

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 13, 1998

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROSCOE RAY YOUNG,	:	Docket No. KENT 98-254-D
Complainant	:	BARB CD 98-13
v.	:	
	:	
LONE MOUNTAIN PROCESSING, INC.,	:	Huff Creek No. 1 Mine
Respondent	:	Mine ID No. 15-17234

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Complainant; Marco M. Rajkovich, Jr., Esq. and Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs, Lexington, KY, on behalf of the Respondent.

Before: Judge Melick

DECISION

This case is before me upon the application for temporary reinstatement filed by the Secretary of Labor, pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act", and Commission Rule 45, 29 C.F.R. ' 2700.45. The Secretary seeks an order "temporarily reinstating" Roscoe Ray Young, an applicant for employment with Lone Mountain Processing, Inc., (Lone Mountain) pending a final hearing and disposition on the merits of the related discrimination proceeding (Docket No. KENT 98-255-D). At hearings held on July 31, 1998, the parties waived their rights under Commission Rule 45(e), 29 C.F.R. ' 2700.45(e) to a decision within seven days of the hearings in order to file posthearing briefs.

It is undisputed that on September 3, 1997, and until September 4, 1997, Young was employed by Arch of Kentucky (Arch) as a roof bolter. Arch is a separate and distinct mine operator and not a party to this case. In anticipation of a layoff at Arch, Young had applied for employment as a roof bolter at Respondent Lone Mountain's Huff Creek No. 1 Mine. As a condition of employment with Lone Mountain, Young was required to take a roof bolting test. He took this test on September 3, 1997, but claims that during the test, he encountered unsafe roof conditions which prevented him from completing the test in the time prescribed by Lone Mountain. It is further alleged that Lone Mountain's agent, Gary Sisk, was present during the test and that he was made aware by Young of the purportedly unsafe roof conditions. The Secretary maintains that Lone Mountain thereafter refused to employ Young, in retaliation for working

slowly but safely, in violation of the Act.

Within this framework of allegations, the Secretary requests an order of temporary reinstatement directing Lone Mountain to immediately and on an expedited basis "give Young a new roof bolting test under safe conditions and in the presence of an authorized representative of the Secretary, applying the same criteria for employment as was applicable on September 3, 1997, and, if successful, to immediately employ him as a roof bolter at the same rate of pay and with the same or equivalent duties assigned to him as from September 3, 1997."

In its answer and in a motion to dismiss filed at expedited hearings, Respondent, Lone Mountain, maintains, *inter alia*, that the Commission does not have the authority or jurisdiction under the Act to temporarily reinstate an "applicant for employment" such as Mr. Young. In particular it argues that Section 105(c)(2), by its plain language, specifically limits the Commission's authority and jurisdiction in temporary reinstatement proceedings to "miners" and thereby excludes applicants for employment.¹ In particular, it cites the language of Section

105(c)(2) which limits Commission authority and jurisdiction in temporary reinstatement proceedings as follows: "the Commission, on an expedited basis upon application of the

¹ Section 105(c)(2) of the Act provides as follows:

"Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and 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. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph."

Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint" (emphasis added).

The term "miner" is defined in Section 3(g) of the Act as " any individual working in a coal or other mine". Since Congress has clearly defined the term "miner" and that definition does not include an "applicant for employment" there is no need to resort to secondary rules of construction applicable where the statutory language is ambiguous. Where the language of a statutory provision is clear, the terms of that provision must be enforced as they are written unless the Legislature clearly intended the words to have a different meaning. See *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984); *United States v. Baldrige*, 677 F2d 940, 944 (D.C. Cir. 1982); *Phelps Dodge Corp. v. FMSHRC*, 681 F2d 1189, 1192-93 (9th Cir. 1982); *Utah Power and Light Company*, 11 FMSHRC 1926, 1930 (October 1989).

Moreover, under the maxim *expressio unius est exclusio alterius*, the expression or mention in a statute of one thing ("miner") implies an intention to exclude all other things from its operation. For this additional reason it is clear that Congress did not intend to include "applicants for employment" in the temporary reinstatement provisions of Section 105(c)(2) of the Act. It becomes even more apparent that Congress limited the remedy of temporary reinstatement to only "miners" (and not to applicants for employment) when a comparison is made in the statutory language between the term "miner" and the phrase "miner, applicant for employment or representative of miners" as referenced in sections 105(c)(1) and 105(c)(2) of the Act. The phrase "miner, applicant for employment or representative of miners" is cited eight times in these subsections and the term "miner" alone, is cited twice--and both of the references to the term "miner" alone are cited in the context of reinstatement. There can, therefore, be no mistake of Congressional intent that the remedy of temporary reinstatement is to be limited only to miners who have suffered unlawful discrimination.

The Secretary argues, alternatively, that Mr. Young was in any event, at the time of his protected activity a "miner" as defined in the Act, although he was admittedly a "miner" only because of his employment with another mine operator not involved in the alleged discrimination and who is not a party to this case. Even assuming, *arguendo*, that Young was still an employee of the non-party operator (Arch) on the date of the allegedly discriminatory act, he would not be entitled to temporary reinstatement to that employer because it is neither a party to these proceedings nor is it alleged to have discriminated against Young. Moreover Young would not be entitled to temporary reinstatement to Lone Mountain by virtue of his status as a "miner" at Arch. Reinstatement means to restore to a position from which the person has been removed. Likewise, since Young was not employed by Lone Mountain as a "miner" he could not be reinstated to Lone Mountain as a "miner". The Secretary in any event is not seeking to reinstate Young as a "miner" with Lone Mountain but as an "applicant for employment".

While it is not necessary for the disposition of this issue, I nevertheless note that it has not by any means been established that Young was, in any event, employed as a "miner" at the time of

the alleged discrimination (the decision not to hire him) even with that other non-discriminating operator, Arch. It is undisputed that Young's last day of employment with Arch was September 4, 1997. The only evidence as to when the decision not to hire Young was made comes from Lone Mountain Division Training Coordinator Gary Sisk. Sisk testified that within three days after giving Young the roof bolting test on September 3, 1997, he fed the raw timing data into his computer and obtained the final tabulated results on which he based his decision not to hire Young. Sisk testified that after obtaining those results he contacted his boss who agreed that Young had operated too slowly and that Young should therefore be informed that he would not be hired. The letter Young received on September 18 (Government Exhibit 1) advising Young that he would not be hired was the result, according to Sisk, of the computer calculations performed within three days of the roof bolting test. Under the circumstances it is unclear whether Young was even a "miner" for Arch on the date he allegedly suffered discrimination.

ORDER

This Commission is without statutory authority and jurisdiction to reinstate applicant, Roscoe Ray Young, for employment. The Secretary's application for temporary reinstatement herein is accordingly dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

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