FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of THOMAS HARPER, Complainant, v. KINGSTON MINING INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2015-816-D MSHA Case No.: HOPE-CD-2015-09 Mine: Kingston No. 2 Mine Mine ID: 46-08932

DECISION AND ORDER REINSTATING THOMAS HARPER

Appearances: J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA, Representing Respondent

Before: Judge Lewis

On June 17, 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 Thomas Harper ("Harper" 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 Harper on May 14, 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 Harper to his former position as a utility/scoop.

Respondent filed a motion requesting a hearing regarding this application on June 26, 2015. On July 2, 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 July 7, 2015. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses 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 Harper.

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.[1] *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 s had no role in Harper's layoff" *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 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'

[1] "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)).

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 Harper 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 the 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 May 14, 2015, Harper executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> I made complaints about the evening shift no cleaning section properly and was unjustly laid off

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

The Secretary also submitted the June 11, 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 Harper's 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. Harper engaged in protected activity when he expressed concern about unsafe working conditions at the Kingston No. 2 Mine. Harper suffered an adverse action when he was discharged on April 10, 2015.

4. Based on my investigation to this date, I have concluded that there is a reasonable cause to believe that Harper 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 Harper was not frivolous.

Id. at Exhibit A, p. 3-4. 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 Harper did not engage in any protected activity. (*Respondent's Memorandum* at 10-13). Further, it argued that even if Harper engaged in protected activity, there was no nexus between that protected activity and the adverse employment action. (*Id.* at 13-17).

Summary of Testimony

Thomas Carl Harper was present at hearing and testified. (Tr. 14). At the time of the hearing he was not employed. (Tr. 14). His last position was as a utility scoop operator with Respondent. (Tr. 14-15). In that capacity he cleaned and dusted the section to prepare it for the next cut. (Tr. 16). He sometimes filled in on the roofbolter and operated a forklift. (Tr. 36-37). Harper worked for nine years at the mine as a utility scoop operator, bolter, hauler, buggy/forklift operator, and motor runner. (Tr. 15, 28). He had nearly 15 years of mining experience. (Tr. 15, 40). He was a certified underground miner. (Tr. 28). During his career, Harper was never disciplined, told he was not doing a good job, or fired. (Tr. 15-16).

At hearing, Harper testified that he engaged in series of protected activities, including complaints to management and state officials. (Tr. 29-30, 53). He stated that following those protected activities, he was discriminatorily discharged during a layoff at the mine. (Tr. 29). He testified his relevant protected activity began in early 2015. (Tr. 17-18, 48-49)

In 2015, Mine Foreman Danny Helmondollar retired and was replaced by Tim Alderman.[2] (Tr. 16). On March 19, after Alderman took over, he told Harper's direct

[2] Timothy Alderman was present at hearing and testified. (Tr. 111). At the time of the hearing Alderman was employed at Kingston and had started on March 9, 2015. (Tr. 111-112). When he arrived, he was a general mine foreman replacement for Martin. (Tr. 112, 114). Two weeks after his arrival Helmondollar retired and Alderman stepped into the position. (Tr. 114-115). He had prior experience as a superintendent at two other Alpha subsidiaries. (Tr. 115).

supervisor, Eric Bragg, that he wanted to split the duties of the two scoop operators so that one man would clean the section and the other would go outby to rock dust and bring supplies. (Tr. 16-17, 34-36, 47, 49-50, 116-117). Before this new policy was in place, both scoop operators performed both of those tasks. (Tr. 34-36). Alderman testified that he hoped to equalize the load and hold everyone accountable. (Tr. 116). Harper became the inby operator in charge of cleaning. (Tr. 34). Harper "didn't think too much," of this plan because it left some work undone and it made it impossible to clean the whole section. (Tr. 17). While Harper managed to clean the section on his shift, the evening shift failed to do so. (Tr. 33-35). However, the problems with cleanliness on the section started before Alderman took over. (Tr. 30-31).

Alderman believed that the crew had done an excellent job keeping the area clean even before he changed the duties of the scoop operators. (Tr. 117). Every time he saw the section, both before and after the change, it looked good. (Tr. 117-118). He was happy with the results of the new plan because he was a stickler on cleanliness. (Tr. 125). In fact, a government roof control specialist told Alderman on June 25, 2015, that the section was beautiful. (Tr. 118).

It was a violation and a hazard to start mining before the section was cleaned and dusted. (Tr. 17, 49). Under Section 75.400, the section had to be free of combustible material within 40 feet of the working face. (Tr. 49). Alderman did not believe a small amount of accumulation was a problem, especially given the fact that water and dust were present. (Tr. 127, 129). Alderman testified that an accumulation would have to "terrible" or block the section to be a hazard. (Tr. 127-130). MSHA asked Respondent to produce accumulation citations issued between February 1 and April 10 at the mine. (Tr. 55-56). Respondent produced two citations (one of which was for an accumulation of hydraulic oil) but the investigator, James Humphrey, did not know if these were all of their citations.[3] (Tr. 55-57, 59).

In early January 2015, Harper complained to Bragg about the problems with the new policy and coal dust accumulations. (Tr. 17-18, 48-49). Harper told Bragg he needed to ensure that the evening shift was doing what they needed to do. (Tr. 18). Harper continued to speak with Bragg about this issue daily until the time he was laid off. (Tr. 18, 48-50). His written statement also indicated that he had made a complaint to Bragg two weeks before his layoff about the failure to clean combustible material as a result of the new clean-up policy. (Tr. 32).

In another incident that occurred about two weeks before he was laid off, Harper spoke with safetyman John Murphy about an issue during a safety meeting. (Tr. 19, 32-33, 48-49). The entire section was present for the meeting, but Harper could not recall if members of management were present. (Tr. 20). Specifically Harper noted that the evening shift was not following the mining procedure. (Tr. 19). He believed it was important to point out that the evening shift was not cleaning because that failure was a violation. (Tr. 20). He was not complaining about the evening shift doing a poor job but about the violations. (Tr. 20).

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[3] James R. Humphrey was present at the hearing and testified. (Tr. 46). At the time of the hearing, Humphrey was a special investigator with MSHA. (Tr. 46). He had worked for MSHA for 15 years, 8 years as special investigator. (Tr. 46). Special investigators conduct 105(c) investigations when a miner believes he faces discrimination and 110(c) investigations. (Tr. 47).

Alderman testified he never heard any complaints about the new plan. (Tr. 125-126). Alderman never heard from Harper and he never mentioned that he was unhappy with the night shift leaving coal accumulations on the section he worked. (Tr. 126). If a miner complained about coal accumulations, he would take it seriously and follow up. (Tr. 130).

A couple of weeks before Harper was laid off, Alderman went to Harper's section, Section No. 2, and discussed a "Running Right" comment card that had been submitted that dealt with bolting downwind of the continuous miner more than once during a shift. (Tr. 21, 25, 37-38, 50-51, 122). Bolting in the return air more than once a shift was not permitted at the mine and the card indicated that it was happening. (Tr. 23-24). In fact in early 2015, Harper knew it was happening and at one point he spoke with a state inspector about the issue. (Tr. 24, 39, 52). The inspector filed a complaint and eventually went to the mine and spoke to the management. (Tr. 24-25, 39-40). The complaint was anonymous and it was unlawful for the company to try to find out the identity of the complainer. (Tr. 39). The state conducted an investigation but Harper did not know if citations were issued. (Tr. 39). Four miners and a boss were fired at some point due to bolting in the dust. (Tr. 23, 38). However, Harper believed Respondent fired them for doing what management had ordered. (Tr. 37).

The card Alderman had was a safety report filled out by a miner and placed in a box for management to read. (Tr. 22, 119). These cards were supposed to allow management to know what was going on at the mine and to help correct problems. (Tr. 22, 119). The cards were anonymous. (Tr. 22, 119). Alderman reviewed the cards daily. (Tr. 120). The Running Right program was a company-wide policy of Respondent's parent company, Alpha Natural Resources. (Tr. 40). It included Employment Involvement Group meetings and Performance Group meetings that involved hourly workers in the process. (Tr. 41-42). Alpha also spent a large amount of money to create a Running Right Leadership Academy in West Virginia. (Tr. 42) Harper did not think that the program did much good. (Tr. 25). Men wrote cards and expected answers but never heard anything back. (Tr. 26). Harper recalled making comments to this effect to John Murphy. (Tr. 26).

When speaking to the miners on the No. 2 Section, Alderman said the comment card he had first addressed No. 3 Section, where the card was written, and that "nobody up there was man enough" to tell him who wrote it. (Tr. 21, 37, 51). He asked if anyone on No. 2 Section knew who had submitted the card. (Tr. 51). Harper responded that under the training and Running Right policies, Alderman was not allowed to ask who wrote the cards or to confront the miners. (Tr. 22, 51-52). Harper believed it was wrong and a violation of company policy for Alderman to ask about the cards. (Tr. 22-23). Harper never saw the card. (Tr. 37).

Alderman testified that he spoke with the Miners on the No. 3 Section and asked about their concerns. (Tr. 122, 130). He asked the four bolt men if they bolted downwind more than once a shift and they denied it. (Tr. 122-123). Alderman testified that he never tried to find out who filled out the cards at Kingston or at any other Alpha mine. (Tr. 119-120, 123). He just told them that as the new mine manager, if they had any concerns they should come and talk to him. (Tr. 123). Alderman then went to the No. 2 Section and did the same thing. (Tr. 124, 131). He wanted to hear the concerns of all of the miners on the production shifts and to develop a rapport

with them. (Tr. 131). When he arrived on the section he read the card to the miner and was clear that he did not care who made the complaint. (Tr. 131-132). He asked the bolters as a group and individually if they bolted downwind more than once a shift and they denied it. (Tr. 124). He did not attempt to determine who wrote the card. (Tr. 124). He did not have a confrontation with Harper about discussing the card and the only time he met Harper was in the hallway at the hearing. (Tr. 124, 126-127, 133). He did not believe Harper or anyone else would find his questions intimidating. (Tr. 132-133).

Humphrey later interviewed Alderman about this incident. (Tr. 61). Alderman denied that he received a Running Right card about the bolter operating in the dust. (Tr. 61-62). However, several miners corroborated the story. (Tr. 62, 64). Humphrey did not ask Alderman if he tried to find the identity of the person who wrote the card. (Tr. 61-63). He did not believe there was a reason to pursue that question. (Tr. 63). He also did not ask about Harper contacting the West Virginia official. (Tr. 64). Alderman believed that during his interview Humphrey asked him if he allowed miners to bolt downwind, and he said "no, never." (Tr. 121). He did not believe Humphrey asked if he ever received any Running Right cards on that topic. (Tr. 121). If that was the intent of the question, Alderman misinterpreted it. (Tr. 121). He received Running Right cards about bolting downwind more than once. (Tr. 120-121).

Respondent had an operational performance group ("OPG") designed to figure out how to run more coal. (Tr. 26-27, 42). The group made recommendations, conducted studies, and watched what occurred on the section. (Tr. 42-43). He did not believe the OPG had a safety function. (Tr. 27). While at the mine, Harper voiced objections about the OPG to other miners. (Tr. 27). He believed that 90% of the workforce did not like OPG and other miners voice concerns as well. (Tr. 43-44). He stated in safety meetings and with other miners that the OPG did not know what they were doing. (Tr. 27). The OPG would tell Harper to work faster, but he did not believe faster was safer. (Tr. 43). He complained to Murphy, Helmondollar, and general mine foreman Kenny Martin. (Tr. 28, 49). Helmondollar and Martin agreed with his assessment but said they had to go along. (Tr. 27).

In January 2015, Kingston No. 2 mine began to encounter geological conditions that slowed their production. (Tr. 67-68). The sections were producing too much rock and the area was not profitable. (Tr. 68). Geological surveys were used to determine what conditions would look like further out. (Tr. 69). No. 1 Section was marked for a possible shutdown. (Tr. 68-69).

On January 22, a meeting was held with Shad West, HR Director Kyle Bane, General Manager Robert Gordon, and the mine superintendents for Kingston No. 1 and No. 2 to plan accordingly.[4] (Tr. 69, 72). If the coal producing section was shut down, Respondent could not afford the employees budgeted for that section. (Tr. 70). Kyle Bane, the HR Director for the

[4] Shad Allen West was present at the hearing and testified. (Tr. 66). At the time of the hearing he was employed by Maxxim Shared Services, a subsidiary of Alpha with responsibility over Kingston Mining and Mammoth Coal Company as a human resources manager. (Tr. 66). In that capacity he dealt with staffing, labor relations, and workers' compensation. (Tr. 66). West held that position from January 2011 and had no previous HR experience. (Tr. 67).

region covering Kingston, conducted training on employee evaluation forms with a PowerPoint presentation (RX-1). (Tr. 71-72). The training discussed employee evaluations, the evaluation forms, and the ways to properly conduct evaluations in the event of a layoff. (Tr. 70).

The evaluation process contained 15 criteria (RX-1, p. 7) that were graded on a scale of 1-5, with one being the lowest score and five being the highest.[5] (Tr. 73, 75-76, 94-95). There were large categories and then subcategories that included the actual criteria. (Tr. 96). One of the criterion was "Running Right" and the goal was to grade people on how well they adhered to company policy and maintained high ethical standards when conducting business and interacting with others. (Tr. 73-74). Another criterion was Job Efficiency, which dealt with whether the miner understood his duties and responsibilities, demonstrated knowledge, the ability to analyze details and break problems into smaller components, and to make decisions that drove the company's vision. (Tr. 74). Another criterion was Initiative, which dealt with a miner's skill and inventiveness to tackle complex issues, developing strategies that anticipated and exceeded business needs and objectives despite associated risk, and generating new ideas that lead to financial gain. (Tr. 74-75). The miners were not represented by a union and seniority did not play a role in the layoffs. (Tr. 70-72). Management's stated goal was use the evaluation process to keep the most talented employees. (Tr. 72-73). Miners with the lowest scores would be laid off in the event of downsizing. (Tr. 95).

The Human Resources Department asked two people to evaluate each miners: the mine superintendent of each mine and the miner's department head. (Tr. 76). Each candidate would then be evaluated on the 1-5 scale using the criteria from the evaluation form. (Tr. 76-77). At hearing, West reviewed the evaluation form (RX-1, p. 4). Every employee working as part of the underground mine was evaluated. (Tr. 77-78). The two separate Kingston mines were considered together and some miners would be transferred after a lay off. (Tr. 88-89). There were also two blank boxes for comments to support the numerical ratings. (Tr. 78, 97).

Harper was evaluated by Helmondollar and Martin on January 29, 2015 (RX-3). (Tr. 79, 99). At hearing West reviewed the spreadsheet showing Harper's subtotal score based on the 15 criteria (RX-2, p. 45-46, line 246). (Tr. 89). The total, rather than subtotal score, included bonus points for certifications like EMT or electrician. (Tr. 78, 90). Miners were to be compared using their subtotals and the total was used as a tie breaker. (Tr. 90). Harper was evaluated as a scoop operator because that was the task he normally conducted. (Tr. 91, 93). Harper's position , utility operator, was a legacy from a time when the mine was owned by a different company and was being phased out through attrition. (Tr. 91-93). Harper was the lowest scoring scoop operator at both mines. (Tr. 93).

The only comments initially included for Harper were that he needed to improve his "initiative" and his Running Right engagement. (Tr. 107). Later management determined that some miners did not have comments and some of the comments were vague with respect to reasons for a low score. (Tr. 107-108). West testified that Harper's comments were not robust

[5] A score of 1 meant unsatisfactory, 2 meant needs development, 3 meant meets expectations, 4 meant exceeding expectations, and 5 meant substantially exceeding expectations. (Tr. 75-76).

enough and better explanations were needed. (Tr. 108). West followed up with the superintendent's to get additional information on the low ratings. (Tr. 108-109). After receiving these additional comments, nothing was changed with respect to Helmondollar's ranking of workers. (Tr. 110).

After the forms were completed they were given to West on February 3 and 4. (Tr. 80). West then placed the values into an Excel spreadsheet (RX-2), completing the task on February 19. (Tr. 80-81, 98, 107-108). The spreadsheet was forwarded to Bane. (Tr. 81).

On February 26, there was a PG meeting at the Running Right Leadership Academy and West met with Helmondollar, Jiles, the maintenance chiefs from both mines, and the mine foremen (including Martin). (Tr. 82). That day they were told the number of miners that would remain in the event of a layoff. (Tr. 82-83). No decision had yet been made to go forward with the layoff. (Tr. 82). West gave the superintendents staffing charts that were blank except for the positions. (Tr. 83). The people responsible for making the evaluations were responsible for filling out these charts with the budgeted number of miners. (Tr. 83). Helmondollar returned the completed staffing chart for the instant mine to West the next day (RX-4). (Tr. 84-85). On March 27, West compared the staffing chart to the employee evaluations to ensure that the miners laid off were the miners with the lowest scores. (Tr. 85-87, 98). West, Helmondollar, and Gordon spoke on the phone about the issue. (Tr. 87). Respondent also conducted additional "discrimination testing" at the corporate level to ensure there was no disparate impact. (Tr. 86). No changes were made to Halmondollar's original list. (Tr. 87).

West believed this process was objective. (Tr. 95). He believed the appropriate ratings were ensured because two people were involved in the evaluation process. (Tr. 98-99, 102-103). Helmondollar was present for the January 22 training with the PowerPoint presentation, but Martin was not. (Tr. 99-100, 103). Helmondollar trained him with copies of the PowerPoint. (Tr. 99, 103). West testified that objectivity was also protected by including the supporting comments and reasons for low ratings. (Tr. 100-101, 106-107). When possible he could also cross reference the ratings with documents, like attendance records and disciplinary and corrective actions. (Tr. 100, 105). The evaluators were told to be objective in every case and West believed they went out of their way to do so. (Tr. 104).

However, West agreed it was ultimately a subjective judgement about each miner. (Tr. 104-105). It was possible that if an evaluator did not like a miner that he could give the miner a lower score on any given category. (Tr. 105). Also, for many categories, like "quick learner" it was not possible to cross reference a record. (Tr. 101-102). Respondent relied on evaluators to understand the mining process to determine a miner's ability to learn quickly. (Tr. 101-102). Relying on an evaluator's score meant depending on his objectivity. (Tr. 102).

The decision to go forward with the layoffs was made between March 30 and April 2. (Tr. 86). Alderman testified he had no role in the layoff and did not learn about it until April 9. (Tr. 115-116). On April 10, 2015, Harper learned from his son that he had been laid off. (Tr. 28, 52, 88, 115). A total of 23 miners were laid off. (Tr. 88-89). He believed he was laid off for speaking his opinions and possibly because of his age and health. (Tr. 29). He often spoke his

mind about what was not right at the mine including the failure to properly clean the section. (Tr. 29-30). He also spoke with state regulators and management about safety issues, sometimes in front of the crew. (Tr. 53). Humphrey believed that Harper's claim was not frivolous and that he suffered discrimination for his safety complaints. (Tr. 53). Humphrey also believed that Harper was inaccurately evaluated for the layoff.[6] (Tr. 53-54).

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 Harper 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, Harper testified that he engaged in a long-term campaign of protected activity that began no later than early January 2015. Specifically, he testified that in early January 2015, he began to complain to Bragg about the cleanliness of the section. (Tr. 17-18, 48-49). He continued to raise this issue daily until he was laid off. (Tr. 18, 48-49). He also

[6] Humphrey was familiar with the evaluation because this was not the first 105(c) case arising from that evaluation. (Tr. 54). Bragg had also been evaluated by Martin and Helmondollar and Humphrey also believed he was inaccurately evaluated. (Tr. 54). Humphrey did not interview Martin, Helmondollar, or Bragg. (Tr. 54-55).

complained about this issue to Murphy at a safety meeting. (Tr. 19, 32-33, 48-49). These conditions started before Alderman took over as foreman/superintendent. (Tr. 30-31).

Also in early 2015, Harper spoke to state inspectors about miners bolting twice in return air. (Tr. 24, 39, 52). This action was a violation of the ventilation plan and constituted a safety hazard. Eventually, the state inspector returned to the mine and spoke with management about the condition. (Tr. 24-25, 39-40).

Harper also testified that while at the mine he voiced concerns about the OPG to other miners. (Tr. 27). He also complained to Martin and Helmondollar. (Tr. 28, 49). In particular, he was concerned that the OPG was telling miners to work more quickly. (Tr. 43). Harper believed that working more quickly would affect safety. (Tr. 43). It is not exactly clear when this activity occurred but Harper's testimony implied his complaints were ongoing and certainly occurred before Alderman took over.

Finally, just a few weeks before the layoff, Harper testified that he had a confrontation with Alderman. Alderman had received a complaint card regarding miners bolting twice in return air. (Tr. 21, 25, 37-38, 50-51, 122). According to Harper, Alderman attempted to find out who had submitted the card, claiming that others were "not man enough" to tell him. (Tr. 21, 37, 51). Harper testified that he confronted Alderman and told him that under company policy he was not supposed to attempt to find out the identity of someone making a safety complaint. (Tr. 22, 51-52).

Taken together, Harper's testimony regarding his actions constitutes a series of ongoing safety complaints. Starting at least from January 2015, Harper lodged safety complaints and caused the institution of a state safety investigation. Those actions would constitute protected activity under the Mine Act.

At hearing and in its brief, Respondent argued that Harper's complaint was not protected activity. (*Respondent's Memo* at 10-13). Specifically, Respondent argued that Harper's complaint only referenced the fact that the evening shift was not cleaning properly. (*Respondent's Post-Hearing Brief* at 11). Respondent claimed this was his opinion about the performance of another crew rather than a safety complaint. (*Id.*). Further, Respondent argued even if Harper made additional complaints they were specious because the section was clean and Respondent had not been cited for it. (*Id.* at 11-12). Respondent also argued that Harper never confronted Alderman regarding the Running Right Program and that even if he did, he was not making a safety complaint but instead "questioning Mr. Alderman's administration of that process." (*Id.* at 13). Finally, at hearing Respondent's counsel claimed that all of the protected activity alleged by Harper in this case occurred after Harper received his low evaluation for the purposes of layoff. (Tr. 139-140). Further, Respondent took great pains at hearing to demonstrate that the layoff process was objective and fair.

With respect to Respondent's first argument, regardless of what Harper claimed in his initial complaint, testimony at hearing made clear that this was a safety complaint. The cleanliness of the section and whether another crew was performing its task bore direct relation

on whether there were accumulations of combustible material on the section. Clearly this would be a safety issue and therefore Harper's complaints were related to a safety concern.

With respect to the remaining arguments, the above-cited case law is quite clear that the ALJ should not resolve conflicts in testimony at a temporary reinstatement proceeding. Ultimate credibility assessments and fully scale discovery enquiries are beyond the statutory scope of temporary reinstatement proceedings and are to be reserved for the full on-the-merits section 105(c) hearing. Further, under *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, the ALJ must apply "the not frivolously brought" standard contained in section 105(c)(2). 35 FMSHRC 394 (Feb. 2013).

Respondent essentially asserts two intertwined arguments to avoid the mandates of applicable case law in respect to temporary reinstatement and tolling proceedings. First, Respondent advances a variant of the *post hoc ergo propter hoc* argument[7]: the miner's layoff took place *after* the employee evaluation rankings had been concluded; therefore the miner's layoff was solely *because* of his low ranking. Secondly, since the employee rankings were completed before much of the miner's protected activity, the temporary reinstatement/tolling issue can be resolved without need for credibility determinations.

Placing aside the problematic logic of Respondent's assertions, the ALJ notes that Respondent's arguments rest upon factual assumptions that would demand ultimate credibility determinations that only could be reached after complete discovery and a full on-the-merits hearing. Initially, there is some question as to whether the employee evaluations had *in fact* been completed *before* any of the miner's protected activity had taken place. As discussed *supra*, in January 2015 Harper began to complain about the cleanliness of the section, in early 2015 he complained to state inspectors about the mining process, and he appeared to make ongoing complaints about OPG before Helmondollar and Martin conducted the evaluations in February. Furthermore, even if the evaluations had been initially completed before the layoff, there is an additional question as to whether there had been any changes in the rankings after the miner had expressed his safety complaints. As West testified, additional comments were added to Harper's evaluation much later in the process. (Tr. 107-110).

Even without Harper and Humphrey's testimony that protected activity occurred before Respondent's evaluation commenced, there is a non-frivolous issue regarding the effect Harper's complaints had on his layoff. After spending more than forty years in the law, this court has observed countless instances where dates and time periods have been asserted that were later found to be inaccurate and/or manipulated.

Further, many of the criteria utilized by Respondent in ranking miners (for layoff) struck this ALJ as being extremely subjective with associated numerical values that could be easily

[7] Latin for "after this, therefore because of this" – a logical fallacy that has been the basis for many superstitions and erroneous beliefs.

manipulated to punish an offending miner for protected activity.[8] It is significant that Respondent explicitly failed to take into account seniority, one truly objective standard. In fact, West conceded at hearing that the rankings criteria were, ultimately, subjective. (Tr. 104-105).

The ALJ recognizes that Respondent's layoffs may have been conducted in an objective manner, that the Respondent may have reached its ranking of Harper in good faith and that a valid affirmative defense may well exist. However, such ultimate credibility and fact determinations and legal conclusions are beyond the scope of this proceeding.

Therefore, the ALJ finds that Harper's claim that he engaged in protected activity was not frivolously brought.

The next issue is whether Harper suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge 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 Harper was laid off on April 10, 2015.

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[8] My esteemed colleague, Judge Andrews, apparently reached the same conclusion in assessing such. *See Sec'y of Labor on behalf of Brooks v. Kingston Mining, Inc.*, 2015 WL 3932760 (Jun. 19, 2015). In that case, Judge Andrews evaluated the same layoff at issue here with respect to a different miner. He concluded:

> At hearing Respondent presented extensive evidence showing that it created an objective method for determining the layoffs. 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 layoff 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).

Id. at *14.

(Tr. 28, 52, 88, 115). Therefore, Harper's claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Harper engaged in protected activity and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the April 10 layoff. 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 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.

Here, many of the Harper's protected complaints were made directly to members of management. Harper complained to Bragg and to Murphy regarding the cleanliness of the section. (Tr. 17-19, 32-33, 48-49). He also complained to Helmondollar and Martin about OPG. (Tr. 28, 49). Significantly, Helmondollar and Martin were the members of management who evaluated Harper for the purposes of his layoff. (Tr. 79, 99). Further, he complained directly to Alderman regarding the Running Right program. (Tr. 22, 51-52). Harper also complained to a West Virginia state inspector and was aware that the inspector later spoke to management. (Tr. 24, 39, 52). While the evidence for knowledge here is less straightforward, it is not absurd to believe that management would conclude Harper was behind the investigation given his penchant for safety complaints. Therefore, I find that Harper has raised a non-frivolous issue as to whether Respondent had knowledge of his protected activity.

In its brief, Respondent argued that all of Harper's complaints were made to Murphy, Bragg, and Alderman and that these three individuals had no role in Harper's layoff. (*Respondent's Post-Hearing Brief* at 14). Only Helmondollar and Martin were involved in that decision. (*Id.*) Respondent's argument fails for two reasons. First, as noted *supra*, Harper's complaints regarding OPG were made directly to Helmondollar and Martin. Further, the issue is whether Respondent had knowledge of Harper's protected activity, not whether any particular

member of management had actual knowledge. As a general matter, the knowledge of an agent is imputed to the operator under the Mine Act. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) aff'd 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that acts or knowledge of an agent are attributable to a principal); *see also Sec'y of Labor on behalf of J. Don Arnold v. BHP Navajo Coal Company*, 2015 WL 2174407, *31 (Apr. 24, 2015)(ALJ Lewis). There is a non-frivolous issue as to whether Murphy, Bragg, or Alderman shared the information they learned from Harper with Helmondollar and Martin before the layoff occurred. Therefore, there is sufficient evidence of knowledge to support such a finding for the purposes of a temporary reinstatement.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and 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 layoff; 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 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

Here, Harper made several safety complaints starting in early January and continued to do so right up until the time he was laid off. Further, he was making these complaints during the course of Respondent's decision-making process regarding layoffs. As a result, I find that the time span between the protected activities and the adverse action easily meets the threshold requirements for a temporary reinstatement proceeding.

Respondent argued that Harper's alleged complaints were, in fact, too close to the adverse employment action. (Respondent's Post-Hearing Brief at 16). Specifically, it argued that all of Harper's protected activity occurred after his low evaluation and therefore did not contribute to his layoff. (Id.). As demonstrated *supra*, there is a non-frivlous issue as to whether some of Harper's protected activity occurred before the evaluation, the objectivity of the evaluations, and whether changes were made in the evaluation after the protected activity. Therefore, the timing here 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).

Harper testified that Helmondollar and Martin were dismissive of his safety complaints. Specifically, when Harper complained about OPG, Martin and Helmondollar told him that everyone had to follow the OPG's recommendations. (Tr. 27). He also testified that Alderman was openly hostile to safety complaints and attempted to find out who had complained about miners bolting twice in return air. (Tr. 51). This was a violation of company policy. (Tr. 22-23, 51-52). Further, Respondent's actions in giving Harper a low overall performance rating and his low reputation with management that this rating implies, also demonstrate animus towards Harper's protected activity. *See e.g. Cobra Natural Resources*, LLC, 35 FMSHRC 101, 115 (2013)(ALJ Steele) *aff'd* 35 FMSHRC 394 (Feb. 2013). These actions constitute animus sufficient to meet the evidentiary standards of a temporary reinstatement.

Respondent argued that there was no animus in this case and that the company had an excellent record with respect to accumulation violations, showing it took cleanup issues seriously. (*Respondent's Post-Hearing Brief* at 15-16). Determining the cleanliness of the section at issues would require making credibility assessments which, as discussed *supra*, are barred at this time. Further, even if the area were clean, that would not change the animus demonstrated by management towards Harper's 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, insufficient evidence was presented to establish that Harper faced disparate treatment.

However, 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, and coincidence in time. Therefore, I find that the Secretary has established a nexus between Harper protected activity and the Respondent's subsequent adverse action.

Conclusion

In concluding that Harper's complaint herein was not frivolously brought, I find that there is reason to believe that Harper made safety complaints in January through April 2015 and that he caused a state investigation to be instituted against Respondent. I also conclude there was a non-frivolous issue as to whether Harper suffered an adverse employment action. Finally, I conclude that there was reason to believe Respondent was aware of Harper's actions, that

Respondent showed animus toward Harper, and that there was a close connection in time between the alleged protected activity and the disparate treatment. Therefore, there is a non-frivolous issue as to whether there was a nexus between the protected activity and the adverse employment action.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Thomas Harper 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 Harper if Respondent so desires and Harper and the Secretary freely 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.

John Kent Lewis
Administrative Law Judge

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/tjb