

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
721 19th Street, Suite 443
Denver, CO 80202-2536
Email: rmanning@fmshrc.gov

September 6, 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

ORDER DENYING MOTION FOR CONSEQUENTIAL DAMAGES

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).¹

Following Grimes Rock’s unsuccessful appeal to the Ninth Circuit Court of Appeals, the Commission, by order dated July 23, 2024, confirmed that I retain jurisdiction over this matter and can proceed on remand pursuant to the Commission’s instructions in the November 28, 2023 decision. 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” and “a determination of any remaining temporary reinstatement payments and interest owed as well as a determination on whether consequential damages are appropriate.” 45 FMSHRC at 961.

On August 5, 2024, I ordered the parties to file briefs by September 10, 2024 on the remanded issues and to suggest possible resolution of those issues. At the time I issued that order, I had not yet carefully studied the Secretary’s motion for consequential damages filed on August 25, 2022 or Grimes Rock’s opposition to the motion filed on September 7, 2022.² However, having since had an opportunity to review the motion and opposition, I find that the filings are comprehensive and provide all that is needed for me to rule on the motion. Accordingly, I conclude that the issue of consequential damages has been fully briefed by the

¹ The Commission affirmed the Judge’s January 7, 2022 order denying the operator’s motion to toll temporary reinstatement and her June 17, 2022 order enforcing temporary reinstatement.

² The Secretary’s motion also asked for interest on the amount not timely paid by Grimes Rock to Saldivar. Grimes Rock opposed the motion for the payment of interest. However, in its November 28, 2023 decision, the Commission resolved the issue of whether interest is due and remanded to me the responsibility to calculate the amount of the interest owed. That issue remains before me and is not addressed in this order.

parties and that further briefing on the subject is unnecessary and will not be helpful. For the reasons set forth below, the Secretary's motion for consequential damages is **DENIED**.

SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary, in her motion, asserts that the complainant, Alvaro Saldivar, incurred certain consequential damages because Grimes Rock failed to timely pay temporary economic reinstatement amounts due under orders issued by former Commission Judge Miller. Sec'y Mot. 1. She argues that, in addition to miners who suffer discrimination, miners awarded temporary reinstatement are entitled to "make-whole" remedies, such as consequential damages, even when there is no finding of discrimination in the related case on the merits. Sec'y Mot. 6-7. In making this argument, the Secretary relies on the legislative history of the Mine Act (the "Act") and Congress's statement that temporary reinstatement is an "essential protection for complaining miners who may not be in a position to suffer even a short period of unemployment or reduced income pending the resolution" of their complaint. Sec'y Mot. 7 (citing S. Rep. No. 95-181, at 37).

Grimes Rock, in its opposition, argues that because the issue of consequential damages was not raised before Judge Miller, the Secretary waived and/or forfeited any right to consequential damages and, as a result, the Commission does not have authority to consider the request for consequential damages. Grimes Opp'n 7-10. In addition, Grimes Rock argues that, because Saldivar failed to mitigate any alleged damages, Grimes Rock is not obligated to pay consequential damages. Grimes Opp'n 11. Specifically, Grimes Rock asserts that Saldivar failed to mitigate his damages by (1) deliberately choosing to not seek modification of the order approving temporary economic reinstatement so as to avoid Judge Miller questioning his credibility due to his incarcerations, which would have adversely affected his discrimination case, and (2) not making reasonable efforts to find employment after being discharged from his other job.³ Grimes Opp'n 12-14. Finally, Grimes Rock argues that nothing in the Act's legislative history supports an absolute right to economic reinstatement, especially when a miner is unavailable to work due to his own choices. Grimes Opp'n 15-16. Here, Grimes Rock paid Saldivar exactly what was owed under the settlement agreement, and it was Saldivar, through his own misconduct, who created the financial woes for which he now seeks damages. Grimes Opp'n 16-17.

³ Given my analysis and findings below, I do not reach the question of mitigation of damages. However, it is worth noting that, in the context of temporary economic reinstatement, such as is the case here "there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim." *North Fork Coal Corp.*, 33 FMSHRC 589, 593 (Mar. 2011). In response to my August 15, 2024 order to provide information, the Secretary confirmed that Grimes Rock's payment of \$12,533.94 satisfied its temporary economic reinstatement payment obligations through June 17, 2022, excluding interest and possible consequential damages. Given my findings and conclusions, only the issue of interest remains for the period up to and including June 17, 2022. Accordingly, Grimes Rock's arguments regarding mitigation of damages need not be addressed.

ANALYSIS

The Act grants the Commission authority “to require a person *committing a violation* of . . . [Section 105(c)(2)] to take such affirmative action to *abate the violation* as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.” 30 U.S.C. § 815(c)(2) (emphasis added). In *Sec’y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126 (Feb. 1982) the Commission explained that “this broad remedial charge was designed not only to deter *illegal retaliation* but also to restore the employee, as nearly as possible, to the situation he would have occupied *but for the discrimination*.” (citing *Sec’y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1 (Jan. 1982) (emphasis added)). Pursuant to this history, the Commission and its judges have awarded relief in the form consequential damages to miners for losses stemming from unlawful discrimination. *E.g.*, *Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992) (remanding case to judge for recalculation of consequential damages related to repossession of a truck the miner could not make payments on after he was discriminatorily discharged) and *Sec’y of Labor on behalf of Groves v. Con-ag, Inc.*, 39 FMSHRC 1811 (Sept. 2017) (ALJ) (awarding damages for late fees on car payment incurred due to loss of income stemming from discriminatory discharge).

Notably, but not surprisingly, consequential damages have only been awarded in Commission proceedings following an affirmative finding of discrimination in the underlying merits case. Requiring a finding of discrimination in order to award consequential damages is in harmony with both the language of the Act, which requires a “violation” of 105(c)(2), i.e., a finding of discrimination, as well as the legislative history, which states that “[i]t is the Committee’s intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of *the discriminatory conduct* including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for *any special damages sustained as a result of the discrimination*.” S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) (emphasis added).

Although the Commission possess broad remedial authority following a finding of discrimination in a merits proceeding, the Act does not grant the Commission the same range of remedies in a temporary reinstatement proceeding. Rather, in the context of temporary reinstatement, the Act provides only for “the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2); *See Sec’y of Labor on behalf of Garcia v. Veris Gold U.S.A., Inc.*, 36 FMSHRC 2365 (Aug. 2014) (ALJ).⁴ A review of Commission case law reveals no instance in which consequential damages have been awarded in a temporary

⁴ In *Garcia*, Judge Simonton noted the “differing scopes of relief provided for within Section 105(c)(2)” and found that, although an “expansive range of remedies” is available in a discrimination case on the merits upon a finding of unlawful discrimination, temporary reinstatement itself is the “sole remedy directly provided for by the Mine Act” in a temporary reinstatement proceeding. 36 FMSHRC at 2368. I agree with Judge Simonton’s reasoning.

reinstatement proceeding absent a finding of discrimination in a related merits case.⁵ In light of this analysis, I hold that, as a general matter, consequential damages are only available where a violation of Section 105(c) is proven in the merits case.

I find that the Act does not authorize an award of consequential damages in this case. On June 17, 2022, Judge Miller issued her decision in the merits case finding that the Secretary had “failed to prove a violation of section 105(c) of the Mine Act.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock Inc.*, 44 FMSHRC 473 (June 2022) (ALJ). Although the parties appealed the temporary reinstatement case to the Commission, Judge Miller’s decision on the merits was not appealed by either party and, accordingly, became a final decision of the Commission 40 days after its issuance. *Sec’y of Labor on behalf of Hargis v. Vulcan Constr. Materials, LLC*, 46 FMSHRC ___, No. SE 2021-0163 et al. (Aug. 29, 2024). Consequently, because there was no violation of Section 105(c), and given my holding that consequential damages are only available where a violation of Section 105(c) is proven in the merits proceeding, I find that an award of consequential damages in this temporary reinstatement proceeding is not appropriate.

Even if an award of consequential damages were appropriate, it would be virtually impossible to calculate here. The Secretary’s principal argument in her motion is that Saldivar “incurred consequential damages” because he did not receive temporary economic payments in a timely manner.⁶ Sec’y Mot. 4. The Secretary agrees that she must prove that the requested consequential damages were caused by Grimes Rock’s “wrongdoing.” Sec’y Mot. 7. However, Saldivar was incarcerated approximately 32% of time between the date Judge Miller issued the order approving temporary economic reinstatement and when she ultimately terminated his reinstatement, albeit prematurely, in her decision dismissing the merits case on June 17, 2022.⁷ Temporary economic reinstatement payments were tolled during periods of Saldivar’s incarceration. As a result, Saldivar’s loss of income during those periods of tolling was a result of his own actions rather than any wrongdoing by Grimes Rock. It would be nearly impossible to determine whether the consequential damages that the Secretary is seeking were the result of the

⁵ In its November 28, 2023 decision in this matter the Commission stated that “[i]f a miner prevails on the merits of the [discrimination] complaint, and the Judge finds that the operator violated the Mine Act, only then does the Judge consider remedies for the violation.” 45 FMSHRC at 953.

⁶ In her motion, the Secretary seeks consequential damages for the following items: Interest on late and missing child support payments, late rent fees, repossession of his vehicle, suspension of cell phone service, rental insurance suspension, and car insurance cancellation. Sec’y Mot. 4.

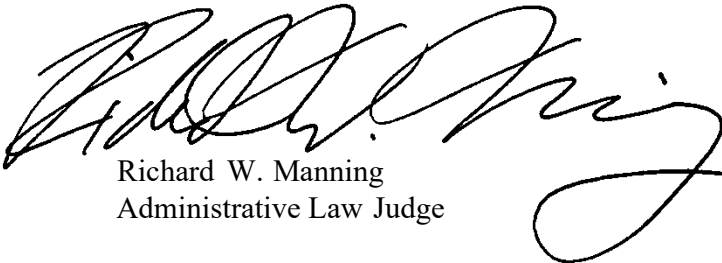
⁷ This percentage was calculated by counting the days that Saldivar was entitled to temporary economic reinstatement and the days that he was incarcerated and then calculating the percentage of the time that he was incarcerated. Consistent with the Commission’s November 23, 2023 decision in this matter, I recognize that Grimes Rock may be required to pay additional temporary economic reinstatement, as well as interest on those payments, for the time period after Judge Miller issued her decision on the merits, but before that decision became final.

wrongdoing of Grimes Rock, the actions of Saldivar, or a combination of both. Nevertheless, the primary reason for my denial of consequential damages is as set forth above.

Finally, Grimes Rock makes an important point concerning the Secretary's failure to raise the issue of potential consequential damages before Judge Miller. It argues that the Secretary and Saldivar waived, and therefore forfeited, any claimed right to consequential damages because the Secretary failed to establish good cause for not raising the consequential damages issue before Judge Miller. Grimes Opp'n 9-10. The Commission's procedural rules make clear that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the Judge had not been afforded an opportunity to pass." 30 C.F.R. § 2700.70(d). Even if consequential damages were available, I might well find that the Secretary, by waiting more than two months after Judge Miller issued her decision dismissing the discrimination case to file the motion for consequential damages, waived any right Saldivar may have had to such damages, and that the cursory reason offered for the delay, i.e., "mostly because Grimes stopped paying near the end of the litigation before" Judge Miller, Sec'y Mot. 8, does not establish good cause. Nevertheless, the Commission in its November 28, 2023 decision ordered me to determine whether "consequential damages are appropriate." 45 FMSHRC at 961.⁸

ORDER

For the reasons set forth above, the Secretary's motion for consequential damages is **DENIED**.



Richard W. Manning
Administrative Law Judge

⁸ I note that former Commissioner Althen, in his dissent in the Commission's November 28, 2023 decision, agreed with the argument presented by Grimes Rock. 45 FMSHRC at 977-79. However, I am bound by the Commission's majority decision on this issue and it was remanded to me for resolution. As a consequence, I find that I have jurisdiction to make the findings included in this order.

Distribution: (Via email and First Class Mail)

Ryan M. Kooi, Esq. U.S. Department of Labor, Office of the Solicitor, U.S. Department of Labor, Mine Safety and Health Division, 201 12th Street South, Suite 401, Arlington, VA 22202-5452 (kooi.ryan.m@dol.gov)

Kenneth H. Moss, Esq., Mark R. Pachowicz, Esq., and Tina Amoke, Pachowicz & Goldenring PLC, 6050 Seahawk Street, Ventura, CA 93003 (ken@pglaw.law; mark@pglaw.law; tina@pglaw.law)

Alvaro Saldivar, 2531 Taffrail Ln., Oxnard, CA 93035 (alamirez805@icloud.com)

RWM