

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

November 26, 2008

SECRETARY OF LABOR, MSHA, on	:	TEMPORARY REINSTATEMENT
behalf of PETER J. PHILLIPS,	:	PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2008-1057-DM
	:	RM MD 2008-05
	:	
A & S CONSTRUCTION CO.,	:	Mine ID: 05-04875
Respondent	:	Portable Crusher No. 4

Appearances: Thomas A. Paige, Esq., U.S. Department of Labor, Arlington, Virginia,
on behalf of the Complainant
Richard P. Ranson, Esq., Ranson & Kane, P.C., Colorado Springs, Colorado,
on behalf of the Respondent

Before: Judge Barbour

DISSOLUTION OF ORDER OF TEMPORARY ECONOMIC REINSTATEMENT
AND
DISMISSAL OF PROCEEDING

In this proceeding arising under Section 105(c), 30 U.S.C. § 815(c), of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. § 801, *et. seq.*, the Secretary of Labor, through her Mine Safety and Health Administration (MSHA) and on behalf of Peter J. Phillips, applied for the temporary reinstatement of Mr. Phillips, an employee of A&S Construction Company (A&S). Mr. Phillips was discharged by A&S on September 13, 2007. On February 11, 2008, Mr. Phillips filed a complaint with MSHA alleging his discharge was motivated by protected safety complaints. MSHA conducted a preliminary special investigation of Mr. Phillips' complaint and determined it was not frivolous. The finding resulted in the Secretary's temporary reinstatement application. The Commission received the application on May 22, 2008.

On May 23, 2008, the application was assigned to me. On May 27, 2008, I scheduled the matter to be heard on June 4, in Pueblo, Colorado. Subsequently, counsels conferred and reached an agreement to economically reinstate Mr. Phillips. They further agreed a hearing on the Secretary's application was unnecessary. Therefore, the hearing was canceled, and on June 6, 2006, I ordered Mr. Phillips' economic reinstatement "at the same rate of pay, with the same benefits, and for the same work period he held prior to his discharge." Order of Temporary Economic Reinstatement. As part of the economic reinstatement, the parties and I agreed the Secretary would promptly investigate Mr. Phillips' underlying discrimination complaint and

determine whether she would bring a complaint of discrimination on behalf of Mr. Phillips under section 105(c)(2) of the Act. (A&S was, of course, obligated to pay Mr. Phillips while the investigation was ongoing.) I requested then counsel for the Secretary, James Crawford, to advise me periodically of the status of the investigation. Pursuant to my request, on July 2, 2008, counsel stated a final determination was anticipated “within the next few weeks to a month, if not sooner.” Secretary’s Update on Merits Determination (Update) 1-2. On August 1, 2008, counsel stated a final determination “will be made within the next two weeks.” Update 1-2. On September 10, 2008, counsel stated a determination would be made “as soon as possible.” Update 2. Following the September update, Mr. Crawford retired, and the matter was transferred to Thomas Paige.

On November 10, 2008, the Commission received a notice from Mr. Paige that the Secretary did not intend to proceed under Section 105(c)(2) of the Act on Mr. Phillips’ behalf. Mr. Paige further stated Mr. Phillips had been notified by letter dated November 3, 2008, of the Secretary’s decision and of his right to file a complaint on his own behalf under Section 105(c)(3). 30 U.S.C. § 815(c)(3). Counsel also stated:

[I]t is the Secretary’s position that the . . . Order of Temporary Economic Reinstatement . . . remains in effect until there is a final order of the Commission disposing of Mr. Phillips’s case, and that such order cannot be dissolved before that time without violating the clear language of the statute. The Order of Temporary Economic Reinstatement must remain in effect if Mr. Phillips decides to proceed on his own behalf. [T]he Secretary . . . will oppose any motion . . . [to dismiss] the order of temporary [economic] reinstatement prior to the date the complaint is finally disposed of.

Notice of the Secretary’s Intent Not to Proceed 1-2. Attached to the Secretary’s notice was the November 3 letter to Mr. Phillips in which the Assistant Director of MSHA’s Technical Compliance and Investigation Office advised Mr. Phillips MSHA had “determined that facts disclosed during the investigation do not constitute a violation of Section 105(c)” and “[t]herefore, discrimination, within the confines of the Mine Act, did not occur.” *Id.*, Exh. A.

On November 10, the Commission also received a request from A&S to schedule a hearing to determine, in view of the Secretary’s conclusion Mr. Phillips’ termination did not violate the Act, whether Mr. Phillips’ complaint was frivolously brought and/or whether the reinstatement proceeding should be dismissed and the order of temporary economic reinstatement rescinded. Respondent’s Request to Set Matter for Hearing [and] Motion to Dismiss.

On November 14, following discussions with counsels and with the agreement of Mr.

Phillips, I scheduled a telephonic oral argument on A&S's request and motion. I stated in part, "At issue is the effect of the Secretary's Notice of Intent Not to Proceed Under Section 105(c)(2) of the Act on the . . . Order of Temporary Economic Reinstatement." Order Scheduling Oral Argument. Because of the need for a speedy resolution of the issue, I advised the parties I would orally rule on the request and motion and, once I received the transcript, I would confirm the ruling in writing. I added, "The written ruling will be the basis for any appeal to the Commission." *Id.*

On November 18, 2008, the argument went forward as scheduled. Counsels and Mr. Phillips participated. At the conclusion of the argument I held as follows:

The fundamental issue before me is the continuing viability of an order of temporary reinstatement once the Secretary has decided the facts under[ly]ing . . . [a] miner's complaint . . . [do] not constitute a violation of Section 105(d). With all due respect . . . , I disagree with the Secretary's position [– as ably argued by her counsel –] that the [O]rder of Temporary Economic Reinstatement must remain in effect if Mr. Phillips decides to proceed on his own behalf.

As I read the Act, the authority to issue an order of temporary reinstatement arises under Section 105(c)(2)[,] [which] states . . . [that an] order of temporary reinstatement remains in effect "pending final order on the complaint." [In my view] the complaint referenced in this quote is the miner's complaint as made to and investigated by the Secretary. [A] ["final order["] on the miner's complaint is reached when the Secretary [advises] the miner[,], as she has done in this proceeding[,], that "Your complaint of discrimination under Section 105(c) has been investigated. A careful review of the information gathered during the investigation has been made. On the basis of that record, MSHA has determined that facts disclosed during the investigation . . . [do] not constitute a violation of section 105(c)."

With regard to the complaint the miner has filed with the Secretary[, w]hat could be more final? The Secretary's involvement with the complaint has ended. The temporary reinstatement proceeding has ended. [As the Act states,][i]f the miner wishes to proceed on his [or her] own behalf, under Section 105(c)(3) . . . [h]e [or she] must "file an action on his [or her] own behalf before the Commission." It is worth noting Section 105(c)(2), which authorizes temporary reinstatement, speaks to the Secretary. Section 105(c)(3),

which does not authorize temporary reinstatement, speaks to the miner. While I am cognizant of counsel for the Secretary's argument that I must defer to the Secretary's interpretation of Section 105(c)(2) and Section 105(c)(3), I do not find the[se] provisions ambiguous [and therefore obligating deference]. To me, they clearly stand for the proposition that an order of temporary reinstatement must end once the Secretary decides not to proceed.

The Commission's rules in this regard [t]rack the statute. Under . . . Rule 40(b), for a miner to proceed on . . . [his or her] own behalf, a new complaint must be filed This complaint is a new action, one separate from the Secretary's application for temporary reinstatement. Not only do the Act and Commission's rules treat miner's complaints and the Secretary's application for temporary reinstatement as separate and distinct from the miner's complaint on his [or her] own behalf under Section 105(c)(3), so does the Commission[']s docket office, which long has docketed actions for temporary reinstatement separate from actions brought under Section 105(c)(3). Moreover, and more importantly, the remedies available to the miner under Section 105(c)(3) do not, and I emphasize "not", include temporary reinstatement. Rather, if he or she prevails, the miner is made economically whole in part by back pay and interest.

The remedial provisions in Section 105(c)(2) and [Section] 105(c)(3) represent a balancing . . . of interests . . . [underlying] [C]ongress's desire to encourage [miners] to actively participate in furthering health and safety under the Act. Congress recognized [miners] have an interest in being protected against possible discrimination they may suffer as a result of . . . activities on behalf of health[,] . . . safety and enforcement[.]. . . Congress also recognize[d] . . . operators have an interest . . . [in] control[ling] their workforce. By providing temporary reinstatement under Section 105(c)(2), [C]ongress determined . . . operators should bear the greater burden while the Secretary concludes whether, in her view, a miner's complaint of discrimination has [merit]. But [C]ongress also recognize[d] the operator's interest in controlling its workforce by making reinstatement [and its resulting burden] temporary[.] [A]s the 11th Circuit

noted, deprivation of an employer's right to control the makeup of its . . . workforce is ["only a] *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or [by] a decision on the merits in the employe[r]'s favor.["] . . . [*Jim Walter Resources v. Federal Mine Safety and Health Review Commission*, 920 F.2d738, 748 n. 11 (emphasis in original)]. It seems clear to me the Court believed the temporary nature of reinstatement under Section 105(c)(2) meant . . . reinstatement could end with, as the Court stated, "[t]he Secretary's decision not to bring a formal complaint" [*Id.*], and the right of the operator to control its workforce could be returned [to the operator] as the miner contemplated whether or not to proceed on his or her own behalf under Section 105(c)(3).

For these reasons, and given the Secretary's conclusion . . . [based on] the information gathered during her investigation of Mr. Phillips' complaint . . . [that Mr. Phillips suffered] no discrimination within the confines of the Act[,] I conclude the [O]rder of Temporary [Economic] Reinstatement entered on June 5, 2008, should be dissolved and this matter should be dismissed.

I will dissolve the order and dismiss this proceeding in a written order confirming this . . . [oral ruling]. Until such written order is issued, the order of temporary economic reinstatement will remain in effect.

Tr. 25-30 (editorial changes added).

ORDER

For the reasons stated above, the Order of Temporary Economic Reinstatement entered by me on June 6, 2008, **IS DISSOLVED** and this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail & by Facsimile)

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