FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2013

DEAN B. HILDRETH, SR., Complainant	TEMPORARY REINSTATEMENT PROCEEDING
v.	Docket No. WEST 2013-401-DM MSHA Case No. WE-MD-13-07
TECK ALASKA, INC., Respondent	Mine ID: 50-01545 Mine: Red Dog Mine

ORDER RETAINING JURISDICTION OVER TEMPORARY ECONOMIC REINSTATEMENT PROCEEDING PENDING SETTLEMENT OR DETERMINATION OF REMEDY IN UNDERLYING DISCRIMINATION PROCEEDING

Before: Judge McCarthy

This Temporary Reinstatement Proceeding is before me pursuant to § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). In support of this Order, the following uncontradicted factual representations were taken as true.[1]

I. Factual Background

On November 4, 2012, Hildreth filed a discrimination complaint with MSHA under § 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 et seq. (1994). He alleged that his termination was motivated by discriminatory animus toward his protected activities. *See Discrimination Complaint, MSHA Form 2000-123*, dated Nov. 4, 2012. On January 16, 2013, MSHA sent Hildreth a letter documenting its finding that no discrimination had occurred under § 105(c) of the Mine Act.[2] MSHA erroneously sent that letter to an unrelated, non-party mine operator, N.A. Degerstrom, Inc., from Veradale, Washington, instead of also sending a copy of that letter to Respondent or its Counsel.

On a March 7, 2013 conference call with the undersigned, counsel for the Secretary stated

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[1] During an April 4, 2013 conference call, the Secretary took the position that the Secretary's party status had terminated as a result of MSHA's "no discrimination" determination made on January 16, 2013.

[2] On January 18, 2013, MSHA sent Hildreth a second letter. The difference between the letters is immaterial since the only update was the inclusion of the Commission's correct address.

that on or about January 20, 2013, Hildreth and counsel for the Secretary discussed the terms of the proposed Joint Motion to Approve Settlement. Counsel stated that during the January 20, 2013 meeting, he explained to Hildreth that under the proposed Joint Motion, Hildreth could only receive economic reinstatement between January 14-16, 2013 due to MSHA's "no discrimination" determination. Counsel further stated that he did not notify Respondent of MSHA's "no discrimination" finding because he assumed MSHA properly served Respondent with the January 18, 2013 letter.

On January 28, 2013, the Secretary filed two documents: 1) an Application for Temporary Reinstatement after finding that Hildreth's discrimination complaint was not frivolous; and 2) a Joint Motion to Approve Settlement signed and approved by the Secretary, Hildreth, and Respondent. Respondent entered into the Joint Motion without notice of MSHA's "no discrimination" finding. *Resp't Mot. For Appropriate Relief*, 3, dated Mar. 29, 2013. Pursuant to the Joint Motion, Hildreth was entitled to receive temporary economic reinstatement equivalent to his predischarge compensation and benefits, effective January 14, 2013. *Id.*

On February 5, 2013, I issued an Amended Consent Order that approved the agreed upon terms in the January 30, 2013 Joint Motion. *Am. Consent Order*, 1, dated Feb. 5, 2013. The Amended Consent Order was designed to terminate Hildreth's temporary economic reinstatement upon MSHA's finding of no discrimination. *Id.* at 2.

On February 9, 2013, Hildreth exercised his right under § 105(c)(3) of the Mine Act to file a pro se discrimination complaint with the Commission. Hildreth also sent a copy of his pro se complaint to Respondent, which was received by administrative personnel on February 14, 2013. *See Resp't Mot. for Appropriate Relief*, 4. Respondent's administrative personnel did not communicate the receipt of Hildreth's complaint to its counsel. *Id.*

On March 3, 2013, Respondent's counsel learned of MSHA's determination of "no discrimination" through a status update discussion with my office. *Id.* at 5. Respondent then terminated further temporary economic reinstatement to Hildreth. *Id.* Respondent had already paid Hildreth retroactive temporary economic reinstatement payments from January 14, 2013 through February 13, 2013, which, before tax and including the value of benefits, totaled $8,327.68.[3] *Id.*

During a March 7, 2013 conference call with the undersigned, Hildreth stated that all of the money received from Respondent had already been spent on car payments and the repayment

[3] Respondent requests relief only through February 13, 2013, the day before its administrative offices received Hildreth's pro se complaint. *Resp't Mot. for Appropriate Relief*, Attachment D.

of loans from his father, which were incurred in order to get to California.[4] Respondent claims that Hildreth is lawfully entitled to retain $1,496.82 for the three-day interval of January 14-16, 2013. *Id.* Respondent requests reimbursement of $6,830.86 that represents the total paid to Hildreth after January 16, 2013. *Id.* Hildreth requests an order that Respondent comply with the Amended Consent Decree, and an order to compel the Secretary to represent him as counsel. *Resp. To Mot. For Appropriate Relief*, 3, dated Apr. 15, 2013.

II. Legal Analysis

The novel issue presented by Respondent's Motion for Appropriate Relief is whether and to what extent Hildreth can be compelled to repay Respondent for temporary economic reinstatement payments that Hildreth received and spent despite his knowledge of MSHA's finding of "no discrimination" on January 16, 2013.

A. Retention of Jurisdiction Over The Temporary Economic Reinstatement Proceeding

In relevant part, Rule 45(e)(4), 29 C.F.R. § 2700.45(e)(4), provides that "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." Respondent has not filed a motion to dissolve temporary economic reinstatement, and I will not now Order its dissolution sua sponte. Accordingly, I retain jurisdiction over the proceeding. My retention of jurisdiction does not change the fact that Hildreth's economic reinstatement terminated on January 16, 2013. The legal mechanism that terminated economic reinstatement by operation of law was MSHA's "no discrimination" finding, *Vulcan Constr. Materials*, *L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012), which is distinct from a Rule 45(e) jurisdictional dissolution analysis.

B. Hildreth's Temporary Economic Reinstatement Was Terminated On January 16, 2013

The Commission Procedural Rules do not address whether temporary economic reinstatement must end after MSHA's "no discrimination" finding.[5] The terms of the Joint

[4] The Respondent's Red Dog Mine is located in an area called Northwest Arctic Borough, Alaska. *Appl. for Temporary Reinstatement*, 2, Jan. 28, 2013. Following his departure from employment with Respondent, Hildreth lived in Fresno, California. As per a May 5, 2013 email to this Commission, Hildreth indicated that he currently lives in Alaska and has a P.O. Box in Anchorage, Alaska.

[5] The Commission deleted the requirement in Rule 45(g), 29 C.F.R. § 2700.45(g) that the judge dissolve the order of temporary reinstatement after the Secretary has found "no discrimination". *See* 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). The preamble explained

Motion and the Amended Consent Order, however, state that Hildreth's temporary economic reinstatement was to terminate upon MSHA's finding of "no discrimination." Furthermore, Circuit Courts have found that "upon the Secretary's determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement." *N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744-46 (6th Cir. 2012) ("it is difficult to understand why Congress would favor reinstatement after the Secretary has found the miner's complaint to lack merit") (Sutton, J., concurring); *see also Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 309 (7th Cir. 2012) (holding that a finding of "no discrimination" terminates temporary economic reinstatement because of "the unambiguous language of [§ 105(c)] . . . . ") In spite of MSHA's "no discrimination" finding, Hildreth argues that the Secretary should be Ordered to represent him in prosecution of his § 105(c)(3) complaint. *See Resp. to Mot. for Appropriate Relief*, 3, dated Apr. 15, 2013. Compelling the Secretary to represent Hildreth is not an available remedy.

Hildreth's right to temporary economic reinstatement terminated on January 16, 2013 by operation of law pursuant to the above precedent and the terms of Amended Consent Order.

C. Hildreth Was Unjustly Enriched By His Continued Receipt Of Temporary Economic Reinstatement Payments After He Knew That Temporary Economic Reinstatement Terminated On January 16, 2013

In *North Fork*, the Commission denied a mine operator's motion to stay pending appeal by holding that a miner can not be compelled to reimburse a mine operator for temporary economic reinstatement that the miner *rightfully* received in compliance with a valid consent order. *N. Fork Coal Corp.*, 33 FMSHRC 589, 597 (Mar. 2011) (repayment of reinstatement "would run counter to the very spirit of [§ 105(c)(2)], which is to provide immediate relief to complaining miners while they wait for their cases to be decided"), *rev'd on other grounds*, 691 F. 3d 735, 744 (6th Cir. 2012). In that case, the mine operator did not pay the miner by mistake in contravention of the consent order, or under circumstances where the Secretary and the Complainant both knew that the right to temporary economic reinstatement had terminated. *Id.* Accordingly, the Commission was clear that repayment of the mine operator for economic reinstatement rightfully received is not an appropriate remedy under the Mine Act. *Id.*

But the situation in *North Fork* is distinct from the issue in this case. Here, Hildreth was paid more than he was rightfully entitled under the Amended Consent Order and thus became unjustly enriched. Furthermore, Respondent makes no similar claim that Hildreth must repay the value of the temporary economic reinstatement Hildreth rightfully received for work between

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"that the deletion leaves open for litigation … whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under § 105(c)(3)." *Phillips v. A&S Constr. Co.*, 31 FMSHRC 975, 986 n. 11. (Sept. 2009); *see also* Rule 45(g).

January 14-16, 2013.

In light of these distinctions, I find the following rule governing unjust enrichment by mistake to be especially compelling: *"*[p]ayment by mistake gives payor a claim in restitution against the recipient to the extent payment was not due.*"* Restatement (Third) of Restitution & Unjust Enrichment § 6 (2011) (emphasis added). Liability in restitution for payment not due is commonly challenged by interposing the "change of position" defense. That defense may reduce a recipient's liability in restitution for mistaken payments "[i]f receipt of a benefit has led a recipient *without notice* to change position in a manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient's liability in restitution is to that extent reduced." Restatement (Third) of Restitution & Unjust Enrichment § 65 (2011) (emphasis added). This defense, however, is not available to a recipient of mistaken payment that was notified that payment was no longer due and accordingly knew or had reason to know he was being unjustly enriched by receipt of subsequent payments after such notice. *See* Restatement (Third) of Restitution & Unjust Enrichment § 69 (2011) (defining the phrase "without notice").

In this case, Hildreth's right to temporary economic reinstatement terminated on January 16, 2013. Respondent continued Hildreth's temporary economic reinstatement after January 16, 2013 based on the mistaken belief that MSHA had not yet issued a "no discrimination" finding. Therefore, Respondent has a strong case for restitution from Hildreth for economic reinstatement paid to after January 16, 2013. *See* Restatement § 6.

Since Hildreth signed the Joint Motion that I granted through the Amended Consent Order, he manifested assent to the terms of the Joint Motion. *See Paterson v. Reeves*, 304 F.2d 950, 951 (D.C. Cir. 1962) (per curiam) ("[o]ne who signs a contract which he had an opportunity to read and understand is bound by its provisions"); *see also Simon v. Circle Assoc., Inc.*, 753 A.2d 1006, 1012 (D.C. 2000) (holding that courts must look to objective manifestations of assent when assessing settlement agreements). Accordingly, Hildreth is held to the provision within the Joint Motion stating that his right to economic reinstatement terminates upon MSHA's "no discrimination" finding. Once Hildreth received MSHA's finding of "no discrimination," he was on notice that he was not entitled to economic reinstatement after January 16, 2013.

Moreover, on a March 7, 2013 conference call with the undersigned, the Secretary stated that he told Hildreth that the proposed Joint Motion entitled Hildreth to economic reinstatement, from January 14, 2013 until the date of the "no discrimination" finding on January 16, 2013. Therefore, Hildreth was on notice that his economic reinstatement terminated on January 16, 2013, well before Hildreth received the first economic reinstatement payment made by Respondent on February 8, 2013. *See Resp't Mot. For Appropriate Relief*, 4.

Hildreth also had reason to recognize the payments that he received and spent greatly exceeded the amount of payment he would have expected to receive in three days. Hildreth had experience working for and being paid by Respondent. Hildreth's completion of the Discrimination Complaint Form 2000-123 verifies his detailed knowledge of those payment

terms. Thus, I find that Hildreth knew that he was receiving more than three days worth of economic reinstatement pay from Respondent.

In sum, Hildreth was uniquely positioned among the parties to *know* each factor relevant to reach the conclusion that he was not entitled to temporary economic reinstatement after January 16, 2013. Since Hildreth *knew* of the factors causing his own unjust enrichment as a result of the overpayment, he was on notice.

Therefore, Hildreth is ineligible for the defense of change of position.[6] *See* Restatement § 65. Hildreth's ineligibility for the defense is illustrated by the following example:

> Licensee continues to pay royalties to Patentee following expiration of the licensed patent. Patentee, a charitable trust, uses its royalty to support medical research. When facts come to light, Licensee sues Patentee to recover the amount of its excess payments under section 6 [payment by mistake]. Patentee interposes a defense of change of position, offering to prove that the receipt of additional royalties led it to make additional expenditures in its charitable endeavors. The court finds that the Patentee knew that its patent had expired; knowledge of this fact constituted notice that the post-expiration royalties were being made by mistake. Patentee is not entitled to defense of change of position.

Restatement (Third) of Restitution & Unjust Enrichment, § 65 cmt. f, illus. 21 (2011).

D. The Value of Hildreth's Unjust Enrichment Recoverable in Restitution is $4,739.97

Respondent claims that Hildreth owes Respondent a total of $6,830.86. *Resp't Mot. For Appropriate Relief* at 6. That figure was formulated based on the belief that Hildreth should pay the entirety of Respondent's "out of pocket" expenses caused by the payment of economic reinstatement after January 16, 2013, regardless of Hildreth's enrichment by those expenditures. That methodology, however, erroneously inflates the value of Hildreth's actual restitution. Hildreth never gained possession of the taxes withheld, nor did he derive any value greater than

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[6] The sloppy handling of this case by MSHA and the Secretary gives me great pause. Hildreth's unjust enrichment was caused as much by the absence of adequate communication from MSHA and the Secretary to Respondent and its counsel, as it was by Hildreth's knowing receipt of overpayment. This failure of communication was exacerbated by the Secretary's assumption that MSHA correctly sent Respondent the January 16, 2013 "no discrimination" letter. Due to such negligence, Respondent entered into the Amended Consent Order without notice that Hildreth's economic reinstatement had already expired.

that of any citizen taxpayer from the mistaken tax withholdings Respondent made after January 16, 2013. Moreover, Respondent may only recover mistaken taxes from the party enriched by the mistaken tax payments. *See* Restatement (Third) of Restitution and Unjust Enrichment § 19 (2011) (discussing restitution of tax payments made by mistake). Since Hildreth wasn't enriched by the tax payments, Respondent can't recover those taxes from him.

Hildreth's actual unjust enrichment between January 17, 2013 and February 13, 2013 is calculated by subtracting from the total value of economic reinstatement ($8,327.68): 1) the total tax withheld between January 14, 2013 and February 13, 2013 ($2,255.49); 2) the value of benefits Hildreth rightfully received during the temporary reinstatement ($454.20); and 3) the amount of take home pay Hildreth rightfully received during the temporary reinstatement ($878.02). The resulting figure, $4,739.97, is Hildreth's liability in restitution for unjust enrichment.

III. Order

In light of the forgoing, it is **ORDERED** that I maintain jurisdiction over the temporary reinstatement proceeding pursuant to § 2700.45(e)(4) pending resolution of the underlying discrimination case in Docket No. WEST 2013-548-DM set for hearing on August 12, 2013 in Anchorage, Alaska.

It is further **ORDERED** that if Hildreth prevails in his underlying discrimination claim entitling him to a remedy in his favor, including settlement, the value of his back pay remedy shall be offset in restitution by $4,739.97, the value of Hildreth's unjust enrichment.[7]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

[7] Should Hildreth fail to prevail in the underlying discrimination case, I will then decide whether restitution to Respondent of $4,739.97 remains appropriate after reviewing all relevant factors.

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