FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 8, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ROBERT GATLIN	: : : : :	Docket No. KENT 2009-1418-D
v.	: :	
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 31, 2009, Administrative Law Judge Margaret Miller issued an order temporarily reinstating Robert Gatlin to employment with KenAmerican Resources, Inc. ("KenAmerican") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). On September 18, 2009, the Judge issued an order clarifying and adding to the temporary reinstatement order. KenAmerican filed a petition with the Commission seeking review of the Judge's September 18 order. In the petition, KenAmerican also moves the Commission to stay the effect of the September 18 order pending the Commission's review and decision. For the reasons that follow, we grant the petition, deny the motion for stay, vacate the September 18 order, and remand the matter to the Judge for further proceedings.

I.

Factual and Procedural Background

The facts of this case are set forth in detail in the Judge's August 31 order. Mr. Gatlin was employed with KenAmerican from February 2009 until he was discharged on June 7, 2009. Mr. Gatlin was discharged on June 7 after he refused to work in a section of KenAmerican's Paradise No. 9 Mine, which he believed to be unsafe. Mr. Gatlin filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that the discharge amounted to discrimination in violation of section 105(c) of the Mine Act. The

Secretary filed an Application for Temporary Reinstatement on August 3, 2009, and the Judge held a hearing on the application on August 20, 2009.

The Judge concluded that the Secretary had made a sufficient showing of the elements of a prima facie discrimination case and that she met her burden of establishing that Mr. Gatlin's discrimination complaint had not been frivolously brought.[1] Aug. 31 Order at 8. More specifically, the Judge determined that the Secretary had presented evidence that Mr. Gatlin refused to work on June 7 because he had a good faith belief that the section he was assigned to was unsafe, and that Mr. Gatlin had expressed his concern to KenAmerican management. *Id.* at 6. The Judge further found that there was sufficient evidence that KenAmerican did not address Mr. Gatlin's concerns and terminated Mr. Gatlin for his work refusal. *Id.* at 7-8. Accordingly, the Judge ordered KenAmerican to temporarily reinstate Mr. Gatlin to his former position effective as of the date of the order, noting that the operator could economically reinstate Mr. Gatlin if it chose to do so. *Id.* at 8.

On September 11, 2009, the Secretary filed a Motion to Enforce Order of Temporary Reinstatement with the Judge. The Secretary stated in the motion that although KenAmerican had been ordered on August 31, 2009 to temporarily reinstate Mr. Gatlin, the operator had failed to do so, and was contending that Mr. Gatlin's position had been eliminated in a layoff. Mot. at 1. The Secretary asserted that KenAmerican had an obligation to reinstate Mr. Gatlin regardless of whether it was economically beneficial for it to do so. *Id.* at 2. The Secretary requested that the Judge immediately reinstate Mr. Gatlin to his former position pending the final hearing and disposition of the case. *Id.*

On September 15, KenAmerican filed an opposition to the Secretary's motion with the Judge. The operator asserted that it had not failed to reinstate Mr. Gatlin, and that it considers Mr. Gatlin reinstated as of August 31. KA Resp. to Mot. to Enforce ("KA Resp.") at 1, 2. It explained that, as it had indicated in a teleconference with the Judge and the Secretary on September 3, KenAmerican intended to offer economic reinstatement to Mr. Gatlin. *Id.* at 1. The operator stated that while it was in the process of finalizing a Joint Motion to Approve Economic Reinstatement Agreement with the Secretary, an independent management decision was made to idle KenAmerican operations with a massive workforce reduction, and that counsel learned of the decision on September 10, 2009. *Id.* at 1-2. As of September 14, 2009, 290 of 370 employees were laid off because the Paradise mine was idled due to adverse mining conditions. *Id.* at 2. The operator states that Mr. Gatlin was among the employees subject to the layoff, and that his selection was made solely on the basis of skill level, performance, and years of service as related to operational needs. *Id.* KenAmerican contended that a bona fide economic retrenchment bars reinstatement, and that the reinstatement order should not be enforced because there is no job to which Mr. Gatlin could be reinstated, and it would be inequitable for Mr. Gatlin

[1] The scope of a hearing on an application for temporary reinstatement is limited to a determination of whether the miner's complaint was frivolously brought. 29 C.F.R. § 2700.45(d).

to be paid while other, more senior, miners are out of work. *Id.* at 3-4. KenAmerican states that it made an offer to the Secretary to pay Mr. Gatlin from August 31 to September 18, the last pay date for laid-off employees.[2] *Id.* at 2. KenAmerican attached to its opposition an affidavit supporting its factual allegations.

On September 18, the Judge issued an order clarifying and adding to the August 31 temporary reinstatement order ("Sept. 18 Order").[3] The Judge concluded that Mr. Gatlin must be reinstated to his former position, at least temporarily, until the layoff can be reviewed with other aspects of the case. Sept. 18 Order at 2. She explained that "A temporary reinstatement order, such as the one issued here, requires the complaining miner to be re-employed, under any circumstance, including changing circumstances at the mine." *Id.* The Judge reasoned that to determine otherwise would be to undermine the purpose of the temporary reinstatement and to grant the mine operator a defense that was not raised during the temporary reinstatement hearing. *Id.* Accordingly, the Judge ordered that the operator begin the economic reinstatement of Mr. Gatlin immediately without the need for further agreement or order. *Id.*

In its petition, KenAmerican states that the Judge's Sept. 18 Order is contrary to law and is not supported by substantial evidence. Pet. at 3. KenAmerican maintains that the Secretary has not disputed its submission that due to economic reasons precipitated by adverse mining conditions, the Paradise Mine was idled, which necessitated a massive workforce reduction, including Mr. Gatlin, whose selection was based solely on skill level, performance and years of service as related to operational needs. *Id*. at 4. It submits, therefore, that the "undeniable facts before the Judge are that [Mr.] Gatlin was laid off after his reinstatement as part of a massive workforce reduction and would have been in the same situation had there never been a prior termination or reinstatement." *Id.* at 5 (emphasis omitted). KenAmerican states that a change in circumstances does, in fact, make a difference in terms of whether a reinstatement is enforceable. *Id.* at 6. It explains that a miner cannot be reinstated to a position that no longer exists, and that it could not have raised such a defense at the temporary reinstatement hearing because the circumstances surrounding the layoff occurred one month after the hearing. *Id.* Accordingly,

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[2] KenAmerican's counsel states that after learning of the layoff decision, he contacted counsel for the Secretary to verbally relay information about the layoff and to inform the Secretary that KenAmerican would pay Mr. Gatlin until the day of the workforce reduction. Rather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin's reinstatement, KenAmerican should have moved the Judge to modify the August 31 Order. *See Consolidation Coal Co.*, 14 FMSHRC 956, 970 (June 1992) ("[N]o operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.").

[3] The Judge stated that she lacks authority to enforce her own orders, and that if the Secretary believes that the temporary reinstatement order is not being fully enforced, the Secretary's remedy is to seek injunctive or other appropriate relief from a United States District Court. Sept. 18 Order at 1. She interpreted the Secretary's motion to be one for clarification. *Id.*

KenAmerican requests that the Judge's order be reversed and moves the Commission to stay the effect of the order pending its review and decision. *Id.* at 1, 8.

The Secretary responds that KenAmerican has not established that changed circumstances warrant relief from the Judge's temporary reinstatement order. S. Resp. at 9-11. First, she argues that KenAmerican is estopped from arguing that changed circumstances warrant relief. *Id.* at 11-12. The Secretary explains that parties may be estopped from taking inconsistent positions in the same litigation. *Id.* at 11. She asserts that because KenAmerican chose to pay Mr. Gatlin money without receiving job services from him, it cannot now take the inconsistent position that it should be relieved from paying him because a layoff eliminated his job. *Id.* Next, the Secretary argues in the alternative that if KenAmerican is not estopped, the Commission should remand the case to the Judge in order to give KenAmerican an opportunity to prove that changed circumstances warrant relief from the temporary reinstatement order. *Id.* at 12-16. The Secretary acknowledges that under Commission precedent, an operator may be able to convince a Judge that changed circumstances make compliance with a temporary reinstatement order impossible. *Id.* at 12. She states that the affidavit submitted by the operator is inadequate but that it should be provided an opportunity to make such a showing. *Id.* at 12-14. Finally, she asserts that the Commission should deny KenAmerican's motion to stay because the operator failed to adequately brief the issue and because it failed to establish the extraordinary circumstances warranting a stay. *Id.* at 16-19.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] 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." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Here, KenAmerican has not challenged the Judge's determination that Mr. Gatlin's discrimination complaint was not frivolously brought. Rather, KenAmerican challenges the period of time for which it must economically reinstate Mr. Gatlin. In such circumstances, the Commission reviews a "judge's remedial order for abuse of discretion and to ensure that it effectuates the purposes of the Mine Act." *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997). Abuse of discretion may be found when "'there is no

evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Id.* at 1258 n.3 (citations omitted).

We conclude that the Judge's decision is based on an improper understanding of the law.[4] The Judge abused her discretion when she determined that a temporary reinstatement order requires a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order. Sept. 18 Order at 2.

The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or "the occurrence of an event tolling the reinstatement obligation"); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that back pay award ended upon date of layoff). As a Commission Judge reasoned, "if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination." *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb. 1984) (ALJ) (citations omitted); *see also NLRB v. Federal Bearings Co.*, 109 F.2d 945 (2d Cir. 1940) (concluding that an employer should not be held in contempt for failing to reinstate a wrongfully discharged employee when depressed business conditions required a reduction in force).

Thus, as noted by both parties (Pet. at 5; S. Resp. at 12), Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding. *See generally Sec'y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC 2450 (Dec. 1993) (remanding to Judge to determine effect of operator's layoff on Judge's temporary reinstatement order). We therefore hold that the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine.

The Commission has also recognized in remedial contexts that an operator has the burden of establishing "'facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability.'" *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, "[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an

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[4] We reject the Secretary's estoppel argument. We see no significant inconsistency between KenAmerican's agreement to economically reinstate Mr. Gatlin and its position that the operator's reinstatement obligation was subsequently tolled when Mr. Gatlin's job was eliminated.

affirmative defense to reinstatement and backpay." *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence. *Id.*

Given this precedent, we vacate the Judge's Sept. 18 Order and remand for further proceedings. On remand, the Judge, upon request, shall expeditiously take further evidence and provide an opportunity for discovery, if appropriate, to determine whether the duration of temporary reinstatement set forth in the August 31 Order should be modified. More specifically, the Judge should determine whether KenAmerican has proven by a preponderance of the evidence that the occurrence of the layoff is a legitimate reason for tolling Mr. Gatlin's economic reinstatement. Factors to be considered by the Judge include whether the layoff was unrelated to the August 31 Order and whether the layoff properly included Mr. Gatlin.[5] In sum, in order to justify termination of economic reinstatement, KenAmerican must prove by a preponderance of the evidence that Mr. Gatlin's inclusion in the layoff was entirely unrelated to his protected activities.

Furthermore, we deny KenAmerican's motion to stay the effect of the Sept. 18 Order. The motion is moot given our vacating of that order. Because the terms of the August 31 Order remain in effect until such time, if any, that the period of reinstatement is modified by the Judge, Mr. Gatlin shall continue to receive economic reinstatement until such modification, if any. Thus, KenAmerican must continue to comply with the terms of the August 31 Order and pay Mr. Gatlin until the matter is resolved by the Judge.

[5] We note that although KenAmerican stated that it considered four factors (mining experience, skill level, performance, and years of service) in making the workforce reductions, it only asserted that three of these factors (excluding mining experience) were relevant to Mr. Gatlin's inclusion in the layoff. Pet. at 4; KA Resp. at 2. Moreover, in its submissions to the Judge and in the Petition to the Commission, KenAmerican has described only the fact that Mr. Gatlin had been its employee "shortly over six months." Pet. at 4; KA Resp. at 2. On remand, KenAmerican should explain how all of the factors it considered were applied to Mr. Gatlin or why any factor not applied was deemed irrelevant.

III.

Conclusion

For these reasons, we grant KenAmerican's petition, vacate the Judge's September 18 order, deny the motion for stay, and remand for further proceedings consistent with this decision.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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