FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of WENDELL McCLAIN, COY McCLAIN, WADE DAMRON, and GARY CONWAY	Docket Nos.	KENT 2005-96-D KENT 2005-97-D KENT 2005-98-D KENT 2005-99-D
v.		
MISTY MOUNTAIN MINING, INC., STANLEY OSBORNE, and SIMON RATLIFF		

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

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This consolidated proceeding involves discrimination complaints filed by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") on behalf of Wendell McClain, Coy McClain, Wade Damron, and Gary Conway (collectively referred to as "the complainants" or "the miners") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2000) ("Mine Act" or "Act"),[1] against Misty Mountain Mining, Inc. ("Misty

[1] Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

Mountain"), Stanley Osborne, and Simon Ratliff.[2] Administrative Law Judge T. Todd Hodgdon determined that the miners were discharged twice in violation of the Mine Act. However, he awarded back pay in an amount lower than that proposed by MSHA and concluded that the miners' right to reinstatement had ended once they turned down offers of reemployment following their second discharge. 27 FMSHRC 690, 697-98, 701-03 (Oct. 2005) (ALJ). The miners appealed the judge's reduction in their back pay and his conclusion that they had no further right of reinstatement; the Commission granted review. The Secretary filed, and the Commission granted, a motion to intervene in the proceeding before the Commission. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Misty Mountain was owned by Stanley Osborne. 27 FMSHRC at 691. Misty Mountain operated Mine No. 5, which was located in Letcher County, Kentucky, from July to November 13, 2004. *Id.* From July until October 14, superintendent Simon Ratliff was in charge of day-to-day operations at the mine. *Id.*

On August 1, 2004, Ratliff hired Gary Conway as an equipment operator. *Id.* Conway worked as a shuttle car operator for 3 days, and then was assigned to operate a roof bolter. *Id.* When he operated the shuttle car, he complained about the lack of brakes. *Id.* at 693. While assigned to the roof bolter, Conway complained to Ratliff about the need for new dust filters in the dust boxes and the failure of the automatic temporary roof support ("ATRS") to extend to the roof. *Id.* at 693-94.

In mid-August, Wade Damron was hired to assist Conway on the roof bolter. *Id.* at 691. Damron told Ratliff that the dust filters on the roof bolter did not work. *Id.* at 694. Also in mid-August, Coy McClain was hired to operate the shuttle car and a scoop. *Id.* at 691. He complained to Ratliff about the lack of brakes on both the scoop and the shuttle car. *Id.* at 694. In addition, he reported that the ATRS on the roof bolter did not reach the roof in some places. *Id.* Following Coy McClain's employment at Misty Mountain, Wendell McClain, Coy's brother, was hired as a shuttle car operator. *Id.* at 691. Wendell also informed Ratliff that the shuttle car did not have any brakes and that the ATRS did not reach the roof. *Id.* at 694.

On August 30, Ratliff removed Conway and Damron from operating the roof bolter and assigned Coy and Wendell McClain to operate it. *Id.* at 691. Damron was then assigned to the scoop. *Id.* at 691. When the roof bolter became stuck in the No. 3 entry, Damron brought in the scoop to free it. *Id.* As the scoop approached the roof bolter, Damron was unable to stop by

[2] Both mine owner Stanley Osborne and mine superintendent Simon Ratliff were individually named in the complaint as "persons" under the Mine Act, rather than charged as agents under section 110(c), 30 U.S.C. § 820(c).

applying the brakes. *Id.*; Tr. 74-75. Damron began yelling, "No brakes!" and signaling with his helmet light to Rafliff, and Coy and Wendell McClain, who were standing in the entry. 27 FMSHRC at 691. Damron was able to stop the scoop by steering it into the rib about 20 feet from where Ratliff and the other miners were standing. *Id.*

Wendell McClain told Ratliff that "someone was going to be killed" if the brakes on the scoop were not fixed. *Id.* Ratliff responded that he was not going to let anyone disrespect him like that and told Wendell McClain that he would not be needed anymore. *Id.* Ratliff told Coy McClain to go with him. *Id.* Wendell and Coy McClain understood that to mean that they were fired. *Id.* That same day, they filed discrimination complaints with MSHA. *Id.* Also on August 30, superintendent Ratliff told Wade Damron and Gary Conway that they were "deadbeats" and to get their buckets and leave. *Id.* Damron and Conway understood this to mean that they were fired. *Id.* They filed discrimination complaints with MSHA on August 31. *Id.*

Coy McClain went back to the mine on August 31 and was allowed to return to work. *Id.* at 692. On September 27, the Secretary of Labor filed applications for temporary reinstatement for Wendell McClain, Damron, and Conway.[3] *Id.* Before a hearing could be held on the applications, Misty Mountain agreed to reinstate the three miners on October 4. *Id.* Wendell McClain returned to work that day, and Damron and Conway returned to work on October 11. *Id.*

After the complainants went back to work, they were only permitted to work a few hours each day before Ratliff sent them home, while other miners continued working. *Id.* On October 14, Ratliff told the complainants that he could not work with them anymore. *Id.* Believing that to mean they were fired, they left the mine. *Id.* The same day, Ratliff quit his position as superintendent at Misty Mountain, and Mine No. 5 was closed until October 25, when a new superintendent was hired. *Id.*

On October 22, the Secretary filed an application for temporary reinstatement on behalf of Coy McClain. *Id.*; Appl. for Temp. Reins't, Docket No. KENT 2005-28-D. That same day, the Secretary also filed a Motion to Enforce Order to Temporarily Reinstate Wendell McClain, Gary Conway and Wade Damron. Docket Nos. KENT 2005-02-D; KENT 2005-03-D; KENT 2005-04-D. Shortly thereafter, Stanley Osborne spoke with MSHA special investigator Ricky Hamilton and told him that the complainants could return to work when the mine reopened. 27 FMSHRC at 692; Tr. 403-04; 528-29.

[3] At that time, no temporary reinstatement application was filed on behalf of Coy McClain because he had returned to work. *See* Docket No. KENT 2005-28-D.

On October 24, Coy McClain called Osborne at home and told him that he had another job.[4] 27 FMSHRC at 692. Neither Conway nor Damron returned to work on October 25 when the mine reopened. *Id.* On October 26 and 27, Osborne again spoke with the MSHA office and stated that he could place one of the miners at another mine. *Id.* On October 28, the secretary of MSHA investigator Hamilton called Osborne and told him that Conway and Damron had other jobs and would not be returning.[5] *Id.*

Wendell McClain returned to work at Misty Mountain on October 25 and continued to work at Mine No. 5 until it closed on November 14, 2004. *Id.* When the mine closed, Osborne offered Wendell McClain a job at Misty Mountain Mine No. 2. *Id.* McClain turned down the offer on the grounds that it was too far from his home and that he had no money for gas to drive there. *Id.*

The Secretary filed discrimination complaints on behalf of the miners in which she sought reinstatement, back pay, and other damages related to their discharges. *Id.* at 693. The Secretary also sought civil penalties of $20,000 against Misty Mountain, $10,000 against Stanley Osborne, and $10,000 against Simon Ratliff. *Id.* Thereafter, a hearing was held before the judge in which Misty Mountain, Osborne, and Ratliff appeared *pro se. Id.* at 690.

Based on these credited facts,[6] the judge found that the complainants engaged in protected activity by making various safety complaints regarding the equipment at Misty Mountain Mine No. 5. *Id.* at 693-94. The judge further found that the complainants were fired on August 30

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[4] Subsequently, the Secretary moved to dismiss Coy McClain's temporary reinstatement application because he was working at another mine. 27 FMSHRC at 692; Order of Dismissal (Dec. 6, 2004), Docket No. KENT 2005-28.

[5] The judge noted that Osborne's conversations with the MSHA office contained hearsay but that they were not disputed by the other parties. Osborne was not cross examined about them, and they were corroborated by MSHA investigator Hamilton. 27 FMSHRC at 700.

[6] The judge stated the following with regard to the credibility of the witnesses:

> On the whole, I found the main protagonists in this episode, Simon Ratliff, the McClains, Conway and Damron to be of doubtful credibility. Not only did they have obvious interests in the outcome of these cases, but their testimony, in addition to the specific instances already noted, was characterized by selective memory, inconsistencies and self-serving statements. I have tried to rely on their testimony only when it was supported or corroborated by other evidence.

27 FMSHRC at 705.

because of their safety complaints. *Id.* at 694-98. The judge also found that, following their reinstatements during the week of October 11, the complainants worked fewer hours than other miners. *Id.* at 698. Finally, the judge found that on October 14 the complainants were fired for a second time as a result of their discrimination complaints.[7] *Id.*

The judge held that the complainants were entitled to some back pay, but not to reinstatement and other monetary damages. *Id.* at 693, 699, 707. He determined that, following the October 14 terminations, "Osborne made a suitable offer of reinstatement to the four [c]omplainants. . . . [T]he fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable." *Id.* at 700. Accordingly, the judge concluded that, once the complainants refused reinstatement, they were not entitled to it again. *Id.* at 701 n.3. He also concluded that they were entitled to back pay only until the date when they refused reinstatement.[8] *Id.* at 701. He rejected the Secretary's position that Midguard Mining, which was owned by Stanley Osborne's son and took over some of the Misty Mountain mines, was liable as a successor operator. *Id.* at 704. The judge also rejected liability for back pay by former superintendent Simon Ratliff because he was acting only as an agent of Misty Mountain. *Id.* at 704-05. However, the judge held that Misty Mountain owner Stanley Osborne was jointly and severally liable for back pay. *Id.* at 704.

Finally, the judge imposed a penalty of $10,000, which was reduced from a proposed penalty of $20,000 against Misty Mountain and its owner, Osborne. *Id.* at 705-06. The judge rejected the Secretary's further penalty proposals of $10,000 against Ratliff and Osborne individually because there was no basis for their liability under section 110(c), 30 U.S.C. § 820(c), in this proceeding. *Id.*[9]

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[7] There has been no appeal from the judge's determination that the complainants were discharged twice as a result of their protected activity in violation of the Mine Act.

[8] The judge awarded back pay to the complainants in the following amounts: Gary Conway – $2,660; Wade Damron – $2,660; Coy McClain – $238; and Wendell McClain – $1,860. 27 FMSHRC at 701-03, 707.

[9] Both Osborne and Ratliff timely filed briefs with the Commission. However, to the extent that their briefs addressed issues not raised in the PDR, the Commission did not consider them in deciding this case. *See Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co., Inc.*, 21 FMSHRC 265, 284-85 n.25 (Mar. 1999) ("because these contentions were not raised by [a timely-filed petition for review], were not ordered by the Commission sua sponte for review, and attack the judge's orders . . . , they are not properly before the Commission."). Further, both Osborne and Ratliff refer to evidence that is not part of the record, including the recanting of testimony by a witness after trial and the results of a polygraph test, attached to Ratliff's brief. Because this evidence is not part of the record on review, it cannot be considered by the Commission. *Id.; see* 30 U.S.C. 823(d)(2)(A)(iii) ("no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been

The complainants filed a petition for review limited to the judge's reduction in their back pay resulting from their rejection of Misty Mountain's reinstatement offers and his determination that they had no further right of reinstatement once they had rejected those offers.

II.

Disposition

The petition for discretionary review, filed on behalf of the complainants, challenges the judge's determination that they "were not entitled to reinstatement." PDR at 1.[10] More specifically, the petition appeals the judge's determination that Wendell McClain's entitlement to back pay ended on November 15, 2004; that Coy McClain's entitlement to back pay ended on October 24, 2004; and that Damron's and Conway's entitlement to back pay ended on October 25, 2004. *Id.* at 1-2. With regard to Wendell McClain, Damron, and Conway, the petition asserts that they were under no obligation to accept temporary reinstatement after their second discharge. *Id.* at 13. Further, the petition argues that Wendell McClain was not required to accept a transfer to another mine, when Misty Mountain No. 5 closed, because he was in temporary status. *Id.* With regard to Coy McClain, the petition challenges the judge's determination that McClain was not entitled to back pay and reinstatement once he took a job at another mine, because there is no evidence that Stanley Osborne made an unqualified offer of permanent reinstatement. *Id.* at 13-14. The petition argues that the judge's conclusion that Osborne made a suitable offer of reinstatement to the complainants is incorrect as a matter of law. *Id.* at 15. Finally, the petition concludes that the judge's finding that a bona fide offer of reinstatement was made and communicated to the complainants is not supported by substantial evidence. *Id.* at 15-16.

The Secretary asserts that the judge erred when he failed to explain how he determined that Misty Mountain's second offer of reinstatement was "bona fide." S. Br. at 1, 15-17. The Secretary further argues that, assuming the reinstatement offers were bona fide, the judge failed to explain how he determined that the complainants' rejection of the offers constituted rejection of any further reinstatement with Misty Mountain. *Id.* at 1-2, 20-23. In support of her position, the Secretary asserts that a miner has no obligation to accept temporary reinstatement in order to preserve his right to permanent reinstatement. *Id.* at 23 n.14. Contrary to the complainants' position on appeal, the Secretary argues that the offers of reinstatement, following the second discharge, were effectively communicated. *Id.* 17-19.

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afforded an opportunity to pass."). In addition, Ratliff filed two briefs with the Commission well after the expiration date of the briefing period, which ended on March 27, 2006. Briefing Order (Jan. 5, 2006). Those briefs have not been considered by the Commission.

[10] The complainants designated their petition for discretionary review as their brief to the Commission. Letter (Feb. 3, 2006).

In challenging the judge's determination that the complainants were not entitled to reinstatement and that their back pay was cut off by Misty Mountain's offer of reinstatement following the second discharges, the complainants have placed squarely before the Commission the adequacy of those reinstatement offers.

A. Reinstatement Offers and Mitigation of Back Pay

The Commission applies the abuse of discretion standard when reviewing a judge's remedial order. *See Sec'y of Labor on behalf of Reike v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1257-58 (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 (quoting *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998) (unpublished)). "A litigant seeking to establish . . . abuse of discretion bears a heavy burden." *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (citing *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1844 (Nov. 1995)).

Under section 105(c), the Commission is authorized to "require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2).[11] Accordingly, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (Dec. 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Sec'y of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982). "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to'" a discriminatee. *Bailey*, 5 FMSHRC at 2049 (quoting *Sec'y of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982)).

The Commission recognized in *Dunmire and Estle* that the failure of a discriminatee to mitigate his damages is a compelling reason that could warrant less than complete relief. 4 FMSHRC at 144. Thus, the Commission has held that "back pay may be reduced in appropriate circumstances where an employee incurs a 'willful loss of earnings' (fails to mitigate damages)." *Id.* (quoting *OCAW v. NLRB*, 547 F.2d 598, 602-03 (D.C. Cir. 1976)). Finally, the operator bears the burden of proof with respect to willful loss. *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

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[11] Under section 105(c)(2), upon investigating a miner's complaint of discriminatory discharge and finding that the complaint has not been "frivolously brought," the Secretary must apply to the Commission for an order for "the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission is required to grant the application if it finds the statutory standard has been met. *Id.*; *see generally Sec'y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 585, 586-87 (Oct. 2003).

Disposition of the appeal in this proceeding turns on whether Misty Mountain made a suitable offer of reinstatement to the complainants following their second discharge. An offer of unconditional reinstatement to their jobs at Misty Mountain would toll the accumulation of back pay. *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463, 3464 (Dec. 1980); *Bryant v. Dingess Mine Service, Inc.*, 10 FMSHRC 1173, 1180 (Sept. 1988). Thus, it is "only in 'exceptional' circumstances that a discriminatee's rejection of an unqualified job offer [will] not end the back pay period." *Bryant*, 10 FMSHRC at 1180-81. Finally, if a suitable offer of employment was made and refused, then the need to offer reinstatement is moot. *Munsey*, 2 FMSHRC at 3464.

B. Validity of Osborne's Reinstatement Offers

Following the complainants' second discharge on October 14, the mine was shut down from October 15 until October 25, when a new superintendent was hired to replace Simon Ratliff. 27 FMSHRC at 699. Sometime before October 25, Stanley Osborne, owner of the mine, conveyed an offer of reinstatement to the complainants through MSHA investigator Ricky Hamilton. Tr. 403-04; 528-29.[12] According to Osborne, he "told all four employees that there would be work for them." Tr. 528. Only Wendell McClain returned to work on October 25. He continued working there until November 13, when the mine closed. 27 FMSHRC at 699.

While testimony in the record regarding the reinstatement offers is terse, there is nothing to suggest that the offers were conditional. *See* Tr. 403. Further, there is nothing in the record that would support the conclusion that acceptance of the offers would be futile, as the Secretary has argued. S. Br. at 15-16. Significantly, Ratliff, the principal source of friction who had initiated the prior terminations, had, by that time, quit his employment with the mine, resulting in the mine's closing until a new superintendent could be hired and leaving Osborne to convey job offers to the complainants. *Compare Sec'y of Labor on behalf of Hyles, etc. v. All American Alphalt*, 21 FMSHRC 119, 141 n.28 (Jan. 1999) (operator's placement of miner in a job before it was posted indicates that efforts of discriminatorily laid off miners to bid on the job when it was posted would have been futile). Thus, there is no circumstance that alters the plain words of Osborne's reinstatement offers. Under these facts, once a suitable offer of reinstatement was made, that tolled the accumulation of back pay, and there is no further requirement to offer reinstatement. *See Munsey*, 2 FMSHRC at 3464.

[12] Counsel for the Secretary initially objected to testimony regarding the reinstatement offers because, as a matter of law, the complainants could refuse an offer of temporary reinstatement and, therefore, the testimony was irrelevant. Tr. 401-04 (Hamilton). Subsequently, counsel further objected to testimony regarding the reinstatement offers because they were part of settlement discussions. Tr. 528 (Osborne). The judge overruled the objections.

Before the judge, the Secretary argued that a reinstatement offer made to settle a temporary reinstatement complaint could never be "suitable." The judge rejected the Secretary's argument.[13] 27 FMSHRC at 700. Now, before the Commission, the complainants argue that the judge's conclusion was incorrect and inconsistent with the Commission's decision in *Bryant*. In further support of their position, the complainants argue that temporary reinstatement can never be "unconditional" and is "contingent" and "places a condition upon one's employment status." PDR at 15.

These arguments must be rejected because they are at odds with the plain language of the Mine Act. In this regard, section 105(c)(2), 30 U.S.C. § 815(c)(2), makes no distinction between the "immediate reinstatement" which the Commission shall order following the Secretary's determination that a discrimination complaint is not "frivolously brought," and the reinstatement ordered by the Commission following a hearing and a determination of a violation. In other words, until a Commission judge has issued a ruling on the validity of the complaint, it is unknown whether the "immediate reinstatement" called for in section 105(c)(2) is temporary or permanent in nature. Thus, an operator's offer of reinstatement should be regarded as unconditional unless its terms expressly indicate otherwise.[14]

Nor does Commission case law support the position of the Secretary or the complainants that a reinstatement offer should be interpreted to mean something other than its plain language. In *Bryant*, cited by the complainants, the Commission held that an operator's offer to place a discriminatee on a recall panel coupled with the operator's guarantee that the discriminatee would be called back to work within two or three days was a bona fide offer of reemployment. 10 FMSHRC at 1180-82. The Commission further held that once the discriminatee turned down the offer, the right to back pay terminated. *Id.* at 1182. In this proceeding, Osborne's offer of work was unconditional. 27 FMSHRC at 699-700. On cross examination of Osborne, the Secretary's counsel tried to show that Osborne limited his offers of reemployment because they were made in the context of the Secretary's having filed temporary reinstatement complaints. Tr. 531-33. When asked if the reinstatement offers were made "pursuant to the temporary reinstatement

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[13] The dissenting opinion rests on the mistaken premise that the judge did not make a finding of suitability regarding Osborne's reinstatement offer. However, the judge clearly did so, noting in particular that the reinstatement offers were made to settle the Secretary's reinstatement applications. 27 FMSHRC at 700. Thus, although our dissenting colleague would have the judge further review the record testimony on remand to determine whether the offers were for "temporary" or "permanent" reinstatement, slip op. at 14, such a remand would be groundless and unnecessary. Moreover, even if one could conclude that the judge had not made such a suitability finding, Osborne's testimony is the only probative evidence on this issue, and it can only be read to support the conclusion that he made an unconditional offer of reemployment.

[14] If events indicate that the offer of reinstatement is not bona fide, e.g., the complainant is treated adversely after reinstatement, the remedy is for the Secretary to seek additional relief from the judge.

cases," Osborne responded, "I don't know . . . . I didn't temporarily give them a job. I would have given them a job . . . ." Tr. 532. Indeed, Osborne's offer of reinstatement is more absolute and open-ended than the one that the Commission found acceptable in *Bryant*.[15]

The complainants further cite *Dunmire and Estle* and *Bowling* to support their argument that a discriminatee is not required to accept an offer of temporary reinstatement to mitigate damages. In *Dunmire and Estle*, a discriminatee, who had not sought a temporary reinstatement application, was nevertheless found to have made the necessary reasonable efforts to mitigate his damages when he found alternative but lower paying employment. 4 FMSHRC at 144. The Commission refused to hold that the discriminatee had failed to mitigate his damages because he would have earned more by obtaining temporary reinstatement to the position from which he had been discharged. *See id.* In *Bowling*, the Commission concluded that a discriminatee had not failed to mitigate his damages when he did not seek reopening of his temporary reinstatement application, where there was no evidence that he was aware that he had a right to ask the Secretary to refile his application. 21 FMSHRC at 284-85. Neither case can be read to support the Secretary's and complainants' position that an offer of reemployment, made pursuant to a temporary reinstatement application, cannot constitute an unconditional offer to return to work.

In sum, the positions of the complainants and the Secretary on appeal must be rejected.

C. Substantial Evidence Supports the Judge's Findings

When Misty Mountain Mine No. 5 closed, Osborne offered to transfer Wendell McClain to Mine No. 2, and he agreed to take the position. 27 FMSHRC at 699. However, he never showed up at the mine, because, according to McClain, it was too far to drive or he did not have the money for gas. *Id.* The judge found that McClain's excuses for not accepting the job at the mine were "inconsistent and nonsensical." *Id.* The judge noted in particular that Osborne had paid McClain $800, purportedly in settlement of his MSHA complaint, which he used to pay for Christmas gifts on lay-away, rather than for gas to go to work. *Id.* The judge concluded that Wendell McClain's failure to report at the No. 2 mine was "not justified." *Id.* Therefore, the judge further concluded that McClain was not entitled to reinstatement because he chose not to accept the offer of work at the No. 2 mine "without articulating a legitimate reason for doing so." *Id.* at 701. The judge also held that McClain's back pay should not run beyond the time he turned

[15] The dissent's transformation of Osborne's unconditional offer of work to a conditional "temporary job offer," slip op. at 16-17, is without basis in the record and appears to be a thinly veiled attempt to apply the holdings of cases decided under the National Labor Relations Act ("NLRA"). *See* slip op. at 17. However, those cases are readily distinguishable because there is no provision in the NLRA comparable to the immediate reinstatement provision in section 105(c)(2) of the Mine Act.

down the offer of work at the No. 2 mine. *Id.* at 702. We hold that substantial evidence supports the judge's findings.[16]

Additionally, the decision clearly rests on credibility determinations made by the administrative law judge. *See* slip op. at 4 n.6, *supra*. We will not disturb these determinations except in extraordinary circumstances not found here. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (Sept. 1992) (quoting *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (Jan. 1984), *aff'd mem.* 750 F.2d 1093 (D.C.Cir. 1984)).

Further, the complainants argue that the reinstatement offer was not effectively communicated.[17] However, the record indicates and the judge found that the offer was made by Osborne to MSHA investigator Ricky Hamilton and the Secretary's counsel. 27 FMSHRC at 699; Tr. 403; 529. Moreover, that the offer was made and communicated was borne out by Wendell McClain's return to work.

With regard to Coy McClain, Gary Conway, and Wade Damron, the judge found, as noted above, that Stanley Osborne made an offer of reinstatement, through Hamilton and the Secretary's counsel, following the second discharge. 27 FMSHRC at 699. The judge found that Coy McClain turned down the reinstatement offer because he had found a higher paying job.[18] *Id.* at 700. The judge further found that Osborne made a similar offer of reinstatement to Conway and Damron but that they had found other jobs. *Id.* Neither the Secretary nor the complainants

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[16] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[17] The Secretary disagrees with the complainants that the reinstatement offer was not effectively communicated. *See* S. Br. 17-19 and PDR at 15-16. More specifically, the complainants assert that Osborne never told them directly that they could come back to work. We agree with the Secretary's position that there is nothing inherently improper with an operator's conveying a reinstatement offer through MSHA representatives. Indeed, in this case it appears that Osborne believed that he was required to communicate with the complainants through MSHA. Tr. 529.

[18] The judge noted that Coy McClain "professed not to recall this incident and . . . was very evasive when questioned about it." *Id.* (citing Tr. 173-75). However, the judge indicated that MSHA investigator Hamilton testified that Osborne had told him that Coy had quit to take a higher paying job (Tr. 397-98), and the payroll records in evidence showed that Coy was making more during his employment at McPeaks Energy during the period of October 17 to November 12. 27 FMSHRC at 700; Gov't Ex. 24.

challenge the judge's findings. In light of these uncontested findings, the judge's conclusion that "Osborne made a suitable offer of reinstatement" to the complainants, and "[a]ll four were offered a chance to return to Mine No. 5 or to transfer to other Misty Mountain mines and all four turned [the offers] down," is supported by substantial evidence. *Id.* at 700, 699.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

Both the judge and my colleagues avoid the central issue in this case: were the job offers from Stanley Osborne to the miners offers of temporary reinstatement, or permanent job offers? The majority concludes that substantial evidence supports the judge's finding that Osborne made a suitable offer of reinstatement, but the key question determining the adequacy of the offer was not addressed, much less answered, in his opinion. Therefore, I would vacate the judge's decision and remand the case to him.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994). The D.C. Circuit has further explained that, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) (citations omitted). In this case, the question of whether Osborne's job offer was "suitable," hinges in large part on the factual issue of whether the offer was for temporary or permanent employment. Without such a finding, I am unable to determine whether the judge's ultimate holding that a suitable job offer was made should be sustained.

According to the judge, "the fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable," 27 FMSHRC 690, 700 (Oct. 2005) (ALJ), but it is unclear what he meant by this statement. As the judge, noted, after the first firing, the miners went back to work in the same positions and at the same pay as they originally earned. *Id*. While these factors are generally a necessary component of a suitable offer, they do not equate to a permanent job offer. When the miners were fired a second time, "Osborne made it known to them that they could return to Mine No. 5 or to other mines that he operated." *Id*. The judge points to no evidence that would lead one to reasonably conclude that this second offer was any more permanent than the first.

The judge also relies on the fact that "after October 14, Ratliff, who seems to have been the catalyst for all of the problems at the mine, had resigned." *Id*. at 700-01. While this may be an appropriate factor to consider in making a determination as to whether a permanent job offer is suitable, it does not transform a temporary offer into a permanent one.

In any event, regardless of whether Osborne intended to offer a permanent, as opposed to a temporary job, it is unclear whether the miners would have any reason to think something other than *temporary* reinstatement was being offered. The offer at issue (the one after the second firing), was apparently made on October 22 (27 FMSHRC at 692, 699), the same day the

Secretary filed a Motion to Enforce Order to Temporarily Reinstatement Wendell McClain, Gary Conway and Wade Damron. Docket Nos. KENT 2005-02-D: KENT 2005-03-D; KENT 2005-04-D. The Secretary also filed an Application for Temporary Reinstatement for Coy McClain on that day. 27 FMSHRC at 692. Why should an offer to return the miners to work that day be viewed as anything more than an effort to comply with the judge's order requiring only *temporary* reinstatement? Why is it reasonable to conclude, without compelling evidence in support, that an operator who fired miners on two occasions in violation of section 105(c), and who, in between those firings illegally reduced their wages, was now offering to take action above and beyond what was required under the statute? Because the judge failed to address these key questions, I cannot affirm his decision. I would remand the case to him so that he could take these issues into account in deciding whether the job offer was temporary or permanent.

On remand, I would also ask the judge, in making a finding as to whether the offers were for temporary or permanent employment, to review the scant record testimony on this issue, including the testimony from Stanley Osborne (the only evidence relied on by my colleagues to support their finding that the offers were unconditional) wherein he states "I didn't temporarily give them a job. I would have given them a job . . . ." Slip op. at 10 (quoting Tr. 532);[1] s*ee also* Tr. 394. On the other hand, I would also ask the judge to consider Osborne's acknowledgment that before he made the job offers at issue, counsel for the Secretary had informed him that as part of the temporary reinstatement, he had to "put those four people back to work." Tr. 527.

Apparently, my colleagues believe that, when ascertaining whether an operator's job offer is "suitable," it does not matter whether the offer is for temporary or permanent employment. Slip op. at 9-10. According to the majority, whenever an operator offers immediate reinstatement following Commission agreement that a discrimination complaint is not frivolously brought, that reinstatement "should be regarded as unconditional unless its terms expressly indicate otherwise." *Id*. at 9. Put another way, my colleagues have deemed a job offer issued pursuant to the Commission's *temporary* reinstatement proceedings to be the equivalent of a permanent job offer. Such a ruling defies logic as well as the ordinary meaning of the term temporary reinstatement.

The majority relies on the language of section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), which it contends does not distinguish between "the immediate reinstatement," that the judge must order if he or she affirms the Secretary's determination that a discrimination complaint "is not frivolously brought," and the reinstatement ordered by that judge following a

[1] The fact that the majority relies on this testimony implies that it believes that, in calculating a back pay award, a judge should take into account whether a job offered to a miner was for temporary or permanent work. Otherwise, this testimony would not be relevant to the majority's determination of whether the job offer was "suitable." *But see* slip op. at 14-15, *infra*.

hearing and a determination that a violation of section 105(c) occurred.[2] Slip op. at 9. It points out that if the judge ultimately upholds the miner's section 105(c) complaint, the previously ordered immediate reinstatement becomes permanent in nature. *Id*. Because we do not know at the outset whether the immediate reinstatement will ultimately prove to be of a temporary or permanent nature, my colleagues conclude that this offer must be deemed unconditional unless its terms expressly indicate the contrary. *Id*.[3]

I disagree that the plain language of section 105(c) leads to the conclusion that offers of temporary reinstatement are unconditional offers to return to work. Section 105(c)(2) of the Mine Act provides that when a miner files a discrimination complaint deemed not frivolous, the Commission "shall order the immediate reinstatement of the miner *pending final order on the complaint*." 30 U.S.C. § 815(c)(2) (emphasis added). In contrast, when the miner ultimately prevails on the complaint, the Commission is authorized to order whatever relief the Commission deems appropriate including "the rehiring or reinstatement of the miner to his former position, with back pay and interest." *Id*. There is no conditional language regarding the pendency of this reinstatement. Thus, the drafters of the Mine Act clearly recognized the important difference between these two concepts, a difference that for some reason my colleagues are attempting to blur.

Although the majority acknowledges that it is the operator who bears the burden of proof with respect to willful loss of earnings, slip op. at 7 (citing *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985)), its analysis turns this burden upside

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[2] The majority thus appears to disregard the Commission's own procedural rules, which explicitly recognize temporary reinstatement. Comm Proc. Rule 45, 29 C.F.R. § 2700.45.

[3] My colleagues correctly rely on *Bryant v. Dingess Mine Service, Inc.*, 10 FMSHRC 1173 (Sept. 1988), for the proposition that a bona fide offer of reinstatement tolls the accumulation of back pay. Slip op. at 8. Notably, though, in that case, the Commission, in its discussion of "unconditional" and "bona fide" job offers, was referring to a permanent job rather than a job of shorter duration. This is demonstrated by its reference to an employment law treatise (10 FMSHRC at 1180), in which the authors stated that:

> termination of the back pay period normally occurs when the discriminatee is unconditionally and in a bona fide fashion offered *the employment, reinstatement, or promotion at issue*. This can occur pursuant to a final court decree or pursuant to a voluntary bona fide offer of employment, reinstatement, or promotion *to the position at issue*.

B. Schiei and P. Grossman, *Employment Discrimination Law* 1432 (2d ed. 1983) (emphasis added) (footnotes omitted).

down. In effect, the majority has created a presumption that any job offer rendered by an operator is unconditional, and therefore cuts off a back pay award, unless the operator has taken care to clearly indicate that it is conditional.[4] This is troubling because it significantly reduces the operator's burden of proof in establishing a willful loss of earnings. It is especially worrisome in a context such as the one presented in this case, where an offer of employment is made at the same time that the Secretary seeks a temporary reinstatement order from the judge. Why an operator's job offer at this juncture should be presumed unconditional (and permanent) is simply not explained by the majority.

My colleagues are correct, however, that until a judge issues a ruling on the validity of the discrimination complaint, it is impossible to know whether the "immediate" reinstatement is temporary or permanent. Slip op. at 9. That is precisely why a rigid rule truncating a miner's back pay recovery if he or she refuses temporary reinstatement is ill-founded: in a practical, rather than a merely theoretical world, a miner who has found alternative employment may be reluctant to discard it for a temporary job with a former employer, because at the time of the offer it is impossible to know whether the temporary job will, in fact, become permanent. Giving up steady, permanent employment and job security for a temporary job that may or may not become permanent after a period of litigation provides little solace for a miner. I doubt that the drafters of the Mine Act contemplated that a miner bringing a discrimination claim would be forced to gamble on his or her chances of litigation success in order to preserve back pay rights.

In addition, the majority fails to cite one Commission case directly in support of the novel principle that a refusal of a temporary job offer (which they consider to be "unconditional") automatically tolls a back pay award. The Commission has made it emphatically clear that a miner is not required to seek temporary reinstatement in the first place in order to mitigate his or her damages. *See Sec'y of Labor on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982); *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co*., 21 FMSHRC 265, 284 (Mar. 1999). If a miner cannot be penalized for failing to seek temporary reinstatement in the first instance, why should he or she automatically suffer a reduction in back pay for failing to accept a subsequent offer of temporary reinstatement?[5]

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[4] The majority dismisses the harsh consequences that could result from its presumption that offers are unconditional by stating that if an offer is in fact not bona fide, the Secretary may request relief from the judge. Slip op. n.14. This affords small comfort to a minor who has quit a job in reliance on an operator's presumably unconditional offer.

[5] My colleagues assert that *Dunmire* and *Bowling* do not support the position that "an offer of reemployment, made pursuant to a temporary reinstatement application, cannot constitute an unconditional offer to return to work." Slip op. at 10. It is true that this precise question was not at issue in these cases. However, in both cases the Commission held that failure to seek a temporary job does not affect a miner's back pay award. The natural extension of this logic is that failure to accept a temporary job does not necessarily affect a miner's back pay award.

Furthermore, a holding that a refusal to accept a temporary job always extinguishes a miner's right to back pay directly contravenes well-established case law under the National Labor Relations Act.[6] For example, in *Oil, Chemical and Atomic Workers International Union v. NLRB*, 547 F.2d 598 (D.C. Cir. 1976), the Court held that a willful loss of earnings was not incurred by workers' rejection of an employer's offer of temporary reinstatement. 547 F.2d at 604.[7] Although the Court acknowledged that an "unreasonable rejection of a valid, interim offer might in some circumstances constitute a willful loss of earnings," it emphasized that the purpose of section 10(j), the provision of the National Labor Relations Act providing "appropriate temporary relief," 29 U.S.C. § 160(j) (2004), "might be undercut if a discharged employee's refusal of an offer of temporary reinstatement is found to constitute a willful loss of earnings." 547 F.2d at 604 n.7; *see also Morvay v. Maghielse Tool and Die Co.*, 708 F.2d 229, 232 (6th Cir. 1983) ("an offer is insufficient to terminate back pay liability . . . if the job which [an employee] is offered is temporary").

As the foregoing discussion illustrates, both the language of the Mine Act and cogent policy considerations require the judge in this case to determine whether Osborne's offers were for temporary or permanent reinstatement. But the judge's inquiry should not necessarily end there. Granted, if he were to conclude that the offers were for permanent employment, then his work would be completed, as his finding that the offers were "suitable" would be an appropriate one in this case. However, if he were to determine that the offers were only for temporary reinstatement, I would instruct him to take into account additional factors in deciding if the refusal of the temporary jobs constituted a failure on the part of the miners to mitigate their damages.[8] This could include the fact that they had other jobs at the time of the offers, and the rate of pay at those jobs compared to their salary at Misty Mountain. *See, e.g., OCAW*, 547 F.2d at 604-05. If the judge were to determine that the miners did not fail to mitigate their damages, I would instruct him to recalculate their backpay awards accordingly.

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[6] As the Commission has acknowledged, "[b]ecause the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, [the Commission] ha[s] sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay." *Metric*, 6 FMSHRC at 231.

[7] The Court also took into account factors involving salary and job location. 547 F.2d at 604.

[8] The factual analysis on remand would be different for Wendell McClain than for the other three miners, because he returned to the mine to work on October 25 until it closed on November 13, but did not report to work at a different Misty Mountain mine when he was subsequently offered a job there. 27 FMSHRC at 699.

In sum, for the foregoing reasons I would vacate the judge's decision and remand the case to the judge for a finding of whether a suitable job offer was made, and if necessary, for a recalculation of the back pay award.

Mary Lu Jordan, Commissioner

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