

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 03 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of GARY KITTELSON
Petitioner

TEMPORARY REINSTATEMENT
PROCEEDINGS

Docket No. LAKE 2015-80-DM
MSHA CASE NO. RM-MD-15-01

v.

NORTHERN AGGREGATE, INC.,
Respondent

Mine: Portable Crusher
Mine ID: 21-02623

**ORDER DENYING MOTION TO AMEND TEMPORARY REINSTATEMENT AND
REQUEST FOR EXPEDITED HEARING ON MERITS**

This case is before me pursuant to an Application for Temporary Reinstatement brought under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c), *et. seq.* (the “Mine Act”). On November 5, 2014, this court issued an Order Approving Temporary Reinstatement. On December 30, 2014, this court issued an Order to Correct and Enforce the Temporary Economic Reinstatement. Before this court now is Respondent’s January 14, 2015 motion to partially toll the temporary economic reinstatement and move the hearing date forward.¹ On January 27, 2015, the Secretary filed objections to the Respondent’s motion. For the reasons that follow, the Respondent’s motion is **DENIED**.

In its motion, the Respondent requests that the court reduce the ordered amount of economic reinstatement from \$1,716.00 per week to \$600.00 per week.² Respondent states that it runs “a seasonal operation that switches to ‘winter season’ or ‘shop hours’ during the freeze up/winter season while mining activities are not feasible.” During the winter season, Respondent alleges that its employees receive lower pay, work limited hours, and rarely work overtime hours. The Respondent states that “similarly situated employees to Petitioner Kittelson (i.e. those

¹ The Respondent’s motion is captioned “Motion to Amend Order of Temporary Financial Reinstatement and Request for Expedited Hearing on Merits.” However, the motion is in essence a motion requesting partial tolling of the temporary economic reinstatement order.

² At one point in its motion, Respondent requests a reduction to \$600.00 per week, and at another asks for a reduction to \$640.00 per week. Presumably, one of these figures is in error.

with the same or similar experience, training, and longevity with the company), receive an hourly rate of \$16.00 per hour and work 40 hour weeks or less on average during the winter season.” *Resp. Motion*, 2. Furthermore, Respondent requests that this reduction be made retroactive to December 1, 2014, and that Respondent be given credit for payments made in excess of this amount.

With regards to the retroactive repayment of backwages, the the Commission has held that miners are not liable for repayments of funds paid during the period of temporary reinstatement. *N. Fork Coal Corp.*, 33 FMSHRC 589, 597 (Mar. 2011), *rev'd on other grounds*, 691 F. 3d 735, 744 (6th Cir. 2012); *see also Shemwell v. Armstrong Coal Co., Inc.*, 2012 WL 10906743, *4 (ALJ) (Sept. 12, 2012).

The Commission has held that an order of temporary reinstatement may be tolled or modified based upon layoffs for economic reasons, or similar conditions. *Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, 396-397 (Feb. 28, 2013). However, the mine operator must affirmatively prove that the miner on temporary reinstatement was properly included in the reduction or layoff by either a preponderance of the evidence or under the “not frivolously brought standard,” depending on whether the objectivity of the layoff as applied to the miner is called into question. *Id.* at 397. In the instant case, Respondent has provided pay stubs for one miner from 10/26/2014-12/13/2014. This evidence does not come close to meeting either standard. In order to show that all miners are working fewer hours due to seasonal conditions, Respondent would have to submit evidence that all miners are working less due to seasonal conditions. One possible method of doing so would have been to attach pay stubs for all miners, along with historical data showing the seasonality of this trend.

The Respondent further requests that the hearing for the merits case, currently scheduled for July 2-3, 2015, be heard sooner. Though the undersigned sympathizes with any economic hardship on Respondent that has resulted from the temporary economic reinstatement, this request must be denied. Moreover, this case will involve several discrimination complaints and, as the Secretary notes in her brief, regardless of the outcome of LAKE 2014-705-DM, Kittelson would remain on temporary reinstatement in the instant case. It would be inefficient, and result in no appreciable difference for the Respondent, to have two hearings here. Therefore, all matters relating to Kittelson will be heard on July 2-3, 2015 in Bemidji, MN.

Wherefore it is **ORDERED** that the Respondent’s motion is **DENIED**.


John Kent Lewis
Administrative Law Judge

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