

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

**AUG 15 2017**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of BENJAMIN LEADMON,  
and FRANKLIN JEREMIAH GIBSON,  
Complainants,

v.

BLUE CREEK MINING, LLC,  
Respondents.

TEMPORARY REINSTATEMENT  
PROCEEDINGS

Docket No. WEVA 2017-498-D  
MSHA Case No.: HOPE-CD-2017-04

Docket No. WEVA 2017-499-D  
MSHA Case No.: HOPE-CD-2017-05

Mine: Blue Creek No. 1 Underground Mine  
Mine ID: 46-09297

**DECISION AND ORDER**  
**REINSTATING BENJAMIN LEADMON**  
**REINSTATING FRANKLIN JEREMIAH GIBSON**

Appearances: Kathleen F. Borschow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, Representing Respondent

Todd C. Meyers, Esq., Blackhawk Mining, LLC, Lexington, KY, Representing Respondent

Before: Judge Steele

On July 19, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Benjamin Leadmon ("Leadmon") to his former position with Blue Creek Mining, LLC, ("Blue Creek" or "Respondent") at Blue Creek No. 1 Underground Mine ("Blue Creek Number 1") pending final hearing and disposition of the case. On July 19, 2017, the Secretary of Labor also filed an Application for Temporary reinstatement of miner Franklin Jeremiah Gibson ("Gibson") to his former position with Blue Creek at Blue Creek No. 1 pending final hearing and disposition of the case.

The applications followed two separate Discrimination Complaints filed by Leadmon and Gibson on June 20, 2017, that alleged, in effect, their terminations were motivated by their protected activities. The Secretary represents that these Complaints were not frivolously brought

and requests an Order directing Respondent to reinstate Leadmon and Gibson to their former positions with the same rate of pay and benefits they received prior to their discharge.

Respondent requested hearings regarding these applications on July 31, 2017. On July 31, 2017, an Uncontested Motion To Consolidate Docket Nos. WEVA 2017-499-D and WEVA 2017-498-D was filed by the Secretary. The Motion to Consolidate was granted by the undersigned on August 3, 2017.

A hearing was held in South Charleston, WV on August 8, 2017, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.<sup>1</sup>

For the reasons set forth below, I grant the applications and order Blue Creek to temporarily reinstate Benjamin Leadmon and Franklin Jeremiah Gibson.

## I. 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., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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.” *Id.* at 624-25.

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.<sup>2</sup> *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).

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<sup>1</sup> 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).

<sup>2</sup> “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)).

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

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

In the instant matter, the Secretary 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).

## II. THE PETITIONS FOR TEMPORARY REINSTATEMENT

### Benjamin Leadmon

On June 6, 2017, Leadmon executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

Wrongfully terminated after making safety complaints. I would like to have my regular job back with back pay and benefits.

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

The Secretary also submitted with the Application the July 19, 2017, Affidavit of Perry Brown, a Special Investigator employed by the Mine Safety and Health Administration ("MSHA"). Brown made the following findings and conclusions:

2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the discrimination claim filed by Benjamin Leadmon on June 20, 2017. My investigation to date has revealed the following facts:

A. At all relevant times, Blue Creek Mining, LLC, (the "Operator" or "Blue Creek") is a "person" as defined in § 3(f) of the Mine Act.

B. The applicant, Benjamin Leadmon, was employed by the Operator to work as a roof bolting machine operator at the Blue Creek No. 1 Underground Mine and was therefore a "miner" within the meaning of § 3(g) of the Mine Act.

C. Leadmon was employed at the mine for approximately 6 years until May 25, 2017.

D. Richard "Red" Hensley was Leadmon's partner on the bolting machine for a couple of months. Jeremy Gibson worked on the same crew as a continuous mining machine operator. Bill Vanover was their section boss.

E. Leadmon told me of several unsafe incidents he experienced at the mine, including that his crew once cut into the intake airway in violation of the mine's approved ventilation plan, allowing dust to come back over the miner operator; that Vanover told Gibson to cut into unsupported top in violation of 30 C.F.R. § 75.203(d); and that the crew was expected to bolt down wind of the mining machine in the dust more times than the ventilation plan allowed.

F. Leadmon also told me that on one occasion, after telling Vanover his Continuous Personal Dust Monitor was at 98% of the allowable limit, Vanover instructed him to take it to the intake airway and sent someone else to man the bolter in his place. Leadmon believed he would have been fired had he not done as he was told.

G. Leadmon told me that he, Gibson, and Hensley complained to mine management about the above events and their safety concerns on May 23, 2017. Leadmon gave Superintendent Mike Dotson a written list of the above events and safety concerns that Gibson had begun recording

approximately one month prior. Dotson said he was concerned and informed Assistant General Manager Jamie Wiant of their complaints. That same day, the three miners each met individually with Dotson, Wiant, Safety Manager Josh Bell, Mine Foreman Nike Nichols, and Maintenance Manager Jason Dooley. Leadmon told them each about his concerns.

H. Leadmon told me that believes he did the right thing by informing mine management of his safety concerns, and felt that mine management would no longer force him to work in the dust so much. He believes, however, that he was discharged for making these safety complaints.

3. There is reasonable cause to find that the Complainant was discharged because he engaged in protected activity. Leadmon engaged in protected activity when he complained to mine management about various safety concerns at the mine. Leadmon suffered an adverse action when he was suspended on May 23, 2017 and ultimately discharged two days later on May 25.

4. Based on my investigation to this date and based upon the proximity in time between the protected activity and the adverse action and the operator's knowledge of the protected activity, I have concluded that there is reasonable cause to believe that Leadmon was discharged because he engaged in protected activities by complaining about unsafe practices at the mine. I have concluded that the complaint filed by Leadmon was not frivolous.

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

### **Franklin Jeremiah Gibson**

On June 6, 2017, Gibson executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

I was wrongfully terminated after making safety complaints. I would like to have my regular job back with back pay and benefits.

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

The Secretary also submitted with the Application the July 19, 2017, Affidavit of Perry Brown, a Special Investigator employed by MSHA. Brown made the following findings and conclusions:

2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the

discrimination claim filed by Franklin Jeremiah Gibson on June 20, 2017. My investigation to date has revealed the following facts:

A. At all relevant times, Blue Creek Mining, LLC. (the "Operator" or "Blue Creek") is a "person" as defined in § 3(f) of the Mine Act.

B. The applicant, Franklin Jeremiah Gibson, was employed by the Operator to work as a continuous miner operator at the Blue Creek No. 1 Underground Mine and was therefore a "miner" within the meaning of § 3(g) of the Mine Act.

C. Gibson was employed at the mine for approximately ten months until May 25, 2017.

D. Richard "Red" Hensley and Benjamin Leadmon worked on the same crew as Gibson for a couple of months. Bill Vanover was their section boss.

E. Gibson told me of several unsafe incidents he experienced at the mine, including that his crew once cut into the intake airway in violation of the mine's approved ventilation plan, allowing dust to come back over the miner operator; that Vanover told him to cut into unsupported top in violation of the 30 C.F.R. § 75.203(d); and that the crew was expected to bolt down wind of the mining machine in the dust more times than the ventilation plan allowed.

F. Gibson also told me that on one occasion, he questioned Vanover's instruction to take deep cuts into the intake air, and Vanover cursed at him and told him to do as he was instructed. Gibson believed he would have been fired had he not done as he was told.

G. Gibson told me that he, Leadmon, and Hensley complained to Superintendent Mike Dotson about the above events and their safety concerns on May 23, 2017. Leadmon gave Superintendent Mike Dotson a written list of the above events and safety concerns that Gibson had begun recording approximately one month prior. Dotson said he was concerned and informed Assistant General Manager Jamie Wiant of their complaints. That same day, the three miners each met individually with Dotson, Wiant, Safety Manager Josh Bell, Mine Foreman Nike Nichols, and Maintenance Manager Jason Dooley. Gibson told them each about his concerns.

H. Gibson told me that believes he did the right thing by informing mine management of his safety concerns. He believes, however, that he was discharged for making these safety complaints.

3. There is reasonable cause to find that the Complainant was discharged because he engaged in protected activity. Gibson engaged in protected activity when he complained to mine management about various safety concerns at the mine. Gibson suffered an adverse action when he was suspended on May 23, 2017 and ultimately discharged two days later on May 25.

4. Based on my investigation to this date and based upon the proximity in time between the protected activity and the adverse action and the operator's knowledge of the protected activity, I have concluded that there is reasonable cause to find that Gibson was discharged because he engaged in protected activities by complaining about unsafe practices at the mine. I have concluded that the complaint filed by Gibson was not frivolous.

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

### III JOINT STIPULATIONS<sup>3</sup>

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 (“the Act”).
2. Blue Creek Mining, LLC (“Blue Creek”) is a wholly owned subsidiary of Blackhawk Mining, LLC.
3. Blue Creek Mining, LLC operates the Blue Creek #1 Mine in Kanawha County, West Virginia.
4. The products or operations of the Blue Creek #1 Mine enter or affect commerce, within the meaning and scope of Section 4 of the Act.
5. The Blue Creek #1 is a mine as that term is defined in 30 U.S.C. 802(h).
6. Blue Creek is an “operator” as defined in Section 3(d) of the Act at the Blue Creek #1 Mine.
7. Operations of Blue Creek at the Blue Creek #1 Mine are subject to the jurisdiction of the Act.
8. Blue Creek is a “person” within the meaning of § 105(c) and within the definition of § (f) of the Act. 30 U.S.C. 802(f).

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<sup>3</sup> The Joint Stipulations were entered at hearing and admitted into the record as Joint Exhibit 1. (Tr. 11-12). Each Joint Stipulation will hereinafter be cited to as J.S. followed by its number.

9. Prior to May 25, 2017, Complainant Benjamin Leadmon was employed as a Roof Bolting Machine Operator at the Blue Creek #1 Mine, and, therefore, was a “miner” within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).
10. Prior to May 25, 2017, Complainant Franklin Jeremiah Gibson was employed as a Continuous Mining Machine Operator at the Blue Creek #1 Mine, and, therefore, was a “miner” within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).
11. Complainant Gibson was employed by Blue Creek for approximately ten months until May 25, 2017.
12. On May 25, 2017, Blue Creek terminated the employment of Complainants Leadmon and Gibson.
13. Between May 23 and 25, 2017, Richard Hensley was employed by Blue Creek as a Roof Bolt Machine Operator in the Blue Creek #1 Mine.
14. Between May 23 and 25, 2017, Jamie Wiant was employed by Blue Creek as the Operations Manager.
15. Between May 23 and 25, 2017, Josh Bell was employed by Blue Creek as the Safety Manager.
16. Between May 23 and 25, 2017, Charles Childers was employed by Blue Creek as the General Manager.
17. Between May 23 and 25, 2017, Jason Dooley was employed by Blue Creek as the Maintenance Manager.
18. Between May 23 and 25, 2017, Bill Simon was employed by Blue Creek as the Evening Shift Mine Foreman.
19. Between May 23 and 25, 2017, Mike Dotson was employed by Blue Creek as the Superintendent of the Blue Creek #1 Mine.
20. Between May 23 and 25, 2017, Mike Nichols was employed by Blue Creek as the Mine Foreman at the Blue Creek #1 Mine.
21. Prior to his discharge on May 23, 2017, Bill Vanover was employed by Blue Creek as the Section Boss on the #4 Mains Section of the Blue Creek #1 Mine.
22. On May 23, 2017, Blue Creek terminated the employment of Mr. Vanover.



#### IV. SUMMARY OF TESTIMONY

Franklin Jeremiah Gibson was a continuous miner operator at Blue Creek Number 1 Underground Mine. (Tr. 28-29). Blue Creek Mining, LLC, a subsidiary of Blackhawk Mining, LLC, operates Blue Creek Number 1. (J.S. 2,3). Gibson worked at Blue Creek for approximately 10 months.<sup>4</sup> (Tr. 28-29).

At Blue Creek, Gibson worked as a continuous miner first at the eight section, then the four main section. (Tr. 34). At the four main section, he worked dayshift at the time of his discharge. (Tr. 34).

Gibson never had any disciplinary action taken against him at previous mining jobs until he worked at Blue Creek Number 1. (Tr. 32). At Blue Creek Number 1, Gibson was suspended for leaving a dust pump hanging underground. (Tr. 32-33). He was suspended for five days. (Tr. 33-34).

Benjamin Leadmon was a roof bolt operator at Blue Creek Number 1 Mine. (Tr. 97). He worked at Blue Creek Number 1 for 17 months while Black Hawk owned it and five years before that when Patriot owned the mine.<sup>5</sup> (Tr. 97). Leadmon and Richard (“Red”) Hensley were roof bolters for the four main section. (Tr. 37, 102).

Leadmon has had only one previous disciplinary action at Blue Creek of a written warning for five excused absences approximately 18 months ago. (Tr. 99).

Gibson and Leadmon’s direct supervisor at the four main section was Bill Vanover, the section foreman. (Tr. 34, 85, 100). Gibson testified that Vanover was his supervisor for only three or four weeks. (Tr. 35). Gibson testified that Vanover was the worst boss he ever had because Vanover would order Gibson to work in unsafe, illegal conditions. (Tr. 35). Leadmon also testified that Vanover made miners take illegal actions because Vanover only cared about “the numbers.” (Tr. 101).

On May 4, 2017, Gibson testified that his crew was cutting the four right section, where “the scrubber” was down. (Tr. 35). Gibson told Vanover that the airflow needed to be switched around because it was moving in the wrong direction. (Tr. 35). Vanover ultimately said that nothing could be done about the unsafe air intake situation as the crew was too far behind in production. (Tr. 36). When the evening shift foreman Bill Simon arrived, Gibson testified that he told Simon that they needed to “flop the air.” (Tr. 36). Simon just looked at Gibson and walked away “through the flop air” to speak with Vanover. (Tr. 36). Vanover and Simon spoke, and Vanover said again that the crew was too far behind to “shut it down and flop the air.” (Tr. 36).

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<sup>4</sup> Gibson has worked as a miner for nine and a half years for several mining companies including Murray Energy, Speed, Yellow Bush, and Campbell’s Creek Number 7. (Tr. 30-32).

<sup>5</sup> Leadmon worked at Mammoth Coal for Massey for two years as a roof bolter and supply loader before working at Patriot. (Tr. 98).

On May 11, 2017, Gibson testified that he was supposed to cut the number four heading at the start time. (Tr. 36). The roof bolter was in three right, so Gibson was sitting, after completing his “dust printers and everything.” (Tr. 36). Vanover came to Gibson and told him to begin “loading” because the bolting was almost finished in the three right section.<sup>6</sup> (Tr. 36). Gibson replied that he would not start “loading” until the bolting was finished. (Tr. 36). Vanover told Gibson to “go ahead,” and Gibson again said no. (Tr. 36). Vanover then went to check how much bolting was left, and after he returned, said that the bolters were backing out, so Gibson should start loading. (Tr. 37). Gibson then went about 15 feet on one side cut before the bolter Richard Hensley came over and said the area in front of Gibson was not bolted. (Tr. 37). Gibson then backed up and told Vanover that he was not going to cut into the unsupported area. (Tr. 37). Vanover then replied “You F-ing cut into it now.” (Tr. 37). Benjamin Leadmon was standing with Hensley at that time, so Gibson looked over at them and cut into the area Vanover requested. (Tr. 37).

Leadmon also testified, in reference to the May 11, 2017, incident, that Vanover had Leadmon and Hensley stop bolting the four right section and back out so that Gibson could cut into the unsupported top. (Tr. 102). Leadmon testified that he objected to this request but Vanover said “you will do it” and “made [Leadmon and Hensley] back out.” (Tr. 102).

On another occasion in May, Gibson testified that the continuous miner had “nine inserts crack that would not hold bits... [f]our bits stuck and one lug tore off.” (Tr. 37-38). Gibson testified that more than one insert or lug cannot be missing for more than 24 hours. (Tr. 37). Gibson testified that he repeatedly asked Vanover to fix the cracks, and Vanover told Gibson “no, you’ll run it” and that “[h]oot owl will fix it.”<sup>7</sup> (Tr. 38). Gibson also asked the evening shift electrician to fix the cracks, and was told again that “hoot owl” will fix it. (Tr. 38). Then Gibson asked Hensley to request that Vanover fix the issue because Gibson was tired of asking Vanover to shut down the continuous miner machine. (Tr. 38). Again, Gibson was told to keep running the machine and that “hoot owl” would fix it. (Tr. 38).

These three occasions of cutting into an unsupported top, cutting into the intake air, and running the miner with an improper amount of lugs and bits are the unsafe incidents Gibson remembered at hearing. (Tr. 38). Gibson testified that he first said no to Vanover when ordered to complete these unsafe actions, but completed them anyway because he was afraid he would have been fired if he had not followed orders.<sup>8</sup> (Tr. 39).

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<sup>6</sup> It appears that “loading” refers to cutting into the coal with the continuous miner machine. *See* (Tr. 37).

<sup>7</sup> It is not clear to this Court from the testimony who or what “hoot owl” was, although the term has colloquially been known to refer to the night shift.

<sup>8</sup> Vanover never specifically told Gibson he would be fired for not cutting into the unsupported top or intake air. (Tr. 52-53). However, it was Vanover’s insistence that Gibson complete unsafe work orders, which led Gibson to believe his job was at risk. (Tr. 37-39).

Leadmon testified that Jamie Wiant, the operations manager, Tony Sparks, the safety director, and Mike Dotson, the superintendent, said on multiple occasions to follow supervisors' orders, implying that disciplinary action would be taken if you did not follow work orders. (Tr. 102-03).

Gibson testified that he began taking notes of these unsafe incidents because he heard from many miners, including Ernie Butcher, the fill-in boss and Darryl Messer, a continuous miner operator, after returning from his first suspension that Wiant was trying to fire Gibson. (Tr. 39-40). Gibson copied his notes summarizing the unsafe work orders he was given, which were admitted as Government Exhibit 1.<sup>9</sup> (Tr. 41). Gibson said the notes summarize that on May 11, 2017, Vanover ordered Gibson to cut into an unsupported top. (Tr. 41). Also, the notes documented that Gibson was ordered to cut into the intake air on May 4, 2017, which Gibson believes resulted in his lungs hurting and his bronchitis diagnosis.<sup>10</sup> (Tr. 41). On May 5-6, 2017, Gibson was not at work but recorded in his notes that Vanover again asked another miner, Josh, a "buggy man," who filled in for Gibson, to cut into the air intake. (Tr. 41).

Leadmon testified that Vanover would also have the roof bolters bolt more than one cut each shift in the dust, which is illegal. (Tr. 101).

Leadmon further testified that Vanover told Leadmon to take a personal dust monitor, ("PDM"), to the air intake. (Tr. 84, 101). Leadmon testified that he told Vanover his PDM monitor was at 98%. (Tr. 104). Vanover then told Leadmon to take his PDM over to the air intake. (Tr. 104). Leadmon testified that he did not know it was illegal, but he knew that Vanover instructed him to take the PDM to the air intake for a fresh air sample. (Tr. 104).

Wiant testified at hearing that he first became aware of safety infractions from Levi Stevens ("Cody"), a scoop operator, who gave his two weeks' notice on May 22, 2017. (Tr. 68-69). Gibson also testified that he heard from Levi Stevens that Stevens was going to inform management of the unsafe working conditions in the four main section. (Tr. 55). Stevens told Dotson about miners making deep cuts and cutting into unsupported top. (Tr. 69). Wiant testified that taking a deep cut in a crosscut that is not bolted puts miners at risk for a cave-in from the roof or ribs. (Tr. 74). Wiant testified that Dotson went underground on May 22, 2017, but did not observe any safety infractions. (Tr. 71). That evening Dotson called Wiant to inform him of the situation, and Wiant told Dotson he would be in the office the next day. (Tr. 71).

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<sup>9</sup> Government Exhibits will hereinafter be cited to as GX followed by its number, Joint Exhibits will be cited to as JX followed by its number and Respondents Exhibits will be cited to as RX followed by its number.

<sup>10</sup> Gibson testified that he was out of work on May 5-6, 2017, because he had to go to the doctor for lung pain that resulted from cutting into the air intake, "half through the sand rock." (Tr. 41). He had bronchitis and "something else" that he was certain resulted from breathing in dust during the aforementioned incident. (Tr. 41).

On May 23, 2017, Gibson made a copy of his notes with safety complaints and gave it to Leadmon, because they were going to bring the notes to Mike Dotson, the superintendent. (Tr. 42). Gibson testified that Leadmon brought the notes to Dotson, who took the notes and went back into his office.<sup>11</sup> (Tr. 42). It did not appear to Gibson that anything was “going on,” so he went with Leadmon and Hensley to speak with Dotson about the unsafe working conditions. (Tr. 43). Leadmon testified that he, Hensley, and Gibson went to give Gibson’s note to Dotson on May 23, 2017, because they listed the most serious infractions that they believed could hurt or kill someone. (Tr. 108-09). Dotson told them that he was sorry any of these things happened and that they should not have been asked to do the unsafe work. (Tr. 43). Dotson told them that he would “take care of it.” (Tr. 43).

After, there was a safety meeting that morning on May 23, 2017. (Tr. 43). Following the meeting, the four main section was asked to remain. (Tr. 43). Each person was taken into the office and questioned about any safety concerns in the four main section. (Tr. 43). Wiant testified that nine individuals were questioned from the four main section. (Tr. 81). When Gibson was called into the office, he told management that his boss had him cut into unsupported top and into intake air that wasn’t “flopped.” (Tr. 44). Gibson testified that management said they appreciated him telling the truth and that “the truth will set you free.” (Tr. 44). Gibson left the meeting with a feeling that management really listened and was going to do the right thing. (Tr.

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<sup>11</sup> Wiant testified at hearing for Respondent. Wiant is currently employed at Blue Creek as the operations manager and was operations manager on May 22-25, 2017. (Tr. 63). As operations manager, he oversees the safety, compliance, health, and production in three underground deep mines, including Blue Creek Number 1. (Tr. 63). His duties include disciplining and terminating miners. (Tr. 64). He has worked at Blue Creek for approximately one year. (Tr. 64). He was an Equipment Operator from 2000 to 2003, which included working with a continuous miner machine. (Tr. 64). Since 2003 Wiant has worked in management. (Tr. 65). Wiant received his foreman’s papers in 2003 and his mine foreman’s card in 2005. (Tr. 65). He became a mine foreman at that time. (Tr. 65). In 2007, Wiant became a mine superintendent until 2012. (Tr. 65). In 2012, Wiant worked for Patriot. (Tr. 65). Prior to working for Patriot, he worked for Massey and Alton. (Tr. 65). He has a miner’s red card, foreman card, EMT card, shop foreman’s card, and underground instructor card.” (Tr. 65).

Wiant testified as to the events on May 23, 2017. (Tr. 71-72). As this testimony conflicts with that of Leadmon and Gibson, it is noted only for the record, as credibility determinations will not be made concerning these Temporary Reinstatement proceedings. Wiant testified that on May 23, 2017, Dotson was in his office and saw Leadmon, who Dotson asked to come into the office and speak with him. (Tr. 71). Dotson first questioned Leadmon and no safety accusations arose. (Tr. 72). However, during a second questioning, where Dotson again approached Leadmon, Leadmon stated the same infractions as Levi Stevens for deep cuts, cutting into the unsupported top, intake air, and also falsifying a PDM dust sample by taking it down the air intake. (Tr. 72).

44). Gibson believed the right thing was to give section four a different supervisor because he believed Vanover, the current supervisor, was going to “get someone killed.”<sup>12</sup> (Tr. 44-45).

Leadmon also testified that he told mine management about the unsafe work orders on May 23, 2017, during his individual meeting. (Tr. 107-08). Leadmon testified that he did not say anything earlier because he was afraid he would be terminated. (Tr. 108). When Leadmon met with management individually, he told Dotson about the deep cut, and cutting into the unsupported top, as well as taking a PDM to the air intake for a sample while roof bolting. (Tr. 110). Leadmon told Dotson about the PDM sample because he thought someone was bolting when that occurred, not because he thought it was illegal. (Tr. 110).

Wiant testified that Ron Bennett, in the four main section made a safety related work refusal to haul any of the cuts because a shuttle car was supposed to do that work. (Tr. 87-88). Wiant testified that Bennett was not disciplined by Vanover or anyone else in management (Tr. 87). Wiant also testified that all of the other miners from the four main section raised the same safety infractions as Leadmon and Gibson during these individual meetings. (Tr. 87-88). Wiant testified that these other miners were not disciplined. (Tr. 88).

After the individual meetings for the four main section on May 23, 2017, Gibson was told to wait with the other miners and not to talk to anybody. (Tr. 45). He stood outside until approximately 12:30 p.m. when he was called into the office. (Tr. 45). Wiant, the operations manager, Dotson, the superintendent, Mike Nichols, the dayshift mine foreman, Bell, the safety director, and Dooley, the chief electrician were in the meeting. (Tr. 114-15). At this meeting, management told Gibson he was suspended. (Tr. 46). Gibson testified he was told he could sign a document stating that he cut into the air intake and unsupported top, then leave work. (Tr. 46). Gibson said at this second individual meeting that Vanover made him do this unsafe work. (Tr. 46). Management asked if Vanover held a gun to Gibson’s head, to which Gibson replied no. (Tr. 46). Management said Gibson had the keys to the continuous miner machine and did not have to do that work, and it was Gibson’s fault. (Tr. 46). However, Wiant testified that Gibson said he questioned Vanover’s work orders when told to cut into the unsupported top and air intake. (Tr. 91). Gibson then signed this document and left. (Tr. 46). Gibson believed that management would fire Vanover and bring Gibson back to work in two or three days. (Tr. 46-47).

At approximately 1 p.m. on May 23, 2017, Leadmon was called into the office, where management told Leadmon that he would be suspended for five days for falsifying a PDM sample. (Tr. 115). Leadmon felt he was not in the wrong because he was following a direct order, and he did not know it was illegal at the time. (Tr. 115-16). Leadmon signed a written warning for falsifying a PDM sample and then Leadmon left. (Tr. 116). On Friday, May 25, 2017, two days after the suspension, Wiant, Samantha Owens, from human resources, and Chuck Childers, the mine operator called Leadmon on the phone. (Tr. 47, 116). Owens told Leadmon he was fired for falsifying a PDM sample. (Tr. 47, 116)

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<sup>12</sup> Two months prior to this meeting Vanover was removed from his position as a boss and Gibson testified that Wiant said Vanover “would never boss again at this mine as long as I’m here.” (Tr. 45).

On May 25, 2017, Gibson testified that he also received a phone call from Samantha Owens, who said Chuck Childers, and Jamie Wiant, were on the phone call too. (Tr. 47). During this phone call, Owens told Gibson that he was terminated. (Tr. 47-48).

Owens called Gibson back approximately one hour later and asked if Gibson had anything to turn in. (Tr. 48). At that time, Gibson asked why he was being terminated. (Tr. 48). Owens said it was because Gibson willingly, knowingly cut into the air intake and unsupported top. (Tr. 48).

Wiant testified that Gibson was discharged on May 25, 2017, for putting the safety of other miners at risk by cutting into an unsupported top, taking deep cuts, and prior incidents. (Tr. 66). Gibson's Termination Form indicates involuntary termination, which Wiant testified was for safety infractions May 4-22, 2017. (Tr. 67; RX-1). Wiant further testified that Leadmon was terminated that same day for falsify a PDM sample and not notifying management. (Tr. 130).

Wiant testified that Vanover was also terminated for not making sure the miners under his supervision were following safety requirements and for not bringing "accusations" to upper management. (Tr. 85-86).

## **V. CONTENTIONS OF THE PARTIES**

Gibson and Leadmon argue that they have met their burden of establishing that their complaints are non-frivolous, and as a result they should be temporarily reinstated. Gibson highlighted his protected activities of making safety complaints and providing a copy of his notes with safety complaints on May 23, 2017, to management as well as making safety complaints to Vanover when he was given unsafe work orders. Gibson argues that his suspension on May 23, 2017, and termination on May 25, 2017, are adverse actions under the Act for which Respondent is liable. Further, Gibson argues that there was knowledge and a coincidence in time between the protected activities and the adverse actions.

Leadmon also argued that he made safety complaints by bringing Gibson's notes with safety complaints to management and that Leadmon verbally made safety complaints to management in multiple meetings on May 23, 2017. Leadmon argues that his suspension and termination were adverse actions under the act. Further, Leadmon argues that there was knowledge and a coincidence in time between the protected activities and adverse actions.

Respondent argues that both Gibson and Leadmon did not make protected work refusals, and that the safety complaints made were in response to disciplinary proceedings. Respondent argues that Gibson and Leadmon were terminated for violating safety regulations.

## **VI. FINDINGS AND CONCLUSIONS**

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary's burden is "relatively insubstantial." For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone

or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaints were not frivolously brought.

Gibson and Leadmon's discrimination complaints and the adverse actions taken against them coincide factually. Thus, this Court will address Gibson's and Leadmon's claims together.

#### **A. Gibson and Leadmon Engaged in Protected Activity**

The record contains several actions that constituted protected activity. First, Gibson testified that on May 4, 2017, he told his supervisor, Vanover, when they were cutting with the continuous miner machine, that the airflow needed to be "flopped" for safety. (Tr. 35-36). Vanover refused to "flop" the airflow because production was running behind. (Tr. 35-36). Next, on May 11, 2017, Gibson told Vanover that Gibson did not want to use the continuous miner machine in the number four heading because it was unsafe due to the area not being properly bolted. (Tr. 36-37). Then, on May 23, 2017, Gibson engaged in protected activity when he copied his notes listing unsafe work orders given by Vanover and gave them to Leadmon, who brought the notes to Dotson, the superintendent. (Tr. 42). Gibson further engaged in protected activity by making safety complaints to Dotson and the other members of management, Wiant, the operations manager, Nichols, the dayshift mine foreman, and Bell, the safety director, in the two meetings that occurred on May 23, 2017 concerning the four main section, such as cutting into the air intake and cutting into an unsupported roof with the continuous miner machine. (Tr. 43-46).

Leadmon engaged in the same protected activity on May 23, 2017. (Tr. 107-10) Leadmon took the note with safety complaints that was copied by Gibson and brought them to Dotson. (Tr. 107-08) This alone is protected activity. Then, in the following meeting Leadmon had with Gibson, Hensley, and Dotson, the three miners made safety complaints involving Vanover. (Tr. 108-09). These safety complaints included cutting into the air intake and cutting into an unsupported top that was not roof bolted. (Tr. 109-10). Leadmon also complained in his individual meeting with management, Wiant, Nichols, Dotson, and Bell that Leadmon was given a work order to take his PDM, which was supposed to remain with him while roof bolting, to the air intake for a sample. (Tr. 110).

There was some dispute by Respondent as to the motivation for the safety complaints made by Gibson and Leadmon. (Tr. 76-77). Respondent argues that the safety complaints were made in response to disciplinary proceedings. (Tr. 76-77). However, this Court cannot resolve conflicts in testimony in the context of a Temporary Reinstatement. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). Therefore, this Court finds Gibson and Leadmon presented substantial evidence that they engaged in protected activity.

#### **B. Gibson and Leadmon Suffered Adverse Employment Actions**

There is clear adverse employment action for both Gibson and Leadmon who were suspended on May 23, 2017, after their individual meetings with management. (Tr. 45-46, 115). Gibson and Leadmon were also discharged over the phone on May 25, 2017, by Owens, Wiant,

and Childers. (Tr. 47-48, 116). These adverse actions are not in dispute by either party. (Tr. 47-48, 83, 116, 134; RX-1, 3).

### **C. A Nexus Existed Between the Protected Activity and the Adverse Employment Action**

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.

#### **1. Knowledge of the protected activity**

According to the Commission, “the Secretary need not prove that the operator has knowledge of the complainant’s activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090, *citing Chicopee Coal Co.*, 21 FMSHRC at 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.

Gibson testified that he repeatedly told Vanover, the section foreman, that Gibson did not want to engage in unsafe work orders—cutting into the air intake and an unsupported top—which he ultimately admitted to completing for fear of termination. *See* (Tr. 39). Leadmon also testified that he told Vanover that he did not want to back out of the four right section when it was not sufficiently roof bolted for the continuous miner machine to run. (Tr. 102).

Gibson and Leadmon further testified that Gibson wrote up safety complaints, which he copied on May 23, 2017, and Leadmon brought the notes to Superintendent Dotson. (Tr. 42, 108-09). Additionally, Gibson and Leadmon testified that they went with Hensley on May 23, 2017, into Dotson’s office to make safety complaints concerning work orders from Vanover to cut into the air intake and an unsupported top. (Tr. 43, 108-09). As Leadmon and Gibson were both part of the conversation on May 23, 2017, where they made safety complaints to Dotson, this shows sufficient evidence that Dotson, the superintendent, knew of their safety complaints. (Tr. 43, 108-09).

Wiant admitted that Dotson told him prior to Leadmon and Gibson being suspended that “an issue” was brought forward. (Tr. 81). Dotson told Wiant this right after Wiant saw Leadmon, Gibson, and Hensley meet with Dotson. (Tr. 81).

Nonetheless, a credibility determination cannot be made at this time, and the allegations by Gibson and Leadmon that they spoke with Vanover, the section foreman, and Dotson, the



superintendent, about their safety complaints is sufficient to demonstrate knowledge by Respondent.

## **2. Coincidence in time between the protected activity and adverse action**

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

In the instant cases, there was an extremely close proximity in time between the protected activities and adverse actions. Gibson and Leadmon both brought safety complaints to management on May 23, 2017, engaging in protected activity. (Tr. 42-43, 108-09). The same day, on May 23, 2017, Gibson and Leadmon were suspended. (Tr. 45-46, 115). Two days later, on May 25, 2017, Gibson and Leadmon were discharged. (Tr. 46-47, 116). As a result, I find that the time span between the protected activities and adverse actions is sufficient to establish a nexus.

## **3. Hostility or animus toward the protected activity**

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

Gibson experienced multiple occasions of hostility to the safety complaints he made to Vanover, the section foreman, and Dotson, the superintendent. (Tr. 36-37). When Gibson asked Vanover to switch the airflow while the continuous miner machine was cutting in to the air intake on May 4, 2017, Vanover and Smith, an evening shift foreman, just ignored Gibson’s complaints and told Gibson to keep working in the dangerous condition. (Tr. 36). Moreover, on May 11, 2017, Gibson testified that Vanover cursed at him, yelling that Gibson needed to “F-ing cut into it now” when Gibson objected to cutting into an unsupported roof. (Tr. 37). Gibson also was suspended on May 23, 2017, after written and verbal safety complaints were presented to management. (Tr. 42-43).

Leadmon also experienced hostility when he told Vanover that he did not want to back out of the number four right section without completing bolting for the continuous miner. (Tr. 101). Vanover told Leadmon “you will do it” and “made [the roof bolters] back out.” (Tr. 102).

Additionally, Leadmon was suspended on May 23, 2017, after he brought Gibson's list of safety complaints to Dotson and made verbal safety complaints to management. (Tr. 108-09, 115).

As a result, Gibson and Leadmon both received hostility, which was directed towards their safety complaints when Vanover ignored their safety complaints and continued to demand they complete unsafe work orders. (Tr. 36-37). Moreover, the fact that they were suspended the same day that they made safety complaints to management demonstrates animus. (Tr. 45-46, 115).

#### **4. 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.

There was some testimony brought forward by Respondent indicating that Ron Bennett and the other miners working in the four main section made safety complaints without being terminated. (Tr. 87-88). Evidence was not brought forth by the Secretary to indicate whether there was disparate treatment in the instant matter. However, this factor is not necessary for a *prima facie* claim of discrimination and does not outweigh the other factors indicating a nexus between protected activity and adverse action.

#### **D. Defenses**

Respondent argued at hearing that Leadmon and Gibson's safety complaints were only made in response to disciplinary action taken by Respondent. (Tr. 76). This defense requires a credibility determination, and is therefore outside of the scope of these temporary reinstatement cases. Further, Respondent argues that Complainants were terminated for taking unsafe actions in the mine. (Tr. 66, 130). Specifically, Respondent contends that Gibson was terminated for cutting into the air intake and an unsupported roof, while Leadmon was terminated for falsifying a PDM sample. (Tr. 66-67, 130; RX-1, 3). These defenses are not appropriate for a temporary reinstatement proceeding as they do not challenge the Secretary's burden of bringing a claim that is not frivolous. These defenses do not challenge that there is reasonable cause to believe by substantial evidence that a violation of section 105(c) has occurred.

### **VII. CONCLUSION**

In concluding that Gibson's and Leadmon's complaints were not frivolously brought, I find that there is reason to believe Gibson and Leadmon engaged in protected activities and that there was a nexus between the protected activities and their terminations.

**ORDER**

For the reasons set forth above, it is **ORDERED** that Complainant Benjamin Leadmon be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

Further, it is **ORDERED** that Complainant Franklin Jeremiah Gibson be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

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

*William S. Steele*

William S. Steele  
Administrative Law Judge

Distribution (Via E-mail and Certified Mail):

Kathleen F. Borschow, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202-5450; [borschow.kathleen@dol.gov](mailto:borschow.kathleen@dol.gov)

Todd C. Myers, Esq., Associate General Counsel, Blackhawk Mining, LLC, 3228 Summit Square Place, Suite 180, Lexington, KY 40509; [tmyers@blackhawkmining.com](mailto:tmyers@blackhawkmining.com)

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513; [kilpatrick@rwktlaw.com](mailto:kilpatrick@rwktlaw.com)

Benjamin Leadmon, 93 Fullmoon Drive, Charleston, WV 25306

Franklin Jeremiah Gibson, 4622 Foster Ridge Road, Given, WV 25245