

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 16, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

ARGUS ENERGY WV, LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2012-1448-D
MSHA Case No. PINE-CD-2012-02

Mine: Deep Mine No. 8

**ORDER TOLLING TEMPORARY REINSTATEMENT
OF CLINTON RAY WARD**

Appearances: John M. Strawn, Esq. and Jodeen M. Hobbs, Esq., Office of the Solicitor,
U.S. Department of Labor, Suite 630 E, The Curtis Center, 170 S.
Independence Mall West, Philadelphia, PA on behalf of Clinton Ray Ward

Mark E. Heath, Esq., and Dennise R. Smith, Esq., Spilman, Thomas &
Battle, PLLC, 300 Kanawha Blvd, East, P.O. Box 273, Charleston, WV for the Respondent

Before: Judge Steele

This matter is before me on Respondent's December 12, 2013 Motion to Dissolve Temporary Reinstatement.¹ In the Motion, Respondent argued that the mine where Clinton Ray Ward worked would be closed on December 27, 2013, and Ward's position would be eliminated. The Secretary opposed the Motion, arguing that the Respondent has not met its burden of proof in arguing that the Temporary Reinstatement should be tolled.

Ward has been temporarily reinstated since August 21, 2012. A discrimination hearing was held on June 27-28, 2013 in South Charleston, West Virginia. On December 12, 2013, Respondent filed a Motion to Dissolve the Temporary Reinstatement due to the December 27, 2013 closure of Deep Mine No. 8. I issued a Decision and Order Denying the Discrimination Complaint and Dissolving the Temporary Reinstatement on December 27, 2013. In the decision,

¹ Parties originally filed their motions in this matter under the Discrimination Proceeding, WEVA 2013-597-D. However, they corrected this error and requested that all matters related to this Motion be considered under the Temporary Reinstatement Proceeding, WEVA 2012-1448-D.

I did not rule on the pending Motion to Dissolve the Temporary Reinstatement because I found the matter to be moot.

Respondent requested that the Motion to Dissolve the Temporary Reinstatement be ruled upon in order that the temporary reinstatement be dissolved on the date of the mine closure, rather than after it becomes a final order on the complaint.² The parties briefed their respective positions, expedited discovery was permitted, and a hearing was scheduled for January 16, 2014 in South Charleston. On January 09, 2014, the Secretary communicated that a hearing was unnecessary, and that they would oppose the motion through briefing. For the following reasons, I order that Ward's temporary reinstatement be tolled, effective December 27, 2013.

FINDINGS OF FACT

The only evidence submitted in support or opposition to this motion was the affidavit of Charles Leonard, the General Manager of Argus Energy's West Virginia properties, and notices required under the Worker Adjustment Retraining Notification ("WARN") Act, including notice issued to all employees, notice to the State of West Virginia Dislocated Worker Unit, notice to the Mayor of Kenova, and notice to the Wayne County Commission.³

The reason for the closure of these facilities was due to, among other things, "the collapse of the Central Appalachian coal market. *Sec. Supp. Aff. Leonard* ¶ 2. According to the affidavit, Leonard was involved in the business decision to close Argus' mining complex in West Virginia, which included, among other facilities, Mine #8. *Sec. Supp. Aff. Leonard* ¶ 2; *WARN Notice*. There was a "complete and total cessation of coal production at the mine complex" on December 27, 2013, and "there were no extensions of the layoffs and no persons were transferred to any other Argus facilities." *Id.* at ¶ 3. The closure of the facilities is expected to be permanent. *WARN Notice*. The only work being performed at the mine complex is removal and transportation of equipment, and the only coal being transported is for clean-up purposes. *Id.* at ¶ 4, 5. Of the original 62 employees at the mine, 56 were laid off. *Id.* at ¶ 7.

Six underground employees have been retained at Mine No. 8, where Ward was employed, and four have been retained at Mine No. 7. *Id.* at ¶ 6. The individuals were chosen to

² Section 105(c)(2) of the Mine Act states that, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, "shall order the immediate reinstatement of the [complaining] miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added). Section 113(d)(1) of the Act states: "The decision of the administrative law judge ... shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed" 30 U.S.C. § 824(d)(1) (emphasis added). Therefore, the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision.

³ An affidavit for Charles Leonard was attached to the Respondent's Motion to Dissolve the Temporary Reinstatement on December 12, 2013, and a second supplemental affidavit for Charles Leonard was submitted on January 9, 2014.

assist in the process of closing down the mine on the basis of seniority, experience, certifications, and skills. *Id.* Their tasks included examinations of the mine and its airways, as well as EMT services, during the equipment removal, as required by law. *Id.* at ¶ 7, 8. There were no persons from the second shift or the third shift crew retained. *Id.* at ¶ 6.

At the time of Ward's discharge, Ward had 4.5 years of underground experience, 2 years of experience as an electrician, and 8 months of experience at Argus No. 8 Mine. He had an underground miner certification and electrical cards. He did not have his foreman papers and was not an EMT, and therefore is unable to perform examinations other than electrical examinations. *Id.* at ¶ 9.

The six individuals retained to assist in closing Mine No. 8 were the following:

- Grover Meade—Mine Superintendent. Meade has worked as mine superintendent of No. 8 Mine for three years and has 16 years of experience as a coal miner. Meade is certified as a foreman in West Virginia and Kentucky, has underground surface mining cards for West Virginia and Kentucky, and is a federal limited instructor and EMT. *Id.* at ¶ 7.
- Lloyd Mann—Mine Foreman. Mann worked for 1.5 years at Argus, has been a certified mine foreman since 2002, and has 24 years of underground mining experience. *Id.*
- Jake Bowen—Chief Electrician for all shifts. Bowen worked for Argus for 3 years and four months, has 7 years of experience as a chief electrician, 15 years of experience as an electrician, and 27 years of experience as a coal miner. He has electrical and EMT certifications for West Virginia and Kentucky, has mine foreman's certification, MSHA certification in dust, is an approved Kentucky and MSHA mine safety instructor. *Id.*
- John Dingess—Master Electrician, Plumber, and Examiner. Dingess worked for Argus for 11 years and has 32 years of experience as a coal miner. He is a certified plumber and airways examiner, has a mine foreman's and electrician's card, and is an EMT. *Id.*
- Kay Adkins—Outby Mine Foreman and Examiner. Adkins worked for Argus for 11 years, two of which were as mine foreman. He has 33 years of experience as a coal miner. Adkins is a West Virginia certified mine foreman, a certified EMT, and CPR certified, and he has a surface miner card. *Id.*
- Robert Ratcliff—Outside Man. Ratcliff was the mine outside mine prior to the mine closure and is being retained in that role during closure. He operates the mine communication system and dispatches, and is an EMT. *Id.*

CONTENTIONS OF THE PARTIES

The Respondent argues that Ward's temporary reinstatement should be dissolved due to the closure of Mine No. 8, the cessation of all mining operations, and the elimination of Ward's position on December 27, 2013. *Resp. Mot. Dissolve Temp. Reinst.*, 1-4. Respondent argues that it would be contrary to Commission precedent and inequitable to permit the temporary

reinstatement to continue under a bona fide economic retrenchment, where all but several more senior miners have been laid off. *Id.* at 4.

In Response, the Secretary argues that Respondent has not met its burden of proof under the “not frivolously brought” standard applicable to tolling arguments in a temporary reinstatement hearing.⁴ *Sec. Reply to Mot. To Diss. Temp. Reinst.*, 3-4. Specifically, the Secretary argues that Respondent has not provided sufficient evidence concerning the status of miners after December 27, 2013, the possible availability of jobs to laid off miners, and the duration of the closure. *Id.* at 5. Furthermore, the Secretary asserts that the Respondent has not sufficiently explained how the six miners retained during the closure were selected, and questions the objectivity of the selection. *Id.* The Secretary argues that Ward was capable of performing the work during closure, and the Respondent has not proven otherwise. *Sec. Resp. to Sec. Supp. Aff. Leonard*, 2-3.

ANALYSIS

A. The Mine’s Closure and Mass Layoff Tolls the Temporary Reinstatement

“The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.” *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). This “limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous,” must be consistent with the “narrow scope of temporary reinstatement proceedings.” *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin*, 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC, 2013 WL 865606, *4 (Feb. 2013). “In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous.” *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

The Commission has categorized tolling as an affirmative defense, and held that the operator must make a showing by a preponderance of the evidence that no work was available for the miner. *KenAmerican Resources*, 31 FMSHRC at 1054-55; see also *Chadrick Casebolt*, 6

⁴ In the *Secretary’s Reply to Respondent’s Motion to Dissolve Temporary Reinstatement*, the Secretary also argued that in the alternative discovery should be permitted. Expedited discovery and an opportunity for hearing was so permitted, however after conferring and exchanging some discovery the parties decided that no additional discovery or a hearing were necessary.

FMSHRC 485, 499 (Feb. 1984) (“if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.”)

In the instant case, the Secretary has called into question the objectivity of the layoff as applied to Ward. It has suggested that Ward could perform work during the closure, and has raised the issue of whether other miners who did not allege discrimination were provided alternate employment opportunities. Therefore, the Respondent must make a showing by a preponderance of the evidence that the layoff was for legitimate non-discriminatory reasons under the “not frivolously brought” standard.

The Secretary has not submitted any evidence to support its position, so the only evidence that may be considered are the Respondent’s evidentiary submissions, as well as any relevant evidence from the original temporary reinstatement hearing. Charles Leonard, the general manager of Argus Energy’s West Virginia properties, has stated that the closure of Mine No. 8 (as well as Mine No. 7 and several other facilities) was due to “the collapse of the Central Appalachian coal market.”⁵ *Sec. Supp. Aff. Leonard* ¶ 2. As a result of the closure, 56 of the mine’s 62 employees have been laid off. *Id.* at ¶ 7. The six employees not laid off, have been retained to assist in the mine closure, and they were chosen on the basis of seniority, experience, and skill. *Id.* at ¶ 3-7. No employees from the second or third shift crews were retained, and Ward worked in the third shift. *Id.* at ¶ 7, 10. Considering the totality of the Respondent’s evidence submitted in this case, and the complete lack of any evidence from the Secretary to the contrary, I find that the Respondent has met its burden.⁶ As a result, the temporary reinstatement shall be tolled from the date of the mine’s closure.

B. The Temporary Reinstatement Should be Tolled on December 27, 2013

Respondent’s Motion presents a procedural issue upon which neither party briefed. Respondent requested that its Motion to Dissolve be ruled upon even though it was successful in the Discrimination Proceeding, in order that it not be required to continue Ward’s employment during the period before this Court’s decision becomes final.⁷ The issue that must now be

⁵ In the October 25, 2013 *WARN Notice* to employees, the operator stated that it was working to secure additional sales contract that may permit the mine to remain open. However, in Leonard’s Second Supplemental Affidavit on January 9, 2014, he stated under oath that “there was a complete and total cessation of coal production.” *Sec. Supp. Aff. Leonard* ¶ 3. I accept the latter statement to be the more accurate, as it was stated after the mine’s December 27, 2013 closure.

⁶ It should be noted that this is an exceptional case where Ward’s Discrimination complaint has already been denied by this Court, there was a complete closure of the mine, and the Secretary submitted no evidence opposing Respondent’s claims.

⁷ “The decision of the administrative law judge ... shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed” 30 U.S.C. § 824(d)(1).

resolved is whether an Administrative Law Judge may dissolve or toll a temporary reinstatement prior to a “final order on the complaint.” 30 U.S.C. § 815(c)(2).

In this case, the conditions changed after Ward was temporarily reinstated, and the plain language of the Act indicates that the reinstatement may only be terminated upon a “final order on the complaint.” 30 U.S.C. § 815(c)(2). *See* note 1 *supra*. Such a final order may only come from the Commission. Therefore, it would seem that the ALJ is permitted to order a temporary reinstatement effective on the date of the Order, but not dissolve one until after the Commission has had the opportunity to review it.

Previous Commission decisions concerning tolling have involved cases where the tolling argument was raised contemporaneously with the application for temporary reinstatement. Furthermore, Commission decisions concerning dissolving temporary reinstatements have involved cases where the Secretary has announced that it would not be filing a discrimination complaint on the miner’s behalf. Under such circumstances, the Sixth Circuit has held “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.” *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012).

The Sixth Circuit reversed the Commission’s decision in *MSHA obo Mark Gray v. North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), on a narrow issue, holding that the Secretary’s decision not to file a discrimination complaint provides the statutory prerequisite to dissolve the discrimination complaint. Therefore, it remains unclear whether the Commission’s holding that a judge lacks “the necessary statutory prerequisite for dissolving [a] temporary reinstatement because no final order had been issued on the miner’s complaint,” would still hold in situations where the Secretary filed a discrimination complaint on the behalf of the miner. *Id.* at 37.

In the instant case, it is more precisely tolling that is at issue, rather than dissolution of the temporary reinstatement. Though Respondent’s submissions in this case were styled as motions to dissolve, their arguments all spoke to tolling. I found, *supra*, that the operator’s obligations under the temporary reinstatement should be tolled due to the mine closure. Tolling is usually applicable only upon a showing economic necessity has resulted in mass layoffs or mine closure. As such, this extraordinary circumstances warrant that the tolling take effect immediately. I therefore hold that such tolling shall take effect on the date of the mine closure rather than after a final order of the Commission.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the temporary reinstatement of Clinton Ray Ward be **TOLLED** as of December 27, 2013.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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