

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 22, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JAMES MCGAUGHRAN,
Complainant,

v.

LEHIGH CEMENT COMPANY, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. PENN 2019-0144-DM
MSHA Case No. NE-MD_19-05

Mine: Nazareth Plant I
Mine ID: 36-00190

ORDER TOLLING TEMPORARY REINSTATEMENT

Before: Judge Rae

This matter comes before the Court on Respondent’s Motion for Tolling of Economic Temporary Reinstatement. For the reasons set forth below, the Respondent’s Motion is granted, and the Order Granting Temporary Economic Reinstatement is tolled, effective May 22, 2020.

I. BACKGROUND

On August 20, 2019, I issued an Order Granting Temporary Economic Reinstatement, whereby Lehigh Cement Company, LLC (“Respondent”) was ordered to temporarily economically reinstate James McGaughran (“Complainant” or “McGaughran”), in accordance with all terms set forth in the parties’ Joint Motion to Approve Settlement Regarding Temporary Reinstatement. Subsequently, this matter was set for hearing from June 2 through 4, 2020.¹ In the interim, the COVID-19 pandemic caused the Commission to suspend in-person hearings, including the hearing scheduled for this docket. In light of this development, the Commission offered Zoom videoconferencing as an alternative for conducting hearings.

On May 5, 2020, the Secretary of Labor (“Secretary”) filed a Motion to Oppose Remote Hearing, indicating that it did not wish to participate in a hearing using Zoom videoconferencing, and requested that the hearing for this docket be continued to a later date. By email, the Respondent agreed to a hearing via Zoom videoconferencing, and requested that the matter proceed to hearing. On May 5, 2020, I held a conference call to discuss the positions of the parties. During the conference, the Secretary raised numerous objections to using Zoom, including the potential for various technological problems and issues associated with assessing credibility via video. However, the Respondent indicated its desire to proceed to hearing using

¹ The associated Discrimination Proceeding is docketed as PENN 2020-0015.

Zoom because of the continued temporary economic reinstatement obligation that Respondent had towards McGaughran, as well as uncertainty regarding the resumption of in-person hearings. On May 11, 2020, the Respondent filed an Opposition to the Secretary’s Motion to Oppose Remote Hearing, along with a Motion for Tolling of Economic Temporary Reinstatement.

II. DISCUSSION

A. Temporary Reinstatement Under the Mine Act

Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) provides that “[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [the Mine Act] may . . . file a complaint with the Secretary alleging such discrimination.” 30 U.S.C. § 815(c)(2). Further, Section 105(c)(2) provides for temporary reinstatement of a miner “if the Secretary finds that such complaint was not frivolously brought,” whereby “the Commission . . . shall order the immediate reinstatement of the miner pending final order on the complaint.” *Id.*

The Mine Act’s temporary reinstatement provision was included “[t]o protect miners from the adverse and chilling effect of loss of employment while such matters are being investigated.” H.R. REP. NO. 95-655, at 52 (1977) (Conf. Rep). Congress viewed the temporary reinstatement provision as “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. REP. 95-181, at 37 (1977).

B. Commission Precedent Regarding Temporary Reinstatement

Aside from the entry of a final order on the complaint, the Mine Act does not explicitly identify any conditions that interrupt the mine operator's reinstatement obligation. However, Commission precedent has established that the obligation may be tolled or dissolved in several situations. “The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee.” *Sec’y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009) (citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989)). Further, “the judge may appropriately consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions *or similar conditions*.” *Sec’y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013) (emphasis added) (citing *Gatlin*, 31 FMSHRC at 1054).

The Commission has crafted a remedy with respect to reducing any award for back pay by the amount of the complainant’s unrelated interim earnings. *See Meek v. ESSROC Corp.*, 15 FMSHRC 606, 617 (1993); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 994-995 (1982). However, we are faced with an unprecedented situation due to the COVID-19 pandemic, which has suspended travel and continues to cause unforeseen difficulties—without an end date. No Commission case law directly addresses such a situation.

C. Tolling McGaughran's Temporary Economic Reinstatement

I conclude that the Respondent's obligation to temporarily economically reinstate McGaughran must be tolled. The purpose of temporary reinstatement under the Mine Act is to make the miner whole while the case is pending on the merits, not for the purpose of unjustly enriching a complainant at the operator's expense. Tolling McGaughran's Temporary Reinstatement does not cause a chilling effect or an inability for the Complainant to pursue the discrimination complaint, nor does it run afoul of the spirit or intent of the Mine Act. Respondent has represented through email conversations with the court—and without contradiction by the Secretary—that the Complainant admitted during depositions he is earning approximately \$107,000 per year in his current position, and is therefore suffering no economic loss.

I find that the unusual and unexpected pandemic and associated travel restrictions have created a situation where the Respondent is put in a position of an economic hardship, pending the lifting of restrictions at some unknown date. Recognizing that ordering a three-day hearing with multiple witnesses without the willing consent of both parties would be difficult—at best—and not an expeditious resolution of the matter, I granted the Secretary's request for a continuance over the objection of the Respondent. Therefore, I find it unfair to put such a burden on the Respondent due to circumstances not of its making, and that tolling the temporary economic reinstatement would not be contrary to the spirit and purpose of the Mine Act in this particular situation.

ORDER

It is **ORDERED** that the Order Granting Temporary Economic Reinstatement is tolled effective May 22, 2020.²



Priscilla M. Rae
Administrative Law Judge

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²The tolling of the Order Granting Temporary Economic Reinstatement will remain in effect until a decision is made on the merits.