

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
and JONATHAN HOLSKEY,

Complainants

v.

PENNYRILE ENERGY, LLC,

Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2018-0004-D
MSHA Case No. MADI-CD-2017-05

Mine: Riveredge Mine
Mine ID: 15-19424

**ORDER GRANTING JOINT MOTION FOR TEMPORARY ECONOMIC
REINSTATEMENT**

Before: Judge Andrews

On October 26, 2017, this Court issued a Decision and Order Reinstating Jonathan Holskey to his former position with Pennyryle Energy at the Riveredge Mine at his former rate of pay. Soon thereafter, the parties negotiated a Temporary Economic Reinstatement agreement in lieu of actual reinstatement, and have moved this Court to grant economic reinstatement.

Section 105(c) of the Mine Act, which protects miners in making health and safety complaints is central to the proper functioning of the law. Congress stated that “If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 95-181, at 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). Section 105(c) was intended to ensure that miners’ rights to make complaints or refuse work were not chilled by any company action. Indeed, the Senate Committee stated that it “intends section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* The intent of the legislation is best served by actual reinstatement at the mine of the miner.

Temporary Reinstatement of a miner who brings a nonfrivolous complaint of discrimination protects miners from losing their livelihoods while the merits of a case proceeds through the Commission. It also serves to show others in the mine that the miner who speaks up about health and safety matters is back at work, so they can be confident that the law will protect them if they ever feel the need to make a health or safety complaint.

It has become the norm that parties have routinely negotiated agreements for economic reinstatement in lieu of actual reinstatement, with the assumption that the two are equivalent. Commission ALJs (including the undersigned) have routinely granted requests for economic reinstatement in lieu of actual reinstatement. *See eg Sec'y o/b/o Mosby v. Mulzer Crushed Stone, Inc.*, 34 FMSHRC 391, 392 (2012) (ALJ). *Sec'y o/b/o Whiton v. Wharf Resources, (USA), Inc.*, 38 FMSHRC 124, 125-26 (2016)(ALJ); *Sec'y o/b/o York v. BR&D Enterprises*, 23 FMSHRC 697, 698 (2001) (ALJ); *Sec'y, on behalf of Phillips, v. A & Construction Co.*, 30 FMSHRC 1119, 1121 (2008) (ALJ); *Sec'y o/b/o Hines v. Martin Marietta Materials, Inc.*, 34 FMSHRC 1063, 1063 (2012) (ALJ); *Sec'y o/b/o Mitchell v. Vulcan Construction Materials, LP*, 34 FMSHRC 2985 (2012); *Sec'y o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1418, 1418-19 (2009) (ALJ); *Sec'y o/b/o George v. Freeport-McMoran, Bagdad, Inc.* 33 FMSHRC 2488, 2488-89 (2011) (ALJ); *Sec'y o/b/o Jackson v. Lafarge North America, Inc.*,34 FMSHRC 2993, 2993-94 (2012)(ALJ); *Sec'y o/b/o Billings v. Proppant Specialists, LLC*,33 FMSHRC 2340, 2340 (2011) (ALJ); *Sec'y o/b/o Glosson v. Lopkey Quarriers, Inc.*, 38 FMSHRC 2356, 2356 (2016) (ALJ); *Sec'y o/b/o White v. GS Materials, Inc.*, 35 FMSHRC 506, 506-07 (2013) (ALJ). In many instances, parties submit the agreements without any facts or reasons supporting a temporary economic reinstatement in lieu of actual reinstatement. A temporary economic reinstatement is an agreement in the nature of a settlement and, as such, scrutiny should be applied to make sure that they serve the purposes of the Act.

This Court recognizes that there are certain instances where economic reinstatement may be preferable or necessary, such as when there is no work for the miner, where one or both parties are concerned about safety, or where it is impossible or impractical for the miner to return to the mine. However, the Act says nothing about Temporary Economic Reinstatement, and specifically authorized judges to reinstate miners. Economic reinstatement is not equivalent to actual reinstatement for the Complainant or for other miners, because even under the most favorable of agreements, the Complainant loses experience, the Complainant would not receive promotions that could only come from actual work in the mine, and if the Complainant seeks alternative work the future employer will take note of his absence from the mine. Furthermore, there are no assurances that other miners are made aware that the Complainant has prevailed in his Temporary Reinstatement proceeding, as they would if they saw him back at the mine. Such lack of information can chill the speech rights of the other miners.

In the instant case, the parties were instructed to submit a motion for economic reinstatement, wherein they provided legal and factual arguments supporting economic reinstatement. Accordingly, the Motion for Temporary Economic Reinstatement is **GRANTED** according to the terms of the agreement submitted by the parties. However, in recognition of the

Complainant's right to physical temporary reinstatement, the Complainant may at any time move this Court to order physical (rather than economic) temporary reinstatement.



Kenneth R. Andrews
Administrative Law Judge

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