# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 19 2015

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>on behalf of GARY BROOKS,<br>Complainant,<br><br>v.<br><br>KINGSTON MINING INC.,<br>Respondent. | TEMPORARY REINSTATEMENT<br>PROCEEDING<br><br>Docket No. WEVA 2015-784-D<br>MSHA Case No.: HOPE-CD-2015-07<br><br><br><br>Mine: Kingston No. 2 Mine<br>Mine ID: 46-08932 |

## DECISION AND ORDER REINSTATING GARY BROOKS

Appearances: Anh T. LyJordan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

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

Before: Judge Andrews

On May 29, 2015, 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 Gary Brooks ("Brooks" or "Complainant") to his former position with Kingston Mining Inc., ("Kingston" or "Respondent") at Kingston No. 2 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Brooks on April 20, 2015, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Brooks to his former position as a fireboss/supplyman.

Respondent filed a motion requesting a hearing regarding this application on June 5, 2015. On June 11, 2015, Respondent submitted a Pre-Hearing Memorandum of Law addressing its legal arguments in this matter. A hearing was held in South Charleston, WV on June 16,

2015.[1] The Secretary presented the testimony of the Complainant. Respondent had the opportunity to cross-examine the Complainant and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Brooks.

**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.[2] *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 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

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[1] 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). During a conference call, the parties agreed to waive this limitation and allow the hearing to be held one day late.

[2] "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)).

addition to Congress' "appears to have merit" standard, the Commission and the 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 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 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and Brooks 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).

**Contentions of the Parties**

On April 20, 2015, Brooks executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> I was laid off and feel it was in retaliation due to my brother filing a complaint against the company.

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

The Secretary also submitted the May 27, 2015 Affidavit of James R. Humphrey, a Special Investigator employed by the Mine Safety and Health Administration with the Application. Humphrey wrote that he investigated Brooks' discrimination claim against Respondent. Humphrey laid out his findings of fact based on his investigation. *Id.* at Exhibit A, p. 1-3. He concluded:

> 3. There is reasonable cause to believe that the Complainant was discharged because he engaged in protected activities. Brooks engaged in protected activity when he expressed concern about unsafe working conditions at the Kingston No. 2 Mine and when he provided running right cards to be used in a Commission proceeding. Brooks suffered an adverse action when he was discharged on April 10, 2015.
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> 4. Based on my investigation to this date, I have concluded that there is a reasonable cause to believe that Brooks was discharged because he engaged in protected activities by complaining about unsafe practices at the mine and providing running right cards to be used in a Commission proceeding. I have concluded that the complaint filed by Brooks was not frivolous.

*Id.* at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 4.

In its pre-hearing submission, Respondent argued that Brooks did not engage in any protected activity. (*Respondent's Memorandum* at 11-12). Further, it argued that even if Brooks engaged in protected activity, there was no nexus between that protected activity and the adverse employment action. (*Id.* at 15-18).

**Summary of Testimony**

Gary Edward Brooks was present at the hearing and testified. (Tr. 17). At that time he was unemployed, last working as a supply man and fire boss for Respondent. (Tr. 18). He had worked at the instant mine for nine years and had a total of 22 years of experience, mostly underground. (Tr. 22). As a fireboss, Brooks conducted an exam two hours before an oncoming shift. (Tr. 18). As a supply man, he would take supplies to production crews at two underground sections. (Tr. 18-19). Brooks could operate all of Respondent's equipment both above and below ground. (Tr. 19-20). He could fill in for anyone who was out. (Tr. 21-22). Brooks estimated there were around 168 miners at the mine when he worked there and he did not believe anyone else could run all of the equipment. (Tr. 20-21). He had extensive surface and underground certifications. (Tr. 22-23).

The issues in this matter began when Brooks attended an Employee Involvement Group ("EIG") meeting held on August 15, 2014. (Tr. 24, 31, 89-90). Those meetings occurred once a month and served to gather information from employees regarding violations or hazards that needed to be corrected. (Tr. 24-26, 88). The information came in the form of anonymous complaints called "Running Right" cards that dealt with violations or hazards in the mine. (Tr.

27-28, 49, 88). Pads of the cards were located throughout the mine and 100 to 2,300 a month were submitted. (Tr. 49, 103). Only Brooks and the superintendent, Daniel Helmandollar, had a key for the lock box.[3] (Tr. 28, 105-106). Brooks retrieved these cards from a lock box each morning and then categorized them by importance to distribute the appropriate management official. (Tr. 27-29, 50, 105). Helmandollar would then review all the cards and triage the issues raised in them. (Tr. 100, 103, 114). Brooks then received the cards back at the EIG meeting and if the condition was corrected or addressed it would be noted on the card. (Tr. 29, 52, 115). The goal of the meeting was to explain to the miners that their concerns were being addressed. (Tr. 29, 88-89). Cards were regularly destroyed approximately four to six weeks after the meeting, but Brooks did not know if that was mandatory. (Tr. 55, 115).

Brooks attended those meetings in his capacity as "Running Right Champ." (Tr. 38). Running Right Champ was a voluntary, unpaid position that required work at home a couple of times a month. (Tr. 38, 102). Brooks had been asked to become Running Right Champ by Helmandollar when the program was first implemented because Brooks knew the mine well and Helmandollar believed he was a good candidate. (Tr. 30-31, 101). As Running Right Champ, Brooks chaired the meetings. (Tr. 26). In addition to Brooks, the meetings contained a rotating selection of six to eight hourly employees who brought different perspectives to the meeting. (Tr. 25-26, 47-48). There were also a number of management personnel who attended every meeting including Helmandollar, Mine Foreman Kenny Martin[4], human resources employee and Running Right Coordinator Justin McMillion, General Manager Robert Gordon[5], chief electrician Jerry Birchfield, and safety director John Murphy. (Tr. 25-26, 47-48).

After the EIG meetings, brooks would also attend large Performance Group ("PG") meetings. (Tr. 27, 30). The PG meeting was attended by the champs, the hourly employees, and most of management. (Tr. 30). All Alpha Natural Resources mines had Running Right Champs and conducted EIG meetings before reaching the PG meetings. (Tr. 51-52). Those meetings were run by Justin McMillion. (Tr. 30).

At the end of the August 2014 EIG meeting, after most people had left, Gordon asked Brooks why morale was low at the mine. (Tr. 31, 53, 89-90). Gordon testified he asked if there were any rumors or if anything was bothering anyone. (Tr. 90, 93). While initially reticent, Brooks eventually told Gordon he believed morale was low because of a safety issue related to dust, because mantrips ran too fast, and because miners were kept late without pay. (Tr. 31-32,

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[3] Daniel Helmandollar was present for the hearing and testified. (Tr. 98). At the time of the hearing Helmandollar was retired but previously worked as the Superintendent of the mine at issue. (Tr. 98-99). In that capacity he was responsible for all matters at the coal mine, including safety. (Tr. 98). He had 40 years of mining experience, 25 years as a supervisor. (Tr. 99).

[4] Kenny Ray Martin was present at hearing and testified. (Tr. 117). At the time of the hearing Martin was a general Mine Foreman and Kingston No.2 but had previously held the same position at the instant mine for two years. (Tr. 117).

[5] Robert C. Gordon was present at hearing and testified. (Tr. 85). At the time of the hearing, Gordon was a general manager at Mammoth Coal Company and previously held the same position at Kingston. (Tr. 85-86). He had previously worked for several operators at several management-level positions through the years. (Tr. 86-87). Gordon had been instrumental in implementing the Running Right Program at Alpha. (Tr. 86-87).

90-91). Brooks believed his complaint implicated management and was reluctant to speak, even though most of management was not present. (Tr. 32). The complaints came from miners and Running Right cards, though he had never discussed these bolting in dust issues in his presentation. (Tr. 36, 52). He had no personal knowledge of the dust issue. (Tr. 54).

Brooks then left the mine but was called back to the mine site on his way home to talk to Martin and Helmandollar about the issue. (Tr. 32-33). When he arrived back at the mine Gordon, Martin, Helmandollar, and perhaps Jerry Birchfield and/or Shad West from human resources were present.[6] (Tr. 33, 91-92). Brooks told the group that one of the safety foremen had told him that the bolter was not staying on the cut cycles and that he was tired of getting "jumped onto for low production." (Tr. 33, 53). Brooks explained the evening shift was getting off the cut cycle and hindering the day shift. (Tr. 33-34, 53, 90-91). The cut cycle was in place so that the bolter did not in the dust. (Tr. 34). According to the ventilation plan, miners were only allowed to work in the dust one time per shift because of the volume of rock and coal dust in the air. (Tr. 34-35). Brooks testified the complaint here arose because miners either had to bolt in the dust or wait and lose production. (Tr. 35-36, 53). Waiting was expensive and miners had to stay for overtime. (Tr. 35). Brooks believed he was raising a safety issue. (Tr. 35). Brooks recalled Martin said that he did not understand the cut cycle. (Tr. 36).

Gordon believed that Brooks was complaining about morale being low because of delays in the mining process. (Tr. 89-91, 94). The miners were frustrated because they wanted to run coal and do a good job and did not want to wait. (Tr. 94-95). Gordon told Brooks that regardless of the cut cycle and delays, they had to obey the plan. (Tr. 91). Gordon asked Helmandollar and Martin to explain to everyone that they would try to work the cut cycle but that there would be times when they would have to wait. (Tr. 92, 96). Gordon did not believe Brooks was making a safety complaint; they were discussing the mentality of the mine. (Tr. 92-93). Gordon never heard, from Brooks or anyone else, that bolters were being made to bolt more than once in the dust until management discovered it in September. (Tr. 95-97, 103). Bolting twice downwind of a continuous miner would be a violation of the plan and a safety hazard. (Tr. 97).

About a month-and-a-half after this meeting Brooks' brother, Dallas Brooks, who worked as a bolter operator on the section Brooks complained about, was suspended and discharged from the mine. (Tr. 36-37). Brooks believed his safety complaint led to his brother's discharge. (Tr. 42). Everyone knew they were brothers. (Tr. 37). Helmandollar testified that Dallas Brooks was suspended and discharged for a serious safety violation that had nothing to do with Gary Brooks. (Tr. 114).

Dallas later filed a request for temporary reinstatement.[7] (Tr. 42, 99). Dallas never asked Brooks to help prepare for the reinstatement hearing. (Tr. 42). Brooks' only participation in the

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[6] Shad Allen West was present at the hearing and testified. (Tr. 125). At the time of the hearing West worked as the Human Resource Manager for Kingston Mine, a position he held since October 2011. (Tr. 125). He had worked at other mines and had four and a half years of experience in human resources. (Tr. 125).

[7] On February 25, 2015, a hearing was held regarding that claim. On March 3, 2015, Judge Rae issued a decision finding Dallas' claim that he encountered discrimination for complaining about bolting multiple times downwind of the miner was not frivolously brought. *Sec'y of Labor on*

investigation into his brother's claim was providing two Running Right Cards that discussed working in the dust. (Tr. 43). The cards indicated that the issue raised had been addressed; Brooks believed one card was stamped "addressed." (Tr. 53, 56). Brooks had these cards at home because he had used them to prepare a presentation. (Tr. 43). Brooks was sure Respondent knew he provided the Running Right Cards because he was the Champ, had access to the cards, and his brother had them. (Tr. 43, 56). He did not know for sure if Respondent knew, but it was obvious. (Tr. 43, 56). No one said they believed Brooks provided the cards. (Tr. 56).

Helmandollar testified at Dallas' temporary reinstatement hearing in February of 2015. (Tr. 99). Those two Running Right cards were discussed at that hearing. (Tr. 99-100, 127). However, Helmandollar did not recognize the cards, he did not know who filled them out, and did not know who gave them to the Secretary of Labor. (Tr. 100). In fact, Helmandollar could not recall ever seeing those cards before the hearing. (Tr. 101-104). Despite the high number of cards, Hermandollar testified that he read and remembered them all. (Tr. 104).

Helmandollar did not assume or conclude Brooks had given the cards to his brother; he was not sure where they came from. (Tr. 101, 104). West testified there were too many people with access to cards to make that assumption. (Tr. 127). Blank cards were available everywhere and just because they were filled out did not mean they were turned in. (Tr. 56, 127-128). However, Helmandollar conceded that no other workers had access to the physical running right cards. (Tr. 105-106). Other miners could only get the card by asking for it. (Tr. 106, 116). Miners were not supposed to keep the cards but they could. (Tr. 116). No one from management would have reason to give the Solicitor the card. (Tr. 107).

Two days after Dallas was suspended from the mine, Helmandollar asked Brooks to step down as Running Right Champion. (Tr. 40). Helmandollar said it was because he wanted to cycle other employees through the Running Right process and that Gordon and McMillion agreed. (Tr. 40, 107-110). Helmandollar believed this would provide different perspectives for the position. (Tr. 48). Management had never before suggested rotating the position. (Tr. 41). After he resigned as Champ, Brooks spoke with Respondent's other Running Right Champs and none of them were rotated off of the position or asked to do so. (Tr. 41). He also spoke with McMillion, who said he had never spoken with Helmandollar about the issue and that it was solely up to Helmandollar. (Tr. 41). Brooks was not replaced as Running Right Champ for 1.5-2 months because they had trouble filling the position. (Tr. 41-42). Brooks believed he was removed from the Running Right Champ position because his brother worked at the mine and Respondent believed he had an interest in the case. (Tr. 42).

However, Brooks conceded at hearing that at one time he had asked to step down as Running Right Champion because of the burden the task was placing on his home life and his relationship with other employees (who called him "snitch"). (Tr. 38-39, 50, 102, 107). Helmandollar was not surprised but asked him not to step down because he was good at the job and they needed him. (Tr. 39, 50). Brooks testified that Helmandollar did not bring up finding a replacement; he just talked Brooks into staying. (Tr. 39). Neither Brooks nor management raised

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*Behalf of Dallas Brooks v. Kingston Mining, Inc.*, 37 FMSHRC 531 (Mar. 2015). As a result, judge Rae ordered his temporary reinstatement to the mine. *Id.*

this issue again for another six to eight months, until Helmandollar asked him to step down. (Tr. 39-40, 107).

Helmandollar testified that he only asked Brooks to stay while he found a replacement. (Tr. 108). In fact, Helmandollar said that Brooks offered to stay until that time. (Tr. 108). Helmandolar would have let him stop at any time. (Tr. 108). Helmandollar testified that it took some time after the request to find a suitable replacement. (Tr. 102, 109). He began the search as soon as he and Brooks spoke. (Tr. 109). He testified he did not remove Brooks from the position because of issues concerning bolting in the dust. (Tr. 102).

Adam Williams took over for Brooks as Running Right Champion. (Tr. 57). Helmandollar testified that he waited until Williams was in place before asking Brooks to step down. (Tr. 110). He also testified that there was no significance to the fact that Brooks was asked to stand down within days of Dallas' suspension. (Tr. 113). There was a small gap in time between the two champs so that Williams could be trained. (Tr. 111). John Murphy trained Williams and made the first presentation for Williams because he was not yet ready. (Tr. 57-58, 111). Even after that presentation, Williams needed Brooks' help because he could not run the computer. (Tr. 57-58, 111). Murphy covered some of the other duties for Williams. (Tr. 111-112). Williams ran the EIG meetings and sorted the cards for handing out. (Tr. 58, 112). There was no particular reason Respondent did not train Williams before he took over. (Tr. 112). Brooks did not train Williams because they were on different shifts. (Tr. 112-113). Brooks may have been willing to train Williams outside of his shift but Helmandollar did not ask. (Tr. 113).

In January 2015, Respondent had concerns about adverse conditions in the number one section of the instant mine. (Tr. 61-62). The area was producing mostly rock, little coal, and the costs were high. (Tr. 62). The mine was then closely monitored to see if conditions improved so they could keep all the sections running. (Tr. 62). Despite hoping the section could be profitable, Respondent conducted a training section with supervisors on an evaluation process in the event a reduction in force was necessary. (Tr. 62). Kyle Bane conducted the training with a PowerPoint presentation. (RX-3)[8] (Tr. 63). The training was conducted so employees would know how the evaluation form looked and so they would conduct fair, consistent and honest evaluations. (Tr. 63-64, 76-77, 80-81). Page 5 of the PowerPoint contained the grading system: a list of 15 questions with a rating of one to five. (Tr. 63-64, 76). The ratings were to cover the miners' entire work history. (Tr. 77). There was also a section for areas the miner needed to improve and for other comments by the evaluator. (Tr. 64-65). Additionally, there was a place for supervisors to fill in whether employees could run several pieces of equipment. (Tr. 65).

The evaluations were conducted at the end of January and beginning of February. (Tr. 71). The supervisors used the evaluation forms then returned them to human resources, and West made a spreadsheet of the findings (RX-4). (Tr. 65-67, 84, 127, 130, 138-139). Bane and West were not present when the supervisors conducted the evaluation. (Tr. 80-81, 130). A column on the spreadsheet showed the subtotal of all of the 15 questions in the evaluation for

[8] Kyle Bane was present at hearing and testified. (Tr. 60). He was Human Resources Director for Brooks Run North Region at Alpha Natural Resources and had held that position since June 2011. (Tr. 60). In that capacity he oversaw human resources at several mines including the instant mine. (Tr. 61). He had previously worked in HR for Massey Coal Services. (Tr. 61).

each miner. (Tr. 67-68). Two of the evaluation categories were "attitude" and "right thing." (Tr. 78). Page seven, third question states that attitude means, "demonstrates support of company's missions, vision, values by exemplifying a strong sense of teamwork." (Tr. 79). "Right thing" was on page seven, fourth question and means "adheres to high ethical standards, treats others with dignity and respect." (Tr. 80). All evaluators were trained to use these questions in the evaluation. (Tr. 79-80). Another column showed the total score, which included scores for "bonus point questions" for being a certified foreman, an EMT, or anything else. (Tr. 68). The bonus points were used as a tie breaker in the evaluation process when two people had the same subtotal. (Tr. 68). West reviewed some of the fields where he had personal knowledge to ensure they were accurate. (Tr. 130-131). For instance, if a miner was listed as having good attendance and West knew it was not true, he would correct it. (Tr. 131).

The spreadsheets included both Kingston mines so that the most talented employees from both mines would be retained. (Tr. 70). In the interest of that goal, Respondent also did not consider seniority. (Tr. 69-70). Certification, performance, attitude, job efficiency, and keeping the best people possible were the reasons certain people were selected. (Tr. 74). Brooks later believed seniority was considered but no one told him that was the case. (Tr. 56-57).

Respondent attempted to control quality by using two people at all times for evaluations. (Tr. 77-78, 82-83). The training and guidelines were meant to ensure that each numerical ranking was consistent between various members of management. (Tr. 78). However, if a supervisor had a personal problem with a miner, the presence of the other evaluator would ensure the miner did not receive an artificially low score. (Tr. 82). West testified that he did not have a system for determining the dependability of the other categories beyond checking against personnel records. (Tr. 131-134). Bane conceded that if they both had problems with the miner, it was possible a miner could be given a score that did not accurately reflect his professional abilities. (Tr. 82). West conceded it was "possible for someone to enter scores that make [someone] the lowest coal miner in the ranking system." (Tr. 133). However, West did not believe anyone deliberately under-evaluated Brooks, in fact he believed they went out of their way to be fair. (Tr. 139).

Pages 43-44 of the spreadsheet, number 241 showed Gary Brooks' score, a subtotal of 35. (Tr. 69). West recalled that it was the lowest score of any supply man at either mine. (Tr. 126). In addition to the score, Brooks' evaluation sheet stated he admitted to spreading rumors. (Tr. 128, 134). At one time, another Alpha mine had a bonus program that was experimental. (Tr. 128). Brooks asked about the bonus and when asked where he had heard about it explained that he had heard about it from a few people. (Tr. 128). When asked if he had specific knowledge of the bonus he demurred. (Tr. 128). Then he said it was a rumor that he had created, and that he sometimes did that just to see what people would say. (Tr. 128). West and Helmandollar discussed the incident before including it in the comments. (Tr. 135-136). Every employee had some comment, though West did not discuss all of them. (Tr. 135-136). It was possible for Helmandollar to put in a comment that was not true, but West was present for Brooks admission regarding the rumor so he knew the comment was true. (Tr. 137, 139).

In the following months conditions did not improve and drill samples showed that the conditions would get worse on the section. (Tr. 72). As a result, Respondent decided to discontinue the section. (Tr. 72). The decision to layoff was made at the end of March or

beginning of April. (Tr. 71). To conduct the layoffs, local mine management was given a list of remaining positions and asked who should fill them. (Tr. 72-73). After that, West and Gordon cross-referenced those determinations with the evaluations to make no one who stayed had a lower subtotal score than someone who left. (Tr. 73, 125-126). Bane reviewed the decisions as well. (Tr. 73).

On April 10, 2014, 23 of the 167 miners at the mine were laid off and one miner quit.[9] (Tr. 44, 72). Ten contractors were also released. (Tr. 72). That day all of the miners were assembled in the basket room and several miners, including Brooks, heard their names called. (Tr. 44). These miners were taken to a different location and told they were being laid off. (Tr. 44). Bane testified he was present and explained that conditions had driven the decision. (Tr. 73-74). Brooks recalled one miner asked how they chose who got laid off and management explained it was due to qualifications and experience. (Tr. 44). Brooks told them he felt this was a lie because he had every certification and qualification at the mine but he got no response. (Tr. 45). However it had been some time since he operated a miner, three years since he operated a bolter, and eight months since he acted as boss. (Tr. 46). His EMT certification was current (though he was not on the mine rescue team) and he had operated the backhoe a week earlier. (Tr. 46-47). Bane recalled Brooks saying that the layoff was in retaliation for his brother. (Tr. 74). Bane said he did not know who Brooks' brother was and that it did not have anything to do with it. (Tr. 74-75).

There were several miners who were kept that had fewer certifications, fewer qualifications, and who had been suspended and missed work. (Tr. 45). Brooks had never been formally or informally disciplined by Respondent, and had never been late or had an unexcused absence. (Tr. 23-24). Martin testified that Brooks often had trouble getting along with others. (Tr. 118). Brooks had lots of ongoing problems with other motormen. (Tr. 119). Martin testified about an instance in which Brooks swore at another miner and refused to make up and shake hands. (Tr. 118-119). He also testified that Brooks was merely an adequate worker who did the minimum. (Tr. 119-121). He did his job, but if asked to cover for others he would get upset. (Tr. 119-120). His partner could get more done when he did not work with Brooks. (Tr. 121). He would often find Brooks outside when there was work to be done. (Tr. 120). However he conceded that Brooks was the only motorman he dealt with regularly. (Tr. 120, 123-124). Further, he testified that Brooks had never been disciplined for swearing, bad behavior, productivity, or anything else. (Tr. 121-122). Brooks' altercations never became physical. (Tr. 122-123). Swearing and altercations occurred occasionally at the mine, but were not common. (Tr. 122). Discipline could occur, depending on severity. (Tr. 123).

Brooks believed he was laid because of the issues he raised at the EIG meeting and because of his brother's suspension with intent to discharge and the resulting 105(c) case. (Tr. 45, 54-55). Bane and West denied that Brooks was laid off because of his brother's 105(c) case or because of the August meeting about bolting in dust. (Tr. 75, 127).

Brooks received 354 hours of overtime from April 11, 2014 to April 10, 2015, which is about 6.8 hours a week, or roughly 14 hours a pay period. (Tr. 128-129).

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[9] Everyone shown in red on the spreadsheet was laid off on April 10 (RX-4), (Tr. 70). People highlighted in yellow were demoted from salaried to hourly employees. (Tr. 70-71).

**Findings and conclusions**

*Protected Activity and 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. The initial issue here is whether Brooks engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See* 30 U.S.C. § 815(c)(1); *See also 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). According to the legislative history:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection... or the participation in mine inspections... but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

(S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (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* (1978). Further, "the listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive." *Id.*

In this matter, Brooks testified to an ongoing course of protected activity starting in August of 2014 and extending through his brother's hearing in February 2015. Specifically, Brooks testified that following a EIG meeting on August 15, 2014, he informed a member of management, Gordon, that he believed that miners had low morale because of an issue involving bolting in a dusty environment. (Tr. 31-32, 90-91). He testified that miners felt that pressure was put on them to increase production and that the only way to achieve this goal was to bolt twice downwind of the miner during a single shift. (Tr. 33, 35-36, 53). Gordon testified that this action would be a violation of the ventilation plan and a hazard. (Tr. 97). Brooks believed he was making safety complaint. (Tr. 35). Making a safety complaint is quintessential protected activity under the Mine Act.

At hearing and in its brief, Respondent's counsel argued that Brooks' complaint was not protected activity. (*Respondent's Memo* at 13-14, Tr. 142). Specifically, Respondent argued that Brooks was complaining about having to wait because they were not roof bolting in the dust more than once a shift. (Tr. 142). Essentially, it argued that Brooks was complaining because Respondent was *not* being unsafe.

The exact nature of Brooks' complaint after the EIG meeting is somewhat unclear from the record. It is possible that at the time Brooks was complaining about the delay and was pushing Respondent to bolt in the dust more frequently. However, I believe it is at least equally likely that he was complaining because production demands were squeezing the foremen in the area and pushing them to bolt in the dust more than once per shift. In light of the low standard of proof in a temporary reinstatement proceeding, discussed *supra*, I find that Brooks has raised a non-frivolous issue as to whether he engaged in protected activity by complaining about a legitimate safety issue.

Following this instance of protected activity, Brooks' brother, who worked in the section he complained about, was suspended and discharged. Respondent's witnesses testified that this action was for serious breach of company rules. (Tr. 114). Brooks believed his complaint about bolting in dust was related to his brother's discharge. (Tr. 42). Brooks' brother filed a 105(c) action and a temporary reinstatement hearing was held. (Tr. 42, 99). Brooks testified that he assisted his brother in his temporary reinstatement case by providing him with two Running Right cards. (Tr. 43).

In light of the broad interpretation of Section 105(c) suggested by the legislative history, I find that Brooks' action in providing assistance to his brother, a fellow miner, could constitute participation in an administrative proceeding under the Act. While Brooks did not testify or appear at hearing, he did provide evidence to the Secretary for use in preparing for the hearing. (Tr. 43). That evidence was related to safety complaints and possible safety issues at the mine. (Tr. 43). Providing information for use by MSHA and participating, in whatever way, in proceedings related to the health and safety of miners is the primary purpose of the discrimination protections of the Act. The Mine Act ensures that miners like Brooks are able to bring information to MSHA and assist in Commission proceedings without fear of reprisal. Therefore, Brooks' claim that he was engaged protected activity with respect to his brothers' hearing is not frivolous.

Respondent also asserted that even if Brooks' claim was true, it could not support a 105(c) claim. (*Respondent's Memo* at 12). Respondent argued, "[i]t is axiomatic that a complainant's 105(c) claim must be based on conduct by that complainant..." and that in this matter, the claim was based on another person's activity, Brooks' brother. (*Id. citing* 30 U.S.C. § 815(c)(1)).

As noted *supra*, Brooks' claim does not rely solely on the actions of his brother. Brooks raised a non-frivolous issue as to whether he personally engaged in protected activity. Specifically, Brooks raised the issue that he provided his brother with Running Right cards to assist in the prosecution of a claim under Section 105(c) of the Act.

However, beyond Brooks' actions, "[t]here is decisional support for the proposition that a miner is protected under 105(c) from retaliation based on the protected activity of a relative." *Sec'y of Labor on behalf of Kizziah v. C&H Company, Inc.*, 14 FMSHRC 1362, 1366 (Aug. 1992)(ALJ Melick) *citing Mackey and Clegg v. Consolidation Coal Co.*, 7 FMSHRC 977 (Jun. 1985)(ALJ Broderick); *See also Sec'y of Labor on Behalf of Flener v. Armstrong Coal Co.*, 34 FMSHRC 1658, 1665-1666 (Jul. 2012)(ALJ Simonton)(rejecting a strict reading and

interpretation of 105(c) that would "require that the complaining miner be the only individual who is protected from reprisal for complaining about a health and safety concern.")

In one particularly well-reasoned instance, Judge Zielinski faced a substantially similar situation: "[t]he central issue raised... is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity." *Sec'y of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill v. Leeco, Inc. and Blue Diamond Coal Co.*, 24 FMSHRC 589, 590 (May 2002). In that case, Respondent argued from the plain meaning of the statute that "the protected activity prompting the unlawful motive must be that of the miner complaining of adverse action, not that of a third party." *Id.* at 591. Judge Zielinski found ambiguity in Section 105 and granted deference to the Secretary's interpretation; namely that a discrimination claim based on the protected activity of a relative is permitted. *Id.* at 591-593. In fact, he noted that the Secretary's position was not only reasonable, but "far more consistent with the statute's purpose than the contrary interpretation urged by Respondents." *Id.* at 593. He concluded that, "refusing to allow Jimmy Caudill's claim of retaliation based upon protected activity by his father would nullify some of the most important protections intended by Congress."[10] *Id.* at 591.

In short, Respondent's assertion is incorrect: a 105(c) claim can, under the circumstances present here, be based on the protected activity of a relative. There is a non-frivolous issue as it relates to the instant matter whether Dallas engaged in protected activity by complaining about roof bolting. There is also non-frivolous issue as to whether Brooks faced retaliation as a result of his brother's actions. While the evidence shows some reason to believe Brooks personally engaged in protected activity, even if he had never done so, he was protected from retaliation as a result of his brother's actions.

The next issue is whether Brooks suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 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). It is uncontested that Brooks was laid off on April 10, 2015. (Tr. 10). Therefore, Brooks' claim that he suffered an adverse employment action is not frivolous.

*Nexus between the protected activity and the alleged discrimination*

Having concluded that Brooks engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the April 10, 2015 lay-off. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial

[10] Judge Zielinski also noted several comparable statutory provisions have also been held to allow such causes of action. Id. at 594 citing *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543-44, n.1 (6th Cir. 1993) (Title VII, 42 U.S.C. § 2000e-3(a)); *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (Equal Pay Act, 29 U.S.C. § 215(a)(3)); and *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c))(footnote omitted).

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 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 to meet the evidentiary threshold. Specifically, Brooks made his initial safety complaint at an EIG meeting in front of several members of management. (Tr. 33, 91-92). There is no question Respondent was aware of that complaint. Further, with respect to Brooks' participation in his brother's temporary reinstatement proceeding, Brooks testified that his assistance was "obvious." (Tr. 43, 56). The Secretary of Labor had two Running Right cards at hearing which discussed dust. (Tr. 43, 99-100, 127). According to Respondent's practices, those cards should have been destroyed. (Tr. 55, 115). Brooks was the only hourly miner who had access to the Running Right cards. (Tr. 28, 43, 56, 105-106, 116). Everyone knew that the two miners were related. (Tr. 37). Therefore a reasonable person would be lead to the conclusion that Brooks provided the running right cards. Thus, I find that Complainant and the Secretary have raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity.

Respondent also argued that the Running Right cards at issue were declared privileged by the Judge in Dallas' temporary reinstatement hearing and that Brooks was not named. (Tr. 142). In fact, several of Respondent's employees testified that they did not assume that Brooks provided the cards. (Tr. 101, 104, 127). Some even argued that the cards may never have been submitted. (Tr. 127-128). However, Respondent's testimony ultimately raises a question of credibility that is inappropriate at this time. Brooks raised a non-frivolous issue of knowledge and therefore the Secretary has met the evidentiary burden.

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 present matter, Brooks made his safety complaint approximately six months before his adverse employment action. (Tr. 31-32, 44, 89-91). In isolation, such a delay may prove problematic in supporting a finding of a nexus. However, it would be a mistake to consider the instant matter as a series of discrete protected activities. As with *All American Asphalt*, the long term consequences of a safety complaint can serve to tie an earlier safety complaint into a later adverse action. Brooks testified that his complaint ultimately led to his brother's suspension and discharge. (Tr. 42). His brother's discharge led Brooks to participate in a proceeding under the Act. That final action occurred just a few weeks before Brooks was laid off and, in fact, was right around the same time his evaluation was being made. All of these events are, arguably, tied together in this instance. 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).

Brooks testified that when he made his initial safety complaint, management told him that he did not understand the cut cycle, essentially dismissing his safety complaint. (Tr. 36). Perhaps more importantly, following Dallas' suspension, Helmandollar told Brooks to stand down as Running Right Champ. (Tr. 40).

The evidence regarding this action is contradictory and unclear. Brooks testified that he at one time he wished to quit the position and was convinced to stay. (Tr. 38-39, 50, 102, 107). Helmandollar testified that this action had nothing to do with Brooks' protected activity. (Tr. 102). What exactly happened is unclear and making a determination would require credibility assessments.

However, the decision to ask Brooks to step down in the context of the other events at issue is troublesome. Specifically, Books requested to be released from the position but nothing was done with the request for half a year. (Tr. 38-40, 50, 102, 107). Then, just a few days after Brooks' brother was suspended, Brooks was removed from the position and replaced with someone who was not rained. (Tr. 40, 57-58, 110-113). This raises a non-frivolous issue with respect to animus. There is reason to believe that Respondent was punishing Brooks after firing his brother for an alleged instance of protected activity. Therefore, I find sufficient animus to meet the evidentiary bar at issue here.

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, Brooks testified that other miners with less experience and more problematic work records were not laid-off. (Tr. 45). Therefore there is reason to believe that Brooks suffered from disparate treatment with respect to other miners.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, coincidence in time, and disparate treatment. Therefore, I find that the Secretary has established a nexus between Brooks' protected activity and the Respondent's subsequent adverse action.

*Affirmative Defense*

At hearing Respondent presented extensive evidence showing that it created an objective method for determining the lay-offs. Specifically, it created an evaluation form, reviewed by two or three members of management, to rank employees based on objective measures. (Tr. 63-64, 7677, 80-81). Those rankings were then used to determine layoffs. (Tr. 73, 125-126).

Ultimately, I am unconvinced by the evidence showing that the layoffs were conducted in an objective manner. Both Bane and West admitted under cross examination that values could be subjectively assigned to a miner to ensure that he received a low ranking. (Tr. 82, 133). The extent to which Brooks' scores, particularly for "attitude" and "right thing," were low because of his protected activity, rather than work performance, is not clear. Similarly, Respondent's impression that Brooks did not get along with others may have been related to his service in a safety capacity and consequently being considered a "snitch" by other employees. (Tr. 39). There is reason to believe that that Brooks' layoff occurred, at least in part, because of his safety complaint and his decision to participate in a Commission proceeding. Under Commission case law, an ALJ is permitted to review an operator's proffered objective lay-off procedure to ensure that it is not a rationalization of a discriminatory action. *See Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394 (Feb. 2013).

However, the persuasiveness of Respondent's argument is largely academic in this matter. The question here is whether there is a non-frivolous issue as to discrimination. For the reasons given above, such an issue exists in this case. Any consideration of affirmative defenses goes beyond the scope of that inquiry. *CAM Mining, LLC*, 31 FMSHRC at 1091. Therefore, to the extent the evidence regarding the lay-off procedure constitutes an alternative, non-discriminatory reason for the discharge, it must, at this time, be disregarded.

**Conclusion**

In concluding that Brooks' complaint herein was not frivolously brought, I find that there is reason to believe that Brooks' made safety complaints in August 2014, that those complaints were related to his brother's discharge, that he subsequently participated in his brother's temporary reinstatement proceeding, and that this participation led to his lay-off. I also conclude

that there were non-frivolous issues as to whether Respondent was aware of Brooks' actions, that Respondent showed animus toward Brooks' alleged protected activities, that there was a close enough connection in time between his alleged protected activity and layoff, and that Brooks was treated disparately relative to other miners.

## ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Gary Brooks be 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 parties may elect to economically reinstate Mr. Brooks if they so agree.

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* but no later than 90 DAYS following the receipt of the complaint of discrimination. 30 U.S.C. § 815(c)(3). Immediately upon completion of the investigation, the Secretary SHALL notify counsel for Respondent and my office, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.* If, upon expiration of the statutory period a decision has not been made, I will entertain a motion to issue an order to show cause why the reinstatement should not be terminated.

Kenneth R. Andrews
Administrative Law Judge

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