

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 13, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of FRANK CAFEGO,
Complainant,

v.

CIVIL, LLC,
Respondent

TEMPORARY REINSTATEMENT

Docket No. WEVA 2022-0317
MSHA Case No.: HOPE CD 2022-04

Mine: CV #2 Surface Mine
Mine ID: 46-09105

ORDER GRANTING TEMPORARY REINSTATEMENT OF FRANK CAFEGO

Before: Judge Lewis

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on April 28, 2022, filed an Application for Temporary Reinstatement of miner Frank Cafego (“Complainant”) to his former position as an equipment operator and truck driver with Civil, LLC. (“Respondent”) at Respondent’s mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Application for Temporary Reinstatement was served on Respondent by electronic mail on April 29, 2022. My management analyst provided Respondent with Commission Rule 45 on May 4, 2022. The Respondent has not filed a timely Request for Hearing. The Secretary proposed on May 11, 2022, an Order of Temporary Reinstatement, which I approve herein.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c) of the Act, the temporary reinstatement of Frank Cafego is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that “if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). 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,¹ shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the Complaint filed by Complainant (Exhibit "A" to the Application) and the Declaration of Special Investigator Russell Richardson indicating that this was done (Exhibit "B.")

Mr. Richardson's Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought:

1. At all relevant times, Civil, LLC, ("Civil") was a Limited Liability corporation and is a "person" as defined in § 3(f) of the Mine Act.
2. Applicant was employed as an equipment operator and truck driver at Civil, LLC, and therefore, was a "miner" within the meaning of § 3(g) of the Mine Act.
3. Applicant was employed at the mine for approximately three months, from January 2022 until he was discharged from his employment on March 25, 2022.
4. On April 7, 2022, Cafego filed a discrimination complaint with MSHA for being fired on March 25, 2022.

¹ The Act's legislative history suggests 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).

² "Substantial evidence" means "such relevant evidence as a reliable 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)).

5. Applicant alleges that he was fired because he engaged in protected activities.
6. Applicant alleges that he complained to management about the condition of the equipment that he was assigned to operate on numerous occasions prior to his being discharged. For instance, Mr. Cafego complained to management repeatedly during his employment of an anti-freeze leak and lack of air conditioning in the truck he was assigned to operate, which required him to operate the truck with the windows open and exposed him to excessive amounts of dust being generated at the worksite.
7. The investigation into Cafego's complaint is ongoing. To this point, I have interviewed several employees and management personnel at the mine. Employees and management corroborated that Cafego complained about the condition of the equipment on numerous occasions. Management personnel admitted that they were aware of Cafego's complaints. Management personnel stated that the reason Mr. Cafego was discharged was in part because he complained too much.

Dec. of Russell Richardson, April 28, 2022 (Ex. "B" to App. For Temp. Reinst.)

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant Frank Cafego is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Frank Cafego** be **immediately TEMPORARILY REINSTATED** to the position he held on the date of his discharge from Civil, LLC, or a comparable position within the same commuting area and at the same rate of pay and benefits he received prior to his discharge.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.


John Kent Lewis
Administrative Law Judge

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