FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

December 17, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BOBBY D. SMITH, Complainant	:	**TEMPORARY REINSTATEMENT PROCEEDING**
	:	Docket No. CENT 2003-247-D
	:	Sebastian County Coal Mine
v.	:	Mine I.D. 03-01736
MID-AMERICA MINING AND DEVELOPMENT, INC., and its Successors, Respondent	:	**DISCRIMINATION PROCEEDING**
	:	Docket No. CENT 2003-308-D
	:	Sebastian County Coal Mine
	:	Mine I.D. 03-01736

ORDER REOPENING TEMPORARY REINSTATEMENT PROCEEDING

The Secretary of Labor filed an application for temporary reinstatement on behalf of Bobby D. Smith against Mid-America Mining and Development, Inc., and its successors, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Act"). The parties filed an Agreed Order of Temporary Reinstatement that disposed of all issues in the temporary reinstatement case. On July 1, 2003, I issued a decision approving the parties' proposed settlement, which included the economic reinstatement of Mr. Smith.

On August 18, 2003, the Secretary filed her complaint of discrimination on behalf of Smith against Respondent under section 105(c)(2) of the Act. This discrimination case has been set for hearing and the parties are conducting discovery.

On October 27, 2003, Respondent filed a "Motion to Amend Order Concerning Temporary Reinstatement Benefits and Motion to Expedite Proceedings on the Motion." In the motion, Respondent states that it closed its mine, laid off most of its personnel including Smith's supervisor, and retained only five hourly employees to answer the phones, provide security, and operate underground pumps. Respondent states that, had Smith been working at the mine, he would have been laid off. As a consequence, Respondent seeks to have my order of temporary reinstatement amended and asks that Smith's economic reinstatement be terminated.

Complainant opposes Respondent's motion because I do not have jurisdiction to dissolve the order of temporary reinstatement, Respondent should be required to abide by its settlement of the temporary reinstatement case, and Smith would have continued his employment with Respondent following the September layoff if he had not filed the discrimination complaint.

Respondent operates an underground coal mine in Sebastian County, Arkansas. Smith was employed by Respondent as the general mine manager until he was separated from his employment in May 2003. Complainant alleges that he was terminated for engaging in protected activities. Respondent denies this allegation. Before the September 2003 layoff, the mine employed about 11 people. Respondent alleges that only five people are working at the mine at the present time, all of whom are hourly employees who are paid at a rate of $19 an hour. Prior to his termination, Smith was earning about $110,000 a year.

Respondent maintains that the mine was shut down in September for safety and financial reasons. An independent safety consultant made several recommendations that the mine owner adopted. First, because it is likely that old coal mine workings will be encountered as the mine is developed, a program of drilling must be initiated to locate the old workings. Second, the mine's electrical system needs to be reworked. As a consequence, Respondent anticipates that the mine will be closed at least through the spring of 2004 if not for a longer period of time. Respondent discussed this closure with the MSHA District 9 Manager.

Respondent contends that the mine was closed for legitimate reasons that have nothing to do with Smith's discrimination complaint and that Smith would have been laid off along with all other management personnel. As a consequence, it believes that it should not have to continue Smith's economic reinstatement. Under the circumstances, Smith should not be in a better position than he would have been had he not filed his discrimination complaint. In addition, Respondent contends that Smith would have been laid off if Respondent had agreed to actually reinstate him in response to his application for temporary reinstatement.

I hold that I have jurisdiction to amend my July 1, 2003, order of temporary reinstatement. In *Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (April 2001), the Commission held that the administrative law judge retains jurisdiction over a temporary reinstatement proceeding during the investigation of the miner's complaint. In addition, the Commission stated that the judge does not surrender "any such jurisdiction after the Secretary files a complaint with the Commission on behalf of a miner." *Id.* at 389. The Commission concluded that after "a discrimination complaint is filed with the Commission, it is solely within the judge's discretion to entertain any motions made to amend, modify, enforce, or otherwise address his underlying order of temporary reinstatement." *Id.* Consequently, I reject the Complainant's argument that I lack jurisdiction to consider Respondent's motion.

In addition, I hold that it is appropriate to amend an order of temporary reinstatement under the appropriate circumstances. Respondent alleges that it agreed to settle the temporary reinstatement case because of the liberal standard applied in such cases. Under the settlement,

Respondent agreed to pay Smith $8,461 per month, to pay his health insurance premiums, and to make the monthly payment on his wife's vehicle. Respondent states that circumstances have changed so dramatically that reopening the temporary reinstatement case is warranted. I find that it is appropriate to reopen my order of temporary reinstatement in this case to consider the issues raised by Respondent. For that reason, I reopen the case solely to consider whether Respondent's agreement to pay Smith the amounts listed above should be amended or eliminated in light of changed circumstances. I am not reopening the case to reconsider whether Smith's complaint of discrimination was frivolously brought.

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*").

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "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." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

In *Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612, 620 (Oct. 2003), *aff'd* 25 FMSHRC 585 (Oct. 2003), Kennecott argued that, because Mr. Ondreako was let go as a result of a layoff, there was no position available for him at the mine and, if required to reinstate him, the company would be forced to lay off someone else. I held that this argument could be made any time an application for temporary reinstatement is granted following a layoff and I ordered the temporary reinstatement of Ondreako. I held that when a miner's complaint is determined to be non-frivolous, the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. *Id.* In enacting the temporary reinstatement provision, Congress determined that the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring a miner, who may prevail, to go through the discrimination proceeding without income. *See also Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2290, 2302 n.12 (Nov. 1993) (ALJ).

In *Sec'y of Labor on behalf of Haynes v. Decondor Coal Company, Inc.*, 10 FMSHRC 1810, 1814 (Dec. 1988), Administrative Law Judge Weisberger ordered the temporary reinstatement of Mr. Haynes but the judge did not reinstate him to his former position because his job had been eliminated due to a layoff "necessitated by business reasons." *Id.* The judge

reasoned that to do so "would be a windfall to Haynes and would clearly go beyond Congressional intent." *Id.* Instead, the judge ordered the respondent to immediately reinstate Haynes once any position became available that he was qualified for by reason of his training or work experience. *Id.*

Respondent's motion to amend my order of temporary reinstatement and the Complainant's response raise many factual issues that may be impossible to resolve without a hearing, unless the parties can stipulate to key facts. The mine in the *Ondreako* case was large and other employees operated heavy equipment along with Ondreako. Mr. Ondreako alleged that he was included in the layoff because of his protected activities. In the present case, Smith was the only general mine manager and the layoff was a separate event. It is not clear whether Respondent, at the time of the September 2003 layoff, would have (1) retained Smith as the general mine manager; (2) offered Smith a lower paying position; (3) transferred Smith to another facility; or (4) laid Smith off along with his supervisor. It may be impossible to know the answer to these questions.

One way to look at the issue raised by Respondent's motion is to consider what remedy would be appropriate had Respondent laid off all but five of its employees after Smith's separation before the application for temporary reinstatement had been filed. Respondent would likely argue that, under these circumstances, Smith should not be reinstated as the general mine manager. Complainant would likely argue that any adverse action taken against Smith during the layoff would have been an additional indication of discriminatory animus. The parties should understand that by reopening the temporary reinstatement case to consider Respondent's motion, I have not determined that the economic reinstatement that I granted Smith in my order of July 1, 2003, should be modified or revoked. I am reopening the case solely to consider this issue. The burden of persuasion lies with Respondent because it is seeking to modify or set aside the agreed upon settlement. Respondent will need to balance the cost of trying to meet this burden of persuasion at a hearing versus the cost of continuing Smith's economic reinstatement.

For the reasons discussed above, the temporary reinstatement proceeding is **REOPENED** to consider Respondent's motion and Complainant's response. The parties shall schedule a conference call with me to discuss the issues raised by the motion and response and to discuss other issues that may have emerged since the motion and response were filed. The parties should be prepared to discuss potential hearing dates in the event I determine that a hearing is necessary.

Richard W. Manning
Administrative Law Judge

Distribution:

Robert C. Beal, Esq., Office of the Solicitor, U.S. Department of Labor, 525 S. Griffin St., Suite 501, Dallas, TX 75202-5036 (Fax and First Class Mail)

Mindy G. Barfield, Esq., Dinsmore & Shohl, 250 W. Main Street, Suite 1400, Lexington, KY 40507-1726 (Fax and First Class Mail)

Charles W. Newcom, Esq., Sherman & Howard L.L.C., 633 Seventeenth Street, Suite 3000, Denver, CO 80202-3622 (Fax and First Class Mail)

RWM