and place of any hearing requested.

August F. Cetti  
Administrative Law Judge