

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 31, 2003

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of JOSEPH M. ONDREAKO

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v.

Docket No. WEST 2003-403-DM

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KENNECOTT UTAH COPPER
CORPORATION

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(2) (1994). On October 15, 2003, the Commission received from Kennecott Utah Copper Corporation (“Kennecott”) a petition for stay and review of Administrative Law Judge Richard Manning’s October 9, 2003 decision and order of temporary reinstatement issued pursuant to section 105(c)(2) of the Act. 25 FMSHRC ___, slip op. at 9, No. WEST 2003-403-DM (Oct. 9, 2003). See also 29 C.F.R. § 2700.45. On October 22, the Commission received the Secretary of Labor’s opposition to Kennecott’s petition. For the reasons that follow, we grant the petition for review, deny Kennecott’s request for a stay, and affirm the judge’s order requiring the temporary reinstatement of Joseph M. Ondreako (“Ondreako”).

Complainant Ondreako was hired by Kennecott in 1999 as a haul truck driver. Slip op. at 2. In 2002, he was promoted to “advanced operator.” *Id.* He was notified on May 8, 2003, that he had been demoted to the position of “operator B.” *Id.* at 3; Tr. 39-40. In June 2003, he was laid off. Slip op. at 5.

On July 9, 2003, Ondreako filed a complaint of discrimination with the Department of Labor’s Mine Safety and Health Administration. *Id.* at 2. After MSHA conducted a preliminary investigation, the Secretary filed an application for temporary reinstatement alleging that

Kennebecott, on May 8, 2003, demoted Ondreako and, on June 26, 2003, laid him off because of safety complaints he made over the course of several months. Application at 2. The application for temporary reinstatement requested that Ondreako be reinstated to the position which he held before his demotion on May 8, 2003. *Id.*

On October 2, 2003, Judge Manning held a hearing on the Secretary's application for the temporary reinstatement of Ondreako. Slip op. at 1. The judge found that the Secretary presented evidence sufficient to demonstrate that Ondreako's discrimination complaint was not frivolously brought, including evidence that Ondreako engaged in protected activity, that Kennebecott took adverse action against Ondreako, that the protected activity and the adverse action were proximate in time, and that Ondreako's complaints were public and open. *Id.* at 7-9. The judge noted that Kennebecott presented evidence that may amount to "a convincing defense to Ondreako's complaint in the underlying discrimination case." *Id.* at 7. However, the judge declined to resolve conflicts in testimony at this preliminary stage of the proceeding and reiterated that "the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the applicant establishes that the discrimination complaint is not frivolous." *Id.* The judge ordered Ondreako reinstated to the position he held immediately prior to his lay-off, or to a similar position at the same rate of pay and with similar benefits. *Id.* at 9.

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] 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 Commission has repeatedly recognized that 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." See *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993) (quoting *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 (11th Cir. 1990)). The Commission applies the substantial evidence standard in reviewing the judge's determination.¹ *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

Thus, the only issue before us is whether Ondreako's discrimination complaint was frivolously brought. After careful review of the evidence and pleadings, we conclude that the

¹ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable 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)).

judge's determination that the complaint is not frivolous is supported by the record and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.²

Accordingly, we affirm the judge's decision reinstating Ondreako.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

² Kennecott's request for a stay of the temporary reinstatement order fails to demonstrate extraordinary circumstances and is therefore denied. 29 C.F.R. § 2700.45(f). *See Sec'y of Labor on behalf of Bowling v. Perry Transport, Inc.*, 15 FMSHRC 196, 198 (Feb. 1993).

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