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SOL (MSHA) V. SOVEREIGN 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

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| SECRETARY OF LABOR, | : | TEMPORARY REINSTATEMENT |
| MSHA, on behalf of | : | PROCEEDING |
| DANNY SHEPHERD, | : | |
| Petitioner | : | Docket No. KENT 94-69-D |
| v. | : | |
| | : | BARB CD 93-25 |
| SOVEREIGN MINING COMPANY, | : | BARB CD 93-27 |
| Respondent | : | |
| | : | Mine No. 1 |

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

On October 28, 1993, the Secretary filed an Application for Temporary Reinstatement on behalf of Danny Shepherd. The application was supported by an affidavit of Lawrence M. Beeman, Chief, Office of Technical Compliance and Investigation for Coal Mine Safety and Health, Mine Safety and Health Administration. Beeman's affidavit identified several protected activities, including Shepherd's duties as a miners' representative for safety matters at the respondent's No. 1 Mine.

The Secretary's Application for Temporary Reinstatement was served upon Leroy B. Lackey, Jr., President, Sovereign Mining Company, on October 28, 1993. Commission Rule 45(c), 29 C.F.R.

2700.45(c), in part provides: "Within ten days following receipt of the Secretary's Application for Temporary Reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

The Secretary filed a Motion for Order of Temporary Reinstatement on November 10, 1993, noting that the respondent had failed to request a hearing in this matter. To date, the respondent has not requested a hearing or opposed the Secretary's Motion. Therefore, Commission Rule 45(c) requires me to review the Secretary's application to determine if Shepherd's complaint is not frivolously brought.

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The "not frivolously brought" standard set forth in Section 105(c), 30 U.S.C. 815(c), is satisfied when there is a reasonable cause to believe that the underlying discrimination complaint is meritorious. *J. Walter Resources v. Federal Mine Safety and Health Review Commission*, 920 F.2d 738, 747 (11th Cir. 1990). Thus, the Secretary must prevail on an application for temporary reinstatement if the facts supporting the application are not insubstantial or frivolous. *Id.* at 747. Beeman's affidavit submitted in support of the Secretary's application specifies alleged protected activities that are contemporaneous with Shepherd's employment suspension which occurred on or about August 5, 1993. Consequently, I conclude that Shepherd's complaint is not clearly without merit or pretextual in nature. Therefore, I find that Shepherd's complaint has not been frivolously brought.

Accordingly, the Sovereign Mining Company IS ORDERED to immediately reinstate Danny Shepherd to the position from which he was suspended on or about August 5, 1993, or to an equivalent position, at the same rate of pay and with the equivalent benefits. Shepherd's entitlement to backpay and benefits shall be calculated from the date of this order.

Jerold Feldman
Administrative Law Judge
(703) 756-5233

Distribution:

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