FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 29, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
on behalf of JAMES RIEKE :
:
v. : Docket No. LAKE 95-201-DM
:
AKZO NOBEL SALT INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

[1] Commissioner Verheggen assumed office after this case had been considered and decided by the Commission. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), Administrative Law Judge Gary Melick determined that Akzo Nobel Salt Inc. (AAkzo@) violated section 105(c)(1)[2] of the Act by demoting James Rieke to a laborer position from his position as powderman/blaster. 17 FMSHRC 1368, 1378 (August 1995) (ALJ). The judge ordered his immediate reinstatement to the powderman/blaster position. *Id.* at 1379. At issue is whether the judge properly denied the Secretary of Labor=s later motion for relief from that reinstatement order, requesting that Rieke be permitted to remain in a higher-paying position with Akzo that he secured after his discriminatory demotion. 17 FMSHRC 1501, 1502 (August 1995) (ALJ). We granted a petition for discretionary review filed by the Secretary challenging the judge=s denial. Akzo subsequently filed a motion to dismiss the proceeding as moot. For the reasons that follow, we reverse in part, vacate in part and remand to the judge.

I.

Factual and Procedural Background

The underlying facts of the discrimination are not in dispute. On February 10, 1994, Rieke observed his foreman remove a Adown@ tag on a powder rig without determining whether the necessary repairs had been made. 17 FMSHRC at 1371, 1375. Rieke reported the incident to his union safety committee and an MSHA inspector. *Id.* at 1375. On March 31, 1994, the foreman informed Rieke that he was being disqualified from the powderman position and demoted to a position as laborer. *Id.* at 1370.

Rieke subsequently bid on and was awarded a higher-paying position as haul truck driver on October 21, 1994. 17 FMSHRC at 1501; S. Br. at 2-3; A. Br. at 1. In January 1995, the Secretary filed a complaint of discrimination on Rieke=s behalf, seeking, among other things, A[a]n order restoring the Complainant to his position as a blaster.@ S. Complaint at 4. At the time of the hearing on May 11, 1995, Rieke occupied the haul truck driver job. 17 FMSHRC at 1501; Tr. 9. He testified on direct examination as follows:

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[2] 30 U.S.C. ' 815(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any . . . mine subject to this Act 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, or the representative of the miners at the . . . mine of an alleged danger or safety or health violation in a . . . mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

Q. Mr. Rieke, what kind of relief are you seeking in this case?
1. My qualifications to be reinstated.
17. Which qualifications are those?
1. Powderman and EIMCO driver; and the backpay that I have lost, because I was demoted to a lesser paying job; and all the overtime that I have lost.

Tr. 39. The Secretary filed a post-hearing brief on July 12, 1995, also seeking an Aorder restoring the Complainant to his position as a powderman.@ S. Post-Hearing Br. at 19.

In an interlocutory decision dated August 7, 1995, the judge determined that Rieke=s disqualification from the powderman job constituted discrimination in violation of the Act. 17 FMSHRC at 1378. The judge assessed a civil penalty of $2,000 against Akzo and directed the Aimmediate[ ]@reinstatement of Rieke to his position as powderman/blaster. 17 FMSHRC at 1379. The judge ordered the parties to confer on the issue of damages and report back to him by August 25, 1995. *Id.* The parties stipulated to damages of $2,542.04 and the judge awarded this amount to Rieke. 17 FMSHRC 1500 (August 1995) (ALJ).

On August 22, 1995, the Secretary moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that portion of the order directing Akzo to reinstate Rieke to the powderman position. The Secretary asserted that she inadvertently failed to modify the prayer for relief to delete the request for reinstatement and that Athe miner wished to maintain the higher paying job.@ S. Mot. for Relief at 2. The Secretary alleged that (1) she informed counsel for Akzo, prior to imple-mentation of the order, that Rieke was not interested in the powderman position; (2) Akzo replied that Rieke could bid on the haul truck job opening and reinstated Rieke to the powderman=s job; and (3) a miner with greater seniority secured the haul truck job. *Id.* Akzo objected to the Secretary=s motion for relief.

Judge Melick denied the motion for relief. 17 FMSHRC at 1501-02. He reasoned that Rieke was granted the Aprecise remedy sought@whereas modifying the order would displace an innocent third party employee who had been awarded Rieke=s haul truck driver job and violate the collective bargaining agreement. *Id.*

On September 1, 1995, the Secretary filed with the judge motions to withdraw her previous motion and for reconsideration of the reinstatement order, to which Akzo objected. The judge referred these pleadings to the Commission because they were filed after the issuance of his final decision and he therefore no longer had jurisdiction over the case. The Commission granted the Secretary=s petition for review of the judge=s denial of relief.

While the appeal was pending and after all briefs had been filed with the Commission, Akzo filed a motion to dismiss the proceeding as moot based on Rieke=s discharge for cause. The Secretary opposed the dismissal motion, contending that a live controversy still existed.

II.

Disposition

A. Motion to Dismiss

Akzo asserts that on July 8, 1996, Rieke was discharged for a violation of its attendance program. A. Mot. at 1. It alleges that Rieke=s absence resulted from his conviction for felonious assault, for which he was incarcerated. *Id.* As a result, Akzo argues that no issues remain for the Commission to resolve. *Id.* at 1-2. The Secretary opposes the dismissal on the grounds that, A[e]ven if the complainant was lawfully discharged in July 1996,@ the Commission must still decide the issues of whether the judge erred by not allowing Rieke to remain in his higher paying job and whether Rieke is then entitled to backpay in the amount of the difference between the two jobs. S. Opp=n at 1-3.

We agree with the Secretary that Rieke=s discharge does not moot the issue of whether Rieke is entitled to additional backpay if the judge erred in failing to permit Rieke to remain in the higher paying haul truck driver position. Accordingly, we deny the motion to dismiss. However, if Rieke was in fact discharged for cause in July 1996, as Akzo asserts, and that discharge has not been and could not now be timely challenged, Rieke is not entitled to reinstatement nor is Rieke eligible for backpay after his discharge date. *See Cruz v. Puerto Rican Cement Co.*, 7 FMSHRC 487 (April 1985) (post-discrimination conduct on the part of employee may render an order of reinstatement inappropriate and toll period for which backpay is due); *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1385-86 (8th Cir. 1980) (employee misconduct may justify rejection of reinstatement remedy).

B. Remedy

The Secretary argues that the judge=s refusal to modify the reinstatement order is contrary to the Mine Act=s objective of making victims of discrimination whole and that a complainant is not required to accept reinstatement to a job that pays less than his present employment. S. Br. at 12-14. Additionally, she contends that the judge should have changed Rieke=s mandatory reinstatement to an *offer* of employment in accordance with case law under the National Labor Relations Act, 29 U.S.C. ' 160(c) (1994) (ANLRA@). S. Br. at 7-8. The Secretary asserts that the judge further erred by failing to amend the pleadings to conform to Rieke=s testimony regarding the remedy sought. *Id.* at 9-12. The Secretary also contends that neither the displacement of another employee nor the collective bargaining agreement prevent modifying the reinstatement order. *Id.* at 16-17.

Akzo responds that the judge properly denied the Secretary=s motion for relief because the Secretary failed to explain her inadvertence in not seeking to modify the remedy sought until after the order issued. A. Br. at 1-4. According to Akzo, the basis for appellate review of a denial of a Rule 60(b) motion or a motion for reconsideration is whether the judge abused his discretion and

the judge has not done so here. *Id.* at 4-6. Akzo submits that the judge did not err in granting the Secretary the exact relief she requested on Rieke=s behalf. *Id.* at 7-8, 10. Akzo also challenges the Secretary=s claims that the remedy is at odds with Rieke=s testimony and that the judge erred in failing to amend the complaint when the Secretary never sought leave for such an amendment. *Id.* at 8-10.

The Commission enjoys broad remedial power in fashioning relief for victims of discrimination. Mine Act section 105(c)(2) states in pertinent part: AThe Commission shall have authority . . . 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). As the Commission stated in *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (February 1982), this is a Abroad remedial charge@ and that Aso long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.@ Thus, the Commission reviews the judge=s remedial order for abuse of discretion and to ensure that it effectuates the purposes of the Mine Act.[3]

The Mine Act=s legislative history similarly indicates Congressional intent for expansive remedial relief to victims of discrimination:

> It is the Committee=s intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.
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> . . . .
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> It is the Committee=s intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

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[3] Abuse of discretion may be found when Athere is no evidence to support the decision or if the decision is based on an improper understanding of the law.@ *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (February 1997) (citing *Utah Power & Light Co., Mining Division*, 13 FMSHRC 1617, 1623 n.6 (October 1991); *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)), *appeal docketed*, No. 97-1392 (4th Cir. March 25, 1977).

S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

In accordance with these principles, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (December 1983). AOur concern and duty is to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations.@ *Dunmire*, 4 FMSHRC at 143. A>Unless compelling reasons point to the contrary, the full remedial measure of relief should be granted to [an improperly] discharged employee.=@ *Arkansas-Carbona*, 5 FMSHRC at 2049 (quoting *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982)).

As a corollary to the basic principle that the Commission must provide full remedial relief to make the miner whole, a miner should not be made worse off than he otherwise would have been because he has chosen to vindicate his rights under the Mine Act. The judge=s denial of the Secretary=s motion runs afoul of this principle by placing Rieke in a lower paying job than he would have occupied had he not filed a complaint. We conclude that reinstatement against the wishes of the discriminatee does not further the broad remedial charge of Mine Act section 105(c). *Cf. Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (National Labor Relations Board may or may not order re-employment depending on circumstances); *NLRB v. Brown-Dunkin Co.*, 287 F.2d 17, 20-21 (10th Cir. 1961) (Board in its discretion could properly grant wronged employees option of reinstatement or remaining in higher paying jobs); *Oil, Chemical and Atomic Workers International Union v. NLRB*, 547 F.2d 598, 603-04 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (no requirement that wronged employee mitigate damages by accepting offer of reinstatement if he has secured higher paying interim job).

The judge=s rationale for denying the Secretary=s request to modify the reinstatement order was inconsistent with Commission precedent. In this case, the judge should not have looked to the collective bargaining agreement in fashioning his relief under section 105(c). The Commission has stated that it does not Adecide cases in a manner which permits parties= private agreements to overcome mandatory safety requirements or miners= protected rights.@ *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citing *Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp.*, 3 FMSHRC 1175, 1179 (May 1981)). By the same token, displacement of the third party is not controlling. Section 105(c) of the Mine Act provides for reinstatement or rehiring. If transferring Rieke back to his truck driver position had resulted in other grievances under the collective bargaining agreement, as Akzo suggested in its Response to Motion for Relief at 2-3, then it was for Akzo, the wrongdoing operator, rather than Rieke, the victim of discrimination, to bear any burden resulting from purportedly conflicting requirements of section 105(c) and the union contract. *Cf. W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766-70 (1983) (where compliance with consent decree under Title VII of the Civil Rights Act of

1964 caused discriminating employer to violate seniority provisions of collective bargaining agreement, burden for breach appropriately placed on employer rather than on employees). It was not for the judge to weigh the rights of other parties not before him. *See Mullins*, 9 FMSHRC at 899 (Athe Commission does not sit as a super grievance or arbitration board@).

Akzo=s other arguments are not persuasive. Its contention that the Secretary obtained exactly the relief requested is disposed of by *Dunmire*, 4 FMSHRC at 144. There, the Commission rejected the operator=s argument that the miner=s backpay was tied to the Secretary=s pleadings. *Id*. The Commission held that the relief to the miner was Anot necessarily limited by[] the relief sought in the pleadings@ and that A[o]ur concern is to make miners whole, and technical problems in the pleadings can fairly be cured.@ *Id.; see also Brandon v. Holt,* 469 U.S. 464, 471 (1985) (Ait is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed@). Therefore the Secretary=s failure to properly amend the pleadings to account for Rieke=s request to remain in the higher paying job is not determinative of this issue. We note however that this case involves Secretarial inadvertence in failing to seek the appropriate relief for Rieke. S. Mot. for Relief at 2. At the hearing, Rieke testified that he wished to have his qualifications restored, not that he wanted his old job back. Tr. 39. Despite this testimony, the Secretary did not attempt to remedy this mistake until after filing her post-hearing brief and the judge=s issuance of his reinstatement order. The Commission eschews punishing a miner for the inadvertence of the Secretary. *Cf. Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) (ACongress clearly intended to protect innocent miners from losing their causes of action because of delay by the Secretary@).

The parties disagree over whether Akzo intended to discriminate against Rieke by returning him to the powderman position. S. Br. at 17; A. Br. at 12. Akzo=s intent makes no difference and we make no finding in this regard. The effect of the judge=s refusal to allow Rieke to remain a haul truck driver was to penalize Rieke for filing a discrimination complaint and such a penalty contravenes the broad remedial charge to make a miner whole under section 105(c)(2) of the Mine Act.[4]

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[4] The Secretary=s motion for expedited consideration is moot in light of our disposition. In addition, we decline to address, as beyond the scope of the petition before us, the Secretary=s request, contained in note 1 of her Opposition to Akzo=s Motion to Dismiss, to determine Akzo=s possible successor-in-interest. 30 U.S.C. ' 823(d)(2)(A)(iii). Moreover, as we have explained, A[t]here is no serious legal question that a Commission judgment may be enforced against a genuine successor.@ *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 778 (May 1989) (citing

cases).

III.

Conclusion

Based on the foregoing, we conclude that the judge=s refusal to modify the reinstatement order to allow Rieke to remain in his job of haul truck driver, amounted to an abuse of discretion. We reverse the judge and remand for the calculation of backpay, including the loss of pay and benefits which he suffered as a result of his demotion from haul truck driver to powderman. If, as Akzo asserts in its motion to dismiss, Rieke was discharged on July 8, 1996, and the discharge is final, we will not order Rieke=s reinstatement to the haul truck driver position. Accordingly, we vacate the reinstatement order and remand to the judge to determine the questions of whether Rieke was discharged in July 1996, whether Rieke has contested that discharge, and whether that discharge is final. If the judge determines that the discharge is in fact final, Rieke=s reinstatement claim is moot and we instruct the judge to dismiss it and to award no backpay for the period following the discharge date.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner