FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710sip

August 29, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON HARGIS	:	
v.	:	Docket No. SE 2021-0163
VULCAN CONSTRUCTION MATERIALS, LLC	:	Docket No. SE 2022-0001
JASON HARGIS	:	Docket No. SE 2022-0013
v.	:	
VULCAN CONSTRUCTION MATERIALS, LLC	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, Baker, and Marvit, Commissioners

DECISION

BY: Jordan, Chair; Rajkovich, Baker, and Marvit, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., 815(c)(2) (2018) ("Mine Act" or "Act"). They involve three cross-petitions for discretionary review by the Secretary of Labor ("Secretary"), Vulcan Construction Materials, LLC ("Vulcan" or "the operator"), and a miner, Jason Hargis ("Complainant" or "Hargis").

The proceedings originated from a back injury reported by Hargis on Monday, April 12, 2021. He first experienced the injury while working at the mine on Saturday, April 10, 2021. He was terminated on May 12, 2021.

Following his termination, Hargis filed a timely complaint of discrimination under section 105(c) of the Act with the Department of Labor's Mine Safety and Health Administration ("MSHA") on June 7, 2021. He alleged that his report of his injury was protected activity and that his firing one month later constituted unlawful retaliation. The Secretary found that Hargis' complaint was not frivolously brought. Upon agreement of the parties, the Administrative Law Judge entered an order temporarily economically reinstating Hargis, effective July 27, 2021.

On October 1, 2021, the Secretary filed her own discrimination complaint under section 105(c)(2)[1] of the Act. On December 13, 2021, she also filed a civil penalty petition alleging that the operator had failed to report Hargis' occupational injury to MSHA, as required by 30 C.F.R. § 50.20(a).[2]

After a hearing on the merits, the Judge issued a decision on December 1, 2022. 44 FMSHRC 733 (Dec. 2022) (ALJ). The Judge affirmed the Secretary's civil penalty case and held that the operator failed to report an occupational injury. The Judge dismissed the Secretary's discrimination complaint, and immediately dissolved his previously issued order, which had temporarily reinstated Hargis. All three parties filed petitions seeking discretionary review of the Judge's decision, which the Commission granted.

Hargis contends that the Judge erred in dismissing the merits of his discrimination complaint. Vulcan claims that the Judge erred in finding that mine management violated section 50.20(a)'s injury reporting requirement. The Secretary argues that the Judge erred in terminating Hargis' temporary reinstatement on the same day the Judge issued his merits decision, since his merits decision was not yet a "final order" under section 113(d)(1) of the Act. *See* 30 U.S.C. § 823(d)(1). The Secretary does not seek review on the merits of the Judge's finding regarding discrimination.

For the reasons stated below, we affirm the finding that the operator violated 30 C.F.R. § 50.20(a) by failing to report an occupational injury.

We also affirm the Judge's holding that the operator's explanation for terminating Hargis was not pretextual, but find that the Judge erred in applying the *Pasula-Robinette* test.

Finally, we hold that the Judge erred in dissolving his temporary reinstatement order immediately with his discrimination decision. We conclude, under sections 105(c)(2)[3] and 113(d)(1)[4] of the Act, that temporary reinstatement expires 30 days after the Commission issues

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[1] Section 105(c) prohibits discrimination against miners in retaliation for exercising any protected right under the Act. *See generally* 30 U.S.C. § 815(c).

[2] Section 50.20(a) states that operators "shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a). Section 50.2(e) defines an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022).

[3] Section 105(c)(2) authorizes temporary reinstatement pending "final order on the complaint" and instructs that the "order shall become final *30 days* after [the] issuance" of the decision. 30 U.S.C. § 815(c)(2) (emphasis added).

[4] Section 113(d)(1) of the Act states that "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission *40 days* after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission . . . ." 30 U.S.C. § 823(d)(1) (emphasis added).

an appellate decision – or alternatively, if the Commission declines to grant review, we hold that temporary reinstatement expires 40 days after a judge issues his or her decision.

Accordingly, we affirm in part and vacate in part the Judge's decision.

I.

Factual and Procedural Background

A. Factual Background

1. Hargis' Work and Disciplinary History at the Mine

Vulcan operates the Wilson Quarry, a rock crushing facility in Tennessee. Tr. 502. Hargis was a miner at the Wilson Quarry from August 2018 until he was discharged on May 12, 2021. Tr. 11-12. He mainly worked as a plant operator during the time relevant to this proceeding. Tr. 305.

As plant operator, Hargis had a variety of duties, including running the plant's crushing machinery to break and size rocks mined at the quarry, Tr. 306; cleaning, e.g., shoveling, and maintaining an area assigned to him, Tr. 348; and lubricating or greasing the bearings of the crushing machine daily. Tr. 415.

While working at the mine, Hargis had been disciplined pursuant to the company's progressive discipline policy under which employees were verbally warned, then given a written warning, followed by a second written warning and three-day suspension. Sec. Ex. 7, 8. The second written warning provides that the employee may be terminated for any subsequent violation of company policies. Sec. Ex. 8.

Hargis' disciplinary issues were not related to his duty to run the plant's crushing machinery. Rather, they stemmed generally from his failures to completely clean and grease areas and equipment for which he was responsible before leaving work. Specifically, Hargis received his first written warning from his direct supervisor on December 4, 2020, for a failure to clean his area. Tr. 347. Hargis admitted that he had been counseled about the need to clean more thoroughly, but that he disagreed, and that he did not change what he was doing in response to his supervisor's input. Tr. 408-09. Hargis received his second written warning from another supervisor on February 8, 2021, for leaving work before the end of his February 1 shift without completing his cleaning.

2. Management at the Mine

Hargis worked under two direct supervisors, Kyle Parr and Chris Williams, who replaced Parr following Parr's resignation. The plant also employed a more senior manager, Anthony Humes, who managed the two plant supervisors.

Hargis testified generally that management was dismissive of miners' concerns regarding their treatment, and that he felt "targeted." Tr. 367. He also criticized Parr specifically, claiming that Parr had "no clue" about plant operations. Tr. 368. Other miner

witnesses similarly criticized Parr's management style and testified that Parr seemed to target Hargis and others. *See, e.g.*, Tr. 59, 65 (testimony by Vulcan's lead man Andrew Tucker), *see also* Tr. 207 (testimony of equipment operator Cody Dycus), Tr. 241-42 (testimony of hourly employee Shane Stultz).

Parr resigned in January 2021, and Humes assumed Parr's duties. Tr. 700. Accordingly, Humes (rather than Parr) was the plant manager at the time of the events raised in Hargis' complaint. While some miner witnesses took issue with Humes' management style, their testimony indicates that Humes did not uniquely target Hargis. *See* Tr. 85-86, 111-14 (Tucker's testimony that Humes "yelled at everybody" but did not target Hargis); Tr. 258 (Schultz's testimony that Humes "had it out" for both Schultz and Hargis).

Williams was brought to the Wilson Quarry to replace Parr and assumed supervisory responsibility over the plant. Witnesses testified that Vulcan was generally a safety-conscious operator. *See* Tr. 79, 397-98.

3. Hargis' Injury, Request to See a Physician, and Termination

On Saturday, April 10, 2021, Hargis injured his back while working at the mine. Tr. 46-48, 314-16. He was working with his supervisor, Williams, and the lead man, Tucker, at the time. All three miners were working to install liner plates at the mine's rock crusher. Tucker was working inside the crusher with Williams working outside the crusher to attach plates from the outside. Hargis also worked on the outside of the crusher, handing the plates into the crusher to Tucker. Each plate weighed approximately 35 to 50 pounds. Tr. 314-15. Hargis had to reach, lean, and twist to pick up the plates and pass them into the crusher for installation. Tr. 315-16.

While handing the plates to Tucker, Hargis experienced pain and discomfort in his lower back, which he conveyed to Williams. Hargis mentioned it in passing to Tucker and Williams on April 10, but he felt that his back might get better if he rested over the remaining portion of the weekend before officially reporting the incident. Tr. 314-16, 415. During the weekend, Hargis used heat and ice to try to alleviate the pain, but it grew worse. Tr. 314. By Monday, April 12, 2021, his lower back condition had not improved, so he reported this to Williams and requested to see a physician.[5] Tr. 316. Williams responded that he would turn in Hargis's request, which Hargis understood to mean that Williams would inform other mine management. Tr. 316-17.

Hargis was placed on light duty through April 14, 2021, when he took medical leave for an unrelated cardiac procedure. Tr. 317-20. Hargis would operate the plant crusher but would not perform any of his other job duties, which included cleaning his work area of rock debris, and greasing equipment. Tr. 371.

On April 14, Hargis exchanged text messages with the safety manager Brandon Clemmons who confirmed Hargis' painful condition and his modified duty of only running the

[5] TENN. CODE ANN. § 50-6-204(a)(1)(A) (2022) requires employers to furnish medical treatment to an employee, free of charge, when such employee suffers a qualifying work-related injury.

plant crusher. Sec. Ex. 9. Hargis testified that his injury made even running the plant crusher uncomfortable while other tasks, such as cleaning and greasing, were "very painful" to "unbearable." Tr. 323.

Hargis was thereafter off work for a cardiac procedure from April 15 through May 3, 2021. Hargis testified that when he returned to work at the mine on May 4, he was still experiencing back pain from the April 10 injury. Tr. 328. He testified that he reported the continued injury and pain to supervisors Williams and Humes. Tr. 329. Hargis further testified that around May 8, 2021, he told safety manager Clemmons that his back still hurt from the April injury, but Clemmons did not respond. Tr. 384. Clemmons denied that this interaction ever occurred. Tr. 748.

Williams and Humes testified that after his return on May 10-11, 2021, Hargis was still not completing his assigned duties as required. Specifically, Humes testified that Hargis was not cleaning his zone or greasing his equipment fully and was leaving hazards behind for the next morning. Tr. 612-13. This was discussed in both staff safety meetings with management and with Hargis one-on-one. Tr. 612-13.

Humes testified that Williams recommended terminating Hargis' employment for failing to clean his area and grease his equipment as well as for leaving work without telling anyone these tasks had not been completed. Humes then called Ellis at HR and recommended that Hargis be terminated. Tr. 631. As set forth above, the operator had previously warned and disciplined Hargis about such failures. This discipline included a three-day suspension and notice that an additional failure could or would result in termination of employment.

The next day, on May 12, 2021, Hargis told Williams that he could not deal with his back issues anymore, and again requested to see a doctor. Mine management witnesses testified that prior to Hargis' request to see a physician on May 12, they had already decided to terminate Hargis based upon his prior work writeups as well as his most recent poor job performance. Tr. 508-09, 520, 612-13, 630-31.

Later that day, management provided Hargis a panel of physicians for treatment under the Tennessee Workers' Compensation Act, in addition to terminating his employment. Ex. 6, Tr. 338. Hargis was advised that he was being terminated because of his two prior writeups and the most current job performance, and that the decision to terminate him bore no relationship to his request for seeing a physician. Tr. 631; 781-83. Ellis had law enforcement present during the termination based on misleading information from Williams that Hargis "normally had a gun on him." 44 FMSHRC at 746 (ALJ).

B. The Judge's Decision

The Judge held a hearing from April 12 to April 14, 2022. The hearing covered both the discrimination complaint and the alleged reporting violation. On December 1, 2022, the Judge affirmed the Secretary's civil penalty case and held that Hargis had experienced an occupational injury that the operator failed to report in violation of section 50.20(a). The Judge dismissed the Secretary's discrimination complaint. The Judge then immediately dissolved his

previously issued order temporarily reinstating Hargis.[6]

II.

Disposition

A. The Judge properly found that the operator violated section 50.20(a) by failing to report Hargis' occupational injury.

Under section 50.20(a), operators "shall report each accident, occupational injury, or occupational illness at the mine." 30 C.F.R. § 50.20(a) (2022). The Secretary has defined an "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job." 30 C.F.R. § 50.2(e) (2022).

The specific issue here is whether Hargis' injury resulted in an "inability to perform all job duties." 30 C.F.R. § 50.2(e)(3). After reviewing the Judge's decision, we conclude that substantial evidence supports the Judge's finding that Hargis' pain, along with Vulcan limiting his essential duties, Tr. 628, showed that Hargis was unable to perform all his job duties due to his injury. This made it a reportable "occupational injury" under 30 C.F.R. § 50.2(e).

Specifically, the ALJ relied on Hargis' testimony at hearing that his lower back pain was "extraordinary" and "unbearable." Tr. 323, 379. Hargis made it very clear to Williams on April 12 that his back pain was worsening, and that he could not perform his normal tasks at "a hundred percent." Tr. 381-82; *see also* Sec. Ex. 9 (text messages with safety director Clemmons confirming that Hargis was "taking it easy" due to his lower back injury). The Judge also credited Hargis' testimony that he asked Williams to see a doctor on April 12. 44 FMSHRC at 747. Furthermore, the Judge credited Hargis' co-worker Clint Evans' testimony that Hargis had let the crew know when he needed help cleaning, explaining that Hargis "would clean what he could" but that "his back would limit him." Tr. 177–78. Humes also testified that, because of his pain, Hargis was placed on "light duty," *i.e.,* he would not have to clean the passageways or grease the crusher. Tr. 627-29. This is substantial evidence that supports the ALJ's conclusion that the miner suffered a reportable occupational injury pursuant to 30 C.F.R. § 50.2(e).[7]

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[6] Our dissenting colleague provides a timeline of these proceedings on appeal that is misleading, incomplete, and filled with ad hominem attacks against his colleagues. Our responses will be limited to our colleague's factual and legal arguments.

[7] The Secretary argues that we must interpret "inability" in section 50.2(e) to mean, as a matter of law, that the miner is suffering a "functional" rather than "literal" inability to work. Sec. Resp. Br. at 10. She claims that under the operator's interpretation, nothing less than total physical disability renders a miner unable to do something within the meaning of section 50.2(e). However, it is unnecessary to reach this issue or set forth a definition of "inability" beyond its regular, common meaning. The facts in this case show that Hargis was in considerable pain and as a result, unable to perform all his job duties. Tr. 177–78, 323, 379, 627-28. Therefore, substantial evidence supports the ALJ's determination regarding section 50.2(e).

Vulcan argues that even though Hargis' job was "painful" to do, he was not "unable" to do it, and therefore the reporting requirement was not triggered.

Further, Vulcan argues that even if Hargis were unable to perform all of his job duties, the operator was unaware of that fact. As stated above, the record establishes that mine management knew about Hargis' pain, and that they had placed him on modified light duty as a result. Tr. 381–82, 627-29 (Humes' testimony); Sec. Ex. 9. The ALJ credited this evidence over the testimony from Ellis that placing Hargis on light duty was out of "kindness" rather than necessity. *See* Tr. 538-39. When the Commission reviews a Judge's factual findings, "credibility determinations are entitled to great weight and may not be overturned lightly." *Pappas v. CalPortland*, 40 FMSHRC 664, 671 (May 2018) (citations omitted).

We hold that substantial evidence supports the Judge's determination that Hargis suffered an occupational injury, and that the operator had the requisite knowledge to support a finding of a violation of section 50.20(a).

B. The Judge erred in finding no nexus of discrimination, but the operator affirmatively defended the termination.

Section 105(c) of the Act prohibits discriminating against miners for exercising any protected right under the Act. A miner alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and 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 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) (the "*Pasula-Robinette*" analysis).

Under *Pasula-Robinette*, the operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Con-Ag, Inc. v. Sec'y of Lab*., 897 F.3d 693, 700 (6th Cir. 2018) ("Discrimination claims under the Act are analyzed using the *Pasula–Robinette* framework."); *Boich v. Fed. Mine Safety & Health Rev. Comm'n*, 719 F.2d 194 (6th Cir. 1983) (same).[8]

[8] The Ninth Circuit in *Thomas v. CalPortland Co*., 993 F.3d 1204, 1210–11 (9th Cir. 2021) recently decided that Commission discrimination cases in that Circuit must apply the Supreme Court's "but for" analysis used for Title VII cases. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009), and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). The instant case is not within the Ninth Circuit, and neither party has contested the application of the *Pasula-Robinette* standard. *Contrast Cont'l Cement Co. v. Sec'y of Lab.,* No. 23-2213, 2024 WL 827782 *3 (8th Cir. Feb. 28, 2024) (acknowledging Commission's application of *Pasula-Robinette* but following the Secretary's position that the approach "requires but-for causation.").

Because direct evidence of discriminatory intent is rare, we look to common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant, with knowledge of the protected activity often being the most important factor. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981), *rev'd on other grounds sub nom. Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

1. The Judge erred in finding that there was no nexus between Hargis' protected activity and his termination.

We hold that the Judge erred in finding that there was insufficient evidence—either direct or indirect—to support a nexus between the protected activity on April 12 and May 12 and the adverse employment action on May 12.

a. The Judge erred in finding that no inference of discrimination may be found based on management knowledge of protected activity.

Hargis injured himself at work on Saturday, April 10, 2021, and contemporaneously mentioned the injury in passing to his supervisor, Chris Williams. The Judge found that over the weekend, the pain from the injury became worse, and on Monday, April 12, Hargis made a formal request to Williams to see a physician for the injury. 44 FMSHRC at 743, 747; *see also* Tr. 316. The supervisor responded that he would get the request "turned in" to upper management and placed Hargis on light duty. *Id*. at 743-744.

Despite the Judge's finding that management was aware of Hargis's injury on April 10 and his requests to see a doctor on April 12 and May 12, the Judge focused his analysis almost entirely on the May 12 request, finding that "Complainant's request for medical care on May 12 certainly had no effect on a termination decision that was well underway before the decisionmakers were aware of it." *Id*. at 759. The Judge based this holding on the fact that Williams appears not to have told upper management about Hargis's April 12 request for a doctor, and it was upper management that made the decision to terminate Hargis. While Ellis, the mine manager, might have been unaware of Hargis's request to see a doctor, the record clearly shows that Ellis's decision to terminate Hargis began with Williams and worked its way up to Ellis. According to the Judge's findings, "Mr. Humes said Mr. Williams recommended Complainant be terminated . . . " and "Mr. Humes called Mr. Ellis and explained the issue to him . . . [h]e recommended Complainant be terminated." *Id*. at 745. Stated differently, Hargis's supervisor, Williams, knew of Hargis's request for a doctor; Williams recommended to Humes that Hargis be fired; and Humes recommended to Ellis that Hargis be fired.

The Commission has acknowledged that an operator may not launder knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but 'acted in direct response to another supervisor's recommendation to dismiss an employee. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011), citing *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982); *see also Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) ("An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions."). Here, there is no question that Williams knew of Hargis's protected activity and that he was

involved in the decision to fire Hargis. Therefore, his knowledge should be imputed to the ultimate decisionmakers.

b. The Judge erred in finding that there was no hostility or animus toward the protected activity.

The Judge found that Hargis properly reported his injury to his supervisor and requested to see a doctor due to the pain he was experiencing from the April 10th injury. Despite the supervisor's response that he would inform upper management, the supervisor appears to have taken no actions to ensure that Hargis be provided a doctor.

The Judge erred in finding that ignoring or evincing "indifference" towards a miner's injury and protected activity of requesting medical care did not constitute animus toward the protected activity. It is the very definition of animus towards a protected activity when a miner makes a health or safety complaint or engages in protected activity that requires attention, and the operator chooses to ignore it and do nothing. The Judge focused his entire analysis of animus on whether management treated Hargis unkindly following his protected activity.[9] While hostility directed towards a miner may indicate animus, the Commission has clearly stated that the proper inquiry should focus on animus "specifically directed towards the alleged discriminatee's protected activity." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC at 2511.[10]

Animus towards a protected activity does not require that the operator display anger or unkindness towards the miner. If a miner makes a complaint about an unsafe condition at the mine and the supervisor responds with a smile and shrug but takes no action to investigate or correct the condition, the supervisor has displayed animus toward the protected activity. Here, Williams's refusal to provide Hargis with medical care, whether through indifference or ignoring the Complainant's exercise of his rights as a miner, constitutes a form of animus toward the

[9] The Judge found that the way that the operator carried out the termination—with two sheriff's deputies present—was "unfortunately embarrassing" and based on information that may have been unflatteringly conveyed to Ellis. 44 FMSHRC at 746, n.18. The operator's use of law enforcement runs contrary to the Judge's holding that management did not show any hostility towards Hargis. The Judge noted that neither Humes nor Williams said anything about Hargis having a history of violence, and that "such a characterization would be inconsistent with the testimony of Complainant's co-workers and the demeaner I observed during the hearing." *Id*. Hargis testified that the presence of law enforcement was "intimidating" and "embarrassing." Tr. 338. The Judge found that Ellis made the decision to have law enforcement present because Williams and Humes told him that Complainant "normally had a gun on him," but Williams testified that although he had seen Hargis carry a gun "at times," he had never seen him have one at work. 44 FMSHRC at 746, n.18. This treatment of Hargis not only displayed hostility towards him generally, but also shows another instance of upper management making an independent decision with regards to the termination based on the recommendation of Williams.

[10] In the seminal *Chacon* decision, the majority makes clear that the focus of the inquiry is the animus *toward the protected activity*, while the dissent states that the focus of the analysis should be "the existence of employer hostility or animus *toward an employee*." *Chacon*, 3 FMSHRC at 2524 (Lawson dissenting) (emphasis added).

protected activity. Just as with knowledge, the Commission has held that the animus of a supervisor who participates in the termination decision in any way can be imputed to the operator. *See Turner*, 33 FMSHRC at 1068; *Metric*, 6 FMSHRC at 230 n.4. Therefore, the Judge erred in holding that there was no evidence of animus because the operator ignored and displayed indifference toward Complainant's request for medical care.

c. The Judge erred in finding that the coincidence in time did not indicate discrimination occurred.

The Judge's decision focuses almost entirely on Hargis's May 12 request to see a doctor, finding that since the decision to fire Hargis had already been made by then, "the coincidence in time turns out to be just that—a coincidence." 44 FMSHRC at 761. However, the Judge engaged in no analysis as to whether Hargis's April 12th request for a doctor was sufficiently close in time to serve as one of the circumstantial indicia of discriminatory intent.

"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.'" *Sec'y of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 132 (Feb. 1999), quoting, *Hicks v. Cobra Mining, Inc.,* 13 FMSHRC 523, 531 (Apr. 1991). As a Commission judge has pointed out that:

> Improper motive has been found in cases with varying periods between the protected activity and the adverse action, ranging from a few hours to a few months. *See, e.g., Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986-87 (holding that the ALJ was correct in inferring a discriminatory motive from adverse action taken less than two hours after complainant's safety complaints); *Sec'y of Labor on behalf of Houston v. Highland Mining Co.*, 35 FMSHRC 1081, 1093 (Apr. 2013) (ALJ) (holding that a five-day gap between the adverse action and protected activity constituted circumstantial evidence of a nexus); *Baier*, 21 FMSHRC at 959 n.7 (holding that two weeks between complainant's discussion with MSHA inspector and discharge was sufficiently coincidental in time to support a finding of discriminatory motive); *see also CAM Mining, LLC*, 31 FMSHRC at 1090 (holding that three weeks between the protected activity and adverse action was sufficient to find discriminatory motive); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (holding that an adverse employment action four months after a protected activity constituted close temporal proximity where the operator had knowledge of the protected activity); *Hyles*, 21 FMSHRC at 42, 46-47 (finding temporal proximity despite 15-month gap between miners' contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA's issuance of penalty as a result of the miners' notification of the violations and

given evidence of intervening acts of hostility, animus, and disparate treatment).

Sec'y of Labor on behalf of Vega v. Syar Indus., Inc., 40 FMSHRC 55, 64 (Jan. 2018) (ALJ).

In the instant case, Hargis was fired on May 12, one month after he first engaged in protected activity. Though one month is sufficient to support an inference of discrimination, the time period may even be considered shorter because Hargis was on medical leave during much of that month. Following the April 12th request to see a doctor, Hargis was on light duty from April 12-14, and then on unrelated medical leave from April 14-May 4. Hargis was fired approximately one week after he returned on May 4. Therefore, he was only on working status for approximately ten days from when he engaged in protected activity to when he was fired. The Judge's finding that the May 12th request for medical care was too late to inform the decision to fire Hargis, erred in failing to analyze whether the April 12th request was close enough in time to infer discriminatory intent.

d. Substantial evidence supports the Judge's finding that the evidence in the record does not support a finding of disparate treatment.

Substantial evidence supports the Judge's determination that the only evidence of any potential disparate treatment had occurred *before* Hargis' April 10th injury and his exercise of protected activity. *Id*. at 755-58; Sec'y Ex. 7 (December 4, 2020 written warning to Hargis); Sec'y Ex. 8 (February 8, 2021 second written warning and three-day suspension). However, "[t]he 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." *Sec'y of Labor on behalf of Harrison v. Consolidation Coal Co*., 37 FMSHRC 1497, 1511 (July 2015) (ALJ), *citing Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510-13 (Nov. 1981).

Hargis argued that his February 8, 2021, receipt of a second written warning under Vulcan's progressive discipline policy (for leaving work before the end of a shift on February 1 with four coworkers) constituted disparate treatment by management, particularly on the part of Parr. 44 FMSHRC at 755-56. In determining that this evidence did not demonstrate disparate treatment, the Judge noted that another miner, Clint Evans, also left early and was told by Williams that he would incur discipline for doing so. *Id*. at 756. The Judge also considered that, on another occasion, management gave a second written warning and three-day suspension to Caleb Walker due to a similar disciplinary history. *See* Tr. at 548, 549; Vulcan Ex. L at 36. Beyond the fact that Hargis was treated consistently with other miners, the Judge emphasized how this incident (and every action Hargis alleged was part of the campaign to "get rid" of him) *predated* Hargis' first exercise of protected activity on April 12, 2021 and therefore could not have motivated Vulcan's actions. Substantial evidence supports this determination.

Despite the Judge's finding that there was insufficient evidence to find disparate treatment, the Judge erred in finding that there was insufficient evidence to support an inference that Complainant was discriminated against because of his protected activity. The operator, however, "may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner

in any event for the unprotected activities alone." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC at 2799-2800.

2. Substantial evidence supports the Judge's finding that Vulcan presented an affirmative defense that its termination of Hargis would have been taken based on unprotected activity alone.

Having found that the Complainant met his burden in presenting a *prima facie* case, the operator may rebut by showing that the "adverse action was in no part motivated by protected activity. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone."[11] *Sec'y of Labor on behalf of Pendley v. Highland Mining Co*., 34 FMSHRC 1919, 1920 (Aug. 2012) (citation omitted).

In the instant case, Hargis had received two written warnings according to the company's progressive discipline policy for not cleaning and greasing the areas and equipment for which he was responsible prior to leaving work. Tr. 347, 408-409. Hargis testified that he understood the employer's requirement that he clean his area, but stated that he did not change the manner in which he cleaned because he disagreed with his supervisor. Tr. 408-409.

On May 10 and 11, Hargis left work without cleaning and greasing his area properly, or telling anyone that he had not cleaned or greased his area. Tr. 630-631, 785. Hargis admitted that he did not clean or grease his areas on those days, and did not know if anyone else had done so. Tr. 422-424. Hargis testified that he could not grease his area on those days because he did not have the proper equipment. Tr. 435. This explanation does not excuse Hargis for leaving without informing anyone that he had not cleaned or greased his area. Due to the two previous write-ups, Hargis was on a last-chance agreement when he left without telling anyone that he did not clean or grease his area on May 10-11. Tr. 712. The operator has adequately shown that it followed its progressive discipline policy and would have fired Hargis for a non-discriminatory reason alone.

C. The Judge erred in dissolving the temporary reinstatement order, prior to it becoming a final order of the Commission.

The Judge abused his discretion when he dissolved the temporary reinstatement order upon the issuance of his decision on the merits of the complaint. Temporary reinstatement terminates upon a "final order on the complaint" (30 U.S.C. § 815(c)(2)) and a Judge's decision does not become a final order of the Commission immediately upon issuance.[12]

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[11] Since the Judge in this case held that the Complainant had not made a *prima facie* case, he applied a pretext analysis. Having found that the Judge erred in holding that no inference of discrimination could be drawn, we now apply an affirmative defense analysis, which is effectively identical to the pretext inquiry.

[12] Our dissenting colleague argues that by the term "final" decision, the Secretary means a final non-appealable decision by the Commission, a United States Circuit Court of Appeals, or the United States Supreme Court." Slip op at 27. This argument exceeds the bounds of the

In *Sec'y on behalf of Bernardyn*, 21 FMSHRC 947 (Sep. 1999), the Commission unanimously reversed a Judge when he attempted to dissolve a temporary reinstatement order upon the issuance of his decision on the merits of the complaint. The Commission held that:

> . . . when the judge purportedly dissolved the temporary reinstatement order, the time had not yet passed for the Commission to review the judge's decision on the merits of Bernardyn's discrimination complaint. Accordingly, the judge's decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review. Since we have granted the Secretary's petition for review of the judge's determination on the merits, the judge's dismissal of the complaint will not become a final decision under section 113(d)(1) of the Act until we review and issue a decision upon that matter.

21 FMSHRC at 949.

Section 105(c)(2) of the Act states, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, "shall order the immediate reinstatement of the [] miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). Section 113(d)(1) of the Act states that "[t]he decision of the administrative law judge . . . shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed . . . ." 30 U.S.C. § 824(d)(1) (emphasis added). Consistent with these statutory mandates, the Commission "vacate[d] the judge's order, and order[ed] the continued temporary reinstatement of Bernardyn pending a final Commission decision on the complaint." *Id*. at 951. *See also Sec'y on behalf of Alvaro Saldivar,* 45 FMSHRC 947 (Nov. 2023); *Sec'y on behalf of Grant Noe,* 22 FMSHRC 705, 706 (June 2000).

In the instant case, the operator argues that the Commission's construction of the Act in *Secretary of Labor on behalf of Bernardyn* was later rejected by the Sixth and Seventh Circuits in *North Fork Coal Corp*., 691 F.3d 735 (6th Cir. 2012), and *Vulcan Constr. Materials*, 700 F.3d 297 (7th Cir. 2012). The operator is incorrect, conflating the provisions of 105(c)(2) and 105(c)(3) of the Act.

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parties' arguments or the issues before us. In fact, the Secretary simply noted, "[w]hether temporary reinstatement continues pending review by a court of appeals is beyond the scope of the supplemental briefing order." Sec'y Supp. Br. at 2, n.1. Moreover, the Commission lacks authority to order a Circuit Court or the Supreme Court to either continue a temporary reinstatement or dissolve it, once jurisdiction passes to the federal tribunals. As a result, we need not address this issue here.

In contrast to the instant case, the actions before the Court in *North Fork* and *Vulcan* were filed by miners on their own behalf pursuant to section 105(c)(3) of the Act, rather than by the Secretary on the miners' behalf pursuant to section 105(c)(2).[13] As noted, section 105(c)(2) provides that temporary reinstatement shall continue "pending final order on the complaint." The Sixth and Seventh Circuits clarified that the statutory basis for temporary reinstatement expires if the Secretary concludes her investigation and determines that no violation has occurred, i.e., decides not to file a complaint under section 105(c)(2). *North Fork*, 691 F.3d at 743; *Vulcan*, 700 F.3d at 310 ("the temporary reinstatement order lasts only as long as the proceedings [are] governed by § 815(c)(2)"). The holdings in *North Fork* and *Vulcan* are entirely consistent with the Commission's ruling in *Bernardyn*.

Vulcan now argues that because Hargis, and not the Secretary, filed the petition seeking review of the Judge's decision, this proceeding is more akin to a section 105(c)(3) proceeding. According to Vulcan, the temporary reinstatement order should be dissolved. This argument does not account for the Act's plain requirements; once the Secretary determines that the Act was violated and files a complaint pursuant to section 105(c)(2), temporary reinstatement is to continue until there is a final order on that complaint. 30 U.S.C. § 815(c)(2). There is no mechanism under the Act that transforms a complaint filed pursuant to section 105(c)(2) to a section 105(c)(3) action. Rather, the Act clearly delineates between these two types of cases. The complaint at issue was filed pursuant to section 105(c)(2). The Secretary may file a motion to withdraw her section 105(c)(2) complaint if she determines, during the litigation process, that section 105(c) of the Act was not violated. *See, e.g., PCS Phosphate Co.*, 33 FMSHRC 5, 6 (Jan. 2011). This has not happened.

Although the Secretary has not petitioned for review of the Judge's decision on the merits, that decision is independent from her investigation and determination that the operator violated section 105(c)(2) of the Act.[14] Sec'y Rep. Br. at 7. Here, the Commission granted

[13] According to section 105(c)(2), if the Secretary finds that a miner's allegations of discrimination are "not frivolously brought" the Secretary applies for the miner's temporary reinstatement. The Secretary, thereafter, conducts further investigation, and if she determines that the requirements of section 105(c) have been violated, she files a complaint of discrimination with the Commission. 30 U.S.C. § 815(c)(2). In *North Fork* and *Vulcan*, the Secretary initially applied for temporary reinstatement, which the Commission granted. After further investigation, however, the Secretary determined that unlawful discrimination had not occurred, and declined to file a section 105(c)(2) complaint. Instead, the miners filed complaints of discrimination on their own behalf as permitted under section 105(c)(3), which does not provide for temporary reinstatement. 30 U.S.C. § 815(c)(3). As will be discussed further below, our dissenting colleague makes this same error in his analysis by treating the Secretary's decision not to appeal the merits of this case as equivalent to those cases where the Secretary determined during the course of an investigation that no discrimination occurred.

[14] We reject the operator's attempts to apply our "abandonment" doctrine to this case. This is not a situation where a party is attempting to raise an argument on its own behalf in a reply brief for the first time, nor is it a scenario in which a party has raised an issue in its petition for discretionary review but then failed to raise it in its subsequent briefing. *See, e.g.*, *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 22 (Jan. 2020).

review of the Judge's decision on the merits of the Secretary's section 105(c)(2) complaint.[15] Accordingly, the order is not final; temporary reinstatement continues.

We are not persuaded by Vulcan's argument that as a matter of due process, the temporary reinstatement must end once the Judge issues its decision in the 105(c)(3) case. Courts have long held that the process for temporary reinstatement before the Commission is sufficient, and that Congress intended employers to bear a proportionately greater burden of the risk of erroneous temporary reinstatement. *See Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) ("JWR"), *quoting Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 263 (1987). It has been well-established that due process is satisfied so long as the "pre-reinstatement procedures establish a reliable initial check against mistaken decisions, and complete and expeditious review is available.'" *JWR*, 920 F.2d at 745-46. Prior to the Secretary petitioning for temporary reinstatement, it conducted an investigation, wherein the operator had the opportunity to provide evidence and information concerning the Complainant's termination. Following this investigation, once the Secretary determined that a non-frivolous claim of discrimination had been made, Vulcan had the right to a hearing on whether the miners' allegations were frivolous, but chose not to exercise that right, instead agreeing to economically reinstate the miner.[16] We reiterate that the process available to operators is sufficient, especially considering that it is balanced against the strong public interest inherent in protecting miners who make safety complaints, which persists regardless of the exercise of the government's litigation strategies. Temporary reinstatement plays a central role in the statutory scheme.[17]

We similarly reject the dissent's characterization of the posture of this case as the Secretary having "dropped the claim of discrimination." Slip op. at 27. The Secretary filed briefings on appeal concerning when the temporary reinstatement ends, but declined to appeal the Judge's holding on the merits. There are many reasons why a party may choose not to appeal a Judge's decision while still believing in the merits of the case, including resource allotment, internal analyses on the likelihood of success, and triaging caseloads. Choosing not to appeal the merits of a case is in no way equivalent to instances when the Secretary conducts an investigation and determines that no discrimination occurred. The dissent's attempts to blur these lines misunderstands basic elements of how cases proceed before agencies and courts.

[15] Though the Commission here ultimately upholds the Judge's decision, it should be noted the majority found legal error in the Judge's discrimination analysis.

[16] Our dissenting colleague makes much of the fact that the operator has been required under the law to pay the complainant without receiving work in exchange. However, the miner was ordered to be temporarily reinstated to work. The operator and complainant filed a joint motion requesting that the complainant be temporarily economically reinstated—that is, paid his salary without returning to work—so the decision to not receive work in exchange for payment was the mutual choice of the operator and complainant.

[17] In passing the Act, Congress recognized that "[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant 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. 95-181 at 5-6. Congress further stated that "temporary reinstatement is an essential protection for complaining miners who may not be in

In addition to the arguments raised by the operator, our dissenting colleague raises several additional concerns regarding due process. While acknowledging that "[t]he constitutional correctness of this minimal temporary reinstatement process is not in question in this case," the dissent nonetheless claim that the Commission's process falls short of the general Constitutional requirements. Slip op. at 29.

At the outset, we note that the dissent's characterization of the law is not accurate. Certainly, the Supreme Court has consistently held that to satisfy due process, "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). However, nothing in the law indicates that litigation must always be accompanied by full discovery, cross examination, and credibility determinations. Instead, a review of the Supreme Court's case law regarding due process shows that, as with most constitutional principles, it requires a balancing test that weighs the particular property interest deprived against the process due. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Nonetheless, the dissent argues broadly that the Commission's temporary reinstatement procedures and standards are so lax that any challenge by an operator is necessarily futile.[18] Slip op. at 29 n.9. That assertion is not borne out by Commission caselaw. The Commission has certainly denied applications for temporary reinstatement.[19] The dissent also raises more specific

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the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id*. at 37.

As for operators' private interests, our dissenting colleague argues repeatedly that Vulcan has been deprived of large sums of money during the course of this litigation. Slip op. at 26, n.1. However, both the Supreme Court in *Brock* and the 11th Circuit in *JWR* defined the employer's interest for due process purposes as control of the workforce, without reference to money. As the Court in *JWR* observed: "[a]ny material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits." 920 F.2d at 748, n. 11. Vulcan's decision to offer economic reinstatement in this case, wherein Hargis was paid but not required to work, was voluntary. Vulcan's voluntary decision to offer money without demanding labor does not change the due process analysis.

[18] To bolster this claim, the dissent provides, without citation, figures on the number of successful temporary reinstatement claims. These unsubstantiated figures do not appear to include instances where a miner filed a discrimination complaint and, after the Secretary's investigation of the matter, determined that it lacked merit. Furthermore, the Supreme Court has cautioned against using statistics to prove due process violations, stating, "[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Mathews v. Eldridge*, 424 U.S. at 346.

[19] For example, temporary reinstatement has been denied where the Secretary failed to present any evidence regarding protected activity. *See, e.g.*, *Sec'y on behalf of of Hagene v. Prairie State Generating Co., et al.*, 38 FMSHRC 290 (Feb. 2016) (ALJ). Likewise, Temporary

challenges to the Commission's procedures. Our colleague alleges that Mine Act Respondents are afforded fewer due process protections than those approved by the Supreme Court in *Brock*, claiming for example that *Brock* affords a right to credibility determinations at the temporary reinstatement stage.[20] Slip op. at 31. Our colleague has the issue backwards. With respect to proceedings under the Surface Transportation Act, *Brock* explicitly reserved credibility determinations for the administrative law judge's decision on the merits, rather than the investigator's preliminary "reasonable cause" determination. 481 U.S. at 266. The Court also more broadly noted that witness examinations at the temporary reinstatement stage "need not be formal" and need not afford cross-examination. *Id.* at 264. Significantly, the Eleventh Circuit has compared the Commission's procedures to those afforded in *Brock*. *JWR*, 920 F.2d at 747-748. Contrary to our dissenting colleague's allegation, the Eleventh Circuit unequivocally stated that the Commission's process was more robust, finding that our procedure of affording the opportunity for a full evidentiary hearing prior to temporary reinstatement "far exceed[s] the minimum requirements" of the Constitution as articulated in *Brock*.[21] *Id.*

Our dissenting colleague further argues that the parties' interests regarding temporary reinstatement should be reweighed once the Judge has issued a decision on the merits of the complaint. Specifically, the dissent argues that the Judge's decision after a "full and fair" hearing on the merits is more reliable than the Judge's determination at the temporary reinstatement stage, therefore if a Judge determines no discrimination occurred, the balance of interests no longer favors temporary reinstatement. Slip op at 28-30, 34.

First, we note that the phrase "full and fair hearing" is found nowhere in the Mine Act or Commission regulations, nor does it appear to have any specialized meaning within the law in general.[22] *See, e.g., Galke v. Duffy*, 645 F.2d 118 (2nd Cir. 1981). A term which does not appear

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Reinstatement has been denied where the Secretary failed to produce any evidence demonstrating the miner suffered an adverse employment action. *See, e.g.*, *Sec'y on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000).

[20] The dissent also repeatedly criticizes the "not frivolously brought" standard as being an unduly low burden of proof as contrasted with the "reasonable cause to believe" standard. Slip op at 30, n.7. We note the reviewing courts have consistently held these standards to be synonymous. *See JWR*, 920 F.2d at 747; *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012).

[21] The dissent takes footnote 11 in *JWR* out of context. The Court was not conceding that the two standards were distinct, but rather simply arguing in the alternative to make a further point about the sufficiency of additional existing procedures for due process. This is why the Court explicitly found that the two standards were "strikingly similar" and the "functional equivalent" of each other. *Id*. at 747.

[22] It is not entirely clear why the dissent leans so heavily on the phrase "full and fair hearing," which he treats as both a term of art and as possessing a common sense meaning upon which all reasonable people would agree. Contrary to the dissent's repeated assertions, the phrase does little to resolve his concerns, and instead turns longstanding due process jurisprudence on its head. *See, e.g*., Slip op. at 28 ("Due process in litigation ordinarily occurs through a full and fair hearing during which each party presents witnesses and evidence, cross-

to have any particular legal meaning cannot overcome statutory language providing that temporary reinstatement remains in place until a final decision on the merits is reached. Moreover, the entire theory of appellate review is that a Judge may have made errors, as the Judge in the instant case did. In other words, it is not certain (until after review) that a Judge's hearing on the merits *was* full or fair, given those terms' colloquial meaning. The dissent would create a rule that a Judge's decision is presumed to be without error even before the Complainant has the opportunity to seek review. There is no basis for that presumption in the law. To the contrary, Congress expressly sought to allow miners to have the benefit of temporary reinstatement until a final decision on the merits is reached.

Our dissenting colleague's final due process argument is that delays in the Commission's handling of this matter amounted to a due process violation. Slip op. at 27, 29-30, 34, n.9. It should be highlighted that no party has raised these arguments in any briefing or argument before the Commission, and it is inappropriate for the dissent to argue and advocate on behalf of a party. Doing so violates the party presentation principle and implicates parties' due process rights. The Supreme Court has stated that "[i]n our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 'in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" *U.S. v Sineneng-Smith*, 590 U.S. 371, 375 (2020) (citations omitted). The Supreme Court has repeatedly held that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard. *Lachance v. Erickson*, 522 U.S. 262, 266 (1998). The dissent's sua sponte introduction of an argument not made by the parties deprives the parties of notice of the issues under consideration on appeal and an opportunity to be heard on those issue. *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002). We see no reason to create Constitutional challenges that the parties did not even raise. Consistent with *JWR*, we conclude that there are no due process concerns in this case.

Moving beyond due process claims, Vulcan argues that if the Secretary is not litigating the appeal, the operator lacks an important safeguard to prevent meritless appeals to the Commission. We are not persuaded. Appeals to the Commission are not a matter of right, but rather granted on a discretionary basis. Therefore, the Commission serves as the gatekeeper,

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examines witnesses, and makes arguments for its position."). This, and similar assertions peppered throughout the dissent, are simply incorrect and contrary to the cases cited by the dissent. Citing a long line of cases, the Supreme Court held that "[t]hese decisions underscore the truism that '(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. at334 (citations omitted). In specifically addressing the issue that so troubles our dissenting colleague—that many administrative hearings often have a more limited format—the *Mathews* Court reiterated "the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" *Id*. at 348.

preventing meritless appeals. The Commission has instituted safeguards to prevent undue delay of proceedings, regardless of the Secretary's involvement, such as expediting cases and setting deadlines. *See* 29 C.F.R. Part 2700.

We also reject the operator's argument that its continued voluntary payment of Hargis' economic reinstatement renders the Secretary's appeal moot and the Judge's error harmless. A party cannot moot a claim by voluntarily ceasing unlawful behavior or by promising to continue engaging in lawful behavior. *See North Am. Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012). Additionally, Hargis has a right to be temporarily reinstated to his prior position, pending a final order on the complaint, pursuant to section 105(c)(2) of the Act. Accordingly, the Judge's error in immediately terminating the temporary reinstatement order was not harmless. An error is not harmless if it affects a party's "substantial rights." Fed. R. Civ. P. 61; *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 584 (6th Cir. 2015) (citing *Morales v. Am. Honda Motor Co*., 151 F.3d 500, 514 (6th Cir. 1998). Moreover, the Judge's error implicates the rights of all miners on whose behalf the Secretary has sought temporary reinstatement and subsequently filed a complaint.

Accordingly, for the reasons above, we find that a reading of the Mine Act that provides for temporary reinstatement through a final decision best comports with the plain language of the Act and raises no due process concerns.

D. Temporary reinstatement continues for 30 days after the issuance of a Commission appellate decision; alternatively, if the Commission declines to grant review, temporary reinstatement expires 40 days after the Judge issues his or her merits decision.

Vulcan further argues that temporary reinstatement must end 30 days after a Judge dismisses a discrimination case on its merits, *regardless* of whether the Commission directs review. Vulcan relies on language in section 105(c)(2) which states that orders affirming, modifying or vacating the Secretary's discrimination complaint "shall become final 30 days after [ ] issuance." 30 U.S.C. § 815(c)(2). In so arguing, Vulcan misreads the Act and our caselaw.[23]

Consistent with our decision in *Bernardyn,* the 30-day language in section 105(c)(2) refers to decisions issued by the *Commission*, not our Judges. Section 113(d)(1) states that Judges' decisions "shall become the final decision of the Commission *40 days* after its issuance unless within such period the Commission has directed that such decision shall be reviewed . . ." 30 U.S.C. § 823(d)(1) (emphasis added). Under section 113(d)(2)(A)(i), 30 U.S.C. § 823(d)(2)(A)(i), "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision." The Commission has the remaining days of the 40-day period to consider the petition and grant review.[24]

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[23] The dissent engages in a similar misreading of the Mine Act and Commission caselaw.

[24] Alternatively, the Commission may grant review sua sponte within 30 days of the issuance of a Judge's decision. 30 U.S.C. § 823(d)(2)(B).

Section 113(d)(1) contains language that is generally applicable to all Administrative Law Judge issuances pursuant to the Act. Section 113(d) by its terms applies to Judge's decisions in section 105(c) cases because it applies to "*any proceeding* instituted before the Commission . . . , assigned to [an] administrative law judge by the chief administrative law judge of the Commission or by the Commission." 30 U.S.C. § 823(d)(1) (emphasis added). This includes section 105(c)(2) cases.

Conversely, the 30-day language in the Act routinely refers to appellate Commission decisions. *See* 30 U.S.C. §816(a)(1) (circuit court review of final agency decisions may be sought "30 days following the issuance" of a Commission order). Reading the 30-day language of section 105(c)(2) in the context of section 113(d)'s appellate review provisions, so that Commission appellate decisions become final within 30 days but Judges' issuances become final after 40 days, best reconciles the statutory language of each section.[25] It is also consistent with the language of section 105(c)(2) itself. The provision states that temporary reinstatement shall continue pending "final order on the complaint." 30 U.S.C. § 815(c)(2). It goes on to state that the Secretary shall "file a complaint with the Commission," and that "the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order." *Id.* It concludes by stating that "[s]uch order shall become final 30 days after its issuance." *Id.* Based on this plain language, the "order" that shall become final after 30 days is the *Commission's* order on the Secretary's complaint.

Vulcan's arguments that extending temporary reinstatement until there is a final order on the complaint violates its right to due process of law are not availing. Similar arguments were considered and dismissed by the Eleventh Circuit in *Jim Walter Resources*, 920 F.2d 738 (11th Cir. 1990) as discussed *supra*. In fact, in *Jim Walter Resources*, the Eleventh Circuit recognized that the temporary reinstatement order that was before it, continued to remain in effect, even though the Commission reversed the Judge's finding of a violation and remanded the case for further analysis. *See* 920 F.2d at 743 n.2 ("Because no final determination of the ultimate merits of [the miners] complaints has yet been reached, the temporary reinstatement order continues to affect the parties' rights and interests in this case.").

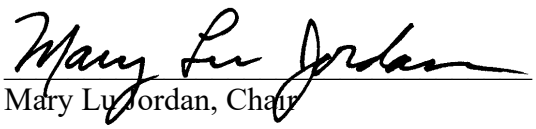
III.

Conclusion

For the foregoing reasons, we affirm in part and reverse in part the Judge's decision. We uphold the portion of the Judge's decision that affirmed the violation of section 50.20(a)'s injury reporting requirements. We also affirm the portion of the Judge's decision that dismissed the discrimination complaint under section 105(c). We find that the Judge erred in his nexus

[25] A contrary approach would create a strange result. Under the operator's approach, a Judge's finding on the merits would be "final" after 30 days for purposes of temporary reinstatement but would not yet be a final order on the *discrimination complaint* because it would still be subject to review by the Commission for another ten days. A decision is either *final* or *not*, it cannot be both. If the Judge's issuance is deemed final with respect to *both* temporary reinstatement and the merits case after 30 days, this would remove the statutory 10-day window granted to the Commission under section 113(d)(1) to decide whether to grant a party's petition for discretionary review. 30 U.S.C. §823(d)(1).

analysis, but that it constituted excusable error because of the operator's affirmative defense. Finally, we vacate the portion of the Judge's decision immediately terminating Hargis' temporary reinstatement. No additional payments are necessary, however, because the operator has been voluntarily paying Hargis' temporary reinstatement during the course of this appeal. Temporary reinstatement terminates **30 days** after the date of this decision.



Mary Lu Jordan, Chair

Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

Commissioner Rajkovich, concurring:

I fully concur with the majority in Parts II.A, C, and D of the Disposition. I also concur in result with the majority's holdings in Part II.B that Vulcan did not discriminate against Hargis and that he was ultimately terminated due to unprotected activity. I disagree solely with the majority's finding in Part II.B.1 that the complainant met his *prima facie* case of discrimination. My colleagues conclude that the Judge erred by finding insufficient evidence of a motivational nexus between Hargis' protected activity and his adverse employment action. I would find that substantial evidence supports the Judge's determination that the complainant failed to show discriminatory intent sufficient to establish a motivational nexus, and that Vulcan's decision to terminate Hargis was not motivated in any part by his protected activity on April 12 and May 12.

A. The Judge properly found insufficient evidence to support a nexus between Hargis' protected activity and the adverse employment action.

As the majority notes, a miner seeking to establish a *prima facie* case of discrimination must show that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity, in other words, that a motivational nexus existed between the protected activity and the adverse action. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (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 (Apr. 1981).

In order to determine whether a motivational nexus existed, the Commission may consider indirect indicia of discriminatory intent such as (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-12 (1981), *rev'd on other grounds sub nom. Donovan on behalf of Chacon v. Phelps Dodge*, 709 F.2d 86 (D.C. Cir. 1983).

For the reasons below, substantial evidence supports the Judge's conclusion that Hargis failed to show sufficient indicia of discriminatory intent to support a finding of discrimination.

1. Substantial evidence supports the Judge's finding that no inference of discriminatory intent may be found based on management knowledge of protected activity.

Regarding Hargis' May 12 request, the Judge acknowledges that management was aware of the request *on May 12*, but notes that the decision to terminate Hargis was "well underway" by then. 44 FMSHRC at 754, 759. The record shows that Hargis was recommended for termination on May 11. Tr. 508-09, 630-31. When deciding to take the relevant adverse action, mine management could not have had knowledge of a request that had not yet occurred. As for Hargis' April 12 request, the Judge notes that the complainant was unable to produce any evidence that Williams discussed the request with anyone else in the company. 44 FMSHRC at 761-62 n.29. Substantial evidence supports the Judge's finding that management was unaware

of the April and May requests *prior to taking adverse action*. Accordingly, discriminatory intent cannot be inferred from management knowledge.[1]

2. Substantial evidence supports the Judge's finding that there was no hostility or animus toward the protected activity.

The Judge properly found no evidence of animus toward Hargis' requests to see a doctor. The Judge notes that every disciplinary action prior to his termination occurred *prior* to his protected activity, and that the record did not demonstrate any adverse responses to Hargis' requests from mine management. 44 FMSHRC at 758-59. To the contrary, the Judge noted that Williams showed concern for the condition of Hargis' back, even placing Hargis on light duty after the April 12 injury report. *Id.* at 748, n.19, 762.

Hargis points to other alleged evidence of animus, claiming that Vulcan engaged in a course of conduct to "get rid of him" going back to December 2020. Tr. 20, 637. However, as noted, all of the alleged incidents occurred either *before* Hargis' first request for a physician on April 12, or *after* management had already decided to terminate Hargis' employment. The Judge reasonably found that any alleged animus before the protected activity or after the adverse action could not serve as evidence of a motivational nexus *between* the protected activity and the adverse action.

The majority challenges the Judge's finding that Vulcan's "indifference" towards Hargis' request for medical care does not constitute animus towards protected activity. Slip op. at 9-10. My colleagues claim that choosing to do nothing when a miner engages in protected activity is the "very definition of animus." *Id.* at 9. In support of this proposition, they cite the long-standing Commission proposition that the focus of an animus inquiry is animus towards the complainant's protected activity, rather than animus toward the complainant him-or herself. *Id.*, *citing Chacon*, 3 FMSHRC at 2511.

The proper inquiry is certainly whether animus was directed toward the complainant's protected activity. However, it is unclear how that proposition establishes that *indifference* towards protected activity constitutes *animus* towards protected activity. Animus is generally understood to contain some element of intent, particularly intent to take negative action.[2] This is

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[1] My colleagues in the majority state that Williams' knowledge of the April 12 request may be imputed to management while also emphasizing that Williams recommended Hargis' termination, implying a motivational connection. Slip op. at 8-9. As the majority notes, the rationale behind imputing knowledge is to prevent an operator from "launder[ing]. . . knowledge and animus through a neutral superior." *Id. at 8*, *citing Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1068 (May 2011). Here, as discussed below, nothing in the record suggests Williams' recommendation was directed at protected activity. Even if Williams' *knowledge* can be imputed to management, there is no *motivation* to impute to management. Nothing in the record indicates an attempt to "launder" discriminatory intent through a neutral party.

[2] *See Animus*, Collinsdictionary.com, *https://www.collinsdictionary.com/dictionary/english/animus* (last visited Aug. 26, 2024) ("an animating force or underlying purpose; intention . . . a feeling of strong ill will or hatred.");

consistent with the general purpose of the animus analysis in the discrimination context, which is to locate indicia of "*discriminatory intent*" to determine whether the complainant's protected activity *motivated* the operator's decision to take adverse action. *Chacon*, 3 FMSHRC at 2510 (emphasis added). It is unclear how a *lack* of intent to take action in response to protected activity would demonstrate discrimination.

More narrowly, it is arguable whether the Judge truly found indifference toward Hargis' protected activity. The only reference to "indifference" in the Judge's decision states:

> There is no evidence that Mr. Ellis was aware that Complainant requested to see a doctor before making the decision to terminate his employment, or that he discussed any previous requests with Mr. Humes, Mr. Williams, or Mr. Clemmons. Nor is there any evidence that any of the other individuals involved in the decision to discharge Complainant ever evinced anything worse than *indifference* in response to his request to see a doctor.

44 FMSHRC at 759 (emphasis added).

In context, it appears the Judge was discussing the impact of Hargis' requests on the *disciplinary decision-making process*—the decision-makers were "indifferent" to the protected activity *when deciding whether to terminate Hargis*. There is nothing in the Judge's opinion that suggests Vulcan was "indifferent" to the requests themselves or unwilling to arrange for medical visits.[3] The Judge's finding here was merely that, in this instance, the protected activity did not motivate the adverse action.

3. Substantial evidence supports the Judge's finding that no inference of discriminatory intent was found based on coincidence in time.

The Judge acknowledged the coincidence in time between Hargis' protected activity and his termination. 44 FMSHRC at 760. However, he noted that Hargis had already been placed on a "last chance" disciplinary agreement prior to both the April 12 and May 12 requests, and that Hargis had already been recommended for termination *prior* to the May 12 request, such that the latter request "did not influence, but rather interrupted" the execution of the adverse action. *Id.* at 760-61. Finally, he noted the lack of any corroborating facts to suggest that the coincidence in time indicated discriminatory intent, particularly noting Williams' care for Hargis' health issues. *Id.* at 762. Accordingly, the Judge concluded that the coincidence in time was, in truth, just a coincidence. *Id.* at 761. Substantial evidence supports the Judge's reasoning. Tr. 20-21, 466, 508-09, 430-31, 630-31, 666.

Dictionary.com, https://www.dictionary.com/browse/animus (last visited Aug. 26, 2024) ("strong dislike or enmity . . . motivating purpose or intention; animating spirit.").

[3] To the contrary, Hargis was provided with a panel of physicians in response to his May 12 request. Tr. 513.

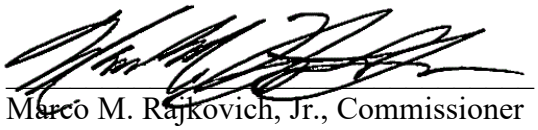
4. Substantial evidence supports the Judge's finding that there was no disparate treatment of Hargis due to protected activity.

The majority correctly accepts the Judge's finding that the only evidence of potential disparate treatment occurred before Hargis' protected activity. Slip op. at 11. The majority considers this insufficient to overcome other indicia of discriminatory intent, while I find it to be consistent with the lack of record evidence indicating discriminatory intent.

B. Substantial evidence supports the Judge's finding that Vulcan's explanation for the termination is not pretextual; Vulcan terminated Hargis based on unprotected activity alone.

My colleagues find that the complainant met his initial burden, but that the operator has successfully rebutted the *prima facie* case through an affirmative defense. As discussed above, I would find that the complainant *did not* meet his initial burden in presenting a *prima facie* case, therefore no affirmative defense is required. However, as the majority notes, the affirmative defense analysis is similar to the pretext inquiry conducted by the Judge below. Slip op. at 12, n. 11. I concur with the majority's factual findings in Part II.B.1.d.1 and agree that Vulcan has "adequately shown that it followed its progressive discipline policy and would have fired Hargis for a non-discriminatory reason alone." *Id.* at 12. Accordingly, substantial evidence supports the Judge's conclusion that Vulcan's business justification was not pretextual.

In sum, I would affirm the Judge's findings that the complainant failed to establish a motivational nexus between his protected activity and the adverse action, and that the operator's business justification was not pretextual. Accordingly, I concur with the majority in result and would find that no discrimination occurred.



Marco M. Rajkovich, Jr., Commissioner

Commissioner Althen, joining in part, concurring in part, and dissenting in part:

I join Part II.A to affirm the citation for failure to report an occupational injury.

I join with Commissioner Rajkovich's concise and dispositive concurrence of Part B that substantial evidence supports the Administrative Law Judge's decision denying Jason Hargis' discrimination claim.

I write separately to dissent on the discrete issues presented in Parts II.C and II.D concerning the continuation of temporary reinstatement after an ALJ decision following a full and fair hearing.

I.

CONTINUATION OF TEMPORARY REINSTATEMENT AFTER AN ADMINISTRATIVE LAW JUDGE FINDS NO DISCRIMINATION FOLLOWING A FULL AND FAIR HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

A. BACKGROUND

On June 7, 2021, Hargis filed a discrimination complaint against Vulcan Construction Materials, LLC. The Secretary of Labor sought temporary reinstatement. The parties filed a Joint Motion for Economic Reinstatement. On July 27, 2021, the Administrative Law Judge temporarily reinstated Hargis pending further adjudication. That Order implemented an agreement between the parties in which Vulcan agreed to pay Hargis $1,014.87 per week plus benefits. The Commission is not aware of any modification or suspension of that Order or the payments. If payments have not been suspended, the total amount of temporary reinstatement payments to a lawfully discharged employee will be approximately $155,000.[1]

On December 1, 2022, the ALJ found that Vulcan had not discriminated against Hargis and terminated temporary reinstatement. The Secretary challenged the termination of temporary reinstatement. Since December 1, 2022, Hargis has continued to receive economic reinstatement and will continue to do so until thirty days after the date of this decision.

[1] The operator has been required to "temporarily reinstate" the losing complainant for more than three years – more than twenty-two months after the ALJ's decision denying the claim and more than nine months after the Commission open meeting. There is no explanation for the failure to complete this case in a timely manner. The Commission owes the operator an apology for its neglect of this case. However, the majority refused to express any regret for its inexcusable nonfeasance thereby necessitating this footnote. Moreover, we cannot blow off, as federal bureaucrats are wont to do, $155,000 dollars as if it were pocket change for private citizens. It is unfortunate that the operator has no means to obtain redress from the Commission for the Commission's neglect of the operator's rights.

After the ALJ decision, the Secretary dropped the claim of discrimination. Nonetheless, the Secretary filed a Petition for Discretionary Review asserting the ALJ erred in dissolving the temporary reinstatement order on the date of his fully considered decision of no discrimination—a decision on the merits that the Secretary accepted.

The Secretary asserts that Hargis must remain temporarily reinstated until a "final" decision. By the term "final" decision, the Secretary appears to mean a final non-appealable decision by the Commission, a United States Circuit Court of Appeals, or the United States Supreme Court. Specifically, the Secretary claims "Once a complaint is filed on a miner's behalf [by the Secretary], the miner has a defined path to pursue recourse: appeal an unfavorable decision of the judge to the Commission, and appeal an unfavorable Commission decision to the federal court of appeals." Sec'y Reply Br. at 12.

The majority does not accept the Secretary's argument regarding the length of temporary reinstatement but instead finds that temporary reinstatement exists 30 days after this decision by the Commission.[2] After three years of delay, the Commission at least finds that temporary reinstatement need not continue for the many months it would take to resolve an appeal. That is certainly an unsatisfying salve for the injured party's wounds.

B. THE CONSTITUTIONAL ISSUE

The Secretary claims that temporary reinstatement under the nonfrivolous standard of proof without credibility determinations or consideration of factual disputes continues after a full hearing and decision by an ALJ. According to the Secretary, the expedited and sharply limited hearing under a non-frivolous standard of proof is sufficient due process for reinstatement to last not only for the many months it takes for an ALJ to rule on the case after a full hearing but also for a year or more after the ALJ decision. Vulcan responds that continuation of reinstatement based upon the initial cursory non-frivolous standard after a full and fair hearing before an ALJ deprives it of due process rights.[3]

The Secretary's position in this case is a dramatic change from the position taken by the Secretary before Congress in 1999. The Assistant Secretary for Mine Safety and Health under the Clinton administration, Davitt McAteer, wrote in an addendum to congressional testimony that temporary reinstatement is "effective *until the ALJ rules on the merits of the miner's discrimination complaint.*" INCREASING MSHA AND SMALL

[2] The Commission's majority holding means it believes that Congress passed a law requiring an employer that lawfully discharged an employee for misconduct must allow the employee to work for another thirty (30) days after a determination by the Commission that the discharge was lawful. This interprets the Mine Act as creating a statutorily mandated 30 days of continuing work or pay for a fully adjudicated mal or mis performing worker. That alone is unconstitutional. *See* U.S. Const. amend. XIV.

[3] The opinion upon the constitutionality of extending temporary reinstatement after a decision following a full hearing is not confined to the twenty months between the ALJ decision and the Commission decision in this case. However, the particular facts of this case do well illustrate the fundamental unfairness of the Commission's approach.

MINE COOPERATION: HEARING BEFORE THE SUBCOMM. ON EMPLOYMENT, SAFETY, AND TRAINING OF THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 106th Cong. 174 (Comm. Print 1999) (emphasis added.). Assistant Secretary McAteer's statement correctly interpreted the law. The current Acting Secretary and my colleagues now veer from the constitutional approach taken in 1999.

To reach a constitutional issue, a case must involve a deprivation of rights. Section 105(c) of the Mine Act creates a right for employees to not have adverse employment consequences because they have exercised protected rights.[4] A miner's claim under section 105(c), therefore, raises a claim of statutory rights.

Separately, Vulcan has a constitutionally protected right to manage its workforce including a right to fire an employee. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-61 (1987); *see* ; *Business Commc'ns, Inc. v. U.S. Dept. of Educ.*, 739 F.3d 374, 379 (8th Cir. 2013); *Chernin v. Lyng*, 874 F.2d 501, 506 n.3 (8th Cir. 1989). Consequently, proceedings challenging an employer's management actions implicate the employer's rights and, therefore, constitutional considerations.

It is not unusual for the constitutional rights of separate parties to come into tension. Such occurrences include, as here, cases in which an employer wishes to assert its lawful management rights while an employee believes the employer's action violated his statutory rights. This situation brings into play the due process rights of the respective parties.

Due process in litigation ordinarily occurs through a full and fair hearing during which each party presents witnesses and evidence, cross-examines witnesses, and makes arguments for its position. A party is entitled to assert its rights "at a meaningful time and in a meaningful

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[4] Section 105(c)(1) provides:,

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, . . . , or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. §815(c)(1).

manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted).

The Mine Act and Commission rules provide little due process—indeed, virtually no process at all—preceding temporary reinstatement. If, following an initial, expedited investigation, the Secretary finds that the miner's complaint is not "frivolous," the Mine Act requires the Secretary to seek temporary reinstatement. Commission rules of procedure require a highly expedited procedure for temporary reinstatement requests. 29 C.F.R. § 2700.45.

A temporary reinstatement hearing is sharply limited. The "scope of a temporary reinstatement hearing is 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), *citing* 30 U.S.C. § 815(c)(2) (other citations omitted), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The proceedings are greatly expedited. The ALJ may not make credibility determinations and may not resolve conflicts in testimony. These limitations provide the miner's testimony the benefit of the doubt on any contested fact even when his testimony strains credulity or appears inconsistent with other factual testimony. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citations omitted) ("It was not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings."). As a result of an almost non-existent standard of proof, great expedition, the absence of credibility determination, and the absence of resolution of factual disputes, the operator has little or no chance of prevailing at this stage of the proceeding.[5]

The constitutional correctness of this minimal temporary reinstatement process is not in question in this case. Here, however, the Secretary goes further and claims that temporary reinstatement under the nonfrivolous standard of proof, without credibility determinations or any consideration of factual disputes, continues after a full and fair hearing before an ALJ until the complainant exhausts its appeal rights. Delays in obtaining disposition of a temporary reinstatement through appeal to the Commission add a minimum of many months or, as here,

[5] Settlements of temporary reinstatement claims are not unusual. They are the norm. Faced with the lowest standard of proof known to the law (a "nonfrivolous" claim), strict limits on factual review, no credibility determinations, and the virtual certainty of loss at a temporary reinstatement hearing, operators often choose to forego the expense of an inevitably futile temporary reinstatement hearing. A review of Commission records by our Librarian and Docket Clerk for fiscal years 2016 through 2023 shows that the Secretary requested temporary reinstatement 107 times. Eighty-two were granted. Twenty-four were settled, withdrawn, or abandoned. Only one was denied. In that case, the Secretary failed to present any evidence of any protected activity. The majority, apparently seriously, counters by arguing that operators have a good chance at a temporary reinstatement hearing. They cite two cases 16 years apart demonstrating only that every decade and a half the Secretary's lawyers fail to allege a critical element necessary for temporary reinstatement. Slip op. at 16 n.19. Further, the majority suggests that it is fine for a business to retain a former disgruntled employee discharged for misconduct in its workforce for a number of years. They are untroubled by a business having to "temporarily reinstate" a disgruntled, non-performing employee for years amid its workforce or pay for years to avoid disruption of its operations.

years, to the length of temporary reinstatement. In essence, the operator's right to a "final" decision after a full and fair hearing is delayed/denied for months/years while the operator must employ an unsafe or ineffective worker even though an ALJ upheld the discharge after a full and fair evidentiary hearing.[6]

In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Supreme Court reviewed Section 405 of the Surface Transportation Assistance Act of 1982 ("STAA"). That section authorizes the Secretary of Labor to order the reinstatement of an employee under the "reasonable cause to believe" standard. As enacted, the Act did not require the Secretary to inform the employer of the basis of the claims or allow the employer to address those claims. In *Brock*, the employer challenged the constitutionality of this process.[7]

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[6] The majority attempts to dodge the substantial constitutional questions in this case by focusing on temporary reinstatement hearings. Then, they go so far as to say they do not really know what is meant by a full and fair hearing. Indeed, they respond to a constitutional argument by writing that the phrase "'full and fair hearing' is found nowhere in the Mine Act." Slip op. at 17-18. Are their views so radical as to suggest operators are not entitled to full and fair hearings under the Mine Act or that discrimination hearings are not full and fair? They cite one case between a union member and his union to support their incredible claim that the concept of a full and fair hearing is not a well understood or applied legal concept. In any event, the complainant has not suggested the hearing was not fair. He suggests the decision was wrong, not that he did not receive a fair hearing on his claim. The occurrence of a full and fair hearing is when the constitutional balance shifts in this case.

[7] In *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review Commission,* 920 F.2d 738 (11th Cir. 1990), the Eleventh Circuit affirmed the *temporary reinstatement procedures* as constitutional and, obviously, did not consider the circumstances after a full ALJ hearing. The circuit court analogized the "not frivolously brought" standard to the "reasonable cause to believe" standard applied by other federal statutes. It conceded "not frivolously brought" could be interpreted as "less stringent" than a "reasonable cause to believe" standard but upheld "not frivolous" even if it is a lesser standard. 920 F.2d at 748 n.11. The majority cites this one case for the incorrect proposition that courts "have consistently held these standards to be synonymous." Slip op. at 17 n.20. A "reasonable cause to believe" facially requires more than a "non-frivolous" claim. Black's Law Dictionary defines a "frivolous claim" as "a claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment." *Claim*, Black's Law Dictionary (12th ed. 2024). When no credibility determinations may be made and no factual determinations may be made, it is inevitable that, unless a complainant fails to allege a necessary element such as adverse action, the claim must almost always be found "non-frivolous."

Worse yet, the circuit court referred to a temporary reinstatement hearing as a "full evidentiary hearing." 920 F.2d at 747. It is clearly incorrect to refer to a hearing at which neither credibility determinations nor factual findings may be made as a full hearing. A hearing at which a party may speak but the Judge may not listen is not a full hearing. In any event, this case deals not with temporary reinstatement procedures but whether "temporary reinstatement" achieved hastily through a seriously compromised procedure may continue after a full and fair hearing results in a considered decision adverse to the complainant.

A plurality of the Court consisting of Justice Marshall, Justice Blackmun, Justice Powell, and Justice O'Connor found the failure to notify the employer of the basis of the claim of discrimination or to allow the employer to respond violated the employer's constitutional rights. 481 U.S. at 268. The plurality held the employer had a constitutional right to receive "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." *Id.* at 264. Those factors are critical to whether there was a "reasonable cause to believe."

Importantly, the Court's decision inevitably envisions weighing the statements of rebuttal witnesses regarding the facts. Undoubtedly, the Court took it as a given that the Secretary would be neutral in applying the reasonable cause to believe standard to the claims and evidence presented by the parties. Therefore, the right under the STAA to have rebuttal statements by witnesses and credibility, along with the reasonable cause to believe standard, makes the procedures identified by the Supreme Court in *Brock* substantially more robust than the procedures under the Mine Act as interpreted by the Commission where the standard of proof is "non-frivolous," no credibility determinations may be made, and factual disputes may not be decided.

The Court found that in the context of temporary reinstatement, the limited procedures were sufficient if an opportunity is given to present rebuttal and dispute the factual allegations. The plurality held that it was not unconstitutional to reinstate temporarily under a reasonable cause-to-believe standard without an evidentiary hearing provided the employer could present fact witnesses to the Secretary.

For purposes of this case, it is critical to understand that *Brock* involves an initial determination and not a determination made by a truly neutral judge after a full and fair hearing. Critically, the Court repeatedly emphasizes the rights of employers. The Court stated:

> The property right of which Roadway asserts it has been deprived without due process derives from the collective-bargaining agreement between Roadway and its employees' union. It is the right to discharge an employee for cause.

Id. at 260.

> Reviewing this legislative balancing of interests, we conclude that the employer is sufficiently protected by procedures that do not include an evidentiary hearing before the discharged employee is temporarily reinstated. So long as the prereinstatement procedures establish a reliable "initial check against mistaken decisions," *Loudermill, supra,* at 545, 105 S.Ct., at 1495, and ***complete and expeditious review is available***, then the preliminary reinstatement provision of § 405 fairly balances the competing interests of the Government**,** the employer, and the employee, and a prior evidentiary hearing is not otherwise constitutionally required.

Id. at 263 (emphasis added).

> This is not to say, however, that the employer's interest in an expeditious resolution of the employee's complaint can never provide a basis for a due process violation. ***At some point, delay in holding postreinstatement evidentiary hearings may become a constitutional violation***. *See Loudermill,* 470 U.S., at 547, 105 S.Ct., at 1496. *Barry v. Barchi,* 443 U.S. 55, 66, 99 S.Ct. 2642, 2650, 61 L.Ed.2d 365 (1979); *Mathews,* 424 U.S., at 341–342, 96 S.Ct., at 905–06.

Id. at 267 (emphasis added).

In the above-quoted passages, the Court emphasizes the due process problem of a delay in holding an evidentiary hearing, the step the Commission accomplished through the ALJ hearing. This case is far worse; it deals with years of delay after a full and fair hearing.[8]

Justice Brennan, in dissent, emphasized:

> The adequacy of predeprivation procedures is in significant part a function of the speed with which a postdeprivation or final determination is made. Previously the Court has recognized that "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey v. Montrym,* 443 U.S. 1, 12, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979). *See also Loudermill, supra,* 470 U.S., at 547, 105 S.Ct., at 1496. ("At some point, a delay in the post-termination hearing would become a constitutional violation"). Were there any guarantee that the final hearing would occur promptly—within a few weeks, for example—the procedure endorsed by the Court might suffice. No such guarantee exists.

Id. at 270.

Justice Brennan found the absence of a full hearing constituted an insuperable barrier to constitutionality. He concluded that the government's interest did not justify the entry of a reinstatement order based on evidence that was not disclosed to the employer and tested by

[8] The Court referred to delay "in holding post-reinstatement **evidentiary** hearings." 481 U.S. at 267. Here, we consider the constitutionality of continuing payments **after** that evidentiary hearing. It is not an excuse to claim that this case presents an extraordinary delay. The central point is that after a full adjudicatory hearing both parties have received due process. Think of a balance. On one side there is an expedited decision after an almost non-existent, summary, and expedited hearing without any credibility determinations and without any findings on disputed facts. On the other side, there is a fully adjudicated decision after discovery, credibility judgments, and findings on all the facts. Surely, the constitutional balance swings to the adjudicated hearing.

cross-examination in an adversary proceeding before the order became effective. Foreshadowing the disregard of fundamental fairness present in this case, Justice Brennan wrote, "The combination of uncertainty and delay inherent in the Secretary's regulatory scheme eliminates any possibility that it might compensate for the inadequacy of the predeprivation hearing." *Id*. at 271. Here, as distinguished from *Brock*, **we are at the post-hearing stage**; yet the Secretary argues a nonfrivolous claim must still be honored.

The obligation for a timely hearing to resolve fully the rights of the parties is controlled by the Court's decision in *Barry v. Barchi*, 443 U.S. 55, 66 (1979). There, a finding of drugs in a horse resulted in the suspension of a horse trainer's license. The relevant state statute provided for a summary suspension of a license for 15 days upon an initial finding of an unlawful drug in a horse. The statute further provided for a full hearing but did not specify any time obligation for such a hearing. *It required a final decision within 30 days after the full hearing*. 443 U.S. at 61. Barchi challenged the constitutionality of the statute.

In a decision presaging *Brock*, the Supreme Court upheld the immediate temporary suspension finding that the State was entitled "to impose an interim suspension, *pending a prompt judicial or administrative hearing that would definitively determine the issues*, whenever it has satisfactorily established probable cause [note the higher standard] to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging." *Id.* at 64 (citations omitted).

The Court went on to find that after a temporary infringement on a person's property interest, the judicial pendulum necessitates a prompt final resolution. Recognizing that Barchi had an important property interest, the Court struck down the statute based on the failure to ensure a timely evidentiary hearing. The Court opined,

> [I]t was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

Id. at 66.

Based upon the Court's definitive statement, the Court certainly would not have allowed the temporary suspension to continue after a full hearing which found no fault on the part of the trainer. Nonetheless, my colleagues now find such reinstatement must continue after a full and fair hearing at the cost of many more months or years of deprivation of the operator's basic rights.

The majority writes as if the constitutional issue in this case is the balance of rights before temporary reinstatement. That is not an issue in this case. The issue here is the balance of rights after a full and fair hearing, not whether the operator received sufficient due process **before** the issuance of the Order of Temporary Reinstatement. It is whether the displacement of the protected rights of the operator may continue indefinitely **after** an ALJ affirms the discipline

following a full hearing.[9] Perhaps the easiest way to demonstrate the folly in the majority's position is to suppose the statute did not provide for immediate temporary reinstatement but instead provided for a greatly expedited full and fair hearing. No one, I think, would argue that it would pass constitutional muster to compel reinstatement if the unproven claim at that hearing had not been wholly frivolous. However, effectively, that is now the case before us.

II.

TEMPORARY REINSTATEMENT CEASES WHEN THE SECRETARY DECIDES NOT TO PURSUE AN INDIVIDUAL'S COMPLAINT OF DISCRIMINATION.

A complainant may receive temporary reinstatement if the Secretary finds within an expedited time frame that the claim is not frivolous and files a complaint with the Commission. The Secretary then continues to review the claim. Without a doubt, if the Secretary decides not to follow through as an advocate for the complainant, temporary reinstatement ends. *Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Rev. Comm'n*, 700 F.3d 297, 310 (7th Cir. 2012); *North Fork Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 691 F.3d 735, 744 (6th Cir. 2012). This is the established law of the Commission.

By failing to appeal the ALJ's decision, the Secretary gives up on its complaint and accepts the ALJ's decision that the operator did not discriminate within the meaning of 30 U.S.C. § 815(c). There is no reason to treat this conclusion by the Secretary differently from a conclusion by the Secretary after an investigation, that discrimination did not occur.

Indeed, consider the scenario in which the Secretary files a complaint after an investigation but, after later discovery, determines discrimination did not occur. Certainly, the Secretary is not required to pursue a case in which the Secretary no longer believes a finding of discrimination may be made. If the Secretary withdraws from a case after filing a complaint, the parties are in the same position as if the Secretary had not filed a complaint in the first place. This policy must apply when the Secretary decides to withdraw a previously filed complaint and

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[9] The majority inserts a long passage apparently premised upon the false thought that the due process issue here is the time between the ALJ's decision and the issuance of the opinion in this particular case. Certainly, that could be argued. However, as stated repeatedly, the primary issue here is the balance of rights after the ALJ hearing. Moreover, if the argument did turn upon the palpable neglect of the Commission, the majority makes the argument that the parties did not brief the issue. Slip op. at 18. The parties hardly could brief constitutional issues raised by Commission's neglect before it occurred. Certainly, no one could argue that the Commission has considered this case in a "timely" manner in this case. *Armstrong v. Manzo, 380 U.S.* at 552; *Mathews v. Eldridge*, 424 U.S. at 334. This claim by the majority is of a kind with its claim that there is no commonsense meaning of a full and fair hearing. As the Supreme Court has explained, the commonsense meaning is a hearing at a meaningful time and in a meaningful manner. The nature of the required hearing may vary by the circumstances. However, no-one could argue that the ALJ hearing in this case was not a full and fair hearing. The Commission is not a "gatekeeper, preventing meritless appeals." Slip op. at 18-19. If the Commission does not take an appeal, the appellant has a right to appeal to a United States Circuit Court of Appeals.

must also apply when the Secretary gives up its claim and accepts an ALJ's decision of no discrimination.

Yet, the majority today finds that if an ALJ finds after a full hearing that discrimination did not occur and the Secretary decides not to pursue the claim further, the Secretary's decision not to prosecute the case is irrelevant, and temporary reinstatement continues through a lengthy appeals process despite the absence of the Secretary. I cannot join my colleagues in finding that Congress could mean to create a nonsensical procedure so that, when the Secretary drops out before a hearing, temporary reinstatement ceases, but if the Secretary drops out after a full hearing finds no discrimination, temporary reinstatement continues.

In summary, the Secretary contends that after the Secretary no longer supports or proposes a finding of discrimination, the "temporary" reinstatement must continue through an appeal to the Commission and then through possibly multiple appeals because many months previously the Secretary filed a complaint before an ALJ. Given the Commission's record of taking months to issue decisions and the time inevitably involved in further appeals, final action on the discrimination complaint by a circuit court of appeals could not be reached until July 2025 at the earliest.[10] Temporary reinstatement would have lasted a year from its initial grant and then another twenty months on appeal, meaning temporary reinstatement would continue long past a ruling of no discrimination by an ALJ after a full and fair hearing.

III.

THE TEXT OF THE MINE ACT REQUIRES REINSTATEMENT END 30 DAYS AFTER ISSUANCE OF THE ALJ'S DECISION.

The Mine Act states that temporary reinstatement shall be ordered pending " final order on the complaint." 30 U.S.C. § 815(c)(2). Historically, when determining the final order date, the Commission has relied on the general rule pertaining to appeals of ALJ decisions. *See Sec'y ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999).[11] This rule states that "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission…" 30 U.S.C. § 823(d)(1).

[10] In this case, rather than fight the Secretary's demand for continued temporary, the operator has continued to make reinstatement payments for more than a year after the ALJ decision.

[11] In *Bernardyn*, the Commission found that section 113(d)(1) of the Mine Act governs when a discrimination order becomes final for the purposes of determining when temporary reinstatement ends. *Sec'y ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999). The Commission, in that case, did not address the language contained in section 105(c)(2) and, as such, is not relevant to the issue currently before the Commission. However, to the extent that *Bernardyn* deviates from the Act, it should be overturned.

However, section 113(d)(1) conflicts with 105(c)(2) of the Mine Act which governs temporary reinstatement and discrimination proceedings. Section 105(c)(2) deals specifically with temporary reinstatement and provides that after temporary reinstatement is ordered, the Commission "shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. **Such order shall become final 30 days after its issuance**." 30 U.S.C. § 815(c)(2) (emphasis added).

Thus, one section of the Mine Act states that orders become final 40 days after a hearing with the ALJ unless the order is appealed, in which case, the final order date is extended. The other standard states that orders become final 30 days after the hearing and finality is not extended based on an appeal of the ALJ's initial decision. The conflict in these two sections of the Mine Act is a novel question that the Commission has not yet addressed. Accordingly, on July 6, 2023, the Commission directed the parties to file supplemental briefing to explain the apparent conflict between sections 113(d)(1) and 105(c)(2).

In the Secretary's supplemental brief, the Secretary argues that the statutory text and structure of the Act support applying the 40-day rule to determine when discrimination cases become final orders. This reading of the Act would have the Commission align the two sections by reading section 105(c)(2)'s 30-day rule to apply to Commission decisions, not ALJ decisions. Therefore, an ALJ's decision would become final after 40 days, unless appealed, when it would become final 30 days after the Commission's decision. The Secretary argues that this interpretation comports with basic principles of statutory construction, is in line with Commission precedent, and promotes the purposes of the Mine Act.[12] Importantly, the Secretary does not argue that the Mine Act is ambiguous, nor does the Secretary seek deference in support of that position.

The Secretary's attempted adherence to a textualist approach to reconciling these two sections fails in producing a standard consistent with the Mine Act. First, if all Commission orders are final 30 days after the Commission issues a decision on appeal, it seems odd that Congress, in its wisdom, would decide to randomly remind readers of this general proposition in the middle of a section on temporary reinstatement and discrimination proceedings. The Secretary and the majority do not explain why the 30-day rule would be inserted in section 105(c)(2). Thus, the Secretary's reading of the Act would relegate the 30-day rule in section 105(c)(2) to mere surplusage—redundant language.

Second, the Secretary's reading ignores the fact that section 105(c)(2) refers to the order issued after hearing and based on findings of fact. The Federal Mine Safety and Health Review Commission is an independent agency comprised of a core of administrative law judges and a five-member Commission that reviews Judge's decisions. The Mine Act uses the word "Commission" to refer to both the agency as a whole and just the appellate body. When section

[12] It bears repeating that an Assistant Secretary for Mine Safety and Health head of MSHA acknowledged in an addendum to his congressional testimony that temporary reinstatement is only effective "until the ALJ rules on the merits of the miner's discrimination complaint. INCREASING MSHA AND SMALL MINE COOPERATION: HEARING BEFORE THE SUBCOMM. ON EMPLOYMENT, SAFETY, AND TRAINING OF THE SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, 106th Cong. 174 (Comm. Print 1999).

105(c)(3) directs the "Commission" to afford an opportunity for a hearing, the section is referring to the agency, not the appellate body. The Commission, as an appellate body, does not hold hearings, nor does it make findings of fact. Those powers are reserved exclusively for the Commission's ALJs. Section 105(c)(2) requires that the order become final 30 days after a hearing and "based upon findings of fact." 30 U.S.C. § 815(c)(2). Accordingly, the text does not support an interpretation where the 30-day rule is applied to Commission decisions.

One of the most fundamental principles of statutory interpretation is *generalia specialibus non derogant*. This canon of interpretation instructs readers of the law that, where there is a conflict between a general provision and a specific provision, the specific provision prevails. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . .").

The Mine Act provides a general rule in section 113(d)(1) whereby the decision of an ALJ will become final in 40 days with the possibility that the final order will be further delayed pending appeal. This definition applies to a vast majority of cases before the Commission that primarily address alleged violations of mandatory health and safety standards. Section 105(c)(2), however, is specific to the small number of cases of discrimination that come before the Commission. This section prescribes novel concepts like an investigation by the Secretary into the miner's claims and temporary reinstatement, that warrant special treatment. In this special context, Congress instructed that the parties be afforded a hearing and should be issued an order based on findings of fact. Upon the issuance of that order, the section clearly states that the order becomes final in 30 days at which time temporary reinstatement ends. Section 105(c)(2) uses a different calculation for finality (30, rather than 40, days) and makes no mention of appeals. Given the clear instruction of this section based on the specificity concerning discrimination proceedings and the proximity to the language requiring the reinstatement to extend only to the "final order on the complaint," it is difficult to see how anyone could rationalize extending the termination date beyond 30 days.

Moreover, reading the Act to require that temporary reinstatement end after 30 days of an ALJ's finding of no discrimination avoids exacerbating the constitutional questions raised above. *See* sections I, II, *supra*. When interpreting the Mine Act, the Commission should also be mindful of the interpretive canon requiring readers of the law to avoid statutory construction that raises "grave and doubtful constitutional questions." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Contrary to the assertion of the majority, the application of the 30-day rule to ALJ discrimination decisions does not conflict with the purpose of the Mine Act. Temporary reinstatement is injunctive relief offered before a due process hearing and thus must be applied only insofar as the public interest in protecting a miner's income during a complaint outweighs the operator's innate interest in directing its workforce. The Mine Act offers temporary reinstatement, not to every miner who files a complaint, but rather, only to miners who have at least a nonfrivolous chance of prevailing on the merits of their discrimination claims. In the first instance, temporary reinstatement can be denied by the Secretary after a cursory examination of the facts of the case.

Applying the 30-day rule is in keeping with this principle. The miner in a section 105(c)(2) case would be temporarily reinstated until the ALJ issues a decision on the merits of

the discrimination case. If the ALJ finds that no discrimination occurred, the balance between the public and private interest shifts, and the miner is given 30 days of continued reinstatement to get their affairs in order before the period of reinstatement ends.

The majority seeks to apply a rule that is contrary to the purposes of the Act. By extending temporary reinstatement after the miner fails to prove discrimination on the merits, the majority creates a perverse incentive to appeal non-meritorious claims to extend temporary reinstatement for months or even years. This is not the result that Congress would have intended.

IV.

CONCLUSION

I join my colleagues in finding that substantial evidence supports the ALJ's finding of no discrimination and his finding that the operator should have reported the injury. I cannot vote to affirm a procedure that continues temporary reinstatement under a nonfrivolous claim not tested by any factual or creditability determinations after an ALJ finds after a full hearing that discrimination did not occur. After a full and fair hearing, the balance of rights falls to the employer against a nonfrivolous claim awarded with only the barest minimum of rights.

William I. Althen

William I. Althen, Commissioner

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