

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 15, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	TEMPORARY REINSTATEMENT
ADMINISTRATION (MSHA),	:	PROCEEDING
on behalf of	:	
CHARLES SCOTT HOWARD,	:	
Complainant	:	Docket No. KENT 2011-1044-D
	:	
v.	:	
	:	
CUMBERLAND RIVER COAL	:	
COMPANY,	:	Band Mill No. 2
Respondent	:	

**ORDER DENYING REQUEST FOR HEARING**  
**ORDER OF REINSTATEMENT**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor; Tony Oppgard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Charles Scott Howard; Timothy M. Biddle, Esq., and Willa B. Perlmutter, Esq., Crowell & Moring LLP, Washington, D.C., for Cumberland River Coal Company.

Before: Judge Lesnick

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Charles Scott Howard, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The application seeks the reinstatement of Mr. Howard as an employee of the Respondent, Cumberland River Coal Company (“Cumberland”), pending final disposition of the discrimination complaint Howard has filed with the Mine Safety and Health Administration (MSHA) against the company.

A dispute has arisen in this case as to the timeliness of Cumberland’s request for a hearing. The Secretary filed her application for Mr. Howard’s reinstatement with the Commission via facsimile on May 27, 2011. Counsel for Cumberland received a copy of the application via facsimile on that same day, May 27, 2011. Respondent’s Request for Hearing,

Declaration of W. Perlmutter at ¶ 3. Cumberland, however, asserts in an email to the Commission's Docket Office that it received the application on June 3, 2011, the day on which the company received a service copy of the application sent via certified mail. Cumberland filed a request for a hearing with the Commission on June 13, 2011.

Under Commission Procedural Rule 7(c)(2), service by facsimile is “effective upon successful receipt by the party intended to be served.” 29 C.F.R. § 2700.7(c)(2). An application for temporary relief must include “proof of notice to and service on the person against whom relief is sought *by the most expeditious means of notice and delivery reasonably available.*” 29 C.F.R. § 2700.45(b) (emphasis added). An operator may request a hearing pursuant to Commission Procedural Rule 45(c) “[w]ithin 10 calendar days following *receipt* of the Secretary's application for temporary reinstatement.” 29 C.F.R. § 2700.45(c) (emphasis added).

It is undisputed that Cumberland *received* the Secretary's application on May 27, 2011. The Commission's rules do not distinguish between receipt of or being served with such an application. Under Commission Procedural Rule 45, the relevant events for purposes of determining the timeliness of a request for a hearing on the application are *notice* and *receipt* of the application. 29 C.F.R. § 2700.45(b)-(c). Here, given that Cumberland had both notice and actual receipt of the Secretary's application on May 27, 2011, any request for a hearing had to have been made by the company on or before June 6, 2011. I conclude that Cumberland's June 13, 2011 Request for Hearing was untimely, and I therefore deny the request.

Commission Procedural Rule 45(c) provides in relevant part: “If no hearing is requested, the Judge assigned to the matter *shall review immediately the Secretary's application* and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement.” 29 C.F.R. § 2700.45(c) (emphasis added). Pursuant to this provision, I have reviewed the Secretary's application and find that Mr. Howard's complaint was not frivolously brought.

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *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, 747 & n.9 (11th Cir. 1990). In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In this case, the Secretary has established that Mr. Howard has a long history of bringing safety concerns to the attention of Cumberland, MSHA, and members of Congress. Soon after his return to work on May 16, 2011 after suffering a work-related injury in July 2010, Cumberland removed Mr. Howard from the company payroll, effectually terminating all his employment rights. Given the very public nature of Mr. Howard's past protected activities, I find that there is a reasonable cause to believe that he could establish that Cumberland's adverse action was motivated by those activities.<sup>1</sup>

Moreover, as the Secretary notes in her response to Cumberland's request for hearing, Mr. Howard "currently remains under Court ordered temporary reinstatement as a miner," citing Judge Zielinski's September 4, 2009 Order of Temporary Reinstatement in Docket No. KENT 2009-1427-D. Sec'y Resp. at 5. The complaint on which Judge Zielinski granted Mr. Howard temporary reinstatement is pending before Judge Gill in Docket No. KENT 2010-493-D. Thus, under the circumstances, even if Mr. Howard's instant complaint had been frivolously brought, he would be entitled to immediate reinstatement pursuant to Judge Zielinski's order, which has not been modified since it was issued and regarding which no final order on the complaint has issued.

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<sup>1</sup> Although under Rule 45(c) I am not required to consider any of Cumberland's arguments having found it did not file a timely request for hearing, I have done so and conclude that the company's assertions that Mr. Howard was not a miner on May 16, 2011, and that his employment was not actually terminated on that date, lack any merit whatsoever.

Accordingly, I conclude that Mr. Howard's discrimination complaint has not been frivolously brought and that he is entitled to immediate reinstatement pending final order on his complaint.

**ORDER**

Cumberland River Coal Company's Request for Hearing is **DENIED** as untimely.

The Secretary's Application for Temporary Reinstatement made on behalf of Charles Scott Howard is **GRANTED**. Cumberland River Coal Company is **ORDERED TO REINSTATE** Mr. Howard to the position that he held on May 16, 2011, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**. In addition, Cumberland River Coal Company is **ORDERED TO PAY** Mr. Howard his pay and benefits retroactive to MAY 16, 2011.

Robert J. Lesnick  
Chief Administrative Law Judge

Distribution (Certified):

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