

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

August 30, 2022

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of ALVARO SALDIVAR	:	
	:	
v.	:	Docket No. WEST 2021-0178-DM
	:	
GRIMES ROCK, INC.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

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”).¹ On August 17, 2022, the Commission received from Grimes Rock, Incorporated (“Grimes Rock”) a motion to stay the Administrative Law Judge’s June 17, 2022 order enforcing the parties’ settlement agreement for temporary

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.

economic reinstatement of miner Alvaro Saldivar. For the reasons that follow, we deny the operator's motion.²

I.

Factual and Procedural Background

Miner Alvaro Saldivar was terminated from his job at Grimes Rock in January 2021. The Secretary brought a section 105(c)(2) action on his behalf and sought temporary reinstatement. A Commission Administrative Law Judge granted the temporary reinstatement. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 287 (May 2021) (ALJ). Grimes Rock appealed, and the Commission affirmed the Judge's order on June 11, 2021. *Sec'y on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 307 (June 2021). While the appeal was pending, the parties agreed to temporary economic reinstatement, and the Judge approved the agreement on May 28, 2021. Under the agreement, because Saldivar had found work with another employer, Grimes was responsible for paying the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock. Unpublished Order at 1 (May 28, 2021). The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. In July of 2021, the Secretary filed a complaint for discrimination on Saldivar's behalf.

While the parties awaited the Judge's decision on the merits of Saldivar's discrimination complaint, Saldivar was incarcerated and unavailable for work on two occasions. During these periods, Grimes Rock's payments were tolled pursuant to Saldivar's unavailability. After Saldivar's first incarceration, Grimes filed a motion to toll or terminate temporary reinstatement, which the Judge denied. Grimes appealed the decision, and it is currently pending before the Commission.

After Saldivar was first released, around November 2021, Grimes Rock resumed making payments, but there is dispute about what was owed pursuant to the temporary reinstatement. After the miner was released the second time in May 2022, Grimes Rock did not resume making payments. On May 27, 2022, the Secretary filed with the Judge a motion to enforce temporary reinstatement, which was granted on June 17, 2022. The Judge ordered Grimes Rock "to pay Saldivar the full wages as ordered in the Reinstatement Order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC ___, slip op. at 3, No. WEST 2021-0178, 2022 WL 2290543, (June 17, 2022). Simultaneous with her order granting enforcement, the Judge issued her decision in the

² The Commission's denial of the motion to stay does not constitute a decision upon the merits of the issues currently on appeal in the Temporary Reinstatement proceeding.

merits case finding that Grimes Rock did not violate the discrimination provisions of the Mine Act and terminating temporary reinstatement as of the date of the decision.³

Grimes appealed the Judge's order granting the Secretary's motion to enforce on July 13, 2022, and the appeal is currently pending before this Commission. On August 15, 2022, MSHA issued a section 104(a) citation to Grimes for violating the Judge's order to enforce temporary reinstatement. 30 U.S.C. § 814(a). On August 17, 2022, Grimes Rock filed for immediate stay of the Judge's June 17 order granting enforcement.

II. **Disposition**

Commission Procedural Rule 45(f) provides that, with respect to an order granting temporary reinstatement, “[t]he filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances.” 29 C.F.R. § 2700.45(f); *Sec’y of Labor on behalf of Shaffer v. The Marion County Coal Co.*, 40 FMSHRC 39, 45 (Feb. 2018); *Sec’y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2386 (Oct. 2011).

In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay pending review of a temporary reinstatement decision or order 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 (D.C. Cir. 1958). These four factors are: (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. 259 F.2d at 925; *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.” 35 FMSHRC at 2374; *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).

We conclude that Grimes Rock has failed to demonstrate “extraordinary circumstances.” We, therefore, deny its motion to stay.

A. Likelihood that Grimes Rock will prevail on appeal

Grimes Rock argues that the Judge retroactively modified the parties' settlement agreement by requiring the operator to pay the full reinstatement amount after Saldivar no longer had other employment, which was more than the agreed upon amount (the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock). GR Mot. to Stay. at 6. It asserts that the Judge improperly interpreted the agreement to include implied terms that should

³ *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC ___, slip op. at 15, No. WEST 2021-0265, (June 17, 2022), 2022 WL 2290545.

only have been considered upon the Secretary's proper filing of a motion to modify the existing order. *Id.* at 6-7.

The operator's argument of retroactive modification is not sufficiently persuasive. This is especially so given the purpose of the temporary reinstatement provision, which is to put the miner, during the time he pursues his discrimination claim, in no worse a position than he was while working for the operator. *See North Fork Coal Corp.*, 33 FMSHRC 589, 597-98 (Mar. 2011). Grimes Rock provides state contract law in furtherance of its contention, but it neglects to discuss this state law in the context of the Mine Act's temporary reinstatement provision. In fact, it completely fails to offer any support from the Mine Act or mine safety case law to support its argument. GR Mot. to Stay at 6-7. For purposes of this Motion to Stay, we conclude that it was not unreasonable for all involved to assume that in the event Saldivar were no longer employed elsewhere, Grimes Rock's payments would automatically revert to the full amount under the Judge's Order, consistent with the purpose of temporary reinstatement. Thus, we conclude that the operator has not sufficiently substantiated its likelihood of prevailing.

However, even if Grimes Rock were to prevail on its argument that the Judge erred by retroactively modifying the parties' agreement, a stay is not warranted because Grimes Rock fails to establish the remaining three *Virginia Petroleum* factors. As the Commission has recognized, 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. *See Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812-13 (Apr. 2013) (citing *Virginia Petroleum*, 259 F.2d at 926).

B. Irreparable harm to Grimes Rock if Stay is denied

Grimes Rock argues that it will have no recourse to get its money back should it prevail on its appeals. GR Mot. at 7-8.⁴ This argument too must fail. "It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Virginia Petroleum*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *Rodriguez*, 35 FMSHRC at 813. Moreover, the fact that Grimes Rock ultimately prevailed in the discrimination proceeding does not change the outcome here. As we have previously stated, to accept this argument "would effectively nullify the temporary reinstatement provisions of the Mine Act." *North Fork*, 33 FMSHRC at 597. Reinstated miners often are not ultimately successful on the merits of their discrimination claims, even when their claim is brought by the Secretary pursuant to section 105(c)(2). *Id.*; *Baird v. PCS Phosphate Co.*, 33 FMSHRC 127, 129-30 (Feb. 2011). There is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the

⁴ Grimes Rock also contends that if there is no immediate stay, it will be subjected to every punishment and fine the Secretary can assert for non-compliance with an order that is before the Commission on appeal. GR Mot. to Stay at 7. However, the operator can properly challenge any citation or order before a Commission Administrative Law Judge in accordance with 30 U.S.C. § 815(a).

reinstatement order. *North Fork*, 33 FMSHRC at 597. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided. *Id.*

In this case, the operator chose to forego the services of the miner and opted for economic reinstatement instead. As the Secretary points out, had Saldivar been temporarily reinstated to his work at the mine, the operator would not have been able to recoup the wages paid for his labor. The result is the same for temporary economic reinstatement. Furthermore, we have held that “if the operator chooses to pay the miner while foregoing the miner’s labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.” *Id.* at 593.

C. Adverse effect on Miner Saldivar

Grimes Rock argues that the Commission should find that the minimal amount of time Saldivar will have to wait for the Commission to decide the pending appeals pales in comparison to the significant amount of money the operator stands to lose. GR Mot. to Stay at 8-9. However, the temporary reinstatement provision was intended to protect the miner not the operator. In enacting the Mine Act, Congress stated the essential reasoning behind the temporary reinstatement remedy: “The Committee feels that this temporary reinstatement is an essential protection for complaining miners who 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.” S. Rep. No. 95-181, at 37 (1977), 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) (“Legis. Hist.”).

Here, Mr. Saldivar was lawfully awarded temporary reinstatement by a Commission Judge under the Mine Act, while he awaited resolution of his discrimination complaint. As previously stated, the purpose of the temporary reinstatement provision is to put the miner, during the time he pursues his discrimination claim, in no worse a position than he was while working for the operator. *See North Fork*, 33 FMSHRC at 597-98. Because Saldivar has not received the full wages he would have received if he had still been working at Grimes Rock, as contemplated by the Mine Act, this Commission cannot conclude that he would not be adversely affected.

D. Public interest

Grimes Rock argues that no public interest will be served by forcing it to pay Saldivar additional wages when the Judge has already determined that the miner was properly discharged. It asserts that “[e]xtorting” \$12,533 may be in the best interest of the miner but not in the interest of the public. GR Mot. to Stay at 9.

First, the outcome of a discrimination proceeding has no bearing on the outcome of the temporary reinstatement proceeding. *See Grimes Rock*, 43 FMSHRC at 303 (“[T]he requirements for a full discrimination proceeding do not affect the ‘not frivolously brought’ standard in a temporary reinstatement case.”). This is so even after the discrimination case has been decided

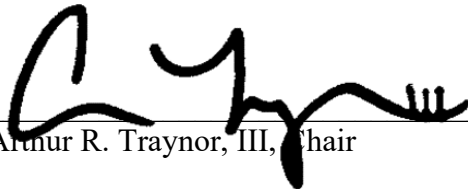
and the temporary reinstatement case remains ongoing pursuant to an order of temporary reinstatement issued prior to the dissolution of the merits case.

Second, while the operator is correct that it is in the best interest of Saldivar to allow the enforcement order to proceed, we do not agree that such outcome is not also in the public's interest. Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). The legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, Legis. Hist. at 624. There is a clear public interest in protecting miners' temporary reinstatement rights. *See also Rodriguez*, 35 FMSHRC at 814. We thus conclude that the public interest is best served by denying a stay of the temporary reinstatement order, as opposed to granting the stay, which would only serve Grimes Rock's private interest.

III.

Conclusion


Miner Saldivar's ultimate failure to succeed in his discrimination case does not invalidate his previous award for temporary reinstatement, nor does it place him outside of the scope of miners contemplated by Congress in enacting the temporary reinstatement provision. Because Grimes Rock failed to demonstrate requisite extraordinary circumstances for the reasons discussed above, we deny the operator's motion to stay.



Arthur R. Traynor, III, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

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