FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 4, 2020

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of WILLIAM R. WHITMORE, Complainant v. YAGER MATERIALS CORP., Respondent	TEMPORARY REINSTATEMENT Docket No. KENT 2020-0116-DM Mine: Riverside Stone Mine Mine ID: 15-00081 Docket No. KENT 2020-0117-DM Mine: Riverside Stone Mine Mine ID: 15-18549

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Thomas J. Motzny, Esq., Nashville, Tennessee, for the Secretary of Labor

Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Whitesburg, Kentucky, for the Complainant

Arthur M. Wolfson, Esq., Fisher & Phillips, LLP, for the Respondent

Before: Judge William B. Moran

This matter is before the Court on an application for temporary reinstatement ("Application") filed by the Secretary of Labor on behalf of Complainant William R. Whitmore pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The application, which was filed on July 9, 2020, seeks reinstatement of the Complainant "to the position he held immediately prior to the discharge, or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties." Application at 3. A video hearing on the Application was held on July 29, 2020. For the

reasons that follow, the application is granted. Respondent is **ORDERED** to immediately reinstate the Complainant, William R. Whitmore, to the position he held immediately prior to his discharge, or to a similar position, at the same rate of pay, and the same shift assignment, and with the same or equivalent duties.

SUMMARY OF THE EVIDENCE

As set forth below in greater detail, on the basis of credible testimony presented during the July 29, 2020 video hearing, the Court finds that the Complainant established several instances of protected activity by voicing safety complaints, that the Respondent had knowledge of those safety complaints, and that the Complainant's suspension and termination occurred soon after those safety complaints were made. The Respondent's defense did nothing to dispel the credibility of the Complainant's safety complaints, but rather spoke to an alternative basis for the Complainant's firing. That defense did not, in any way, tend to show that Mr. Whitmore's claim was frivolous. Accordingly, the Court finds that the Mr. Whitmore's Complaint was not frivolously brought and on that basis that the Complainant is to be immediately reinstated to his former position.

HEARING TESTIMONY AND FINDINGS OF FACT[1]

Mr. William Whitmore, the Complainant, testified first. Whitmore began his employment with Respondent, Yager Materials Corp, on September 30, 2019. His job title was "maintenance manager."[2] Tr. 19-20. The name of the mine for both its underground and surface operations is Riverside Stone. Tr. 60. He described his job duties as "[s]ite-wide maintenance management for the underground mine and the surface mine. … [which entailed] [a]ll of the plant equipment that processes the aggregate and also all of the mobile equipment that produces the aggregate." [3] Tr. 20. It is noted that, among his work experience, Whitmore is an MSHA

[1] This section of the Court's decision and order represents a more detailed summary of the hearing testimony and is derived from what the Court determined to be the salient evidence for the limited nature of the issue to be resolved in this hearing. It is not intended as a substitute for the entirety of the transcript. The parties were all provided with a copy of the transcript on the morning of July 30, 2020, the day following the hearing.

[2] According to Whitmore, "Yager Materials never had a maintenance manager for that site since 1954, approximately, whenever they started mining there." Tr. 64. Once Carmeuse acquired Yager, they determined it "necessary to have a maintenance manager on-site," and he was the first maintenance manager hired for that mine. Tr. 64-65. It was Whitmore's understanding that Bryan Ory, the site's general manager, had worked at Yager for some 32 years. Tr. 65.

[3] Yager Materials, at both its surface and underground facility, produces limestone. Tr. 78. The operation is located in Battletown, Kentucky. Tr. 20.

certified instructor and has done a lot of miner safety training in the course of his 36 years of mining experience. Tr. 62. Whitmore was terminated (fired) from his job at Yager on April 29, 2020. *Id.*

Whitmore testified that, during January 2020, while he was on medical leave, he anonymously reported safety incidents, which occurred prior to that leave, to MSHA through an online method provided by MSHA to report such matters. Tr. 21-24. The incidents he reported through the MSHA online method involved inadequate training and improper documentation of such training, relating to mobile equipment operators. *Id.* Upon his return to work, though no one accused Whitmore as the source for the anonymous complaint, Bryan Ory, the site's general manager, who was Whitmore's immediate supervisor at Yager, acted differently toward him. Tr. 21, 25. Whitmore presented credible examples to support his claim that Ory treated him differently upon his return to work following his medical leave. *E.g.* Tr. 28.

During April 2020, Whitmore raised safety issues with Yager. The first was his concern that a contractor working on-site was not complying with the mine's COVID-19 restrictions and protocols. Tr. 28. Those protocols were put in place by Yager's parent company, Carmeuse. *Id.* He emailed his concern about this to Jenn Carnley, Respondent's office manager, and a human resources employee, described as a "HR generalist." Tr. 29. Several other Yager personnel were included in Whitmore's email to Carnley, including Bryan Ory. Ex. C 1 and Tr. 30. Following that, Whitmore had a face-to-face discussion with Ory about this issue. Tr. 31.

A separate instance occurred on April 17, 2020. This involved the Complainant's assertion that there was a near miss accident while he was driving in the company's pickup truck as he came upon a haul truck using the same road. According to Whitmore's account which, *for purposes of this hearing*, the Court finds to have been credible, a 70 to 75 ton haul truck was speeding on the road and upon hitting a dip in the road, large pieces of aggregate (limestone ore) fell off the haul truck, narrowly missing hitting Whitmore's vehicle. Tr. 32. Following that event, Whitmore drove to Ory's office and related the event to him, including his suggestions to remedy the safety issue he perceived. Tr. 33. Whitmore contended that Ory acted disinterested about the matter. Whitmore also emailed others within the Respondent's chain of authority about this event. Tr. 34-35 and Ex. C 2, C 3, C 4, and C 5.

Whitmore then identified another safety concern he raised with Yager. This also occurred in April 2020. Tr. 41, Ex. C 6. This matter involved maintenance concerns and his recommendation that equipment with safety issues should be taken out of service until repairs were made. In conjunction with this issue, Whitmore created a spreadsheet identifying safety deficiencies with particular pieces of equipment. This spreadsheet included some handwritten additional safety concerns involving inadequate steering control on loaded trucks. Ex C 6, with Whitmore's signature on the exhibit and dated April 21, 2020. That document was created entirely by Mr. Whitmore, including the handwritten notes on it. Tr. 76-77. Whitmore testified, again the Court finding his testimony to have been credible, *in the context of this temporary*

reemployment proceeding, that he reported this to Ory, placing it on his desk. Tr. 41-42. The report Whitmore created was not an isolated instance, as he presented similar such reports "every couple of weeks." Tr. 42. The next day Whitmore found the spreadsheet returned to his desk, with no comment from Ory. Tr. 43. Whitmore informed the Court that reviewing the preshift notes and deficiencies were part of his job. Tr. 44. Whitmore provided credible detail about the nature of the safety issues he identified in that spreadsheet. Tr. 45-50.

Following the safety concerns expressed by Whitmore, as described above, on April 23rd, that is to say, two days after the spreadsheet was presented to Ory, Whitmore was instructed by Lisa Wellman to be in Ory's office for a telephone conference that day. Tr. 51. During that conference Wellman raised questions about Whitmore's interaction with a new employee, who was identified for purposes of this hearing and with the agreement of all parties only as "Mike." Whitmore was Mike's direct supervisor. Tr. 77. Focusing upon the only issue of potential pertinence to this proceeding was the Respondent's interest as to whether Whitmore had spoken to Mike on the issue of whether the new employee's probationary period could be extended. Whitmore denied ever discussing that subject with Mike. [4] Tr. 55. The upshot of the telephone conversation was that Whitmore was informed he was suspended for three days, "[p]ending an investigation of conversations [that he, Whitmore] had with Mike." *Id.* The suspension began on April 23rd. Tr. 56. Subsequently, Whitmore was told to appear at Yager's Owensboro corporate office on April 29th. Several Yager management persons were at the meeting, including Ory, who was present, via computer, from Battletown. Tr. 57-58. Lisa Wellman directed the meeting, and informed the Complainant that he was being terminated. Tr.58. According to Whitmore, he could not get an answer as to reason for his firing but eventually Wellman, as Whitmore related her response to him, informed him that "management cannot say to an employee "what [he Whitmore allegedly] said [to Mike] and they determined that was unacceptable and that was grounds for my dismissal." Tr. 58-59, reflecting Whitmore's recounting of Wellman's reason for his firing. Following that, he was on that day given his termination letter, a severance document and informed that he had 21 days to respond to it. Tr. 59. Whitmore did not sign the agreement presented to him by Yager. *Id.*

Both at the time of the testimony under cross-examination of Mr. Whitmore and upon review of the transcript of that cross-examination, (Tr. 78- 97), and recalling that the Respondent has advanced in its defense the single claim that Whitmore made inappropriate remarks about the probationary period for the employee identified as "Mike," the Court has concluded that only the following has relevance to this proceeding seeking temporary reinstatement. Whitmore was questioned by Respondent about his duties as maintenance manager and in particular about Exhibit C 6 which, it will be recalled, involved alleged safety issues Whitmore recorded on that exhibit. Though that exhibit listed "up" for each equipment issue, the term being used to declare that the equipment was still being operated, Whitmore stated that he lacked authority to tag out

[4] In later testimony, as discussed *infra*, Yager employees arrived at a different conclusion, determining that, in their view, Whitmore *had* raised the topic with Mike.

equipment, making it unavailable for service. The Court finds that the Respondent's line of questioning regarding the equipment Whitmore listed with deficiencies did not advance the Respondent's attempts to diminish the information contained in that exhibit. Whitmore added that while he tagged out a lot of equipment, beyond the equipment listed in Ex. C 6, "in most cases the tags were disregarded and the equipment was run anyway." Tr. 84. It is noted that the Respondent presented no evidence in its case on rebuttal to challenge Whitmore's claim on that score.

Challenged by Whitmore's private counsel as to the Respondent's line of questioning about Ex. C 6 and Respondent's Counsel's admission that such questions were directed to Whitmore's veracity about the information in that exhibit, Whitmore's private counsel noted that credibility findings are not within the ambit of a temporary reinstatement proceeding. Respondent's Counsel differed on that score, contending that the views of two Commissioner's in *Shaffer v. Marion County*, 40 FMSHRC 39, (Feb. 2018) ("*Shaffer*") supported the line of questioning. The Court ruled by noting again that the Respondent's defense had been limited to the claim that Whitmore had made inappropriate remarks to Mike in connection with that employees probationary period. The Court then noted its view that the expressions s of any two Commissioners has no precedential value. Tr. 87-88. More will be said about *Shaffer* in the discussion regarding conclusions of law, *infra*. The Court also agreed that credibility determinations must await the full discrimination action.

However, the Court permitted Respondent's attorney some leeway to continue that line of questioning on the basis that "the rule itself [addressing temporary reinstatement proceedings, at 29 C.F.R. § 2700.45(d)] says that the respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought. Tr. 88. Thus given limited leeway to proceed, the Court finds that in the few questions that followed, the Respondent made no headway on that score to advance the contention that Whitmore's complaint was frivolous. [5] The Court elaborated on this subject with the following remark:

> The issue with reference to C6 might be the subject of a full hearing on discrimination, but really, for purposes of this proceeding it is just whether the respondent was aware that Mr. Whitmore created this document. And his testimony was, if I have it correct, that he created this document, put that and others on the desk of Mr. Ory, and so that's the limited focus. Not whether, in fact, a backup alarm, reverse lights were fixed and not whether the lights that were out were corrected. The same is true for the question [Respomdent's Attorney] just asked about documentation and training. The subject for this hearing [in the

[5] Similarly, the Court finds that the Respondent made no advances to establish frivolousness, when Whitmore was asked about his anonymous complaint regarding inadequate training and insufficient documentation of such training. Tr. 89-90.

> context of this line of questioning is] did the complainant raise issues with Yager about training and about documentation of the training. Not into the particulars of that. That is further down the road. So that's my ruling on that and so you can proceed on to something else.

Tr. 92.

When Respondent's Counsel questioned Whitmore about whether, in Ex. C 1, he specifically raised the subject of *social distancing* in connection with the COVID 19 pandemic, in that email, the Court noted that while *those words* were not expressly in the email, it was clearly the import of the message. When next asked if he received a response to that email, over an objection to the question by the Secretary's attorney, the Court allowed the question but observed that:

> for purposes of the temporary reinstatement application, A, the respondent has not alleged that had anything to do with Whitmore's termination. Another point is any employee, Mr. Whitmore doesn't have to be making a safety complaint or safety issue about those within his particular ambit, in other words those people that work directly under him or not. If I'm electrician at a mine, which is a shocking suggestion, but if I were and I make a complaint about someone who has a totally different job doing something, I can still make that complaint to management or I can make an anonymous call. It doesn't have to be something that's in my circle of authority. So, again, I come back to the point the issue in C1 is that Mr. Whitmore transmitted this message to Jenn Carnley and that's the extent of it.

Continuing, the Court noted that:

> [h]ow they respond to [my electrician making a safety complaint example] gets far afield to what [the Court has] to determine in the narrow scope of this proceeding." [As applied here], "[d]id Mr. Whitmore send this email. Doesn't seem to be any challenge about that. So he communicated this concern and I think beyond that, when we get into issues about well, what did the respondent do about that, that, in my view, gets into the question of a full discrimination proceeding and for determination perhaps in such a proceeding if that occurs. That's my ruling on that. It is far afield.

Tr. 95-96

With Respondent's Counsel expressing that he was unsure where the Court's ruling pointed, the Court then added,

> [i]t leaves you, I'm not interested in this hearing, it might be very interesting in a full discrimination proceeding, but I'm not interested in this proceeding whether

> the company did something constructive in reaction to that because that wouldn't tell me, that wouldn't instruct me that the complaint was frivolously brought and I would also note that this was not the only issue that was raised by Mr. Whitmore. There are numerous subjects that he raised during his direct testimony. It is certainly not limited to this. For my purposes, … I view this as whether the complainant issued what is effectively a complaint and a concern, safety and health concern, and [ ] there's no challenge to that. He did communicate that.

Tr. 96

The Secretary then rested its case and the rebuttal testimony from the Respondent proceeded. Tr. 98. Ms. Lisa Wellman was then called by the Respondent. She is the HR manager for Carmeuse. She reports to Melissa Croll and for any other operations within Carmeuse she reports up through Victoria Neff. Ms. Neff is the director of HR for the field operations for Carmeuse but she does not have responsibilities over Yager. Tr. 102-103. For Yager related matters, Wellman reports to Ms. Croll. Tr.103. As to this Whitmore proceeding, Wellman informed that she "conducted the investigation and ultimately made the recommendation to Melissa Croll for [Whitmore's] termination. Tr. 104, 113-114. Again, Respondent's position is that it fired Whitmore solely for his "inappropriate comments regarding extending a probationary period for an employee with [a] medical condition." *Id.* Wellman then related the alleged circumstances regarded the claimed inappropriate comments, which comments, as have been noted, Mr. Whitmore has denied making them. There is no purpose is an extended retelling of Ms. Wellman's testimony on this score. In sum, she conducted her investigation, concluded that Mr. Whitmore's version was not true and on that basis he was fired.[6] Wellman's recommendation to terminate Whitmore was made to Ms. Croll, who agreed with that outcome. Tr. 115.

At the conclusion of Ms. Wellman's testimony the Court took the opportunity to remark that

> for the purposes of the decision I have to make that I'm able to and I must compartmentalize as follows: In box A, if you will, I have Mr. Whitmore's multitude of safety and health issues which he raised. I'm not speaking to Miss

[6] Although Counsel for the Respondent, in response to an objection, that his question to Ms. Wellman was for the limited purpose of showing that those who decided to fire Whitmore had no knowledge of his protected activity and were only making the decision because the Whitmore's alleged remarks to Mike, the Court sustained the objection. The Court explained its ruling further noting that "it's enough if I have, if I accept the veracity of the complainant's testimony and then we have a close in time termination, which is what we have here. I do have some evidence that he communicated some of these safety concerns via email and via his testimony about the spreadsheet. So, … beyond that, that's all I have to have in meeting the very low bar for whether this complaint is frivolous[ ] or not." Tr. 110-111.

> Wellman's knowledge of that. I have box A, I have all of that testimony. And then in box B I have, if you will, the Mike issue. It seems to me that I don't have to resolve the Mike issue in the context of a temporary reinstatement application. If I accept for the moment that Miss Wellman knew nothing about any of this, I'm not suggesting you did, that nobody at Yager knew anything about any of these things, it doesn't matter for purposes of the temporary application proceeding. What I have to find are the bare elements, which I've reviewed already and so that would not make up, even accepted as absolutely true, that transforms Mr. Whitmore's application into a frivolous one. That's my view of it. Tr. 117.

Respondent then called Melissa Croll. Ms. Croll is based in Pittsburgh, PA and is employed by Carmeuse Americas. Tr. 126. She is the vice-president of human resource for Carmeuse Americas. *Id.* As pertinent to this proceeding, Ms. Croll stated that Lisa Wellman reports to her only for Yager Materials activities. Tr. 127. Croll determines matters of employee terminations and she approved Whitmore's firing. Tr. 128. She stated that the termination was merited because Whitmore's remarks "that he made were inappropriate and illegal and was worthy of termination." Tr. 128. Thus, she accepted Wellman's recommendation. *Id.* As with Wellman's testimony, Croll maintained that she knew nothing about Whitmore's various safety related complaints. Tr. 129.

Commission Case Law on Applications for Temporary Reinstatement

The Commission has a venerable history regarding the standard to be applied in applications for temporary reinstatement and by virtue of that, the applicable law to be applied in applications for temporary reinstatement has been well established. A representative example expressing the law to be applied is set forth here:

> Section 105(c) of the Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right afforded by the Act. Under Section 105(c)(2) of the Act, "if the Secretary finds that [a discrimination] 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 Commission has stated that the scope of a temporary reinstatement hearing is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *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 (11th Cir. 1990). This standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision ***637** in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

> The Commission has explained that "it is not the judge's duty … to resolve [[[any] conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). *See also, Sec'y of Labor on behalf of Shaffer v. Marion County Coal* Co., No. WEVA 2018-117-D, 40 FMSHRC ___, slip op. at 4, 9 (Feb. 8, 2018). Nevertheless, the Judge "need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous." *Shaffer*, slip op. at 9 (Althen, Chairman, and Young, Comm'r). ["*Shaffer*"] [40 FMSHRC 39, 47].
>
> The issues raised in a temporary reinstatement hearing are "conceptually different from those implicated by the underlying merits" of the miner's discrimination claim. *JWR*, 920 F.2d at 744. The temporary reinstatement proceeding addresses "whether the evidence mustered by the miner[] to date establishe[s] that [his] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Id.*
>
> While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, the elements of a discrimination claim are relevant to the analysis of whether the evidence presented satisfies the non-frivolous test. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under the Act, a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The Commission has acknowledged that evidence of motivation is frequently indirect, and has identified several "circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action." *Williamson*, 31 FMSHRC at 1089; *Sec'y 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). The question for the judge at this stage is whether there is a non-frivolous question as to the elements of the case. *Williamson*, 31 FMSHRC at 1091.

D&H Mining, 40 FMSHRC 635, 636-637 (Mar. 19, 2018) (ALJ Miller) ("D&H").

Recently, however, the Court has noted that two Commissioners, Commissioner William Althen and Commissioner Michael Young, have expressed new perspectives about the standard

required in applications for temporary reinstatement. This occurred in *Sec'y of Labor on behalf of Shaffer v. Marion County Coal Co*., 40 FMSHRC 39 (Feb. 2018) ("*Shaffer*"), wherein they introduced the view that the "preponderance of the evidence" plays a role in temporary reinstatements proceedings. This is new. As set forth below, in an examination by this Court of all prior Commission level decisions, it has not been able to find and therefore has not located any prior decision introducing that test into the temporary reinstatement analysis. In fact, as set forth below, a Commission majority opinion, which included Commissioner Young, disavowed consideration of engaging a preponderance test in such matters. *See*, *Williamson v. CAM Mining*, 31 FMSHRC 1085 (Oct. 2009), *infra.*

Here is what Commissioners Young and Althen had to say about the matter in *Shaffer*:

> There is no presumptive right to temporary reinstatement. Rather, the complainant's entitlement must be established by substantial evidence, as in any other proceeding. Only the standard that the evidence must meet is diminished. Thus, **in a discrimination case**, the complainant bears the burden of proving discrimination by **a preponderance of the evidence**. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2797-2800 (Oct. 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, at this early stage of the proceedings, *the Secretary has the burden of proving* ***by a preponderance of the evidence*** *only that the claim is not frivolous. Sec'y of Labor on behalf of Pappus*, 38 FMSHRC 137, 154 (Feb. 2016), rev'd on other grounds, *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016).
>
> **Preponderance of the evidence** means the greater weight of the evidence, such that the Secretary has demonstrated that it is more probable than not that the claim is not frivolous. **The burden of proof in a temporary reinstatement case, therefore, <u>contains two legal standards</u>: "preponderance of the evidence" and """"non-frivolous."**
>
> As with all disputed claims, the outcome depends upon the evidence presented. If the operator requests a hearing, the hearing is a full judicial proceeding. In *Secretary of Labor on behalf of Gray v. North Fork Coal Corp*., 33 FMSHRC 27 (Jan. 2011), the Commission quoted with approval the decision of the Eleventh Circuit regarding the nature of a temporary reinstatement hearing:
>
> At [the temporary reinstatement hearing], the employer has the opportunity to test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement…. [T]he statute grants [the employer] the

> right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal.
>
> 40 FMSHRC 39 at 42 (quoting *Jim Walter Res*., 920 F.2d at 747-748) (emphasis added).
>
> We glean two points. First, a temporary reinstatement hearing or proceeding is a full evidentiary process, albeit a greatly expedited one. The opportunity for such a hearing satisfies the operator's due process rights.
>
> Second, the opportunity to test credibility identified by the Commission in *Gray* would be meaningless without a genuine exposition of the evidence presented. If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.
>
> Thus, all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve. It is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.

Id. at 46-47 (emphasis added).[7]

[7] In *Shaffer,* Commissioner Mary Lu Jordan and now former Commissioner Robert F. Cohen Jr. hewed to the traditional and longstanding analysis applied to temporary reinstatement application proceeding, expressing:

"Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] 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 Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the [J] udge as to whether a miner's discrimination complaint is frivolously brought." *See 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 (11th Cir. 1990). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748

(11th Cir. 1990).

Courts and the Commission have likened the "not frivolously brought" standard set forth in section 105(c)(2) with the "reasonable cause to believe" standard applied in other statutes. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) ("there is virtually no rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012) (other citations omitted). The Commission has noted that in the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing "reasonable cause to believe" that a violation of the statute has occurred is a "relatively insubstantial" burden. *Argus Energy*, 34 FMSHRC at 1878 (citing *Schaub v. W. MI Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). The Commission stated that in *Schaub*, "the Court explained that the proponent 'need not prove a violation of the NLRA nor even convince the district court of the validity of the Board's theory of liability; instead he need only show that the Board's legal theory is substantial and not frivolous."' *Id.* (citations omitted). It noted that the Court cautioned:

> An important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting evidence between the parties. *See Fleischut [v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988)] (stating that the appellant's appeal did not seriously challenge whether reasonable cause exists; instead it simply showed that a conflict in the evidence exists); *Gottfried [v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987)] (same). Rather, so long as facts exist which could support the Board's theory of liability, the district court's findings cannot be clearly erroneous. *Fleischut*, 859 F.2d at 29; *Gottfried*, 818 F.2d at 494.

Id. (citations omitted).

Similarly, at a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d 744. As the Commission has recognized, "[i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The Commission applies the substantial evidence standard in reviewing the Judge's determination. *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of

Of course, the opinions of any two Commissioners, as with the views of Commissioners Althen and Young recounted here, when unaccompanied by other Commission *majority decisions subscribing to such views*, is of no precedential value. Commissioner Young has observed this in *The American Coal Co.*, 35 FMSHRC 380 (Feb. 2013) ("*American Coal* "), expressing that:

> the Secretary *was unable to persuade a majority of the Commission* of the propriety of that definition then, at least in *Phelps Dodge* flaming combustion was the actual hazard occasioned by a stubborn grease fire ignited by cutting a piece of mining equipment with a torch. *Id.* at 647. Two Commissioners rejected then the imposition of a *relevant* broader definition, in part based on a reasonable concern about unintended consequences. *See id.* at 663 (Duffy and Young, concurring) ("Far-ranging conclusions, not necessary to the disposition of issues presented to the reviewing court in one case, may, ironically, end up constricting the court's discretion in subsequent cases where the facts may be significantly different.

Id. at 390 (Commissioner Young, concurring in part and dissenting in part) (emphasis added).[8]

The Court's Research of Commission Case Law on Applications for Temporary Reinstatement and the Term "preponderance of evidence."

The Court's research revealed fifteen (15) cases where the phrase "*preponderance of evidence*" was expressed, but *only* in ***Shaffer*** has the term been employed to an applicant for temporary reinstatement. What follows are the cases uncovered by the Court's review.

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establishing (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 on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *CAM Mining*, 31 FMSHRC at 1089 (other citations omitted)." *Shaffer* at 41-43.

[8] By analogy, this is in keeping with the somewhat related concept that where two Commissioners vote to grant a motion and two to deny, the original decision stands. *See, e.g., Sec'y of Labor on behalf of McGary v. Marshall County Coal Co.*, 40 FMSHRC 767, 768 (June 28, 2018) (Commissioners Jordan and Cohen, in favor of denying the stay and then Acting Chairman Althen and Commissioner Young, in favor of granting the stay).

In *Cobra Natural Resources, LLC*, 35 FMSHRC 394 (Feb. 2013), a temporary reinstatement proceeding, the Commission employed the phrase, but in the context of *an operator* affirmatively proving that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Id.* at 397 (citing *Gatlin*, 31 FMSHRC at 1055).

In *KenAmerican Resources*, 31 FMSHRC 1050 (Oct. 2009), also a temporary reinstatement proceeding, the issue of whether the duration of a temporary reinstatement should be modified was involved. There, the Commission instructed that the judge "should determine whether [the mine operator] KenAmerican *has proven by a preponderance of the evidence* that the occurrence of the layoff is a legitimate reason for tolling Mr. Gatlin's economic reinstatement. … In sum, in order to justify termination of economic reinstatement, *KenAmerican must prove by a preponderance of the evidence* that Mr. Gatlin's inclusion in the layoff was entirely unrelated to his protected activities." *Id.* at 1055 (emphasis added).[9]

In *C.R. Meyer and Sons Co.*, 35 FMSHRC 1183 (May 2013), yet another temporary reinstatement proceeding, the question of tolling the reinstatement obligation was again

[9] A few of the cases found by the Court have been relegated to this footnote as follows. In the temporary reinstatement proceeding in *North Fork Coal Corp.*, 33 FMSHRC 27 (Jan. 2011), *a majority* of the Commission held that the miner's reinstatement was not dissolved following the Secretary of Labor's decision to not pursue the full discrimination proceeding. The miner, however, as permitted under the statutory scheme, then filed his own action under section 105(c)(3). Commissioners Young and former Commissioner Duffy dissented on that outcome, but as it pertains to this review, "preponderance of the evidence" only arose in the context of those dissenting commissioners referring to the Secretary's burden of proof in the *full* discrimination proceeding. *Id.* at 55. In *Lehigh Cement Co.*, 2020 WL 4366183 (July 2020), a unanimous Commission concluded that the judge erred in tolling a miner's economic reinstatement. Here again, although the phrase "preponderance of the evidence" was invoked, it was to point out that "[*o*]*perators* bear the burden of showing by a preponderance of the evidence that tolling is justified." Citing, *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013). *Id.* at *3 (emphasis added). Note, in a related *Lehigh Cement Co.* case, 2020 WL 4366184 (July 2020), distinctive only in that a different docket number was involved, the same result was reached. In *Robinette v. United Castle Coal*, 3 FMSHRC 803, (April 1981), the Commission remanded to address an aspect of the discrimination issue. For the purposes of this review, the phrase "burden of proof" only arose in a footnote analogy concerning unfair labor practices in NLRB matters and therefore is of no consequence to this review. *Id. at* 818, n. 20. Last, in *Contractors Sand and Gravel*, 20 FMSHRC 960, (Sept. 1998), that case too is only tangential to this review because its thrust concerned the recovery of attorney's fees and expenses under the Equal Access to Justice Act. In speaking to that issue, the Commission found that the Secretary's position had a reasonable basis in fact and rejected the contention that the Secretary had to establish its position under the preponderance of evidence standard. *Id*. at 973.

involved. The phrase "preponderance of the evidence" arose there, but again only in the context of the mine operator's burden, with the Commission stating "[s]hould the Secretary fail to sufficiently establish the possibility that any inclusion of Rodriguez in the layoff might have been motivated by the miner's protected activity, the judge must then consider the entire record and determine *whether the operator* has proven by a preponderance of the evidence that the layoff of local miners, … justifies tolling its obligation to temporarily reinstate [the miner]." *Id.* at 1188 (emphasis added).

In the temporary reinstatement proceeding of *CalPortland*, 38 FMSHRC 137, (Feb. 2016), a Commission majority affirmed the miner's temporary reinstatement. In that case Commissioner Althen dissented on grounds not pertinent to this review of cases, referring to the "preponderance of the evidence," but his remark was *in the context of a full discrimination proceeding*, that "if the Secretary or [the miner] can prove by a preponderance of evidence that CalPortland refused to hire [the miner] based on protected activity, [the miner] will be entitled to full relief under section 105(c). *Id.* at 148, n. 1

Sec'y of Labor obo Williamson v. CAM Mining, 31 FMSHRC 1085 (Oct. 2009), is yet another temporary reinstatement matter but it is of particular importance regarding the preponderance of evidence applicability in such matters. There, an administrative law judge denied reinstatement, a decision the Commission reversed and for which it ordered the immediate reinstatement of the miner. Pointedly all four members then composing the Commission, *which group included Commissioner Young*, stated: "we note that evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. In essence, the judge weighed the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case. In doing so, the judge erred by assigning a greater burden of proof than is required**. In a temporary reinstatement proceeding, the Secretary need not establish a prima facie case of discrimination by a preponderance of the evidence. Rather, the Secretary was required to prove only that a non-frivolous issue exists as to whether Williamson's discharge was motivated in part by his protected activity.** *Id*. at 1091, also citing, *Chicopee Coal Co.*, 21 FMSHRC at 719 (emphasis added).

In *Reading Anthracite*, 22 FMSHRC 298, (Mar. 2000), involved was a review by the Commission vacating a judge's determination that Reading did not violate the Act's section 10(c) discrimination provision. There the miner had been previously temporarily reinstated. Reference to the preponderance of the evidence appears only in the dissent. However, the dissent was somewhat atypical because the dissenting commissioners agreed that the judge erred; their dissent was that it was unnecessary to send the matter back to the judge and that the judge's decision could simply be reversed, finding in favor of the complainant miner. The dissenting commissioners reminded that the mine operator, "Reading must prove its affirmative defense by a preponderance of the evidence," *Id.* at 314, citing (*Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc*., 14 FMSHRC 1549, 1556 (Sept. 1992)). ("*Price and Vacha*").

Speaking of *Price and Vacha,* four members of the Commission, affirming the judge's decision upon remand that Jim Walter Resources discriminatorily applied its drug program against the complainants, referred to the "preponderance of the evidence" *but in the context of the mine operator's burden in its affirmative defense*, stating: "[a]n operator must prove this

affirmative defense by a preponderance of the evidence. *E.g*., *Eastern Associated Coal*, 813 F.2d at 642." 14 FMSHRC 1549 at 1556.

In *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite,* 23 FMSHRC 924, (Sept. 2001), the Commission again remanded the matter to the administrative law judge, after that judge again found no violation of section 105(c)(1). This decision reiterates the point made in *Price and Vacha*, and cites to that decision for the principle that in order "[t]o make out its affirmative defense, *the operator must prove by a preponderance of the evidence* that it would have taken the adverse action in any event because of unprotected activity alone. *Id*. at 929. (emphasis added).

Hopkins County Coal, 38 FMSHRC 1317 (June 2016) is yet another decision by the Commission which refers to the phrase "preponderance of the evidence," but its use is not of value to this discussion, as it employed the phrase only in the context of the Secretary's burden to establish the validity of a section 104(b) order, a burden which the Secretary met. The discrimination matter involved a separate dispute. It involved violations which were issued in response to the mine's refusal to release personnel records to inspectors as part of an MSHA discrimination investigation, records which the Secretary sought in order to determine whether there was a violation of the anti-discrimination provisions of the Act. Three commissioners, which is to say a majority, affirmed that the order was validly issued. Commissioners Althen and Young dissented, but they made no mention to the preponderance of the evidence, although they believed that the Secretary "utterly failed to carry his burden of proof of showing a reasonable basis for the document demand." *Id*. at 1338. In making no mention of the burden of proof, even when they were referencing temporary reinstatements, the dissenters, Commissioners Althen and Young, described for that process that "MSHA's preliminary investigation "must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was 'not frivolously brought." *Id*. at 1344, n.9. (emphasis in original).

From the foregoing, it can be seen that invoking "preponderance of the evidence" in the context of an application for temporary reinstatement has no place in the determination of whether a claim is not frivolously brought. Even the Commission itself, through the vehicle of a majority opinion, has acknowledged this to be the case. *Sec'y of Labor on behalf of Williamson v. Cam Mining*, 31 FMSHRC 1085 (Oct. 2009), *supra.* This makes sense as a general matter as well, since establishing a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. *Fischl v Armitage,* 128 F.3d 50, 55 (2d Cir. 1997). That burden is decidedly *not* required in a temporary reinstatement proceeding. In fact, it is inappropriate to engage in such determinations. Mixing the concepts of "not frivolously brought" with "preponderance of the evidence" is inappropriate, as they are mutually exclusive concepts in the context of temporary reinstatement applications and doing so introduces a layer of consideration which can only invite conflict.[10]

[10] Although the Court's exposition of the Commission's case law regarding temporary reinstatement is dispositive, it is noted that in other non-mine safety and health matters, courts have eschewed comingling the concepts of preponderance of evidence and frivolousness. For

Summary of the Court's Conclusions and Findings Regarding Complainant William R. Whitmore's Application for Temporary Reinstatement

The Court finds that the credible evidence adduced during the temporary reinstatement hearing established, writ large, that William Whitmore's application for temporary reinstatement was not frivolously brought. [11] Mr. Whitmore's testimony was not demonstrably false, nor

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example, in National Labor Relations matters pertaining to temporary injunctive relief, the 5th Circuit observe that it was not their duty at that "juncture to pass upon whether violations have been established by a preponderance of the evidence, but merely to decide that the Board's theories are substantial and not frivolous." *Boire v. Pilot Freight Carriers, Inc*., 515 F.2d 1185, 1191 (5th Cir. 1975).

[11] The Court received a "Post-Hearing Statement" from the Respondent. ("R's Statement"). The parties representing the Complainant were given an opportunity to respond and declined to do so. The Court finds that the Complainant's representatives' decision to not respond is understandable, given the record testimony. Further, the body of this decision ordering Mr. Whitmore's immediate reinstatement effectively addresses the contentions raised by the Respondent. However, the Court makes the following additional comments about the R's Statement. Respondent raises two challenges in an attempt to show that the application is frivolous. First, Respondent contends that Complainant's April 6, 2020 email expressing his concern about a contractor employee and whether that individual was practicing social distancing in light of COVID 19 did not constitute protected activity. R's Statement at 5. The Court does not agree. The Court refers the reader to the transcript summary above. By raising his concern, the Complainant was voicing a health concern, which constitutes protected activity. The Respondent then states that such a concern may be analogized to a protected work refusal. *Id.* From that argument, the Respondent seems to argue that a miner's expressed health concern, when not specifically covered by a standard, evaporates once the miner has been given reassurance about the concern. The analogy does not hold up; Whitmore did not make a work refusal in connection with his expressed health concern. Further, expressing his concern was protected activity and its status as such remained so, even if the employer addressed it.

Respondent's second contention is that without showing that the Respondent's decision-makers, meaning the two individuals who decided to fire the Complainant, knew of, that is to say "had knowledge of" Whitmore's several instances of protected activity, the complaint is frivolous. Respondent asserts that the only evidence of record is that the two individuals who decided to fire Whitmore testified that they knew nothing of his protected activities and terminated him solely on another basis, as described above in the body of this decision. As such, Respondent asserts that, their decision being pure of any protected activity knowledge, makes Whitmore's complaint frivolous. *Id.* 7-9. As the discussion of the applicable case law, set forth above, makes clear, the temporary reinstatement application proceeding may not be based on such claims, as it would transform the proceeding into resolving conflicts in testimony. Such a conflict is plainly present. A conflict can exist in less direct forms than a contention and a denial. Thus, the mere assertion by two witnesses maintaining certain factual contentions, even if not *specifically* denied, can still present a conflict, when viewed from the perspective of the entire record. In short, a conflict can exist in more subtle forms than an assertion and a parallel

patently incredible, nor obviously erroneous. The Court finds that the testimony mustered by Whitmore presented evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity and in light of that, established that his complaint was not frivolously brought.[12]

The Application for Temporary Reinstatement is hereby **GRANTED**. Immediately upon receipt of this decision Respondent is **ORDERED** to reinstate Complainant William R. Whitmore to his former position at the mine, or to a comparable position within the same commuting area at the same rate of pay and benefits he received prior to his discharge, pending a final Commission order on the discrimination complaint. The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).

Per 30 U.S. Code § 815, titled, "Procedure for enforcement," and in particular, subsection (c)(3) of the section, the Secretary is directed to comply with that provision which commands that "[**w]ithin 90 days** of the receipt of a complaint filed under paragraph (2)[of subsection (c)], **the Secretary shall notify**, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." (emphasis added). The Secretary shall diligently pursue completion of the investigation in the underlying discrimination complaint. Immediately upon completion of the investigation, the Secretary SHALL notify counsel for Yager Materials Corp. and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. The Court considers the Secretary's duty to comply with this provision to be of high importance. The mine operator's rights in defending against the discrimination claim are significantly affected by delays in meeting this statutory deadline.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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denial. At this stage, made for the purpose of determining only non-frivolity, it is not required for the Complainant to establish that the two individuals made their decision on grounds beyond their claimed basis. Instead, again as plainly described above, the Complainant established *multiple* instances of protected activity, each of which the Court found to be have been communicated, that he suffered the adverse action of termination, and that such termination occurred within a short period of time following expression of his safety and health concerns. "Requiring the Judge to resolve alleged inaccuracies and conflicts in testimony when the parties have not yet completed discovery would improperly transform the temporary reinstatement hearing into a hearing on the merits." *Sec. obo Deck v FTS Int'l*, 34 FMSHRC 2388, 2391 (Sept. 2012), citing *Chicopee Coal*, 21 FMSHRC at 719; *CAM Mining*, 31 FMSHRC at 1088-89.

[12] It is worth restating that in the context of an application for temporary reinstatement the test is *not* whether there is sufficient evidence of discrimination to justify permanent reinstatement.

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