FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2014

SECRETARY OF LABOR, (MSHA), on behalf of Cameron Garcia, Complainant, v. VERIS GOLD U.S.A., INC., Respondent. SECRETARY OF LABOR, (MSHA), on behalf of Cheryl Garcia, Complainant, v. VERIS GOLD U.S.A., INC., Respondent.	DISCRIMINATION PROCEEDINGS Docket No. WEST 2014-788-DM MSHA Case No.: WE MD 14-17 Docket No. WEST 2014-789-DM MSHA Case No.: WE MD 14-16 Jerritt Canyon Mill Mine Mine ID: 26-01621

DECISION

Appearances: Seema Patel, U.S. Department of Labor, Office of the Solicitor
90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Peter Gould, Squire Patton Boggs (US) LLP
1801 California Street Suite, 4900 Denver, CO 80202

Before: Judge Simonton

DECISION AND ORDER GRANTING APPLICATION FOR REINSTATEMENT FOR CAMERON GARCIA AND CHERYL GARCIA AND DENYING REQUEST FOR ECONOMIC REINSTATEMENT OF CHERYL GARCIA

On June 20, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed Applications for Temporary Reinstatement of miners Cameron Garcia and

Cheryl Garcia[1] to their former positions with Veris Gold U.S.A., Inc. ("Veris" or "Respondent") at the Jerritt Canyon Mill Mine.

Read in full, Mr. Garcia's original complaint stated "I was terminated because I reported unsafe actions to my employer." Cameron Garcia Discrimination Complaint, 2. Read in full Ms. Garcia's original complaint stated "I was let go immediately after giving my notice because I was constantly being harassed and discriminated against because I reported safety/ health concerns to my employer." Cheryl Garcia Discrimination Complaint, 2.

Based upon the findings of an MSHA Special Investigator, the Secretary asserts that these Complaints were not frivolously brought and requests an Order directing Respondent to reinstate Mr. Garcia to his former position and rate of pay including overtime, which Mr. Garcia has represented to be between 24-30 hours per week. Cameron Garcia Application, 3; Cameron Garcia Discrimination Complaint, 1. The Secretary also asks that I order economic reinstatement for Ms. Garcia at her previous rate of pay including overtime, which Ms. Garcia has represented to be between 24-30 hours per week. Cheryl Garcia Application, 3; Cheryl Garcia Discrimination Complaint, 1.

On June 30, 2014 Respondent filed a "Combined Opposition to the Secretary's Application for Temporary Reinstatement." "Resp. Mot." Within, the Respondent presented a detailed rebuttal argument and requested that the Court deny the applications, stating that Mr. Garcia and Ms. Garcia's complaints were frivolously brought and that Mr. Garcia's complaint was late filed and time barred. Resp. Mot.,12, 16. Additionally, the Respondent asserted that even if the court granted temporary reinstatement, both Mr. and Ms. Garcia's overtime requests were grossly in excess of their actual overtime work history and presented copies of Mr. Garcia's and Ms. Garcia's pay stubs to support this claim. *Id.* at 16: Ex. K-L.

The Respondent did not explicitly request a hearing in these matters within their brief. Sec'y Supp. Br., 3. However, after the Court requested clarification from the Respondent on whether they were requesting a hearing, Respondent's Counsel issued an e-mail on July 1st to the Court and the Secretary's representative stating that they were reserving a right to a hearing in these dockets. July 1, Gregory M. Louer. On July 2, the parties participated in a teleconference where the Respondent stated that they preferred the Court to rule after considering the Secretary's application and the Respondent's Motion in Opposition but would participate in a hearing if the Court or Secretary objected. Sec'y Supp. Br., 3. The Secretary did not object to the proposed procedure and I requested that the parties file a Joint Stipulation agreeing to a "decision on the motions" and then submit appropriate briefs per an agreed upon schedule. *Id.* During the conference call, I emphasized to the parties that I would only consider evidence and arguments appropriate to these temporary reinstatement proceedings.

On July 3, 2014 the parties submitted the following Joint Stipulation:

1. The Secretary filed an Application for Temporary Reinstatement of Cheryl Garcia and an Application for Temporary Reinstatement of Cameron Garcia in above captioned proceedings, respectively, on June 20, 2014.

[1] Cameron Garcia is Cheryl Garcia's son. I have referred to Cameron Garcia as Mr. Garcia and Cheryl Garcia as Ms. Garcia throughout.

2. Veris timely filed its Combined Opposition to the Secretary's Applications for Temporary Reinstatement on Behalf of Ms. Cheryl Garcia and Mr. Cameron Garcia on Monday, June 30,2014.

3. The Parties recognize, however, that an evidentiary hearing on the Secretary's applications for the temporary reinstatement of Mr. Cameron Garcia and Ms. Cheryl Garcia (collectively, "the Complainants") may not be necessary to the proper disposition of the instant temporary reinstatement cases.

4. Instead, Petitioner and Respondent agree that this Court shall rule on the Secretary's applications after considering:

a. The applications filed on June 20, 2014;
b. Respondent's Combined Opposition to the Secretary's Applications for Temporary Reinstatement on Behalf of Ms. Cheryl Garcia and Mr. Cameron Garcia filed on June 30, 2014;
c. A responsive brief to be filed by the Secretary no later than July 7, 2014; and
d. A reply brief to be filed by the Respondent no later than July 9, 2014.

5. The Court will limit its review of the documents listed in paragraph 4, above, to the scope of a hearing on an application for temporary reinstatement, as defined by Commission Rule 2700.45(d), "to a determination as to whether the miner's complaints [subject to the above captioned proceedings] were frivolously brought."

6. If the Court is unable to make a determination on whether the complaints subject to the above captioned proceedings were frivolously brought on the basis of the documents listed in paragraph 4, above, the Court shall schedule an evidentiary hearing in accordance with Commission Rule 2700.45(d).

Jt. Stip., 1-2.

On July 7, 2014 the Parties also filed the following Joint Stipulation for Purposes of Supplemental Briefing:

1. At all relevant times hereinafter mentioned, Veris Gold U.S.A, Inc., ("Veris" or "Respondent") was an "Operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. §802(d). The federal mine identification number for Jerritt Canyon Mill Mine is 26-01621.

2. Jerritt Canyon Mill Mine, the mine and milling operation at which Respondent operated and performed services or construction, is located at or near Elko, Nevada and is a "mine," the product of which enters commerce or the operations or products of which affect commerce, all within the meaning of Sections 3(b), 3(h) and 4 of the Mine Act, 30 U.S.C. §§ 802(h) and 803.

3. Complainant, Cameron Garcia, worked for Respondent at Jerrit Canyon Canyon Mill Mine as a Strip Operator, and is a "miner" within the meaning of Section 3 (g) of the Mine Act, 30 U.S.C. § 802(g). Complainant, Cheryl Garcia, worked for Respondent at Jerrit Canyon Mill Mine as an Industrial Hygiene Coordinator, and is a "miner" within the meaning of Section 3 (g) of the Mine Act, 30 U.S.C. § 802(g).

4. On January 28, 2014 Respondent Terminated Mr. Garcia's employment.

Jt. Stip. for Supp. Br., 1-2.

On July 7, 2014 the Secretary filed a Supplemental Brief per the stipulated briefing schedule. Sec'y Supp. Br. The Secretary moved within her supplemental brief to wholly exclude the Respondent's Motion in Opposition and subsequent Reply Brief. Sec'y Supp. Br., 3. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike this request as contrary to the specific stipulation agreed to by the parties on July 3, 2014 and Commission Rule 2700.45(d). Jt. Stip., 2, 4- b, d; 29 CFR § 2700.45 (d) ("The Respondent may present testimony and documentary evidence in support of its position that the complaint was frivolously brought."). On July 9, 2014 the Respondent filed a Response Brief per the stipulated briefing schedule. Resp. Br. As the Secretary and Respondent stipulated to the above procedure, I have considered 1) the Secretary's June 20 Application for Temporary Reinstatement, 2) the Respondent's June 30 Combined Motion in Opposition, 3) the Secretary's July 7, 2014 Supplemental Brief and 4) the Respondent's July 9, 2014 Reply Brief.[2] However, as the Commission has issued strict evidentiary guidelines for temporary reinstatement proceedings, while I have considered facts presented by the Respondent in consideration of the totality of the circumstances, I have primarily restricted my review of the Respondent's Motion in Opposition and Reply to properly raised arguments regarding the legal sufficiency of the Secretary's application. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). For the reasons stated below, I **GRANT** both Cameron Garcia and Cheryl Garcia's Application for Temporary Reinstatement at the Jerrit Canyon Mill Mine, but **DENY** the Secretary's request for the economic reinstatement of Cheryl Garcia.

TEMPORARY REINSTATEMENT

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing 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. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 623 (1978).

[2] In agreeing to the referenced procedure, I am aware the Commission has held that summary decision is not appropriate when the operator has requested a hearing. *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 999-1000 (May 2012). However, as the Respondent requested and stipulated to a "summary decision" in this case, I find no reason to object to the stipulated procedure. If I have erred in granting such a request, I have erred in the interest of reaching an efficient resolution of the parties' dispute, rather than disregard for Commission precedent.

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.,* 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies. *Sec'y of Labor o/b/o Peters v. Thunder Basin Coal Co.,* 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990). In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.,* 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd,* 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor o/b/o Ward v. Argus Energy WV, LLC,* 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.,* 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor o/b/o Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (April 1981).

However, in the instant matters, the Secretary need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor o/b/o Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor o/b/o Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered

the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Timeliness

Cameron Garcia was discharged by the Respondent on January 28, 2014. Jt. Stip. for Supp. Br., 2. Cheryl Garcia resigned from her position on February 28, 2014. Cheryl Garcia Aff., 3; Resp. Mot. Opp., 8. Cameron and Cheryl Garcia both filed their discrimination complaints on May 6, 2014. Sec'y Supp. Br., 13-14. Thus, Mr. Garcia filed his complaint 98 days after his discharge, while Ms. Garcia filed her complaint 67 days after her resignation. As such, both Complainants failed to file within the 60 day period allowed for by Section 105(c) 2.[3] 30 USC 815 (c) 2. However, as acknowledged by both parties, the Commission has held that this filing period is not jurisdictional and may be equitably tolled by justifiable circumstances including genuine ignorance, mistake, inadvertence, and excusable neglect. *Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984); *Phillips Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (Nov. 1996). The Secretary contends that neither Ms. Garcia nor Mr. Garcia were aware of their right to file a discrimination complaint until former Veris Safety Manager Danny Lowe informed them of this right.[4] Sec'y Br., 14.

Furthermore, based upon a footnote contained in *Sec'y of Labor o/b/o Young v. Lone Mountain Processing*, 20 FMSHRC 927, 932 n. 6 (Sept. 1998) (declining to consider timeliness of underlying discrimination complaint at the Commission level after finding that job applicants were barred from seeking temporary reinstatement altogether), the Secretary also contends that the Court may not consider timeliness during temporary reinstatement proceedings. After carefully reviewing the *Lone Mountain Processing* decision and a recent citing Commission case, I disagree with the Secretary's interpretation. *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000-01(May 2012) (declining to consider timeliness during Commission review after remanding case for a temporary reinstatement hearing). I do recognize that the Commission has stated that the timeliness of a discrimination complaint was to be properly considered during the "proceeding on the merits". *Armstrong Coal Co.* 34 FMSHRC, 1000-01. This language might ordinarily appear to refer to the substantative discrimination hearing. However, as the effect of the *Armstrong Coal Co.* decision was to remand the case to the ALJ for a temporary reinstatement hearing, I am left to conclude that the Commission simply remanded the timeliness question to the ALJ and declined to decide the issue at the Commission level, rather than absolutely prohibit considerations of timeliness at the temporary reinstatement stage. Indeed, when outlining the appropriate review standard for late filed complaints, the Secretary cites to a case in which the ALJ fully considered the issue of timeliness during a temporary reinstatement proceeding. *Sec'y of Labor o/b/o Keith Overfield v. Highland Mining Co.*, 2014 WL 2920571, *13-14 (Jun. 2014) (ALJ).

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[3] The discrimination complaints filed by Mr. Garcia and Ms. Garcia appear to have been signed on April 23, 2014. Cameron Garcia Discrimination Complaint, 2; Cheryl Garcia Discrimination Complaint, 2; However, the time stamp on both of these documents indicate that they were received by MSHA on May 6, 2014. Id. As the Secretary has indicated that both applications were filed on May 6, 2014, absent any evidence to the contrary, I am considering both applications as filed outside the 60 day filing period. Sec'y Supp. Br., 14.

[4] None of the briefs, application or affidavits submitted by the Secretary specify when Mr. or Ms. Garcia learned of their right to file a discrimination claim or clarify whether they were informed of this right before or after their termination.

However, in this particular proceeding, as I am not able to assess the credibility of Mr. Garcia and Ms. Garcia's claims that they were not aware of their right to file a discrimination complaint, or fully consider the Respondent's rebuttal evidence on this point, I decline to decide this issue at this time. Prior to a hearing on the merits, I would consider summary judgment motions on the timeliness of these complaints if properly submitted to me by either party with sufficient factual stipulations.

Cameron Garcia- WEST 2014-788-DM

Cameron Garcia worked for Veris Gold from April 30, 2012 to January 28, 2014 and at all times relevant to these proceedings served as a Strip Operator. Cameron Garcia Aff., 1. The following is a complete list of Mr. Garcia's representation of his protected activities and the alleged hostility and adverse actions encountered by Mr. Garcia. At this temporary reinstatement proceeding, I have detailed Mr. Garcia's assertions not as findings of fact, but as possible support for his discrimination claim. All of the following representations are taken from Mr. Garcia's affidavit and the Secretary's supplemental brief.

January 6, 2014 - Mr. Garcia reported that the pressure gauge on the Strip Vessel 2 was not working to his supervisor Cecil Pranke and documents this report on a "Five-Point Safety Card." Cameron Garcia Aff., 1.

January 17, 2014 - Mr. Garcia reported that the pressure gauge on the Strip Vessel 2 was not working to Supervisor Pranke and documents this report using a "Five-Point Safety Card." *Id.*

January 18, 2014 - Mr. Garcia reported that the Strip Vessel 1 vent, the Strip Vessel 2 pressure gauge, and the auto valves on the bottom of a vessel were not working. Mr. Garcia also reported that there was carbon in the Strip Vessel 2. *Id.*

January 24, 2014 - Mr. Garcia filed a hazard complaint with MSHA after his safety reports were not addressed by Veris Gold. *Id.*

January 25, 2014 - Veris Gold suspended Mr. Garcia when he arrived at work, pending further notice. *Id.*

January 28, 2014 - Veris Gold terminated Mr. Garcia's employment at the Jerritt Canyon Mill Mine. *Id.*

After reviewing the Secretary's Application, the Secretary's supplemental brief, and Mr. Garcia's affidavit, it is clear that the Secretary has presented evidence that Mr. Garcia engaged in protected activity by filing in-house safety complaints with Veris management and filing a MSHA hazard complaint after those concerns were allegedly not addressed by Veris. The Respondent has not, at this point, contradicted Mr. Garcia's representation of his protected activities. As it is undisputed that Veris terminated Mr. Garcia on January 28, 2014 it is also clear that there is evidence of an adverse action. Jt. Stip. For Supp. Br., 2. Additionally, Veris's alleged failure to respond to Mr. Garcia's safety concerns could support an inference of Veris's hostility towards proper

maintenance of safety mechanisms. Cameron Garcia Aff., 1, e. Furthermore, the close proximity in time between Mr. Garcia's safety reports/ MSHA complaint and his termination stand as supportable evidence of a nexus between Mr. Garcia's protected activities and the adverse action.

I have reviewed the Respondent's Motion in Opposition and Reply Brief in full as it pertains to Mr. Garcia's discrimination claim. I acknowledge that the Respondent has provided affidavits and documentary evidence indicating that Mr. Garcia was issued numerous disciplinary warnings prior to and during the time period relevant to this complaint for unsafe or substandard work performance, including an alleged failure to properly maintain the temperature log in the Assay Laboratory immediately prior to his termination. Resp. Mot., 4-5: Ex. B-D. I also acknowledge that the Respondent has provided affidavits and documentary evidence demonstrating that another miner with a clean disciplinary record submitted similar safety complaints in December of 2013 and was not discharged or disciplined by Veris Gold after those safety complaints. Resp. Mot. In Opp., 5, 11: Ex. E. Although such evidence could successfully rebut Mr. Garcia's discrimination claim at the substantive discrimination proceeding, Commission precedent prevents me during this temporary reinstatement proceeding from weighing such evidence against Mr. Garcia's presentation of a timeline that could support a discrimination claim. *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.,* 21 FMSHRC 717, 719 (July 1999).

I also acknowledge that the Respondent has noted that Mr. Garcia has not presented any evidence of obvious hostility towards his protected activities to support his claim that he was terminated, at least in part, due to his safety hazard reports. However, the Commission has held that it is difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Additionally, as noted above, the Commission has specifically listed knowledge of the protected activity and a coincidence in time between the protected activity and the adverse action as factors that may support a discrimination claim. *Sec'y of Labor o/b/o Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). As Veris terminated Mr. Garcia just weeks after he submitted multiple safety complaint to Veris management, and just one day after he filed a hazard complaint with MSHA, I find that the Secretary has established that Mr. Garcia's discrimination claim was not frivously brought.

In making this determination, I acknowledge the Respondent's argument that I must consider the totality of circumstances and that a coincidence in time cannot by itself support a discrimination claim, even at the temporary reinstatement proceedings. *Sec'y of Labor o/b/o Markovich v. Minnesota Ore Operations, USX Corp*, 18 FMSHRC 1250, 1256-57 (July 1996) (ALJ), aff'd by an equally divided court, 18 FMSHRC 1349 (Aug. 1996); *Sec'y of Labor o/b/o Gregory Bradley v. Climax Molybendum Co.*, 34 FMSHRC 2080, 2823 n. 13 (Oct. 2102) (ALJ). However, in reviewing the cases in which a coincidence in time between the protected activity and the adverse action has been insufficient to sustain an application for temporary reinstatement, it is clear that the miners in those cases explicitly admitted to impermissible activities that clearly warranted termination. *Minnesota Ore Operations, USX Corp.,* 18 FMSHRC 1257

(Secretary conceded that miner had vandalized no smoking signs on many occasions, an offense that had also led the operator to discharge a different foreman); *Sec'y of Labor o/b/o Jeffrey Fletcher v. Frontier-Kemper Constructors*, 34 FMSHRC 2189, 2200 (August 2012) (ALJ) (miner admitted to working under unsupported roof in same timeframe as other workers who were also discharged for working under unsupported roof). In this case, neither the Secretary nor Mr. Garcia have conceded that Mr. Garcia committed the work infractions alleged by Veris. Furthermore, at this temporary reinstatement proceeding, even if I were to take the Secretary's silence on this matter within her brief as an admission of Mr. Garcia's misconduct, I am not currently prepared to conclude that the Mr. Garcia's alleged errors, including his failure to update the temperature log at the Assay Laboratory, were so obviously egregious that they would regularly result in termination. Resp. Mot., 4-5, Ex. B-D.

Therefore, I **ORDER** that Cameron Garcia be reinstated to his former position as Strip Operator at the same rate of pay and overtime as reflected in his official pay records. The Respondent has submitted copies of Cameron Garcia's pay records indicating that he worked an average of 6.75 hours of overtime per week over the previous 12 months. Resp. Mot. 16, Ex. L. Mr. Garcia claimed within his discrimination claim that he worked an average of 24-30 hours of overtime per week. Cameron Garcia Discrimination Complaint, 1. As the Respondent has requested a ruling on this discrepancy; I **ORDER** the Respondent to reinstate Mr. Garcia to the amount of overtime established by the Respondent's payroll records. If Mr. Garcia chooses to dispute the Respondent's payroll record, he may elect to file a separate complaint with the U. S. Department of Labor's Wage and Hour Division.

Cheryl Garcia - WEST 2014-789-DM

Cheryl Garcia worked for Veris Gold a total of three years and at all times relevant to these proceedings served as an Industrial Hygiene Coordinator. Cheryl Garcia Aff., 1. The following is a complete list of Ms. Garcia's representation of her protected activities and the alleged hostility and adverse actions encountered by Ms. Garcia. At this temporary reinstatement proceeding, I have detailed Ms. Garcia's assertions not as findings of fact, but as possible support for her discrimination claim. All of the following representations are taken from Ms. Garcia's affidavit and the Secretary's supplemental brief.

August 16, 2013 - Ms. Garcia submitted safety complaints to upper management regarding faulty alarms in the Refinery and Strip. Cheryl Garcia Aff., 1.

September 10, 2013 - Ms. Garcia observed temporary employees working without restroom facilities, water or radios and reported the condition to a supervisor. Ms. Garcia later learned that port-a-johns had not been ordered and ordered them herself from a vendor, and verified that the port-a-johns were in place on September 16, 2013. On the same day, after a miner raised concerns regarding a "potential safety hazard," Ms. Garcia advised a worker that he did not have to work in unsafe conditions. *Id.*

October 2013 - Ms. Garcia responded to a complaint regarding a mouse problem in the lunchroom, photographed "evidence of mice eating the food in the refrigerator" and sent an

email to Mill Manager Kiedock Kim and Assistant Mill Manager Chris Jones about the issue. Chris Jones responded with an e-mail sitting "What do you want me to do about it?" *Id.* at 1-2.

October - November 2013 - Ms. Garcia posts a do not enter sign on the lunchroom in response to high levels of mercury in the lunchroom. According to Ms. Garcia, Chris Jones yelled at Safety Manager Danny Lowe about the sign and stated that Mr. Lowe and Ms. Garcia were trying to "stab him in the back." *Id.* at 2.

December 11, 2013, Ms. Garcia questioned management regarding why management was requiring her son, Cameron Garcia, to see a doctor regarding caustic burns on his feet, when it did not require other similarly situated miners to do the same. Ms. Garcia also told management that such an incident must be reported to MSHA as a potential lost time injury, to which HR Manager Dwayne Ward indicated the company would just claim to have changed Cameron's work schedule. *Id.*

December 14, 2013 - Chris Jones asked Ms. Garcia in a company hallway "Why are your boys the only ones high on mercury? Do you go home and stick a thermometer up their a** and break it." Ms. Garcia responded to Chris Jones by telling him that other miners also exhibited high levels of mercury. *Id.*

December 16, 2013 - Chris Jones sees Ms. Garcia limping in the hallway and asks her, "What is the matter with you? Do you have caustic burns on your feet?" *Id.*

December 17, 2013 - Ms. Garcia met with MSHA Special Investigator Kyle Jackson in connection with another MSHA investigation. Ms. Garcia testified in that case and Ms. Garcia alleges that Dwayne Ward learned of her involvement with that case. *Id.* Dwayne Ward confirms within his affidavit that he believes Ms. Garcia made allegations regarding his conduct to a MSHA investigator. Resp. Mot: Ex. B, 3.

December 18, 2013 - Ms. Garcia submits a report to Manager Johnston claiming that she is being harassed and that Chris Jones has stated "Danny Lowe and Ms. Garcia are stabbing me in the back and f**cking me over safety issues in the Fine Crush." Ms. Garcia also reports that Chris Jones has stated he was going after Ms. Garcia's other two kids. Cheryl Garcia Aff., 3.

February 18, 2014 - Ms. Garcia is questioned regarding an allegation that she improperly provided Danny Lowe with company documentation in connection with Lowe's separate MSHA complaint. Ms. Garcia denied the allegation and requested that the report be removed from her record. Chief Operating Officer Graham Dicksen urged her not to quit and assured Ms. Garcia that he would take care of the write-up. Ms. Garcia claims that she "continued to experience harassment by Chris Jones in the work place" following this meeting. *Id.*

February 28, 2014 - Ms. Garcia submitted a two-week notice of resignation to the Respondent. *Id.* The Respondent agreed to, and did in fact, pay Ms. Garcia for the next two weeks but ordered her to leave the mine property that same day. Resp. Mot., 8.

After reviewing the Secretary's application, the Secretary's supplemental brief, and Ms. Garcia's affidavit, it is clear that Ms. Garcia has presented evidence that she

engaged in protected activity by filing hazard reports, posting danger signs, and participating in an MSHA special investigation. The Respondent's Motion in Opposition concedes that Ms. Garcia did in fact engage in these protected activities, but emphasizes that they encouraged such efforts. Resp. Mot., 14.

As Ms. Garcia resigned and did not suffer any formal demotion, transfer, or work reduction prior to her resignation, I must find there is a reason to believe that Ms. Garcia's resignation was the result of "constructive discharge" in order to grant her application for temporary reinstatement. Sec'y Br. 10 n. 5, Resp. Mot., 13. Specifically, I must find that there is supportable evidence that the Respondent created a workplace environment "so intolerable that a reasonable miner would have been compelled to resign." *Sec'y of Laor o/b/o Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (Nov. 1994).

When viewed in isolation, none of the alleged hostility encountered by Ms. Garcia appears to rise to the level of a serious threat or vulgarity that would truly shock the conscious. However, when viewed together, accepting Ms. Garcia's representations as true at this stage, I cannot rule out the possibility that a reasonable miner would have felt compelled to quit after experiencing continued harassment from a fellow employee even after reporting that harassment to upper management. Cheryl Garcia Aff., 2-3. Additionally, as Chris Jones alleged harassment stemmed from his hostility to Ms. Garcia's chemical contamination reports and her son's injury reports, it appears that there is some evidence of a nexus between Mr. Jones hostility and Ms. Garcia's protected activities. *Id.* Although Ms. Garcia has not asserted that Mr. Jones was her direct supervisor, she has alleged that Mr. Jones continued to harass her after her December 2013 complaint to upper management and the February meeting regarding a separate MSHA complaint. *Id.;* Resp. Mot. , 14-15 n. 3. As such, at this preliminary stage, there is a non-frivolous reason to believe that Ms. Garcia was compelled to quit because she believed upper management had not and would not take action to prevent Mr. Jones from continuing to harass her.

I have reviewed the Respondent's Motion in Opposition and Reply Brief in full as it pertains to Ms. Garcia's discrimination claim. I acknowledge that the Respondent asserts that management conducted a prompt and through investigation of Ms. Garcia's harassment complaint against Mr. Jones and found it meritless. Resp. Mot. 7: Ex. B, D. However, as Commission precedent precludes me from making credibility determinations at this stage, I cannot discount Ms. Garcia's version of events. *Secy of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). I also acknowledge, as pointed out by the Respondent and conceded by Ms. Garcia, that the Respondent actively tried to retain Ms. Garcia when she first threatened to resign following the February 18 meeting regarding her alleged involvement in Danny Lowe's MSHA complaint. Cheryl Garcia Aff., 3; Resp. Mot. 8, 15. Still, as Ms. Garcia has alleged that Mr. Jones continued to harass her following assurances from management that she would not be written up, there is some evidence that Ms. Garcia continued to face hostility up until her resignation. Cheryl Garcia Aff., 3. For these reasons, I find that the Secretary has established that Ms. Garcia's complaint was not frivolously brought.

Therefore, I **ORDER** that Cheryl Garcia be reinstated to her previous position at

the Jerritt Canyon Mill Mine at the same pay rate and overtime amount as reflected upon her official pay records. The Respondent has submitted copies of Cheryl Garcia's pay records indicating that he worked an average of 5.77 hours of overtime per week over the previous 12 months. Resp. Mot. 16: Ex. K. Ms. Garcia claimed within her discrimination claim that she worked an average of 24-30 hours of overtime per week. Cheryl Garcia Discrimination Claim, 1. As the Respondent has requested a ruling on this discrepancy; I **ORDER** the Respondent to reinstate Ms. Garcia to the amount of overtime established by the Respondent's payroll records. If Ms. Garcia chooses to dispute the Respondent's payroll record, she may elect to file a separate complaint with the U.S. Department of Labor's Wage and Hour Division.

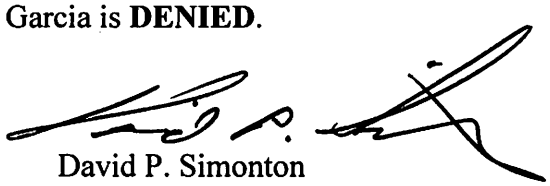
At this point, I **DENY** the Secretary's request to order economic reinstatement. As a jurisdictional matter, this Court does not have the authority to order economic reinstatement without the prior express agreement of both the miner and the operator. *Sec'y of Labor o/b/o Kenneth Wilder v. Bledsoe Coal*, 33 FMSHRC 2031, 2032 (August 2011) (ALJ); *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 589, 592-93 (Mar. 2011).[5] Based upon the record, it does not appear that the Respondent has made any such agreement.

Furthermore, I do not agree with the Secretary's argument that economic reinstament is necessary due to Ms. Garcia's allegations of a hostile work environment at the Jerritt Canyon Mine. All discrimination claims, in essence, involve a claim of a hostile work environment. Nevertheless, it is clear that, absent a voluntary agreement to the contrary, "The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits." *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 592. Additionally, my temporary reinstatement findings are not a finding that Ms. Garcia actually was constructively discharged or actually did or would face an intolerable environment at the Jerritt Canyon mine. They are merely a finding pursuant to Commission precedent that Ms. Garcia has presented evidence establishing that her claims are non-frivolous. However, I am amenable to approving the economic reinstatement of Ms. Garcia if the Respondent agrees to such a measure.

[5] A previous Commission decision, *Sec'y of Labor o/b/o Mark Gray v. North Fork Coal*, 33 FMSHRC 27 (Jan. 2011), involving the same parties was overturned by the 6th Circuit. *North Fork Coal Corp v. FMSHRC*, 691 F. 3d 735 (6th Cir. 2012). However, the 6th Circuit decision held solely that temporary reinstatement orders must be dissolved if the SOL concludes there is no discrimination and did not disturb the Commission's separate holding that economic reinstatement is a voluntary option requiring consent of both parties. *Id.* ; *Sec'y of Labor v. North Fork Coal*, 33 FMSHRC 592-93.

ORDER

Based on the above findings, the Secretary's Applications for Temporary Reinstatement are **GRANTED**. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Cameron Garcia, as a strip operator, and Cheryl Garcia, as an industrial hygienist, at the same rate of pay, for the same number of hours worked, and with the same benefits, as reflected upon their official pay records, as at the time of discharge. For the reasons detailed above, the Secretary's request for economic reinstatement of Cheryl Garcia is **DENIED**.



David P. Simonton
Administrative Law Judge

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