

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 6, 2023

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) obo
GEORGE PORTER
Complainant,

v.

PACER MINERALS, LLC,
Respondent

TEMPORARY REINSTATEMENT

Docket No. CENT 2023-0058
MSHA No.: DENV-CD-2023-01

Mine: Pink Monster
Mine ID: 39-01653

ORDER GRANTING TEMPORARY REINSTATEMENT OF GEORGE PORTER

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on December 15, 2022, filed an Application for Temporary Reinstatement of miner Frank George Porter (“Complainant”) to his former position as a heavy equipment operator with Pacer Minerals, LLC, (“Respondent”) at Respondent’s mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Application for Temporary Reinstatement was served on Respondent by electronic mail on December 14, 2022. The Respondent has not filed a timely Request for Hearing.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c) of the Act, the temporary reinstatement of George Porter is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that “if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). 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,¹ shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the Complaint filed by Complainant (Exhibit "2" to the Application) and the Declaration of Special Investigator Daniel Scherer indicating that this was done (Exhibit "1.")

Mr. Scherer's Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought:

3. My investigation of this case, which included witness interviews and a review of documents that Pacer provided, disclosed the following:
 - A. At all relevant times, Pacer operated the Pink Monster Mine near Pringle, S.D. (the "Mine"). MSHA has inspected Pacer's operations on numerous occasions and Pacer is an "operator" under Section 3(d) of the Mine Act.
 - B. Pacer's products, which include feldspar and mica, enter commerce, or its operations or the Mine's products affect commerce.
 - C. Porter was, at all relevant times, employed as a heavy equipment operator by Pacer and was, therefore, a "miner" under Section 3(g) of the Mine Act.

¹ The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

² "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

- D. On October 24, 2022, Porter timely filed a discrimination complaint with MSHA alleging that Pacer discharged him in violation of section 105(c) of the Mine Act.
4. Porter's discrimination complaint arose from the following circumstances:
- A. Porter worked for Pacer as a safety manager beginning in August 2021. At the time of his discharge, he worked 40 hours per week and earned \$25.00 per hour as a heavy equipment operator.
 - B. In the fall of 2022, Pacer assigned Porter to work at the Mine after he had worked at another of the company's mines, the White Elephant, that Pacer subsequently closed.
 - C. On September 15, 2022, Porter and a colleague, Mark Hughes ("Hughes"), used heavy equipment to clear blasted overburden out of the Mine's pit. Unbeknownst to them, they worked near where Pacer's blasting contractor, Century Blasting Service, LLC ("Century"), had set explosives in six holes for blasting. Mine Manager Tony Boggs ("Boggs") knew that the explosives were present but did not tell Porter. Instead, he directed them to work away from the explosives' location without explaining why. Porter unwittingly worked near undetonated charges for several hours.
 - D. The explosives remained from an earlier blast on Pink Monster's upper level. Century drilled and loaded holes for two shots, one above the other. However, the lower level holes – near where Porter and Hughes worked – were not tied into the blast sequence of the upper level holes. Neither Pacer nor Century noticed that this had occurred.
 - E. Porter reported this incident to Pacer General Manager Ryan Fredsall ("Fredsall") on September 22, 2022.
 - F. Fredsall and the company's human resources director/accountant, Tamera Sutherland, investigated the incident but did not discipline anyone.
 - G. On September 30, 2022, Pacer laid off Porter.
 - H. Porter did not work at the Mine again.

Dec. of Daniel Scherer, December 14, 2022 (Ex. "1" to App. For Temp. Reinst.)

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.


Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant George Porter is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **George Porter** be **immediately TEMPORARILY REINSTATED** to the position he held on the date of his discharge from Pacer Minerals, LLC, or a comparable position within the same commuting area and at the same rate of pay and benefits he received prior to his discharge.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.


John Kent Lewis
Administrative Law Judge

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