

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 4, 2023

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

v.

LEXINGTON COAL COMPANY, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2023-0363
MSHA Case No. HOPE-CD-2023-4

Mine: Twilight Mtr Surface Mine
Mine ID: 46-08645

ORDER GRANTING UNOPPOSED MOTION TO TOLL TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge McCarthy

Procedural Background

This case is before the undersigned upon an Application for Temporary Reinstatement filed by the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), and 29 C.F.R. § 2700.45. On June 12, 2023, the Secretary filed an application on behalf of miner Phillip Bowman (“Complainant”) seeking his reinstatement to his former position as a rock truck driver at the Twilight Mtr Surface Mine operated by Lexington Coal Company, LLC.¹

¹ The following allegations are delineated within the Secretary’s application and MSHA’s special investigator’s affidavit affixed as Exhibit A thereto:

- 1) Complainant began working as a truck driver at the Twilight Surface Mine in October 2021;
- 2) On or about April 3, 2023, Complainant informed his foreman that rock truck number 252 CAT 777 had no air conditioning and was releasing exhaust fumes into the cab of the truck;
- 3) On April 4, 2023, Complainant downed rock truck number 252 CAT 777 and informed his foreman that he would not drive the truck in its current condition;
- 4) On April 5, 2023, he was told to run rock truck number 252 CAT 777 in its then current condition or to go home. Complainant then contacted MSHA and reported his concerns with the truck;
- 5) On April 6, 2023, MSHA inspectors issued a citation which identified conditions consistent with those alleged by Complainant (Ex. C);
- 6) Complainant was “discriminatorily terminated” on April 19, 2023. App. at 8.

On June 29, 2023, the Secretary filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. The terms of the agreement provide for the Complainant to receive economic reinstatement with Lexington Coal Company in lieu of immediately returning to work. The undersigned approved this Settlement Agreement on July 10, 2023, and held that

the parties were to comply with the terms and conditions in the Joint Motion,” and “that this economic reinstatement shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant, or such a case is brought and there is a final determination on it by Commission decision, approval of settlement, or other order of this tribunal or the Commission.

Order Granting Joint Motion for Economic Reinstatement at 2-3. The undersigned retained jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

On August 25, 2023, the Respondent filed a Motion to Toll [the] Economic Reinstatement Order, claiming that the Mine was idled on July 11, 2023 – the day after the temporary economic reinstatement was Ordered in this matter. The Motion further claimed that the mine had been idled due to “a downturn in the coal market resulting in all of its production coal miners being laid off by the Lexington [sic].” Mot. to Toll Economic Reinstatement Order at 2. In support of its assertions, the Respondent attached an Affidavit signed by mine superintendent Casey Miracle, which briefly describes the shutdown at Lexington's surface mine in Boone County, West Virginia. That affidavit avers, in part, that

1. Complainant was previously employed as rock truck operator at the Twilight Surface Mine in Boone County, West Virginia;
2. As of July 11, 2023, coal production at the Lexington's Twilight Surface Mine has been idled and all employees have either been laid off or transferred;
3. No person with the Complainant’s specific skill set is currently working at the Twilight Surface Mine;
4. Complainant would have been laid off from working at the Twilight Surface Mine on July 11, 2023, along with the other coal miners with a similar skill set.

Aff. of Casey Miracle at ¶¶ 3-7.

On Thursday September 21, 2023, the undersigned held a conference call with the parties to discuss his concerns regarding the then-pending request to toll Complainant’s temporary economic reinstatement. More specifically, the undersigned expressed concern that 1) the Mine was idled nearly contemporaneously with the issuance of my July 10, 2023 Order granting Complainant’s temporary economic reinstatement; 2) while Respondent’s counsel referenced a downturn in the metallurgical coal market in her motion, this downturn was not referenced in Mr. Miracle’s affidavit or substantiated by any other evidence; 3) no explanation was provided for why Complainant was ineligible for transfer to another mine facility operated by Lexington Coal; and 4) there was no indication whether the layoff was temporary or permanent. During the call,

counsel for the Respondent confirmed that on or about July 25, 2023, a single payment was remitted to Complainant under the terms of my Order. Counsel for the Secretary indicated that the Secretary was pursuing the underlying discrimination case.² The undersigned requested that Respondent's counsel prepare a revised motion addressing my concerns.

On September 27, 2023, the Respondent filed a Revised Verified Motion to Toll Economic Reinstatement Order. The Revised Motion included a Revised Affidavit from Casey Miracle (Exhibit 1) and copies of 1) Commission case law, and 2) samples of non-precedential ALJ decisions resolving motions to toll temporary reinstatement (Exhibit 2). Mr. Miracle's revised affidavit states as follows:

1. I [Casey Miracle] am currently employed as a Superintendent of Lexington Coal Company, LLC ("Lexington") and have been employed in such a capacity since February 22, 2022.
2. I am therefore authorized and qualified to create this Affidavit and have personal knowledge of the facts contained therein.
3. I wish to clarify the statements made during my Affidavit dated August 25, 2023; I am the *only* employee of Lexington who was transferred from Twilight. Upon information and belief, I was transferred because I am the Superintendent of the operation and such a specific skillset was required at another of Lexington's operations, being one hour and forty-five minutes northwest.
4. On or about the first week of July, 2023, the Twilight layoff was coordinated by Lexington's management; upon information and belief, such decision was made as a result of its loss of a high price sales contract.
5. I was instructed by management at approximately *8:00 a.m.* on July 10, 2023 and it was necessary to lay off the employees on July 11, 2023.
6. The layoff was strictly due to the coal market decrease Lexington faced, beginning during the first week of July 2023. Specifically, there became low demand for Lexington's Metallurgical coal product mined from Twilight. Lexington could not afford to operate Twilight until and unless it secured another order to fill the void.
7. There are currently no individuals with [Complainant]'s skill set working for Lexington at the Twilight Surface Mine.
8. There were no transfers available for any other employees.
9. All employees with [Complainant]'s skill set were laid off on July 11, 2023.
10. [Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set working for Lexington at the Twilight Surface Mine.

For the reasons that follow, the undersigned tolls Complainant's economic reinstatement as of the date of this Order.

² Upon questioning from the undersigned, counsel for the Secretary indicated that MSHA had confirmed that there was a layoff at the Mine, but had not investigated whether the layoff or partial closing itself was motivated by protected activity.

Analysis

“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 found that tolling is an affirmative defense and an 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; *Cf.*, *Chadrick Casebolt*, 6 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 this case, Respondent initially submitted limited evidence to carry its burden to prove, by a preponderance of the evidence, that layoffs at the Mine justify tolling Complainant's temporary economic reinstatement. *See Gatlin*, 31 FMSHRC at 1054. The only submission provided in support of the Motion to Toll Temporary Economic Reinstatement was Casey Miracle's affidavit. That affidavit makes a passing reference to a possible change in the economic conditions at the Mine, stating that, “as of July 11, 2023, Lexington's Twilight Surface Mine has been idled.” *Aff. of Casey Miracle* at ¶ 5. Within the affidavit, Mr. Miracle states further that “there are currently no individuals with [Complainant's] skill set working for Lexington Coal Company, LLC at the Twilight Surface Mine,” and “were it not for this honorable Court's Temporary Reinstatement Order, [Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set working for Lexington Coal Company, LLC at the Twilight Surface Mine.” *Id.* at ¶¶ 6-7. Mr. Miracle did not expound on the reasons for Respondent's decision to idle production at the Twilight Surface Mine, such as a market downturn or other externalities that might lawfully motivate that decision. *See Id.* at ¶ 5. Nor did he provide any justification at all for his employer's decision to either terminate or transfer every employee previously assigned to the Twilight Surface Mine. *See Id.* at ¶ 4. Furthermore, other than stating that Complainant “was previously employed as a rock truck operator,” Mr. Miracle provided no

details concerning Complainant’s skill set or credentials. *See Id.* at ¶ 4. There was nothing provided in Miracle’s initial affidavit explaining why Complainant would have been ineligible for transfer or reassignment rather than termination, except for the conclusory statement that “[Complainant] would have been laid off on July 11, 2023 with the other coal miners with his skill set.” *Aff. of Casey Miracle* at ¶ 7.

Mr. Miracle’s revised affidavit ameliorates many of the foregoing concerns. First, he describes how the decision to idle production at the Mine was motivated by "low demand for Lexington’s Metallurgical coal” following the “loss of a high price sales contract.” *Rev. Aff. of Casey Miracle* at ¶¶ 4, 6.³ Mr. Miracle further averred that “Lexington could not afford to operate Twilight until and unless it secured another order to fill the void.” *Id.* at ¶ 6. In addition, Miracle now avers that after the decision to idle the Twilight Surface Mine was made, only Mr. Miracle – as the mine superintendent – was transferred to another mine facility operated by the Respondent. *See id.* at ¶ 3. No other employees at the Twilight Surface Mine were eligible for transfer, and all other employees, including those individuals with a skill set similar to Complainant’s, were laid off. *See id.* at ¶¶ 7-9.

The Secretary has not filed an opposition to the motion to toll or otherwise submitted any evidence to rebut Respondent’s evidence. Thus, the only evidence that may be considered at this time are the Respondent's evidentiary submissions, as well as any relevant evidence from the original application for temporary reinstatement. Considering the totality of the Respondent's evidence and the lack of any evidence from the Secretary to the contrary, the undersigned finds that the Respondent has met its burden. As a result, my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement shall be tolled.

The undersigned must next consider the effective date of tolling and whether the Respondent maintains any obligation to remit additional payments to Complainant. In its initial motion Respondent argued that tolling should be effective on July 11, 2023, the date production was idled at the Mine. The Respondent cites *Wiggins v. E. Assoc. Coal Corp.* and *Casebolt v. Falcon Coal Co., Inc.* in support of the proposition that “a back pay award ends upon the date of a layoff.” *See* 7 FMSHRC 1766, 1772-73 (Nov. 1985); 6 FMSHRC 485, 486 (Feb. 1984). This case law is inapposite. In the former case, the Commission reviewed an ALJ Decision following a discrimination hearing on the merits, a hearing that Wiggins had requested pursuant to 30 U.S.C. § 815(c)(3) after the Secretary declined to prosecute a case on his behalf. *See Wiggins*, 7 FMSHRC at 1768. In the latter case, Casebolt did not seek economic reinstatement and conceded that he suffered no loss of pay from any alleged discrimination, instead seeking broader “make whole” remedies. *See Casebolt*, 6 FMSHRC at 486. Neither case involved the approval of a temporary reinstatement order at any stage of the proceedings, and calculation of any ‘back pay’ occurred only after the complainants were afforded the opportunity to present a full case on the merits.

The Respondent also relies on *MSHA o/b/o Clinton Ray Ward v. Argus Energy WV, Inc.*, a non-precedential ALJ decision attached as Exhibit 2 to the Respondent’s initial Motion to Toll Economic Reinstatement Order. The Respondent contends that “the present situation is very similar to the one reviewed by ALJ Steele while rendering [that] decision.” *Mot. to Toll Economic Reinstatement Order* at 2. However, unlike the present situation, Judge Steele’s decision resolved

³ No other documentation establishing loss of this contract was provided.

a motion to dissolve temporary reinstatement *after* the Judge had already denied the Discrimination Complaint on the merits. Moreover, the motion to dissolve the temporary reinstatement order was filed in that case on December 12, 2023, which was more than two weeks before the mine was set to idle on December 25, 2023. By contrast, the idling of the Mine and layoff in this case was not raised until well after my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement. Indeed, more than six weeks passed before Respondent filed its initial August 25, 2023 motion alleging that the idling of production and layoff constituted sufficient changed circumstances to justify tolling of my Order. *See Gatlin*, 31 FMSHRC at 1054. This delay occurred despite the fact that the mine was idled the day after issuance of my Order and a mere twelve days after the parties agreed to a potential settlement regarding the then-outstanding reinstatement request. The Respondent cannot now claim that its payment obligations should be tolled retroactively to July 11, 2023, when Respondent was responsible for the 45-day delay between the July 11 layoff and the August 25, 2023 filing of its initial motion to toll my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement.

As noted above, during the September 21, 2023 conference call, counsel for the Respondent confirmed that a single payment was remitted to Complainant on or about July 25, 2023. The Respondent, however, was obligated to continue to comply with the terms and conditions of my economic reinstatement Order which “shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant, or such a case is brought and there is a final determination on it by Commission decision, approval of settlement, or other order of this tribunal or the Commission.” Order Granting Joint Motion for Economic Reinstatement at 2-3. Rather than complying with that Order, Respondent apparently unilaterally ceased payments to Complainant after July 25, 2023, without leave of this tribunal and a full month before filing its initial motion to toll. In previous cases, the Commission has rebuked a mine operator for unilaterally cutting off payments to an alleged discriminatee on the date of a reduction-in-force rather than on the date of modification of an order. *Gatlin*, 31 FMSHRC 1050, n. 2. In *Gatlin*, the Commission stated that “[r]ather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin’s reinstatement, [the Respondent] should have moved the Judge to modify the ... Order.” *Id.*, citing *Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) (“[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.”). If the Respondent here had continued payment to the miner pursuant to the temporary economic reinstatement Order, that money would not be recoverable by the Respondent even though its July 11, 2023 layoff warranted tolling the temporary economic reinstatement. *See Sec’y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 813-814 (Apr. 2013) (“[T]here is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided.”)

Consistent with the reasoning in *Gatlin*, because the terms of my July 10, 2023 Order remained in effect until such time as the period of reinstatement is modified, Complainant Bowman should have continued to receive economic reinstatement until the date of this Order granting tolling. *Gatlin*, 31 FMSHRC at 1055 (“Thus, KenAmerican must continue to comply

with the terms of the August 31 Order and pay Mr. Gatlin until the matter is resolved by the Judge.”).

Order

It is **ORDERED** that Complainant’s temporary economic reinstatement is **TOLLED** as of October 4, 2023, the date of this Order.

It is **ORDERED** that Respondent remit to Complainant any payments that are still due under the terms of my July 10, 2023 Order Granting Joint Motion for Economic Reinstatement from July 25 until October 4, 2023.

It is further **ORDERED** that the Respondent shall inform the Secretary, Complainant, and this tribunal if the Twilight Mtr Surface Mine is brought back into production, or any employees are recalled from layoff.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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