

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

May 15, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-188-D
on behalf of LEVI BUSSANICH,	:	
Complainant	:	Centralia Coal Mine
	:	
v.	:	Mine I.D. 45-00416
	:	
CENTRALIA MINING COMPANY,	:	
Respondent	:	

**ORDER DENYING RESPONDENT’S MOTION FOR PARTIAL SUMMARY DECISION**

This discrimination proceeding was brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company (“Centralia”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.50 *et seq.* This case includes four discrimination complaints that Mr. Bussanich filed with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). In the first complaint, DENV-CD-97-08, filed on January 28, 1997, Mr. Bussanich alleges that his foreman prevented him from leaving the shop without a supervisor’s escort because he had raised safety issues with MSHA. In the second complaint, DENV-CD-99-13, filed on February 16, 1999, Mr. Bussanich alleges that he was treated disparately because the company would not accept a work release from his physician when he was ready to return to work after a non-work related injury and he was also required to take a drug test before he could return. In the third complaint, DENV-CD-99-22, filed on August 23, 1999, Mr. Bussanich alleges that he was disparately subjected to a search of his vehicle at the mine. In the fourth complaint, DENV-CD-2000-06, filed December 18, 2000, Mr. Bussanich alleges that he was terminated from employment at the Centralia Mine in violation of section 105(c) of the Mine Act.

On or about December 28, 1999, the Secretary filed an application for temporary reinstatement on behalf of Mr. Bussanich in WEST 2000-99-D, under section 105(c)(2) and 29 C.F.R. § 2700.45. In a temporary reinstatement proceeding, the Secretary has the burden of proving that the miner’s complaint of discrimination was not frivolously brought. Centralia requested a hearing in the temporary reinstatement case. A hearing was held before me on January 21, 2000. In my decision issued January 27, 2000, I held that the Secretary did not meet her burden of proof because she failed to establish a colorable claim that Bussanich was terminated from his employment. *Secretary of Labor o/b/o Bussanich v. Centralia*, 22 FMSHRC 107. My decision was affirmed by the Commission, 22 FMSHRC 153 (Feb. 2000).

Centralia filed a motion for partial summary decision in the present proceeding. It contends that the issue of whether Bussanich was discharged on account of protected activity was adjudicated adversely to the Secretary in the temporary reinstatement case. As a consequence, it argues that Mr. Bussanich's fourth discrimination complaint, DENV-CD-2000-06, must be dismissed.

In support of its motion, Centralia argues that the Secretary is collaterally estopped from relitigating the same issue that was decided in WEST 2000-99-D. Centralia maintains that the doctrine of collateral estoppel precludes the Secretary's attempt to relitigate the issue of whether Bussanich was terminated from his employment and Centralia is not obligated to again rebut the Secretary's allegation. It argues that since the Secretary's burden of proof was lower in the temporary reinstatement case, collateral estoppel clearly bars a "second bite at the apple." (C. Motion at 7). Since the Secretary was unable to prove that Bussanich's discrimination complaint was not frivolous, collateral estoppel precludes her from trying to establish, by a preponderance of the evidence, that Bussanich was discharged by Centralia because of his protected activities.

Centralia further argues that, even though temporary reinstatement proceedings are expedited, the Secretary could have investigated Bussanich's fourth complaint more thoroughly, as recommended by Centralia, prior to bringing that action. The Secretary chose to bring the temporary reinstatement case before MSHA's investigators interviewed Centralia managers or reviewed the company's documents. Thus, it contends that the Secretary had the opportunity to more fully investigate the facts prior to the temporary reinstatement hearing but chose not to do so. Centralia argues that the Secretary's opportunity to litigate the merits of the discharge claim in the temporary reinstatement proceeding was the substantial equivalent of what is available in the present case so that principles of collateral estoppel should be applied.

The Secretary opposes Centralia's motion. She contends that MSHA's investigators discovered new evidence after the temporary reinstatement hearing. She also states that she has initiated discovery against Centralia which may also lead to new evidence that was not available for a temporary reinstatement hearing. Thus, the Secretary argues that, because there are genuine issues of fact in dispute in the present case, a motion for partial summary decision is not proper under 29 C.F.R. § 2700.67(b)(1).

The Secretary states that the Commission, in affirming my temporary reinstatement decision, held that its decision has "no bearing on the ultimate merits of the case." 22 FMSHRC at 159, n. 8 (citation omitted). The Secretary argues that she should not be bound by the evidence presented at a separate hearing having a different and narrower purpose. The hearing in a temporary reinstatement proceeding should not become the hearing on the merits of the underlying discrimination complaint because "full discovery and examination of the evidence" is not expected and "would be contrary to the legislative purpose for providing temporary reinstatement." (S. Response at 10). The Secretary maintains that if the Secretary were required to present a fully developed case at a temporary reinstatement proceeding in order to avoid the risk of being collaterally estopped in the discrimination case, the complainant would be put in a

difficult financial position. Rather than being reinstated on an expedited basis, the complainant would have to wait until MSHA's investigation is virtually complete before he could be reinstated. The mine operator would have a great incentive to delay the investigation by refusing to cooperate with MSHA investigators.

Finally, the Secretary focuses on the purpose for temporary reinstatement and the legislative history of section 105(c) of the Mine Act. She maintains that Congress intended that temporary reinstatement occur as soon as possible to the benefit of the complaining miner. The Secretary maintains that collateral estoppel should not be applied in these circumstances.

I agree with the arguments presented by the Secretary. This case presents rather unique facts that will infrequently arise. It is important to understand that, although a temporary reinstatement case is related to the underlying discrimination case, they are two separate cases with distinct functions. The same issue is not litigated in both cases. Although the Secretary's burden of proof is easier to meet in the temporary reinstatement case, the nature of that case is much narrower. The language of section 105(c)(2) of the Mine Act is instructive. That provision states that, upon receipt of a complaint of discrimination, the Secretary shall forward a copy of the complaint to the respondent and cause an investigation to be undertaken. This provision goes on to state:

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 ....

This provision clearly contemplates that the Secretary seek reinstatement as quickly as possible before her investigation is completed. The legislative history supports my interpretation, as follows:

Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation and complaint. The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36-37 (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 624-25 (1978).*

Neither the Mine Act nor the legislative history speak of a right to a hearing in cases of temporary reinstatement. Initially, the Commission's procedural rules did not provide mine operators with a right to challenge an order of temporary reinstatement in a formal hearing. This right was added in response to a Sixth Circuit Court of Appeals decision. Subsequently, in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Supreme Court held that a temporary reinstatement provision in the Surface Transportation Assistance Act satisfied due process even though employers were not provided with the right to a hearing on the issue.<sup>1</sup>

The Commission affords mine operators the right to challenge temporary reinstatement orders in a formal hearing. Nevertheless, the focus of the hearing is quite narrow: whether the Secretary presented sufficient evidence to show that the miner's discrimination complaint was not frivolously brought. The temporary reinstatement hearing is not a trial on the merits of the discrimination complaint and it cannot even be deemed a mini-trial on that issue. Temporary reinstatement is sought so that the complaining miner will not have "to suffer even a short period of unemployment or reduced income" pending the resolution of the discrimination complaint. The Secretary would be shirking her duty if she sought temporary reinstatement only after MSHA completed its investigation or only after she had sufficient information to present a *prima facie* case of discrimination.

Given this mandate, it is clear that the Secretary will not have sufficient facts at the time of a hearing in a temporary reinstatement case to be bound by the concept of collateral estoppel in the subsequent discrimination proceeding. MSHA's investigation will not be complete and there is insufficient time to develop the case through discovery. In most cases, of course, this issue will not arise because the Secretary's burden of proof is so low in temporary reinstatement proceedings. But in those few cases where the Secretary does not prevail in a temporary reinstatement case, issue preclusion should not apply because the issues in a discrimination case are not reached in a temporary reinstatement case.

It is important to recognize that when the Secretary prevails in a temporary reinstatement proceeding, the holding of the administrative law judge in that case "has no bearing on the ultimate merits" on the underlying discrimination proceeding. 22 FMSHRC at 159, n. 8 (citation omitted). Likewise, when the Secretary does not present sufficient evidence to meet her burden of proof in a temporary reinstatement case, the judge's holding denying temporary reinstatement should not have any bearing on the ultimate merits of the discrimination case.<sup>2</sup> The complaining

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<sup>1</sup> A more detailed history of the Commission's Procedural Rule in temporary reinstatement proceedings is presented in the dissenting opinion of Commissioners Marks and Beatty in the temporary reinstatement proceeding. 22 FMSHRC at 162-63.

<sup>2</sup> The parties can use the transcript from the temporary reinstatement hearing in the discrimination case. For example, a party may attempt to demonstrate, on cross-examination, that

miner should not have his discrimination complaint dismissed simply because the Secretary was not able to sufficiently marshal the facts in the temporary reinstatement hearing. Although the Secretary is a party in temporary reinstatement and discrimination proceedings, she is fundamentally representing the complaining miner so his interests are paramount.

For the reasons set forth above, Centralia's motion for partial summary decision is **DENIED**.

Richard W. Manning  
Administrative Law Judge

Distribution:

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Fax and First Class Mail)

Thomas C. Means, Crowell & Moring, 1001 Pennsylvania Ave., NW Washington, DC 20004-2595 (Fax and First Class Mail)

RWM.

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a witness made prior inconsistent statements while under oath.