FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 13, 2004

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROBERT H. KINNAMAN,	:	Docket No. WEST 2003-402-DM
Complainant	:	MSHA No. WE MD 03-10
	:	
v.	:	3M Corona Plant
	:	
3M CORP.,	:	Mine I.D. 04-00191
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO AMEND TEMPORARY REINSTATEMENT ORDER

On or about August 25, 2003, the Secretary of Labor filed an application for temporary reinstatement on behalf of Robert H. Kinnaman against 3M Corp. under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Act"). On September 18, 2003, I approved the settlement reached by the parties. In the settlement, Respondent agreed to economically reinstate Kinnaman at his regular rate of pay for 40 hours a week, to pay him for his average overtime hours, and to continue his benefits.

On April 16, 2004, Respondent filed a motion asking me to reopen this case on the basis of changed circumstances, as described below. Respondent also requests that I expedite my consideration of the motion. Although I approved the parties' proposed settlement, I retain jurisdiction over this proceeding to consider Respondent's motion. *See Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (April 2001). On May 5, 2004, the Secretary filed an opposition to the motion. For the reasons set forth below, the motion is denied.

I. RESPONDENT'S MOTION AND THE SECRETARY'S OPPOSITION

In its motion, Respondent stated that it recently learned that Kinnaman has been pursuing permanent disability benefits under the California Workers' Compensation law based on an injury he suffered in July 2002. It appears that Kinnaman's right hand was injured in July 2002 when he and another worker were moving a piece of heavy equipment with a crane. Apparently, when they set the equipment down in the work area, part of Kinnaman's right hand was injured. (Motion, Ex. 3, p. 2). Surgery was performed on his little finger and he was off work for a few months. He subsequently returned to his regular duties at the Corona Plant. On January 15, 2004, a workers' compensation medical examiner, who is a physician, found Kinnaman's condition to be "permanent and stationary" and he placed Kinnaman under work restrictions.

Among other conditions, the examination revealed that "there was very little movement in the proximal interphalangeal joint" and Kinnaman could not "make a full grip with his right hand." *Id.* at p. 7. The medical examiner precluded Kinnaman from "repetitive gripping, grasping and repetitive manipulation" with his right hand. *Id.* at p. 8. The examiner further stated that, if the employer is unable to accommodate the work restriction, then Kinnaman would be eligible for vocational rehabilitation. *Id.*

By letter dated February 18, 2004, Kinnaman was notified by his workers' compensation provider that he was eligible for permanent disability benefits as a result of this injury effective November 20, 2003, the date he was examined by the medical examiner. (Motion, Ex. 4). It appears that Kinnaman is entitled to workers' compensation payments of $160 per week until a total amount of $6,500 has been reached. *Id.*

Respondent contends that the examiner's restrictions cannot be accommodated. It states that the job of Maintenance Mechanic requires the ability to use both hands repetitively while lifting or working on heavy objects. As a consequence, Respondent argues that Kinnaman is physically unable to perform the duties of his position of Maintenance Mechanic. Respondent maintains that, by receiving workers' compensation benefits in addition to his pay under the economic reinstatement settlement, Kinnaman is earning more money than he would if he were still working at the plant, thereby unjustly enriching him. It states that if Kinnaman were working at the plant, he would have been placed on a medical leave of absence without pay effective January 15, 2004, as a result of the permanent disability determination.

Respondent asks that my decision approving settlement dated September 18, 2003, be modified to eliminate all pay and benefits for Kinnaman, effective January 15, 2004, except those benefits he would have been entitled to if placed on a medical leave of absence on that date. Respondent also asks that Kinnaman be required to reimburse Respondent for all monies it paid him since that date because of his failure to inform Respondent of the medical examiner's findings and the status of his workers' compensation claim.

The Secretary maintains that there is no authority to support Respondent's assertion that Kinnaman is not entitled to receive $6,500 from workers' compensation while receiving his earnings under my order approving temporary reinstatement. She also contends that there is no support for Respondent's claim that Kinnaman could not return to his regular duties at the plant with work restrictions. The record shows that he worked for Respondent as a Maintenance Mechanic from October 12, 2002, after returning from his surgery, until June 30, 2003, when he was separated from his employment. The Secretary states that, because the work restrictions are so minimal, there is no basis for Respondent's assertion that they could not be accommodated. She observes that if the motion is granted, Kinnaman would only have the $6,500 workers' compensation benefits to live on during the pendency of the underlying discrimination case.[1]

[1] The underlying discrimination case was filed by the Secretary with the Commission in April 2004 and was assigned to me on May 3, 2004. *Sec'y of Labor on behalf of Kinnaman et al.*

The Secretary maintains that, if a doctor determines that an employee's injury is permanent and that it will not improve with additional care (*i.e.*, stationary), he is entitled to benefits. These benefits are not an income substitute but are "to compensate the injured worker for the permanent damage suffered as a result of the industrial injury." (S. Opposition, 3). Thus, the Secretary argues that permanent disability benefits are analogous to a personal injury award in a tort claim. Under California law, an injured employee does not have to be out of work to receive permanent disability benefits. Once an injured employee returns to work, he is entitled to his disability benefits as well as the wages he earns.

The Secretary also argues that there is no evidence that Respondent could not accommodate Kinnaman's work restrictions. The work restrictions are rather moderate. Kinnaman is left handed and he worked at his regular job for over eight months before he was separated from his employment at the plant.

Finally, the Secretary contends that granting Respondent's motion would defeat the underlying purpose of temporary reinstatement because Kinnaman's income would be significantly reduced. A miner should not be forced to endure a reduction of income while his discrimination complaint is being litigated.

II. ANALYSIS

I agree with the arguments presented by the Secretary. Congress enacted the temporary reinstatement provision of section 105(c) because "complaining miners may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of their discrimination complaint." (S. Rep. 95-181, at 37, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978)). It would be unfair to Kinnaman to suffer a reduction in income because he has a permanent partial disability. Indeed, if the motion were granted, Respondent would receive a windfall because it would no longer be required to pay Kinnaman his wages as Respondent committed to in the parties' "Settlement Agreement and Motion for Temporary Reinstatement."

The workers' compensation payments are to compensate him for his disability, which appears to be a loss of 30% of the use of his right hand. (S. Opposition, 3). "Temporary" disability benefits serve as a wage replacement when an employee is injured and cannot return to work. These benefits terminate when an employee is able to return to work, with or without restrictions. "Permanent" disability benefits are available only after a physician has certified that an employee's injury is permanent and stationary. These benefits are not an earnings substitute; rather they compensate the individual for the impairment of function after maximum recovery from the industrial accident. *See, Calif. Dept. of Rehab. v. Workers' Comp. Appeals Bd.*, 70 P.3d 1076, 1081-83 (2003). In this instance, the physician determined that Kinnaman could continue

working with certain restrictions. Respondent should not enjoy a windfall as a result of Kinnaman's partial disability and Kinnaman should not be required to suffer a loss of income.

It is also important to consider the fact that Respondent voluntarily agreed to economically reinstate Kinnaman. Although I have the authority to reopen this case and modify my decision approving the parties' settlement, I believe that such modifications should be made only in exigent circumstances. Respondent has not demonstrated a compelling need to modify the parties' settlement. Respondent argues that, if Kinnaman were working at the plant, it would not be able to accommodate his work restrictions. Respondent's argument is simply a bald assertion without any evidence to support it. More importantly, even if Respondent's assertion is true, it is largely irrelevant. Kinnaman was not working at the plant because he was receiving economic reinstatement as agreed to by the Respondent and his income should not be reduced while the underlying discrimination claim is adjudicated. Reducing his income would defeat the purpose of the temporary reinstatement provisions of section 105(c).

Although unemployment benefits are not entirely analogous, it is interesting to note that the Commission has held that an employer is not entitled to offset unemployment benefits that an employee has received from a backpay award in a discrimination case. The Commission originally held that unemployment benefits should be deducted from backpay awards. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (April 1993). Commissioner Backley dissented from that part of the decision. 15 FMSHRC 621-26. In *Sec'y of Labor on behalf of Poddy v. Tanglewood Energy, Inc.*, a majority of the Commission reversed itself and adopted the reasoning of Commissioner Backley in *Essroc*. 18 FMSHRC 1315, 1325 (Aug. 1996).

For the reasons set forth above, the motion of Respondent to reopen this temporary reinstatement proceeding to modify my decision approving settlement is **DENIED**. I expect the parties to proceed expeditiously in the underlying discrimination case. Discovery shall be initiated and completed as quickly as possible and settlement discussions shall be initiated. As I stated in my prehearing order, the parties shall initiate a conference call in that case on or before June 3, 2004.

Richard W. Manning
Administrative Law Judge

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