

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 12 2015

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

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. SE 2015-201-DM  
Case No. SC-MD 15-01

v.

BASF CORPORATION,  
Respondent

22-00415  
Mine: BASF– Jackson, MS

**ORDER GRANTING TEMPORARY REINSTATEMENT**  
**OF CARLTON JOHNSON**  
**and**  
**ORDER APPROVING AGREEMENT**  
**REGARDING ECONOMIC TEMPORARY REINSTATEMENT**  
**FOR CARLTON JOHNSON**

Before: Judge Harner

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”) on March 10, 2015, filed an Application for Temporary Reinstatement of miner Carlton Johnson (“Complainant”) to his former position as a mechanic with BASF Corporation at its Clover Fork No. 1 Mine in Jackson, Mississippi (“Respondent”) pending final hearing and disposition of the case.

The case was assigned to me on March 11, 2015. The Secretary also filed a Settlement Agreement on Temporary Reinstatement along with his Application for Temporary Reinstatement. For the following reasons, the temporary reinstatement of Carlton Johnson is hereby **GRANTED**.

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., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on

Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(b). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, s[he] shall issue immediately a written order of temporary reinstatement. *Id.*

In adopting section 105(c) of the Act, 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 on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). The plain language of the Act states that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."<sup>1</sup> *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The Declaration of Mark Shearer was filed with the Complainant's Application for Temporary Reinstatement (Exhibit A) and asserts the following:

1. Mr. Shearer is a special investigator with the Mine Safety and Health Administration ("MSHA") and was assigned to conduct an investigation into a complaint filed by the Complainant. Decl. 1-3.
2. Respondent is engaged in the operation of a metal/non-metal mine at its Jackson, Mississippi, facility and its products enter commerce. Therefore, it is an "operator" within the meaning of Section 3(d) of the Act and a "mine" as defined in Sections 3(b), 3(h) and 4 of the Act. Decl. 4a and 4c.
3. The Complainant was employed at the Respondent's Jackson, Mississippi mine ("Mine") where he was employed as Electrical and Instrumental Technician and then as a mechanic. Decl. 4b.

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<sup>1</sup> "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

4. The Complainant has asserted that he engaged in protected activity over a five month period by complaining to Respondent that a newly hired Electrical and Instrumental Technician did not know what he was doing and was engaging in unsafe work practices. In addition, the Complainant filed a safety complaint with MSHA, requesting an investigation. Decl. 4d, see also Exhibit B.
5. On October 7, 2014, 2014, the Complainant was discharged. Decl. 4e.
6. Based on the facts adduced during his investigation, special investigator Shearer believes that the discrimination complaint was not frivolously brought. Decl 4d and 4f.

Based upon the affidavit of the special investigator and the asserted facts therein, I find that the Secretary's complaint is not frivolously brought. **WHEREFORE**, it is hereby **ORDERED** that Carlton Johnson be **TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime and a benefit pending final order on the complaint or until this Order is dissolved.

1. In lieu of actual reinstatement, the parties have executed a Settlement Agreement providing for economic reinstatement. Respondent BASF Corporation ("BASF") shall economically temporarily reinstate complainant Carlton Johnson ("Johnson") rather than physically placing him back to work at the mine. This economic temporary reinstatement is effective March 16, 2015. This Agreement shall remain in effect until the entry of a final order of the Federal Mine Safety & Health Review Commission ("the Commission") regarding Johnson's underlying discrimination complaint (MSHA Case No. SC-MD-15-01) or until this Order approving this Agreement is dissolved, whichever shall occur first.
2. BASF shall pay Johnson at his regular rate of pay of \$21.44 per hour for 35 hours per week and 10 hours of overtime per week at one and one-half times his regular rate. The total gross wages per week starting March 16, 2015, until the Temporary Reinstatement terminates shall be \$1, 072.00 per week. BASF will provide the first check, which will include any back pay due for the period from March 16, 2015, until the date of this Agreement, on the next regularly scheduled payroll date. Johnson will receive paychecks in accordance with BASF's regular payroll policy from that point until the Temporary Reinstatement order is dissolved.
3. With respect to this temporary reinstatement pay, Johnson will be treated under the same terms and conditions of employment as all other similarly situated (physically employed) employees. Johnson's benefits shall be restored, including but not limited to, health insurance and 401(k) payments. Health insurance premiums shall not be deducted for the period of back pay. Johnson will have a health insurance premium deducted from his regular pay check in accordance with BASF's health plan. BASF shall be responsible for making all legal deductions and payments required by law for state and federal taxes.

4. BASF will notify Johnson before shutting down the mine and ceasing to employ any personnel at the mine.
5. All paychecks shall be issued to Johnson and shall be mailed to the following address:  
143 Pine Grove Drive, Florence, Mississippi 39073.
6. Complainant Johnson does not object to this Agreement.

**WHEREFORE**, it is **ORDERED** that the Settlement Agreement on Temporary Reinstatement for Carlton Johnson is **APPROVED**.



Janet G. Harner  
Administrative Law Judge

Distribution:

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Carlton Johnson, 143 Pine Grove Drive, Florence, Mississippi 39073

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