

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

April 28, 2014

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

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. VA 2014-199-D
NORT-CD 2014-03

v.

KNOX CREEK COAL CORP.,
Respondent

Mine: Tiller No. 1
Mine ID: 44-06804

ORDER DENYING MOTION FOR APPROVAL OF ECONOMIC REINSTATEMENT

Before: Judge Moran

Before the Court is Respondent’s Motion for Approval of Economic Reinstatement. On April 7, 2014,¹ the Court issued a decision in which it ordered the temporary reinstatement of Complainant Charles Riordan, on whose behalf this proceeding was brought by the Secretary of Labor² pursuant to Section 105(c) of the Mine Safety and Health Act of 1977. Thereafter, Knox Creek Coal sought to have Mr. Riordan economically reinstated, but the parties reached an impasse on the issue of whether Knox Creek may offset the earned income the Complainant may receive from outside employment against the payment it owes the Complainant during this period of temporary reinstatement. Knox Creek now seeks an order for economic reinstatement in which the Court would impose a provision that would allow for this offset of income. Per the Commission’s clear ruling in *MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011), Commission judges, absent rare and unusual circumstances, leave the terms of such potential agreements to the parties and do not become involved in the particulars of economic reinstatement agreements. Accordingly, as explained more fully below, Respondent’s Motion is DENIED.

Respondent has moved for the Court to enter an order that would impose economic terms upon the Complainant’s temporary reinstatement that are opposed by the Complainant. Both the Secretary and private counsel for the Complainant object to the provision in Knox

¹ The Court entered an Amended Decision and a Second Amended Decision on April 8 and 10, 2014, respectively, but neither made a substantive change to the original Decision.

² Separate from the Secretary’s representation, Attorneys Tony Oppgard and Wes Addington also represent Mr. Riordan in this proceeding.

Creek's proposed order that would enable the mine to deduct any income that the Complainant may earn from outside employment from the amount it owes the Complainant during this period of temporary reinstatement. Given this disagreement between the parties, the Respondent argues that an ALJ is empowered to order economic reinstatement as a part of the Act's broad authority in discrimination proceedings. Reply at 4 (quoting *MSHA o/b/o Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982)).³ Both the Secretary and Complainant's counsel object to the Court's involvement in this matter, and they cite to *MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011) as guidance for the limits placed upon Commission judges in the temporary reinstatement phase of discrimination proceedings.

The Court finds the Commission's decision in *North Fork Coal* to control in this matter. Similar to Knox Creek, the *North Fork* Respondent sought to have Complainant's earnings, while employed elsewhere during his economic reinstatement, to offset the amounts he was owed by Respondent. In rejecting the Respondent's position, the Commission differentiated between the legal principles that apply to monetary awards when a miner prevails in a discrimination proceeding on the merits versus those that govern in the temporary reinstatement context:

With regard to the former, the Commission has noted that the provision for back pay and other remedies in section 105(c) awarded once it has been established that a miner was discriminated against, is modeled after the remedial provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c). *Sec'y on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 n.4 (Jan. 1982). Under that statute, concepts of offset and the duty to mitigate damages are routinely applied to back pay awards, and the Commission has incorporated those concepts in computing back pay awards under section 105(c). *See, e.g., Sec'y on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142-44 (Feb. 1982). We have recognized that back pay is designed to make the miner as nearly whole as possible for the losses he or she has suffered between the time the miner was discriminated against and the time his or her claim of discrimination was upheld. *Id.* at 143. If the miner does not prevail, the miner is due no award.

In contrast... the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her. *Conversely, if the operator chooses to pay the miner while foregoing the miner's labor, 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.* 33 FMSHRC at 592-93 (emphasis added).

³ In its Motion, Respondent cites to *Secretary o/b/o Thurman Wayne Pruitt v. Grand Eagle Mining*, 33 FMSHRC 1638 (July 2011) (ALJ Melick) to illustrate this principle. This case, however, provides no such holding, as the ALJ granted the Secretary's application for temporary reinstatement, but did not speak to the issue of economic reinstatement or to the Commission's broad authority in discrimination proceedings under the Mine Act.

In light of this distinction, the Commission rejected the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before it. *Id.* at 593. The Commission elaborated that “[u]nlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements.” *Id.*

The *North Fork* decision applied these legal principles as it examined three separate periods of time that transpired over the course of the discrimination proceeding. The first involved the period from when the ALJ entered the order of economic reinstatement, which was the product of a negotiated agreement between the parties, to when the ALJ dissolved the TR order. For this time frame, the Commission ordered that the Respondent pay the miner according to the terms of the economic reinstatement agreement. *Id.* at 595. The second time period does not apply here.⁴ For the third time period, addressing the date the Commission reversed the judge’s decision and forward, it held that “the judge’s earlier supplemental order incorporating the parties’ agreement should be applied, with no offset.” *Id.* Compliance with the terms of the original order, with no offset, would continue until the parties negotiated a new agreement that the judge would then enter as either a superseding new order or as a modification to the original order. *Id.* at 596.

Knox Creek’s Reply brief attempts to apply the Commission’s ruling during this second, “interim” period, when no economic reinstatement order was in effect, and then during the third period, when the ALJ could enter a modified order, to justify its position that an ALJ has broad discretion to modify the terms of an economic reinstatement agreement or offset amounts paid by other employers despite a miner’s opposition. Reply at 4-5. Only during this interim (second) period when the economic reinstatement order was temporarily dissolved did the Commission order the Complainant to offset his payments from Respondent against his earnings from outside employment. This offset, however, was unique to the circumstances in *North Fork*, where no order existed for a brief period following the dissolution of a previously entered order, and is not applicable here, where the parties have yet to reach an agreement at all. Furthermore, in the third time period, the Commission ordered that the original economic reinstatement agreement from the first period controlled until the parties negotiated a new agreement, which the Court could then enter as either a modified order or a new order. The ALJ was therefore not free to modify the order at the behest of one party; rather, the parties would need to arrive at a new agreement before the Court could take any subsequent action. Contrary to Knox Creek’s arguments, the scenario before the Court here is most closely akin to the first time period in *North Fork*, where an economic reinstatement order had been entered that incorporated the terms of the parties’ negotiated economic reinstatement agreement. As noted above, during this first period the Commission declined to intervene in making any monetary modifications and asserted that the parties’ agreed-upon order controlled.

Respondent’s assertion regarding the Court’s broad discretion to enter or modify an order of economic reinstatement presupposes the existence of an underlying agreement between the

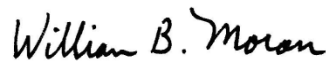
⁴ That time period involved the “interim period” between when ALJ ordered the dissolution of the TR order and when the Commission reversed the judge’s order dissolving temporary reinstatement. For that limited period of time, in applying principles of fairness, the Commission declined to impose the terms of the economic reinstatement upon the Respondent, and ordered that the Complainant offset his pay from Respondent with his outside earnings. 33 FMSHRC at 595.

parties, which here is not the case. The Commission's rulings for the second and third time periods in *North Fork* were premised upon the existence of a negotiated agreement that was entered in the first time period. The parties here have not yet reached even this preliminary level of agreement. The Commission has spoken plainly that Commission judges *do not decide the terms of economic reinstatement agreements*. The lack of an agreement does not trigger this Court's intervention. Until the parties reach an agreement on the terms of any economic reinstatement, the Court's involvement is foreclosed.

The Court would also echo the Commission's observation in *North Fork*, where it noted that "we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge." *Id.* at 593. Here the Court would note that Knox Creek does retain the option to actually reinstate Mr. Riordan at the mine. After all, it is Knox Creek that seeks to forego Mr. Riordan's labor, a fact that undercuts its objection to Riordan working elsewhere during this interval. This offer to pay could coincide with his working at the mine, which would alleviate concerns that Mr. Riordan is receiving an income from an outside employer.

In sum, the Court's broad discretion in discrimination proceedings does not encompass the authority to enter an order of temporary economic reinstatement for Mr. Riordan absent an agreement between the parties as to its terms. The make-whole principles that govern in discrimination merits rulings do not also apply in the context of temporary reinstatement, for the purpose of temporary reinstatement is to put a miner back to work. Accordingly, Respondent's Motion is therefore DENIED.

SO ORDERED.



William B. Moran
Administrative Law Judge

Distribution:

Karen M. Barefield, Office of the Associate Regional Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Tony Opegard, Esq., P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY 41858

Steve Hodges, Esq., Penn, Stuart & Eskridge, 208 E. Main Street, Abingdon, VA 24210