

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY - 4 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) ON
BEHALF OF NICHOLAS DOVE,

Complainant,

v.

KENTUCKY FUEL CORP.,

Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2015-158-D
MSHA Case No. PIKE-CD-2014-06

Mine: Beech Creek Surface
Mine ID: 15-19475

**ORDER GRANTING JOINT
MOTION TO TOLL TEMPORARY REINSTATEMENT**

This case is before me pursuant to an Application for Temporary Reinstatement brought under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c), *et. seq.* (the "Mine Act."). On January 26, 2015, I approved a settlement between the parties and ordered temporary economic reinstatement of Nicholas Dove. On March 9, 2015, the Respondent filed a Motion to Toll Temporary Reinstatement arguing that a reduction in force that occurred on February 9, 2015 warranted a tolling of the Temporary Reinstatement Order. In support of its assertions, the Respondent attached an Affidavit signed by mine manager, Kenny Lambert, Jr.. The Secretary opposed the Respondent's Motion, and urged the Court to deny the Motion because there was "insufficient information concerning the total workforce in this case and because the information furnished to the court omits critical information about all the mining operations controlled by Respondent." *Secy's Opp. Mot.* ¶5. Furthermore, it stated that Respondent had ceased payments to the miner on February 9, 2015, in violation of this Court's Order to Temporarily Economically Reinstatement Dove.

On March 16, 2015, the undersigned issued an Order Denying Respondent's Motion to Toll Temporary Reinstatement. In that Order, the undersigned ordered the Respondent to provide information requested by the Secretary to show that tolling was warranted. Furthermore, the undersigned ordered the Respondent "to immediately pay Dove all outstanding payments due under the Temporary Reinstatement Order of January 26, 2015, and to continue such payment until this court orders otherwise." *Ord. Denying Resp.'s Mot.*, 2. Following this Order, a conference call was held with the parties, wherein the Respondent agreed to provide the Secretary additional information and the Secretary agreed to review the information

expeditiously. It was agreed that once the Respondent provided sufficient information to show that tolling was warranted in this case, the parties would submit a joint motion to toll the Temporary Economic Reinstatement Order.

The Secretary and Respondent submitted a Joint Motion to Toll Economic Reinstatement Order on April 16, 2015. In this joint motion, the parties represented that additional information was supplied to the Secretary and, based on such information, the “Court’s Reinstatement Order should be tolled due to conditions unrelated to Dove’s alleged protected activity under the Mine Act.” The parties further requested this Court to toll the Reinstatement Order effective March 9, 2015, the date of Respondent’s initial opposed motion for tolling, which was denied. By email correspondence with the undersigned’s law clerk, the Respondent has represented that it has only paid Dove through March 9, 2015, in violation of the two previous orders of this court.

For the reasons that follow, the Joint Motion to Toll Economic Reinstatement Order is **GRANTED**, effective April 16, 2015.

“The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.” *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). This “limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous,” must be consistent with the “narrow scope of temporary reinstatement proceedings.” *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin*, 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC, 2013 WL 865606, *4 (Feb. 2013). “In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous.” *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

The Commission has categorized tolling as an affirmative defense, and held that the operator must make a showing by a preponderance of the evidence that no work was available for the miner. *KenAmerican Resources*, 31 FMSHRC at 1054-55; see also *Chadrick Casebolt*, 6 FMSHRC 485, 499 (Feb. 1984) (“if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.”)

In the instant case, the Secretary opposed the March 9, 2015 Motion to Toll and challenged the objectivity of the layoff. Therefore, under the “not frivolously brought” standard, the Respondent’s motion failed. After the Respondent provided additional information and

evidence to the Secretary, the Secretary dropped its objections to the objectivity of the layoff, and indeed joined the Motion to Toll on April 16, 2015. Therefore, the standard of review is now preponderance of the evidence. Under this standard, the Respondent's evidence that the Secretary has reviewed that it idled the Bevins Branch and Bent Mountain surface mines due a loss of coal sales, resulting in a reduction-in-force of 72, is sufficient. *Joint Motion*, 1. The Respondent retained five supervisors and 11 heavy equipment operators at its three surface mines, but it retained no greasers (Dove's position at the mine). *Id.* at 2. Under these circumstances, Dove's temporary economic reinstatement should be tolled.

In the Joint Motion, the parties suggest that the Temporary Reinstatement Order be tolled effective March 9, 2015—the date of the first Motion to Toll. This request is denied, and instead the Temporary Reinstatement Order is tolled effective April 16, 2015—the date of the Joint Motion to Toll upon which this Order is based.

According to two previous orders, the Respondent was required to continue payments to Dove until such time as this Court ruled otherwise. Respondent unilaterally ceased payments on February 9, and only continued payment through March 9 (a date that Respondent again chose unilaterally without leave of the Court) after the denial of its first Motion to Toll and Order requiring the continuation of payment. In previous cases, the Commission has rebuked Respondents for unilaterally cutting off payments to a discriminatee on the date of a reduction-in-force rather than on the date of a modification, stating that “no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.” *Sec. 'y of Labor obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, n. 2 (Oct. 2009). In *Gatlin*, the Commission made it clear what the proper course of action is for an operator that believes a change in conditions warranted tolling, stating “[r]ather than determining unilaterally that the workforce reduction justified terminating Mr. Gatlin's reinstatement, KenAmerican should have moved the Judge to modify the August 31 Order. *Id.*¹

Here, the Respondent chose to wait a month after its reduction-in-force to file its first Motion to Toll, and then took another month after that Motion was denied to provide additional evidence to the Secretary. It cannot now claim that the temporary reinstatement should be tolled retroactively, when it was in control of the information and evidence and was the cause of the delay.² The Respondent provided sufficient evidence that tolling was warranted in its April 16, 2015 Joint Motion. Accordingly:

¹ If Respondent had not violated the court's order and continued payment to the miner, that money would not be recoverable by the Respondent even if the February 9 reduction-in-force warranted tolling the temporary reinstatement. *Sec. 'y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 813-814 (Apr. 2013)(“[T]here is nothing in the Mine Act which contemplates that the miner would be expected to repay the amounts paid pursuant to the reinstatement order. Indeed, that would run counter to the intent of the provision, which is to provide immediate relief to a complaining miner while he or she waits for the case to be decided.”)

² Respondent's stated reason for idling the mine on February 9 was “the general softness of the Central Appalachian coal marke[t].” Presumably this decision was made prior to February 9, and it could have moved this Court prior to that date to toll the economic reinstatement.

It is **ORDERED** that Dove's temporary economic reinstatement is **TOLLED**.

The Respondent is **ORDERED** to pay Dove under the terms of the Temporary Economic Reinstatement Order through April 16, 2015.

It is Further **ORDERED** that the Respondent shall inform the Secretary, Dove, and this Court if Beech Creek, Bevins Branch, or Bent Mountain mines are brought back into production.



John Kent Lewis
Administrative Law Judge

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