

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 22, 2014

SECRETARY OF LABOR, (MSHA),
on behalf of Cheryl Garcia,
Complainant,

v.

VERIS GOLD U.S.A., INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-789-DM
MSHA Case No.: WE MD 14-16

Jerritt Canyon Mill Mine
Mine ID: 26-01621

ORDER DENYING THE COMPLAINANT'S MOTION FOR RECONSIDERATION

This motion is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On July 16, 2014, I granted the Complainant's Application for Temporary Reinstatement but denied the Secretary's request to order economic reinstatement without the agreement of the Respondent. *Sec'y of Labor o/b/o Cheryl Garcia v. Veris Gold, Inc.*, 2014 WL 3725868, *11-12 (July 2014)(ALJ) ("July 16 Order"). On August 4, 2014, the Secretary subsequently filed a Discrimination Complaint on behalf of Ms. Garcia with the Commission. Cheryl Garcia Discrimination Complaint. On August 15, 2014, the Secretary filed a Motion for Reconsideration of the July 16 Order and again sought the temporary economic reinstatement of the Complainant over the Respondent's objections. *Sec'y Mot.*, 1, 8. For the reasons that follow, the Secretary's Motion to Reconsider is **DENIED**.

JURISDICTION

Pursuant to the Commission's procedural regulations, this court retained jurisdiction over the temporary reinstatement proceeding after the issuance of the July 16 Order. 29 CFR § 2700.45(e) 4. However, if a party seeks review of the temporary reinstatement order itself, Commission rules direct the party to file a Petition for Review of Temporary Reinstatement Order with the Commission within five business days after receipt of the order. 29 CFR § 2700.45(f). Instructions regarding these specific procedures for review were distributed to parties with the July 16 Order. Thirty days after the distribution of the July 16 Order, the Secretary submitted a "Motion for Reconsideration of Decision & Order Denying Temporary Economic Reinstatement for Cheryl Garcia and Supporting Brief" to this court. The Secretary did not specify the procedural basis for the "Motion for Reconsideration" before proceeding to the merits of the Complainant's argument. *Sec'y Mot.*, 1. Given the date and title of the Secretary's Motion, I find that the "Motion for Reconsideration" would ordinarily be improperly filed and time barred by 29 CFR § 2700.45(f).

However, the Secretary does allege that changes in Respondent's management personnel after the July 16 Order should move this court to order economic reinstatement on the basis of potential increased hostility at the mine. Sec'y Mot., 6. As such, I have evaluated the Secretary's argument as a Motion for Modification of the July 16 Temporary Reinstatement Order on the basis of changed circumstances rather than a reconsideration of the findings of the July 16 Order.

THE SECRETARY'S MOTION

The Secretary states that a Commission ALJ has previously ordered temporary economic reinstatement over the objection of a complainant miner when the Court could "reasonably infer" that physical reinstatement would result in workplace disruption. Sec'y Mot, 2; *Sec'y of Labor o/b/o Thurman Wayne Pruitt v. Grand Eagle Mining, Inc.*, 33 FMSHRC 1738, 1739 (July 28, 2011) (ALJ Melick). The Secretary argues from this holding that it is similarly appropriate to order economic reinstatement over the objections of the Respondent when there is evidence that the miner would suffer "intolerable harassment" in returning to work. Sec'y Mot., 3. The Secretary argues that courts outside the Commission have "overwhelmingly concluded" that situations of evident antagonism in the workplace render physical reinstatement a meaningless remedy and require front pay as the most appropriate solution. Sec'y Mot., 3 n.1(citing *Lewis v. Fed Prison Indus.* 953 F.2d 1277(11th Cir. 1992); *Prudential Federal Sav. and Loan Ass'n*, 763 F. 2d 1166, 1172-73 (10th Cir. 1985)).

The Secretary goes on to detail Ms. Garcia's allegations of instances of rude and harassing statements made by then Assistant Mill Manager Chris Jones to Ms. Garcia. Sec'y Mot., 4. The Secretary argues that as the Respondent allegedly failed to adequately respond to Ms. Garcia's complaints regarding Chris Jones, Ms. Garcia was "constructively discharged" and forced to resign to avoid continued hostility. Sec'y Mot., 5 (citing *Sec'y of Labor o/b/o Lonnie Bowling et al*, 21 FMSHRC 265, 278 (Mar. 1999)).

The Secretary additionally states that Chris Jones has recently been promoted to Mill Manager at the Jerritt Canyon Mine and that her former supervisor Jim Johnston has left the mine. Sec'y Mot., 6. The Secretary submitted affidavits from Ms. Garcia and the Secretary's counsel of record, Ms. Seema Patel, stating that Ms. Garcia suffered increased anxiety and fluctuating blood sugar levels when considering the Respondent's offer of physical reinstatement to her previous position. Garcia Aff. 2-3; Patel Aff. 2-3. The Secretary contends that Ms. Garcia's anxiety regarding potential harassment, particularly from the recently promoted Chris Jones, prevented her from returning to her previous position on a full time basis. Sec'y Mot., 7. The Secretary finally argues that the parties' inability to agree to a physical reinstatement plan and Ms. Garcia's anxiety regarding the Respondent's proposed work plan should motivate this court to order temporary economic reinstatement over the objections of the Respondent. *Id.* at 7-8.

ANALYSIS

Section 105(c)2 of the Mine Act mandates that the Commission shall, after finding that miner's discrimination complaint is non-frivolous, "order the immediate reinstatement of the minder pending final order on the complaint." 30 USC 815 (c)2. The Commission has stated

that “The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits.” *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 589,592 (Mar. 2011). As such, Commission ordered temporary economic reinstatement is not a remedy provided for or anticipated by the Mine Act.

Indeed, as noted within the July 16 Order, a Commission ALJ has previously held that “parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to.” *Sec’y of Labor o/b/o Kenneth Wilder v. Bledsoe Coal*, 33 FMSHRC 2031, 2032 (August 2011) (ALJ Gill) (citing *Sec’y of Labor v. North Fork Coal Corporation*, 33 FMSHRC 92). Similarly, it appears that the Commission has only ruled on the enforceability of economic reinstatement when all parties, including the respondent, have voluntarily agreed to the economic reinstatement and then subsequently sought modification or tolling. See *Sec’y o/b/o Gatlan v Ken American Res.*, 21 FMSHRC 1050, 1051(remanding tolling effect of company -wide layoffs on preliminary economic reinstatement agreement to ALJ); *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 590-91(ruling on requested modifications to voluntary temporary economic reinstatement plan).

However, at the request of the operator, an ALJ has ordered economic reinstatement over the objections of the complainant miner and the Secretary. *Wayne Pruitt*, 33 FMSHRC 1738-39. In concluding that returning the miner to work would result in safety risks, Judge Melick noted that the miner had conceded at the temporary reinstatement hearing that he had previously backed a front end loader into a tail roller and caused \$30,000.00 in damages. *Id.* at 1738. As such, although specific evidence regarding workplace disruption had not been presented at the temporary reinstatement hearing, the judge was able to conclude from the corroborating testimony of both parties that the miner presented a documented safety risk to himself and others. *Id.* In this case, the Respondent has not conceded any of Ms. Garcia’s discrimination allegations and has submitted an affidavit stating that Respondent’s management investigated Ms. Garcia’s allegations regarding Chris Jones and found them meritless. Ward Declaration, 3.

Nevertheless, the Secretary states that “Section 105(c) 2 of the Mine Act grants the Commission broad authority in discrimination proceedings ‘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.’” *Sec’y Mot. 2-3; Wayne Pruitt*, 33 FMSHRC 1739; 30 USC 815(c) 2. However, after reviewing the entirety of Section 105(c) 2, this court is confident the expansive range of remedies listed above applies only to a decision on the merits of a discrimination complaint itself, and is not customarily available within the temporary reinstatement proceedings:

... Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, *and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.* If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall

immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. *The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection 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 USC 815 (c) 2 (emphasis added).

Given the differing scopes of relief provided for within Section 105 (c) 2 , the language quoted by the Secretary applies only after the Commission has provided an “opportunity for a hearing”, found that a “person commit(ed) a violation of this subsection” and issued an order “based upon findings of fact.”¹ 30 USC 815(c)2. Indeed, the Commission has held that retroactive relief such as backpay and interest listed by the statute as possible remedies after the finding of “a violation” are not available at the temporary reinstatement stage. *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 592 (“The issue of backpay usually does not arise (during temporary reinstatement) since the miner is not compensated for the earlier period of time between termination and the judge’s order temporarily reinstating him or her”). Thus, as this court has not yet made the findings of fact necessary to order the expansive relief possible after a hearing on the merits, the “immediate reinstatement of the miner” to her former position remains the sole remedy directly provided for by the Mine Act at this stage. 30 USC 815(c)2.

In *Pruitt*, Judge Melick justified the decision to order temporary economic reinstatement over the miner’s objections by finding that, “providing a miner with economic reinstatement by paying full salary and benefits fulfils the policy justifications of the Act by protecting the miners’ financial well-being while he awaits trial on the merits.” *Wayne Pruitt*, 33 FMSHRC 1739. However, an order of economic reinstatement without the operator’s consent would deprive the Respondent of the labor it generally receives during temporary physical reinstatement. *See Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 592-93 (“The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits”).

Indeed, the Secretary has not presented, nor has this court identified, a single Commission case in which the operator was ordered to provide temporary economic reinstatement over its objections. As such, I find this court could only issue such an order when presented with a clear showing of extreme circumstances that would render temporary physical reinstatement an objectively meaningless remedy. *Sec’y Mot.*, 3.

¹ Section 105(c)3 of the Mine Act provides that a complainant miner may proceed on her own behalf even after the Secretary has determined that a violation has not occurred and provides for the same hearing opportunity and potential remedies as set forth in Section 105(c)2. 30 USC 815 (c)2-3.

Thus far, the Secretary has not presented any independent corroborating evidence of Ms. Garcia's allegations of workplace hostility and personal anxiety. The submitted affidavits of Ms. Garcia and her counsel are not supplemented by documentary evidence or third party affidavits.² The Respondent submitted multiple affidavits prior to the July 16 Order that rebutted Ms. Garcia's allegations of discrimination and workplace hostility. Ward Declaration, 3; Culver Declaration, 3-4. During a conference call concerning this motion, Respondent's counsel stated that they disputed Ms. Garcia's harassment allegations but reiterated that they were confident Ms. Garcia could return to work at the mine in a productive fashion. Commission precedent precludes this court from making credibility determinations or detailed findings of fact during the temporary reinstatement proceedings. *Secy of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). Thus, given the underlying dispute of fact regarding the mine's workplace environment, it would be inappropriate at this point to rule that Ms. Garcia is likely to face hostility at the Respondent's mine if she returned to her previous position. In addition to findings regarding the occurrence of workplace harassment, this court would be required to determine whether or not that alleged hostility was likely to cause the anxiety alleged by Ms. Garcia and whether or not that anxiety was significant enough to prevent Ms. Garcia from returning to work. It would again be inappropriate to make these sorts of fact and credibility dependent determinations on the basis of the Complainant's self-supporting affidavits. Indeed, any attempt to make a detailed finding of fact at this preliminary stage could prejudice either or both of the parties' positions at the merits proceedings.

The Secretary's argument that courts outside the Commission have awarded front pay in lieu of actual reinstatement ignores the procedural stance of the cited cases. *Lewis v. Fed Ped Prison Indus.* 953 F. 2d at 1280-81 (awarding front pay in constructive discharge case after a hearing on the merits that included testimony from corroborating doctor); *Prudential Federal Sav. And Loan Ass'n*, 763 F. 2d at 1172-73 (awarding front pay after a jury trial when respondent directed explicit hostility towards the plaintiff during the trial). Only after full hearings on the merits did these courts determine that the plaintiffs had successfully met the evidentiary standard necessary to demonstrate constructive discharge and award front pay *Id.* As such, the Complainant's request for an administrative order of economic reinstatement *prior* to a hearing on the merits lacks authoritative support.³

Finally, the Secretary has not produced evidence that the Respondent acted in bad faith regarding the proposed physical reinstatement plan. The Respondent made Ms. Garcia an initial offer of full time reinstatement to her previous position as an Industrial Hygienist with full benefits on July 22, 2014. Garcia Aff., 2. Ms. Garcia did not accept this offer and requested that she be allowed to work part-time weekend shifts on a 4-week trial basis while she

² In noting the lack of independent corroboration for Ms. Garcia's allegations, I am not suggesting that independent documentation would be likely to alter my ruling in this matter. Indeed as stated above, a fact finding inquiry during the temporary reinstatement proceeding would normally be improper. I have noted the lack of independent corroboration only to detail this court's inability to make the findings necessary to impose economic reinstatement upon the Respondent.

³ The *Lewis* court itself indicated that, even after a hearing on the merits, the judicial or administrative award of front pay was highly discretionary, "Front pay remains a special remedy, warranted only by egregious circumstances. Although we have listed several factors that may prompt our resort to this sort of relief, we emphasize that in many cases the remedy of reinstatement will continue to suffice despite the presence of any one of these factors....Not every claim, however legitimate, will produce circumstances which so clearly mandate the remedy of front pay." *Lewis v. Fed Ped Prison Indus.* 953 F. 2d 1281.

continued to work at her current job. *Id.* at 3. The Respondent rejected Ms. Garcia's counter-offer and insisted that she return to work on a full time basis by Aug 4, 2014. *Id.* at 4. By offering to reinstate Ms. Garcia to her previous full-time position with benefits the Respondent clearly attempted to comply with this court's July 16 Order. During a teleconference, Respondent's counsel explained that although the Respondent was willing to reinstate Ms. Garcia to her previous position in order to comply with the July 16 Order, it did not have the financial ability to create a separate part-time position in order to satisfy Ms. Garcia's counteroffer. I find the Respondent's explanation of their position reasonable and absent of any apparent malice towards Ms. Garcia. Section 105(c) 2 of the Mine Act clearly empowers the Commission to reinstate a miner to her previous position after finding that her discrimination complaint is non-frivolous. However, this court is unaware of any authority that requires an operator to agree to, or the Commission to impose, temporary reinstatement terms that differ significantly from the work agreement in place prior to the discrimination claim.

ORDER

For the reasons stated above, the Secretary's Motion to Reconsider is **DENIED**. The parties are directed to conduct good faith negotiations on the standing temporary reinstatement order in conjunction with settlement efforts on the associated merits proceedings. The parties shall provide a status update on these matters to this court no later than September 24, 2014.



David P. Simonton
Administrative Law Judge

Distribution: (First Class U.S. Mail)

Seema Patel, U.S. Department of Labor, Office of the Solicitor
90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Peter Gould, Squire Patton Boggs (US) LLP
1801 California Street Suite, 4900 Denver, CO 80202