

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

August 12, 2010

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MISHA), on behalf	:	
of LAWRENCE PENDLEY,	:	Docket No. KENT 2007-265-D
Complainant,	:	MISHA Case No. MADI CD 2007-05
	:	
v.	:	
	:	Mine ID: 15-02709
HIGHLAND MINING COMPANY, LLC,	:	Mine: Highland No. 9 Mine
Respondent	:	

ORDER DENYING MOTION FOR PROSPECTIVE APPLICATION
OF
REVIVED TEMPORARY REINSTATEMENT

On July 2, 2010, a Commission majority agreed with the Secretary that Lawrence Pendley’s right to temporary reinstatement was revived because the 6th Circuit Court of Appeals in *Pendley v. FMSRHC*, 601 F.3d 417, 429 (6th Cir. 2010), had divested the Commission’s decision in Mr. Pendley’s discrimination case of its “final” nature and had remanded the case to the Commission. The Commission stated: “While the court remanded the discrimination proceeding to the Commission for specific purposes, it also reversed the Commission’s decision upholding the judge. Prior to issuance of the Commission’s discrimination decision, Pendley had a right to temporary reinstatement. Because the discrimination proceeding is back before the Commission, the right is revived.” 32 FMSHRC, KENT 2007-265-D (June 2, 2010) (Order On Temporary Reinstatement) at 3. The Commission then ordered that Mr. Pendley “be reinstated immediately, with back pay retroactive to May 28, 2010, the date of the court’s mandate, and until such time as the Commission issues a final order upon remand in the discrimination proceeding. Jurisdiction over his reinstatement will otherwise rest with the judge.” *Id.* at 4 (n. omitted).

Counsel for Highland has moved that I order the revived temporary reinstatement to be effective as of the date the Commission issued its order – July 2, 2010. Counsel argues revival of the temporary reinstatement was a matter of first impression before the Commission and because it was not dealt with by the Court in its opinion, the first notice Highland had of the Commission’s interpretation of the law on the issue was on July 2, 2010, when the Commission issued its Order on Temporary Reinstatement. Because Highland had no notice of the retroactive nature of the reinstatement, the reinstatement should be effective as of the date of the Commission’s order. Respondent’s Mot. at 2. Highland’s motion is opposed by the Secretary and by Mr. Pendley, both of whom argue that because the Commission has reinstated Mr.

Pendley “retroactive to May 28, 2010,” I do not have authority to modify that part of the reinstatement. Secretary’s Opposition at 2 (*quoting* Commission’s July 2 Order at 4); Letter of Wes Addington to David Barbour (August 3, 2010). In addition, the Secretary asserts that even if I have jurisdiction, the concept of fair notice is inapplicable here, because the remedy of back pay has a “make whole” purpose, not a civil penalty or civil sanction purpose. Secretary’s Opposition at 3-4.

Highland’s motion **IS DENIED**. As both counsel for the Secretary and Mr. Pendley correctly note, the Commission ordered Mr. Pendley’s reinstated “immediately, with back pay retroactive to May 28, 2010, the date of the court’s mandate.” Order at 4. It is true that the Commission has returned jurisdiction over the reinstatement to me, but not as to the effective date of the reinstatement. That issue has been decided by the Commission. Other than that, I may rule on matters concerning Mr. Pendley’s revived reinstatement. Or, as the Commission put it, “Jurisdiction over [Mr. Pendley’s] reinstatement will otherwise rest with the judge.” *Id.*

David F. Barbour
Administrative Law Judge

Distribution:

Matthew N. Babington, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd, 22nd Floor, Arlington, VA 22209

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

Wes Addington, Appalacian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

Mr. Lawrence Pendley, P.O. Box 84, Browder, KY 42326

/sa