

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**MAR 7 - 2016**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of JEFFREY S. BREWER,  
Complainant,

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEVA 2016-238-D  
MSHA Case No.: MORG-CD 2016-14

v.

MONONGALIA COUNTY CO.,  
CONSOLIDATION COAL CO.,  
MURRAY AMERICAN ENERGY INC.,  
and MURRAY ENERGY CORP.,  
Respondents

Mine: Blacksville No. 2  
Mine ID: 46-01968

**ORDER GRANTING TEMPORARY REINSTATEMENT  
OF JEFFREY S. BREWER**

Before: Judge Andrews

Pursuant to Section 105(c)(2) 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 February 19, 2016, filed an Application for Temporary Reinstatement of miner Jeffrey S. Brewer (“Complainant”) to his former position with Murray Energy (“Respondent”) at the Blacksville No. 2 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). By email, the Respondent’s counsel notified the court that they received the Secretary’s Application on February 22, 2016. The Respondent has not filed a timely Request for Hearing. Since, for the following reasons, the complaint appears to have merit the temporary reinstatement of Jeffrey S. Brewer should be granted.

**Law and Regulations**

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95<sup>th</sup> Cong., 1 Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

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, s[he] shall issue immediately a written order of temporary reinstatement. *Id.* In the instant case, the Respondent has not timely filed a request for hearing.

In adopting section 105(c), Congress indicated 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). The plain language of the Act states that "if the Secretary finds that such complain was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. §815(c)(2). The judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."<sup>1</sup> *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

### Evidence

The Discrimination Complaint was filed with the Secretary's Application for Temporary Reinstatement. (see Application for Temporary Reinstatement, Exhibit B). In the Summary of Discriminatory Action, Complainant stated, in pertinent part:

I am a miner who, on October 19, 2015, was suspended pending discharge due to the accusation, by management, that I abused the filing of 103g and reported too many safety concerns.

The Declaration of Special Investigator Jeffrey C. Maxwell was also filed with the Complainant's Application for Temporary Reinstatement (see Exhibit A), and asserts the following:

1. Mr. Brewer was employed and classified as a Shuttle Car Operator, and also performed work as a Roof Bolter and General Inside Laborer, among various other jobs, at Murray's Blacksville No. 2 Mine.

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<sup>1</sup> "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)).

2. Between August 2015 and October 2015, Mr. Brewer filed 103(g) safety complaints with MSHA concerning safety issues at Blacksville No. 2 Mine.
3. Assistant Shift Foreman Chad Martin made statements showing that Mr. Martin believed that Mr. Brewer filed too many 103(g) safety complaints with MSHA.
4. There is evidence showing that Shift Foreman Gary Brookover made statements displaying general animus toward miners who filed 103(g) safety complaints with MSHA.
5. On August 31, 2015, Mr. Brewer filed 105(c) complaint MORG-CD-2015-31, which he subsequently withdrew because Murray did not terminate his employment at that time.
6. On September 1, 2015, Murray issued a letter stating that Mr. Brewer would be suspended with intent to discharge. However, Murray amended this action, and Mr. Brewer was not discharged, but was suspended from August 27, 2015 through September 2, 2015.
7. On October 17, 2015, Mr. Brewer was suspended with intent to discharge for allegedly violating Employee Rules of Conduct Nos. 4 and 9, which provide that

In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including:

...

4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.

9. Absence from work or leaving the workplace without permission from supervisor, except in circumstances, which prevent the giving of such notice.

8. On October 19, 2015, Murray terminated Mr. Brewer's employment.
9. On October 20, 2015, the United Mine Workers of America ("UMWA") Local, which represents miners at Murray's Blacksville No. 2 Mine, filed a grievance to contest Murray's termination of Mr. Brewer's employment.
10. On December 3, 2015, Mr. Brewer filed 105(c) complaint MORG-CD-2016-12, which he subsequently withdrew on December 7, 2015.
11. Representatives from the UMWA advised Mr. Brewer to delay filing his 105(c) complaint with MSHA until after an arbitration decision was issued on Mr. Brewer's grievance regarding his termination.
12. On December 30, 2015, a final Arbitration Opinion and Award was issued, validating and finalizing Murray's termination of Mr. Brewer's employment.
13. Mr. Brewer denies the allegations that he violated Employee Rules of Conduct Nos. 4 and 9. In addition, Mr. Brewer alleges that Employee Rules of Conduct Nos. 4 and 9 are not consistently enforced at the Blacksville No. 2 Mine.

14. On January 14, 2016. Mr. Brewer filed the 105(c) complaint which constitutes the basis of the present 105(c) Temporary Reinstatement Application.

Based upon the information available as the result of the special investigation conducted in these matters, I have concluded that evidence exists that Mr. Brewer was discharged from his employment with Murray because he made 103(g) safety complaints to MSHA. Thus, it is my determination that the discrimination complaint filed by Mr. Brewer was not frivolously brought. Declaration of Jeffrey C. Maxwell, pp. 1-3.

#### Findings and Conclusion

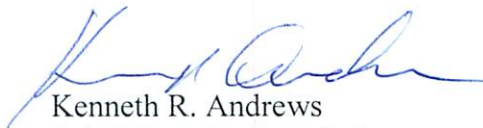
I find that the evidence developed by the Special Investigator is not insubstantial and presents a reasonable cause to believe the instant Discrimination Complaint was not frivolously brought. Miner Jeffrey S. Brewer is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

#### ORDER

It is hereby **ORDERED** that **Jeffrey S. Brewer** be immediately **TEMPORARILY REINSTATED** to his former job at the Blacksville No. 2 mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

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**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Murray Energy did not violate Section 105(c) of the Act.

  
Kenneth R. Andrews  
Administrative Law Judge

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