

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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November 20, 2024

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA), on  
behalf of ALVARO SALDIVAR,  
Complainant

v.

GRIMES ROCK, INC.,  
Respondent

APPLICATION FOR TEMPORARY  
REINSTATEMENT

Docket No. WEST 2021-0178-DM  
MSHA Case No: WE MD 21-06

Grimes Rock, Inc.  
Mine ID: 04-05432

**DECISION UPON REMAND**

Before: Judge Richard W. Manning

On November 28, 2023, the Commission issued a decision in this case affirming in part and reversing in part orders issued by former Commission Judge Margaret Miller and remanding other matters for further determination. 45 FMSHRC 947 (Nov. 2023). The Commission’s instructions on remand require a “recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final”<sup>1</sup> and “a determination of any remaining temporary reinstatement payments and interest owed[.]” 45 FMSHRC at 961.<sup>2</sup>

On August 5, 2024, I ordered the parties to file briefs on the remanded issues and to suggest possible resolution of those issues.<sup>3</sup> For the reasons set forth below, Grimes Rock is ordered to pay Saldivar a total of \$2,634.80 in temporary economic reinstatement payments and interest.

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<sup>1</sup> Judge Miller issued her decision in the discrimination case on the merits on June 17, 2022. *Sec’y of Labor on behalf of Alvaro Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ). Neither party appealed that decision in which Judge Miller dismissed the complaint of discrimination.

<sup>2</sup> The history of this case is long, complicated, and has been laid out in prior issuances by Judge Miller, the Commission, and this court. I decline to do so again.

<sup>3</sup> The Commission also remanded to this court the issue of whether consequential damages are appropriate. On September 6, 2024, I issued an order denying the Secretary’s motion for consequential damages. 46 FMSHRC 842 (Sept. 2024) (ALJ).

## SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary argues that Grimes Rock owes Saldivar a total of \$2,634.80 in temporary economic reinstatement payments and interest. Sec'y Br. 1.

The Secretary asserts that Grimes Rock owes Saldivar \$2,427.56 in additional temporary economic reinstatement payments for the period after Judge Miller issued her June 17, 2022, Enforcement Order until her decision on the merits in the discrimination case became final. Sec'y Br. 4. Judge Miller's decision on the merits in the discrimination case became final 40 days after its issuance, i.e., July 27, 2022. Sec'y Br. 5-6; Sec'y Resp. 7-9. Although there were 26 workdays during the 40-day period after Judge Miller issued her decision, Saldivar was only available to work during 19 of those days. Sec'y Br. 6. Judge Miller previously held that Grimes Rock was not responsible for paying Saldivar during periods he was unavailable to work. Sec'y Br. 3. Consequently, the Secretary claims that Grimes Rock owes Saldivar \$2,427.56<sup>4</sup> in temporary economic reinstatement payments for the 19 workdays he was available during the period after Judge Miller issued the Enforcement Order until her decision on the merits became a final order of the Commission under Section 113(d)(1) of the Mine Act. Sec'y Br. 7.

The Secretary asserts that, utilizing the Commission's general framework for computation of interest in 105(c) cases set forth in *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona*, 5 FMSHRC 2042 (Dec. 1983), Grimes Rock owes Saldivar \$207.24 in interest on the late paid temporary economic reinstatement payments, i.e., those payments that were the subject of Judge Miller's Enforcement Order that were ultimately paid on August 22, 2022.<sup>5</sup> Sec'y Br. 7-11.

Finally, the Secretary asserts that, contrary to Grimes Rock's claims otherwise, Saldivar had no duty to mitigate temporary reinstatement, Saldivar is entitled to interest on the late paid temporary economic reinstatement payments during periods he was incarcerated and allegedly subject to arrest, and Grimes Rock is not entitled to reimbursement or offset for any amount Grimes Rock alleged that it previously paid Saldivar. Sec'y Resp. 10-15.

Grimes Rock argues that this court should not award any additional temporary economic reinstatement payments or interest in this matter. In support of its argument that additional temporary economic reinstatement payments are not due, Grimes Rock asserts that due to multiple instances of failing to get court-ordered drug tests, admitted drug use, and incarceration, Saldivar was unavailable to work during the entire 40-day period after Judge Miller terminated

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<sup>4</sup> The Secretary calculated this amount by multiplying the number of days Saldivar was available for work during the 40-day period (i.e., 19) by the daily rate of pay in Judge Miller's Enforcement Order. Sec'y Br. 3, 6-7. The daily rate of pay was calculated by dividing the gross total Judge Miller ordered Grimes Rock to pay for the period between May 17, 2022 and June 17, 2022, which incorporated the offset of pay from other employers, by the number of workdays Saldivar was available to work during that period. Sec'y Br. 3, 6-7.

<sup>5</sup> The Secretary provided a detailed explanation of her calculation to arrive at the amount of interest she alleges is due. For brevity's sake, I have not summarized that explanation.

the temporary economic reinstatement order. Grimes Br. 10-11. It argues that the temporary reinstatement order was properly terminated as of the date of Judge Miller’s decision in the discrimination case on the merits, and that this court should not retroactively apply the Commission’s “wrongly decided” decision in *Sec’y of Labor on behalf of Hargis v. Vulcan Construction Materials, LLC*, 46 FMSHRC 523 (Aug. 2024) (“*Hargis*”). Grimes Br. 11-14.

In support of its claim that this court should not award any interest, Grimes Rock makes several arguments, including that the Secretary and Saldivar waived and/or forfeited any claimed right to interest by failing to timely raise that issue before Judge Miller, that the Commission exceeded its jurisdiction in ruling on and remanding the issue of interest to this court, and that Grimes Rock is not obligated to pay interest associated with the temporary economic reinstatement order because Saldivar failed to mitigate damages claimed. Grimes Br. 15-22. Further, Grimes Rock asserts that no interest should be awarded for the period Saldivar was a fugitive or incarcerated, that the Secretary should be estopped from claiming any interest prior to the Commission’s November 28, 2023 decision due to prior inconsistent statements made by Secretary regarding whether interest was accruing, and that if interest is ordered by this court it should be at most \$803.36.<sup>6</sup> Grimes Br. 22-28.

Finally, Grimes Rock argues that Judge Miller erred when she ordered that Grimes Rock should not be reimbursed for temporary economic reinstatement payments made to Saldivar when he was a fugitive or incarcerated and that Grimes Rock should either be reimbursed for those payments, or alternatively, that the same amount should be credited as an offset to any payments that are allegedly still due.<sup>7</sup> Grimes Br. 26-28.

## DISCUSSION

As an initial matter, it is important to understand what issues are and are not before me. In its November 28, 2023, decision in this matter the Commission, among other things, vacated Judge Miller’s order dissolving the temporary reinstatement as of the date of the Enforcement Order and decision on the merits in the discrimination case, affirmed Judge Miller’s Enforcement Order, and granted the Secretary’s motion for interest. 45 FMSHRC 947 (Nov. 2023). Judge

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<sup>6</sup> Grimes Rock provided a detailed explanation of its calculation to arrive at the maximum potential amount of interest that could be ordered. For brevity’s sake, I have not summarized that explanation.

<sup>7</sup> Grimes Rock’s initial filing was captioned as a motion for summary decision. However, for purposes of this decision, I have treated it as a brief on the limited issues before me, which is what I instructed the parties to file in my August 5, 2024, Order to File Briefs. Grimes Rock also filed an opposition to the Secretary’s brief on the remanded issues, which I have treated as a response brief. The response brief raises essentially the same arguments as the original brief, with a few additions, including, among other things, that the Secretary should be sanctioned for failing to inform Grimes Rock that Saldivar was incarcerated for part of July 2022, and that any interest awarded should be recalculated to exclude those days that Saldivar was incarcerated, avoiding drug testing, or admitted to drug use. Grimes Resp. 1-2, 4-5, 29-31.

Miller issued her Enforcement Order on June 17, 2022, the same day as she issued her decision on the merits in the discrimination case. 44 FMSHRC 497 (June 2022)(ALJ).

I am not in a position to review already decided questions of law and fact in this case. Consequently, I do not address the issues of whether temporary economic reinstatement was properly terminated at the time Judge Miller issued her decision in the discrimination case on the merits, whether interest is appropriate, whether the Secretary waived any right to interest, whether the Commission had jurisdiction over the issue of interest and had authority to remand the issue to this court for calculation of said interest, whether the Secretary should be estopped from claiming any interest due to prior inconsistent statements made by Secretary regarding whether interest was accruing, and whether Judge Miller erred when she ordered that there would be no return or reimbursement for temporary economic reinstatement payments that had already been made to Saldivar. The remaining issues are addressed below.

#### *Temporary Economic Reinstatement Payments*

The Commission, in its decision, determined Judge Miller “erred when she ended the order of temporary reinstatement concurrently with her merits decision.” 45 FMSHRC 947, 955-956. Accordingly, it remanded to this court the task of recalculating the temporary economic reinstatement payments owed between the time Judge Miller issued her June 17, 2022, Enforcement Order and the date her discrimination decision on the merits became final.<sup>8</sup> Neither party appealed Judge Miller’s discrimination decision on the merits in which she dismissed the complaint of discrimination. Accordingly, her decision became a final order of the Commission 40 days after its issuance, i.e., July 27, 2022. *Hargis v. Vulcan Construction Materials, LLC*, 46 FMSHRC 523 (Aug. 2024) (“*Hargis*”).<sup>9</sup>

The Secretary asserts, and the court agrees, that there were 26 possible workdays during the 40-day period after Judge Miller issued her Enforcement Order.<sup>10</sup>

In her Enforcement Order, Judge Miller held that Grimes Rock was not responsible for paying Saldivar during periods he was unavailable to work.<sup>11</sup> 44 FMSHRC at 498. Here,

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<sup>8</sup> The Secretary, in her response to this court’s August 15, 2024 Order to Provide Information, confirmed that Grimes Rock’s temporary economic reinstatement obligations were satisfied through June 17, 2022.

<sup>9</sup> Grimes Rock argues that *Hargis* was “wrongly decided and should not be applied to this case[.]” Grimes Br. 14. I reject the argument. I note that the Commission, in its decision in this matter, specifically referenced that the issue of the proper termination date for temporary reinstatement was before it in the *Hargis* case. 45 FMSHRC at 956 n. 16.

<sup>10</sup> By the court’s reasoning, the 26 days include a five-day work week and excludes holidays from the total number of possible workdays during the 40-day period.

<sup>11</sup> Judge Miller specifically noted two separate “periods of unavailability.” 44 FMSHRC at 498. A review of the record reveals that Saldivar was incarcerated during those two periods.

although the parties agree Saldivar was unavailable to work during the days he was incarcerated during the 40-day period<sup>12</sup>, they disagree regarding his availability to work during the remainder of that period. Whereas the Secretary asserts that Saldivar was available to work during the other possible workdays, Grimes Rock asserts that Saldivar was unavailable to work for the entirety of the 40-day period due to multiple failures to take drug tests and admitted drug use. I agree with the Secretary<sup>13</sup> and find that Grimes Rock is responsible for temporary economic reinstatement payments equivalent to 19 days of work, i.e., the total number of possible workdays he was not incarcerated, which amounts to \$2,427.56.<sup>14</sup>

### *Interest*

The Commission, in its decision, granted the Secretary's motion for interest and remanded to this court the issue of determining the amount of interest due Saldivar on any temporary reinstatement payments that were paid late.<sup>15</sup> In *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2051-52 (Dec. 1983) ("*Arkansas-Carbona*") the Commission adopted a "quarterly method" for computation of interest awards. Under the *Arkansas-Carbona* method interest is assessed on a quarterly basis at the adjusted prime interest rate and begins accruing beginning with the last day of the quarter in which payment was due until the date of payment. *Id.* Interest amounts accrued for each quarter's net unpaid amount are then summed to yield a total interest award. *Id.* In *Local Union 2274, District 28, United Mine Works of America v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988) ("*Clinchfield*"), the Commission retained the "quarterly method" but modified the *Arkansas-Carbona* framework to switch from using the adjusted prime interest rate to the short-term Federal rate applicable to the underpayment of taxes for the calculation of interest due.

Here, the Secretary applied the Commission's *Arkansas-Carbona* framework, as modified by *Clinchfield*, to the late temporary reinstatement payments that were included in

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<sup>12</sup> Both parties attached to their respective briefs documentation supporting the fact that Saldivar was incarcerated from July 6, 2022 to July 15, 2022. Sec'y Br. Ex. 5; Grimes Br. Ex. 9, 40.

<sup>13</sup> I reject Grimes Rock's argument that Saldivar was unavailable for the entire 40-day period. Failure to drug test and admitted drug use, while certainly not advisable, do not amount to unavailability. Saldivar was available for work during that period, he had been employed as a welder by a different employer and, consistent with Judge Miller's determination in the Enforcement Order, his earnings at other employment have been used to offset the total amount that would have otherwise been due for the days he was available during the 40-day period.

<sup>14</sup> The court agrees with the Secretary regarding how this amount was calculated and incorporates the Secretary's explanation in her brief as part of this decision.

<sup>15</sup> The Secretary, in both her original motion for interest filed with the Commission and her brief filed with this court, did not seek interest on the unpaid temporary economic reinstatement payments discussed above, i.e., payments for the period after the Enforcement Order was issued until the discrimination decision on the merits became final.

Judge Miller's Enforcement Order and not paid until August 22, 2022.<sup>16</sup> Based on the Secretary's calculations, Grimes Rock is obligated to pay Saldivar a total of \$207.24 in interest on late temporary reinstatement payments. I agree and incorporate the Secretary's explanation and calculations in her brief by reference.<sup>17</sup>

I reject Grimes Rock's argument that it should not be obligated to pay interest associated with the temporary economic reinstatement because Saldivar failed to mitigate damages claimed. I agree with the Secretary that, although a duty to mitigate damages exists in the context of back pay awards in discrimination cases, no such duty exists in the context of temporary reinstatement. Sec'y Opp'n 10. As noted by the Secretary, in *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 589, 592-593 (Mar. 2011), the Commission distinguished between discrimination awards, which include back pay and a duty to mitigate, and temporary reinstatement, the goal of which is to quickly put a miner back to work during the pendency of the discrimination case on the merits. There, the Commission "reject[ed] the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us." *Id.* at 593. Here, there was no back pay award which would give rise to a duty to mitigate. Rather, the monetary amount due Saldivar was a result of an agreement between the parties to temporarily economically reinstate Saldivar, which was approved by Judge Miller and ultimately affirmed by the Commission.

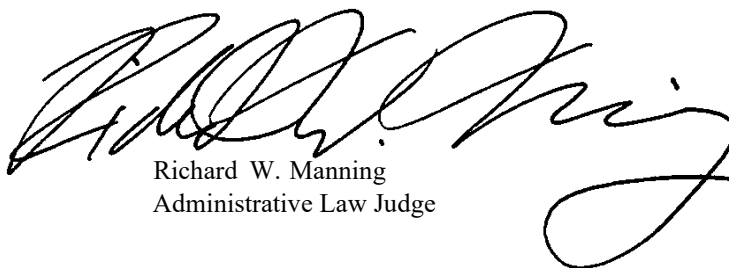
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<sup>16</sup> Judge Miller's Enforcement Order required Grimes Rock to pay a total of \$12,533.94 in past due temporary economic reinstatement payments for a period between November 2021 and June 2022, i.e., three quarters beginning with the fourth quarter of 2021 and ending in the second quarter of 2022. As a result, interest accrued during the first, second and third quarters of 2022 until Grimes Rock paid \$12,533.94 on August 22, 2022. The short-term Federal rate applicable to the underpayment of taxes for the three subject quarters was 3% for Q1, 4% for Q2 and 5% for Q3 2022. IRS Quarterly Interest Rates, <https://www.irs.gov/payments/quarterly-interest-rates> (last visited November 18, 2024). Utilizing the appropriate rates for the relevant quarters, and August 22, 2022 as the date which interest stopped accruing, the Secretary arrived at a total of \$207.24 in interest pursuant to the instructions outlined in *Arkansas-Carbona* and *Clinchfield*. Sec'y Br. 7-11.

<sup>17</sup> I reject Grimes Rock's argument that interest should not be awarded for the period Saldivar was a fugitive or incarcerated. In *Clinchfield* the Commission cited the NLRB's explanation that the purpose of interest is to compensate for the loss of use of money. 10 FMSHRC at 1500. Here, the Commission granted the Secretary's motion for interest and held that Grimes Rock was obligated to pay interest on payments that were paid late to Saldivar. Neither Judge Miller's Enforcement Order ordering the subject payments, nor the Commission's decision on review, allowed for further adjustment of those payments based upon whether Saldivar was a fugitive or incarcerated. Moreover, the ordered payments already reflect a reduction that accounts for when Saldivar was incarcerated. Consistent with the Commission's decision granting the Secretary's motion for interest, interest must be paid for all periods in which it accrued on the \$12,533.94 in late paid temporary economic reinstatement payments.

## ORDER

For the reasons set forth above, Grimes Rock is ordered to pay Saldivar a total of \$2,634.80 in temporary economic reinstatement payments and interest within 30 days of the date of this decision.<sup>18 & 19</sup>



Richard W. Manning  
Administrative Law Judge

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RWM

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<sup>18</sup> Grimes Rock's request for sanctions included in its response brief is **DENIED**. Counsel for the Secretary attested that, prior to September of 2024, the Secretary had no knowledge of Saldivar's incarceration during July 2022, i.e., the days for which the Secretary agrees Grimes Rock does not owe temporary economic reinstatement payments. Sec'y Reply. 1-2 and Ex. 1.

<sup>19</sup> Having addressed all issues remanded to me by the Commission, this is my final decision in this case under Commission Procedural Rule 69. 29 C.F.R. § 2700.69. Given my findings, Grimes Rock's Motion for Evidentiary Hearing, which was filed alongside its brief in this matter, is **DENIED**.