

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 26 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of KELLY RAWLEY,
Complainant,

v.

J.L. SHERMAN EXCAVATION,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING:

Docket No. WEST 2016-467-DM
MSHA Case No. WE MD 16-07

Mine ID: 45-03100

Mine: J.L. Sherman Excavation

APPROVAL OF SETTLEMENT AND ORDERS TO COMPLY

Before: Judge Barbour

Pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), the Secretary of Labor (“the Secretary”) has filed an application for the temporary reinstatement of Kelly Rawley to the position of crusher supervisor at a portable crushing plant owned and operated by J.L. Sherman Excavation (“the company”). The Secretary seeks Mr. Rawley’s reinstatement pending a final disposition of Mr. Rawley’s complaint of discrimination in which Mr. Rawley asserts he was illegally laid off by the company in October 2015 and then illegally denied re-employment in April 2016 when other company employees were called back to work. Upon the company’s failure to offer re-employment, Mr. Rawley filed the previously mentioned discrimination complaint with the Secretary’s Mine Safety and Health Administration (“MSHA”). A copy of the complaint is attached to the Secretary’s application. In the complaint, Mr. Rawley states:

I was the crusher supervisor . . . until October 6, 2015[.]

I had an ongoing argument about the brakes on the [No. 51]

980 front end loader An MSHA Inspector showed up

that day and I was told by the owner[,] Jeff Sherman[,]

do not talk to that inspector because I talk to[o] much[.]

We argued and I was fired[.]

On [November 24, 2015, I withdrew my [previous]

discrimination complaint based on my return as
crusher supervisor in the spring which will
apparently not happen.¹]

Application, Exh. A.

In April 2016, Mr. Rawley filed a second discrimination complaint which MSHA. The agency assigned Owens to investigate the complaint. Owens concluded evidence exists that Mr. Rawley was prevented from speaking with an MSHA inspector and was permanently let go in part because he complained about safe working conditions with regard to the No. 51 980 front end loader. Therefore, Owens found that Mr. Rawley's complaint was not frivolously brought. Upon learning of this determination, the Secretary, through counsel, filed the subject application to temporarily reinstate Mr. Rawley pending a final resolution of Mr. Rawley's April 2016 complaint.

The Commission's Chief Judge assigned the case to the court, and the court, through its law clerk, contacted counsels to schedule a conference call. The court intended to propose an expedited date for hearing the application. However, before the call was made, counsels advised the court's law clerk that they agreed to settle the application by economically reinstating Mr. Rawley until a determination can be made by MSHA if Mr. Rawley's complaint has merit and, if so, until a hearing on Mr. Rawley's discrimination complaint can be held and the matter can be finally decided. On May 23, 2016, the court received the parties Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. The pertinent terms of the agreement are as follows:

- 4.) [The company] agrees to economically reinstate Mr. Rawley to his position as a crusher supervisor, effective upon the approval of this Settlement and Order [The company] agrees to pay Mr. Rawley at his regular rate of pay for \$19 per hour for the first 40 hours per week and \$28 per hour over 40 [hours] per work week subject to normal deductions. [The company] agrees to pay Mr. Rawley for 44 hours per week.
- 5.) [The company] shall provide benefits (if any, including but not

¹ According to MSHA's investigator, Corey Owens, Mr. Rawley's original discrimination complaint was filed on November 12, 2015. Application, Exh. B 3. Owens states that after Mr. Rawley filed the complaint he was told by a company representative that he had not been fired. Instead, the representative described his work hiatus as a "layoff" and told Mr. Rawley that he would be brought back to work in 2016 when the mine's seasonal closure ended. *Id.* However, on April 12, 2016, Mr. Rawley learned that he would not be brought back to work. *Id.*

limited to health insurance, retirement plan, and seniority accrual) associated with Mr. Rawley's employment and consistent with those provided pre-termination. [The company] may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees.

- 6.) The first payment shall be due to Mr. Rawley on [the company's] first regular weekly pay day after the date of approval of this Settlement Agreement by an administrative law judge. All subsequent payments shall be due on [the company's] regular weekly pay days. All payments shall be made by regular payroll or certified check to "Kelly Rawley" and sent to the following address:

Kelly Rawley
P.O. Box 0045
Laclede, ID 83841

Proof of each payment shall be forwarded by email within five days to brown.bruce.1@dol.gov.

- 7.) [The company] agrees to provide a neutral job reference for Mr. Rawley if contacted by potential employers.
- 8.) If [the company] fails to provide payment and benefits as required by this Settlement Agreement and Motion . . . the Commission may sanction [the company].
- 9.) Mr. Rawley's economic temporary reinstatement shall terminate upon a finding by the Secretary that Section 105(c)(1) has not been violated. Alternatively, if the Secretary finds that the discrimination complaint has merit and the Secretary files a Complaint of Discrimination pursuant to Section 105(c)(2)

with the Commission, Mr. Rawley's economic temporary reinstatement shall expire only after entry of a final order on the Complaint.

APPROVAL OF THE SETTLEMENT

The settlement protects the economic interest of Mr. Rawley while the merits of his discrimination complaint are determined. At the same time, it recognizes the limits of Mr. Rawley's proposed economic reinstatement. For these reasons, the court concludes the settlement faithfully reflects the purpose of section 105(c)(2), and the agreement **IS APPROVED**.

ORDER

THE COMPANY'S REQUIREMENTS UNDER THE ORDER

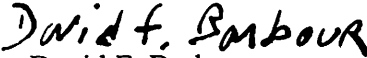
Given the court's approval of the settlement the company **SHALL** comply in full with the terms of the settlement agreement. In particular it **SHALL**:

- (1) Economically reinstate Mr. Rawley to his position as a crusher supervisor, effective the date of this Order and it **SHALL** pay Mr. Rawley at his regular rate of pay of \$19 per hour for the first 40 hours per week and \$28 per hour over hours over 40 hours per week, subject to normal deductions, and it **SHALL PAY** Mr. Rawley for 44 hours per week each week that he is economically reinstated;
- (2) Provide benefits (if any, including but not limited to health insurance, retirement plan, and seniority accrual) associated with Mr. Rawley's employment and consistent with those provided pre-termination. [The company] may deduct all applicable tax withholdings and other withholdings on the same basis as generally required for payment of other benefits pursuant to its policies and practices applicable to other employees;
- (3) Pay Mr. Rawley his first payment on [the company's] first regular weekly pay day after the date of this Approval and Order. All subsequent payments **SHALL** be due on [the company's] regular weekly pay days. All payments **SHALL** be made by regular payroll or certified check to "Kelly Rawley" and **SHALL** be sent to the address specified in the agreement. The company **SHALL** forward proof of each payment by email to brown.bruce.l@dol.gov within five days of each payment;

- (4) Provide a neutral job reference for Mr. Rawley to any potential employer.

THE SECRETARY'S REQUIREMENTS UNDER THE ORDER

To expedite the Secretary's consideration of Mr. Rawley's complaint, the Secretary **SHALL** no later than 60 days from the date of this Order, advise Mr. Rawley, the company, and the court as to its determination whether section 105(c)(1) has been violated. If the conclusion of the Secretary is that the company did not violate section 105(c)(1), Mr. Rawley's temporary economic reinstatement **SHALL** end and from that time forward the company will be under no obligation to pay Mr. Rawley or to comply with any other provisions of the agreement. If the Secretary concludes Mr. Rawley's discrimination complaint has merit and that the company violated section 105(c)(1), the Secretary **SHALL** forthwith file a discrimination complaint with the Federal Mine Safety and Health Review Commission on Mr. Rawley's behalf.


David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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Kelly Rawley, P.O. Box 0045, Laclede, ID 83841

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