

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 3, 2011

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of RODNEY PAYNE,	:	PROCEEDING
Complainant	:	
	:	Docket No. CENT 2010-1135-D
v.	:	DENV-CD 2010-14
	:	
SPIRO MINING, LLC, AND ITS	:	DISCRIMINATION PROCEEDING
SUCCESSORS,	:	
Respondent	:	Docket No. CENT 2011-42-D
	:	DENV-CD 2010-14
	:	
	:	Mine: Calder Mine
	:	Mine ID: 34-02105 A408

**ORDER DISSOLVING TEMPORARY ECONOMIC REINSTATEMENT ORDER
FOR FAILURE TO FILE SECTION 105(c)(3) ACTION**

This matter is before me on the Respondent’s December 29, 2010 Motion to Dissolve Temporary Economic Reinstatement Order granted on behalf of Rodney Payne pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). In Respondent’s Motion to Dismiss, Respondent states that the Secretary has decided not to proceed under section 105(c)(2), and that Payne has not filed an action on his own behalf under section 105(c)(3) within the allowable 30-day time period. Respondent moves that the temporary economic reinstatement be terminated and the September 8, 2010 Order of Temporary Reinstatement be dissolved. For the reasons explained, Respondent’s Motion is granted.

The Secretary filed an Application for Temporary Reinstatement on behalf of Rodney Payne on August 12, 2010. A hearing was scheduled for September 3, 2010 in Fayetteville, Arkansas. Prior to the hearing, the parties negotiated a settlement of the issues raised by the Application and filed a Settlement Agreement and Joint Motion for Temporary Reinstatement. Mr. Payne signed the Settlement Agreement. Pursuant to the terms of the Settlement Agreement, Respondent agreed to economically reinstate Mr. Payne effective September 6, 2010, until the merits of his discrimination complaint were resolved.

On September 8, 2010, I granted the Joint Motion for Temporary Reinstatement and ordered Respondent to economically reinstate Mr. Payne will full pay and benefits as existed prior to his June 14, 2010 termination, as specified in the Settlement Agreement and Joint Motion for Temporary Reinstatement.

On November 17, 2010, the Secretary filed a Motion to Dismiss Discrimination Complaint. In her Motion to Dismiss, the Secretary determined that the provisions of section 105(c)(1) had not been violated. The Secretary vacated the civil monetary penalties proposed and requested the dismissal of her discrimination complaint without prejudice to the right of Mr. Payne to file a timely action under section 105(c)(3). On November 17, 2010, Respondent filed a Motion for Dissolution of Temporary Reinstatement Order.

On November 23, 2010, I issued an Order Granting the Secretary's Motion to Dismiss Discrimination Complaint; Order Denying Respondent's Motion to Dissolve Temporary, Economic Reinstatement Order; Order Denying Respondent's Motion For Summary Judgment Without Prejudice; Order Denying Respondent's Motion for an Expedited Hearing or Alternatively for Order Vacating Temporary Economic Reinstatement; and Order Denying Respondent's Objections to Complaint and Motion to Dismiss. I concluded, *inter alia*, that a temporary reinstatement order remains in effect until final Commission order on the merits of the miner's underlying discrimination complaint, even if the Secretary exercises her prosecutorial discretion not to pursue that complaint under section 105(c)(2). I concluded that under section 105(c)(2) and the terms of my September 8, 2010 Order of Temporary Economic Reinstatement, there had been no final order on the complaint. I further concluded that Mr. Payne had 30 days from the Secretary's November 17, 2010 notification of no violation, to file an action on his own behalf before the Commission under section 105(c)(3). Finally, I noted that if Mr. Payne did not initiate a timely action under section 105(c)(3), the "temporary" reinstatement provision was no longer applicable, and Respondent could move for a dissolution of the Order and obtain a final Commission order on Mr. Payne's discrimination complaint.

As set forth in the Respondent's Motion, Mr. Payne has failed to file his own action under section 105(c)(3) within 30 days of the Secretary's November 17, 2010 notification of no violation. The 30-day statutory deadline expired on December 17, 2010. The expiration of the allowed time to file an action under section 105(c)(3) leaves no further avenue for Mr. Payne to pursue his discrimination complaint. Therefore, the temporary reinstatement provision is no longer applicable and my previous Order of Temporary Economic Reinstatement is dissolved under Commission Rule 45(g). This Order shall become a final decision of the Commission 40 days after its issuance, unless a petition for discretionary review is granted. 30 U.S.C. § 823(d)(1).

Accordingly, it is **ORDERED** that Respondent's Motion to Dissolve Temporary Economic Reinstatement Order be **GRANTED**.

It is further **ORDERED** that my September 8, 2010 Order of Temporary Economic Reinstatement is **DISSOLVED**, and that Mr. Payne's economic reinstatement is terminated.

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Dolores G. Wolfe, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin St., Suite 501, Dallas, TX 75202

Steven Marusich, 25858 Highline Rd., Spiro, OK 74959

Tony Huffman, Esq., P.O. Box 9, 411 Bruce Ave. NW, Camden AR 71701

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