

CCASE:
SOL (DONALD BOWLING) V. PERRY TRANSPORT
DDATE:
19930204
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N. W., SIXTH FLOOR
WASHINGTON, D.C. 20006

February 4, 1993

SECRETARY OF LABOR, on behalf	:
of DONALD BOWLING,	:
Complainant	:
	:
and	:
	:
DONALD BOWLING,	:
Intervenor	:
	:
v.	:Docket No. KENT
	92-1052-D
	:
PERRY TRANSPORT, INC., a	:
corporation; STEVIE CALDWELL	:
TRUCKING, INC., a corporation; and	:
STEVIE CALDWELL, an Individual,	:
	:
Respondents	

DECISION

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Sec. 801 et seq. (1988) ("the Mine Act"), respondents Perry Transport, Inc., Stevie Caldwell Trucking, Inc., and Stevie Caldwell have filed a petition for review of Administrative Law Judge William Fauver's December 28, 1992, order of temporary reinstatement issued pursuant to Commission Procedural Rule 44, 29 C.F.R. Sec. 2700.44 (1986). We grant respondents' petition for review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Donald Bowling.

Complainant Donald Bowling was employed by Stevie Caldwell Trucking, Inc., as a truck driver from February 1990 to February 7, 1992, when his employment terminated.

On April 13, 1992, Bowling filed a discrimination complaint with the Secretary of Labor (Secretary) pursuant to Sec. 105(c)(2) of the Mine Act.^{1/} Following an investigation, the Secretary determined that the discrimination complaint filed by Bowling was not frivolous. On September 15, 1992, the Secretary filed an application for temporary reinstatement. On October 20, 1992, an evidentiary hearing on the application for temporary reinstatement was held. Sixty-nine days later, ^{2/} on December 28, 1992, the judge issued his decision concluding that the complaint was not frivolous.

The Secretary and intervenor Donald Bowling allege that Bowling was discharged from his job in retaliation for reporting safety violations to the Mine Safety and Health Administration (MSHA) on two separate occasions. Respondents contend that Bowling was not discharged and that he voluntarily terminated his employment.

As we have previously stated, "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 of Labor 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).

1/ Respondents seek now to challenge Bowling's discrimination complaint on the additional ground that it is time barred. This issue was not raised before the judge. The typewritten discrimination complaint attached to the Secretary's application for temporary reinstatement is signed by Donald Bowling and dated April 13, 1992. Thus, the complaint would appear to have been filed six days beyond the sixty day statutory time period for such filing. However, in response to this challenge, the Secretary has furnished a copy of Bowling's handwritten discrimination complaint, signed by Donald Bowling and dated April 2, 1992, which the Secretary maintains was submitted timely. (Exhibit B, Response in Opposition to Petition for Review) Because the judge has not had an opportunity to pass on this issue, we decline to rule on it.

2/ While we recognize that each case is unique, we perceive no basis in this record for the protracted delay and failure to adhere to Rule 44(d), which requires that "Within 5 days following the close of a hearing on an application for temporary reinstatement the Judge shall issue an order granting or denying the application."

After conducting an evidentiary hearing and considering the testimony of the complainant and two witnesses for the respondents, the judge concluded:

The hearing evidence shows a sharp dispute of the facts concerning the termination of Mr. Bowling's employment. . . . I do not find that Mr. Bowling's testimony is so incredible or unworthy of belief as to amount to a "frivolous" complaint.

I therefore conclude that the special concern Congress has shown to require temporary reinstatement of a miner unless his claim is frivolous requires temporary reinstatement in this case.

Slip op. at 3.

After careful review of the evidence and pleadings, we conclude that the judge's determination that the complaint is not frivolous is supported by the record and is consistent with applicable law. The only issue before us is whether Bowling's discrimination complaint was frivolously brought. We intimate no view as to the ultimate merits of this case. 3/

Respondents have additionally requested that we "stay the effect of the decision of the Administrative Law Judge pendente lite." Petition at 4. To the extent that respondents sought relief pending our consideration of the instant matter, their motion was considered and is denied. To the extent that respondents seek a stay of the temporary reinstatement order pending a final determination of whether a violation of Section 105(c)(1) of the Mine Act has occurred, their motion is denied. Absent some extraordinary circumstance, yet to be advanced, the granting of such a motion would eviscerate the temporary reinstatement provision of the Mine Act.

3/ No other issues raised by respondents, including the judge's back-pay order, are final and, thus, they are not before the Commission at this time.

~199

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

ARLENE HOLEN, Chairman

RICHARD V. BACKLEY, Commissioner

JOYCE A. DOYLE, Commissioner