

CCASE:
SOL (MSHA) V. BLACK DRAGON MINING
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
ON BEHALF OF FREDDY THACKER	:	Docket No. KENT 93-977-D
Complainant	:	
v.	:	PIKE CD 93-12
	:	
BLACK DRAGON MINING COMPANY,	:	No. 2 Mine
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Carl C.Charneski, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Complainant;
Billy R. Shelton, Esq., Baird, Baird, Baird &
Jones, P.S.C., Pikeville, Kentucky, for Respondent.

Before: Judge Maurer

On September 16, 1993, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent, Black Dragon Mining Company (Black Dragon) to reinstate Freddy Thacker to the position which he held immediately prior to his June 19, 1993, 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 Thacker with MSHA.

On September 27, 1993, Black Dragon filed a responsive pleading, denying that the Secretary is entitled to the requested Order of Temporary Reinstatement, denying that it violated the Mine Act in discharging Thacker and requesting a hearing on the Secretary's Application.

The requested hearing was held pursuant to notice on October 7, 1993, in Prestonsburg, Kentucky.

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

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I am not at this time determining the merits of Thacker's discrimination complaint, but only whether that complaint is frivolous, as that word is commonly used.

The Secretary has produced evidence that Thacker was a shuttle car operator with Black Dragon for about 5 days or so when he was discharged. During his short tenure with the company, Thacker was quite vocal with regard to the complaints concerning defective steering and brakes on the shuttle car which he operated at Black Dragon's No. 2 Mine. There is also other evidence that mine management was well aware of the shuttle car's steering and brake problems. On June 24, 1993, after MSHA Inspector Buster Stewart wrote a 104(a) citation against the shuttle car, management removed it from service and repaired it.

Mr. Thacker believes, as does the MSHA investigator who testified, that Thacker was discharged for complaining about the steering and brakes being bad on the shuttle car he was assigned to operate. The complaint has a lot of common sense appeal. Here is an employee with but a few days seniority making a big todo over a mechanical condition that the evidence would suggest has been of long-standing duration. This begins to look to management like the company might have hired a chronic complainer and it might be prudent at this point to remove the source of irritation. Ergo, Thacker is discharged.

However, there being two sides to nearly every story, Black Dragon maintains they took all these safety complaints in stride. Rather, it was Thacker's unfortunate proclivity to pull the shuttle car's cable off the reel, or pull the cable in two, or otherwise cut the cable -- he did so three times in the 5 days he worked there, that caused him to be let go. Mine Foreman Russell Lewis emphatically states that he was not fired for being too slow or because of making safety complaints.

There is another aspect of controversy with regard to Thacker's maintenance of the shuttle car. Management testified he was not properly maintaining the equipment. Thacker insists he was. There is evidence from others on both sides of the issue.

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 Thacker's complaint was frivolously brought.

Quite frankly, while this is not the strongest case I have ever seen, at least in the current state of the record, there is ample evidence in the record that Mr. Thacker engaged in

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protected activity during his short tenure at Black Dragon and it is also undisputed that he was fired after only 5 days on the job. It is less clear whether this adverse action had any substantial connection to the protected activity, but it is at least arguable and the evidence in the record is sufficient to satisfy the complainant's burden of proof that his complaint was not frivolously brought. In reaching this conclusion, I do not mean to portend, one way or the other, what the ultimate findings concerning the merits of this case might be, as both parties will have further opportunities to enlarge the record.

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

ORDER

Respondent is ORDERED to immediately reinstate Freddy Thacker to the position from which he was discharged on or about June 19, 1993, or to an equivalent position, at the same rate of pay and with the same or equivalent duties.

Roy J. Maurer
Administrative Law Judge

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