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JAN 19 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of AARON LEE ANDERSON, Complainant, v. A&G COAL CORPORATION and CHESTNUT LAND HOLDINGS, LLC,[1] Respondents.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. VA 2017-69-D MSHA Case No.: NORT-CD-2017-02 Mine: Strip #12 Mine ID: 44-06992

DECISION AND ORDER
REINSTATING AARON LEE ANDERSON

Appearances: Ali Beydoun, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Wes Addington, Esq., Appalachian Citizens' Law Center, Whitesburg, KY, Representing the Complainant

Billy R. Shelton, Esq., Shelton, Branham & Halbert PLLC, Lexington, KY, Representing Respondent

Before: Judge Andrews

On January 3, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Aaron Lee Anderson. ("Complainant" or "Anderson") to his former position with A&G Coal Corporation, ("A&G" or "Respondent") at Strip #12 Mine pending final hearing and disposition of the case.

[1] Pursuant to the Secretary's Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, as a Party, the arguments at hearing, and the ruling *infra*, Chestnut Land Holdings, LLC, is added as a Respondent in this case.

The application followed a Discrimination Complaint filed by Anderson on November 29, 2016, that alleged, in effect, his termination was motivated because of his protected activities. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Anderson to his former position or a comparable position, within the same commuting area and with the same rate of pay and benefits he received prior to his discharge.

Respondent filed a timely motion requesting a hearing regarding this application on January 06, 2017. A hearing was held in Pikeville, KY, on January 12, 2017, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.[2]

For the reasons set forth below, I grant the application and order A&G Coal Corporation, or Chestnut Land Holdings, LLC, to temporarily reinstate Aaron Lee Anderson.

Discussion of Relevant Law

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

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

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[3] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that

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

[3] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

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

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

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

The Petition for Temporary Reinstatement

On November 29, 2016, Anderson executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> On November 18 at approximately 6:05 PM U [sic] reported to the foreman that they needed to deploy dust control measures due to limited visibility. They failed to do so and an accident resulted. I was fired because of the accident.

I want my job back with back pay and all my benefits restored. I want temporary reinstatement.

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

The Secretary also submitted with the Application the January 03, 2017, Declaration of Michael Hughes, a Special Investigator employed by the Mine Safety and Health Administration ("MSHA"). Hughes made the following findings and conclusions:

2) As part of my responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity, I have initiated an investigation into the discrimination claim filed by Aaron Lee Anderson (the "Complainant") on November 29, 2016. My investigation to date has revealed the following facts:

   A. On November 29, 2016 Complainant filed a complaint alleging discrimination that occurred on November 18, 2016 and resulted in his firing on November 21, 2016, after he had exercised his [sic]. Exhibit B

   B. The Complainant worked at the mine since August 26, 2016. He has approximately 14 years of coal mining experience.

   C. The Complainant was working on the evening shift of November 18, 2016. He was operating a haul truck which was being used to haul coal from the Pit area of the mine to stockpile.

   D. The Complainant complained to his supervisor, Foreman Danny Orrick, over the cb radio that the pit area was dusty causing compromised visibility and requested that dust control measures be dispatched. Two other truck drivers also complained about the conditions and requested dust control measures. Foreman Orrick responded that a water truck would be sent to the pit area and instructed the drivers to continue doing their jobs. This conversation took place at approximately 6:05 pm.

   E. By approximately 7:10 pm no measures had been taken to address the dusty conditions in the pit area and Foreman Orrick had not come to the area. Complainant was waiting to back his truck up to a loader to be loaded with coal. Complainant saw a truck pull out of the pit and thought it was clear to back up to the loader to be loaded. However, because of the dust and compromised visibility, Complainant was unable to see that another truck was still being loaded and backed into that truck.

   F. According to A&G, the above incident resulted in over $50,000 in damages to the truck that was backed into.

   G. A&G notified the Complainant that he was being terminated on November 21, 2016. He was told that he was being terminated due to the accident.

3) Based on my investigation to this date, I have concluded that there is reasonable

> cause to believe that the Complainant was discharged because he engaged in the protected activity when he complained about hazardous work conditions on November 18, 2016. The Complainant engaged in protected activity when he complained to his superior about the dusty conditions and compromised visibility in the pit area. The Complaint [sic] suffered an adverse action when his employment was terminated. There is reason to believe that the decision to discharge the Complainant was at least in part based upon his protected activity due to employer knowledge of the protected activity, coincidence in time between the protected activity and the adverse action and the close nexus between the protected activity and the proffered justification for the adverse action.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

Preliminary Motions:

Prior to the hearing, on January 11, 2017, the Respondent filed a Motion to Toll Potential Reinstatement Order, wherein it stated that, subsequent to Anderson's termination, A&G Strip No. 12 mine was idled with no immediate plans for future operations at the mine. *Resp. Mot. to Toll*, 1. It further states that "some of the laid off employees at A&G were offered an opportunity to transfer to a mine owned by a sister company at Bishop Coal." *Id.* at 2. However, it states that "Anderson would not have been offered a transfer to Bishop Coal as all persons who accepted transfers to Bishop Coal had more seniority that [sic] Anderson and filled other jobs for which Anderson was not qualified to perform." *Id.* In support of its Motion, the Respondent attached as Exhibit A "a list of the former A&G employees, at the time of the lay-off, who were offered the opportunity to transfer to Bishop Coal."

In response, the Secretary filed on January 11, 2017, a Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, as a Party. Chestnut Land Holdings, LLC, is the operator of the Bishop Impoundment Area Mine, which the Respondent referred to as the "sister mine" in its motion. *Secy. Mot. to Amend*, 2. According to Mine Data Retrieval System reports attached to the Motion, the Controller for both A&G Coal Corporation and Chestnut Land Holdings is James C. Justice II. *Id.* Additionally, the Secretary argues that this Court should not consider on an expedited basis Respondent's Motion to Toll Temporary Reinstatement. *Id.*

Both parties were provided an opportunity to argue their motions at the hearing. Further, both parties were offered the opportunity to submit written replies within 24 hours following the close of the hearing, and both declined to do so.

I permitted evidence of tolling to be admitted at hearing. The ruling on both of these motions is provided, infra.

Summary of Testimony:

At the time of hearing, Complainant Aaron Lee Anderson had been a heavy equipment operator for 14 years. Tr. 23. Equipment operators at A&G Coal Corporation would usually work at the pit, but once or twice a week they would work at the tipple to help load the train or

feed the hopper.[4] Tr. 36-37. On November 18, 2016, Anderson was working as a rock truck driver for A&G Coal Corporation, which is a subsidiary of Southern Coal Corporation. Tr. 23-24. Anderson also operated other pieces of equipment, including a drill, a 980 frontend loader, a 988 frontend loader, a grease truck, and the mechanics truck. Tr. 24, 35. He was paid the truck driver's rate at $16.50 per hour, rather than the operator pay of $18.50 per hour.[5] Tr. 35. Anderson worked a split shift, which consisted of two night shifts and two day shifts each week. Tr. 41-42.

On November 18, 2016, Anderson was working the night shift, which started at 5:45 pm and was scheduled to end at 5:45 am. Tr. 42. The first thing he typically did when he arrived was perform a preshift checklist, which would last approximately 5-10 minutes, and involved him checking his equipment for safety defects. Tr. 43.

On that date, Anderson was running a 777F truck, hauling rock from the pit to the dump area to put it in the spoil pile. Tr. 24. His supervisor was foreman Danny Orrick.[6] Tr. 24, 30. Anderson's truck was the third piece of equipment at the pit, behind two loaders. Tr. 25, 44. The conditions at the pit were "extremely dusty" and it was starting to get dark outside, all of which affected visibility. Tr. 24.

Anderson testified that at 6:05 pm, he called Orrick on the CB radio and told him about the condition.[7] Tr. 25. Anderson testified that Orrick responded that he would get the water truck out to the pit as soon as he could, and that it had to first be loaded with water. Tr. 25-27, 46. Anderson continued with his work, because he was afraid of losing his job if he stopped.[8] Tr. 27. Anderson testified that at the time he was not aware of his rights under the Act to refuse to perform unsafe work. Tr. 38-39, 49.

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[4] The tipple was located approximately four miles from the pit, and was called either Paragon or Kelly Loadout. Tr. 37.

[5] Anderson did not know why he was paid at the reduced rate, and spoke with Superintendent Tim Fugate, Foreman Orrick, and the Safety Director on several occasions about the issue. Tr. 36. They said that they would talk to the front office and try to increase Anderson's pay. Tr. 36. Fugate approached Anderson in early November and said that he was going to approve the increased pay. Tr. 36.

[6] Danny Wayne Orrick testified at hearing on behalf of the Respondent. Orrick has worked in coal mines since 1978. Tr. 61. At the time of hearing, he was an equipment operator for A&G Coal Corporation at the Bishop Mine. Tr. 61. At the time of the incident at issue, he was a C Crew Foreman. Tr. 61. He is certified as a surface mine foreman in Kentucky, Virginia, Tennessee, and West Virginia. Tr. 61-62. Part of Orrick's duties as a foreman included performing the pre-shift examination at the pit. Tr. 63-64.

[7] Employees used a designated channel on the CB radio to communicate. Tr. 25. All employees could hear what was said on the channel used. Tr. 25.

[8] Anderson based this belief on his experience in the mining industry and being told that "if you don't do what they want, that there's another guy to put in your seat." Tr. 49, 51.

Anderson testified that when he was getting his second load, he called again over the CB radio, and stated that there was too much dust in the pit, resulting in him not being able to see. Tr. 28. He said that others needed to be careful, and they needed the water truck quickly because the dust was getting to the point where they couldn't see anything.[9] Tr. 28. He described the conditions as "when something moved in that pit, it was like a cloud that covered everything." Tr. 28. The visibility was made worse through the large headlights of the equipment in the pit, creating what Anderson described as a "wall." Tr. 29. Anderson received no response to this second comment on the CB radio. Tr. 29. At least two other truck operators, Buddy Dotson and David Gent, also made complaints over the radio concerning the dust. Tr. 31, 37.

At hearing, Orrick denied that Anderson had communicated his concerns about the dust to him. Tr. 64. He stated that Anderson may have made comments over the radio, but nothing that was addressed to him.[10] Tr. 66-67. Similarly, Orrick testified that he did not hear anyone raising safety concerns about the dust on November 18.[11] Tr. 67. Orrick testified that the first time he heard about the dust was after the accident when the loader operator called for him on the CB radio to come to the pit.[12] Tr. 64-65, 67-68, 76-77.

Anderson then returned to get his third load, and the maintenance foreman asked him if there was an issue with one of his handrails on the truck because it had been broken and unrepaired for approximately 10 days. Tr. 29, 56. Anderson testified that the handrail was repeatedly fixed, at least eight or nine times, and it repeatedly broke again. Tr. 29, 56. Each day that it was broken, he wrote it in the shift book. Tr. 57-58.

As soon as Anderson ended his conversation with the maintenance foreman, another operator that was running the 777D truck asked Anderson if he was going to proceed to the larger of the two loaders in the pit, the 993 loader. Tr. 29-30. Anderson responded that he would. Tr. 30. A truck got loaded between Anderson and the other staged truck, which left a cloud of dust. Tr. 30. Anderson saw the 993 loader bring his bucket up like he was staging for a truck to come back to him. Tr. 30, 52. The bucket lifts approximately 24 feet in the air, and a lot of loader men will raise their bucket high up in the air in order to let the trucks under them, before lowering the buckets. Tr. 53-54. Anderson saw the bucket above the dust cloud. Tr. 53. Anderson then proceeded. Tr. 30. Anderson struck a 789 rock truck with his 777 truck.[13] Tr. 48.

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[9] In addition to being responsible for watering the pit, the water truck also is responsible for watering any part of the job where people are working. Tr. 83.

[10] The CB radios were mounted in the trucks and equipment, and Orrick did not carry a radio on his person. Tr. 71.

[11] Orrick also denied hearing any complaints on November 18 about lighting in the pit. Tr. 69.

[12] Orrick testified that shortly after 6 pm on November 18, the water truck had left the parking area and had gone to the loading area to get a load of water. Tr. 70. Orrick described the use of the water truck as a "normal thing we do...especially if it's dry, because over the course of the shift there will be some dust created as the roads dry up." Tr. 71. Anderson never saw a water truck come into the pit. Tr. 30.

[13] The 777 rock truck is a 100-ton truck, and the 789 truck is a 200-ton truck. Tr. 48.

After the accident, Anderson returned his truck to the parking lot and then went with Mr. Henry to take a drug test. Tr. 31. Anderson was asked what happened, and he said there was no visibility because the dust was not addressed. Tr. 31. Anderson was told that he and the other operators were on the radio too much. Tr. 31. At the time of the accident, the conversation on the radio concerned defective equipment and safety issues that needed to be corrected. Tr. 31-32. The workers had to sign a document that said that if they used the radio for anything other than business issues, they would be automatically terminated. Tr. 32. Anderson understood this to mean that he and the other operators were not to use the radios. Tr. 32.

Anderson was sent home at 10:30 pm on November 18, and never returned to work. Tr. 32-33. He repeatedly called Southern Coal's main office to check on his employment, and spoke to both Orrick and Superintendent Tim Fugate. Tr. 33. Anderson was told that they were awaiting the results of his secondary drug test to be returned. Tr. 33. On Thanksgiving Day, Anderson received a letter from the drug testing facility with the results, which were negative. Tr. 33. He received a certified letter on November 28, saying that he was terminated effective November 21. Tr. 33.

Prior to the November 18 complaint, Anderson had made three complaints to Orrick concerning the berm height, and how they needed to be raised. Tr. 39. Orrick would become agitated at these complaints, and in one instance Orrick responded that Anderson should do his job and Orrick would do his. Tr. 39.

Senior Vice President of Southern Coal Corporation Patrick Graham testified on behalf of the Respondent.[14] Graham testified that at some point Mine No. 12 was idled, and though there are no immediate plans to reopen the mine, it remained a possibility. Tr. 90-91. Therefore, in order "to keep as many of the A&G employees working as possible, we transferred those that would take positions at another mine in West Virginia. We call it Bishop Mine." Tr. 91. Graham testified that three factors were used to fill positions at Bishop Mine: the employee's skill set, the employee's seniority, and the employee's willingness to transfer. Tr. 91, 96. Graham stated that length of service was the primary factor. Tr. 91-92. Graham testified that no employee that was transferred to Bishop Mine had less seniority than Anderson. Tr. 92. Further, no currently operating A&G operation had a haul truck driver position open. Tr. 93.

Graham reviewed a press release that the Chief Operating Officer of A&G Coal sent out on December 29, 2016. Tr. 97-104; CX-A.[15] The press release stated in relevant part, "A&G Coal Corporation has temporarily idled its mining operations to conduct routine maintenance on its heavy machinery...A&G will continue to conduct all of its reclamation obligations during this temporary idling and anticipates being able to restart the active mining operations in the near future." CX-A. Graham testified at hearing that he did not disagree with any of the contents of the press release. Tr. 99.

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[14] Graham had worked in the mining industry since 1969. Tr. 87. He has operated equipment, operated the shuttle car, and worked as a foreman. Tr. 87. He has worked internationally, and in mine rescue. Tr. 87-88.

[15] The press release and an article on the press release were admitted into evidence as Complainant's Exhibit CX-A.

Findings and conclusions

The Secretary argues that Anderson engaged in protected activity when he complained about the dust in the pit, and that this protected activity contributed to the company's decision to terminate him. The Respondent maintains that Anderson did not make any complaints about the dust, and therefore never engaged in any protected activities. The Respondent further argues that if this court finds that Anderson's complaint was not frivolously brought, it should toll his temporary reinstatement because the Strip #12 mine has been idled, and Anderson would not have been offered a transfer to any affiliated mines. The Secretary maintains that this court should not consider evidence of tolling at this preliminary stage on an expedited basis.

For the reasons that follow, I find that Anderson's complaint was not frivolously brought.

Anderson Engaged in Protected Activity and Suffered an Adverse Employment Action

The Complainant engaged in protected activity when he complained to Orrick over the CB radio about the dust and visibility issues in the pit. Tr. 25-27. Anderson testified that at 6:05 pm, he called Orrick over the CB radio and told him that the dust at the pit was problematic. Tr. 25. Anderson testified that Orrick responded to his complaint by saying that he would dispatch a water truck to the pit. Tr. 25-27. Orrick instructed the drivers to continue doing their jobs. *Aff. Of Michael Hughes*, 2. Anderson then made a second call over the CB radio, complaining about the dust, and requesting that the water truck be expedited. Tr. 28. Orrick never responded to this second call. Tr. 29. Anderson further testified that two other truck operators, Buddy Dotson and David Gent also made complaints over the radio concerning the dust.

Orrick testified that no miners communicated their concerns about the dust prior to the accident. Tr. 64. However, in the context of a Temporary Reinstatement, neither the judge nor the Commission is to resolve conflicts in testimony. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). Therefore, I find that Anderson has presented substantial evidence that he engaged in protected activity prior to his termination.[16]

Further, Anderson suffered an adverse employment action when he was terminated on November 21, 2016. Tr. 33. He had been sent home at 10:30 pm on November 18, before the shift ended at 5:45 am. He was not recalled to work.

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

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

Having concluded that Anderson engaged in protected activities and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of

[16] In addition to complaints about the dust, Anderson also presented evidence that he had made numerous complaints about the truck handrail, as well as raising the berm height. Tr. 29, 39, 56.

discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

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

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. Employees all used a designated channel on the CB radio to communicate, so everyone was able to hear statements made over the CB radio. Tr. 25. Following Anderson's first complaint about dust over the CB radio, Orrick responded by saying that he was sending the water truck and that the drivers should continue their work. Tr. Tr. 25-27; *Aff. Of Michael Hughes*, 2. Orrick never responded to Anderson's second complaint, so there is no evidence that he was aware of it. Tr. 28-29. However, the response to the first complaint of dust is sufficient evidence to show that Orrick, who was the crew foreman, had knowledge of the protected activity.

Coincidence in time between the protected activity and the adverse action

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

In the instant matter, Anderson made the safety complaints concerning the dust in the pit on the evening of November 18, 2016. Tr. 25-28. He was sent home at 10:30 pm on the same date and never recalled to work. Tr. 32-33. On November 28, Anderson received a certified letter stating that he was terminated effective November 21. Tr. 29. The time span between Anderson's

protected activity and his termination was therefore three days. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

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

In the instant case, the Respondent evinced animus towards the protected activity at issue, as well as previous protected activities. Anderson testified that he had made three complaints to Orrick concerning the berm heights, and how they needed to be raised. Tr. 39. He described how Orrick grew agitated at his complaints, and in one instance responded that Anderson should do his job and Orrick would do his. Tr. 39. Furthermore, Anderson had complained many times about the handrail on his truck being broken. Tr. 29. The company repeatedly fixed the handrail, but never in a manner that prevented it from breaking again. Tr. 29, 56. Indeed, on the date of the accident, the handrail had remained unrepaired for approximately 10 days. Tr. 29, 56. Such responses to complaints—from inaction to outright hostility—would lead to a reasonable miner concluding that his safety complaints were unwelcome.

The Respondent also displayed animus towards Anderson's protected activity of making safety complaints about the dust over the CB radio. On the evening of the accident, after making his safety complaints over the CB radio, Anderson was told that he and other operators were on the radio too much. Tr. 31. He was told to sign a document that stated that if he used the radio for anything other than business issues, he would face immediate termination. Tr. 32. The timing of these statements and the document evinces animus. All indications are that Anderson and others were using the CB radio only for safety and other related issues on November 18. Therefore, there appeared to be no reason for emphasizing that Anderson was not permitted to use the radio for non-business purposes, replete with the threat of termination, immediately following his use of the radio for safety complaints.

Disparate Treatment

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

In the instant matter, neither party made an argument concerning disparate treatment.

Anderson's Temporary Reinstatement Should Not be Tolled

The Respondent argued that should this Court grant the Secretary's Application for Temporary Reinstatement, it should be tolled. In support of its request, Respondent states that the Strip No. 12 mine has been idled, and all employees of that mine were either laid off or transferred to the Bishop Mine. It argues that even if Anderson had not been terminated following the accident, he would not have been offered a transfer to Bishop Mine.

Respondent submitted into evidence a chart containing the names, dates of hire, wages, addresses, phone numbers, and whether each listed employee was laid off, transferred to Bishop, or refused transfer. RX-A. At hearing, Respondent put on Senior Vice President of Southern Coal, Patrick Graham, as a witness. Graham testified that three factors were used to fill the positions at Bishop Mine: the employee's skill set, the employee's seniority, and the employee's willingness to transfer. Tr. 91-92. Graham did not testify as to how these three factors were weighted, but stated that seniority was the primary factor. Tr. 91-92.

"The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *MSHA obo Robert Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009). This "limited inquiry to determine whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous," must be consistent with the "narrow scope of temporary reinstatement proceedings." *MSHA obo Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 2013 WL 2146640, *3 (May, 2013). Accordingly,

> [a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Gatlin,* 31 FMSHRC at 1055. However, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the miner's claim.

MSHA obo Russell Ratliff v. Cobra Natural Resources, LLC, 2013 WL 865606, *4 (Feb. 2013). "In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous." *C.R. Meyer & Sons*, 2013 WL 2146640, *3.

Respondent has failed to provide sufficient evidence to support tolling Anderson's temporary reinstatement. Graham testified that three factors were used to determine whether a miner would be laid off or transferred to Bishop Mine. Considering the evidence in light of each of these factors presents a problem. First, Respondent argues that seniority was the primary factor; however the chart shows that a miner that was hired the same month as Anderson was transferred to Bishop, whereas another miner who had a decade more seniority was laid off. One can only conclude that if seniority was actually a factor used by A&G, it did not hold the weight that Respondent states. Second, the chart supplied by Respondent does not list the skill sets or certifications of employees, making it impossible to determine if Anderson's skills would have qualified him for a transfer. The chart only presents hourly wage, which is not a suitable proxy for presenting evidence of employee skills. Lastly, because Anderson was not an employee of

A&G Coal at the time miners were offered transfer, his willingness to transfer was not considered. The evidence presented by Respondent in no way shows that Anderson would not have been transferred to Bishop Coal had he not been terminated following the accident. Therefore the Motion to Toll is denied.[17]

Chestnut Land Holdings Should be Added as a Party

The Secretary filed a Motion to Amend the Pleadings to Include Chestnut Land Holdings, LLC, which operates the Bishop Mine, as a party. The Respondent opposed this Motion, stating that Chestnut Land Holdings is a separate entity in a separate state. Tr. 14.

Federal Rule of Civil Procedure 15 provides that leave to amend pleadings "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In the instant case, Chestnut Land Holdings and A&G have the same Controller, James C. Justice II. Employees at A&G were transferred to Bishop Mine freely, and according the press release issued by A&G, there is an intent to transfer these employees back to A&G in the future. CX-A. In the Respondent's pleadings, it referred to Bishop Mine as a "mine owned by a sister company," and in the press release it referred to it as an "affiliate entit[y]." Resp. Mot. to Toll, 2; CX-A. The Strip No. 12 mine is currently idle, so justice requires that Anderson be temporarily reinstated to the same mine where other employees were transferred.

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[17] In his closing argument, Mr. Shelton made an argument that this Court finds quite troublesome. In the context of arguing that the company should not have to reinstate Anderson, Mr. Shelton stated:

> If you look at the other person, there's another person on 12/20/2015, Kevin Collins, who was a $16.50 an hour person who, again, was there, you know, six or eight months prior to Mr. Anderson. Who's going to explain to Kevin Collins, that he's a more senior employee with the same skills as Mr. Anderson and he has to be laid off so [Anderson] can be reinstated?

Tr. 121. If Mr. Shelton was arguing that the Respondent would lay off other miners as a response to Anderson's discrimination complaint and temporary reinstatement, he should be aware that such actions may constitute discrimination or interference. Anderson's actions of voicing safety complaints and filing a discrimination complaint are protected activities, and the company may not threaten or terminate other miners as a result of those actions.

Further, Mr. Shelton's singling out a miner by name at hearing that would be targeted for layoff as a result of Anderson's discrimination complaint and temporary reinstatement was highly inappropriate, and wholly unnecessary to the proceedings. The transcript of a hearing is a public document, and Mr. Shelton's comments serve no purpose, and may result in miners' speech being chilled for fear that one of their coworkers will suffer.

Conclusion

In concluding that Anderson's complaint herein was not frivolously brought, I find that there is reason to believe that Anderson engaged in protected activity. I further conclude that the Secretary has met its burden in showing that there was a nexus between Anderson's protected activities and his termination.

ORDER

For the reasons set forth above, it is **ORDERED** that Chestnut Land Holdings, LLC, is added as a party to these proceedings. It is further **ORDERED** that Complainant Aaron Lee Anderson be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision. The Respondent's Motion to Toll Temporary Reinstatement is **DENIED**.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.*

Kenneth R. Andrews
Administrative Law Judge

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