

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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March 21, 2017

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
U.S. DEPARTMENT OF LABOR,	:	
on behalf of DAVID FRANKLIN	:	Docket No. LAKE 2017-0190
WINSLOW, JR.	:	MSHA Case No. NC-MD-17-02
Complainant,	:	
	:	
	:	
	:	
v.	:	
	:	
WALBRIDGE COMPANY and	:	Mine: St. Mary's Cement
IMPERIAL CRANE SERVICES, INC.,	:	Mine ID: 20-00038
Respondents.	:	

**ORDER DISMISSING APPLICATION FOR TEMPORARY REINSTATEMENT**

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement under section 105(c) of the Federal Mine Safety and Health Act of 1977, filed by the Secretary on March 8, 2017. On Wednesday, March 15, the Court held an initial conference call with the parties and discussed potential dates for a hearing, should the Respondents request a hearing. During this conversation, counsel for the Secretary stated that it would check with Mr. Winslow to see if he was “available” for a hearing within the coming week, because he is now working at a new job in the Detroit area. The Court then reminded the Secretary that it would not delay a hearing absent a compelling reason, and that the Complainant would need to be conscious of this if requesting an extension of time. 29 C.F.R. § 2700.45(c) (A hearing shall be held within 10 calendar days of a request, “unless compelling reasons are shown in an accompanying request for an extension of time.”).

On Friday, March 17, both Respondents timely notified the Court and the Secretary via e-mail of their request for a hearing. On Monday, March 20, the Court issued a Notice of Hearing, with the hearing to be held on Thursday, March 23, 2017.

That same day, Attorney Jing Zhang e-mailed the Court on behalf of the Secretary, stating,

Mr. Winslow has informed me that he is no longer seeking temporary reinstatement at this time. His job circumstances have changed, and at this time he does not want to be temporarily reinstated. The Secretary requests that this week's hearing on temporary reinstatement be canceled.

E-mail from Attorney Zhang to the Court and all parties, March 20, 2017.

The Court responded,

I am in receipt of your message, Attorney Zhang. I will cancel the Temporary Reinstatement hearing scheduled for this Thursday, March 23, 2017, but before I formally announce that the hearing is cancelled, I want it to be understood that, by foregoing this, Mr. Winslow, is unalterably ceding his right to being temporarily reinstated in this matter.

I express this point because of the language you employed in stating that Mr. Winslow is "no longer seeking temporary reinstatement *at this time*." (emphasis added) You mention the "at this time" qualifier twice in your email, below. The Respondents have businesses to run and they cannot be left in a state of uncertainty as to whether the Complainant might, at some indefinite future time within the ensuing 90 days following the filing of his complaint, want to be temporarily reinstated. Therefore, cancellation of the temporary reinstatement hearing, coming about solely from the Complainant's initiation, will have the effect of permanently barring such temporary reemployment with the Respondents in connection with this complaint.

E-mail from Judge Moran to Attorney Zhang and all parties, March 20, 2017.

In short, the Court has been informed through the Secretary's e-mail that Mr. Winslow has found new employment that he wishes to continue. Because the Complainant no longer wishes to seek temporary reinstatement with the Respondents, the scheduled hearing is canceled and the application for temporary reinstatement is denied.

Congress created the temporary reinstatement process as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." 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 protecting miners with non-frivolous complaints, the temporary reinstatement process forces mine operators to "bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding"

*Jim Walter Resources, Corp.*, 920 F.2d 738, 748 n. 11 (11th Cir. 1990).<sup>1</sup>

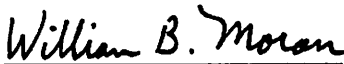
Accordingly, Mr. Winslow, through the Secretary of Labor, had two options at the outset of his case: (a) seek temporary reinstatement pending the Secretary's determination whether to proceed with a discrimination complaint or (b) continue his complaint without seeking reinstatement. Having chosen the former option, a hearing was duly requested by the Respondents and notice served upon all parties. Now, with the Secretary having informed the Court that Mr. Winslow does not want to be temporarily reinstated, his Application for Temporary Reinstatement has been withdrawn. The Secretary vaguely alludes that Mr. Winslow's "job circumstances have changed." This may be accurately translated: the Complainant has found another job. Accordingly, Complainant has waived his right to seek temporary reinstatement.

The position adopted by the Secretary, which is effectively, "the complainant no longer seeks temporary reinstatement, but perhaps at some future time may wish to re-invoke that right," is inconsistent with the fundamental purposes behind temporary reinstatements. Under the Secretary's view, the temporary reinstatement process would provide wide latitude for complainants who wish to vacillate between their employment options. In other words, if the Complainant were to decide next week that he *no longer enjoys his current job*, then the Respondents and the Court may once again be in the position of expending resources to prepare for an expedited hearing. This is not a tenable outcome.

Given the facts above, it would be manifestly unfair to leave the Respondents waiting for weeks on end to see if the Complainant will change his mind once more. As mentioned above, litigants may obtain leave of the Court to delay the temporary reinstatement process for legitimate, compelling reasons. However, abandoning that process, while still leaving the door open to possibly reviving it later on, is antithetical to the provision's purpose and as such is not a legitimate use of that relief.

Accordingly, the application for temporary reinstatement is **DENIED**, and these temporary reinstatement proceedings are **DISMISSED with prejudice**.

So **ORDERED**.

  
William B. Moran  
Administrative Law Judge

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<sup>1</sup> Should an operator economically reinstate a miner, by paying them without the benefit of their labor, the operator has no right "to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim." *North Fork Coal Corp.*, 33 FMRHSC 589, 592 (Mar. 2011).

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