

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**FEB 14 2017**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of AARON LEE ANDERSON,  
Complainant,

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. VA 2017-69-D  
MSHA Case No.: NORT-CD-2017-02

v.

A&G COAL CORPORATION and  
CHESTNUT LAND HOLDINGS, LLC,  
Respondents.

Mine: Strip #12  
Mine ID: 44-06992

**DECISION AND ORDER ON REMAND**

Before: Judge Andrews

**Background**

A Discrimination Complaint was filed by Aaron Lee Anderson (“Anderson” or “Complainant”) on November 29, 2016. On January 3, 2017, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner Anderson. Respondent timely requested a hearing, which was held on January 12, 2017, in Pikeville, Kentucky. By Order of January 19, 2017, the application was granted and the issue of tolling was denied.

On January 24, 2017, Respondent filed a Petition for Review of Temporary Reinstatement Order.<sup>1</sup> The Secretary and counsel for Anderson filed responses on January 31, 2017. Also on January 24, 2017, Complainant’s counsel filed:

Brief In Support Of Aaron Anderson’s Request To Receive The Same  
Rate Of Pay, Hours Worked, And All Other Benefits As The Miners  
Previously Transferred From The Strip #12 Mine.

On the same date Respondent filed a Supplemental Brief in opposition to the request and the Secretary filed a Position Statement requesting clarification of the reinstatement order.

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<sup>1</sup> Rule 45(e)(4) provides:

A Judge’s order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

Thereafter, the Commission affirmed the Temporary Reinstatement Order and remanded the matter to address the parties' supplemental briefs on February 10, 2017.

### Contentions

Complainant, by counsel, contends that he should receive the same rate of pay, hours worked, and all other benefits that are currently received by the miners who were transferred from the A&G Strip #12 mine to the Bishop mine. If Anderson had not been terminated his non-discriminatory status would be the same as the miners at the Bishop mine, and he should be treated no differently than the miners transferred there. Complainant argues refusing a temporarily reinstated miner pay increases and other benefits would violate Section 105(c) of the Mine Act because it would be in response to the miner's protected activities.

Respondents, by counsel, contend the A&G Strip #12 Mine was idled and placed in non-producing status on December 28, 2016 and approximately 35 miners were laid off and approximately 15 miners were transferred to a Bishop Coal mine. A&G reinstated Anderson to a rock truck position it created at an A&G reclamation job where he is receiving the same rate of pay and other benefits as at the time of his discharge. Anderson was not transferred to the Bishop mine but his reinstatement is in complete compliance with the Order and also complies with the spirit of the temporary reinstatement provisions of the Mine Act. Respondents argue there is no known Commission precedent requiring A&G to pay Anderson a higher rate of pay when he was reinstated by A&G to a job at an A&G reclamation site.

The Secretary, in his Position Statement, requests that the Order of reinstatement be clarified since it could be argued the complainant need only be reinstated to the position he held prior to the discriminatory action, or that it is not frivolous to assume that he would have been transferred to the Bishop mine along with his co-workers.

### Discussion

Claims of discrimination under the Mine Act are not finally adjudicated until there is a hearing and decision on the merits, and where the claimant prevails, a decision on the appropriate remedies. If the issue of tolling is raised it is a part of the decision on the merits, and where Respondent prevails on this issue, the period of tolling is considered in deciding the appropriate remedies. These decisions are only entered after the parties have had an opportunity for discovery and time to develop their positions, and present evidence at the hearing.

An Application for Temporary Reinstatement of a miner must be considered and decided within a very short time frame, and under limited evidentiary standards. 29 C.F.R. § 2700.45. An order temporarily reinstating a miner is not a final decision. *Id.* Where, as here, a period of tolling is not granted at this early stage of the proceeding, this determination is also not final.

A temporarily reinstated miner is restored to the status he would have occupied but for the discrimination claimed. Any remedial relief due to him must be determined on the basis of the non-discriminatory status he held following any protected activity, had there not been an adverse action. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1420 (June 1984); *Secretary*

*of Labor on behalf of Cooley v. Ottawa Silica Company*, 6 FMSHRC 516, 522-525 (March 1984).

In the instant case, one of the protected activities alleged was on the evening of November 18, 2016. At that time, Anderson was operating a 100-ton 777D rock truck and was being paid the hourly rate of \$16.50. His employment was terminated on November 21, 2016. Based on information of record provided by the parties, Anderson was reinstated to a job driving a 777 rock truck at the same rate of pay, number of hours worked and benefits he was receiving at the time of his termination. He began work on January 23, 2017, at an A&G reclamation site, the Virginia Fuels Corporation Darby Road Mine #1. This is a different work site than the Bishop mine to which the other A&G miners were transferred.

The Complainant's request is for a modification of the Temporary Reinstatement Order of January 19, 2017, to require that Respondents provide to Anderson the same rate of pay, hours worked, and all of the benefits currently received by the miners transferred from the A&G Strip #12 mine to the Bishop mine. The hourly rate at the Bishop mine was reported to be higher.

Complainant's argument is essentially one of fairness; that temporarily reinstated miners should receive the same increases or decreases in benefits as other miners in equivalent positions, and Anderson should be treated no differently than the miners transferred from the idled A&G mine to the Bishop mine. However, Anderson was not transferred to Bishop with the other miners considered in the evaluation process because he had already been fired. Rather, a position similar to his job at A&G was found for him. Further, no precedent or persuasive authority has been offered as would support an order to a mine operator to either require the temporarily reinstated miner to work at a specific location or increase that miner's pay and benefits based on what other miners receive at the work site.


Complainant argues that an operator's refusal to grant a temporarily reinstated miner pay increases, additional overtime, or increased employee benefits would "violate Section 105(c) of the Mine Act because it would clearly be in response to the miner's protected activities". However, at this preliminary stage of the proceedings, a final decision on the merits of all elements of a claim of discrimination, including protected activity, has yet to be determined. Further, in the opinion of the undersigned, to order even a partial remedy pending a hearing on the merits would be inappropriate. At this time, the parties have not had the opportunity to fully complete discovery and develop their positions, which in this case would include the issue of tolling due to the idling of the Strip #12 mine.<sup>2</sup>

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<sup>2</sup> This Decision and Order in no way forecloses the possibility that, should complainant be successful in the merits case, he may be entitled to the difference between his current rate of pay and the higher rate of pay suggested by the Secretary.

**ORDER**

The request for modification of the Temporary Reinstatement Order to compel Respondents to increase the pay and benefits of Complainant Anderson is **DENIED**.

  
Kenneth R. Andrews  
Administrative Law Judge

Distribution (Via E-mail and Certified Mail):

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