

CCASE:
(MSHA) ROBERT BUELKE V. SANTA FE PACIFIC GOLD

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September 3, 1992

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of ROBERT W. BUELKE

v.
SANTA FE PACIFIC GOLD
CORPORATION

Docket No. WEST 92-544-DM

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("the Mine Act"), Santa Fe Pacific Gold Corporation ("Santa Fe") has filed a petition for review of Commission Administrative Law Judge August Cetti's August 19, 1992, order of temporary reinstatement issued under Commission Procedural Rule 44, 29 C.F.R. □ 2700.44 (1986). We grant Santa Fe's petition for review and, for the reasons that follow, we affirm the judge's order.

Section 105(c) of the Mine Act, 30 U.S.C. • 815(c), prohibits mine operators from discharging or otherwise discriminating against miners who exercise their safety rights under the Act. If a miner believes that he has been discriminated against in violation of section 105(c), he may file a complaint with the Secretary. If, after a preliminary investigation, the Secretary finds that the complaint is "not frivolously brought," she is authorized to apply to the Commission for an order of temporary reinstatement of the miner pending full resolution of the complaint. 30 U.S.C.

□ 815(c)(2). If the Commission finds that the complaint is "not frivolously brought," it must issue an order of reinstatement on an expedited basis. 29 C.F.R. • 2700.44(b).

Complainant Robert W. Buelke was employed as an electrician by Santa Fe at its Rabbit Creek Mine from June 6, 1990, until July 1, 1991, when he was discharged. Buelke filed a complaint of discrimination with the Secretary under section 105(c)(2) of the Mine Act, 30 U.S.C. • 815(c)(2). Following a preliminary investigation, the Secretary filed an application for temporary reinstatement with the Commission on February 7, 1991. Judge Cetti issued an ~1546

order of reinstatement on February 27, 1992, after hearing.(Footnote 1)

Buelke returned to work on March 9, but was discharged for a second time on April 13. It is this second discharge that is the subject of this proceeding.

The Secretary once again filed an application for temporary

reinstatement. At the close of the ensuing hearing on August 5, Judge Cetti issued a bench order, granting temporary reinstatement. The bench order was reduced to writing and issued on August 19.(Footnote 2)

The Secretary alleges that Buelke, on several occasions, made safety complaints relating to the installation, maintenance and repair of the Rabbit Creek Mine's electrical system and that Santa Fe retaliated for those complaints through harassment, intimidation and, ultimately, discharge. The Secretary further asserts that Buelke's second discharge on April 13, 1992, was motivated by the filing of his initial complaint of discrimination and that it was the result of disparate treatment.

Santa Fe responds that Buelke was discharged a second time for unexcused absences from April 4 through April 7, 1992. The operator further contends that it has a strict, evenhanded policy on absenteeism and that the record supports its arguments that Buelke's discharge was not the result of disparate treatment.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." Secretary *o.b.o. Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987), *aff'd*, *Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). In his decision below, Judge Cetti concluded, "I am satisfied from the present record ... that the evidence presented on behalf of Mr. Buelke made a strong showing and established for purposes of the present proceeding for temporary reinstatement only that Buelke engaged in protected activity and that a viable non-frivolous issue exists as to whether or not either or both discharges were motivated by Respondent's desire to retaliate against him for

1 This earlier complaint and temporary reinstatement are the subject of a separate Commission proceeding, Secretary on behalf of Robert W. Buelke v. Santa Fe Pacific Gold Corp., Docket No. WEST 92-243-DM.

2 Santa Fe filed a petition for review of the judge's bench order on August 12, 1992, to which the Secretary filed opposition on August 19. After the judge's written order was issued, Santa Fe filed a second petition, which incorporated the initial petition by reference. The Secretary filed a supplemental response in opposition to the petition. Commission Procedural Rule 44(e), 29 C.F.R. • 2700.44(e), requires that a judge's order granting or denying an application for temporary reinstatement include "findings and conclusions supporting the [judge's] determination." Thus, the rule contemplates a written order. Accordingly, for purposes of the time periods set forth in Rule 44, we deem the judge's written order of August 19, 1992, to be the starting point of the review process. All documents, including those filed before August 19, have been considered on review.

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his protected activity." Order pp. 4-5.

Having carefully reviewed the evidence and pleadings, we conclude that the judge's order is supported by the record and is consistent with applicable law. We intimate no view as to the ultimate merits of this case. The only issue before us is whether Buelke's complaint of discrimination was not frivolously brought.

Accordingly, the judge's order of temporary reinstatement is affirmed.