

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

JAN 21 2016

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of ADAM WHITON	:	PROCEEDING
Complainant	:	
	:	Docket No. CENT 2016-0136-DM
v.	:	MSHA Case No. RM-MD 16-04
	:	
WHARF RESOURCES (USA), INC.	:	
Respondent	:	Mine: The Wharf Mine
	:	Mine ID: 39-01282

ORDER GRANTING TEMPORARY, ECONOMIC REINSTATEMENT

Before: Judge McCarthy

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor (Secretary) on behalf of complainant, Adam Whiton, against Respondent, Wharf Resources (USA), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On January 15, 2016, the Secretary, on behalf of complainant Whiton, and Respondent, filed a Joint Motion to Approve Terms of Economic Reinstatement. On January 8, 2016, the Respondent timely requested a hearing on the Application. Thereafter, the parties negotiated a settlement of the issues raised by the Application.

Pursuant to the terms of the Joint Motion, the parties move for a temporary order that would economically reinstate Whiton, consistent with the terms and conditions of his former position as Pad Operator II at the Wharf Mine during the pendency and litigation of Whiton's October 27, 2015 complaint of discrimination. Specifically, the parties agree that Whiton's temporary reinstatement shall be subject to the following terms and conditions:

1. Respondent shall economically reinstate Whiton, rather than returning him to work. Accordingly, Respondent shall pay Whiton the rate of pay, including company-provided 401(k) contributions for which he qualifies. The parties have calculated the rate of pay and agree that Whiton's monthly gross pay during the period of temporary, economic reinstatement shall be an agreed amount. All applicable tax withholdings and other payroll deductions including, but not limited to, employee 401(k) contributions, deductions for payment of employee medical premiums, voluntary life, and other insurance previously taken from Whiton's gross pay will be withheld from his pay for each pay period. During the term of the temporary

economic reinstatement, Respondent shall also provide Whiton with the same health insurance that he was previously afforded. Whiton agrees that he is not entitled to request or to collect any unemployment benefits during the economic reinstatement period.

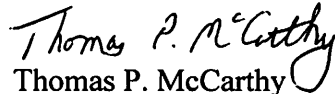
2. Respondent agrees to provide Whiton with a specified amount equally two months of back pay, less taxes and applicable deductions described in Paragraph 1.
3. Whiton will not report for duty with Respondent during the pendency of the temporary, economic reinstatement.
4. Whiton's temporary, economic reinstatement shall be effective beginning January 19, 2016. The first payment to Whiton under this agreement will be made on January 29, 2016. Subsequent payments to Whiton will be made on Respondent's normal payroll schedule.
5. The Secretary represents that the terms of the Joint Motion were conveyed to Respondent, who has agreed to the terms of the temporary, economic reinstatement, as set forth above.
6. Each party agrees that the undersigned Administrative Law Judge shall continue to have jurisdiction over all aspects of the economic reinstatement while it is in effect. At the conclusion of MSHA's investigation into Whiton's October 27, 2015 complaint, if MSHA determines that Respondent did not violate Section 105(c) of the Mine Act, Whiton will no longer be entitled to economic reinstatement payments as of the date that MSHA finalizes that determination.
7. The agreement may not be relied upon by either party for any reason other than to enforce its terms during the pendency of the Temporary Economic Reinstatement Order.

I have reviewed the Joint Motion and determined that it reflects a clear meeting of the minds on the issue of temporary, economic reinstatement, as required by Commission precedent. I have further determined that the parties' settlement agreement is consistent with the purposes of the Act and Section 110(i) of the Act. Upon consideration of the foregoing, the Joint Motion to Approve Terms of Economic Reinstatement is **GRANTED**.

Accordingly, pursuant to the terms of the parties' agreement, Respondent is **ORDERED to economically reinstate** Adam Whiton, as specified in the Joint Motion, as approved herein. The parties are **FURTHER ORDERED** to comply with all of the provisions of the Joint Motion to Approve Terms of Economic Reinstatement.

As set forth in the parties' Joint Motion, this Order Granting Temporary, Economic Reinstatement is not open-ended. If MSHA determines that there is insufficient evidence to proceed on Whiton's discrimination complaint, this order will terminate on the date of MSHA's determination. *See N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 744-46 (6th Cir. 2012);

Vulcan Constr. Materials, L.P. v. FMSHRC, 700 F.3d 297, 309 (7th Cir. 2012). Otherwise, it will end upon final order on the underlying discrimination complaint. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent and this tribunal.


Thomas P. McCarthy
Administrative Law Judge

Distribution: (Electronic and First Class Mail)

Michele Horn, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Donna Vetrano Pryor, Esq. & Erik Dullea, Esq., Jackson Lewis PC, 950 17th Street, Suite 2600, Denver, CO 80202

/med