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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 JOSEPH A. SMITH,
APPLICANT

APPLICATION FOR TEMPORARY
REINSTATEMENT

Docket No. PENN 92-15-D

PITT-CD 91-11

v.

Homer City Mine

HELEN MINING COMPANY,
RESPONDENT

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen M. Lucken, Esq., Tana M. Adde, Esq.,
Office of the Solicitor, U. S. Department of Labor,
Arlington, Virginia, for the Secretary;
Michael Klutch, Esq., Thomas A. Smock, Esq.,
Polito & Smock, P.C., Pittsburgh, Pennsylvania,
for the Respondent.

Before: Judge Maurer

On October 7, 1991, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent Helen Mining Company (Helen) to reinstate Joseph A. Smith to the position which he held immediately prior to his July 2, 1991, discharge, or a similar position at the same rate of pay, and with the same or equivalent duties assigned to him. The application was supported by an affidavit of Lawrence M. Beeman, who is the Chief, Office of Technical Compliance and Investigations, Coal Mine Safety and Health, Mine Safety and Health Administration (MSHA) and by a copy of the original complaint filed by Smith with MSHA.

On October 11, 1991, Helen filed a responsive pleading, denying that the Secretary is entitled to the requested Order of Temporary Reinstatement and denying that it violated the Mine Act in discharging Smith. Helen proposed to economically reinstate Smith as of the date on which a temporary reinstatement hearing would otherwise be held and until such time as a decision on the merits of the discrimination complaint is subsequently rendered. Alternatively, Helen requested a hearing on the Secretary's application.

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Smith, as is his right to do, rejected the offer of economic reinstatement. Therefore, the requested hearing was held pursuant to notice on October 31, 1991, in Indiana, Pennsylvania.

The relevant scope of this hearing, at this preliminary stage of the proceedings, is limited to a determination of whether the miner's complaint is being frivolously brought. I stated on the record at the hearing and will reiterate here that I am not at this time determining the merits of Smith's discrimination complaint, but only whether that complaint is frivolous, as that word is commonly used.

The Secretary has produced evidence to the effect that Smith was Chairman of the UMWA Safety Committee at the Homer City Mine at the time of his discharge and was actively so engaged. Furthermore, between June 18, 1991, and the first of July, he filed three section 103(g) complaints with MSHA. MSHA investigated those complaints and as a direct result issued several section 104(a) citations as well as a section 107(a) Imminent Danger Order. Mine management was aware that it was Smith who was filing the 103(g) complaints according to the inspector who investigated them. Additionally, Smith has filed four section 105(c) discrimination complaints against Helen in the last 12 months, two of which are still active files that are reportedly at the complaint stage of pleading, wherein he is also being represented by the Secretary.

With regard to the immediate sequelae that led to Smith's discharge, the Secretary sponsored evidence that Smith was sick with flu-like symptoms on June 30, 1991, and had taken a "sick day". Then on Monday night, July 1, 1991, Smith went to work intending to perform his normal job as a shearer operator on the longwall. He testified that he still felt "sick," but he thought he could perform that function for his shift. However, upon arrival at the mine, he was told that his work assignment that night would be to "fireboss." The shift supervisor informed him that if he was still there at the start of the shift at 12:01 a.m., he would be given a direct order to "fireboss."

Smith testified that he did not feel that he was physically up to firebossing that night because of the extensive walking that would be required. The company attributes other motives to Smith's reluctance and apparently there has been a long-standing dispute over whether or not the company can order a rank and file miner who has the papers to fireboss against his will.

Smith then in rapid succession stated to his supervisor that: (1) he was going home sick or taking a sick day; (2) he would fireboss if the shift supervisor would write out the assignment and finally (3) he would take an "illegal day," intending to get a medical excuse the next day, thus converting the unexcused absence to an unpaid sick day. There is also a

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substantial dispute between the parties as to whether this latter is a viable option under the union contract.

The next day, Smith did in fact go to the hospital emergency room and was diagnosed as having "gastroenteritis" and advised to take a couple of days off by the treating physician. However, Smith was overtaken by events in this regard in that Superintendent Hofrichter called him at home on July 2, 1991, to advise that he was suspended with intent to discharge for insubordination because he refused the firebossing assignment.

It is the respondent's position that this insubordination was the only reason for Smith's discharge. Respondent goes on to point out numerous prior instances of disciplinary action taken by it against Smith for various and sundry transgressions, most, if not all of which appear to be grounded in fact.

I note that the record contains a great deal more relevant evidence than is recited or dealt with herein, including some evidence that tends to rebut or refute portions of the Secretary's evidence. However, at this stage of the proceedings I do not need to weigh the evidence or make findings on the ultimate issues. At this time I am only required to determine if Smith's complaint was frivolously brought.

I have carefully considered the entire record of this proceeding in that light and I conclude that Smith's complaint is not clearly without merit, fraudulent or pretextual in nature. Therefore, I conclude that Smith's complaint is not frivolously brought.

ORDER

Respondent is ORDERED to immediately reinstate Joseph A. Smith to the position from which he was discharged on or about July 2, 1991, or to an equivalent position, at the same rate of pay and with the same or equivalent duties.

Roy J. Maurer
Administrative Law Judge