FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 22, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O ROBERT BAUMANN	:	
v.	:	Docket No. CENT 2023-0251-DM
MOSENECAMANUFACTURER, LLC D/B/A AMERICAN TRIPOLI	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

ORDER

BY: Jordan, Chair; Baker and Marvit, Commissioners

This proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act" or "Act").[1] On June 26, 2024, the Commission received from MOSenecaManufacturer, LLC *d/b/a* American Tripoli ("American Tripoli") a motion to stay enforcement of the Administrative Law Judge's May 23, 2024 decision awarding backpay after finding that the operator had discriminated against miner Robert

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. 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.

Baumann in violation of section 105(c) of the Mine Act. For the reasons that follow, we deny the operator's motion.

I.

Factual and Procedural Background

At the beginning of 2023, miner Robert Baumann worked at the MOSenecaMfr LLC mine. In March 2023, he was elected miner representative. On April 11-12, 2023, Complainant Baumann walked around with MSHA during an inspection, which yielded a section 104(b) withdrawal order. On April 17, 2023, American Tripoli terminated Baumann's employment. After Baumann's termination, he was unemployed for 62 days and collected unemployment benefits. ALJ Dec. at 46, n.34. Baumann has been employed with Cherokee County Road and Bridge since July 24, 2023. Sec'y Post Hrg. Br. at 29.

On April 25, 2023, Complainant Baumann filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") and the Secretary of Labor brought a discrimination case on Baumann's behalf alleging discrimination and interference. A hearing was held by a Commission Administrative Law Judge, and on May 23, 2024, the Judge issued a decision finding that American Tripoli had discriminated against Baumann in violation of section 105(c) of the Mine Act. The Judge ordered that American Tripoli pay a civil penalty in the amount of $15,000.00 for the discrimination violation and $17,500.00 for the interference violation. ALJ Dec. at 50. He also awarded backpay and interest to Baumann in the amount of $10,552 plus interest accrued to the actual date of payment. ALJ Dec. at 51.

On June 18, 2024, the Commission ordered *sua sponte* review on whether the Judge's decision is contrary to law regarding the meanings and applications of the "discrimination" and "interference" provisions in complaints brought pursuant to section 105(c) of the Mine Act, and whether the provisions are ambiguous and deserving of deference to the Secretary's interpretation. Three days later, American Tripoli filed a petition for discretionary review challenging the Judge's findings of discrimination and interference as well as the Judge's award of backpay as arbitrary and capricious. On June 26, American Tripoli filed this motion to stay enforcement of the backpay award after MSHA notified it that if it did not pay the ordered backpay, it would issue a citation or order against the operator that could result in closure of the mine.[2] The Commission granted review of the operator's petition on June 27.

[2] American Tripoli seeks a stay of enforcement of the backpay only because the Secretary is not seeking immediate enforcement of the civil penalty. A.T. Mot. at 2; Sec'y Resp. at 2, n.2.

II.

Disposition

American Tripoli argues that under section 113(d)(1) of the Mine Act, it is not required to make payment to Mr. Baumann as ordered by the Judge because the decision is currently on appeal and has not become a final order of the Commission.[3] The Secretary responds that an operator must comply with an order issued under the Mine Act regardless of whether it is final. She asserts that: "The philosophy of review of . . . the [Mine] Act[] is that operators are to comply with administrative orders first and litigate their merits later." *Eastern Assoc. Coal Co*., 2 FMSHRC 2467, 2471 n.6 (Sept. 1980) (discussing orders issued by MSHA). The Secretary notes that section 104(a) empowers her to issue a citation for non-compliance with an order—not a "final" order only. 30 U.S.C. 814(a).

In *Secretary on behalf of Price and Vacha v. Jim Walter Res., Inc*., 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must make an adequate showing with respect to the four factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) a likelihood that the moving party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *See also UMWA on behalf of Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013).

The Commission made clear that a stay constitutes "extraordinary relief." *Id*.; *see also W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co*., 18 FMSHRC 1756, 1757 (Oct. 1996). Where a probability of success on the merits is established, an inadequate showing with regard to the other three factors nevertheless still prevents the grant of a stay pending review. *Virginia Petroleum*, 259 F.2d at 926; *see also Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812-13 (Apr. 2013).

As with all Commission cases considering a motion for stay, requests for a stay of a Judge's award of monetary damages pending appeal of a section 105(c) merits' decision are considered on a case-by-case basis and are also analyzed under *Virginia Petroleum*. *See UMWA on behalf of Franks & Hoy*, 35 FMSHRC at 2374 (denying motion to stay enforcement of Judge's backpay award pending appeal on the grounds that the application failed three of the four prongs of *Virginia Petroleum*);[4] *Sec'y on Behalf of McGary and Bowersox v. the Marshall*

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[3] Section 113(d)(1) of the Mine Act states that: "The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2)." 30 U.S.C. §823(d)(1).

[4] In *UMWA on behalf of Franks & Hoy*, the Commission denied the operator's motion for stay, noting that immediate payment of backpay to compensate for two miners' respective

County Coal Co., 38 FMSHRC 220, 222 (Feb. 2016) (granting stay of civil penalty award in discrimination proceeding where appeal before Commission was pending and the Secretary did not oppose and would not be prejudiced).

The legislative history of the Mine Act is clear that the anti-discrimination provisions of the Act are intended to encourage miners to "be active in matters of safety and health" and to "play an active part in the enforcement of the Act" so as to increase the effectiveness of the Act. S. Rep. No. 95-181, at 35 (1977). The remedial goal of section 105(c) is to restore the victim of illegal discrimination to the situation he would have occupied but for the discrimination." *Sec'y of Labor and UMWA v. Jim Walter Res., Inc*., 18 FMSHRC 552, 561 (Apr. 1996); *Sec'y on behalf of Dunmire and Estle v. Northern Coal Co*., 4 FMSHRC 126, 142 (Feb. 1982); *Ronald Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618 (Apr. 1990). In determining backpay, the Commission seeks to make a miner whole and return them to their status before illegal discrimination occurred.[5] *Sec'y on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2218 (Nov. 1994), *citing Meek v. Essroc Corp*., 15 FMSHRC 606, 617 (April 1993) (internal citations omitted).

A. Virginia Petroleum Test

We conclude that American Tripoli has failed to satisfy the four *Virginia Petroleum* factors.

1. Likelihood that American Tripoli Will Prevail on Appeal

American Tripoli argues that due to the number of errors committed in the Judge's decision and given the recent change in deference, there is a likelihood of success on the merits. A.T. Reply Br. at 3.

The number of alleged errors, if any, in the Judge's decision has yet to be determined. The operator cannot make a showing that there is a likelihood it will prevail by simply making a broad allegation that the ALJ made a number of errors. However, even if errors are found, it is not clear that said errors would necessarily be fatal to the Judge's ultimate finding of discrimination or his award of backpay. Moreover, the operator relies on a vague reference to a

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seven-day suspensions would "minimi[ze] the harm to miners from actions which may have been discriminatory." 23 FMSHRC at 2374-75. Accordingly, our dissenting colleagues' suggestion that the Commission only applies the *Virginia Petroleum Jobbers* factors to analyze motions to stay when an Order of Temporary Reinstatement is at issue is erroneous.

[5] Baumann obtained alternative employment relatively soon after his discharge and the Secretary did not seek the remedy of temporary reinstatement pursuant to section 105(c)(2). Had the Secretary sought an order of temporary reinstatement for the miner's non-frivolous filing of a discrimination complaint, the Mine Act would have required Baumann to be immediately reinstated to his former position at American Tripoli.

recent "change in deference," but fails to specifically identify the "change" referred to and provides no explanation as to how this change will affect the current stay factors under *Virginia Petroleum*, particularly in the context of the Mine Act.[6] This is insufficient to prove a likelihood of success on appeal. Therefore, American Tripoli fails to meet this factor.

2. Irreparable Harm to American Tripoli if Stay is Denied

American Tripoli argues that it would suffer irreparable harm because if payment is made to Mr. Baumann and this Commission reverses the decision, there is no procedural mechanism for it to recover its money. A.T. Reply Br. at 3.

The Commission has recognized that "[e]conomic loss does not, in and of itself, constitute irreparable harm." *Franks & Hoy.,* 35 FMSHRC at 2374 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying application for stay of enforcement of Judge's discrimination judgment in part because it saw no irreparable harm to operator should it prevail); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough.") (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The Commission has also noted that an operator can seek reimbursement from a complainant in the event the Commission overturns the Judge's finding of discrimination. *Franks & Hoy*, 35 FMSHRC at 2374; *see also Wisconsin Gas Co. v.*, 758 F.2d at 674, *citing Virginia Petroleum*, 259 F.2d at 925 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm."); *In re NTE Connecticut, LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022) (reasoning that "in most circumstances financial harms can be remedied through subsequent legal action.").

Courts have further held that "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co.*, 758 F.2d at 674, *citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) ("[t]he threat of being driven out of business is sufficient to establish irreparable harm.").

Here, the operator has been ordered to pay Baumann $10,552. However, case law dictates that economic loss alone is insufficient to establish irreparable harm. Additionally,

[6] We believe the operator is referring to the Supreme Court's recent decision in *Loper Bright Enterprises v. Secretary of Commerce, et al.*, 144 S.Ct. 2244, (June 28, 2024). This decision overturned the 40-years old *Chevron* doctrine, which has instructed courts to defer to a federal agency's reasonable interpretation of ambiguous statutory language where that agency is tasked with implementation or enforcement of said law, and which has also allowed courts to look to the legislative history of an ambiguous law. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

American Tripoli has not alleged that paying Baumann the $10,522 would lead to the extinction of its business. Thus, the operator has not demonstrated irreparable harm.

3. Adverse Effect on Complainant Baumann

American Tripoli implies that Baumann will suffer no adverse effect from a stay of the Judge's decision because interest will accrue on the money award while the appeal is pending, and the miner will be able to enforce his rights through MSHA-issued citations if the Judgment is not immediately satisfied once there is a final order by this Commission. A.T. Reply Br. at 4. It argues, however, that Baumann's failure to return the money and the operator's inability to recover the money through administrative remedy will adversely affect the operator. It laments that it would be forced to institute a civil suit against Baumann to attempt recovery of the money paid to him. A.T. Reply Br. at 3.

The Secretary responds that American Tripoli has not demonstrated that a stay would not adversely affect Baumann. She maintains that the miner has already been adversely affected by the operator's failure to pay him, and that it is common sense that for Baumann to continue to go unpaid is to experience an adverse effect. She asserts that the operator will suffer no lasting adverse effect without the stay, and American Tripoli can recover the money if it prevails on appeal. Sec'y Resp. Br. at 6-7.

We agree with the Secretary. The Commission has observed that "[t]he remedial goal of section 105(c) is to 'restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination.' . . . 'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" *Jim Walter Res*., 18 FMSHRC at 561, citing *Sec'y ex rel. Bailey v. Arkansas-Carbona Co*., 5 FMSHRC 2042, 2049 (Dec. 1983). Here, American Tripoli fails to put forth any substantive reason why a stay would not adversely affect Baumann at this time or why Baumann would not need his backpay award right away.

4. Public Interest

American Tripoli argues that Baumann's failure to return the money and the operator's inability to recover the money through administrative remedy is also contrary to the public's interest. A.T. Reply Br. at 3. The Secretary maintains that there is a clear public interest in protecting miners' section 105(c) rights and that Congress intended miners to play an active part in enforcement and should be encouraged to participate. She asserts that this policy is expressed, in part, by the Mine Act's remedies for discrimination, which include "back pay and interest." 30 U.S.C. 815(c)(2). The Secretary argues that deprivation of wages is sure to deter miners from exercising their rights. Sec'y Resp. Br. at 7-8.

First, American Tripoli's assertions regarding its inability to recover the backpay wages and Baumann's suspected future failure to return the money is purely speculative. Second, the operator offers no reason why a stay here would be in the public's interest. As stated by the Secretary, Congress intended miners to "play an active part in the enforcement of the Act," and

recognized that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against… discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977). Thus, we conclude that staying enforcement of the Judge's order would have a chilling effect on other miners at the operator's mine who are aware that Baumann lost his job after taking an active role in safety, contrary to the operator's instructions. Such an outcome clearly runs counter to the public's interest and Congress' intent. Consequently, American Tripoli has failed to carry its burden and show that a stay is in the public's interest.

Finally, as to the operator's argument that the Judge's decision is not enforceable because it is not a final order of the Commission under section 113(d)(1) of the Mine Act, we disagree. Interpreting the Mine Act as to require a final, fully adjudicated order on the complaint, before a Judge's order of backpay can be enforced, would be inconsistent with the expressed intent of Congress. In the Senate Report that accompanied the Mine Act, Congress recognized that "complaining miners [ ] may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Cobra Nat. Res. v. FMSHRC*, 742 F.3d 82, 84 (4th Cir. 2014). Complainant Baumann lost 62 days of employment, and a Judge has ordered that he be made whole. Staying the order would prolong any financial hardship suffered by the miner.

III.

Conclusion

Upon consideration of American Tripoli's motion and the Secretary's opposition, we conclude that American Tripoli has not sufficiently substantiated the four factors required to justify staying the Judge's decision.

Accordingly, the operator's motion for a stay is denied.

Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

Commissioners Althen and Rajkovich, dissenting:

We would find that payment of a backpay award is not due unless and until the order requiring payment becomes a final order of the Commission. Accordingly, we dissent.

A Judge's decision on the merits of a discrimination complaint is not final upon issuance. *See Sec'y on behalf of Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999). Rather, a Judge's decision "shall become a final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission." 30 U.S.C. §823(d)(1). Here, the Judge's decision has been appealed and is currently before the Commission on review. Based on the text of the Mine Act, the Judge's order has not become final, and the Commission has yet to issue a decision. The question of whether American Tripoli engaged in discrimination—and whether the complainant is therefore entitled to a backpay award— is not yet resolved.[1]

As the Secretary notes, the Commission has held that temporary reinstatement payments may be enforced even when an order is on appeal.[2] *See Sec'y ex rel. Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC 725 (Aug. 2022). However, we have also clearly established that backpay and temporary reinstatement are separate mechanisms with different underlying principles. *North Fork Coal Corp.*, 33 FMSHRC 589, 592-93 (Mar. 2011). The purpose of temporary reinstatement is to allow a miner to earn a living *while the discrimination complaint is pending*, while backpay is designed to make the miner whole *after* it has been established that discrimination occurred. *Id.* Temporary reinstatement sustains a miner *until there is a final order*, at which point any appropriate backpay comes into play. *See* 30 U.S.C. § 815(c)(2) (providing for miners to be temporarily reinstated "pending final order on the complaint").

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[1] Notably, the Secretary has agreed to delay payment of the civil penalties that the Judge assessed concurrently with the backpay award. The pending nature of the case is one reasonable explanation for the Secretary's decision not to pursue immediate payment of the ordered civil penalties.

[2] The Secretary also cites *Eastern Assoc. Coal Co.* for the general proposition that operators must "comply with administrative orders first and litigate their merits later." 2 FMSHRC 2467, 2471 n.6 (Sept. 1980). In that case, an operator challenged the validity of a section 103(f) withdrawal order after complying with the order, and a mootness argument was raised and rejected. A brief footnote finding that an operator's compliance with an order issued by MSHA did not deprive the Commission of jurisdiction is of limited precedential weight when determining if an operator must comply with a Judge's non-final backpay award.

More narrowly, the majority notes that the Commission has denied a motion to stay enforcement of a backpay award in a previous case. *UMWA on behalf of Franks & Hoy*, 35 FMSHRC 2373 (Aug. 2013). We note that the stay was initially granted on a temporary basis. Regardless, we maintain that the stay issue in that case was wrongly decided.

As a practical matter, this distinction means that any concerns regarding a miner's financial status while a merits complaint is pending should be addressed through temporary reinstatement, rather than by requiring pre-payment of a final award to which the complainant may not ultimately be entitled. Additionally, interest would accrue on the backpay award during the pendency of the appeal, so complainants who succeed on appeal are ultimately compensated for the "delay" in awaiting a final order. *See* 30 U.S.C. § 815(c)(2).

Essentially, the question before us is whether American Tripoli is required to pay the ordered backpay award prior to the Commission's resolution of the merits case on appeal. The majority concludes that payment cannot be delayed, because American Tripoli has failed to substantiate the four factors required to justify staying the Judge's decision. We dissent, not because we would find the four factors substantiated, but because the order requiring payment is not yet final.

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

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