

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEEBURG PIKE
FALLS CHURCH, VIRGINIA 22041

MAY 25 1993

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	Docket No. WEVA 93-287-D
PERRY PODDEY,	:	
Applicant	:	MORG CD 93-01
v.	:	
	:	Coal Bank No. 12 Mine
TANGLEWOOD ENERGY, INC.,	:	
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Amchan

On April 30, 1993, the Secretary of Labor filed an application for temporary reinstatement, pursuant to section 105(c) of the Federal Mine Safety and Health Act, 30 U.S.C. section 815(c), on behalf of Perry Poddey, a miner. The application alleged that Mr. Poddey had been discharged by respondent on January 6, 1993 in retaliation for engaging in protected safety activity. Attached to the application was the affidavit of Lawrence M. Beeman, Chief of MSHA's Office of Technical Compliance and Investigation Division, and the miner's complaint. Mr. Beeman's affidavit indicates that Mr. Poddey had talked to MSHA Inspector Ken Tenney on November 3, 1992 and January 5, 1993 about a defective parking brake on the scoop he operated. MSHA citations were issued to Respondent on both those dates regarding the parking brake.

Mr. Beeman's affidavit also indicates that the miner discussed the malfunctioning parking brakewith his foreman in November and December, 1992, and on January 4, 1993. Mr. Beeman also found that Respondent admitted that Mr. Poddey reported the defective parking brake to his foreman on January 4, 1993. He further found that Mr. Poddey's foreman, Jeff Simmons had threatened to discharge the miner following the issuance of the citation of November 3, 1992, and that Mr. Poddey was in fact discharged the day after the second citation, The miner's complaint alleges that on the day he was fired he had a telephone conversation with General Mine Foreman Randy Key, who blamed him for the citation just issued to Respondent regarding the parking brake.

Pursuant to the Commission's Rules of Procedure, 29 C.F.R. 2700.45(c), Respondent had ten days from the date of receipt of the Secretary's application for temporary reinstatement to request a hearing on the application. As the application was received by the Commission on May 3, 1993, Respondent had until May 18, 1993, to request a hearing, taking into account the five days allowed to respond to documents served by mail, 29 C.F.R. 2700.8.

On May 14, 1993, Respondent requested a hearing which was scheduled for May 25 and 26, 1993, in Elkins, West Virginia. Subsequently on May 21, Respondent withdrew its hearing request. The parties filed a stipulation in which the Applicant agreed to file his complaint by May 28, 1993, and initiate discovery by June 11, 1993. The parties have also agreed, with qualifications, to the scheduling of the hearing on the discrimination complaint in August 1993.

Commission Rule 45(c), 39 C.F.R. 2700.45(c), provides that if no hearing is requested on an application for temporary reinstatement, the judge shall review the application and immediately issue an order of temporary reinstatement if the judge determines that the complaint was not frivolously brought. Having reviewed the application, I conclude that the complaint was not frivolously brought and order: that Respondent reinstate Mr. Poddey to the position from which he was discharged on or about January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties. The application indicates that Mr. Poddey engaged in activity protected by the Mine Act in complaining about the defective parking brake to his foreman and to MSHA. The application also indicates that Respondent was aware of the protected activity and displayed animus towards the miner as a result of that activity. The timing of the discharge, one day after Respondent was cited for a condition about which the miner complained, creates an inference that Mr. Poddey would not have been discharged but for his protected activity.

The application before me provides ample evidence to suggest that Mr. Poddey was discharged in violation of Section 105(c) of the Mine Act. Secretary on behalf of Robinette v. United States Coal Company, 3 FMSHRC 803 (April 1981). Although the Secretary may not necessarily prevail at a trial on the merits of the discrimination complaint, he has met his burden of proving that the complaint was not frivolously brought. Given the fact that I would have ordered reinstatement on May 18, 1993, had no hearing request been filed, I will order reinstatement effective that date in view of the fact that Respondent's hearing request has been withdrawn. The Applicant

should **not** suffer any loss of **pay** by virtue of the fact that Respondent requested a hearing on the application for temporary **reinstatement** and then had second thoughts.

ORDER

Respondent is hereby ordered to reinstate Perry Poddey to the position from which he was discharged on January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties, effective May 18, 1993.



Arthur J. Amchan
Administrative Law Judge
703-756-4572

Distribution:

**Heather Bupp-Habuda, Esq., Office of the Solicitor,
U.S. Department Of Labor, 4015 Wilson Blvd., Room 516,
Arlington, VA 22203 (Certified Mail)**

**Paul O. Clay, Jr., Esq., Conrad and Clay, P.O. Drawer 958,
Fayetteville, WV 25840 (Certified Mail)**

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