

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 02 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JEREMY COOTS,
Complainant,

v.

YELLOW ROSE COAL CO., LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2016-320-D
MSHA Case No.: BARB-CD-2016-06

Mine: No. 3
Mine ID: 15-18277

**ORDER GRANTING TEMPORARY REINSTATEMENT
OF JEREMY COOTS**

Before: Judge Steele

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 April 13, 2016, filed an Application for Temporary Reinstatement of miner Jeremy Coots (“Complainant”) to his former position with Yellow Rose Coal Co. (“Respondent”) at Mine No. 3 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(b). By email, the Respondent’s counsel notified the court that they would not be requesting a hearing. The Respondent has not filed a timely Request for Hearing. For the following reasons, the temporary reinstatement of Jeremy Coots is hereby **GRANTED**.

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, 95th Cong., 1 Sess. 35 (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 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(b). 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. *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 complaint 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."¹ *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The Declaration of Special Investigator Kenneth McClung was filed with the Complainant's Application for Temporary Reinstatement asserting the following:

1. Prior to his discharge on February 23, 2016, Jeromy Coots (Coots) was employed by Yellow Rose Coal Co., LLC (Yellow Rose). Yellow Rose operates the No. 3 mine. The No. 3 mine is a "coal or other mine" as defined by Section 3(h) of the Mine Act, 30 U.S.C. § 802(h). The No. 3 mine is located in Lejunior, Harlan County, Kentucky.
2. Coots began working for Yellow Rose on February 22, 2016. Coots worked as roof bolter operator at the No. 3 mine.
3. On February 22, 2016, Coots spoke with Yellow Rose mine owner Randall Fleming (Fleming) about a job at Yellow Rose. Fleming told Coots he had an opening for a roof bolter and that he would observe Coots operate the roof bolting machine before he would be hired. Fleming observed Coots operate the roof bolter and stated that Coots was the best bolt machine operator he had seen. Coots was left underground to work the 10 hour shift. On February 23, 2016, Fleming received two phone calls regarding Coots. Both callers informed Fleming that Coots was represented by attorney Tony Oppegard and that

¹ "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)).

Coots had filed a lawsuit against his previous employer, Lone Mountain. Fleming was warned to be careful around Coots.

4. Coots was terminated on February 23, 2016 by Fleming. Fleming stated that he could not continue to employ Coots for fear that Coots would file a complaint against Yellow Rose.
5. On October 7, 2014, the Secretary filed a Discrimination Complaint against Lone Mountain Processing on behalf of Jeromy Coots. An order was issued settling the case on August 17, 2015.
6. Based upon my investigation of these matters, I have concluded that Coots' complaint of discrimination was not frivolously brought. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Based upon the affidavit of the Special Investigator and the asserted facts therein, I find that the Secretary's complaint was not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Jeremy Coots be immediately **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime, and benefits pending final decision on the complaint.

William S. Steele

William Steele
Administrative Law Judge

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