

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

March 25, 2011

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
on behalf of MARK GRAY : Docket No. KENT 2009-1429-D
: :
v. : :
: :
NORTH FORK COAL CORPORATION :

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

ORDER ON PETITION FOR RECONSIDERATION
AND APPLICATION FOR STAY PENDING APPEAL

BY: Jordan, Chairman; Duffy, Young, and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). On January 7, 2011, the Commission issued a decision (“*Decision*”) reversing an administrative law judge’s order which had dissolved his previous order implementing the temporary economic reinstatement of miner Mark Gray with North Fork Coal Corporation (“North Fork”). 33 FMSHRC 27 (Jan. 2011). On January 18, 2011, North Fork, pursuant to Commission Procedural Rule 78(a), 29 C.F.R. § 2700.78(a), timely petitioned the Commission to reconsider the *Decision*. On January 21, 2011, North Fork also applied to the Commission to stay the *Decision* pending federal court review. On February 1, 2011, the Secretary of Labor filed a response in opposition to the stay request. On February 4, 2011, Gray filed responses in opposition to North Fork’s petition for reconsideration and its application for stay.

For the reasons that follow, we (1) grant the petition for reconsideration in part and (2) deny the application for stay pending appeal.

I.

Factual and Procedural Background

The background of Gray's discrimination claims, brought under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), are set forth in the Commission's decision reversing the judge. *See Decision* at 1-3. Pursuant to section 105(c)(2), upon the application of the Secretary, on September 8, 2009, Administrative Law Judge Gary Melick ordered Gray temporarily reinstated to his position at North Fork after he had been discharged by the operator. 31 FMSHRC 1143, 1146 (Sept. 2009) (ALJ). The three parties – the Secretary of Labor, Gray, and North Fork – each represented by separate counsel, agreed that instead of returning to work at North Fork, Gray should be economically reinstated. Consequently, on September 17, 2009, the judge issued a supplemental order setting forth the terms of the economic reinstatement to which the parties had indicated that they had agreed, which was to be effective as of September 14, 2009. 31 FMSHRC 1167, 1168 (Sept. 2009) (ALJ).

On November 23, 2009, the Secretary informed the judge that she had notified Gray that, as a result of her investigation of his complaint, she had decided not to file a complaint pursuant to section 105(c)(2) with the Commission on Gray's behalf. 31 FMSHRC 1420 (Dec. 2009) (ALJ). On December 2, 2009, the judge held that under the circumstances the order of temporary reinstatement must be dissolved and the temporary reinstatement proceeding dismissed. *Id.* On December 30, 2009, Gray, through his own counsel, filed an action on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).¹

Both the Secretary and Gray petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of Gray's section 105(c)(3) action. The Commission granted the petitions, and in the *Decision*, a Commission majority reversed the judge's decision to dissolve reinstatement. The majority held that a miner's right to temporary reinstatement continues until the Commission issues a final order on the merits of the miner's allegations of discrimination, whether that order be issued under section 105(c)(2) or section 105(c)(3) of the Mine Act. *See Decision* at 7-16 (opinion of Chairman Jordan and Comm'r Nakamura), 19-26 (opinion of Comm'r Cohen).

In reversing the judge, the Commission majority ordered that Gray be economically reinstated retroactive to September 14, 2009. *Id.* at 18, 19. That date was the date specified in the judge's supplemental order as the first date of economic reinstatement. The Commission majority also stated that reinstatement was to be at Gray's former rate of pay, including any pay increases, bonuses, and other benefits. *Id.* at 18, 19. This was based on the judge's supplemental order. *See* 31 FMSHRC at 1167-68.

¹ A hearing in the case, docketed with the Commission at No. KENT 2010-0430-D, was recently held before another Commission administrative law judge. The issuance of her decision is currently pending.

II.

Disposition

A. The Petition for Reconsideration

North Fork requests that the Commission reconsider its *Decision* and modify the economic reinstatement it ordered both retroactively and going forward. North Fork learned during the discrimination case on the merits that Gray had been working at another mining job. NF Pet. at 3 n.1. North Fork contends that it first became aware of Gray's employment in August 2010 when he answered interrogatories that had been served during the previous January. *Id.* At the December 2010 hearing on the merits of his discrimination claim, Gray testified that he had been continuously employed by one or more mining companies since June 2009, the month after he had been terminated from his position at North Fork. *Id.* at 3 & Ex. A at 223 (KENT 2010-430-D hearing transcript). North Fork submits that to provide full economic reinstatement to the miner in these circumstances is contrary to the intent of the temporary reinstatement provisions of the Mine Act, and that, accordingly, the *Decision* should be modified so that North Fork's obligation is only to put Gray in the same economic position he would have been in had North Fork not terminated his employment. *Id.* at 4-6.

In his response, Gray urges the Commission to deny the petition for reconsideration. Gray first contends that the issue could have been raised by North Fork prior to the Commission's issuance of the *Decision*, and because it was not, the Commission does not have jurisdiction to consider the issue. G. Resp. at 7-9. Gray further contends that the Commission can order nothing but full adherence to the judge's temporary economic reinstatement order, because the order was the product of an agreement between the parties that has contractual effect. *Id.* at 9-11. Gray reports that he has earned significantly less in the other positions than he would have had while working at North Fork, and that he did not receive health insurance at those positions as he did when he worked for North Fork – a major difference given that Gray has two young children and his wife suffers from a serious ailment. *Id.* at 4.

The Secretary, in her response in opposition to the stay request, stated that she “has not taken a position” on the petition for reconsideration. S. Resp. at 4 n.2. The Secretary has filed nothing further regarding the petition.

Pursuant to section 105(c)(2), the judge's original September 8, 2009 order of reinstatement established that Gray had the right to return to his position at North Fork while his discrimination claim was pending, and that during that time North Fork was obligated to permit him to work at that position as if his termination had never occurred and to pay him accordingly. The parties subsequently agreed that Gray's physical presence at the mine would not be required, but that North Fork would still compensate him as if he was working at the mine. This type of economic reinstatement is not unusual. *See, e.g., Sec'y on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001).

The parties, consistent with the Commission's procedural rules and the judge's continuing jurisdiction over the matter, submitted their agreement to the judge and moved that it be entered as an order in the case. *See* 29 C.F.R. § 2700.10 (a) (“[a]n application for an order shall be by motion . . . and shall set forth the relief or order sought”) and § 2700.45(e)(4) (except during appellate review of an order temporarily reinstating a miner, a judge retains jurisdiction over the reinstatement proceeding even after he has issued his order). Because the economic reinstatement agreement was subsumed in the judge's order, and described how the parties proposed to implement relief ordered by the judge pursuant to the Mine Act, we do not believe we can ignore that statute in determining the construction, application, and effect of the agreement. Consequently, we reject Gray's argument that the issue raised in North Fork's petition should be decided solely by reference to contract law.

North Fork argues that under the Mine Act, Gray's earnings while he is employed elsewhere during his economic reinstatement should be used to offset the amounts he is owed by North Fork. NF Pet. at 4-5. North Fork confuses the legal principles that apply to back pay awards if and when the miner succeeds in his discrimination complaint on the merits, with the legal principles governing the wholly separate temporary reinstatement proceeding.

With regard to the former, the Commission has noted that the provision for back pay and other remedies in section 105(c) awarded once it has been established that a miner was discriminated against, is modeled after the remedial provisions of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 160(c). *See* *Sec'y on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 n.4 (Jan. 1982). Under that statute, concepts of offset and the duty to mitigate damages are routinely applied to back pay awards, and the Commission has incorporated those concepts in computing back pay awards under section 105(c). *See, e.g., Sec'y on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142-44 (Feb. 1982). We have recognized that back pay is designed to make the miner as nearly whole as possible for the losses he or she has suffered between the time the miner was discriminated against and the time his or her claim of discrimination was upheld. *Id.* at 143. If the miner does not prevail, the miner is due no award.

In contrast, as is explained at length in the *Decision*, the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. *Decision* at 14-15 (Chairman Jordan and Comm'r Nakamura), 25-26 (Comm'r Cohen). The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her.²

² A claim by the miner for compensation for the time between his or her termination and a return to work under a reinstatement order could be heard later, as part of the discrimination case on the merits. Should the miner prevail, the relief would be crafted with the intention of

Conversely, 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.

Consequently, we reject the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us. Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties. Moreover, we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge.

The basis for the objection which North Fork raises in its petition is that, from the outset of his economic reinstatement, Gray was working at other mines, and therefore to require payment of full wages and benefits to Gray results in a windfall to him. NF Pet. at 4. However, it was North Fork that proposed economic reinstatement and nothing would have prevented North Fork in September 2009, from negotiating an agreement that adjusted payments to Gray in the event he obtained alternative employment during the period of temporary relief.³

Our analysis of the amounts due to Gray involves three separate periods of time. The first time frame extends from September 14, 2009, until December 2, 2009, the point at which, presumably, North Fork stopped making payments because the judge had dissolved the order of temporary reinstatement.⁴ North Fork states that it has fully compensated Gray, in accordance with the terms of the economic reinstatement order, for that period of time. NF Pet. at 3. This

making the miner whole, with back pay for the entire period he or she was out of work, less appropriate offsets. *See Kentucky Carbon*, 4 FMSHRC at 1-2; *Northern Coal*, 4 FMSHRC at 144.

³ We note that Gray testified at the September 2, 2009 temporary reinstatement hearing and was cross-examined at length by counsel for North Fork, but the subject of what, if any, work Gray had done since being terminated by North Fork four months earlier was never raised. Tr. 60-90. After the judge ordered temporary reinstatement on September 8, 2009, the counsel for North Fork contacted the counsel for Gray and raised the issue of temporary reinstatement because "North Fork did not want Mr. Gray back at the mine." G. Resp., Aff. of Tony Oppgard at 1.

⁴ We reject Gray's argument that the Commission lacks jurisdiction to consider the petition for reconsideration because North Fork could have raised the same argument earlier in the proceeding. After the judge dissolved the temporary reinstatement order, North Fork ceased making payments and, therefore, had no reason to seek a forum in which to argue that any payments owed to Gray under the economic reinstatement agreement should be offset by his earnings from alternate employment.

contention has not been disputed by Gray. Assuming that is the case, our *Decision* should not be read to require any further payment by North Fork; however, neither has North Fork the right to recover or “clawback” some of what it paid Gray, based on earnings he received elsewhere, for that period of time.

The second time period runs from December 2, 2009 (the point at which North Fork stopped making payments because the order of temporary reinstatement had been dissolved) until January 7, 2011 (when we reversed the judge’s order dissolving temporary reinstatement) – hereinafter “the Interim Period.” While our decision awarded relief retroactively, under the facts of this case, as now further explained by the parties, we conclude it would be inequitable to blindly apply the terms of the economic reinstatement order during this Interim Period, which largely encompasses the time during which the Commission was considering Gray’s appeal. The Commission has recognized that “so long as our remedial orders effectuate the purposes of the Mine Act . . . we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.” *Northern Coal*, 4 FMSHRC at 142.

In the context of discrimination remedies, retroactive relief is generally awarded only to the extent that it is appropriate, and the equitable nature of the remedies ordered are considered in determining which remedies should apply retroactively. See *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718-23 (1978) (vacating order granting retroactive relief under Title VII). Generally, a ruling granting temporary economic relief does not engender a large retroactive pay award. This is because most temporary reinstatement cases are resolved quickly, due to the strict deadlines in the Commission’s procedural rules.⁵ Although we determined it was appropriate to apply our *Decision* retroactively, we appreciate that this presents the unusual situation of imposing significant retroactive liability in a context where parties would not normally have anticipated such a result.

Moreover, it is understandable that North Fork did not seek to modify the economic reinstatement order when it learned of Gray’s other employment in August 2010. At that time, it was not liable for any economic reinstatement payments, as the judge’s order had been dissolved.

⁵ For example, 29 C.F.R. § 2700.45(c) and (e), requires that a hearing on an application for temporary reinstatement must be requested within 10 calendar days following receipt of the Secretary’s application for temporary reinstatement, the hearing must be held within 10 calendar days following receipt of the request, and the judge must issue a written order within 7 calendar days following the close of the hearing. A party seeking review of such an order must petition the Commission within 5 business days following receipt of the order; briefing is expedited; and the Commission’s decision must generally be rendered within 10 calendar days of the close of the briefing period. 29 C.F.R. § 2700.45(f). This appeal did not fall under this procedural rule because it did not involve review of an order “granting or denying an application for temporary reinstatement,” but instead concerned the Secretary’s petition for discretionary review of the judge’s action in dissolving the order of economic temporary reinstatement and dismissing the temporary reinstatement proceeding.

There was no need to request a modification. Indeed, it is not even clear whether such a modification request could have been successful, because due to the dissolution of the order, objections regarding standing and mootness might have been raised.⁶ Consequently, we conclude that offsetting the temporary reinstatement award by the amount of wages Gray earned during this period of time is appropriate.

We view the third time period as commencing when the *Decision* was issued on January 7, 2011, reversing the judge's order dissolving temporary reinstatement. From that date, going forward, we conclude that the judge's earlier supplemental order incorporating the parties' agreement should be applied, with no offset. The obligation to comply with the terms of that order as written, with no offset, will continue unless and until the parties negotiate a new agreement and it is entered as a superceding order by the judge, or either party invokes the judge's continuing jurisdiction and the judge modifies or rescinds the existing order. In the event a motion is submitted to modify or rescind the previously entered consent order, the judge is required to examine all the relevant circumstances, in accordance with section 105(c) of the Mine Act, and not just whether the miner or operator still consents to it.

Accordingly, we grant North Fork's petition in part and modify the *Decision* as follows:

1. For the period beginning September 14, 2009 (the date the judge's order of economic reinstatement took effect), until the date of the judge's dissolution of the economic reinstatement order on December 2, 2009, North Fork was obligated to pay Gray pursuant to the terms of the judge's order of economic reinstatement. If it did so, it has no additional monetary liability to Gray for that period of time. North Fork has no right to recover from Gray any money based on earnings he received elsewhere during this period.

2. For the period beginning December 2, 2009, until January 7, 2011, the date of the *Decision* (the period we have characterized as "the Interim Period"), North Fork shall pay Gray pursuant to the terms of the judge's order, offset by his compensation and benefits from employment during that period. Because the record in this case does not reflect the amount of compensation and benefits Gray earned from December 2, 2009, until January 7, 2011, we are remanding this matter to the judge for the computation of the net amount Gray is owed for the Interim Period.

⁶ Commissioner Cohen postulates that if the judge had not dissolved the order of economic reinstatement, Gray would have received economic reinstatement in accordance with the agreement of the parties, with no offset for any other work he may have been doing "at least through the date" of the decision of the judge who is hearing the case on the merits. Slip op. at 12. We question whether North Fork, if it was still under the order to pay Gray, would have taken no steps to modify that economic reinstatement order once it discovered in August 2010 that Gray was working at a second job.

3. For the period from January 7, 2011, through the end of Gray's temporary economic reinstatement, North Fork shall pay Gray pursuant to the terms of the judge's September 8, 2009 order (unless that order is modified upon motion of a party) with no offset from Gray's other employment.

This case is remanded to Judge Melick. Without waiting to hear from the judge, the parties should begin negotiating the amounts Gray is owed by North Fork consistent with the *Decision* as modified. These amounts would be payments pursuant to the terms of the economic reinstatement agreement (including for any benefits which Gray was or is being deprived of while he foregoes working at North Fork), as offset by his compensation (including the value of benefits received) from employment during the Interim Period only. In the event that the parties are unable to come to an agreement regarding those amounts within 20 days of the date of this order, they shall report so to the judge, who should expeditiously resolve any dispute and order the implementation of the *Decision* as modified.⁷

B. The Application for Stay Pending Appeal

We read North Fork's application for a stay as totally independent of its petition for reconsideration. Regardless of the result of its petition for reconsideration, North Fork is urging the Commission to stay the effect of the *Decision* in its entirety while North Fork pursues its appeal rights under the Mine Act.

Rule 18 of the Federal Rules of Appellate Procedure provides that "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." 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 must satisfy the factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958): (1) a likelihood that the 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. *Id.* at 925. The court also made clear that a stay constitutes

⁷ Any petition for federal court review of the *Decision* pursuant to section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), must generally await resolution of the remand to the judge, a further petition for discretionary review to the Commission, and disposition by the Commission of the petition. Even then, the court of appeals does not have exclusive jurisdiction in the proceeding until such time as the record before the Commission is filed with the court. *See Sec'y on behalf of Smith v. The Helen Mining Co.*, 14 FMSHRC 1993, 1994 (Dec. 1992). Under Rule 17(a) of the Federal Rules of Appellate Procedure, the record is generally due in the court within 40 days of service upon the Commission of the petition for review. Thus, under the judge's continuing jurisdiction pursuant to Commission Procedural Rule 45(e)(4), the parties should have ample time to address the issue of the reinstatement going forward, should it be raised as discussed *supra*.

“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).

1. Whether It is Likely That North Fork Will Prevail on the Merits of its Appeal

North Fork contends that there is a substantial likelihood it will prevail on appeal, describing the *Decision* as having reversed 30 years of Commission precedent. NF Appl. at 3. The Secretary responds by correctly pointing out that the issue of whether an order of temporary reinstatement obtained by the Secretary under section 105(c)(2) of the Mine Act remains in effect while a miner pursues his own discrimination complaint under section 105(c)(3) had never before been decided by a Commission majority. S. Resp. at 11-12 n.5; see *Decision* at 3. We are not persuaded that there is a substantial likelihood that North Fork will succeed in overturning the *Decision*. See *Decision* at 9-16, 20-23, 24-26.

2. Whether North Fork Will Suffer Irreparable Harm Should a Stay Not Issue

North Fork alleges that it will be irreparably harmed by being required to pay Gray all that he is owed under the economic reinstatement agreement until such time as the miner’s section 105(c)(3) case is heard and decided, because North Fork would be unlikely to recover the payments should the company succeed on appeal. Appl. at 3. North Fork’s argument is one that, if accepted, would effectively nullify the temporary reinstatement provisions of the Mine Act. 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). There is nothing in the Mine Act which contemplates that such miners would be expected to repay the amounts paid them pursuant to their reinstatement orders; indeed, that would run counter to the very spirit of the provision, which is to provide immediate relief to complaining miners while they wait for their cases to be decided. See *Decision* at 14-15, 25-26. That it is the miner, instead of the Secretary, who ultimately brings the case is irrelevant to this principle.

In any event, “[i]t is also 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. Consequently, we disagree with North Fork that not staying the *Decision* will lead to it suffering irreparable harm; it will merely be in the same position it would have been had the judge not erred by dissolving the economic reinstatement order.

3. Whether Other Interested Parties Would be Adversely Affected by a Stay

North Fork also asserts that Gray will suffer little or no harm from a stay pending appeal. Appl. at 3. Gray and the Secretary disagree. G. Opp’n at 3-4; S. Resp. at 15-16. As was discussed previously, the purpose of the temporary reinstatement provisions 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. Because Gray is receiving significantly less in pay and benefits at present than he would be if he were working at North Fork, it is clear that Gray would be adversely affected by a stay pending appeal.

4. Whether a Stay Would Serve the Public Interest

North Fork contends that a stay would serve the public interest by preventing the inequitable result of payment of back pay and benefits to a miner whose termination may later be determined to be entirely lawful. Appl. at 3. North Fork ignores the beneficial effect of the Commission's decision upon the miner and his ability to pursue his discrimination claim. Accordingly, while a stay would serve the private interest of North Fork, we fail to see how a stay would serve the public interest, as set forth by Congress in the Mine Act's temporary reinstatement provisions.

Finally, we note that this issue has already been addressed in the companion to this case. On February 15, the Commission denied the operator's request in *Baird v. PCS Phosphate Co.*, Docket No. SE 2010-74-DM, to stay the Commission's earlier decision. 33 FMSHRC 127 (Feb. 2011) (denying motion to stay *Baird v. PCS Phosphate Co.*, 33 FMSHRC 5 (Jan. 2011)). A federal appeals court subsequently also summarily denied the operator's request for stay pending appeal to that court. *See PCS Phosphate Co. v. FMSHRC* (4th Cir. No. 11-1102, Mar. 4, 2011).⁸

⁸ Commissioners Duffy and Young would grant North Fork's application and stay the effect of the Commission's January 7, 2011, decision pending appeal, because that decision constituted a substantial departure from the Commission's past practice with regard to the question at issue. *See Decision* at 27 (Commissioners Duffy and Young, dissenting). However, although they dissented from the decision of a majority of Commissioners to interpret the Mine Act to permit a reinstated miner's right to reinstatement to extend through the course of the section 105(c)(3) proceeding, that decision having been issued, they agree with the Chairman and Commissioner Nakamura as to the disposition of the operator's petition for reconsideration.

III.

Conclusion

For the foregoing reasons, (1) North Fork's petition for reconsideration is granted in part, and our decision of January 7, 2011, is modified and remanded to the judge as described herein; and (2) North Fork's application for stay pending appeal is denied.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Cohen, concurring in part and dissenting in part:

I concur with the majority's Order, except for its conclusion to abrogate the parties' agreement, subsumed in Judge Melick's September 17, 2009 supplemental order, so as to impose an offset for the period from December 2, 2009 to January 7, 2011 ("the Interim Period").

The majority's opinion establishes that the principles applicable to temporary reinstatement are different from an award of back pay. The majority opinion also makes clear that temporary economic reinstatement results from agreement among the parties, as in this case, in situations when the operator does not want the complainant-miner back at work. As the majority states, the Commission judge approved the economic reinstatement agreement subsequent to a hearing where Gray testified and where the operator could have questioned him about what, if any, work he had performed since his termination by North Fork. Slip op. at 5 n.3. Based on these principles, I do not see grounds for imposing an offset against Gray's economic reinstatement based on his earnings.

The majority's first basis for imposing an offset is that the Interim Period "largely encompasses the time during which the Commission was considering Gray's appeal." Slip op. at 6. Gray's appeal was from Judge Melick's December 2, 2009 order, which erroneously terminated Gray's temporary economic reinstatement. Another judge, Priscilla Rae, held a hearing on the merits of Gray's underlying section 105(c)(3) discrimination complaint on December 15, 2010, has just received the parties' briefs, and has not yet issued a decision. If Gray's temporary economic reinstatement had not been erroneously terminated, he would still be receiving it, and would continue to receive it at least through the date of Judge Rae's decision. Thus, the fact that the Commission was considering Gray's appeal on the termination of temporary reinstatement between December 2, 2009 and January 7, 2011, is irrelevant.

A second basis for the majority's imposition of an offset during the Interim Period is that the Commission's January 7, 2011 Decision imposed "significant retroactive liability in a context where parties would not normally have anticipated such a result." Slip op. at 6. In referring to "parties," presumably the majority is speaking of North Fork. Whether or not North Fork "anticipated" significant retroactive liability must be viewed in the context of the facts that (1) North Fork, which did not want Gray back at its mine after the judge initially ordered temporary reinstatement on September 8, 2009, initiated the discussions which led to the temporary economic reinstatement,¹ (2) North Fork agreed to pay Gray the full amount he would have been paid for working at its mine, but for his firing, (3) in a lengthy cross-examination of Gray at the hearing on temporary reinstatement on September 2, 2009, four months after his firing, at which time Gray was already working at another mine, North Fork's counsel failed to inquire about any other work which Gray might have been doing,² (4) North Fork could not have

¹ See slip op. at 5 n.3. The Affidavit of Tony Opegard in this regard is uncontradicted.

² See slip op. at 5 n.3.

been relying on settled Commission law because the previous decision addressing the issue of temporary reinstatement in the context of a miner's discrimination complaint under section 105(c)(3) of the Mine Act, *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009), had been a two-to-two split among the then-four Commissioners, and (5) since the decision in *Phillips*, a fifth Commissioner had joined the Commission, and would presumably break the tie. These facts call into question the reasonableness of North Fork's non-anticipation of significant retroactive liability.

Moreover, the liability was retroactive only because the Secretary chose not to file a discrimination complaint on Gray's behalf under section 105(c)(2) of the Mine Act. Whether or not the Secretary would file a 105(c)(2) complaint was not known to North Fork when it initiated discussions and agreed to pay Gray what he would have earned as its employee, regardless of any work he might perform during the period of temporary economic reinstatement. If the Secretary had chosen to file a section 105(c)(2) complaint, North Fork would have had the same liability, only it would have had to make the payments as they accrued. The majority is imposing a significant offset on Gray based on the circumstance of the Secretary's decision not to file a section 105(c)(2) complaint.

Additionally, the majority's reliance on the parties' "anticipation" ignores Gray's anticipation. When Gray negotiated the agreement for temporary economic reinstatement, he was already working at the other mine. The Secretary had not yet made a decision as to whether to file a section 105(c)(2) complaint. Presumably, Gray's "anticipation" was that he would receive his full North Fork salary and benefits (for his forbearance from returning to work at North Fork's mine), together with the money from his work at the other mine, for whatever time it took for the Commission to resolve his discrimination complaint. He certainly did not anticipate that his work at the other mine would be for the ultimate economic benefit of North Fork, the result of the majority's decision.

I understand that the approach of not imposing an offset during the Interim Period puts Gray in a position that one could call "double dipping," in that he would be receiving money from North Fork for not working there at the same time as he receives wages from another employer. Yet this is precisely what North Fork bargained for. In exchange for Gray not returning to work at its mine while his discrimination case was pending before the Commission, North Fork agreed to pay him what he would have earned had he been working. Understood in these terms, North Fork is receiving a windfall because of the majority decision to impose an offset during the "Interim Period."

Robert F. Cohen, Jr., Commissioner

Distribution

Stephen M. Hodges, Esq.
Penn, Stuart & Eskridge
P.O. Box 2288
Abingdon, VA 24212

Tony Oppegard, Esq.
P.O. Box 22446
Lexington, KY 40522

Wes Addington, Esq.
Appalachian Citizens Law Center, Inc.
317 Main Street
Whitesburg, KY 41858

Robin Rosenbluth, Esq.
Jerald Feingold, Esq.
W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Derek J. Baxter, Esq.
Matthew Babington, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2296

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021