

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 6, 2011

KEVIN BAIRD	:	
	:	
v.	:	Docket No. SE 2010-74-DM
	:	
PCS PHOSPHATE COMPANY, INC.	:	

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

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

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”). Pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), Administrative Law Judge Jacqueline R. Bulluck had ordered miner Kevin Baird temporarily reinstated to his position at PCS Phosphate, Inc. (“PCS”) after he had been discharged by the operator. Unpublished Orders, dated Dec. 18, 2009, and Feb. 2, 2010 (ALJ) (hereinafter, respectively, “TR Order No. 1” and “TR Order No. 2”). Following the Secretary of Labor’s subsequent withdrawal of the discrimination complaint she had earlier filed on Baird’s behalf, Baird filed his own discrimination complaint pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3). The judge then dissolved the order of reinstatement and dismissed both the reinstatement proceeding and the discrimination case that the Secretary had brought. 32 FMSHRC 325, 327 (Mar. 2010) (ALJ).

Baird filed a timely petition for discretionary review, challenging the dissolution of the reinstatement order in light of the pendency of his section 105(c)(3) case. The Commission granted the petition, and a Commission majority now reverses the judge’s decision to dissolve reinstatement, holding that a miner’s temporary reinstatement continues until the Commission issues a final order regarding the merits of the miner’s allegation of discrimination, whether it be under section 105(c)(2) or section 105(c)(3) of the Mine Act. A majority also orders Baird economically reinstated to his former position, retroactive to November 16, 2009, at his former rate of pay.

## I.

### **Factual and Procedural Background**

On March 13, 2009, Baird was discharged from his position as a shift foreman at PCS's Lee Creek Mine, a phosphate mine in Aurora, North Carolina. TR Order No. 1, at 1; TR Appl. at 2. According to Baird, his termination was due to safety complaints his wife, an employee of a PCS contractor, had filed regarding conditions at the Lee Creek Mine which had resulted in inspections by federal agencies. *Id.* Consequently, on August 15, 2009, Baird filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that his discharge by PCS was unlawful under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). TR Order No. 1, at 1.

On October 14, 2009, the Secretary filed an application with the Commission to temporarily reinstate Baird to his position with PCS. *Id.* After initially requesting a hearing on the application, PCS withdrew its request, and the parties agreed to the judge ruling on the application based on their written submissions. *Id.* In her order temporarily reinstating Gray, the judge applied the "not frivolously brought" standard for temporary reinstatement found in section 105(c)(2). *Id.* at 1-2. The judge concluded that, under that low standard, there was sufficient evidence that Baird's wife had engaged in protected activity and that Baird's discharge was motivated by that protected activity. *Id.* at 3-4. Consequently, the judge ordered Baird temporarily reinstated (*id.* at 4), and later amended her order to reflect the parties' subsequent agreement that Baird would not return to work but rather his reinstatement would be economic. TR Order No. 2, at 4.

The Secretary filed a discrimination complaint on behalf of Baird pursuant to section 105(c)(2) on December 23, 2009, in Docket No. SE 2010-304-DM. PCS filed an answer to the complaint, and according to the operator the Secretary and it engaged in extensive discovery, including multiple depositions. PCS Br. at 3. The judge set a hearing on the merits of Baird's discrimination case for February 10, 2010.

On February 4, 2010, the Secretary filed a notice to withdraw her discrimination complaint, after she had determined that section 105(c) had not been violated and that she would be unlikely to meet her burden of proving that discrimination against Baird had occurred. S. Br. at 3. At the same time, the Secretary requested that Baird's temporary reinstatement continue while he pursued a potential action on his own behalf under section 105(c)(3). 32 FMSHRC at 325. Baird initiated such an action through private counsel, who filed a discrimination complaint for Baird with the Commission on March 10, 2010, in Docket No. SE 2010-523-DM. That case is presently pending before the judge.

Meanwhile, PCS had moved to dissolve the order of temporary reinstatement, a motion which the Secretary opposed. The judge granted PCS's motion, holding that the language of section 105(c) and the legislative history of the Mine Act established that the remedy of

temporary reinstatement was coincident only with the Secretary's involvement under section 105(c)(2), and did not extend beyond that to a miner's private complaint under section 105(c)(3). 32 FMSHRC at 326-27. Consequently, the judge dissolved her amended order of temporary reinstatement effective February 4, 2010, and dismissed both the reinstatement proceeding and the discrimination case brought by the Secretary. *Id.* at 327.

Baird, through counsel, petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of his section 105(c)(3) action. The Commission granted the petition,<sup>1</sup> and subsequently granted the Secretary's unopposed motion to participate as *amicus curiae* in support of Baird.

## II.

### Disposition

The Commission recently addressed the issue this case raises in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009). The judge below in *Phillips* had ordered dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. 30 FMSHRC 1119 (Nov. 2008) (ALJ). In *Phillips*, Commissioners were evenly divided on the question of whether the judge correctly decided that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. 31 FMSHRC at 979-1004. Thus, the effect of the split decision was to allow the judge's decision to stand, as if affirmed. *Id.* at 979 (citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992)).

In *Phillips*, Commissioners Duffy and Young voted to affirm in result the judge's dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. They did so on the ground that, under the plain meaning of section 105(c), a reinstatement order can only remain in effect while the Secretary is pursuing a section 105(c)(2) action; once she had determined that discrimination had not occurred, reinstatement was no longer appropriate. 31 FMSHRC at 980-89.

Chairman Jordan and Commissioner Cohen voted to reverse the judge's order, and would have had the temporary reinstatement order remain in effect. Chairman Jordan did so on the ground that the plain language of section 105(c) mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, whether it be under section 105(c)(2) or section 105(c)(3). *Id.* at 990-97. Commissioner Cohen found the language of section 105(c) to be ambiguous, that deference was

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<sup>1</sup> Baird's petition included a request that the Commission stay the effect of the judge's order dissolving temporary reinstatement (PDR at 1, 8), a request which PCS opposed. Only two of the then four Commissioners voted to grant the stay, so it was denied. *See* Unpublished Order, dated Apr. 8, 2010.

due the Secretary's reasonable construction of the statutory provision, and that the Secretary's interpretation of the provision to require that temporary reinstatement remain in effect while the miner pursues relief under section 105(c)(3) is a reasonable one. *Id.* at 998-1004.

In his petition for review, Baird argued that the instant case is distinguishable from *Phillips*, because here the Secretary had gone so far as to file a discrimination complaint on behalf of the miner, whereas in *Phillips* she had never done so. PDR at 5-7. In his brief, Baird takes the position that the Secretary's interpretation that section 105(c) requires that a temporary reinstatement order remain in effect while the miner pursues an action under section 105(c)(3) is a reasonable and thus permissible one, given the language of the statute and the legislation's history and purpose. B. Br. at 9-13.

In her amicus brief, the Secretary maintains that section 105(c) can only be read one way: a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether that final order is obtained pursuant to section 105(c)(2) by the Secretary, or by a miner under section 105(c)(3). S. Br. at 9. The Secretary takes issue with the opinion of Commissioners Duffy and Young in *Phillips*, both with regard to their conclusion that the Mine Act, by its plain meaning, prohibits the continuation of temporary reinstatement beyond the Secretary's determination that no discrimination occurred (*id.* at 10-21), and their holding that the Secretary is not due deference in her interpretation of section 105(c) with respect to the question at hand because she does not participate in section 105(c)(3) cases. *Id.* at 6-8.

PCS responds that the plain meaning of the text of section 105(c) indicates that temporary reinstatement is to end once the section 105(c)(2) process involving the Secretary has run its course, and does not extend to proceedings under section 105(c)(3). PCS Br. at 6-14. PCS maintains that such a reading of the Mine Act is further supported by its legislative history and purpose. *Id.* at 14-16. PCS further argues that, because the Secretary does not administer section 105(c)(3), her interpretation that temporary reinstatement continues during 105(c)(3) proceedings is not entitled to deference. *Id.* at 16-18. PCS takes the position that such a continuation would deprive the operator of due process of law. *Id.* at 18-20.

The Secretary requested and was granted permission by the Commission to file an amicus reply brief to respond to PCS's due process arguments. She argues that the temporary reinstatement procedures of section 105(c)(2) have been upheld as non-violative of the Due Process Clause of the Fifth Amendment. S. Reply Br. at 5. According to the Secretary, any additional period of time a miner is reinstated while a section 105(c)(3) case is litigated does not deprive the operator of due process. *Id.* at 4.

Consistent with the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, the judge's order dissolving the temporary reinstatement order is reversed. The miner shall be economically reinstated to his

former position, retroactive to November 16, 2009.<sup>2</sup> His economic reinstatement shall be at the rate of pay, including any pay increases, bonuses, and other benefits, as specified in the judge's February 2, 2010 order. *See Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).<sup>3</sup>

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Mary Lu Jordan, Chairman

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Patrick K. Nakamura, Commissioner

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<sup>2</sup> In her initial order of December 18, 2009, granting reinstatement, the judge ordered Baird reinstated retroactive to November 16, 2009. TR Order No. 1, at 4. In her February 2, 2010 amended order granting temporary economic reinstatement, the judge, upon motion of the parties, economically reinstated Baird to his former position retroactive to November 16, 2009. TR Order No. 2, at 4. The judge's February 2, 2010 order economically reinstating Baird retroactive to November 16, 2009, was subsequently dissolved by her order of March 10, 2010, which we now overturn.

<sup>3</sup> Our dissenting colleagues, in addition to basing their decision in this case on their position in *Gray*, suggest that the Commission should not "turn a blind eye" towards the Secretary's conduct of the litigation in this matter. Slip op. at 7-8. Even if we accepted their view of the Secretary's actions, which we do not, it seems to us exceedingly unfair to deprive this miner of temporary reinstatement as a means of expressing disapproval of the Secretary.

Commissioner Cohen, concurring:

Consistent with my opinion in the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, I agree that the judge's order dissolving the temporary reinstatement order should be reversed, and that Mr. Baird shall be economically reinstated to his former position, retroactive to November 16, 2009.<sup>1</sup> His economic reinstatement shall be at the rate of pay, including any pay increases, bonuses, and other benefits, as specified in the judge's February 2, 2010 order.<sup>2</sup>

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Robert F. Cohen, Jr., Commissioner

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<sup>1</sup> In her initial order of December 18, 2009, granting reinstatement, the judge ordered Baird reinstated retroactive to November 16, 2009. TR Order No. 1, at 4. In her February 2, 2010 amended order granting temporary economic reinstatement, the judge, upon motion of the parties, economically reinstated Baird to his former position retroactive to November 16, 2009. TR Order No. 2, at 4. The judge's February 2, 2010 order economically reinstating Baird retroactive to November 16, 2009, was subsequently dissolved by her order of March 10, 2010, which we now overturn.

<sup>2</sup> I agree with footnote 3 in the opinion of Chairman Jordan and Commissioner Nakamura.

Commissioners Duffy and Young, dissenting:

Consistent with our opinion in the decision the Commission issues today in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, we disagree that the judge's order dissolving the temporary reinstatement order should be reversed, and instead would affirm the judge's order to dissolve the temporary reinstatement order.

In so doing we cannot help but notice that the Secretary has apparently succumbed to the temptation her interpretation of section 105(c) raises. It is undisputed that: (1) the Secretary applied for Baird's temporary reinstatement two months after having received his discrimination complaint; (2) two and one-half months later, the Secretary filed a discrimination complaint on Baird's behalf pursuant to section 105(c)(2); and (3) over the next month the Secretary engaged in extensive discovery, including taking multiple depositions.

Then, less than a week before the discrimination hearing was set, the Secretary withdrew her section 105(c)(2) discrimination complaint because her near six-month involvement in the case had demonstrated to her that Baird had not been discriminated against. Consequently, the judge issued a "final order" under section 105(c)(2) dismissing the complaint. Given the language of section 105(c)(2), that ended Baird's right to temporary reinstatement, in our view at least.

Nevertheless, the Secretary urged the judge, and now urges the Commission, to keep "temporary" reinstatement in place while the miner pursues his own action under section 105(c)(3). It needs to be kept in mind that the invocation of section 105(c)(3) does not simply result in the miner's privately retained counsel taking the place of the Secretary in representing the miner at the hearing, or a brief continuance being granted for his new counsel to get up to speed. No, *an entirely new case begins, and even as we issue this decision the scheduled hearing in this case is months away.*

We do not believe the Commission should turn a blind eye toward these events, particularly at a time when the number of cases pending before our judges has increased greatly.<sup>1</sup>

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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<sup>1</sup> We note that it is the Commission’s judges who deal with the Secretary and the litigants on a daily basis in both the temporary reinstatement and discrimination phases of the proceedings, yet none of the multiple judges who have been faced with these circumstances have been persuaded that extending “temporary” reinstatement is appropriate.



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