

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 23, 2020

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA) on	:	
behalf of JAMES MCGOUGHAN	:	Docket No. PENN 2019-0144-DM
	:	
v.	:	
	:	
LEHIGH CEMENT COMPANY, LLC	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The parties in this proceeding filed a joint motion to economically reinstate James McGoughran to employment with Lehigh Cement Company, LLC, which the Judge approved on August 20, 2019. A hearing on the merits was scheduled for June 2 to 5, 2020. However, due to the COVID-19 pandemic, in-person hearings were suspended for those dates. The parties disputed whether to proceed via a video conference. The Judge postponed the hearing but issued an order tolling McGoughran’s economic reinstatement effective from May 22, 2020 until a decision is made on the merits.

For the reasons below, we conclude that the Judge abused her discretion by tolling the miner’s economic reinstatement as a result of a delay in the hearing on the merits of the related discrimination complaint. Accordingly, we reverse the Judge’s decision.

I.

Factual and Procedural Background

On May 16, 2019, McGoughran filed a complaint with the Mine Safety and Health Administration against Lehigh charging discrimination pursuant to section 105(c)(1) of the Mine Act. Following the procedures prescribed in section 105(c)(2) of the Act, on August 1, 2019, the Secretary filed an application for the temporary reinstatement of McGoughran.

Instead of proceeding to a hearing on temporary reinstatement, the parties jointly filed a pleading styled as a Joint Motion To Approve Settlement Regarding Temporary Reinstatement. On August 20, 2019, the Judge granted the motion and ordered Lehigh to temporarily

economically reinstate McGaughran, in accordance with all the terms set forth in the parties' Joint Motion to Approve Settlement Regarding Temporary Reinstatement.

The basic terms of the parties' agreement, which were incorporated in the Judge's order, provide that economic reinstatement was effective as of August 1, 2019, and would terminate upon discontinuance of MSHA's investigation or after a final order by the Commission. The agreement contained a provision prohibiting the miner from requesting unemployment benefits, but did not provide for the off-set of wages if McGaughran obtained employment during the period of economic reinstatement. After issuance of the order granting temporary economic reinstatement, McGaughran obtained alternate employment.

On October 22, 2019, the Secretary filed a section 105(c)(2) complaint on the miner's behalf.¹ On January 3, 2020, the Judge scheduled a hearing on the underlying discrimination case for June 2 to 5, 2020.

Thereafter, the pandemic struck. Through sequential orders, the Commission has suspended in-person hearings through August 31, 2020. It has, however, provided that hearings could proceed through videoconferencing. In the second of the sequential orders (issued on April 2, 2020) the Commission suspended in-person hearings until May 31, 2020 but allowed for the use of remote hearings "in coordination with the parties."

On April 29, 2020, the Administrative Law Judge issued an Amended Pre-Hearing Order asking the parties whether "they are amenable to proceeding [with the hearing scheduled for June 2 to 5] with Zoom videoconferencing" by May 11, 2020. The Secretary was not amenable.

On May 5, 2020, the Secretary filed a motion to oppose remote hearing on a number of grounds including alleged difficulties in making credibility determinations and that it was unknown whether witnesses would have reliable internet access. Lehigh opposed the Secretary's motion, stating that it was prepared to go forward with the hearing by videoconference. Lehigh further responded that, in the event the hearing was postponed, it requested that economic reinstatement be tolled from the original hearing date (June 2, 2020) until the eventual commencement of the hearing. Lehigh argued that it "should not have to bear the burden of the Secretary's opposition to the remote hearing." Mot. in Opp. at 2.

On May 19, 2020, the Judge vacated the June hearing on the merits proceeding stating the parties had "informed" her that the captioned docket had been postponed. Then, on May 21, the Judge issued an Amended Order vacating the June hearing dates and noting that Lehigh had objected to postponement of the hearing.

Finally, on May 22, 2020, the Judge issued an order in the temporary reinstatement proceeding tolling economic reinstatement. The Judge ruled that ongoing economic reinstatement would unjustly enrich the miner and place the operator in a position of economic hardship. 42 FMSHRC 371, 373 (May 2020) (ALJ). Noting that the continuance was due to the Secretary's unwillingness to participate in a remote hearing, the Judge concluded that it would be

¹ The proceeding on the merits is found in Docket No. PENN 2020-0015-DM.

“unfair to put such a burden on the Respondent due to circumstances not of its making.” *Id.* Pursuant to the order, the Judge tolled McGoughran’s economic reinstatement from the date of the order (May 22, 2020) until the Judge issues a decision on the merits.

The Secretary filed a petition for review, which was granted on July 1, 2020. On appeal, the Secretary contends that the Judge abused her discretion by altering the terms of the parties’ economic reinstatement agreement without legal basis, explaining that Lehigh presented no evidence (or arguments) of a change in mine circumstances that would justify tolling.² Lehigh counters that the Judge properly considered factors such as due process protections and balancing of interests.

II.

Disposition

The change in circumstance which led Lehigh to request tolling was a delay in the hearing on the merits complaint in response to technological difficulties arising from the coronavirus pandemic. The question at issue is whether the Judge abused her discretion by tolling Lehigh’s reinstatement obligation as a result of that delay.³ As discussed below, a procedural delay beyond the control of either party is not proper grounds for tolling temporary reinstatement. The Judge abused her discretion by tolling without proper justification.

Under section 105(c)(2) of the Act, if the Secretary finds that a miner’s discrimination 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 Mine Act authorizes Judges to order temporary reinstatement to the miner’s position with the operator, that is, to actually put the miner back to work at the mine. The Commission has recognized, however, that in some cases the parties may prefer not to physically reinstate the miner, instead negotiating an agreement wherein the miner is economically reinstated. The terms of that joint agreement may be accepted by the Judge in lieu of reinstatement. *See Sec’y of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589, 593 (Mar. 2011), *rev’d on other grounds*, 691 F.3d 735 (6th Cir. 2012).

² The Secretary also argued that the tolling period identified by the Judge, which exceeded the tolling period requested by Lehigh, also constituted an abuse of discretion. As discussed below, we find that tolling was not appropriate under these circumstances. Accordingly, we need not address the length of the tolling period.

³ The Commission has held that Judge’s orders tolling reinstatement are reviewed under an abuse of discretion standard. Abuse of discretion may be found when there is no evidence to support the decision, or if the decision is based on an improper understanding of the law. *See Sec’y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1053-54 (Oct. 2009).

A Judge may defer ruling on a temporary reinstatement application or implementing a temporary reinstatement order in light of an economic reinstatement agreement between the parties that is consistent with the purposes of section 105(c). A Judge may not order economic reinstatement on his or her own initiative.

The Commission has recognized that the occurrence of certain events may toll an operator's temporary reinstatement obligation. The types of "events" which may justify tolling are those which would affect the availability of relevant work at the mine for the miner at issue, such as a layoff due to business contraction. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009) (finding the Judge erred in failing to consider "changes that occur at the mine" and explaining that the operator must show that work was unavailable for the discriminatee); *Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315, 319-20 (Feb. 2017) (finding tolling inappropriate where the miner may not have properly been included in the layoff). The purpose of temporary reinstatement is to provide the miner with an income through a return to work until the complaint is resolved. *North Fork*, 33 FMSHRC at 592. The obligation to temporarily reinstate may logically be tolled when work at the mine is no longer available for the relevant miner.⁴

Operators bear the burden of showing by a preponderance of the evidence that tolling is justified. *See Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013). Here, the operator has not presented any evidence, or even raised the argument, that work for this miner is not available at the mine. Accordingly, the necessary grounds for tolling reinstatement have not been asserted.⁵

The only rationale presented by Lehigh is that it is unfair for economic reinstatement to continue during a period of procedural delay due to the COVID-19 pandemic. The Judge accepted this justification, finding it "unfair to put such a burden on the Respondent due to circumstances not of its making." 42 FMSHRC at 373. However, the delay in the hearing has no effect on availability of work at the relevant mine for this miner, nor is it alleged that the Secretary or miner engaged in any wrongful action causing delay. The delay was simply the

⁴ Lehigh argues that tolling may be justified by more than a change in the availability of work at the mine, claiming that the Judge properly considered factors such as the need for an expedited hearing and the speculative nature of the harms outlined by the Secretary. However, these factors are more appropriately considered when deciding whether to continue the hearing in the first place, not once the hearing is already delayed. Moreover, the single case Lehigh cites for expanding tolling justifications deals with remedies and awards, which the Commission has differentiated from temporary reinstatement. *Resp. to Complainant's Pet. for Review* at 10 (citing *Cruz v. Puerto Rican Cement Co.*, 7 FMSHRC 487 (Apr. 1985)); *see North Fork*, 33 FMSHRC at 593.

⁵ The Judge indicates that tolling is justified in part based on theories of economic harm to the operator and unjust enrichment of the miner. While we do not analyze the merits of these justifications, we note that they are unrelated to the availability of work at the mine and were not raised by the moving party.

result of technological concerns arising from events beyond either party's control and with no connection to availability of work. The rationale presented by the operator and accepted by the Judge does not justify tolling reinstatement.

Notably, although the Judge wished to proceed with a remote hearing, she did not order the parties to do so. Instead, the Judge acquiesced in the Secretary's position and delayed the hearing in order to allow it to be held in-person, then found this delay unfair to the operator. Essentially, this case involves the issue of which party should bear the "hardship" of the delay. Under the Mine Act, if a mine operator has a duty to reinstate a miner, the operator must continue to fulfill that obligation during the period prior to a reinstatement hearing. Temporary reinstatement is an essential protection for miners, and Congress intended employers to bear the proportionately greater burden of risk in temporary reinstatement proceedings. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). The Commission does not accept the position that a miner who had been reinstated and returned to work could be laid off due to a delay in a hearing beyond the control of either party.

The Commission is dealing as effectively as possible with the inevitable delays arising from the pandemic.⁶ We expect temporary reinstatement hearings to be conducted as quickly as possible consistent with due process. Delays legitimately related to the COVID-19 pandemic do not present a reason for foregoing the operation of the Mine Act or for tolling reinstatement.

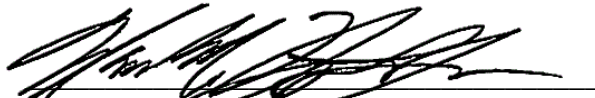
Here, neither party has presented evidence, or even argued, that work for this miner is not available at the mine. Therefore, the necessary grounds for tolling reinstatement have not been asserted. Accordingly, McGoughran's economic reinstatement shall continue under the terms of that agreement.

⁶ Lehigh emphasizes that the current pandemic presents unprecedented challenges. Response at 11. We note that tolling due to the pandemic may well be justified in some instances *if related to the availability of work at the mine*, for example if the mine is shut down for health reasons. In this instance, no evidence or arguments have been presented that the pandemic has impacted work at the mine.

III.

Conclusion

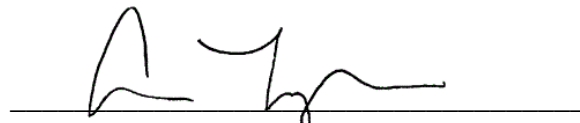
For the foregoing reasons, we conclude that a delay in the hearing in the proceeding on the merits is not a proper justification for tolling economic reinstatement. Accordingly, we reverse the Judge's decision.


Marco M. Rajkovich, Jr., Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


William I. Althen, Commissioner


Arthur R. Traynor, III, Commissioner

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