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CLIENT ALERT

Recent Developments in Whistleblower Retaliation Cases Under the Mine Act

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Pretty much every U.S. mine operator these days is aware – too aware, really – of the increasingly aggressive stance that the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), has taken toward mine safety enforcement in recent years pursuant to the Federal Mine Safety and Health Act (Mine Act). Equally problematic for a growing number of operators is the increase in so-called discrimination litigation before the Federal Mine Safety and Health Review Commission (Commission) pursuant to § 105(c) of the Mine Act, ostensibly to protect self-proclaimed whistleblowers from retaliation by their employers. In 2012, for example, MSHA filed with the Commission a record number of requests for temporary reinstatement (indeed, more than double the number in any previous year) and discrimination complaints on behalf of miners. Indeed, MSHA has recently taken to what at times seems like crowing about its growing discrimination docket, as though it sees itself as the only thing standing between what it perceives to be noble but beleaguered safety crusaders and a legion of scofflaw operators all too willing to tolerate an unsafe work environment while trampling the rights of its workforce.

This article will address two recent developments in Mine Act discrimination litigation: (i) the status of temporary reinstatements after the Secretary concludes no violation of §105(c) has occurred; and (ii) a mine operator's right to seek reimbursement of money paid to a complainant in lieu of wages under an economic reinstatement agreement.

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OVERVIEW

The broad outlines of how a discrimination case proceeds should be familiar to every operator out there: a miner files a complaint with MSHA alleging that he was retaliated against for engaging in some legally protected, safety-related activity, whether it be making a safety complaint, refusing to work under conditions he believed were unsafe, or participating in proceedings under the Mine Act. MSHA investigates the complaint. If the miner claims he was fired for engaging in protected activity and MSHA finds that the complaint was "not frivolously brought," MSHA asks the Commission to temporarily reinstate the miner to his former position while MSHA completes its full investigation and decides whether the miner's rights really were violated. Although the operator can challenge the miner's right to temporary reinstatement, such challenges are rarely successful because the "not frivolously brought" standard, as it has been interpreted by the Commission, sets such a low bar for MSHA and the miner to cross that it is effectively meaningless.

If the mine operator does not want to bring the complaining miner back to the job site while the case is proceeding, it can agree to "economic reinstatement," which effectively means that the company agrees to pay the miner to stay home until the miner is no longer entitled to temporary reinstatement. If MSHA decides that the miner's rights were indeed violated, it will file a complaint with the Commission (the so-called "merits case") to vindicate those rights. If, however, after further investigation, MSHA finds that no violation occurred, it notifies the miner and the operator of its finding, at which point the miner has the right to file his own complaint with the Commission to seek relief from the alleged retaliation.

dissolution of temporary reinstatement

The question often arises: what happens when MSHA obtains temporary reinstatement on a miner's behalf only to conclude, after further investigation, that the miner's complaint of discrimination lacks merit? Until recently, the law was somewhat unsettled. For many years, a Commission rule required temporary reinstatement to be dissolved if MSHA found the complaint of discrimination lacked merit. In 2006, however, MSHA persuaded the Commission revise its rule to eliminate the automatic dissolution provision, on grounds that temporary reinstatement *must* remain in place even if MSHA subsequently decided that there was no merit to the complaint and abandoned the miner's cause. According to MSHA's reading of the Mine Act, if the miner brought his own case, the operator was simply stuck employing him (or at least paying him) until the bitter end: it either had to keep the miner on the job or pay him to stay home until a final order was entered in the case, a process that could take a year or more to resolve (due in no in small part to the miner's disincentive to cooperate in getting the matter scheduled for a prompt hearing). In subsequent administrative litigation, the Commission confirmed that its rule change was intended to codify MSHA's radical policy position.

Fortunately, in two recent U.S. Court of Appeals decisions, the Commission's change of policy (adopting MSHA's interpretation of the statute) was rejected and its former practice (of dissolving temporary reinstatement when MSHA finds that the discrimination complaint lacks merit) restored. In *North Fork Coal*, the Sixth Circuit Court of Appeals held that temporary reinstatement does not continue after MSHA determines that a miner's complaint lacks merit. In that case, a miner was fired for alleged disciplinary issues. He brought a discrimination complaint and MSHA obtained temporary economic reinstatement for him. MSHA subsequently decided not to proceed and the administrative law judge ordered the miner's temporary reinstatement dissolved. The miner challenged the judge's ruling on appeal and, in a split decision, the Commission reversed the ruling. North Fork appealed to the Sixth Circuit.

Applying general principles of administrative law, the court of appeals decided that the statutory language of the Mine Act was unclear as to whether temporary reinstatement should survive MSHA's decision not to bring a merits case on behalf of a miner alleging discrimination. Since the law was ambiguous, the court had to find the "most reasonable interpretation." In so doing, the court gave *some* deference to MSHA – but not *absolute* deference, because MSHA's interpretation was offered in litigation, an informal medium, rather than through notice-and-comment rulemaking. Looking at the language of the Mine Act and its legislative history, together with MSHA's 27-year acceptance of the Commission's previous practice of dissolving temporary reinstatement after a finding of no discrimination, the court held that that "the most reasonable interpretation of the Mine Act is that the order of temporary reinstatement dissolves when the Secretary determines that no violation has occurred."

Less than three months later, the Seventh Circuit joined the Sixth in holding that temporary reinstatement ends after MSHA decides not to pursue a merits case on a miner's behalf. In *Vulcan Construction Materials*, after MSHA found that the miner's

discrimination complaint lacked merit, Vulcan asked the administrative law judge to dissolve the economic reinstatement that had previously been ordered at MSHA's request. Echoing the position it had taken before the Sixth Circuit in *North Fork* (which at that point had not yet been rejected by the appeals court), MSHA objected. The judge agreed with MSHA and declined to dissolve the reinstatement. On appeal, the Commission affirmed the judge's decision, the Commissioners taking the very same positions they had in the *North Fork* case.

Vulcan appealed. After an in-depth review of the positions historically taken by MSHA and the Commission, the court got to the heart of the matter. Unlike their colleagues on the Sixth Circuit Court of Appeals, the judges on the Seventh Circuit panel concluded that the Mine Act was not ambiguous at all, and that Congress intended for temporary reinstatement to be tied to MSHA's advocacy on behalf of the complaining miner, such that it should terminate with the termination of MSHA's involvement. The Seventh Circuit did not end its analysis there, though. Even though it was not necessary to its holding, the court held that MSHA's position was entitled to *respect* but not to *deference* because it was not arrived at pursuant to MSHA's rulemaking authority and was, simply, a position in litigation. The appellate decisions in *North Fork* and *Vulcan* effectively carve the Commission's original (pre-2006) practice into the bedrock of Mine Act law: once MSHA makes a finding of no discrimination, the previously ordered temporary reinstatement dissolves as a matter of law.

issues relating to reimbursement

Okay, so it is clear that once MSHA decides that the operator had not violated § 105(c) of the Mine Act as alleged, temporary (or economic) reinstatement must come to an end. But what happens if MSHA takes the miner's merits case and *economic* reinstatement continues for the duration of the litigation (which could be months or years), but ultimately MSHA and the miner lose the case? Is the mine operator entitled to reimbursement from the miner for the months or years that it paid him to stay home? (This is not an issue where the miner was temporarily reinstated since, in that case, the operator presumably had the benefit of the miner's labor.)

Generally, the answer is "no." According to the Commission, "if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim."

Two recent cases, however, call into question whether monies paid to a miner that, in the final analysis, were not deserved, are truly beyond recoupment by the operator. In *Hildreth v. Teck Alaska*, after the parties agreed to economic reinstatement, MSHA concluded there had been no discrimination after all and declined to file a complaint on the miner's behalf. It told the miner of its decision but somehow neither MSHA nor its lawyers in the Office of the Solicitor of Labor thought to notify the operator, who continued to pay the miner even after his economic reinstatement should have come to an end. By the time the operator found out, it had already paid the miner almost $10,000 more than it would have had it known that he was no longer entitled to economic reinstatement. What's more, the miner had already spent the money.

When the company asked the administrative law judge to order reimbursement, the judge wrote that "the novel issue presented … is whether and to what extent Hildreth can be compelled to repay Respondent for temporary economic reinstatement payments that Hildreth received and spent despite his knowledge of MSHA's finding of 'no discrimination … .'" After acknowledging the general rule that an operator could not recoup sums paid pursuant to an economic reinstatement agreement, the judge looked to the common law of unjust enrichment – what happens when someone mistakenly makes a

payment to a recipient who was not entitled to receive it. In this case, the judge found, the miner knew he wasn't supposed to get the money, but he took and spent it anyway. The judge netted out the taxes withheld on the miner's behalf and a small sum that was correctly paid before MSHA found the miner's complaint lacked merit and arrived at the sum of $4739.97 as the miner's liability for the unjust enrichment. Strangely, though, the judge then said that if the miner won his case, any back pay he was awarded would be reduced by that amount but that if he lost, the judge would "then decide whether restitution to [the operator] remains appropriate after reviewing all relevant factors." In a footnote, the judge also took MSHA and its lawyer to task for what he called "the sloppy handling of this case," blaming them in the first place for the overpayment that the miner knowingly accepted.

While the *Hildreth* decision might be distinguished as addressing a unique circumstance, operators should take note of a comment made by the Commission in an Order denying a stay pending review in *United Mine Workers of America o/b/o Franks and Hoy v. Emerald Coal Resources*. There, the Commission suggested it may be open to allowing an operator to recover undeserved payments. Following a finding of discrimination after a trial on the merits, the operator was ordered by the administrative law judge to pay the complaining miners back pay, with interest, for the time they had been wrongfully suspended. The operator sought review by the Commission and asked the Commission to stay the judge's order while the appeal was pending (so it would not have to pay the miners until its appeal was decided). The Commission considered whether operator satisfied the legal standard for a stay, which includes (among other factors) whether the operator would suffer "irreparable harm" if the stay was not granted. The Commission denied the stay, partly because it did not believe the operator would be "irreparably harmed," since "'[E]conomic loss does not, in and of itself, constitute irreparable harm' … , and in any event *Emerald can seek reimbursement from the two miners in the event the Commission overturns the judge's decision*." (Emphasis added.) It is hard to know whether or how, but this seemingly off-the-cuff statement could herald a significant change in the right of a mine operator who wins a discrimination case to recoup moneys paid to a miner pursuant to an economic reinstatement agreement.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.