

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 23, 2011

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| SECRETARY OF LABOR, (MSHA) | : | TEMPORARY REINSTATEMENT |
| on behalf of KENNETH R. WILDER, | : | PROCEEDING |
| Complainant | : | |
| | : | Docket No. KENT 2011-1224-D |
| v. | : | BARB-CD-2011-06 |
| | : | |
| PRIVATE INVESTIGATION AND | : | |
| COUNTER INTELLIGENCE | : | Abner Branch Mine |
| SERVICES, INC., and BLEDSOE | : | Mine ID 15-19132 |
| COAL CORPORATION, | : | |
| Respondents | : | |

ORDER GRANTING MOTION TO COMPEL
and
DENYING MOTION TO STRIKE

Participating Parties:

Tony Opegard, Esq., Lexington, KY, representing Kenneth R. Wilder.

Marybeth Zamer, Associate Regional Solicitor, U.S. Department of Labor, Nashville, TN, representing the Secretary of Labor (MSHA) on behalf of Kenneth R. Wilder.

John Williams, Esq., Rajkovic, Williams, Kilpatrick & True, PLLC, Lexington, KY, representing Bledsoe Coal Corporation.

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY, representing PICI.

Before: Judge L. Zane Gill

Procedural Posture

After taking evidence and argument at a hearing on July 15, 2011, the Court ordered the temporary reinstatement of Kenneth R Wilder (“Wilder”), on or about July 27, 2011. In response to that order, Respondent, Private Investigation and Counter Intelligence Services, Inc, (“PICI”) served the Court and the other parties a Notice of Reinstatement, which sets forth terms which, according to PICI, satisfy the Court’s Temporary Reinstatement Order. On August 8, 2011, Counsel for Wilder filed a Response in Opposition to PICI’s Notice of Reinstatement and Motion to Compel Compliance with the Court’s July 27, 2011, Temporary Reinstatement Order. On August 11, 2011, the Associate Regional Solicitor for the U.S., Department of Labor (“ARSOL”)

submitted a letter notifying the Court and the other participating parties that the Secretary of Labor was not in agreement with the terms of the Notice of Reinstatement and that she considered PICI's actions to be unilateral and in violation of this Court's Temporary Reinstatement Order. On August 15, 2011, PICI filed a response to Wilder's opposition to its Notice of Reinstatement. On August 16, 2011, Bledsoe Coal Corporation ("Bledsoe") filed its response to Wilder's opposition to PICI's Notice of Reinstatement. Also on August 16, 2011, the Secretary (ARSOL) filed a Motion to Strike certain exhibit materials (a proposed agreement regarding economic reinstatement) submitted by PICI in conjunction with its August 15, 2011, response to Wilder's opposition. Finally, on August 18, 2011, Wilder filed a reply to PICI's and Bledsoe's responses to his Motion to Compel, and PICI filed a response to ARSOL's Motion to Strike.

For the reasons stated below, the Court grants Wilder's Motion to Compel Compliance and denies the Secretary's Motion to Strike.

Discussion

Wilder's Motion to Compel

The Commission's Administrative Law Judges do not have authority to order economic reinstatement absent an underlying agreement between the parties.¹ We have clear authority to order temporary reinstatement and to approve (and possibly incorporate into our orders) the terms of an economic reinstatement agreement negotiated and agreed to among the parties. 30 U.S.C. § 815(c)(2), of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act); *Sec'y, on behalf of Phillips, v. A & S Construction Co.*, 30 FMSHRC 1119, 1121 (Nov. 2008). An economic reinstatement agreement can be a means of complying with an ALJ's temporary reinstatement order, if duly negotiated and agreed to by the parties and approved by the court. As such, it is a procedure much used and approved by the Commission. *See, e.g., Sec'y on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001). However, the parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to. *Sec'y of Labor, Mine Safety and Health Administration (MSHA) v. North Fork Coal Corporation*, 33 FMSHRC 589 (Mar. 2011).

¹ "Economic reinstatement" is a process by which the parties negotiate and agree to contractual terms that expediently substitute, either in total or in part, for the actual temporary reinstatement ordered by the judge in his/her temporary reinstatement order in a Sec. 105(c) discrimination case. As a matter of practice and custom, the parties may request that the judge modify his/her temporary reinstatement order to incorporate the terms of the economic reinstatement negotiated by the parties. However, as implied in its name, "temporary reinstatement" is an interim mechanism, and any amounts paid to the claimant are intended to be factored into and treated as an accounting adjustment in the ultimate calculation of back pay in the final resolution of the discrimination case on its full merits.

In this case, as is evident in the opposing positions of the parties, there has been no negotiated agreement on terms of economic reinstatement. In the absence of such an agreement, and lacking convincing proof that the terms of the Court's Temporary Reinstatement Order have been satisfied, PICI and Bledsoe have yet to comply with the Court's order. Without Wilder's concurrence, there can be no economic reinstatement for the Court to recognize.

Bledsoe and PICI were ordered to reinstate Wilder to the position he held on May 3, 2011, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Bledsoe and PICI have not reinstated Wilder to the same position he held on May 3, 2011. They have not argued that their unilateral reinstatement action constitutes an equivalence,² nor have they sought the Court's approval of their action in their Notice of Reinstatement of August 1, 2011. When challenged by Wilder, Bledsoe and PICI raised the collateral equitable issues relating to windfall compensation that may become relevant at such time as the Court decides the case on its merits and includes an order of back pay, but are unripe at this point. Issues of offset and/or mitigation may be relevant to a final calculation of damages, if any, but they do not pertain at this stage of the proceeding.

Wilder's Motion to Compel compliance with the Court's Temporary Reinstatement Order is **GRANTED**. PICI and Bledsoe are directed to comply with the Temporary Reinstatement Order immediately.

The Secretary's Motion to Strike

The Secretary's Motion to Strike seeks an order striking the "proposed agreement regarding economic reinstatement" from the record in this case. It is clear from the context of the authority cited by the Secretary's representatives that a motion to strike is more appropriately directed at an offer of evidence to support a claim of liability by tending to infer a culpable state of mind. The typical scenario is a court striking evidence of settlement negotiations or immediate repairs as contrary to the public policy of favoring compromise and settlement of disputes. *See*, Fed. R. Evid. 408 and related commentary. The settlement documents attached as exhibits to the parties' submissions in this case relate to whether there was a meeting of the minds on the issue of economic reinstatement and have nothing to do with any potential liability, at least at this stage of the case.

² PICI makes a passing reference to equivalent reinstatement in its response to Wilder's opposition to the Notice of Reinstatement. However, they present no detail to support their assertion other than to offhandedly claim that Wilder is better off under their reinstatement than he would have been had he been reinstated to the position he held on May 3, 2011, "since he no longer has to drive to the Bledsoe mine site and spend money for gas in his vehicle."

The Secretary's Motion to Strike is **DENIED**.

L. Zane Gill
Administrative Law Judge

Distribution:

Matt S. Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Suite 230, Nashville, TN 37219-2456

Tony Oppedard, Esq., Attorney-at-Law, P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY
41858

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Center
Circle, Ste. 375, Lexington, KY 40513

Richard D. Storm, PICI, 203 Eastern Avenue, Carlisle, KY 40311

Billy R. Shelton, Jones, Walters, Turner & Shelton, 151 N. Eagle Creek Drive, Suite 310,
Lexington, KY 40509-1889