

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 1, 2014

FRED ESTRADA,
Complainant

v.

RUNYAN CONSTRUCTION,
Respondent

DISCRIMINATION PROCEEDING

Docket No. CENT 2013-311-DM
SC-MD 2013-06

Mine ID 29-00159
Mine: Tyrone Mine

ORDER DENYING STAY and FURTHER ORDER REGARDING DAMAGES

Before: Judge Moran

In this section 105(c)(3) discrimination proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (2012) (“Mine Act,” or “Act”) the Court issued its Decision on Liability on March 31, 2014. That decision directed the parties “to confer in order to determine if there can be agreement as to the terms of relief for Mr. Fred Estrada. Section 105(c)(3) of the Act provides, in pertinent part: [‘]Whenever an order is issued sustaining the complainant’s charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney’s fees) as determined by the Commission to have been reasonably incurred by the miner ... for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.’ Some issues related to the relief were raised by Complainant’s Counsel in its post-hearing brief.¹

¹ The Decision on Liability added in a footnote that “Complainant’s post-hearing brief addresses the subjects typically included for the relief aspects of established discrimination claims. In this regard it lists the following: ‘1. Expunge from Mr. Estrada’s personnel file any negative references relating to this matter. 2. Reimburse Mr. Estrada for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case. This amount shall include damages in an amount equal to full backpay, all employment benefits, attorneys’ fees and costs, all medical and hospital expenses and any and all other damages suffered and incurred by Complainant as a result of his discriminatory discharge. Furthermore, interest shall be added to backpay and other expenses, from the date of discharge until the date of payment, at the adjusted prime rate announced semi-annually by the Internal Revenue Service. 3. Post this decision at all of its mining properties in conspicuous, unobstructed, places where notices to employees are customarily posted, for a period of 60 days. 4. Restore Mr. Estrada to his former position as a bird hazer or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties.’ It then addresses the procedural aspects related to determining if an agreement can be reached on these issues: The Parties are ORDERED TO CONFER within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts Runyan shall undertake and pay to carry out this Order. If an agreement is reached, it shall be submitted

Typically, reinstatement to Mr. Estrada's former position, if sought, back pay with an appropriate interest rate, medical expenses, if any, benefits, such as pension contributions, if any, and lost overtime, are among the remedial matters that may be present. In addition, the remedies typically also include: expungement from Fred Estrada's personnel file of all references to the unlawful disciplinary action taken against him, including any such references to the events and circumstances associated with his wrongful termination from any other records maintained by the company; and a posting of this decision at all of its mining properties where Runyan operates, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Runyan at such properties that it will not violate the Mine Act." Decision on Liability at 25-26.

Unnecessary delay has followed. Respondent filed a Motion to Stay on April 17, 2014. The Court responded, via email, on April 18, 2014, advising that "[i]t is probably true that parties are free to file petitions for discretionary review as they choose, but it is my understanding that any petition for discretionary review filed by Runyan is premature, as my decision was not a final decision, and that such petition will be denied on that basis. Rather my decision was titled as the Court's 'Decision on Liability.' Further, the Court noted in that decision that it 'retains jurisdiction in this matter until the specific remedies to which Mr. Estrada is entitled are resolved and finalized. Following the issuance of the final order, this case will be referred to MSHA for assessment of a civil penalty. [footnote omitted] Accordingly, this decision will not become final, and therefore not appealable, until an order granting specific relief and awarding monetary damages has been entered. Counsel are directed to discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.' As the Commission noted recently in *Secretary obo Shemwell v. Armstrong Coal Company*, 2013 WL 4140416 at *1 (June 2013), 'Ordinarily, a judge's decision finding a violation under the Mine Act is not final until the judge issues a penalty against the operator under section 105(d) of the Mine Act, 30 U.S.C. § 815(d). In his Decision in this case, quoted above, Judge Feldman explicitly stated that the decision does not become final until the judge issues a Decision on Civil Penalty and Supplemental Decision on Relief. Thus, the Commission lacks jurisdiction to entertain Armstrong's Petition for Discretionary Review and must reject it.' Though the Commission's decision was speaking broadly to the subject of petitions for discretionary review, their *Shemwell* decision happened to involve a discrimination matter too. Accordingly, [the Court's] instructions in the email [] sent earlier today remain[s] intact. In that earlier email to the parties [the Court] stated: Runyan's Motion to Stay is DENIED."

Subsequent to the Court's April 18, 2014 email, the Commission issued an Order, dated April 29, 2014, denying Runyan's "document entitled "Petition for Discretionary Review." Entitled was the correct description as the Commission noted that such filing was premature,

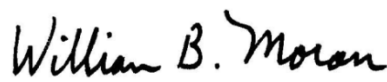
with 30 days of the date of this decision. If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within thirty (30) days of the date of this decision. For those areas involving monetary damages on which the Parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the Parties should so state. C's Br. at 33-34. The Court views this as a reasonable outline for the parties to use in their discussions." Decision at n.39.

agreeing with this Court's April 18th email Order which made that observation, as noted above.²

The Court's March 31st decision on liability instructed the parties to "discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order." On April 21, 2014, Counsel for Mr. Estrada provided a "Joint Update to the Court," advising that it would advise the Court by May 2, 2014 whether a settlement could be achieved.

The Court orders that, absent a complete settlement as to all aspects of damages by May 2, 2014, the parties are to email a joint submission to the Court by Friday, May 16, 2014, setting forth each category of damages. For *each* separately identified category of damages, the parties are to note whether there is an agreement and to separately list the amount agreed upon for each category. In instances, if any, where there is a dispute as to the dollar amount for a given category of damages, the parties are to identify whether the dispute concerns the subject of category being included as damages and/or whether the dispute is limited to the dollar amount. Accordingly, the parties are to identify if there are factual disputes pertaining to any given category of damages or whether the dispute is strictly over a legal determination, challenging the appropriateness of inclusion of a particular item of damages. In this regard, the Court notes that damages are discussed in *Simpson v. Kenta Energy, Inc.* 7 FMSHRC 272, 278-285 (Feb. 1985)(ALJ) and that the decision may provide some guideposts for the parties. That decision addresses back pay, any interim earnings and interest, computed on a quarterly basis, attorney's fees, including the appropriate hourly rate, hours reasonably expended, and various other expenses incurred. Other items may include: medical expenses that would have been covered by the Complainant's medical insurance, if applicable; unemployment compensation payments; vacation pay, if applicable; Fred Estrada's reasonable expenses associated with the November 19, 2013 hearing; and whether reinstatement is sought. Further, the Commission has spoken to the computation of backpay and interest in *UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (1988). The need for a hearing to resolve factual disputes over damages is a rare event.

SO ORDERED.



William B. Moran
Administrative Law Judge

² The Commission also preemptively advised the Respondent that had it instead attempted to seek interlocutory review, which was the correct way to seek review of the Court's Decision on Liability, it would conclude that the conditions for such review would not be met. Commission Order at 2, citing Rule 76(a)(2), 20 C.F.R. § 2700.76.

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