FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 14, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **JEREMY JONES**, Applicant, v. KINGSTON MINING, INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2015-1007-D HOPE-CD 2015-12 Mine: Kingston No. 2 Mine ID: 46-08932

DECISION

Appearances: Lucy Chiu, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Complainant

Arthur Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA, for Respondent

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones ("Complainant") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012). A hearing was held on October 7, 2015, in Charleston, West Virginia. As noted below, temporary reinstatement matters require a minimal evidentiary burden, with the Secretary being required to show that a miner's complaint is not frivolously brought. Nevertheless, temporary reinstatement is not automatic; there is an evidentiary burden which the Secretary must meet. In this instance, for the reasons which follow, the Court finds that the Secretary presented too thin an evidentiary reed to meet its burden and therefore the Court finds that the application is frivolous.

Temporary Reinstatement Proceedings

The law on temporary reinstatements has been long established. The September 8, 2014, decision issued by Administrative Law Judge Zielinski provides a good summary and the Court borrows liberally from that decision. *See Sec'y on behalf of Lear v. Kenamerican Res., Inc.*, 36 FMSHRC 2432 (Sept. 2014) (ALJ). As the Judge there noted:

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"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 Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (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). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity; (2) that he suffered adverse action; and (3) 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 (Oct. 1980), *rev'd on other grounds*, 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).

Protected Activity

> A miner's ability to complain about safety issues is a fundamental right afforded and protected by the Act. Complaints made to an operator or its agent of "an alleged danger or safety or health violation," is specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). In addition, the Commission and the courts have recognized that, although not explicitly stated in the Act, a miner's refusal to work in conditions that he reasonably believes in good faith to be hazardous is also activity protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein.
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> . . . .
>
> It is well-established that the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. "It is 'not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.'" *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009) (quoting *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). *See also Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary's prima facie case, are simply not appropriate at this stage in the proceeding).

Id. at 2438-40.

Findings of Fact

Jeremy Jones, Complainant, testified. He was employed at the Respondent's Kingston No. 2 mine for 2 ½ years as an underground electrician. Jones has been a certified electrician for approximately 6 ½ years. Tr. 35. He was part of a five man electrical maintenance crew, which included Danny Laverty as the crew supervisor. Tr. 35-36. Greg Shrewsbury was the second-in-line supervisor. Tr. 36. Jones has never been disciplined while working at Kingston. *Id.*

Jones viewed himself as a safety advocate at Kingston in that he filled out "running right" cards. Tr. 37. It was Kingston, however, that asked him to fill out those cards twice a day. *Id.* Utilizing those cards, he would note "anything that [he] saw that was a safety issue . . . some of [those] safety issues, [he] addressed himself, if it was something that [he] could take care of." Tr. 38. Elaborating on the safety issues about which he reported, Jones stated that he

> reported damage to cables. That was almost -- that was a weekly, monthly thing that *we* did. I reported trash a number of times on the [roof] bolt machines. Dust bags that were left laying [sic], which is hazardous material. I reported -- *just normal -- just the normal safety things*. I reported the lights on the bolt machine. They were being covered, painted, packed around with mud, which caused the -- caused them to melt and smoke real bad and could have caused a fire or smoke underground . . . .

Tr. 38 (emphasis added). Jones did not feel that the running right cards he submitted were actually anonymous, because he believed it would be easy to figure out the submitting individuals' handwriting on them. Tr. 39. When asked if he had the highest submission rate of running right cards when compared to the other electricians on his crew, Jones stated that he didn't know how his rate compared to the others. Tr. 39-40.

Turning to the issue of covering lights on roof bolting machines, Jones stated that the operators of those machines were "painting" the lenses,[1] a practice he viewed as hazardous because it caused the lights to heat up, melting the globe on the outside and risking a fire. Miners did this because the light hurt their eyes. Tr. 40. However, he viewed that practice as unnecessary as there is a switch to shut off the lights.[2] Tr. 40-41. The practice created work for Jones, requiring him to replace the globe and some of the wiring inside too, because they were getting burned up due to the heat retention. Tr. 41. As Jones described this, it "was something that *we* had continually complained about, wrote on our maintenance worksheets, and [he] addressed it on a number of occasions with [his] supervisors." Tr. 41 (emphasis added). When the Court inquired further about this problem, Jones agreed with the characterization that this problem of miners covering the lenses was a continuing issue during the entirety of his employment. Tr. 42. Further, Jones added that "when [he] would raise the issue . . . *the company would address it* with those [roof bolt] operators." Tr. 42 (emphasis added). To be sure that it understood Jones' recounting, that is, that it was the Court's understanding that the mine would address the issue, Jones confirmed that the mine did address it, although he then added, "if [he] went high enough." Tr. 42-43. Asked how the mine addressed it, Jones explained that "[t]hey would have a meeting with the men, or they . . . would address it in our daily safety meeting before we went underground. We had one every day." Tr. 43.

During his 2 ½ years at Kingston, Jones would raise the bolter light issue to Greg Shrewsbury and Daniel Laverty. Tr. 46. Jones believed that Laverty viewed the issue as simply complaining on Jones' part, not as a safety matter. *Id.* However, this was Jones' personal interpretation; he offered no remark by Laverty to support his view. Additionally, there was nothing unique about Jones' conduct in reporting this bolter light issue; *all* the electricians had a

[1] "Painting" was a general description. Jones actually meant that the miners would pack mud over the lenses. Tr. 41. Miners creatively tried various methods to cover the bolter's lights because the light bothered their eyes.

[2] Jones' electrical crew boss, Laverty, disagreed that one could simply shut off the lights, as the lights need to be on in order for the roof bolters to see what they are doing. Tr. 153-54. In addition, *all* the bolter's lights go off when one flips the light switch. Tr. 155.

checklist to note these issues. Tr. 47. Jones stated that, on the occasions when Laverty did not address the matter, he would go to Greg Shrewsbury. *Id.* When he did that, Shrewsbury "would immediately call somebody. He would usually call the superintendent or he would call the mine foreman, and there were times where he would tell Danny [Laverty] to go look at whatever it was that I had . . . an issue with." Tr. 47-48. Jones felt that Laverty didn't like his complaints about this, and he contended that there were times when Laverty was "short" with him and that he would send him to work by himself, instead of working with a group. Tr. 49-50. Often, Jones stated, the electricians work as a group, although he acknowledged that some work is done individually. Tr. 50.

Regarding Jones' reporting that trailing cables for shuttle cars were being anchored too far from dumping points,[3] when asked how often *he* would raise that issue, he responded, "[t]hat was something that *we* raised quite often. Several times a month, *we* would have problems." Tr. 55 (emphasis added). The Secretary then inquired, "When you say 'we,' do you mean you, or who [sic] are you talking about?" *Id.* Jones responded, "[m]e *and the other electricians*." *Id.* (emphasis added). This issue, as with the others issues Jones had spoken to, occurred "[s]everal times a week usually." Tr. 56. In this regard, Jones noted "*we* had a cable damage report that *we* turned in. So I mean, *we* turned in cable damage routinely. *We* had a report that we --"[4] Tr. 56 (emphasis added). Jones typically reported this chronic issue to Laverty and if he was dissatisfied with his response, he would tell Greg Shrewsbury about it. Tr. 57. When Jones would raise the issue with Laverty his usual response was for Jones to write it in his [i.e., Jones'] paper. Tr. 57-58. The other electricians on Jones' team followed the same reporting protocol, including elevating it to Shrewsbury if unsatisfied with Laverty. Tr. 58. Jones confirmed that Laverty's approach to this issue was the same *to all* of the electricians on the team, not just Jones. Tr. 58. As for whether Jones raised the cable issue more often than the other members of his electrical team, Jones stated, "I don't know how often -- I know that they raised awareness a number of times, because I was in the office when they did. But to say that they did it more than me, I really can't truthfully say that I did it more than everybody else." Tr. 59.

Next, the claim that roof bolt operators were not disposing of dust bags[5] properly was addressed. Jones spoke to this issue along with his parallel problem of trash left by roof bolt operators on their machines. For these matters, he reported the subject to Danny Helmondollar, as that was his area of responsibility. He raised this concern, "quite often," meaning several times a month. Tr. 60. The trash included potato chip bags and items such as boards and bolts

[3] Trailing cables were supposed to be anchored at the dumping point and also they were to be located in a straight line because otherwise it could run the risk of contact with rib plates and run the risk of cutting the cable, presenting a shock hazard. Tr. 55-56.

[4] Jones' response was then interrupted by the Secretary. Tr. 56.

[5] The dust bags refer to bags which collect dust during the operation of the roof bolting machines. Tr. 60. Jones' issue was the proper disposal of such bags once they had been filled and removed from the machine. Tr. 62. The bags would then be put in a trash bag, double bagged, and then tied up. Tr. 61. Jones' objection was that the bags were not then being removed from the mine. Tr. 61-62.

that were left lying around. Tr. 62. As with the other issues Jones had spoken to, the trash and dust bags were chronic problems during his tenure. Tr. 64. Similarly, Jones *was not* the only one who raised these issues. The Court inquired: "And so these other electricians raised the problem to the same supervisors? [Jones]: Yeah. Pretty much, yes." *Id.*

Having covered Jones' safety concerns, the Secretary's Counsel then turned to the Complainant's education about the temporary reinstatement process. Jones disclosed that he first learned of the subject when MSHA special investigator Humphrey came to his house. Tr. 64. This occurred sometime during early August 2015. Tr. 66. Humphrey was there on an entirely different matter having nothing to do with Jones' issues in this proceeding.[6] Tr. 64-65. During the conversation of the matter unrelated to Jones' discrimination complaint, which had not been made at that point in time, *Humphrey* began asking Jones questions about his being laid off and Humphrey informed Jones that he had rights. Tr. 65. Within a day of that visit, Jones then filed his discrimination complaint. Tr. 66. As Jones expressed it,

> So I didn't -- I did not know -- I knew that if -- if they fired me that, you know, for raising safety issues, that I had a case. But I did not know that if I was laid off -- I thought that was something totally separate. But Mr. Humphreys brought the law book in and showed me that I was still protected by the law, you know, even -- even during a layoff, if I felt like that I had been discriminated against.

Tr. 66.

Counsel for the Secretary then moved to introduce, for purposes of identification, Complainant's Exhibit 1, albeit for a limited purpose. This potential exhibit was the employee evaluation form for Jones, dated January 30, 2015. Tr. 70. Jones then stated that he recognized the handwriting on the form to be that of Danny Laverty. *Id.* The Secretary's questions related to the bottom of the exhibit, where comments were inserted for two subjects: what the employee need to improve and "other comments." Regarding the former, Laverty wrote: "Be more able to see the big picture and prioritize what needs to be done, possibly more electrical training." Tr. 70; Ex. C-1. Laverty's comments in the second box, which were hardly critical of Jones, as recorded on the form in January 2015, noted: "Works safe, Good about letting me know if he spots potential problems." Ex. C-1. The Court would expressly note Jones was not laid off until April 10, 2015, and this evaluation by Laverty, if anything, praised Jones raising potential problems.[7]

[6] The subject of Humphrey's visit to Jones' home was not disclosed.

[7] The testimony not having gone well with regard to this exhibit, the Secretary withdrew offering it, but it was later admitted in the record. Tr. 72; Tr. 159. When the Secretary rested, its case consisted solely of the testimony of the Complainant. No exhibits were entered into the record at that point in time.

Jones was then asked about his layoff of April 10, 2015. Jones disclosed that everyone knew that something was developing. Tr. 73-74. Jones "*had conversations with many of the men*, and what was going to take place, what did we think was gonna happen."[8] Tr. 74 (emphasis added). The Secretary then rested its case. Tr. 77.

Following the Secretary's evidentiary presentation, the Court then asked some questions of Jones, prior to Respondent conducting its cross-examination. Through that questioning, it was learned that Jones had a total of some 13 years of mining experience with various mines, with most of that in underground coal mining. Tr. 79-86. Jones agreed that during all of those years he was aware of MSHA's existence. Tr. 87. On cross-examination, Jones agreed that he worked on a maintenance crew for Kingston on the midnight shift. Tr. 89. Kingston is owned by Alpha Natural Resources. Tr. 91. Jones also agreed that the Running Right cards were encouraged to be filled out and were an Alpha-wide process. Tr. 92. In addition, Alpha did training for this at the Running Right Academy. Tr. 92-93.

In questioning Jones about some of the particulars he raised in his Complaint, Respondent's Counsel first addressed the trailing cables for the shuttle cars. Jones agreed that it was part of his job to make sure the cables were maintained in good repair.[9] Tr. 97. As to the lights being covered on roof bolters, Jones also agreed that it was part of his job to make sure that the lights were not covered up and if they were, it was part of his job to remedy that condition. Tr. 100. Sometimes the fix was a simple matter of washing off mud that had been applied to the lights, but other times the lights had been painted and this would require new globes to be installed. *Id.* Jones added that this was a cost to the company to replace those globes over and over. *Id.* Therefore, he agreed that the company *wanted* that practice of covering lights to stop. Tr. 101. Jones also agreed that he *and the other electricians* who were working on the maintenance shift would advise the day shift assistance chief, Mr. Shrewsbury, or Jarrod Birchfield, the chief electrician of this issue. Tr. 101-03.

[8] Although Jones then expressed his view that if there was a layoff, he would lose his job if Laverty had anything to do with it, this was mere conjecture, not credible evidence in any respect. Accordingly, it cannot be relied upon to prove anything, other than Complainant's personal perspective and therefore it is of no probative value to the issue before the Court of frivolousness.

[9] In yet another example demonstrating that Jones was really no different in raising safety concerns than the other electricians he worked with, Complainant told an anecdote of a miner who continued to damage the trailing cables. He related that it took a while to get that miner to stop that practice, but the key point is that all of his fellow electricians were complaining about this individual and *that the company took steps to stop the miner from continuing to damage the cables*. Tr. 111.

Turning to Jones' interview with MSHA special investigator Humphrey, which occurred on August 3, 2015, Jones agreed that it was at that time that he was advised of the temporary reinstatement provision and he learned that he was "protected by the law during a layoff."[10] Tr. 105-06. Still, while he asserted that he did not know of Mine Act protections when a layoff occurs, Jones acknowledged that he did know that employees cannot be fired for making safety complaints. Tr. 106. In fact, that protected right was part of his annual refresher training. *Id.* He also admitted that he knew there was a 60 day time frame to make such a complaint, but maintained that he understood that to apply only to an improper firing and that he did not know a layoff could be within those rights. Tr. 107. The Secretary then rested. Tr. 115.

Respondent then called Danny Laverty. At the time in issue, Laverty was the third shift maintenance foreman. Tr. 129. His coal mining experience spans some 41 years, all of it in maintenance. Tr. 133. The Complainant was part of Laverty's crew, working in the No. 3 section. Tr. 130. Laverty described his duties on that shift:

> The purpose of the midnight shift was doing maintenance, checking permissibility, keeping the equipment in permissible conditions, making sure the equipment was serviced, greased, oil changed, whatever needs to be done, any issues or things that might have caused them problems during the production shift, to try to fix those. Just a lot of preventive type maintenance . . . .

Tr. 131.

Addressing the matter at hand, Laverty explained the work that he and his crew, which included Complainant Jones, were to perform:

> [T]hey were -- generally at the start of the shift, they were given a work list to do. Part of it was generated from previous things that they might not have gotten to earlier, and some of it would come from things that might have happened during the shift just prior, for instance, the day shift or evening shift. And also, there were preventive maintenance programs that would come up as worksheets that they were also assigned to do. And they would have to . . . sign them, put their initials on stuff, check things off that they got, not check off things that they didn't get, kind of a checklist of stuff that they could do. They were expected, what they got done, to write down and turn it in when they got outside and sign it, put their names on it.

Tr. 134-35. Laverty agreed that it was common for all his electricians to note their concerns that they encountered during their work. Tr. 136. As he expressed it, "Sometimes the only way we have of knowing that we have an issue or a problem with something is if somebody will come and tell us." Tr. 138. He agreed that Jones brought items to his attention but the other

[10] Of course, if that is what was conveyed to Jones by MSHA's Investigator Humphrey, that he was protected by the law during a layoff, it was a gross oversimplification of a miner's reinstatement rights. Tr. 106. Layoffs per se are not protected.

electricians on his crew did so as well, and that Jones activity in this regard was "about the same as anybody else." Tr. 138-39.

Speaking to the issue of lights on the roof bolter being covered, Laverty acknowledged that it has been an ongoing problem and that roof bolter operators should not do that. Tr. 141-43. He also agreed that Jones probably brought instances of this occurring to his attention, but there was nothing unique about that, as he stated that "probably every [electrician] on that shift has come to [him] about -- about the lights." Tr. 143-44. Laverty did not ignore the issue; there were occasions when he would raise it to the chief electrician and to the safety director and it would be raised during safety meetings too. Tr. 145.

As for the issue of trash, as one of Jones' raised safety concerns, Laverty likewise acknowledged that miners leave their lunch trash on top of mining equipment and that it too was a continuing problem, presenting a fire hazard. Tr. 146-47. This subject was likewise brought up to the miners during meetings. Tr. 148-49. While he couldn't recall specifically if Jones raised the issue, his electricians had generally raised the matter with him. Tr. 146. As for the cable issue, another of Jones' safety concerns, Laverty agreed that electricians brought the condition of cables to his attention. Tr. 149-50. However, he added that noting damage to cables *was part of his electrician crew's job*. Tr. 150. Turning to the dust bag issue, Laverty similarly agreed that "somebody at some point mentioned to me that guys weren't getting rid of their dust bags properly," but he could not recall which individual noted the matter. Tr. 152.

Upon cross-examination, Laverty did not agree that Jones was more persistent about raising safety issues with him than other miners. Tr. 155. Counsel for the Secretary then revived her interest in admitting C-1, an exhibit offered for identification only during the Secretary's case in chief, but then withdrawn. Laverty agreed the exhibit was his employee evaluation of Jones, which evaluation he made on January 30, 2015. Tr. 156. It is difficult to determine how the evaluation supports the Secretary's case. As Counsel for the Secretary noted, in Laverty's comments about Jones he wrote: "Works safe and is good about letting me know if he spots potential problems." Tr. 156. The Court took note that the comment reflected that Jones "Works safe" and Laverty stated the obvious, that it was not a criticism but rather that it was "a good thing, that he works safe." Tr. 158. Similarly, when asked about his remark that Jones was "good about letting me know if he spots potential problems," that was a positive comment by him about Jones. Tr. 158. Exhibit C-1 was then admitted. Tr. 159.

The Respondent then called Greg Shrewsbury. At the time in issue he was employed at the Kingston No. 2 mine, where he was the assistant chief electrician. Tr. 164-65. Shrewsbury worked the day shift but this he would interact with those miners completing the night shift, as their times overlapped. Tr. 167. Electricians from that night shift would stop by his office as their shift ended and note needed parts and things that would require attention. Tr. 167-68. He encouraged them to do this because it reduces violations. Tr. 169. Complainant Jones would come by his office from time to time, but his visits were not more or less than the other electricians. Tr. 169.

Shrewsbury acknowledged awareness of the issue of lights being covered on roof bolters, describing it as a frequent issue and that it would be addressed in safety meetings. Tr. 171. Similarly, trash was described as a continuing issue and it too would be addressed at safety meetings. The problem would then lessen for a time and then arise again. Tr. 173.

Discussion

The essence of the Secretary's case is the claim that Complainant made safety complaints and that the mine operator, unhappy with Jones' safety advocacy, inappropriately applied its layoff so that Complainant would be laid off. Thus, apart from the late filing, the measure of whether this complaint was frivolously brought involves two elements: did Jones make safety complaints and, if so, was there a connection established between such complaints and the layoff. In a sense, a mine operator has its hands tied in this type of proceeding, as a temporary reinstatement proceeding is not the forum to consider competing claims about the legitimacy of the layoff procedures.[11] However, acknowledging the appropriateness of the limited inquiry, does not equate with an automatic or reflexive finding that a complainant need only assert that he raised "safety concerns" and then couple that with a claim that a mine utilized a suspect layoff system, to establish a non-frivolous claim. The act of challenging temporary reinstatements should not be preemptively deemed frivolous. The inquiry is whether the complaint itself is frivolous.

In this instance, as noted, two obstacles have to be resolved before factoring the fact of the layoff into the analytical mix: Did the Complainant have an excusable basis for his very untimely filing of the discrimination complaint and, if he did, did he engage in genuine protected activity or was he merely performing his maintenance shift duties as an electrician? The Court, as explained below, finds that neither of these predicates was established.

As has been noted, Complainant, Jeremy Jones, was the Secretary's sole witness. The Secretary presented evidence that Mr. Jones, as the affidavit of the Secretary's special investigator for this matter provides, raised "safety concerns" with Respondent. Whether raising "safety concerns" is the equivalent of engaging in protected activity, at least in the context of this case, is another matter. Mindful that resolving testimonial conflict is not permitted in temporary reinstatement matters, this decision does not engage in such weighing. Instead the decision relies upon the Secretary's evidence and evidence from Respondent's witnesses which was consistent with that testimony. The Court considered each of the witnesses to be credible.

[11] For that reason the Court restricted both sides from introducing details about their respective contentions as to the legitimacy and honest implementation of its layoff. Instead, it permitted Respondent to make an offer of proof on the subject of the mine's layoff. Tr. 121-25. After all, since the temporary reinstatement proceeding is not the forum to resolve the merits, or lack thereof, of the layoff system, it makes little sense to have extended testimony about the particulars of the layoff and it application. As the Court expressed during the temporary reinstatement hearing, "the bona fides of the layoff is not something I have to reach." Tr. 121. It is sufficient to note that it is a disputed issue, but one that will not be resolved until after a full evidentiary hearing on the discrimination claim in chief, a matter several months down the road.

In the Court's assessment, Mr. Jones was both an intelligent individual and a credible witness.[12] As explained, Complainant's intelligence is a factor which tends to refute his claim, making it less likely that he was unaware of his protected activity rights, and more likely that, when speaking with the MSHA special investigator, *on a matter unrelated to the discrimination allegations in this proceeding*, that this was an attempt, stimulated by the MSHA investigator, to backfill safety claims and couple those with the unassailable assertion (for now) that there was a non-legitimate basis for his layoff.[13]

Therefore, when considering the long delay in the filing, Jones' demonstrated intelligence, evidenced by the fact he is an electrician; his long number of years employed in the mining industry; the fact that he acknowledged that he was speaking with fellow employees just prior to the layoff announcement; and that, despite all that, the idea that he was the victim of discrimination did not come to him until he started speaking with an MSHA special investigator on a matter unrelated to any yet to be made claim of his own, all combine to make the delay unexcused.

Even assuming that, on any appeal that may occur, a different vantage point about Jones' late filing was reached, the Court concludes that no nexus was established between Jones' expression of his "safety concerns," and the layoff. To the contrary, Jones' own testimony confirms that his raising of those concerns was indistinguishable from those of the fellow electricians on his crew and that, fairly viewed, they were either part of his job to address those matters or not genuine safety complaints. However labeled, there is no evidence that Kingston did anything other than encourage the miners to bring such concerns to its attention. This was true for the trash, the covering of roof bolter lights, the trailing cables, and the running right cards. Jones' own testimony supports each of these conclusions. In fact, with the Secretary's own, single, exhibit, Jones was paid high regard by Mr. Laverty for working safe and letting him know if he spotted potential problems. Ex. C-1. It is noteworthy that this occurred in January 2015, which was at a time several months before the layoff. Therefore, the Court agrees with the Respondent that, in a very technical, literal sense, while Jones raised safety issues, they were non-viable protected activity in the context that they were made and Kingston took no negative

[12] While credible, that does not mean that the Court accepted Jones' unsupported visceral feelings that Laverty didn't like his raising safety matters.

[13] To that point, the Secretary attempted in its Motion in Limine to strike testimony regarding Complainant's job performance and the legitimacy of the layoff, while trying to bootstrap the legitimacy of this case by referencing findings in other proceedings in which two other miners laid were laid off by Kingston, citing *Sec'y on behalf of Brooks v. Kingston Mining*, 37 FMSHRC 1282, 2015 WL 3932760, (June 19, 2015) (ALJ Andrews), and *Sec'y on behalf of Harper v. Kingston Mining*, No. WEVA 2015-816-D, 2015 WL 4512184 (FMSHRC July 14, 2015) (ALJ Lewis). Of course, each case must stand on its own record, and in no manner does this Court second guess or criticize the temporary reinstatements that were ordered in those other cases. However, the Court notes that in the case of *Brooks*, Brooks filed his discrimination claim 10 days after the layoff, and in *Harper*, Harper filed his claim 34 days after the layoff, as compared to Mr. Jones, who filed his claim nearly 4 months after the layoff and then only upon visiting with an MSHA special investigator *on a matter unrelated to his own layoff*.

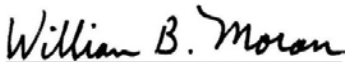
action, by words or deeds, in reaction to them. As noted, on this record, Respondent was supportive and encouraged employees to raise such matters.

Conclusion

Accordingly, the Court finds that, on this record, the Complaint has been frivolously brought. This does not mean that Complainant may not ultimately prevail in a full trial on the merits, a determination about which the Court cannot, and does not, have any opinion at this juncture. Different scenarios may develop. The Secretary may decide not to pursue a section 105(c) complaint. If the Secretary does file such an action, it is possible that he may be able to demonstrate that the miners' layoff evaluation was a ruse, implemented for the purpose of ridding itself of miners who made safety complaints, a showing that could then contextually revive the assessment of Jones' expressed safety concerns. It is also possible that challenges to the legitimacy of the layoff may fail. For now, the issue is limited to frivolousness, a determination here made.

ORDER

IT IS ORDERED that the Secretary's application for the **temporary reinstatement** of Jeremy Jones **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that this temporary reinstatement proceeding **IS DISMISSED**.



William B. Moran
Administrative Law Judge

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