

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

February 15, 2011

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

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

ORDER

BY: Jordan, Chairman, and Cohen 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 6, 2011, the Commission issued a decision (“*Decision*”) reversing an administrative law judge’s order which dissolved her previous orders that miner Kevin Baird be temporarily reinstated with PCS Phosphate Company, Inc. (“PCS”). On January 20, 2011, PCS filed a motion to stay the Commission’s decision pending federal court review. On February 1, 2011, the Secretary of Labor, who had previously been granted amicus curiae status in this proceeding, filed a response in opposition to the motion.¹ On February 2, 2011, Baird also filed a response in opposition to PCS’s motion. On February 3, 2011, the United States Court of Appeals for the Fourth Circuit docketed No. 11-1102, *PCS Phosphate Co. v. FMSHRC and Baird*.² For the reasons that follow, we deny PCS’s motion for stay pending appeal.

¹ The Secretary also filed an unopposed motion for leave to file her response. The motion for leave is granted.

² Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider PCS’s motion. *Sec’y on behalf of Smith v. The Helen Mining Co.*, 14 FMSHRC 1993, 1994 (Dec. 1992).

I.

Factual and Procedural Background

The background of Baird'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 2. Pursuant to section 105(c)(2), Administrative Law Judge Jacqueline R. Bulluck had ordered Baird temporarily reinstated to his position at 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 Unpublished Orders, dated Dec. 18, 2009, and Feb. 2, 2010 (ALJ) (hereinafter, respectively, "TR Order No. 1" and "TR Order No. 2").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'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). 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 reversed the judge's decision to dissolve reinstatement, holding that a miner's 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 4-5 (opinion of Chairman Jordan and Commissioner Nakamura), 6 (opinion of Commissioner Cohen).³ That same majority also ordered Baird economically reinstated to his former position, retroactive to November 16, 2009, at his former rate of pay, including any pay increases, bonuses, and other benefits. *Id.* This was consistent with the judge's last order reinstating the miner. *See* TR Order No. 2, at 4.

II.

Disposition

The PCS motion for stay has been filed pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (August 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;

³ The rationales for the separate Commissioner opinions, including that for the dissenting opinion of Commissioners Duffy and Young, were set forth in the decision the Commission issued on January 7, 2011, in *Secretary on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D ("Gray"). *See Decision* at 4, 6, 7.

(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 “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).

A. Whether It is Likely That PCS Will Prevail on the Merits of its Appeal

PCS contends that there is a substantial likelihood it will prevail before the Fourth Circuit, describing the *Decision* as having reversed 30 years of Commission precedent. Mot. at 3-4. 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 12 n.5; *see Gray*, slip op. at 3.

Baird responds to PCS’s motion by pointing out that the arguments PCS makes that it will prevail on appeal – reliance on what it contends is the plain meaning of the terms of section 105(c) and its legislative history – are no different from the arguments PCS made previously. B. Resp. at 3-4. Baird is correct that the Commission majority considered and rejected those arguments in both *Gray* and in the *Decision*. Consequently, we are not persuaded that there is a substantial likelihood that PCS will succeed in overturning the *Decision*. *See Gray*, slip op. at 9-16, 20-23, 24-26.⁴

B. Whether PCS Will Suffer Irreparable Harm Should a Stay Not Issue

The Commission, in reversing the judge’s order dissolving temporary reinstatement, specified that the order of economic reinstatement, because it should not have been dissolved, would go back into effect as if it had not been interrupted. *Decision* at 4-5 & n.2, 6; *see also Gray*, slip op. at 17, 18. PCS alleges that it will be irreparably harmed by having to pay the miner 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 PCS would be unlikely to recover the payments should the company succeed on appeal. Mot. at 6-7 (citing *Virginia Petroleum*, 259 F.2d at 925).

PCS’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

⁴ PCS, citing *Washington Metro Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), also maintains that, even if it cannot establish “a mathematical probability of success,” the other factors argue in favor of a stay, so the status quo should be maintained while the court hears the appeal. Mot. at 4. As discussed below, we do not agree with the operator’s conclusions as to those other factors.

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 Gray*, slip op. 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 PCS 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.

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

PCS also asserts that Baird will not be harmed by a stay. Mot. at 7. Not surprisingly, Baird and the Secretary vociferously disagree. B. Resp. at 5-6; S. Resp. at 14-16. Given the aforementioned purpose of the temporary reinstatement provisions, the notion that Baird will not be harmed by a stay does not withstand scrutiny.

D. Whether a Stay Would Serve the Public Interest

PCS characterizes the litigation as one only involving private parties, and one in which it is only requesting that the status quo be maintained while the court hears its appeal. Mot. at 7. Again, however, it is giving short shrift to 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 PCS, 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.

III.

Conclusion

For the foregoing reasons, we deny PCS's motion for stay pending appeal.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioners Duffy and Young, dissenting:

We would grant PCS's motion and stay the effect of the Commission's January 6, 2011, decision pending appeal to the Fourth Circuit, because that decision constituted a substantial departure from the Commission's past practice with regard to the question at issue. *See Decision* at 8 n.1 (Commissioners Duffy and Young, dissenting).

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Distribution:

Margaret S. Lopez, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street NW, 5th Floor
Washington, DC 20037

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2228
Arlington, VA 22209

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

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2296

Elizabeth McGrail, Esq.,
PCS Administration (USA), Inc.
1101 Skokie Blvd., Suite 400
Northbrook, Il 60062

Administrative Law Judge Jacqueline Bulluck
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

