

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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OCT 30 2017

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
and JONATHAN HOLSKEY,  
Complainants

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. KENT 2018-0004-D  
MSHA Case No. MADI-CD-2017-05

v.

PENNYRILE ENERGY, LLC,  
Respondent

Mine: Riveredge Mine  
Mine ID: 15-19424

**AMENDED DECISION AND ORDER<sup>1</sup>**  
**REINSTATING JONATHAN HOLSKEY**

Appearances: Thomas Motzny, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, Representing the Secretary of Labor

Tony Oppegard, Esq., Lexington, KY, Representing Complainant Jonathan  
Holskey

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West  
Virginia, Representing Pennyrile Energy, LLC

Before: Judge Andrews

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on September 27, 2017, filed an Application for Temporary Reinstatement of miner Jonathan Holskey (“Holskey” or “Complainant”) to his former position with Respondent Pennyrile Energy LLC, (“Pennyrile” or “Respondent”) at the Riveredge Mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. §2700.45(c). A timely request for hearing was filed on October 12, 2017, and a hearing was held on October 19, 2017, in Madisonville, Kentucky. The parties had the opportunity to present witnesses, documentary evidence, and arguments in support of their positions.

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<sup>1</sup> A pagination error in the original Decision has been corrected.

## **Discussion of Relevant Law**

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, 95<sup>th</sup> Cong., 1 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).

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.” *Id.* at 624-25.

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 on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.<sup>2</sup> *Sec’y of Labor on behalf of 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 federal circuit 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). “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 on behalf of 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 there was an adverse action, which was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub*

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<sup>2</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)).

*nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary and Holskey 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 on behalf of 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 on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

### **Evidence**

On July 31, 2017, Holskey executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement, he alleged the following:

I am an experienced coal miner. I was employed at Pennyrile Energy, Riveredge Mine until I was discharged on 6/2/2017. I suffered an at [sic] work accident on 05/15/17 causing injury to my right leg and ankle. I reported the accident this same night 5/15/17. The brakes on the green car on #1 unit did not set up properly. When I got out of the car it rolled back about two feet. I reported this safety hazard. I worked on 05/16/2017 although in extreme pain and discomfort. When I came out of the mine that morning I insisted on filling out an accident report and going to the doctor. When I got outside after the shift I filled out the accident report. On June 2, 2017, I was given a letter stating I was terminated effective June 2, 2017. I am requesting my job back, all lost pay, bonuses, health insurance, etc., that I would have otherwise earned.

Application for Temporary Reinstatement, Exhibit B.

The Declaration of Special Investigator James Jordan was also filed with the Application for Temporary Reinstatement, and in pertinent part is as follows:

1. I am a special investigator employed by the Mine Safety and Health Administration, United States Department of Labor. I am assigned to the Coal District 10 Office in Madisonville, Kentucky.

2. As part of my responsibilities, I investigate claims of discrimination filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Jonathan Holskey against Pennyrile Energy, LLC (“Pennyrile”). My findings as a result of the investigation disclosed the following:
  - a. Jonathan Holskey was previously employed by Pennyrile at the Riveredge Mine in McClean [sic] County, Kentucky. Holskey began working at Riveredge as an employee of Pennyrile on or about March 15, 2017. Previously, he had worked at that mine as a contract employee. At the time of his discharge on June 2, 2017, Holskey worked on the third shift.
  - b. Holskey was injured at the Riveredge mine on or about May 15, 2017. When Holskey exited a ram car, the parking brake failed, and the car rolled over his foot and leg. He reported this injury and complained about the ineffective ram car brakes to Tommy Boyd, the lead man on the third shift.
  - c. Holskey returned to work the next day, May 16, 2017. Holskey was told by lead man Tommy Boyd to take it easy because of the injury he received the night before. Near the end of the shift, Boyd asked Holskey to finish the dust parameter checks on the section and sign the board indicating that the examination had been completed. Holskey told Boyd that he did not know how to do the “pitot tube” reading on the continuous miner, so he felt uncomfortable performing the examination and signing off on the board. Holskey also asked Boyd to fill out an accident report form during that shift for the accident which occurred on the previous shift. After that shift, Holskey and Boyd met with Susan Dixon, a person in human resources, and Kris Maddox, the underground superintendent, where Holskey’s injury was discussed.
  - d. Holskey had also made previous complaints to Boyd and others about Pennyrile mining coal on the third shift without the proper belt examinations being done during the shift, as required by 30 C.F.R. § 75.362(a)(1).
  - e. Due to the injury sustained on May 15<sup>th</sup>, Holskey missed approximately two weeks of work. When he returned to work, on or about May 30, 2017, Holskey worked two additional days. After clocking in on the evening of June 1, 2017, Holskey was told to go home and return on the morning of June 2, 2017. When he returned the next morning, Holskey was terminated, allegedly because he was a probationary employee.
3. Based upon my investigation of these matters, I have concluded that Holskey’s complaint of discrimination was not frivolously brought.

Application for Temporary Reinstatement, Exhibit A.

## Summary of Testimony

Jonathan Holskey has approximately 14 years of coal mining experience. Tr. 14. He has worked as a roof bolter, continuous mine operator, face boss, second shift mine foreman, and lead man. Tr. 15. Holskey has Kentucky and West Virginia face bossing papers, MSHA dust certification, and explosive blasting certification. Tr. 15.

Holskey began working at Pennyrile's Riveredge Mine in late November of 2016.<sup>3</sup> Tr. 15-16. He first worked through GMS for roughly four months as a contractor as a continuous miner operator and scoop man. Tr.16.

On March 15, 2017, Holskey was hired by Pennyrile as a continuous miner operator. Tr. 16-17, 46-47. When hired, Holskey signed a two-sentence document, which stated: "I understand that if Pennyrile Energy, LLC employs me, it is on a 90-day trial period (this means 90 working days). If at any time during this 90 working day period either party is dissatisfied, employment will be terminated." Tr. 49; RX-1. Until May 1, 2017, he worked on a rotating shift, where he would work two weeks on the dayshift and then two weeks on the second shift.<sup>4</sup> Tr. 16-17, 44-45. On May 1, Superintendent Kris Maddox asked Holskey to transfer to third shift, and Holskey agreed to do so.<sup>5</sup> Tr. 17, 44-45.

The third shift is a "dead shift," meaning that it is used for maintenance, rock dusting, and setting up equipment. Tr. 18. The third shift lasts from 11 pm to 7 am, and is responsible for setting up the unit for the day shift. The third shift has approximately seven people, with two mechanics at the greaser, a lead man, and three setup guys. Tr. 109. The third shift does some production when "early coal" comes in at 5 am.<sup>6</sup> Tr. 19. Holskey testified that he was originally supposed to be lead man, making \$28 per hour.<sup>7</sup> Tr. 17. The lead man is the responsible person

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<sup>3</sup> The Pennyrile Mine is nonunion. Tr. 39.

<sup>4</sup> Holskey misstated the date early in the hearing as June. Tr. 16-17.

<sup>5</sup> Kris Maddox testified at hearing on behalf of the Respondent. Maddox worked as the superintendent of Riveredge Mine until a week before hearing. Tr. 102-103. At the time of hearing, he was general manager of the mine. Tr. 102-103. As superintendent, Maddox's duties included daily operations of the mine, mine planning, and workforce. Tr. 103.

<sup>6</sup> According to Holskey, "early coal" usually started at 5 am, but it could start a few hours earlier or later. Tr. 86-87.

<sup>7</sup> Maddox described Holskey's job as a third shift utility job, with responsibilities to help get the unit ready for the day shift by scooping, rock dusting, and helping move power. Tr. 108. Maddox testified that he never told Holskey that he would be the supervisor on that section, and that no one else would have the authority to assign him to be the lead man. Tr. 109. Similarly, no one besides Maddox could establish Holskey's rate of pay. Tr. 110. The difference in pay between a miner operator and utility man is \$1.50 per hour, and miners who have papers receive an extra 25 cents per hour. Tr. 110.

on the unit; he sets up the unit, gets it ready for the day shift to run coal. Tr. 18. As the lead man, Holskey “took care of the miners,” by setting bits, cleaning out ductwork, and setting up in a fresh cut. Tr. 18.

Holskey had two issues concerning his job on the third shift. Tr. 20. His first issue was that he was supposed to be a face boss, but instead was doing the work of a laborer. Tr. 20. He was originally told by his face boss, Matt Allen, that he would be taking the position as third shift face boss making \$28 per hour.<sup>8</sup> Tr. 81. His second issue was that the shift was ordered to run early coal when the belts had not yet been examined and the dust parameters were not done correctly. Tr. 20. Holskey complained about the problems concerning belt exams and dust parameters every day to his face boss, Tommy Boyd. Tr. 20, 88. Boyd responded that they were going to do what they were instructed to do. Tr. 21.

On the night of May 15—when Holskey’s accident occurred—Holskey had arrived at the unit and found the green ram car was located right behind the shack, one break out by the feeder.<sup>9</sup> Tr. 21, 50. Holskey began by hauling rock dust from bottom to the unit using the ram car.<sup>10</sup> Tr. 21, 23, 50. This entails getting a ram car and going to the bottom of the slope where the rock dust hole was located, loading it, and bring it to the unit. Tr. 21.

When Holskey went to park the ram car, he hit the panic bar, which “knocked the breaker on the car,” and engaged an emergency disconnect that locks the car up and shuts it down completely. Tr. 21, 51-54. Holskey turned around in his seat, and was getting out, when the brakes failed and the ram car backed over top of him. Tr. 21-22. The car backed over him approximately one foot, dragging him under the cab of the car. Tr. 22. Holskey sustained a crushing injury to his right foot, a deep bruise on his Achilles’ heel, a bruise on his back, and a puncture hole in the back of his neck.<sup>11</sup> Tr. 23, 40.

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<sup>8</sup> Holskey testified that at the mine, the terms “face boss” and “lead man” were used interchangeably. Tr. 82.

<sup>9</sup> The “shack” is where the power box is located, and it serves as a gathering place. Tr. 39. It is a physical structure, with a bench where people will sit. Tr. 39.

<sup>10</sup> The height in the mine is five feet. Tr. 22. The ram car is approximately 30 feet long, and has a bed like a pickup truck, which pivots in the middle, with the batteries that power the car on the other end of the vehicle. Tr. 22. The operator lays down in the compartment, with the controls to each side of him. Tr. 22. There is a chain on the car that goes from tire to tire, which smooths out the road as one is traveling back and forth. Tr. 24.

<sup>11</sup> Nicky Stevens testified at hearing on behalf of the Respondent. Stevens worked in maintenance in the third shift at Riveredge Mine. Tr. 147. He has worked in the mines for approximately 40 years, and worked for Pennyryle for approximately two years. Tr. 157. He was working at the Sebree Mine when Ricky Thorpe got crushed to death. Tr. 157.

On May 14, the second shift called out that “the brakes were spongy” on the green ram car, so Chris Pettus and Stevens worked on it. Tr. 148-149. They worked on the car for approximately

Holskey dragged himself out from under the ram car, and walked around the back to the shack. Tr. 22-23. Holskey saw his face boss, Tommy Boyd, at the shack, sitting at the feeder, marking up chain hangers. Tr. 23. Holskey felt nauseous, so he could not talk to Boyd, and instead he walked back to the shack and sat down. Tr. 23. A few minutes later, after Holskey had gathered his composure, he flagged Boyd down. Tr. 23. Holskey told Boyd what happened, how the brakes had failed and that the car backed over his foot and back and slammed him to the ground. Tr. 23-24. Holskey specifically complained that the brakes on the ram car failed. Tr. 24. Boyd responded, "Well, let's go check it out." Tr. 23. They went back to where the incident occurred, and it was visible where the chain on the car shifted back, with Holskey's feet and handprints from his attempts at escape. Tr. 23-24. Boyd said, "It's all right, Holskey. Let's go to the shack and sit down and take it easy for the rest of the shift." Tr. 23.

Back at the shack, Holskey took off his boot and showed Boyd the swelling. Tr. 24. Boyd said, "Sit here for the rest of the shift and take it easy." Tr. 24. Boyd sat in the shack for the remainder of that shift. Tr. 24.

The next day, Holskey came into work, but could not work. Tr. 25. Boyd told Holskey, "Just come on, you can sit at the shack and take it easy." Tr. 25. So, on the night of May 16, Holskey sat in the shack and did not do anything until 5 am. Tr. 25. At that time, Boyd had to leave work, and Holskey assumed the responsibilities of the face boss. Tr. 25. These included the pre-shift examinations and dust parameters. Tr. 25. Holskey told Boyd and third shift mine foreman Matt Greer that he wasn't comfortable with the dust parameters because he had never been trained or performed a Pitot reading.<sup>12</sup> Tr. 25, 40. Greer responded that Holskey should just do the best he could. Tr. 25.

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two to three hours. Tr. 151. Stevens testified that he did not witness the incident with Holskey and the ram car. Tr. 152.

Stevens tested all the breaking methods in the blue ram car and they worked. Tr. 154. Stevens testified that there was no way that Holskey could have been driving the green car. Tr. 155-156. Stevens had told others at the mine that he did not know how Holskey could have been run over by a ram car, and doubted the facts of the accident. Tr. 158. Stevens testified that he did not like to be around Holskey because he complains, and he could not remember if he told an MSHA representative that he did not like Holskey personally. Tr. 167.

Stevens reported to Danny Young and Greg Bowser that he did not find anything wrong with the car Holskey was driving. Tr. 170-171.

Greg Badertscher also testified at hearing on behalf of Respondent. Badertscher was the maintenance chief at the Riveredge Mine responsible for all underground maintenance, repair, and upkeep of the cars and equipment. Tr. 172-173. Badertscher further cast doubt on Holskey's account of the accident. Tr. 172-183.

<sup>12</sup> The dust parameters were required under the mine's ventilation plan. Tr. 26. The Pitot reading is necessary because there must be a certain amount of air going through the scrubber for the

At approximately 6:55 am, Holskey went outside and saw that Boyd was still there. Tr. 26. Holskey went to retrieve an accident report, and testified that he “[caught] grief” from Superintendent Kris Maddox and Susan Dixon from HR. Tr. 26-27. They did not want Holskey to fill out the accident report or go to his doctor. Tr. 41. At first, they refused to show Holskey where the accident reports were located, but eventually they showed him. Tr. 41. Holskey asked Boyd to sign it, but Boyd said that he would fill it out while Boyd talked to the MSHA inspector.<sup>13</sup> Tr. 27. Holskey had to sign it quickly because Boyd was in a rush to leave to his daughter’s graduation. Tr. 61. Holskey testified that he did not have an opportunity to review the accident report. Tr. 61. Holskey then went to Maddox and Dixon to discuss which doctor Holskey would see. Tr. 27. They wanted Holskey to see a doctor in Madisonville, and Holskey wanted to see a doctor in the same facility closer to his house in Owensboro. Tr. 27.

After the conversation with Maddox and Dixon, Holskey went straight to the urgent care clinic, where the doctor put Holskey in an orthopedic boot, took x-rays, explained his injuries, and sent him home. Tr. 29. The doctor told Holskey to continue to wear the boot, and that the more he walked on it the better he’d work it out. Tr. 29.

When Holskey went to work that night, a safety man called “Slick” Burnet met him at the time clock and asked Holskey for his papers. Tr. 29. Holskey handed them to Burnet, and Burnet said, “Well, I got to call Keith [Whitehouse] because you got some restrictions.” Tr. 29. Whitehouse said that because of Holskey’s restrictions, he couldn’t work that night, so Holskey went home. Tr. 30.

The next morning, Holskey went back to the doctor to try to get some of the safety restrictions lifted. Tr. 30. Holskey continued going to the doctor every third day, because he felt that his injuries were getting better. Tr. 31. On Friday, the doctor told Holskey that if he wanted to be released to go back to work Sunday night, he would sign the release. Tr. 31. On Sunday night, Holskey was preparing to go back to work, but his foot was still giving him some issues, so he went back to the doctor on Monday and the doctor placed Holskey back on the restrictions.<sup>14</sup> Tr. 31.

Approximately one week after the injury, Holskey was released back to work, but he was not able to perform work because he still had to wear the boot and elevate his foot with ice. Tr. 32. Holskey’s foot was so swollen that the doctor was considering lancing it open in order to relieve the swelling. Tr. 33.

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dust parameter in order to mine coal. Tr. 40. The scrubber is the exhausting system for the continuous miner that gathers dust out of the atmosphere. Tr. 40.

<sup>13</sup> On that day’s day shift MSHA had two dust samplers coming in to run dust. Tr. 26.

<sup>14</sup> During this time period, Holskey wore the boot intermittently because the doctor said that Holskey needed to walk on his foot, and said he should wear the boot on an as-needed basis. Tr. 65.

On May 30, Holskey was released to work a second time. Tr. 33-34. When he returned, he was taken off the unit and put on rock dusting. Tr. 34. It was unusual for Holskey to perform this type of work, because the entire time he worked at the mine he worked with the miner. Tr. 34.

Holskey worked two shifts. Tr. 35. When he arrived for his third shift following his release back to work, Matt Greer, the third shift foreman met Holskey at his basket and told him to go home and come in the next day at 10 am. Tr. 35.

The following day, Holskey arrived to the mine at 10 am, and went to Kris Maddox's office, where Maddox, Dixon, day shift mine foreman Wyatt Oates, and maybe Whitehouse were sitting. Tr. 35-36. No one said anything to Holskey, but instead slid a paper across the desk to him. Tr. 36; GX-1. Holskey picked up the paper and read it, and asked Maddox, "Is this because of the accident?" Tr. 36. Maddox replied, "No." Tr. 36.

The letter stated in pertinent part, "Effective 6/2/2017, your employment with Pennyrile Energy is terminated. The basis for your termination is the established policy of the Probationary Period Clause."<sup>15</sup> Tr. 37; GX-1. Holskey was not provided an explanation for the termination by anyone in the room. Tr. 37. Holskey said, "Okay," and left to clean out his basket. Tr. 36. Holskey was not provided any further reasons for the termination or any further information about the probationary period. Tr. 38. Maddox testified that he told Holskey, "that it wasn't working out with us and it wasn't working out with him, so I was just going to let him go due to the probationary period." Tr. 119-120.

Maddox was involved in both the hiring and firing processes. Tr. 103. Maddox testified that no subordinates had authority to assign people positions or pay. Tr. 103. When employees are hired, they are placed on a 90-day trial or probationary period.<sup>16</sup> Tr. 104. Maddox testified that the policy is explained to new employees during orientation. Tr. 105. Maddox testified that he has terminated approximately four or five other probationary employees. Tr. 114-115.

Maddox testified that Holskey's performance while he was at GMS was "very good." Tr. 105. However, when he was hired full time by Pennyrile, "his work performance laxed." Tr. 105. Maddox testified that Holskey began "getting a lot of miner cables," and that he was sometimes absent from his miner. Tr. 106. This information came from Holskey's direct supervisor, Matt Allen. Tr. 106. Maddox testified that Holskey was moved to third shift around May 1 because Allen told Oates that "he was tired of chasing Holskey around the unit to get him to his job." Tr. 107. Additionally, Maddox testified that Holskey had asked Maddox to be moved to third shift.

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<sup>15</sup> Maddox told Dixon that Holskey was being terminated because he "could not perform his job duties, cuts a bunch of cables, and can't get along with others," and she typed the termination letter. Tr. 132. Nothing in the termination letter mentions these reasons. Tr. 133.

<sup>16</sup> Maddox testified that during the probationary period, an employee can be fired for any reason or no reason at all. Tr. 137. Maddox also testified that after the probationary period an employee can be fired for any reason or no reason at all. Tr. 137.

Tr. 107. Maddox stated that he did not terminate Holskey's employment at that time because "you want to give somebody a chance to be put in another position so they maybe excel better at that position." Tr. 107.

Maddox testified that on Holskey's second night on the third shift he received complaints that Holskey "was acting like the mine foreman." Tr. 110. Maddox testified that he had a conversation with Holskey to tell him that Boyd was the boss.<sup>17</sup> Tr. 110. Maddox further testified that Holskey had a conversation with Maddox stating that he wanted to run coal early, and that he would pre-shift the belts.<sup>18</sup> Tr. 111. Maddox replied, "No. I don't want—I don't want that. I want the unit set up ready to go at 7:00, and we can start loading. I don't want early coal." Tr. 111. Maddox said this because he wants "to give the third shift the opportunity to make sure everything is right."<sup>19</sup> Tr. 112. Maddox testified coal production usually starts at approximately 7:00 am. Tr. 111. Third shift stays for approximately 30 minutes until dayshift gets there. Tr. 111-112.

Pennyrile sometimes issues written warnings, and has an employee handbook. Tr. 125. They also sometimes reduce oral warnings to writing. Tr. 126. Holskey was never written up for allegedly cutting the miner cable, but Maddox testified that he was "talked to." Tr. 126. Similarly, he was not written up for being absent from the miner, but he was "talked to." Tr. 126. Similarly, he was not written up for "acting like a boss," but Maddox testified that he was "talked to." Tr. 127. Maddox testified that "everybody" was coming into his office complaining about Holskey. Tr. 129. However, when asked to name any miners who complained about Holskey, Maddox could only remember Boyd. Tr. 129. Maddox had no written documentation or recollection of anyone complaining about not working well with Holskey, other than Boyd. Tr. 128-130. There was also no documentation for any of the previous problems of Holskey's that Maddox described. Tr. 128. Maddox never told Holskey that he would be discharged or terminated for any of his conduct. Tr. 130-131. There are no written warnings or documentation of any problems in Holskey's personnel file. Tr. 131.

Maddox testified that he had discussions with Oates on May 12 about Holskey, and that they were "probably going to let Mr. Holskey go." Tr. 114. His decision was also based on discussions with Boyd, Allen, Whitehouse, and Greer. Tr. 125. The decision to fire Holskey was "because of the cables, poor work performance, not working well with the others." Tr. 114. Maddox testified that he never heard about any safety complaints from Holskey, and that the accident report did not factor into his decision to fire Holskey.<sup>20</sup> Tr. 120. Maddox testified that

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<sup>17</sup> Holskey denied that such a conversation took place. Tr. 90.

<sup>18</sup> Holskey denied that such a conversation took place. Tr. 89-90.

<sup>19</sup> Holskey denied that such a conversation took place. Tr. 89-90.

<sup>20</sup> Maddox testified that Pennyrile's policy on reporting accidents at the mine are to report them immediately to the direct supervisor. Tr. 115. He testified that approximately 30 accidents reported by employees, and that none of these employees were fired. Tr. 115, 121. He further pointed out that Holskey was not fired after filling out his accident report in March. Tr. 120-121.

Holskey was not physically on the property on May 12, and that when he terminates the employment of someone during the probationary period, “I have to make sure that he’s on property.” Tr. 114. On cross examination, Maddox admitted that nothing prevented him from firing Holskey during the three-week period between May 12 and June 2. Tr. 121-122.

Maddox testified that he did not want to fire Holskey on May 15 because Holskey had filled out an accident report that day, but the accident report was not filled out until a few hours into Maddox’s shift. Tr. 123. Maddox did not have a reason for not terminating Holskey on May 16, when Holskey came into work. Tr. 124. Maddox testified that he did not fire Holskey when he returned to work two more shifts starting on May 30, because he “just tried to let him work to finish the week out.” Tr. 124. When it was pointed out to Maddox that those two shifts fell on a Tuesday and Wednesday, and asked “how is that finishing the week out?” Maddox simply responded, “I don’t know.” Tr. 124.

### **Contentions**

The Complainant, through the Secretary and private counsel, argue that Holskey has met his burden of establishing that his complaints are non-frivolous, and as a result he should be temporarily reinstated. The Complainant highlights his protected activities of daily complaints concerning walking the belts on the third shift, his accident report, complaints about the brakes on the ram car, and his complaint that he did not know how to do the required Pitot readings. Holskey’s termination followed shortly after these protected activities, and the Complainant argues there was knowledge and animus towards the protected activities.

Respondent Pennyrile argues that Holskey was terminated because he cut the cables too often, had poor work performance, and was not working well with others. The Respondent argues that the 90-day probation policy permitted the operator to fire Holskey for any reason.

### **Analysis**

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary’s burden is “relatively insubstantial”. For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaint was not frivolously brought.

#### *Holskey Engaged in Protected Activity*

The record contains evidence of multiple complaints and actions over a short time period that each constituted protected activities. First, after Holskey was transferred to the third shift on May 1, 2017, he began complaining daily to his face boss, Tommy Boyd, that the belts had not yet been examined and the dust parameters were not performed correctly as required by the ventilation plan. Tr. 20, 88. There is no question that such safety complaints constitute protected activity under the Mine Act. Indeed, Section 105(c)(1) explicitly states that a miner

shall not be discriminated against because such miner “has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent...of an alleged danger or safety or health violation in a coal or other mine.” 30 USC §815(c)(1). Holskey’s daily complaints concerned health and safety matters that he believed were a violation of the Act.

Second, after being crushed by the ram car on the night of May 15, Holskey reported the accident and injury to Boyd. The Commission has held that the act of reporting an injury is a protected activity under §105(c), and explained that such reporting is integral to the proper functioning of the Act. *See Swift, Snyder, and Cunningham v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 14, 1994).<sup>21</sup> Third, Holskey signed an accident report and submitted it to management. Tr. 27, 61.

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<sup>21</sup> In *Swift*, the Commission stated:

We affirm the judge's conclusion that a miner's reporting of injuries to an operator constitutes protected activity. Section 2(e) of the Act provides that “operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines.” 30 U.S.C. § 801(e). In order to carry out this responsibility, mine operators need to know about unsafe conditions that cause accidents and injuries. Further, accurate information must be gathered by operators in order to comply with the Secretary's regulations at 30 C.F.R. Part 50 (1993), requiring operators to file with MSHA reports of all accidents and injuries that occur at mines. Operators can be fully informed about accidents and injuries only with the cooperation of miners. Therefore, taking adverse actions against miners for their reporting of injuries would restrict the free flow of information and compromise accurate reporting and mine safety.

We reject the operators' contention that the act of reporting a personal injury would qualify as protected activity only if the report contains a safety complaint; this approach takes too narrow a view of such reports. The legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (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 (1978) (“Legis. Hist.”).

The right to report injuries, however, carries with it a corresponding responsibility that miners report injuries and accidents. The legislative history of the Act shows that Congress provided protection to miners against discrimination in order to encourage their active role in enhancing mine safety:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the

Fourth, after the accident, Holskey complained to Boyd that the brakes on the ram car failed. Tr. 24. This safety complaint constituted a protected activity under the Act.

Fifth, on May 16, 2017, when Holskey was ordered to perform the dust parameters, he told Boyd and Greer that he was not comfortable performing the Pitot readings because he had never been trained on how to do them. Tr. 25-26, 40. This statement constituted a health and safety complaint. It is unclear from the record if Holskey ended up performing the Pitot readings, but if he refused to do work that he considered unsafe, then it also constituted a protected work refusal.

Each of these safety complaints and accident reports constituted protected activities under the Act. 30 U.S.C. §815(c)(1).

#### *Holskey Suffered an Adverse Employment Action*

On June 2, 2017, Holskey went to Maddox's office, and met with Maddox, Dixon, Oates, and perhaps Whitehouse. Tr. 35-36. Nothing was said to Holskey, but he was handed a letter that terminated his employment. Tr. 36; GX-1. The basis for the termination, as explained in the letter, was "the established policy of the Probationary Period Clause." GX-1. Holskey was not provided any other reason for his termination. Tr. 38. The Act clearly states that a discharge is an adverse employment action. 30 USC §815(c)(1).

#### *A Nexus Existed Between the Protected Activity and the Adverse Employment Action*

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action. Having concluded that Holskey engaged in protected activities and suffered an adverse employment action, the examination now turns to whether those activities have a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the

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enforcement of the Act.... [I]f 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.

Legis. Hist. at 623.

*Swift, Snyder, and Cunningham v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 14, 1994).

Complainant. See, e.g., *CAM Mining, LLC*, 31 FMSHRC at 1089; see also, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

#### Knowledge of the protected activity

According to the Commission, “the Secretary need not prove that the operator has knowledge of the Complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090, citing *Chicopee Coal Co.*, 21 FMSHRC at 719. In the instant matter, there is sufficient evidence of knowledge by Pennyrile of the various protected activities to meet the evidentiary threshold.

Holskey’s daily complaints about the dust parameters, not walking the belts for the third shift, the faulty brakes on the ram car, the accident, and his lack of training on the Pitot readings were made to his face boss, Tommy Boyd. Tr. Tr. 20-21, 23-24, 25, 27. Furthermore, Holskey asked Maddox and Dixon for a blank accident report to fill out. Tr. 26-27. Maddox testified that he was aware of the accident report as soon as it had been filled out. Tr. 123. Therefore, the Respondent had knowledge about each of Holskey’s protected activities.

#### Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated “We ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.” *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant matter, extremely close proximity in time between the protected activities and the adverse actions greatly favors a finding that a nexus existed between the protected activities and the adverse actions. The protected activities at issue here began on May 1, with Holskey’s daily complaints to Boyd about the dust parameters and belt. Tr. 20. The other protected activities surrounding the accident all occurred on May 15 and May 16. Holskey was terminated on June 2. Tr. 35-36. Therefore, the timespan between the termination and the protected activities ranged from 17 to 32 days.

#### Hostility or animus towards the protected activity

The Commission has held, “[h]ostility towards protected activity-- sometimes referred to as ‘animus’--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the

more probative weight it carries.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Although a single instance, even circumstantial in nature would suffice, here there are several indications of animus. Boyd repeatedly disregarded Holskey’s health and safety complaints in a manner that bordered on contempt. In response to Holskey’s daily complaints about the dust parameters and belt examinations, Boyd told Holskey to simply do what they were instructed to do. Tr. 20-21. Following Holskey’s accident with the ram car, where Holskey had his foot crushed, his heel and back bruised, and a puncture hole in the back of his neck, Boyd simply told Holskey to “sit down and take it easy for the rest of the shift.” Tr. 23, 40. When Holskey complained to Boyd and Greer that he felt uncomfortable doing the Pitot readings because he had not been trained, Greer responded that Holskey should just do the best he can. Tr. 26. Furthermore, when Holskey asked Maddox and Dixon for a blank accident report in order to report his ram car accident, they initially refused to tell Holskey where they were kept. Tr. 41. These responses to Holskey’s complaints and accident reports evidence animus towards Holskey’s protected activities.<sup>22</sup>

### Disparate treatment

“Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

Maddox testified that approximately 30 employees that made safety complaints were not fired, and that Holskey was not fired after his accident report in March. Tr. 115, 120-121. These statements, without more information in terms of the nature of the other safety complaints, or other employees who made complaints that were fired, is not sufficient to make a determination on disparate treatment.

### *The Respondent’s Reliance on the Probation Policy is Misplaced*

The Respondent’s central argument was that because the signed probationary policy states that they were permitted to terminate a new employee’s employment for any or no reason within 90 days, the termination of Holskey was permissible. Pennyrile’s Riveredge Mine is a non-union mine, and all employees are at-will. Tr. 39. Maddox testified that all miners at Pennyrile, whether in the probationary period or not, may be fired for any reason or no reason.

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<sup>22</sup> The Respondent’s presentation of Nicky Stevens and Greg Badertscher further illustrate animus towards Holskey’s protected activity of making an accident report. These witnesses had no relevant information to offer concerning any argument or defense by Respondent, but instead simply insinuated that Holskey’s accident report was untrue. Respondent’s defense that Holskey’s termination was wholly unrelated to the accident or accident report was belied by the presentation of these witnesses.

Tr. 137. Respondent's counsel further argued that as a matter of employment law, probationary employees have fewer rights than permanent employees. Tr. 192-196.

While Pennyrile may be able to fire any at-will or probationary employee for any *legal* reason, it cannot rely on a signed policy to terminate an employee for reasons impermissible by law. A host of labor, employment, civil right, health and safety, whistleblower, and other laws protect employees in the workplace, and no policy or signed agreement can permit the company to violate those laws. The probationary policy does not and cannot negate any provision of the Mine Act, and the company may not force employees to sign away any rights under the Mine Act as a condition of employment. Therefore, any reading of the probation policy that includes protected activities is impermissible.

The Respondent's reliance on the probationary policy is misplaced. The Respondent may be permitted to terminate the employment of employees for any legal reason, but it cannot use the policy to terminate employment for illegal reasons. Therefore, the argument by Maddox and by Respondent's counsel that Holskey was fired because of the probationary policy does not negate the necessity of an inquiry as to whether Holskey has made a non-frivolous complaint of discrimination under §105(c) of the Act.

### **Conclusion**

In concluding that Holskey's complaint herein was not frivolously brought, I find that there is reason to believe he engaged in protected activities, and that there was a nexus between the protected activities and his termination. Miner Jonathan Holskey is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

### **ORDER**

It is hereby **ORDERED** that **Jonathan Holskey** be immediately **TEMPORARILY REINSTATED** to his former job with Pennyrile Energy at the Riveredge Mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e) (4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Respondents did not violate Section 105(c) of the Act.



Kenneth R. Andrews  
Administrative Law Judge

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