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MSHA V. ALAMO CEMENT
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FMSHRC-WDC
December 8, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on
behalf of YALE E. HENNESSEE

v. Docket No. CENT 86-151-DM

ALAMO CEMENT COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER

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. (1982), we review for the first time a Commission administrative law judge's order of temporary reinstatement under revised Commission Procedural Rule 44, 29 C.F.R. § 2700.44 (1986)(51 Fed. Reg. 16022 (April 1986)). For the reasons that follow, we affirm the judge's order.

On April 22, 1986 complainant Yale E. Hennessee was discharged by Alamo Cement Company (Alamo") for alleged insubordination during the course of a work refusal incident. The next day Hennessee filed a complaint with the Secretary of labor pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), asserting that Alamo had discharged him unlawfully because he had refused to complete an assigned task under unsafe conditions. On September 10, 1986, after commencing the required investigation of the complaint and determining that it was not brought frivolously, the Secretary filed an application with this independent Commission for the temporary reinstatement of Hennessee. 30 U.S.C. § 815(c)(2). Alamo filed a request for a hearing on the application pursuant to 29 C.F.R.

\$ 2700.44(a)(1986). On October 23, 1986, a hearing was held before Commission Administrative Law Judge George A. Koutras.

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Following the hearing, Judge Koutras issued an order on November 6, 1986, directing Alamo to temporarily reinstate Hennessee. The judge found that a "viable issue" was raised as to whether Hennessee's work refusal, which preceded his discharge, was based in part on his reasonable, good faith belief that performing the task in question was hazardous. Accordingly, the judge concluded that Hennessee's complaint was not frivolous. On November 14, 1986, pursuant to 29 C.F.R. § 2700.44(e) (1986), Alamo filed with the Commission a petition for review of the judge's order. The Secretary has filed a brief in opposition.

We have reviewed carefully the evidence, pleadings, and briefs, and conclude that the judge's order is supported by the record. The scope of a temporary reinstatement hearing is limited to a determination by the judge as to whether the miner's discrimination complaint is frivolously brought. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44(c)(1986). The judge appropriately found that the testimony and other evidence, including certain evidence introduced by Alamo itself, raises a nonfrivolous issue as to whether Hennessee's discharge was in violation of the Mine Act. We also find that the hearing afforded Alamo due process. As relevant here, the essence of due process is the opportunity to be heard. E.g., *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 299-300 (1981). Alamo has been heard in a predeprivation hearing, in which it was allowed to present witnesses and evidence and to cross-examine the government's witnesses. Cf. *Southern Ohio Coal Co. v. Donovan* 774 F.2d 693 (6th Cir. 1985), reh'g denied, 781 F.2d 57 (1986).

No view is intimated herein as to the ultimate merits of this case. The only issue that has been decided is that Hennessee's complaint was not frivolously brought. Alamo's request for a stay is denied, and the judge's order is affirmed. This matter is remanded to the judge. Further proceedings, on the part of all concerned, are to be conducted expeditiously. See Secretary on behalf of Donald R. Hale v. 4-A Coal Co., Inc., 8 FMSHRC 905, 907-08 (June 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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