FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 11, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ANTHONY VEGA, Complainant,	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2018-0135-DM MSHA Case No: WE MD 18-02
v.	
SYAR INDUSTRIES, INC., Respondent.	Mine: Napa Quarry Mine ID: 04-00023

DECISION AND ORDER TEMPORARILY REINSTATING ANTHONY VEGA

Appearances: Abigail G. Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Complainant;

Bradley B. Johnson, Esq., Harrison, Temblador, Hungerford & Johnson LLP, Sacramento, California, for Respondent.

Before: Judge L. Zane Gill

This case involves an Application for Temporary Reinstatement filed on December 11, 2017, by the Secretary of Labor ("Secretary") on behalf of Anthony Vega ("Vega" or "Complainant"), pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815(c)(2), and 29 C.F.R. § 2700.45. Vega filed a Discrimination Complaint with the Mine Safety and Health Administration ("MSHA") in its Western District Office on November 8, 2017. The complaint alleged that Vega was terminated for activity protected under the Mine Act. In his Application for Temporary Reinstatement, the Secretary contends that Vega's complaint was not frivolously brought and seeks an order temporarily reinstating Vega to his former position as a mobile equipment technician for the Respondent, Syar Industries, Inc. ("Syar"), at the Syar Napa shop pending the final hearing and disposition of this case. Syar filed a Request for Hearing on December 22, 2017. An expedited hearing on the application was held on January 4, 2018, in Vacaville, California.

On January 2, 2018, two days prior to the hearing, the Secretary filed a motion in limine to exclude evidence extending beyond the limited scope of the hearing. Syar's counsel stated that Syar did not oppose the Secretary's motion. (Tr.6:11–15) During the hearing I ruled on ad

hoc objections by counsel with the Secretary's limine motion in mind, but did not otherwise rule on it.

For the reasons that follow, I grant the application and order Vega's temporary reinstatement.

I. SUMMARY OF THE EVIDENCE

Syar is a mine operator in northern California, primarily involved in the rock quarrying, asphalt mining, and concrete businesses. (Tr.12:1–10) The mine at issue is divided by a freeway into two parts: the Napa shop and the Napa quarry. (Tr.16:23–17:5) The Napa shop does maintenance work, while the Napa quarry is where the extraction is done. (Tr.17:2–5)

Vega started working at Syar in 1995 while in college. (Tr.14:24–15:3) While at Syar, he worked in various positions: first as a parts runner (Tr.15:8–9), then in the machine shop for six months (Tr.15:10–11), and next as a mechanic, after completing an apprenticeship with the journeyman mechanics. (Tr.15:12–17) Before being terminated by Syar, Vega was most recently employed as a heavy duty repairman. (Tr.15:18–20) Vega primarily worked at the Napa shop site and reported directly to Foreman Ken Calvin. (Tr.17:6–7, 11–13; 19:15; 43:10–11) In addition to his work as a heavy duty repairman, Vega was a Cal/OSHA representative, MSHA miners' representative, and a steward with the Operating Engineers Local 3 Union. (Tr.15:21–22) As a union steward, Vega was tasked with referring other members' complaints to management. (Tr.46:16–18)

<u>Smoke in the Hose Repair Room</u>

The hose repair room is a metal shed measuring approximately 12 feet by 12 feet (Tr.18:20), constructed approximately ten years ago for the purpose of cutting wire-braided hydraulic hoses.[1] (Tr.49:23–24; 50:2–11) Vega testified that although an ordinary "knife blade" would cut a regular rubber hose and up to two wires, most of Syar's hoses are high-pressure hydraulic hoses, which contain four to six wires and cannot be severed by a knife blade. (Tr.18:3–8) Miners were therefore told to cut the hydraulic hoses with an abrasive wheel, which "basically just grinds the rubber and billows out a lot of smoke." (Tr.18:8–11)

Vega wondered if the smoke was toxic and subsequently reported the issue to Napa shop safety director James Kerr sometime in January 2017. (Tr.16:18–20; 41:20–42:2; 51:8–18) Vega testified that Kerr was unable to find any information on the toxicity of the smoke and advised Vega to wear a respirator if the smoke was an issue. (Tr.18:15–17; 42:3–7) Vega testified that the smoke problem had been ongoing since the hose repair room was constructed ten years prior. (Tr.49:16–24) However, until the January 2017 complaint to Kerr, Vega had not reported this smoke issue on his workplace exam forms nor did he raise the issue during safety meetings. (Tr.50:21–51:3)

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[1] The hoses being cut in the hose repair room are very large, measuring approximately 30 feet in length, 2.5 inches in diameter, and weighing 300 pounds. (Tr.20:12–25; 50:14–20)

In July 2017, Bob Hayes, a co-worker, complained to Vega about the hose repair room smoke while they were working on changing out a hydraulic hose that had blown. (Tr.19:1–4; 42:23–43:4) Hayes told Vega that he wanted to see if they could order a hose cutter machine that could cut hoses without producing smoke. (Tr.19:4–7) Vega was skeptical that Syar would buy a new machine, and suggested that they should instead look for a better blade. (Tr.19:7–9) Vega subsequently searched online and found a blade that would fit the old chop saw machine. (Tr.19:9–10) Vega believed that management did not like him (Tr.19:13–14; 33:12–24). He suggested that Hayes make the request for the new part because he felt that management would reject the request if they knew it came from Vega. (Tr.19:11–14) Hayes made the request to their direct supervisor and foreman, Ken Calvin, and received permission to go ahead with the order. (Tr.19:14–16; 43:8–11; 62:10–11) Hayes then submitted the order to Randy Novack, the parts specialist. (Tr.19:17–18)

A week later, Vega followed up with Novack and was told that the parts request was put on hold by Napa shop superintendent James Irvine while he looked for cheaper alternatives. (Tr.19:20–23; 21:11–18) Vega did a second follow-up with Novack the next week but was again told that Irvine was waiting to see what other companies were using to cut their hoses. (Tr.19:24–20:6) Vega testified he told Novack that if Irvine continued to stall, and if the smoke continued to be an issue, Vega would call MSHA. (Tr.20:7–16; 44:7–9) Vega testified that he did not hear anything more about the status of the chop saw or requested part from that point on. (Tr.21:5–8)

Near-Miss Incident on Quarry Haul Road

In July 2017, Vega was working in the quarry when a fellow miner told him of a recent, near-miss incident involving two vehicles on a haul road. (Tr.21:21–22:13) Vega told the miner he would talk to Napa shop safety director Kerr to see what the legal requirements were for the width of a two-way haul road and if warning signs were necessary. (Tr.22:14–18) When he returned to the Napa shop, Vega spoke with Kerr and asked him what the legal width of a haul road was for two-way traffic. (Tr.22:19–20; 53:1–4) Kerr was unable to immediately find an answer. (Tr.22:22–24) Rather than wait, Vega asked Kerr to keep him updated and to relay any findings to Jamal Grayson, the Napa quarry safety director. (Tr.22:25–23:7)

A few days later, Vega spoke again with Kerr. (Tr.23:13–18) Kerr stated that he could not find any information, so he spoke with Irvine about the issue. (Tr.23:17–20) Vega testified that Kerr indicated that Irvine was upset with Vega for involving himself with Napa quarry issues, since Vega was a miners' representative for the Napa shop, not the quarry. (Tr.23:21–24:1; 61:4–7) To Vega's knowledge, nothing further was done about the haul road issue. (Tr.23:8–10)

Writing on Pay Envelopes & Investigation by Management

In mid-July 2017, Vega noticed that people were drawing smiley faces and writing "Hello" or "Good job" on co-workers' pay envelopes left at the front counter. (Tr.25:15–18; 54:12–16) Vega also began writing complimentary notes like "Great job today" or "glad to have you on board" on his co-workers' pay envelopes. (Tr.25:19–20) In one case, Vega wrote,

"There is nothing more pleasing than hearing the sound of your voice over the radio in the morning." (Tr.40:10–13) Vega testified that he only wrote complimentary notes on the envelopes and sometimes signed them with "RT"—the initials of quarry manager Rick Tranchina. (Tr.25:24–26:1; 40:3–5; 75:13–16) Vega thought some of his notes were funny. (Tr.40:17–19) This practice continued for approximately four to six weeks. (Tr.25:23; 74:3–4)

In the first week of August, Tranchina raised the envelope issue with HR Manager Ann Pearson. (Tr.67:15–18; 75:10–16) No other employee, including those who received the envelopes with notes, raised the issue with Pearson. (Tr.75:17–24) Syar subsequently installed a camera near the front counter and hired a handwriting analyst to catch the perpetrators. (Tr.26:22–25; 71:10–15; 76:12–13; 79:5–6) Vega was not told to stop writing on the envelopes or warned in any way by management. (Tr.27:1–5; 32:12–15; 75:25–76:6) Vega was made aware of the camera around September 9, 2017, when a co-worker pointed it out to him. (Tr.29:1–8; 32:2–8; 36:8–17) Vega immediately stopped writing notes on the envelopes when he learned about the camera and management's attempt to catch the perpetrator. (Tr.29:2–3; 32:10–11)

To his knowledge, Vega was the only employee videotaped writing on the envelopes. (Tr.37:14–19) Tom Vella, a co-worker, was also observed on camera standing with Vega as Vega wrote on the envelopes. (Tr.70:19–24; 71:5–7) Vella did not actually write on the envelopes. (Tr.71:22–23)

Termination

On September 11, 2017, Vega and Vella were called into the main office. (Tr.24:9–15; 56:9–16) When Vega arrived, Jesse Espinoza, Vega's business representative, was waiting in the lobby. (Tr.24:18–20) Vega, Vella, and Espinoza went to the conference room, where Irvine, Pearson, and Lance Stevenson were waiting. (Tr.25:8–9) Pearson handed Vega a letter of termination for impersonating a quarry manager. (Tr.25:10–11; 56:18–19) Vella was suspended for two days without pay and given a written warning in his file. (Tr.72:2–3)

Vega testified that Espinoza said they would grieve Vega's termination. (Tr.26:16–17) The grievance was initiated the same day. (Tr.57:14–16) A board of adjustment (grievance) hearing was held in mid to late October. (Tr.58:3–11) At the hearing, two company representatives, including James Irvine, and two union representatives, including Bran Eubanks, met to resolve Vega's contest of his termination. (Tr.58:15–17; 59:10–20; 62:15–18; 64:23–65:5; 66:13–18) Ultimately, the grievance board was unable to reach an agreement—both company representatives sided with the company; both union representatives sided with Vega. (Tr.66:9–10; 66:18–23)

Animus & Disparate Treatment

Vega testified he felt there was "bad blood" with Irvine ever since Irvine's promotion to superintendent in 2014. (Tr.32:24–25; 33:12–24) As a Union Steward, Vega had a history of bringing complaints to Irvine, which were not resolved. (Tr.34:1–4) Vega testified that he would have to "go the union route" to deal with these issues, resulting in his having to "battle it

out" with human resources. (Tr.34:5–9) Vega also testified that he never experienced hostility or animus toward himself in his role as a miner's rep. (Tr.46:1–3)

Vega contends that after he was terminated, he learned that Tranchina had warned other miners to stop writing on the envelopes. (Tr.31:14–18; 31:23–32:1; 37:21–38:2) Vega testified that he would have stopped writing on the envelopes had Tranchina given him the same warning he gave to the other miners. (Tr.31:18–20) Vega testified that this discrepancy in treatment made him feel that he was being singled out. (Tr.32:16–21)

Vega also testified about an incident in 2015, when management tried to suspend him for failing to show up for work, although he had already received permission to take leave from Bob Schwab, the human resources manager at the time. (Tr.34:15–35:18) Vega believes this was another example of management singling him out. (Tr.34:12–15)

II. DISCUSSION OF RELEVANT LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any right protected by 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. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Congress created temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 624–25.

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated to investigate, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis [. . .], shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

The Commission has established a procedure for making the reinstatement decision. Commission Rule 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.

29 C.F.R. § 2700.45(d)

The scope of a temporary reinstatement hearing is narrow, being limited to a determination whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

The legislative history for section 105(c) reveals that Congress discussed the term "frivolous" with the understanding that a complaint is not frivolous if it "appears to have merit." S. Rep. No. 95-181, at 36–37 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard has also been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Res., Inc.*, 920 F.2d. at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

When determining whether a miner's discrimination claim is not frivolous, the Court is essentially required to consider the facts in the light most favorable to the claimant. When presented with conflicting evidence, the judge and the Commission are not required to resolve conflicts in testimony at the temporary reinstatement stage of a discrimination proceeding. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999), *citing Jim Walter Res., Inc.*, 920 F.2d at 744. Indeed, the Commission has determined that it is inappropriate for the Judge to make credibility determinations or resolve conflicts in testimony during a temporary reinstatement hearing. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). Rather, "[a] non-frivolous issue may be shown where there is both supporting and detracting evidence in the record." *Sec'y of Labor on behalf of Nickoson v. Mammoth Coal Co.*, 34 FMSHRC 1252, 1255 (June 2012), *citing Chicopee Coal Co.*, 21 FMSHRC at 718–19. Where there is conflicting evidence in the record, there must be facts in the record that support the Secretary's theory of liability in order to meet the "not frivolously brought" standard. *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1878–79 (Aug. 2012).

To prove a prima facie case of discrimination under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner engaged in protected activity; and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 (Apr. 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla–Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

An applicant for temporary reinstatement, however, does not require the Secretary or aggrieved miner to prove a prima facie case of discrimination with the attendant requirement of

proving all necessary elements at a higher evidentiary standard. The applicant must merely provide evidence of sufficient quality and quantity to allow the judge to find, by application of the "reasonable cause to believe" standard, that: (1) the applicant engaged in protected activity; and, (2) there is sufficient showing of a nexus between the protected activity and the alleged discrimination to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, judges and the Commission have adopted elements of the full prima facie case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in bridging the sometimes difficult gap between alleged actions and the intentions behind them. *See, e.g.*, *CAM Mining, LLC*, 31 FMSHRC at 1088 ("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 recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510–12.

III. CONTENTIONS

The Secretary of Labor on behalf of Complainant argues that he has met his burden of establishing that the discrimination complaint is non-frivolous, and, as a result, Vega should be temporarily reinstated. The Secretary asserts that Vega's complaints to his supervisors in January, July, and August of 2017 constituted protected activity and that his termination on September 11, 2017, was an adverse action, for which Syar is liable under the Act.

Respondent argues that no nexus exists between Vega's alleged protected activity and the subsequent termination because Vega was terminated for tampering with employee pay checks and forging a manager's initials.

IV. APPLICATION OF LAW TO THE EVIDENCE

The scope of this temporary reinstatement proceeding is narrow. For the reasons set forth below, I find that Vega's discrimination complaint was not frivolously brought.

a. Vega Engaged in Protected Activity

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Protected activity under the Act can include making a complaint to an operator or its agent about unsafe equipment, *see, e.g.*, *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1995), or an

alleged danger or safety or health violation. *See, e.g., Sec'y of Labor on behalf of Davis v. Smasal Aggregates & Asphalt, LLC*, 28 FMSHRC 172, 175 (Mar. 2006) (ALJ).

Vega testified that he made three safety complaints. The first was made to shop safety director Kerr in January 2017, regarding the heavy smoke in the hose repair room.[2] The second, also regarding the smoke in the hose repair room, was brought to the attention of Vega's direct supervisor Calvin and parts specialist Novack in July 2017. The third safety complaint was made to Kerr in July or August 2017, regarding a near-miss incident on the quarry haul road and the type of signs legally required on a road with the haul road's width. I note that Respondent has not disputed that Vega made these complaints.

I conclude that the Secretary has presented sufficient evidence at this temporary reinstatement stage to establish that Vega's safety complaints are protected activities under the Act.

b. <u>Vega Suffered an Adverse Employment Action</u>

According to the Act and well-settled Commission precedent, suffering a discharge or demotion is an adverse employment action. 30 U.S.C. § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Vega was terminated on September 11, 2017. His termination constitutes an adverse employment action. The Secretary has presented sufficient evidence to satisfy this element of the test at this temporary reinstatement stage.

c. <u>A Nexus can be Reasonably Alleged Between the Protected Activity and the Adverse Employment Action</u>

The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Circumstantial evidence may include: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and (4) disparate treatment. *Id.* at 2510–12. I will discuss each factor in turn below.

1. 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 718.

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor on behalf*

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[2] Although Vega testified numerous times at hearing that he complained to Kerr about the smoke in January 2017, he failed to mention this event in his Discrimination Complaint. *See* Ex. S–A.

of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999), *citing Chacon*, 3 FMSHRC at 2510. Whether the operator had knowledge of the protected activity may be "proved by circumstantial evidence and reasonable inferences." *Id.* Additionally, the Commission has held that a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment. *See Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1067–68 (May 2011) (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions."); *see also Bos. Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–18 (6th Cir. 1987) (imputing plant manager's knowledge of, and animus against, employee's protected activity based on his involvement in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted).

Vega testified that he spoke directly with Napa shop safety director Kerr about the smoke in the hose repair room in January 2017. In July 2017, Vega discussed the smoke issue with parts specialist Novack when he inquired why the part was put on hold. Vega allegedly stated that MSHA might have to get involved if the smoke continued to be an issue.

Vega also testified that he spoke directly about the haul road incident with Kerr in either July or August 2017. According to Vega, Kerr later told him that Napa shop superintendent Irvine was upset that Vega was involving himself with quarry safety issues. At the hearing, Irvine admitted knowing that safety complaints had been made regarding both the Napa quarry haul road and the smoke in the hose repair room, but he denied knowing who specifically made the complaints. (Tr.64:14–22)

Nonetheless, a credibility determination is proscribed at this juncture. The allegation by Vega that he spoke directly with Napa shop safety director Kerr in January 2017 and parts specialist Novack in July 2017, regarding the smoke issue in the Hose Repair Room, and with Kerr again in July or August 2017, regarding the near-miss incident at the haul road, is sufficient at this stage to establish a non-frivolous issue as to Respondent's knowledge of Vega's safety complaints.

2. Coincidence in Time

The Commission has stated that "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive [. . .]." *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, "[W]e '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 34, 47 (Jan. 1999) (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Often, improper motivation is found "where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge." *Baier*, 21 FMSHRC at 958 (citing *Knotts*, 19 FMSHRC at 837).

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).

In this case, Complainant's protected activities occurred approximately eight months, two months, and one month before the adverse action. I determine that this proximity in time, especially in light of Vega's contention that Irvine was aware of Vega's role in at least one of his safety complaints, establishes a non-frivolous claim that a nexus exists.

3. Hostility Toward 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." *Chacon*, 3 FMSHRC at 2511 (citations omitted).

Vega testified that he felt there was "bad blood" with Irvine, that Irvine put a stop to the blade part request, and that Irvine was upset with Vega for involving himself with safety issues at the Napa quarry. I find that the Secretary has presented sufficient evidence to establish a non-frivolous claim that management may have harbored hostility or animus about Vega's alleged protected activities.

4. Disparate Treatment

Disparate or inconsistent treatment is another, indirect indicium of discrimination. "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." *Chacon*, 3 FMSHRC at 2512. It has been recognized that "precise equivalence in culpability between employees" is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.*

While disparate treatment is most often analyzed by comparing disciplinary fates of similarly situated individuals, Vega's testimony that he was not afforded the same warning to stop writing on the envelopes that Tranchina gave to other miners establishes a non-frivolous issue as to Vega's inconsistent, and possibly disparate treatment.

d. <u>Conclusion</u>

The Secretary has established a non-frivolous claim that: (1) Vega engaged in protected activities; (2) Vega suffered an adverse employment action; and, (3) there was a nexus between the protected activities and the adverse employment action. Vega is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

V. ORDER

It is **ORDERED** that **ANTHONY VEGA** be immediately **TEMPORARILY REINSTATED** to his former job with Syar Industries, Inc. at the Syar Napa shop at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

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

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint within **30 days**. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Respondent did not violate Section 105(c) of the Act.

L. Zane Gill
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail):

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