

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2022

SECRETARY OF LABOR,	:	APPLICATION FOR
MINE SAFETY AND HEALTH	:	TEMPORARY REINSTATEMENT
ADMINISTRATION (MSHA),	:	
on behalf of ALVARO SALDIVAR,	:	Docket No. WEST 2021-0178
Complainant,	:	
	:	
v.	:	
	:	
GRIMES ROCK, INC.,	:	Mine: Grimes Rock, Inc.
Respondent.	:	Mine ID: 04-05432

ORDER GRANTING SECRETARY’S MOTION TO ENFORCE

This case is before me upon an application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), and 29 C.F.R. § 2700.45 et seq. The Secretary of Labor filed the application on behalf of Alvaro Saldivar seeking his reinstatement as a lube and water truck/equipment operator at the Grimes Rock mine pending the final disposition of Saldivar’s discrimination complaint.

A hearing was held on May 11, 2021, and one week later this Court issued a Decision and Order of Reinstatement (“Reinstatement Order”) wherein Grimes Rock was ordered to reinstate Saldivar. Grimes Rock appealed under Procedural Rule 45(f), and the Commission affirmed the Reinstatement Order on June 11, 2021. While the appeal was pending, the parties independently agreed for Saldivar to be economically reinstated in lieu of actual reinstatement. The Court approved the agreement in its Decision Approving Settlement and Order of Temporary Economic Reinstatement (“Economic Reinstatement Order”) issued on May 28, 2021.

Since the issuance of those orders, the Respondent has filed numerous motions in an effort to terminate or pause its payment obligations. Most recently, the Respondent has filed a Renewed Motion to Toll and Terminate Economic Temporary Reinstatement Order in which it argues that its obligation should be suspended altogether due to Saldivar’s changed circumstances following the hearing in this case. As explained in the Court’s January 7, 2022 Order Denying Respondent’s Motion to Toll Economic Reinstatement, the pertinent case law does not support the Respondent’s contention. Therefore, its payment obligations will not be suspended on the bases set forth in the motion.

Meanwhile, the Secretary has submitted a related filing, a Motion to Enforce Court Ordered Settlement Agreement. The Secretary alleges that Grimes Rock is skirting its obligation to make Saldivar whole pending disposition of his discrimination case. The settlement agreement reached by the parties provided that Saldivar would receive the amount of his wages at Grimes Rock minus the amount he was making at his then-employer Wayne J. Sand & Gravel Inc. The agreement was silent as to what would happen if he moved on from that position, and the

Respondent continued paying the diminished amount even after Saldivar left Wayne J. Sand & Gravel Inc. and was unemployed.

The purpose of temporary reinstatement, as codified in the Mine Act, is “to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard.” *North Fork Coal Corp.*, 33 FMSHRC 589, 592 (Mar. 2011). The Reinstatement Order in this case was issued to accomplish this goal for Saldivar. The later Economic Reinstatement Order simply “described how the parties proposed to implement relief ordered by the judge pursuant to the Mine Act.” *Id.* Accordingly, I cannot “ignore that statute in determining the construction, application, and effect” of the Economic Reinstatement Order and the agreement between the parties incorporated within it. *Id.*

The Economic Reinstatement Order was issued in the shadow of the initial Reinstatement Order, which mandated full and total reinstatement for Saldivar at his previous rate of pay. I approved the parties’ settlement agreement insofar as it adequately made Saldivar whole while his discrimination case was pending. Ambiguity in the agreement must be interpreted to further the goal of the Mine Act and of the original Reinstatement Order. Obligations under the Economic Reinstatement Order can change when circumstances change, as evidenced by the tolling of the operator’s obligation upon Saldivar’s unavailability. *See Order Granting Motion to Toll Temporary Reinstatement (April 19, 2022).*

Accordingly, I find that the Respondent is obligated to pay Saldivar the full amount ordered in the original Reinstatement Order offset by his pay from other employers for the period elapsed between May 18, 2021 and June 17, 2022, minus any periods of unavailability. The Secretary has agreed in his motion that those periods of unavailability include August 6 through November 14, 2021 and March 30 through May 17, 2022. Grimes Rock is not responsible for compensating Saldivar while he was unavailable during those periods of time. The company has argued in many repetitious filings that it is not responsible to pay Saldivar during his times of unavailability, and the Secretary has agreed to that assertion. In his motion seeking pay for Saldivar, the Secretary lists, in detail, the times Saldivar was available or unavailable for work, as well as the times that Saldivar mitigated the amount owed with alternative employment. Grimes Rock responded to the Secretary’s motion with some information about payments made to Saldivar, but did not supply any facts to dispute the times and amounts set forth by the Secretary. Hence, there are no facts in the record that contradict Saldivar’s availability to work for all times outside of the two above-listed periods of unavailability. If the Respondent had any **factual** information refuting the Secretary’s calculations of economic reinstatement, it has had ample time to supply those facts. Grimes Rock files incessant motions, often duplicative and irrelevant, but nonetheless has had every opportunity to supply facts instead of conjecture in its constant filings.

Grimes Rock claims that it should be entitled to a hearing on the issue of missed pay, asserting that it has the right to question whether Saldivar has been looking for work. Here again, Grimes Rock misunderstands the nature of temporary reinstatement. Instead of barraging the Court with countless “renewed” motions, the Respondent should take the time to understand the law, and to allow the Court time to address the important and underlying issue of discrimination. Every minute spent reading and digesting these tedious motions only sets back the time the Court

has to issue a final decision in this case. Accordingly, the Respondent’s motions to terminate the temporary reinstatement and its motion for a hearing are hereby denied.

WHEREFORE, the Secretary’s Motion to Enforce Court Ordered Settlement Agreement is **GRANTED**. The Respondent is **ORDERED** to pay Saldivar the full wages as ordered in the Reinstatement Order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period. The Respondent shall pay \$9,723.08¹ that is past due for the period before May 17, 2022, and is further obligated to pay a gross total of \$2,810.86² for the period between May 17 and June 17, 2022. Future payment obligations under the Economic Reinstatement Order are hereby **TERMINATED** as of this date. The Respondent’s renewed motion is **DENIED**.



Margaret A. Miller
Administrative Law Judge

¹ The Secretary does not allege nonpayment before November 8, 2021. Calculations are based on the table below. Information in the table comes from both parties’ submissions in this case. The difference between the final amounts owed here and in the Secretary’s motion is accounted for by the April 1 check, as included in the Respondent’s response.

Pay Period Begins With	Amount Due	Amount Paid	Amount Owed
11/8/2021	\$ 1,583.26	\$ 1,068.39	\$ 514.87
11/22/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
12/6/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
12/20/2021	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/3/2022	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/17/2022	\$ 3,166.53	\$ 2,136.78	\$ 1,029.75
1/31/2022	\$ 1,250.66*	\$ 1,250.66	\$ 0.00
2/14/2022	\$ 3,166.53	\$ 1,250.66	\$ 1,915.87
2/28/2022	\$ 2,616.53*	\$ 2,136.78	\$ 479.75
3/14/2022	\$ 3,166.53	\$ 2,136.00	\$ 1,030.53
3/28/2022	\$ 633.31	\$ 0.00	\$ 633.31
TOTAL	\$ 28,249.47	\$ 18,526.39	\$ 9,723.08

* Periods of mitigation.

² This figure was calculated by subtracting the wages from Saldivar’s new employment (prorated for 22 workdays) from his previous wages from Grimes Rock (prorated for 23 days of availability).

Distribution: (Electronic Mail and Certified Mail)

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