

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 18 2014

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-609-D
Case No. BARB-CD 2014-05

v.

LONE MOUNTAIN PROCESSING, INC.,
Respondent

Mine ID: 15-18647
Mine: Clover Fork No. 1

ORDER GRANTING RESPONDENT'S MOTION TO WITHDRAW
REQUEST FOR HEARING AND
ORDER GRANTING TEMPORARY REINSTATEMENT
OF JEROMY COOTS

Before: Judge Harner

Pursuant to section 105 (c)(2) 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 July 2, 2104, filed an Application for Temporary Reinstatement of miner Jeromy Coots ("Complainant") to his former position with Lone Mountain Processing, Inc. ("Respondent") at the Clover Fork No. 1 Mine pending final hearing and disposition of the case.

The case was assigned to me on July 7, 2014, and Respondent filed its timely Request for Hearing on July 9, 2014. Following conference calls with the parties, Respondent later filed its Motion to Withdraw Request for Hearing on July 17, 2014. For the following reasons, the temporary reinstatement of Jeromy Coots is hereby **GRANTED**.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978).

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(b). If no hearing is requested,¹ 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, s[he] shall issue immediately a written order of temporary reinstatement. *Id.*

In adopting section 105(c) of the Act, 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). The plain language of the Act states that "if the Secretary finds that such 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 judge must determine whether the complaint of the miner "is supported 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).

The Declaration of Freddie Fugate was filed with the Complainant's Application for Temporary Reinstatement and asserts the following:

1. Mr. Fugate is a special investigator with the Mine Safety and Health Administration ("MSHA") and was assigned to conduct an investigation into a complaint filed by the Complainant. Decl. 1-2.
2. The Complainant was employed at the Clover Fork No. 1 Mine ("Mine") and was assigned to replace roof bolts that had become dislodged in the rehab section of the Mine. Decl. 2a-2b.
3. The roof of the rehab section was 12 feet tall, and the Complainant initially used the Automated Temporary Roof Support System ("ATRSS") to support the roof while roof bolting. Decl. 2b. However, the Complainant was advised after a short time that this system could no longer be used because it took too long to set in place. Decl. 2c.

¹ As noted, Respondent has withdrawn its request for hearing, which was timely filed. I shall grant Respondent's Motion to Withdraw its hearing request and proceed as required by 29 C.F.R. § 2700.45(c).

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)).

4. On that same day, the Complainant inquired why the ATRSS could no longer be used, to which he received a response from mine management that the work needed to be done quickly. Decl. 2d.
5. The Complainant continued to work on the rehab section without the ATRSS for six days, but continued to complain to mine management. Decl. 2e.
6. The Complainant was struck and injured by falling material, and he raised the issue of the ATRSS at a mine safety meeting on May 12, 2014. Decl. 2f-2g.
7. Immediately following the meeting, the Complainant was called to the General Mine Foreman's office where it was explained that the ATRSS took too much time to set up, and the work needed to be done quickly. Decl. 2h. The Complainant was then sent home for the day. *Id.*
8. On May 13, 2014, the Complainant was fired. Decl. 2i.

Based upon the affidavit of the special investigator and the asserted facts therein, I find that the Secretary's complaint is not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Respondent's Motion to Withdraw Request for Hearing is **GRANTED**. It is further **ORDERED** that Jeromy Coots be **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime and benefits pending final order on the complaint.


Janet G. Harner
Administrative Law Judge

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