FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 20, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of DEWAYNE YORK	:	
	:	
v.	:	Docket No. KENT 2000-255-D
	:	
BR&D ENTERPRISES, INC.	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(2) (1994). On August 29, 2000, Commission Administrative Law Judge Michael E. Zielinski ordered the temporary reinstatement of Dewayne York. 22 FMSHRC 1013, 1019 (Aug. 200) (ALJ). The matter comes before the Commission on a motion made by the Secretary of Labor under Commission Procedural Rule 1(b) and Rule 60(b) of the Federal Rules of Civil Procedure asking the Commission to reopen the proceedings and remand the case to the judge to allow him to review and rule on an agreement among the parties to economically reinstate York. For the reasons that follow, we find that the judge has sole jurisdiction over this case, and accordingly, we dismiss the Secretary's motion for lack of jurisdiction.

On May 26, 2000, Dewayne York filed a discrimination complaint with the Department of Labor's Mine Safety & Health Administration ("MSHA"). After a preliminary investigation of York's complaint, on August 4, 2000, the Secretary applied to the Commission for York's temporary reinstatement. A hearing on the Secretary's application was held, and on August 29, 2000, the judge ordered York's temporary reinstatement. 22 FMSHRC at 1019. The judge's order was not appealed. *See* 29 C.F.R. § 2700.45(f) (expedited procedures for appealing to the Commission an order in a temporary reinstatement proceeding).

The parties subsequently agreed that York should be "economically reinstated rather than being placed back to work." Mot. Attach. C (Agreed Order on Economic Reinstatement Oct. 11, 2000). It appears that York's economic reinstatement has already been implemented. The parties' Agreed Order states that York's economic reinstatement "began on August 31, 2000," and includes York "receiv[ing] the same amount of pay, including overtime pay . . . [and] any and all benefits which he would receive" if he were working, including health insurance. *Id*. The parties requested that the judge enter an order modifying his temporary reinstatement order to bring it into accord with the parties' agreement on economic reinstatement. *Id*.

In a December 21, 2000 letter to the parties, Judge Zielinski declined to amend his temporary reinstatement order. Mot. Attach. D. The judge stated:

> [T]he Agreed Order raises a serious question of jurisdiction. Commission Procedural Rule 69(b) provides that a judge's jurisdiction terminates upon issuance of a decision. . . . While the rules contemplate some continuing jurisdiction over an order of temporary reinstatement (*see*, Rule 45(f)), I have concluded that the more likely construction is that an ALJ does not have jurisdiction to amend an order of temporary reinstatement and that a motion seeking such relief would have to be directed to the Commission.

Id. The judge advised the parties they could "(1) resubmit the order to him as a motion if they wished him to make a formal ruling on the matter, (2) submit a motion to the Commission, or (3) simply retain the order for their files." *Id*.

The Secretary then filed the instant motion. The motion is made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure under which the Secretary notes "the Commission has reopened proceedings on a number of occasions to allow the parties an opportunity to submit settlement agreements after a decision has become final." Mot. at 3 (citations omitted). The Secretary states that "[f]or purposes of this motion, [she] assumes that the judge was correct in concluding that a judge does not have jurisdiction to amend an order of temporary reinstatement once he has issued it." *Id*. at 2 n.1.

The Secretary's motion presents the issue of whether a judge's order reinstating a miner who has filed a discrimination complaint under section 105(c)(2) of the Mine Act becomes a "final" decision when the period to take an appeal under Commission Procedural Rule 45(f)

expires.[1] The answer to this question will determine whether jurisdiction over a request to amend the order properly lies with the judge or with the Commission.

When a judge orders the temporary reinstatement of a miner under section 105(c)(2) of the Mine Act,[2] the employment status of the miner remains temporary until the complaint on which his or her reinstatement is based is resolved, i.e., "pending final order on the complaint." 30 U.S.C. § 815(c)(2). Temporary reinstatement precedes the filing with the Commission of a formal discrimination complaint by the Secretary. It is based on a finding that the miner's complaint to MSHA is not frivolous, a more lenient standard than the one applied in a subsequent case on the merits of the discrimination claim. Usually, temporary reinstatement precedes a full investigation of the miner's complaint by MSHA. This leaves open the possibility that MSHA could determine, upon further investigation, that the circumstances surrounding the temporarily reinstated miner's complaint do not constitute a violation of section 105(c)(1).

If this occurs, the miner's temporary job status under section 105(c)(2) terminates. Commission Procedural Rule 45(g) sets forth the procedure for formalizing this termination:

> If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C.

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[1] Rule 45(f) provides, in part: "Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition . . . within 5 days following receipt of the Judge's written order." 29 C.F.R. § 2700.45(f).

[2] Section 105(c)(2) provides in relevant part:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

30 U.S.C. § 815(c)(2).

> § 815(c)(1), have not been violated, the *judge* shall be so notified and *shall enter an order dissolving the order of reinstatement*.

29 C.F.R. § 2700.45(g) (emphasis added).

From the explicit requirement in the Procedural Rules that a judge dissolve an order of reinstatement under the foregoing circumstances, it follows that the judge retains jurisdiction over the temporary reinstatement docket during the investigation of the miner's complaint. Nor is there any indication in the Rules that a judge surrenders any such jurisdiction after the Secretary files a complaint with the Commission on behalf of a miner. Thus, when a discrimination complaint is filed with the Commission, it is solely within the judge's discretion to entertain any motions made to amend, modify, enforce, or otherwise address his underlying order of temporary reinstatement.

Further, Rule 45 contemplates Commission jurisdiction over temporary reinstatement dockets only in very narrow circumstances. Under Rule 45(f), we may review a judge's order in a temporary reinstatement proceeding. This limited review is normally the only jurisdiction the Commission may exercise in a temporary reinstatement proceeding. 30 U.S.C. § 815(c)(2). There having been no appeal under Rule 45(f) in this case, we find that the judge has sole jurisdiction over the case "pending final order on the complaint," and that we thus have no jurisdiction to entertain the motion made by the Secretary.[3]

[3] Because of our holding that the judge retains jurisdiction in this matter, the Secretary's request for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is, in effect, moot. There is no need to "reopen the proceedings in this case," Mot. at 3, because they have not yet been terminated, and are still before the judge.

Accordingly, we dismiss the Secretary's motion for lack of jurisdiction. We suggest that the parties may resubmit their agreement to the judge for further action as they deem appropriate.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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