FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY PAPPAS, Complainant, v. CALPORTLAND COMPANY, Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2016-156-DM WE-MD 16-02 Oro Grande Quarry Mine ID 04-00011

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

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

Brian P. Lundgren, Esq., David Grimm Payne & Marra, Seattle, Washington, for Respondent.

Before: Judge Paez

This case is before me upon the application for temporary reinstatement brought by the Secretary of Labor ("Secretary") on behalf of Jeffrey Pappas ("Pappas") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). The application seeks the temporary reinstatement of Pappas as a laborer at the mine known as Oro Grande Quarry, a cement production facility owned by CalPortland Company ("CalPortland" or "Respondent"), pending final disposition of the discrimination complaint Pappas filed with the Mine Safety and Health Administration ("MSHA") on October 12, 2015.

Both section 105(c) of the Mine Act and Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), limit the scope of a temporary reinstatement proceeding to whether the discrimination complaint has been "frivolously brought." To prevail, the Secretary must provide sufficient evidence to establish that the complaint is nonfrivolous. *See, e.g.*, *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants*, 34 FMSHRC 2388, 2390 (Sept. 2012) (discussing the "frivolously brought" standard); *Sec'y of Labor on behalf of Ward v. Argus Energy WV*, 34 FMSHRC 1875, 1877–78 (Aug. 2012) (comparing "frivolously brought" standard to the "reasonable cause to believe standard"). Furthermore, the Commission has emphasized that it is not the Administrative Law Judge's duty to resolve conflicts in testimony at this preliminary

stage of proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

I. PROCEDURAL HISTORY

On December 8, 2015, the Federal Mine Safety and Health Review Commission ("Commission") received an application for temporary reinstatement filed by the Secretary on behalf of Pappas. Chief Administrative Law Judge Robert J. Lesnick assigned this matter to me on December 10, 2015. On December 17, 2015, CalPortland filed a request for hearing pursuant to Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45.[1]

The Secretary's application alleges that Respondent did not "rehire" Pappas at the Oro Grande mine after CalPortland acquired the mine on October 1, 2015, because Pappas had previously filed a discrimination complaint in April 2014 against Martin Marietta Materials, the mine's previous owner, resulting in a reinstatement to his position at the Oro Grande mine. (Appl. for Temp. Reinstatement at 2–3.) The Secretary contends that Respondent CalPortland's actions constitute a discriminatory act in violation of section 105(c)(1) of the Mine Act. (*Id.*)

I held an expedited hearing on January 5, 2016, in San Bernardino, California. The Secretary presented testimony from Jeffrey Pappas and Kyle Jackson, a special investigator for MSHA. CalPortland presented testimony from three witnesses: John Gillan, associate general counsel for Martin Marietta Materials; Steve Antonoff, vice president of human resources for CalPortland; and Mark Rock, vice president of risk management at CalPortland.[2]

II. ISSUES

The Secretary asserts that the current complaint filed by Pappas is not frivolous. (Appl. for Temp. Reinstatement at 2.) The Secretary emphasizes that Respondent CalPortland assumed the entire operations of the Oro Grande mine and is a successor-in-interest to the former owner, Martin Marietta, and thus liable for Martin Marietta's past discrimination. Consequently, CalPortland's failure to "rehire" Pappas at the Oro Grande mine was also discriminatory.

In contrast, CalPortland asserts that Pappas is not a miner for the purposes of section 105(c)(2) of the Mine Act, but merely an applicant and thus not eligible for reinstatement. (Resp't Request for Hearing at 2–3.) CalPortland further asserts that its acquisition of the Oro

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[1] Under Commission Procedural Rule 45, a temporary reinstatement hearing must be held within ten calendar days of an operator's request. 29 C.F.R. § 2700.45(c). In a Motion for Extension of Time accompanying its hearing request, CalPortland requested that the hearing be postponed until January 5, 2016, so its main witnesses could attend. (Resp't Mot. at 2–3.) Counsel for the Secretary consented to this delay upon the agreed stipulation that any subsequent order directing the Temporary Reinstatement of Complainant would be effective December 28, 2015. (*Id.* at 3.)

[2] In this decision, the hearing transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Tr.," "Ex. C–#," and "Ex. R–#," respectively.

Grande mine's cement operation was limited to the facility's physical assets. CalPortland objects to the term "rehire" and emphasizes it was under no obligation to hire any miner at the Oro Grande cement plant, including Pappas, because CalPortland was careful not to acquire the mine's entire labor force from Martin Marietta.

Accordingly, the following issues are before me: (1) whether the Secretary has demonstrated that Pappas was a miner eligible for temporary reinstatement, and, if so, (2) whether the Secretary has shown that Pappas's current discrimination complaint was not frivolously brought.

III. SUMMARY OF THE EVIDENCE

In its request for hearing, Respondent stipulated –

1. Respondent admits that it is the operator of [the Oro Grande Quarry mine] located at 19409 National Trails Highway, Oro Grande, California, 92368.

2. Respondent admits that it is an operator as defined by section 3(d) of the [Mine Act.]

3. Respondent admits that the operation and products of the mine affect commerce and that the mine is subject to the Mine Act.

(Resp't Request for Hearing at 1–2.)

A. Background of the Oro Grande Quarry Cement Plant

The Oro Grande cement plant is a facility associated with the Oro Grande Quarry in San Bernardino County, California. (Tr. 25:4–8.) The cement plant operates on several revolving shifts, employing a total of approximately 105 employees. (Tr. 42:16–24, 141:14–16.) Because of the difficulty of shutting down and restarting the cement plant's kiln, the facility operates around the clock. (Tr. 136:20–137:6.)

Martin Marietta owned the Oro Grande mine through a subsidiary named Riverside Cement. (Tr. 82:23–83:7.) On October 1, 2015, Martin Marietta completed the sale of nearly all the assets of Riverside Cement, including the Oro Grande Quarry and cement plant, to CalPortland. (Tr. 83:15–84:6.)

Jeffrey Pappas worked at the Oro Grande cement plant for 16 years. (Tr. 24:23–25:3.) In his time there, Pappas worked in nearly every hourly-wage position at the plant, excluding managerial positions. (Tr. 25:11–26:3.) In early 2014, Pappas grew concerned about a dangerous situation caused by a supervisor's potentially unsafe directions. (Tr. 26:8–16.) Pappas brought his concerns to mine management's attention, but management dismissed his concerns without fully addressing them. (Tr. 26:15–20.) Pappas later pointed out the problems to an MSHA inspector who investigated and, in turn, wrote the mine citations for safety violations and caused changes in Oro Grande safety policy. (Tr. 26:20–27:2.) Pappas's

relationship with his managers and colleagues deteriorated sharply after MSHA issued the citations, and Martin Marietta eventually fired Pappas. (Tr. 27:3–8.)

On April 21, 2014, Pappas filed a section 105(c) discrimination complaint with MSHA against Martin Marietta. (Tr. 27:9–11; *see* Ex. C–1; Ex. C–2 at 1.) Following depositions in that discrimination case during December 2014, Martin Marietta and Pappas reached a court-approved settlement permanently reinstating Pappas at the Oro Grande mine; Pappas returned to work as a laborer at the cement plant in January 2015. (Tr. 27:12–25, 34:22–35:3; Ex. C–2.) Upon Pappas's return to work, however, Pappas's direct supervisor and his coworkers harassed Pappas about his discrimination case and prior safety complaints. (Tr. 29:8–14, 33:19–34:8.) Pappas asked the mine's upper management, including human resources manager Jamie Ambrose (née Rowe), to intervene and stop the harassing behavior. (Tr. 28:6–15, 29:14–23, 34:9–16.) Ambrose and the other mine officials did not address Pappas's repeated complaints about the harassment. (Tr. 30:1–8.)

Because of management's inaction, Pappas filed grievances with the United Steelworkers Union against three people in management: Ambrose; Terry Jacobs, production manager at Riverside Cement; and Kevin Grogan, the mine's plant manager. (Tr. 31:10–18, 35:10–15.) In June 2015, with his grievance complaints pending, Pappas switched to a new team – the labor team – that did not harass him. (Tr. 34:16–35:22.) Although the harassment of Pappas diminished following this transfer, members of Pappas's former team continued periodically to make disparaging comments to Pappas. (Tr. 35:16–22.) In August 2015, Pappas met with Tim Sheridan, a senior attorney for Martin Marietta, to discuss Pappas's grievances. (Tr. 31:14–32:11; 85:6–17.) During this grievance meeting, Sheridan brought up Pappas's prior discrimination complaint. (Tr. 32:18–22.) Pappas felt that Sheridan was belittling him rather than addressing his grievances regarding harassment. (Tr. 32:9–33:11.)

B. CalPortland Company's Purchase of the Oro Grande Quarry

Also in August 2015, officials from CalPortland Company began visiting the Oro Grande Quarry to determine whether CalPortland should purchase the cement plant and three related assets from Martin Marietta. (Tr. 30:9–24.) In a limited asset sale agreement, CalPortland agreed to purchase the Oro Grande Quarry, including the cement plant, two shipping terminals in National City and Stockton, California, and the remaining inventory stockpiled in Martin Marietta's storage facility in Crestmoore, California. (Tr. 83:15–84:6; Ex. R–2 at 12–15; Ex. R–10.) The asset sale agreement did not include the labor force at these facilities because CalPortland did not want to be bound by the collective bargaining agreement Martin Marietta and the United Steelworkers Union had negotiated at the facilities. (Ex. R–2 at 24–25, Ex. R–3; Tr. 110:8–111:25.) Accordingly, CalPortland was careful to structure the limited asset sale in line with the *Burns* successorship model that the Supreme Court first recognized in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). (Tr. 108:21–111:18; *see* Ex. R–1.) To follow this model and thus ensure CalPortland would be free to negotiate new employment terms, CalPortland and Martin Marietta agreed to "fire" all of the workers at these four locations at 12:00 midnight on September 30, 2015. (Tr. 119:1–20, 111:7–112:19, Tr. 63:19–25.) Immediately thereafter, on October 1, CalPortland would "rehire" the employees it wanted at the plant. (Tr. 86:21–87:25, 112:16–113:16, 135:2–136:6, 146:9–12.)

Because CalPortland wanted to take control of the Oro Grande Quarry cement operation without shutting down the plant's kiln, the company began the process of staffing the plant early.[3] (Tr. 135:2–137:6.) In mid-August, CalPortland's vice president for human resources, Steve Antonoff, contacted Martin Marietta's human resources director, Ambrose, for advice on hiring decisions at the facilities. (Tr. 146:17–147:10.) In a statement to Investigator Jackson, Antonoff recalled comments Ambrose made to Antonoff about which workers "she would not hire."[4] (Tr. 149:15–150:8.) In late August, Antonoff offered Ambrose the human resources manager position at the Oro Grande mine following CalPortland's takeover. (Tr. 147:2–15.)

In September 2015, CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the mine. (Tr. 36:17–37:9; Ex. R–5; *see* Exs. R–6, R–7, R–8, R–9.) Nearly all of the miners from the four plants applied to work under CalPortland, including approximately 120 of the roughly 125 miners working at the Oro Grande cement plant. (Tr. 45:11–15, 112:10–113:10; 127:3–7.) According to Antonoff, CalPortland arranged interviews for all of the miners applying to work for them. (Tr. 112:10–113:10.) Each miner's interview was brief, with some lasting less than five minutes. (Tr. 38:2–17.) CalPortland's interviewers had a list of six questions for each miner regarding the miner's honesty and workplace relationships but not examining the miner's prior work performance. (Tr. 38:18–40:14, 53:17–54:20; *see* Exs. R–11, R–12, R–13.) CalPortland did not receive Martin Marietta's personnel files from the four facilities. (Tr. 118:3–20, 156:5–9.)

On September 26, 2015, CalPortland extended employment offers for the Oro Grande cement plant to approximately 115 miners. (Tr. 113:13–21; Exs. R–14, R–15; *see* Exs. R–18, R–19.) Two days later on September 28, 2015, CalPortland informed the remaining miners that they would not be brought back to the mine. (Tr. 41:1–42:15.) Pappas was among ten hourly workers who were told that day they did not receive an offer of employment from CalPortland and were thus terminated. (Tr. 41:17–42:15, Tr. 63:19–64:7.) Martin Marietta asked those miners to leave the mine immediately and not return for their shifts the following two days. (Tr. 41:14–25.) The miners were still paid through September 30, despite not coming to work. (Tr. 41:25–42:2.) As part of the asset purchase agreement, Martin Marietta and CalPortland arranged severance packages for Oro Grande miners whom CalPortland did not hire. (Tr. 89:18–90:12.)

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[3] Antonoff testified that "a key feature of a cement plant is the large kiln that is used to fire the materials. These kilns are 20 plus feet in diameter, 100 feet long, and operate at about 3,000 degrees Fahrenheit or so. Shutting one of these kilns down is cumbersome. And firing it back up again is cumbersome. So CalPortland had a strong desire to find a way to keep the kiln operating. Because they typically operate 24 hours a day to keep the kiln operating, which meant the entire production process needed to continue to operate." (Tr. 136:22–137:6.)

[4] Antonoff initially testified that his discussion with Ambrose regarding the Riverside Cement workforce was limited. (Tr. 146:20–24, 147:16–148:8.) On cross examination, however, Antonoff conceded that he had previously admitted discussing Ambrose's personnel preferences to MSHA Special Investigator Jackson in a signed statement. (Tr. 148:7–20, 149:9–22.) The scope of a temporary reinstatement proceeding is limited and is not appropriate for resolving conflicting evidence. *See Albu*, 21 FMSHRC at 719. Accordingly, I herein consider only Antonoff's earlier statements to Jackson.

Because CalPortland hired so many of Martin Marietta's miners, the company did not advertise the Oro Grande positions to the general public. (Tr. 146:9–12.) CalPortland renamed a few positions at the mine and changed or combined job responsibilities for some hourly positions. (Tr. 141:22–142:10.) Most of the job positions remained unaltered. (Tr. 143:7–145:18.) CalPortland also made modifications to the miners' hours and benefit packages in the new conditions of employment. (Tr. 138:13–139:3, 140:4–11; Exs. R–16, R–17, R–20.) Specifically, CalPortland eliminated the union grievance proceedings, removed the "just cause" firing protections for workers, eliminated the workers' seniority rankings, and altered the available medical insurance plan. (Tr. 140:4–141:4; Ex. R–4.) The mine now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. (Tr. 144:24–145:5, 171:18–172:18.) CalPortland continues to sell its cement to many of Martin Marietta's former customers with some changes in the customer base. (Tr. 168:2–12.)

IV. ANALYSIS AND CONCLUSIONS OF LAW

A. Pappas's Status as a Miner or Applicant

The Commission has held that temporary reinstatement is limited to "miners," as defined in section 3(g) of the Mine Act, 30 U.S.C. § 802(g). *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 930 (Sep. 1998). Accordingly, "applicants for employment" are not eligible for temporary reinstatement under section 105(c)(2). *Id.*; *Sec'y of Labor on behalf of Piper v. KenAmerican Res.*, 35 FMSHRC 1969, 1972 (July 2013). The Commission has considered the question of whether a complainant is a miner or an applicant as a threshold issue in temporary reinstatement proceedings. *See Young*, 20 FMSHRC at 932 n.5.

CalPortland's sole argument in this matter can be summed up simply: Pappas was an applicant, and thus cannot be entitled to temporary reinstatement under section 105(c)(2) of the Mine Act. (Tr. 177:20–179:9.) CalPortland emphasizes that its decision to fire all the workers was made in an arms-length transaction with Martin Marietta. (Tr. 178:7–179:24, 118:3–20.) In support, Respondent points to the law developed under the National Labor Relations Act, whereby a company may structure its purchase of assets in a manner that allows the purchaser to disregard its predecessor's collective bargaining agreement and negotiate new terms with the continuing workforce. (Tr. 178:8–179:24; Exs. R–1, R–21); *see NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. at 272. Respondent asserts that under the Mine Act Pappas can only be viewed as an applicant for employment because CalPortland followed the *Burns* model of successorship and carefully limited its liability for the Oro Grande mine's workforce. (Tr. 180:5–22.) Pointing to the Commission's decisions in *Young v. Lone Mountain Processing* and *Piper v. KenAmerican Resources*, Respondent asserts that the case law clearly eliminates the availability of temporary reinstatement to applicants, including Pappas. (Tr. 15:12–20:5.)

In contrast, the Secretary argues that CalPortland's adherence to the *Burns* model of successorship is irrelevant to temporary reinstatement proceedings under the Mine Act. (Tr. 177:2–12.) The Secretary asserts that the termination of all Oro Grande miners and immediate hiring of most of those miners was an artificial scheme used to discriminatorily fire a worker –

Pappas – who had caused problems at the mine by filing a section 105(c) complaint.[5] (Tr. 175:2–8, 175:16–176:3, 177:2–7.) The Secretary, also pointing to *Piper v. KenAmerican Resources*, asserts that Pappas is a miner for purposes of this temporary reinstatement proceeding and CalPortland a successor-in-interest to Martin Marietta. (Tr. 176:8–178:12.)

In analyzing whether a complainant qualifies as a miner or an applicant, the Commission has focused on whether the complainant had a prior relationship with the mine operator and what that relationship was at the time of the alleged discriminatory act. *See Piper*, 35 FMSHRC at 1972–73. The Commission has found a complainant to be miner for the purposes of temporary reinstatement where the complainant was employed at the mine in the recent past and the protected activity related back to the complainant's employment at the mine. *Id.* at 1972.

Pappas worked at the Oro Grande concrete plant for 16 years prior to CalPortland's takeover of the mine. (Tr. 24:23–25:3.) Pappas was fired the instant CalPortland took control of the mine. (Tr. 63:19–25.) CalPortland hired back nearly all of the Oro Grande mine's workers immediately, but decided not to bring back Pappas. (Tr. 42:9–15, 113:8–21.) To ensure a smooth transfer, CalPortland made its staffing choices weeks earlier while Pappas was still working as a miner at the Oro Grande cement plant. (Tr. 36:17–38:17, 135:6–137:6.) Pappas's human resources director, Ambrose, helped CalPortland make its staffing decisions. (Tr. 146:17–147:10, 149:15–150:8.) Pappas's employer, Martin Marietta, coordinated with CalPortland to send home early those miners who would not stay on after the asset sale and to pre-arrange severance packages for those miners. (Tr. 89:18–90:12.)

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[5] Respondent maintains that the question of whether a complainant is a miner or an applicant is a threshold issue to which the frivolously brought standard should not apply. (Tr. 22:24–23:15.) Respondent apparently wants me to apply a "preponderance of the evidence" standard. The scope of temporary reinstatement proceedings is unambiguously limited to determining whether the complaint is frivolously brought. Yet, in the temporary reinstatement context, the Commission permits limited inquiries to determine whether an obligation to reinstate a miner may be tolled due to other events, such as a layoff for economic reasons, and allows for a shifting standard. *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 396 (Feb. 2013); *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012). In such cases, an operator generally must affirmatively prove by a preponderance of the evidence that a layoff justifies tolling temporary reinstatement. *Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1055 (Oct. 2009). But, if the Secretary challenges the objectivity of the layoff during the temporary reinstatement proceeding, then the ALJ must apply the "not frivolously brought" standard to the question. *Ratliff*, 35 FMSHRC at 397. The Commission has not enunciated the evidentiary standard applicable to whether a complainant is a miner or an applicant. *See Piper*, 35 FMSHRC at 1972–73. By analogy, however, the Commission's justification for a shifting standard is similarly applicable to the question of whether a complainant is a miner or an applicant in the context of temporary reinstatements. Here, CalPortland has presented evidence on its process of hiring Martin Marietta employees at the Oro Grande mine in compliance with the *Burns* successorship model, and the Secretary has challenged Respondent's application process as a legal fiction created to discriminatorily dismiss a troublesome miner. (Tr. 177:2–12, 69:17–23.) Accordingly, I apply the "not frivolously brought" standard to the miner-versus-applicant question.

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.[6] Pappas is seeking reinstatement to the position he held until one minute prior to CalPortland's takeover of the Oro Grande plant. 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.[7]

Moreover, CalPortland can be liable for Martin Marietta's discriminatory acts. The Commission has recognized that a successor-in-interest to a mine operator may be found liable for, and responsible for remedying, its predecessor's discriminatory conduct. *See Meek v. Essroc Corp.*, 15 FMSHRC 606, 609–10 (Apr. 1993). To make such a determination, the Commission has considered nine factors:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operation, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

Sec'y of Labor on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)). The key factor in this successorship analysis is whether there is substantial continuity of business operations. *Id.*

First, CalPortland is the named party here with direct knowledge of this proceeding, and CalPortland, through Ambrose, had full knowledge of Pappas's prior discrimination complaint and reinstatement. Second, CalPortland purchased nearly all of Martin Marietta's mining assets on the West Coast, leaving Martin Marietta with limited ability to provide relief to Pappas. (Tr. 90:13–91:1, 82:23–84:6.) Third, CalPortland has continued the production of cement at the Oro Grande cement plant (Tr. 144:24–145:5); indeed, it did not interrupt cement production at the

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[6] Respondent relies on the Commission's opinion in *Young*, 20 FMSHRC at 930, as the legal basis that Pappas is a mere applicant. (Tr. 180:5–19.) Yet Respondent's reliance on *Young* is misplaced, as that case is distinguishable from the matter at hand. In *Young*, the worker had no prior relationship with the mine to which he was requesting temporary reinstatement. 20 FMSHRC at 927–28.

[7] Although I make my determination that Pappas is a miner using the "not frivolously brought" standard, I note that applying the "preponderance of the evidence" standard would lead me to the same conclusion: Pappas is a miner, not a mere applicant for employment.

mine during the transfer.[8] (Tr. 136:20–137:6.) Fourth, even though CalPortland shifted some of the cement grinding process to the company's nearby facilities, production at the Oro Grande plant remains the same. (Tr. 169:22–171:11, 171:18–172:18.) Fifth, CalPortland employs approximately 105 of the 130 miners that previously worked at the Oro Grande cement plant. (Tr. 113:13–21) Although not all of the former Martin Marietta (Riverside Cement Company) miners at Oro Grande applied to work for CalPortland (Tr. 112:33–23), CalPortland did not advertise its Oro Grande positions outside of Martin Marietta. (Tr. 146:9–12.) Sixth, CalPortland employed at Oro Grande a number of former supervisors from Martin Marietta. (Tr. 65:5–20.) CalPortland replaced several top managers at the plant but left intact most of Martin Marietta's middle management. (Tr. 46:5–49:12, 72:3–8.) Seventh, although CalPortland altered some job titles and merged some job duties, most of the positions at the Oro Grande plant are the same as under Martin Marietta. (Tr. 141:22–142:10, 143:7–145:18.) Eighth, CalPortland uses the machinery it purchased at the Oro Grande plant in the same manner as Martin Marietta. (Tr. 144:24–145:1.) Ninth, CalPortland produces the same cement product as Martin Marietta. (Tr. 72:5–7.)

Given this evidence as it relates to the nine-factor test, I determine that the Secretary has presented sufficient evidence to establish at this stage of the proceedings that CalPortland is a successor-in-interest to Martin Marietta at the Oro Grande cement plant. As a successor-in-interest, CalPortland can thus be required to remedy Martin Marietta's past discriminatory acts.

Here, CalPortland and Martin Marietta carefully structured the sales purchase agreement for the Oro Grande Quarry to comport with the legal requirements of the *Burns* successorship model. (Tr. 108:21–111:18.) By adopting this legal framework, CalPortland was able to sidestep the miners' collective bargaining agreement and negotiate new labor terms more attractive to CalPortland. (Tr. 110:14–111:18.) Following this *Burns* successorship model does not, however, grant CalPortland carte blanche to disregard the statutory protections provided under the Mine Act. To the contrary, the Supreme Court expressly recognized in *Burns* that companies must still abide by other statutory protections provided to workers. 406 U.S. at 280–81 & n.5 ("However, an employer who declines to hire employees solely because they are members of a union commits a § 8(a)(3) unfair labor practice.").

As the Commission has recognized, "Congress intended that temporary reinstatement provide '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.'" *Piper*, 35 FMSHRC at 1973 (citing S. Rep. No. 181, 95th Cong., 1st Sess., at 37, *reprinted in* Subcomm. on Labor of the S. Comm. on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 625). Adopting Respondent's argument would create a legal loophole through which mine operators could sidestep the whistleblower protections of the Mine Act by using an artificial hiring process to cull "troublemakers" from their workforce. Such a threat of termination would have a grave chilling effect on the willingness of miners to raise safety issues. Respondent's claim must fail.

Considering all the evidence before me under the "not frivolously brought" standard, I determine that the Secretary has established that CalPortland Company is a successor-in-interest

[8] *See* footnote 3 *supra*.

to Martin Marietta at the Oro Grande Quarry and cement plant, and that Pappas is a miner eligible for temporary reinstatement at the mine.

B. Whether Pappas's Discrimination Was Frivolously Brought

Section 105(c)(1) of the Mine Act prohibits discrimination against a miner in exercising his statutory rights.[9] 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under the Mine Act establishes a prima facie case by presenting evidence sufficient to support a conclusion that: (1) the individual engaged in protected activity, (2) there was adverse action, and (3) the adverse action complained of was motivated in any part by that activity. *United Mine Workers of Am. on behalf of Franks v. Emerald Coal Res.*, 36 FMSHRC 2088, 2094 (Aug. 2014); *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). Thus, the Secretary must address each of these three elements to stablish a non-frivolous claim for temporary reinstatement.

1. Protected Activity

The Secretary has presented evidence that Pappas filed a discrimination complaint under section 105(c) of the Mine Act and received reinstatement to the Oro Grande cement plant under a settlement agreement approved by a Commission Administrative Law Judge. Respondent has not contested the Secretary's assertions.

The Mine Act expressly prohibits discrimination based on a miner having "instituted or caused to be instituted any proceeding under or related to this chapter . . . ." 30 U.S.C. § 815(c)(1). The Commission has recognized the importance of protecting miners who bring causes of action before the Commission, stating that "[a] miner who has allegedly been laid off for an impermissible reason must trust that he or she will not suffer adverse consequences later—including not being recalled—simply because he or she filed a discrimination complaint with MSHA." *Piper*, 35 FMSHRC at 1973.

Accordingly, I determine that the Secretary has presented sufficient evidence that Pappas engaged in protected activity.

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[9] Section 105(c)(1) of the Mine Act provides, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment . . . because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act filed or made a complaint under or related to this Act . . . .

30 U.S.C. § 815(c)(1).

2. Adverse Action

The Secretary asserts that CalPortland took adverse action against Pappas when it did not rehire him at the Oro Grande cement plant. (Appl. for Temp. Reinstatement at 2–3.) Respondent does not contend that Pappas's firing does not constitute an adverse action.

In addition, the Commission has recognized harassment and coercive interrogation as forms of adverse behavior prohibited under section 105(c)(1) of the Mine Act. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478–79 (Aug. 1982), *aff'd* 770 F.2d 168 (6th Cir. 1985) ("Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights."). The Commission has held that "an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 & n.2 (Aug. 1984) (recognizing that discrimination "may manifest itself in subtle or indirect forms of adverse action"). Whether an operator's questions or comments concerning a miner's exercise of a protected right constitute coercive interrogation or harassment proscribed by the Mine Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (quoting *Moses*, 4 FMSHRC at 1479 n.8). Accordingly, a mine operator may not allow harassing behavior to proceed unchecked against a miner because that miner has exercised his rights under the Mine Act.

Here, the Secretary presented evidence that Martin Marietta's management tacitly allowed workers to insult and berate Pappas about his safety complaint and reinstatement at the Oro Grande cement plant in January 2015. (Tr. 30:1–8.) Only in June 2015, after Pappas filed a grievance with his union, did Martin Marietta take steps to address the behavior by moving Pappas to a new team. (Tr. 34:16–35:7.) Even then, Pappas states he was subjected to aggressive questioning and affronts at a grievance meeting in August 2015. (Tr. 32:9–33:11.)

Based on this, I determine that the Secretary has presented sufficient evidence to suggest Pappas suffered from two types of adverse action – first, months of unchecked harassment and, second, his firing from the Oro Grande cement plant in September 2015.

3. Discriminatory Motive

The Commission recognizes discriminatory motive may be shown by indirect evidence establishing a nexus between the miner's protected activities and the adverse actions. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission in *Chacon* identified that discriminatory intent can be established by circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510. In reviewing the evidence I again cannot make credibility determinations but focus on whether sufficient evidence exists to conclude the discrimination complaint was not frivolously brought.

a. Knowledge of Pappas's Prior Discrimination Proceedings

At hearing, CalPortland presented evidence that it has not received Martin Marietta's personnel files. (Tr. 118:3–20, 156:5–9.) Thus, it is unclear whether CalPortland had direct knowledge of Pappas's prior section 105(c) complaint and his reinstatement to the mine. Nevertheless, 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*, 33 FMSHRC at 1067–68 (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"). The Secretary presented evidence that CalPortland's Antonoff consulted with Martin Marietta's Ambrose about whom Respondent should hire after taking over the Oro Grande cement plant. (Tr. 146:17–147:10, 149:15–150:8.) Ambrose was a central figure in Pappas's first discrimination complaint. (Tr. 28:1–16, 31: 3–18.) Therefore, I determine the Secretary has raised a non-frivolous issue as to whether CalPortland had imputed knowledge of Pappas's protected activities and has thus met the evidentiary burden.

b. Hostility or Animus toward Pappas's Reinstatement

The Secretary presented evidence that miners regularly harassed Pappas over his prior reinstatement at the Oro Grande cement plant and that Martin Marietta's managers were indifferent to Pappas's complaints over this harassment. (Tr. 30:1–8.) Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. *See Turner*, 33 FMSHRC at 1069 (discussing supervisors' negative reactions to miner's safety complaints); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1085, 1089–90 (Oct. 2009). I determine sufficient evidence exists that management, in failing to address the regular harassment of Pappas, signaled a distinct animus toward his reinstatement at Oro Grande.

c. Temporal Relationship between Pappas's Discrimination Proceedings and the Adverse Actions

Pappas testified that his harassment at work began shortly after his reinstatement to the mine under a court-approved settlement. (Tr. 29:8–14, 33:19–34:8.) This harassment largely continued for most of the next nine months until Pappas was fired from the mine and not rehired alongside most of his coworkers. (Tr. 35:16–22.) Accordingly, I find the Secretary's evidence demonstrates a sufficient nexus in time between Pappas's protected activity, the section 105(c) proceeding and resulting reinstatement to the mine, and the adverse actions against Pappas.

d. Disparate Treatment of Pappas

At hearing, CalPortland's witnesses testified that the company developed an arms-length hiring process that treated each miner the same. (Tr. 118:3–25.) CalPortland's human resources officials held interviews with every applicant and were directed to ask each miner the same six questions. (Tr. 128:15–25; Ex. R–13.) The Secretary challenges the fairness of this hiring process. Pappas insisted that the interviewer asked only three of the six questions in the

application and his answers were not recorded properly but given a negative slant. (Tr. 54:13–20, 61:5–63:18.) Furthermore, Inspector Jackson testified that other miners who gave the same or substantively similar answers in their interviews were rehired, while Pappas was not. (Tr. 70:3–18.) The Secretary suggests that the application process was a façade and the real hiring decisions for CalPortland were made weeks earlier on the advice of Martin Marietta's Ambrose. (Tr. 70:14–25.) Indeed, CalPortland contacted Ambrose to discuss which miners to rehire at the Oro Grande mine the month before the hourly workers even applied for their positions. (Tr. 146:21–147:15.) I determine that the Secretary has presented sufficient evidence that Pappas was treated disparately from other miners in the application process.

C. Conclusions

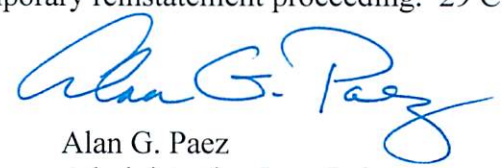
The Secretary has shown that Pappas engaged in protected activity by filing a section 105(c) discrimination complaint. The Secretary has also shown that Pappas suffered adverse actions in the form of regular harassment at work and his eventual dismissal from the mine. The Secretary presented evidence directly linking the unchecked harassment of Pappas to his prior filing of a section 105(c) discrimination complaint against Martin Marietta. In addition, the Secretary showed that the mine's management, including the human resources official that advised CalPortland on its hiring decisions, was fully aware of Pappas's protected activity and consistently displayed animus toward that activity from the first day Pappas returned to the Oro Grande cement plant. Finally, the Secretary has presented evidence that CalPortland treated Pappas differently from other miners in the application process. In sum, sufficient evidence exists to conclude that this discrimination claim was not frivolously brought as it relates to knowledge, animus, coincidence in time, and disparate treatment. I therefore determine that the Secretary has established a nexus between Pappas's protected activity—i.e., his prior section 105(c) complaint and reinstatement to the mine—and Respondent's subsequent adverse action.

The Secretary has presented evidence on all three factors of a prima facie discrimination case under section 105(c) of the Mine Act. Therefore, I conclude that Pappas's current claim of discrimination against CalPortland was not frivolously brought.

V. ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is **GRANTED**. Accordingly, CalPortland Company is **ORDERED** to reinstate Jeffrey Pappas to his position as laborer with the same or equivalent job responsibilities and duties, at the same rate of pay for the same number of hours worked, and with the same benefits, as he would have received if rehired by CalPortland Company. Respondent CalPortland Company shall further provide economic reinstatement dating back to December 28, 2015, as stipulated by the parties.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).



Alan G. Paez
Administrative Law Judge

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