

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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OCT 13 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of J.S.S.,
Complainant,

v.

NICHOLAS CONTURA, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2016-615-D
MSHA Case No.: HOPE-CD-2016-05

Mine: Jerry Fork Eagle Mine
Mine ID: 46-08787

DECISION AND ORDER
REINSTATING J.S.S.

Appearances: Pollyanna E.F. Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, PA, Representing Respondent

Before: Judge Steele

On September 16, 2016, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner James Steven Spencer.¹ ("Complainant, Spencer, or JSS") to his former position with Nicholas Contura, LLC, ("Nicholas Contura" or "Respondent") at Jerry Fork Eagle Mine pending final hearing and disposition of the case.

¹ In order to preserve the Complainant's privacy regarding health and medical status pursuant to the Health Insurance Portability and Accountability Act of 1996, the miner was referred to by his initials in the pleadings. However, prior to hearing, the Complainant signed an Authorization to Disclose Health Information form authorizing the Department of Labor to disclose and use Complainant's health information for the purpose of litigation or potential litigation. Joint Stipulations, ¶25 ("Stip.").

The application followed a Discrimination Complaint filed by J.S.S. on August 18, 2016, that alleged, in effect, that his termination was motivated by his status as a Part 90 miner.² The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate J.S.S. to his former position or a comparable position, within the same commuting area and with the same rate of pay and benefits he received prior to his discharge.

Respondent filed a timely motion requesting a hearing regarding this application on September 26, 2016, wherein it summarized its position. A hearing was held in South Charleston, WV, on October 6, 2016, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.³

For the reasons set forth below, I grant the application and order Nicholas Contura LLC to temporarily reinstate James Steven Spencer.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

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

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.⁴ *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal*

² 30 C.F.R. Part 90 contains the mandatory health standards for coal miners who have evidence of the development of pneumoconiosis.

³ Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator’s request. 29 C.F.R. §2700.45(c).

⁴ “Substantial evidence” means “such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229

Co., 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining “whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and federal circuit courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). “Courts have recognized that establishing ‘reasonable cause to believe’ that a violation of the statute has occurred is a ‘relatively insubstantial’ burden.” *Sec’y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

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

In the instant matter, the Secretary and Spencer need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Petition for Temporary Reinstatement

On August 18, 2016, Spencer executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

(1938)).

During a company change over I was not hired back due to being a Part 90 miner. I was the only person required to take a physical or breathing test.

I would like to be reinstated to my previous job classification as supply motor operator. I would like to be reimbursed for all back pay, medical bills for my family and I and other expense incurred due to the loss of my job. [sic].

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the September 16, 2016, Declaration of Kelly Acord, a Special Investigator employed by the Mine Safety and Health Administration (“MSHA”). Acord made the following findings and conclusions:

- 2) As part of my responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). In this capacity, I have investigated the discrimination claim filed by J.S.S. (the “Complainant”) on August 18, 2016. My investigation to date has revealed the following facts:
 - A. On August 18, 2016, J.S.S. filed a complaint alleging discrimination that commenced July 25, 2016 and resulted in his firing on August 15, 2016, after he had exercised his Part 90 option at the mine.
 - B. At all relevant times hereinafter mentioned, Nicholas Contura, LLC was a “person” within the meaning of § 105(c) and within the definition of § 3(f) of the Act. 30 U.S.C. § 802(f).
 - C. The Complainant was employed as a Supply Motor Operator at the mine, and, therefore, is a “miner” within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).
 - D. The Complainant worked for Alex Energy, Inc. (a subsidiary of Alpha Natural Resources, Inc.) at the mine for approximately two years until August 2016. He has approximately 34 years of coal mining experience.
 - E. On May 4, 2016 the Complainant exercised his Part 90 option under the Mine Act.
 - F. By the end of May, the Complainant was moved from his position as a continuous miner operator to a less dusty position as a supply motor operator to satisfy the Part 90 requirements. Alex Energy, Inc. started running respirable dust samples on him as required by Part 90. He was still paid the rate of a continuous miner operator, which is typically higher than the rate paid to a supply motor operator.
 - G. A week or two after moving to the supply motor operator position, the Complainant went on short term disability related to hernia surgery. The Complainant's personal doctor cleared him to return to work by July 25, 2016.
 - H. At this time mine controller Alpha Natural Resources, Inc. was going through bankruptcy proceedings. By June, it appeared Nicholas Contura, LLC would be

purchasing the mine as the company prepared job offer letters for active miners who were working at that mine at that time.

- I. A job offer letter dated June 20, 2016 was prepared for the Complainant, however it was never delivered. This letter outlined a process under which all active employees would be retained when Nicholas Contura, LLC took over operation of the mine. Under this process, Nicholas Contura, LLC required any inactive employee on temporary disability to undergo a Functional Capacity Evaluation (“FCE”) demonstrating the miner’s ability to perform essential functions of the job. Active miners were not required to undergo an FCE.
- J. At some point in July, human resources manager Robert Blake asked the Complainant to obtain a drug test at the training center on mine property. The Complainant’s drug test came back fine.
- K. On July 25, 2016, the day before the mine sale, Blake and Safety Manager Randy Taylor asked to meet with J.S.S. At this meeting Blake and Taylor told the Complainant he needed to take a pulmonary capacity test and warned him he would not be retained by Nicholas Contura, LLC if a physician determined he had complicated coal workers pneumoconiosis. The Complainant responded that they knew he had coal workers pneumoconiosis because he was a Part 90 miner and he accused them of trying to terminate his employment on this basis.
- L. At no time was the Complainant required to undergo a FCE related to his hernia injury.
- M. On August 4, the Complainant travelled to see the respiratory specialist designated by Nicholas Contura, LLC. A therapist administered a breathing test, but no x-rays were taken and he did not see a doctor.
- N. Dr. Charles E. Porterfield issued a letter dated August 12 stating “[Complainant] has complicated pneumoconiosis on chest x-ray/CT scan and should not be further exposed to coal dust.” It appears Dr. Porterfield relied on an old chest x-ray in making his diagnosis as no new x-rays were taken.
- O. The Complainant had previously been diagnosed with complicated pneumoconiosis. According to Dr. Afzal Ahmed, the Complainant’s September 30, 2015 chest x-ray showed small opacities of q/r shape in upper, middle, and lower zones of both lungs with a profusion of 2/1, indicators of complicated pneumoconiosis. This diagnosis was the basis for the Complainant’s exercise of his Part 90 rights in May 2016.
- P. On August 15, Blake called the Complainant and told him Nicholas Contura, LLC would not be keeping him on at the mine. The following day, an Alpha Natural Resources, Inc. human resources manager called and told the Complainant it was his last day with Alpha and offered him Cobra insurance and an 80-hour severance package.
- Q. Most of the officers under the new management remained the same, including human resources manager Blake and safety manager Taylor. The mine was idled for only one day in order to prepare for the sale. After the mine sale, all active

miners were retained to continue to work at the mine. Miners retained their seniority and vacation after the transfer.

- 3) There is reasonable cause to believe that the Complainant was discharged because he engaged in protected activity when he exercised his Part 90 option under the Mine Act. J.S.S. suffered an adverse action when he was discharged on August 15, 2016.
- 4) Based on my investigation to this date, I have concluded that there is reasonable cause to believe that the Complainant was discharged because he engaged in the protected activity of exercising his Part 90 option. I have concluded that the complaint filed by Complainant was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-5. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

Joint Stipulations:

Prior to hearing, the parties submitted the following Joint Stipulations:

- 1) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 (“the Act”).
- 2) Alex Energy, Inc. was an affiliate of Alpha Natural Resources, Inc.
- 3) Alpha Natural Resources, Inc. and 148 related companies, including Alex Energy, filed a chapter 11 case under Title 11 in the United States Bankruptcy Court for the Eastern District of Virginia (Richmond Division) on August 3, 2015, Bankr. Case No. 15-33896.
- 4) Alex Energy, Inc. was operator of the Jerry Fork Eagle Mine in Nicholas County, West Virginia, until July 25, 2016.
- 5) Nicholas Contura began operating the Jerry Fork Eagle Mine on July 26, 2016 and continues to operate this mine.
- 6) Nicholas Contura is an affiliate of Contura Energy.
- 7) Contura Energy was formed and acquired certain assets of Alpha Natural Resources, Inc. out of the bankruptcy, including those that constituted the Jerry Fork Eagle Mine.
- 8) The products or operations of the Jerry Fork Eagle Mine enter or affect commerce, within the meaning and scope of Section 4 of the Act.
- 9) Jerry Fork Eagle Mine is a mine as that term is defined in 30 U.S.C. 802(h).
- 10) Nicholas Contura is an "operator" as defined in Section 3(d) of the Act at Jerry Fork Eagle Mine.
- 11) Operations of Nicholas Contura at the Jerry Fork Eagle Mine are subject to the jurisdiction of the Act.
- 12) Nicholas Contura is a "person" within the meaning of § 105(c) and within the definition of § 3(f) of the Act. 30 U.S.C. 802(f).

- 13) As of July 25, 2016, Complainant was employed as a Supply Motor Operator at the Jerry Fork Eagle mine, and, therefore, was a "miner" within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).
- 14) Complainant worked for Alex Energy, Inc. at Jerry Fork Eagle Mine for approximately two years until August 2016.
- 15) On May 4, 2016 Complainant exercised his Part 90 option under the Mine Act.
- 16) By the end of May, Complainant was moved from his position as a continuous miner operator to a position as a supply motor operator to satisfy the Part 90 requirements in part because the respirable dust limit for Part 90 miners would be reduced to 0.5mg/m³ on August 1, 2016 and such new limit would exceed the levels of respirable dust in the continuous miner position.
- 17) Complainant was off work from June 6, 2016 to July 25, 2016 for nonwork-related hernia surgery.
- 18) After moving into the supply motor operator position, Complainant was still paid his same rate of \$32.78 per hour.
- 19) Contura Energy prepared a job offer letter dated June 20, 2016 addressed to Complainant, but it was never delivered because he was absent on short term disability while having hernia surgery. Such offer had certain contingencies.
- 20) Immediately prior to July 25, 2016, Robert Blake worked as Brooks Run North Human Resources Manager for Alex Energy.
- 21) As of July 26, 2016, Robert Blake became Human Resources Manager for Nicholas Contura, LLC.
- 22) Immediately prior to July 25, 2016, Randy Taylor worked as Safety Manager for Alex Energy.
- 23) As of July 26, 2016, Randy Taylor became Safety Manager for Nicholas Contura, LLC.
- 24) The drug test taken by Complainant at the Nicholas Contura Training Center on July 19, 2016 was negative for the presence of drugs.
- 25) On September 29, 2016 Complainant signed an Authorization to Disclose Health Information form authorizing the Department of Labor to disclose and use Complainant's health information for the purpose of litigation or potential litigation.

Resp. Prehearing Statement, 2-5.⁵

Summary of Testimony

James Steven Spencer was most recently employed as a supply motor operator at Alex Energy's Jerry Fork Eagle Mine. Tr. 19. He has worked continuously in mining since 1982, first

⁵ Hereinafter, the transcript of the proceeding shall be referred to as "Tr." The Secretary's exhibits shall be referred to as "GX" followed by the number. The Respondent's exhibits shall be referred to as "RX" followed by the number.

running a cut machine and then became a continuous miner operator. Tr. 20. He worked at Jerry Fork Eagle Mine for the two years prior to the hearing, with all but the last two weeks as a continuous miner operator. Tr. 19. Prior to working at the Jerry Fork Eagle Mine, Spencer had worked for Massey and Alpha Natural Resources since 2001. Tr. 19-20. He has never been formally or informally disciplined and has never been late to work. Tr. 20-21.

Nicholas Contura LLC is a new company that purchased certain mine assets from Alpha Natural Resources' Alex Energy. Tr. 82. The sale from Alpha to Nicholas Contura was scheduled to occur on July 25, 2016, but it was carried over to July 26 due to various complications. Tr. 85. Most of the miners and management working at the mine were transferred to the new company after the bankruptcy. Tr. 60-62. The miners who were transferred over retained their seniority. Tr. 62. The mine was shut down for one day, on July 25, to facilitate the purchase. Tr. 62.

On June 20, 2016, offer letters were prepared to transfer employees from Alex Energy to Nicholas Contura. Tr. 83-84. An offer letter was prepared but never sent to Spencer. Tr. 47, 83; GX-3. In the section labeled "proposed effective date," it states, "if you are away from work due to disability at the time of the closing on the company's purchase of Alpha assets, then your employment will also be contingent upon you presenting a medical release to return to work, passing a functional capacity evaluation (FCE), demonstrating your ability to perform the essential functions of the job, with or without reasonable accommodation." Tr. 48; GX-3. At hearing, Spencer testified that he understood the purpose of the FCE as testing one's ability to perform their job. Tr. 49. Though the offer letter had a provision for miners who were out of work due to disability, it was not sent to those miners. Tr. 91.

Spencer is a Part 90 miner, which means that he must be provided a job that has less dust while maintaining the same rate of pay.⁶ Tr. 21. He was diagnosed with complicated pneumoconiosis,⁷ which is also known as black lung, in September 2015 by Dr. Afzal Ahmed.⁸ Tr. 21-22. Spencer filed for black lung benefits through the State of West Virginia in September 2015, but was not awarded any benefits because he passed his breathing test. Tr. 22-23. He has not filed for federal black lung benefits. Tr. 23.

Spencer told Alex Energy that he filed for state black lung benefits and that he was a Part 90 miner. Tr. 23. On December 10, 2015, Spencer signed a release for HealthSmart to release information regarding his occupational disease to his employer for "purposes related to [his]

⁶ Part 90 "establishes the option of miners who are employed at coal mines and who have evidence of the development of pneumoconiosis to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift is continuously maintained at or below the applicable standard as specified in § 90.100." 30 C.F.R. § 90.1.

⁷ Complicated pneumoconiosis occurs when a pattern of dust fills one's lungs and stays there. Tr. 22.

⁸ Dr. Ahmed is a B Reader, which is a special class of reader denominated by the government for reading black lung X-rays. Tr. 51.

occupational disease claim only.” Tr. 41-43; GX-2. Spencer understood this to mean that his medical information could only be released for purposes of his black lung benefits claim. Tr. 43-44.

After becoming a Part 90 miner, Spencer was transferred to a supply motor operator position, which has less dust exposure than his previous position as a continuous miner operator. Tr. 24. The company transferred Spencer because the dust limit for Part 90 miners was scheduled to be reduced from 1 to .5 milligrams per cubic meter on August 1, 2016. Tr. 53. When Spencer was being sampled for dust before his medical leave, the results were less than half a milligram, but they showed some level of dust exposure. Tr. 54. Spencer agreed that any job at the mine would have some exposure to dust. Tr. 54. Spencer worked as a motorman for two weeks before he took medical leave for hernia surgery.⁹ Tr. 25. Though the motorman position typically pays less than the continuous miner position, under Part 90 his pay remained the same. Tr. 25.

Prior to Spencer’s hernia surgery, he had taken medical leave for open heart surgery, lower lumbar surgery, knee surgery, and to have a cyst removed from his back. Tr. 26-27. In previous instances, he always returned to work following the surgeries by providing a work release from his doctor. Tr. 27, 64-65. He was never previously required to take a breathing test before returning to work. Tr. 27.

While Spencer was on short-term disability leave, he heard from others at the mine that job offer sheets were being distributed and had to be submitted by July 15, 2016. Tr. 28. Spencer reached out to Alex Energy Mine Superintendent Dave Tharp and Human Resources Manager Robert Blake.¹⁰ Tr. 28. They told Spencer not to worry about submitting paperwork, and “we’ll take care of it when you come back. We’ll get you fixed up when you come back.” Tr. 29. On July 18, Spencer followed up with Tharp and Blake. Tr. 29. He told Tharp that he had an appointment with his personal doctor, Dr. Bandy Mullins, on July 21 and anticipated being released to come back to work. Tr. 29. Tharp told Spencer to call Blake to tell him, and Spencer did so. Tr. 29. Blake told Spencer that he had to have a drug test, and invited Spencer to get it performed at the Britten building on mine property. Tr. 30. Spencer took the drug test on July 19, and passed. Tr. 30, 32.

While on mine property, Spencer ran into Alex Energy safety director Bill Kell, as well as Robert Blake. Tr. 31. Spencer was in the middle of running his preventive dust measures for the motorman job, and Kell asked him if he would be able to return to work on Monday, July 25.¹¹ Tr. 31-32. Spencer responded that he believed he would be released by then. Tr. 31. Kell

⁹ Though Spencer believed that his hernia was likely work-related, he did not file a workers’ compensation claim. Tr. 25.

¹⁰ Nicholas Contura human resources manager Robert Blake testified on behalf of the Respondent. Tr. 81-82. Prior to working for Nicholas Contura, Blake worked for Alex Energy and Alpha Natural Resources at the Jerry Fork Mine and Power Mountain Prep Plant in the same capacity. Tr. 82.

¹¹ Preventive dust measures are used to check dust levels due to Spencer being a Part 90 miner. Tr. 32.

told Spencer that he would get Spencer's pumps ready for Monday, and said to tell Blake that he would be returning to work then. Tr. 34. Spencer called Blake and told him he would return on Monday, and Blake responded, "Okay, I'll see you Monday," but then before he hung up, said, "Wait, wait, let me run this by higher-ups and make sure all is in order." Tr. 34.

At Spencer's July 21 doctor's appointment, Spencer's personal doctor, Dr. Bandy Mullins, gave Spencer a release to return to work, starting July 25, 2016. Tr. 25-26, 33; GX-1. Spencer testified that after he was released on July 25, he was able to perform the duties of a motorman. Tr. 49.

Blake called Spencer the next morning, Friday July 22, at 9:00 a.m. and told him that he would have to go to a physical. Tr. 35. Spencer believed that the physical would be to test his ability to lift because of his hernia surgery. Tr. 35.

On July 25, Blake called Spencer and told him that he needed to come to the main office at the mine because Kingston Mine safety director Randy Taylor and he needed to talk to Spencer.¹² Tr. 36. At the meeting, Taylor and Blake told Spencer that in order to return to work he would have to have a breathing test. Tr. 36-37. Blake said, "You can't pass that, can you?" Tr. 37. Spencer responded that he had always previously performed well on his breathing test, and asked if there would be additional X-rays. Tr. 37. Blake said that there likely would be, and Spencer responded that an X-ray would show pneumoconiosis. Tr. 37. Blake responded, "You're not complicated, are you?" Blake was aggravated at this question because they were aware that he had complicated pneumoconiosis due to his status as a Part 90 miner. Tr. 37. He believed that the comment was made because he was a Part 90 miner. Tr. 38.

At hearing, Spencer testified that though people don't say anything directly about Part 90 miners, "there is a shadow over Part 90 miners." Tr. 38. Because they require less dust exposure, such miners are often treated as a nuisance. Tr. 38. Spencer felt that they were trying to get rid of him because he was a Part 90 miner. Tr. 38. Blake told Spencer that if the test came back showing that he had complicated pneumoconiosis, he would not be offered a position at Nicholas Contura. Tr. 38. Spencer described the atmosphere at the meeting as "tense" because his experience with Blake led him to believe that "something definitely was...up." Tr. 39.

After the meeting, Taylor told Spencer, "Hey, I hope you go down there and take your test and everything comes back and you're back down there at Jerry Fork on a motor." Tr. 39. Spencer believed that this meant that if he passed the breathing test, he could come back to work. Tr. 39.

The company directed Spencer to see Dr. Charles Porterfield, and they paid for the appointment. Tr. 40. Spencer went to Dr. Porterfield's office in Beckley, West Virginia, for his FCE and pulmonary capacity test. Tr. 39. Spencer did not see a doctor during this visit, or have an X-ray taken. Tr. 40. He did not bring any medical records or his black lung benefits

¹² Nicholas Contura safety manager Randy Taylor testified at hearing on behalf of Respondent. Tr. 94. Prior to working for Nicholas Contura, Taylor was the safety manager for Kingston Mining, which was a subsidiary of Alpha. Tr. 94.

paperwork to the visit. Tr. 40-41. Instead, he saw a respiratory therapist named Teresa Hughes, who performed the breathing test.¹³ Tr. 40. Hughes told Spencer that he did all right on his breathing test. Tr. 40.

Dr. Porterfield faxed a letter to Nicholas Contura LLC on August 10, 2016.¹⁴ GX-5. It states that the pulmonary function studies demonstrates a slight reduction in FVC and FEV1 with normal ratio. Tr. 69. It further states that “Volume studies demonstrate a slight increase in the RV/TLC ratio. Diffusion is normal.” GX-5. Special Investigator Kelly Acord testified that he understood this diagnosis to be positive, meaning that Spencer passed his breathing test.¹⁵ Tr. 69-70.

Blake received the August 10 letter from Dr. Porterfield and sent it to management because there was no interpretation in it. Tr. 87-88. Management told Blake to contact Dr. Porterfield’s office and “ask for an interpretation,” which Blake did. Tr. 88. Blake also provided Dr. Porterfield with certain medical records for Spencer. Tr. 88. Blake could not recall specifically which records he sent, but he believed that he at least sent Dr. Ahmed’s diagnosis. Tr. 93. In response, Dr. Porterfield sent a second letter on August 15, 2016, which reads in full, “Mr. James S Spencer has complicated pneumoconiosis on chest x-ray/CT scan and should not be further exposed to coal dust. If you have any further questions feel free to call or write.”¹⁶ Tr. 88; GX-5. Blake reported this to management, and testified that as a result there was a decision not to offer Spencer a job. Tr. 88.

Acord interviewed Dr. Porterfield, and Porterfield confirmed that he did not examine Spencer. Tr. 70. Instead, his technician, Teresa Hughes, examined him. Tr. 70. Porterfield said that based on that examination he felt that Spencer could function as a coal miner. Tr. 70. Porterfield said that his second letter was based primarily on the X-ray and CT scan that he received from Blake. Tr. 70. Dr. Porterfield told Acord that he could not recall why the two letters were sent five days apart. Tr. 75.

On August 12, Tharp told Spencer that Nicholas Contura might not have to take anyone back who was on short-term disability. Tr. 44. On or about August 15, Spencer called Blake to find out the results of his breathing test, and Blake said he would check and get back to him. Tr. 45. Blake called Spencer back and told him that due to Dr. Porterfield’s findings they did not

¹³ No evidence was presented as to the qualifications of Teresa Hughes.

¹⁴ The letter is not dated, but has a facsimile transmission mark that indicates it was sent on August 10, 2016.

¹⁵ District 4 MSHA Special Investigator Kelly Acord was the primary investigator on Spencer’s case, while Perry Brown also worked as a special investigator on the case. Tr. 70. Kelly Acord testified for the Secretary at hearing. Tr. 58. He has been employed with MSHA since March 2005, starting as a general inspector for two and a half years before moving to the special investigation department. Tr. 59.

¹⁶ The letter is dated August 12, 2016, but the facsimile transmission mark indicates that it was sent on August 15, 2016.

have a position for him at Nicholas Contura. Tr. 45. The following day, Spencer spoke to Alpha Natural Resources human resources director Kyle Bane, and Bane told him that it was the last day of his insurance with Alpha and offered him a two-week severance package and COBRA insurance. Tr. 45. Bane further told Spencer that he believed it was wrong that he was being fired from the mine. Tr. 46.

Spencer believes that he was discriminated against because he was a Part 90 miner. 49-50. Spencer was aware of one other Part 90 miner at the mine, and Spencer believes that he is currently working for Nicholas Contura. Tr. 51-52. The other Part 90 miner was not on short-term disability, so the company did not have the opportunity to question him about his status or require him to take a functional capacity evaluation. Tr. 57-58, 73. Acord was told that there was one miner who was on workers' compensation for a foot injury that had to take some tests before returning to work. Tr. 71, 84. This miner was sent to Dr. Orr, who is a general practitioner, and only had to perform basic tests involving his leg movement. Tr. 72. He was then sent to Dr. Porterfield for a breathing test and passed. Tr. 72.

Findings and conclusions

The Secretary argues that Spencer engaged in protected activity when he exercised his Part 90 rights, and that the Respondent discriminated against him by firing him for exercising those rights.

The Respondent argues that its decision not to hire Spencer was unrelated to his status as a Part 90 miner, but rather had everything to do with Dr. Porterfield's letter. Because this letter stated that Spencer should not be exposed to any coal dust, and there are no jobs at the mine that meet such restrictions, Spencer was not offered a position. Further, the Respondent argues in its prehearing submissions that Spencer was not "fired," but rather not "hired," indicating that he was not a miner, but rather an applicant who is not entitled to temporary reinstatement under the Act.¹⁷

Spencer was a Miner Rather than an Applicant for Employment

Section 105(c)(2) of the Mine Act provides, in relevant part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.... [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.... [Emphases added.]

¹⁷ Though the parties appear to stipulate that, as of July 25, 2016, Spencer was a "miner" within the meaning of the Act, the Respondent raised this issue in a pre-hearing pleading, so this issue will be addressed. Stip. ¶13.

30 U.S.C. §815(c)(2). The Commission has interpreted the language of this provision as limited to miners, rather than applicants for employment.¹⁸ *Sec'y of Labor, MSHA, on behalf of Piper v. KenAmerican Resources, Inc.*, 35 FMSHRC 1969, 1971-72 (July 2013). However, multiple Commission decisions have not looked narrowly at a Complainant's status at the time of the adverse employment action, but rather at his status when he engaged in protected activity or when discriminatory actions were taken against him. *See Piper v. KenAmerican*, 35 FMSHRC 1969 (July 2013), *Sec'y on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 137 (Feb. 2016).

In *Piper*, 35 FMSHRC 1969, the Complainant filed a discrimination complaint as a result of his inclusion in a reduction in force, alleging that it was due to his making a prior safety complaint. The Secretary initially filed an application for temporary reinstatement, but several weeks later filed a motion to dismiss the application after determining that the facts disclosed during the investigation did not support a violation of the Act. However, in the interim, the company began recalling miners, and did not include Piper as one of the recalled miners. As a result, he filed a second discrimination complaint, alleging that he was being discriminated against because he filed the initial discrimination complaint. The Commission affirmed the ALJ's finding that the Complainant was at all times a "miner," rather than an applicant for employment because the "genesis" of the complaint occurred while he was working as a miner. 38 FMSHRC at 1972.

Similarly, in *Pappas*, 38 FMSHRC 137, the Complainant engaged in protected activity, made a discrimination complaint, and was reinstated as part of a settlement when the mine was owned by Martin Marietta. However, when CalPortland began taking steps to purchase the mine it contacted Martin Marietta's human resources manager for advice on hiring decisions. The ALJ concluded that the Complainant, who was not rehired by CalPortland, was a "miner" when he applied for the job, stating:

Pappas was no stranger off the street applying for a position at the Oro Grande cement plant but had an extensive employment history at the mine. Pappas's discrimination complaint relates back to decisions made while he was still employed at the mine CalPortland's structured termination and application process for the Oro Grande workforce does not materially alter Pappas's status as a miner eligible for temporary reinstatement under section 105(c)(2) of the Mine Act.

38 FMSHRC at 140 (quoting ALJ decision). The Commission affirmed the ALJ's findings and noted that "the courts have taken a realistic view of these transactions, and acknowledged that employees caught up in these corporate changes nevertheless may be protected." *Id.* at 143. It is further noted that the transition from the asset seller to the purchaser "was almost seamless. Most of the CalPortland employees were working at the same mine, and the same jobs they held when Martin Marietta owned the assets, and the human relations director remained the same." *Id.*

The facts as presented at hearing in the instant case are even more compelling in finding that Spencer was a "miner." Spencer exercised his Part 90 miner rights with Alex Energy on

¹⁸ The term "miner" is defined in section 3(g) of the Act, 30 U.S.C. § 802(g), as "any individual working in a coal or other mine."

May 4, 2016, prior to the purchase by Nicholas Contura. Tr. 23; Stip. ¶15. As a result, Spencer was moved from his position as a continuous miner operator to a position as a supply motor operator. Stip. ¶16. Spencer then went on short-term disability leave from June 6, 2016, to July 25, 2016, for hernia surgery. Stip. ¶17. On July 26, 2016, Nicholas Contura completed its purchase of the Jerry Fork Eagle Mine and began operating it. Tr. 85; Stip. ¶5. Much of the personnel from Alex Energy, including human resources personnel and miners, continued their positions at the mine under Nicholas Contura, retaining their job titles and seniority. Tr. 60-62; Stip. ¶¶ 20-23. The decisions to make Spencer take a breathing test, and then not offer him employment at Nicholas Contura, was made in significant part by Blake and other human resources personnel that continued from Alex Energy. Tr. 31-40, 44-46. Further, the transfer of assets and personnel was so seamless that the mine was only shut down for one day to facilitate the purchase. Tr. 62.

According to these circumstances, Spencer remained at all times a miner. He had worked at the Jerry Fork Eagle Mine for two years. Tr. 19. Spencer was released to return to work on July 25, 2016, and should have been afforded the opportunity to do so. Instead, he was required to remain off work until such time as the mine purchase was complete, and then not offered employment with the new company.

Spencer Engaged in Protected Activity and Suffered an Adverse Employment Action

The Complainant engaged in protected activity when he exercised his Part 90 rights under the Mine Act. Part 90 provides coal miners who have evidence of the development of pneumoconiosis the option to work in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift is continuously maintained at or below .5 milligrams per cubic meter of air. 30 C.F.R. §§ 90.1, 90.100. Spencer exercised his Part 90 rights on May 4, 2016. Stip. ¶15. Part 90 was promulgated pursuant to Mine Act section 101(a), 45 Fed.Reg. 80,760 (1980), and Section 105(c)(1) lists as protected when “such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101.” 30 U.S.C. §815(c)(1). Therefore, the exercise of these rights is clearly protected activity under Section 105(c)(1) of the Act.

Further, Spencer suffered an adverse employment action when he was not offered continued employment at the mine.

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

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a **non-frivolous claim** that he engaged in protected activity with a connection, or nexus, to an adverse employment action.

Having concluded that Spencer engaged in protected activities and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather

than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, “the Secretary need not prove that the operator has knowledge of the complainant’s activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. The nature of exercising one’s Part 90 rights requires the miner to tell the company that he is exercising those rights. In the instant case, Spencer told personnel at Alex Energy that he filed for state black lung benefits and that he was a Part 90 miner. Tr. 23. Various Alex Energy personnel, including human resources manager Blake and safety manager Taylor, stayed on at Nicholas Contura. In various discussions and meetings with Spencer, these individuals made it clear that they knew of Spencer’s status as a Part 90 miner. Therefore, there is no question that the operator had knowledge of Spencer’s protected activity.

Coincidence in time between the protected activity and the adverse action

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

In the instant matter, Spencer was only at his Part 90 job transfer for two weeks before he left on short-term disability leave. Another seven weeks elapsed between the beginning of Spencer’s June 4 short-term disability leave and his July 25 release to return to work. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, “[h]ostility towards protected activity—sometimes referred to as ‘animus’—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee’s protected activity, the more probative weight it carries.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

In the instant case, there are a host of actions that could constitute animus towards Spencer’s protected activities. In the July 25 meeting Blake evinced a hostile view towards employees who had been diagnosed with pneumoconiosis. Though Blake was aware of Spencer’s condition, he insisted on asking him about his pneumoconiosis, “you’re not complicated, are you?” Tr. 37. Blake then told Spencer that if the test shows that he had complicated pneumoconiosis he would not be offered a position at Nicholas Contura. Tr. 38. These statements were made prior to Spencer visiting Dr. Porterfield’s office, and therefore contradict the Respondent’s argument that the only reason it did not offer Spencer his position at the mine was because of Dr. Porterfield’s second letter.¹⁹

In addition to these statements, the operator’s requirement that Spencer visit their doctor smacks of animus towards Spencer’s status as a Part 90 miner. Nicholas Contura’s policy of requiring employees who are out on disability at the time of the closing to receive an evaluation before returning to work is a reasonable means of testing whether the employee has fully recovered from the injury or illness that required him to take leave before returning to work. However, in this instance, Spencer was cleared by his doctor to return to work on July 25, which is one day prior to the closing. Therefore, he should have never been required to pass an FCE. Further, even if he had been required to pass an FCE, it should have been limited to matters related to his hernia surgery. Instead, the only examination Spencer received was to test his breathing. Tr. 40.

Following what appears to be Spencer’s passing his breathing test, as memorialized in Dr. Porterfield’s August 10 letter, the operator sent Porterfield Spencer’s medical records and asked for “an interpretation.”²⁰ Tr. 88. Based on a review of these medical records and whatever was requested of Dr. Porterfield, he issued a second letter, which in no way appears to be “an interpretation” of the first letter. GX-5. The first letter relates entirely to Spencer’s breathing test

¹⁹ It should further be noted that no evidence was presented at hearing as to the qualifications of Dr. Porterfield—who according to his letterhead is a Doctor of Osteopathic Medicine and a Fellow of the American Academy of Sleep Medicine—in reading and interpreting Spencer’s x-ray or CT scan.

²⁰ Based on the evidence presented at hearing, there are serious questions as to whether the operator was permitted to share Spencer’s medical records with Dr. Porterfield. Spencer signed a release with HealthSmart to release his medical records to his employer for “purposes related to [his] occupational disease claim only.” Tr. 41-43; GX-2. He did not release the operator to share those records in any way they chose. Further, it is distressing that at hearing Blake could not even recall which medical records he sent to Dr. Porterfield. Tr. 93.

in somewhat positive terms, whereas the second letter relates to a chest x-ray/CT scan that the company provided to the doctor. Dr. Ahmed took the scans in September 2015 and interpreted them to determine that Spencer had complicated pneumoconiosis. GX-4. However, he never stated that Spencer could not be exposed to any level of coal dust. But Dr. Porterfield, who never met Spencer or took any examinations or scans of his chest, interpreted Dr. Ahmed's scan to draft a single sentence diagnosis that stated that Spencer "should not be further exposed to coal dust." GX-5. Every step in this course of events evinces animus, and combined shows an arguable coordinated attempt to get rid of a Part 90 miner.²¹

Disparate Treatment

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

In the instant matter, the Respondent argued that one other Part 90 miner was retained at Nicholas Contura, as well as one miner who was on disability for a foot injury. Tr. 51-52, 71, 84. These miners are not similarly situated to Spencer, as neither was both a Part 90 miner and on short-term disability.

Conclusion

In concluding that Spencer's complaint herein was not frivolously brought, I find that there is reason to believe that Spencer engaged in a variety of protected activity. I further conclude that the Secretary has met its burden in showing that there was a nexus between Spencer's protected activities and the operator's declining to offer him his position at the mine.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant James Steven Spencer be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary

²¹ Indeed, Dr. Porterfield's cursory conclusion that a miner with complicated pneumoconiosis should not be exposed to any coal dust essentially nullifies Part 90 for such miners.

shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.*

William S. Steele

William S. Steele
Administrative Law Judge

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