FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 18, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) obo JOHN COLLINS, Complainant, v. CRIMSON OAK GROVE RESOURCES, LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2023-0235 MSHA No.: SE-MD-2023-09 Mine: Oak Grove Mine Mine ID: 01-00851

DECISION AND ORDER REINSTATING JOHN COLLINS

Before: Judge Lewis

On August 25, 2023, 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, John Collins ("Collins" or "Complainant"), to his former position with Crimson Oak Grove Resources, LLC ("Oak Grove" or "Respondent"), at Oak Grove Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint timely filed by Collins on July 27, 2023, 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 Collins to his former position as a mobile equipment operator on the surface of the mine.

Respondent timely filed a motion requesting a hearing regarding this application on September 01, 2023. A remote hearing was held via Zoom on September 11, 2023, wherein the Secretary presented the testimony of the Complainant, and the Respondent had the opportunity to cross-examine the Secretary's witness 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 Collins.

Contentions of the Parties

On July 27, 2023, Collins filed a Discrimination Complaint with MSHA alleging that on June 14, 2023, he was:

> Ask[ed] to load [the] panline on a truck by my immediate supervisor, Jeff Jamsion [sic]. I told him that I don't feel comfortable loading the panline with my 250 Komatzu Loader. He told me we load pan all the time with the Loader and I said I doesn't [sic] feel comfortable loading with the Loader again. Then he say [sic] load the panline Collins[.] Mike is at the dump[,] The truck is waiting to be loaded. I proceeded to load[.] The panline loaded 1 piece of pan[.] The second piece[,] I went to approach the truck to load lift up [sic] and my Loader rock[ed] a little and then when I raise [sic] up my forks[,] went to the ground and the back end comes [sic] off the ground 6 feet and slams down[,] jarring my back. Jeff Jamsion [sic] fill[ed] out a[n] incident report that day[,] June 14th. [On] June 23[,] I was call[ed] to the office saying [sic] that they [were] investigating the incident and I was suspended pending investigation on the equipment to he [sic] find out what's wrong with the Loader. June 26th was a meeting [sic] suspension with intent to discharge [for failure] to care for myself and other's and company property [sic]. July 21st[,] I was discharged by the arbitrator. I want my job back with full backpay! [I] want this incident clear off my record!

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

The Secretary also submitted the August 24, 2023, Affidavit of Michael LaRue, a special investigator employed by the Mine Safety and Health Administration with the Application. LaRue wrote that he investigated Collins' discrimination claim against Respondent. LaRue found and concluded the following:

2. a. At all relevant times, Respondent Crimson Oak Grove Resources, LLC ("Oak Grove") engaged in the operation of a coal or other mine and is, therefore, an "operator"within the meaning of Section 3(d) of the Act.

   b. Oak Grove Mine ("the mine"), Mine ID 01-00851, located in Jefferson County, Alabama, has products that enter commerce and is, therefore, a "mine" within the meaning of Sections 3(b), 3(h), and 4 of the Act. Oak Grove operates the mine.

   c. Collins worked for Oak Grove at the mine for the past nineteen (19) years. For fifteen (15) years he worked underground as a motor man. Collins was transferred to the surface and worked in the bathhouse since March of 2022. In February 2023 Collins began working as a mobile equipment operator on the surface of the mine. Collins is a "miner" within the meaning of Section 3(g) of the Act.

   d. On Wednesday, June 14, 2023, Collins was told by his supervisor, Jeff Jamison ("Jamison"), to use a Komatsu 250 with fork attachments to load pan lines onto a haul truck.

   e. Collins expressed concern to Jamison about the weight of the pan lines being too heavy for the Komatsu 250 – that the Komatsu 250 was not equipped to handle the load. Jamison told Collins they "do it all the time."

f. Collins again told Jamison he did not feel comfortable completing the task with the Komatsu 250. Jamison advised Collins the Cat loader, a larger piece of equipment, was not available for use for this task as it was being used by another miner elsewhere at the mine.

g. For a third time Collins told Jamison he did not feel comfortable using the Komatsu 250 for the task, as he felt it was an undersized piece of equipment. However, Collins also felt he could not further disagree with his supervisor. Jamison told Collins to "just go ahead and load" the pan lines. Collins reluctantly began the task.

h. As Collins loaded the first pan line, he noticed the Komatsu 250 was unsteady when the forks were raised.

i. As Collins loaded the second pan line, he felt the rear tires of the Komatsu 250 lift off of the ground. Collins stopped moving the Komatsu 250 in an effort to stabilize the equipment.

j. Collins then proceeded to lift up the forks carrying the second pan line. As the forks rose higher, the weight of the pan line caused the front-end loader to tip forward. This caused the back tires of the Komatsu 250 to come off of the ground approximately six (6) feet. The unsecured pan line slipped off of the forks and fell to the ground. The rear of the Komatsu 250 then slammed to the ground onto the rear tires.

k. Collins continued to work the rest of the day, while another miner finished the job of loading the pan lines with the Cat loader.

l. Collins filled out an accident report due to pain in his back as a result of the Komatsu 250 slamming to the ground.

m. On Friday, June 23, 2023, Collins was called to a meeting with the mine manager, Jesse Avery ("Avery"). Present with Avery were a union representative and a human resources representative. Collins was shown a video of the incident and advised he was suspended pending investigation, with the intent to discharge. During the meeting Avery acknowledged Collins told Jamison about his safety concerns with using the Komatsu 250 for the task. Avery also advised the incident and video had just come across his desk, so while there was a delay in time since the incident, it was just brought to the attention of Avery.

n. On Monday, June 26, 2023, Collins was called to a meeting, this time with multiple representatives from the mine, the union and human resources. Collins was informed he would continue to be suspended with the intent to discharge or pending the outcome of arbitration.

o. On Friday, July 21, 2023, Collins and Oak Grove appeared before an arbitrator due to Collins filing a grievance with the United Mine Workers of America. During the arbitration Jamison admitted that Collins voiced safety concerns to Jamison about the task of loading the pan lines with the Komatsu 250. The arbiter ruled in favor of the mine and Collins was verbally terminated.

p. Collins timely filed a discrimination complaint with MSHA on Thursday, July 27, 2023 asserting his termination was motivated by his reports of unsafe working conditions.

3. Based upon my investigation of these matters, I have concluded that Collins' complaint of discrimination was not frivolously brought.

Id. at Exhibit A, p. 1-4. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 1.

In its pre-hearing submission and during hearing, Respondent argued that Collins did not engage in protected activities, Tr. 107, and was instead discharged "because of the manner in which he negligently operated a loader on June 14, 2023." Resp. Req. for Hearing at 1. Respondent further argues that Collins had a documented history of conduct that led to equipment being damaged, and that an arbitrator had affirmed Collins' discharge, indicating that they had a legitimate reason to discharge him. *Id.*

The parties jointly stipulated at hearing that the Administrative Law Judge has jurisdiction over this proceeding. The Oak Grove Mine is a mine as defined by the Mine Act, that its products enter interstate commerce, and that at all relevant times, John Collins was a miner as contemplated by the Mine Act. Tr. 8.

Summary of Testimony

John Collins was a miner at the Oak Grove Mine, where he had worked for 19 years. Tr. 20. He became a mobile equipment operator in February of 2023 and worked six days per week. Tr. 21. Prior to working as a loader or mobile equipment operator, he had worked as an underground laborer, a motorman, and surface utility, which was in the bathhouse at the north portal. Tr. 21, 43. Collins described his work in the bathhouse as being janitorial, however he also used a loader in this position.[1] Tr. 23. He worked in that position for three to four years. Tr. 23. At some point during his time at the bathhouse, Paul Jamison became Collins' direct supervisor.[2] Tr. 23. Jamison was Collins' direct supervisor for over a year in the bathhouse. Tr. 23.

[1] At the north portal, Collins operated a 380 loader and Cat loader. Tr. 44. He used these loaders to load pan lines onto supply cars. Tr. 44-45. The 250 Komatsu loader was not at the north portal. Tr. 44.

[2] Paul Jamison was the surface supply yard manager. Tr. 58. His duties were to supervise the loading, unloading, and storage of supplies at the mine. Tr. 58-59. For approximately two years,

In 2016, Collins (who is Black) had filed an EEOC complaint after Jamison spit on him. Tr. 23. As a result of the complaint, Collins believes that Jamison was terminated. Tr. 23-24. Collins described his relationship with Jamison in 2021 as "better," but said that he made complaints to the general manager stating that he was not comfortable having Jamison as a supervisor. Tr. 24. He was told in response that no changes would be made. Tr. 24. In 2022, Collins made further harassment and discrimination complaints against Jamison, alleging that Jamison was picking on him. Tr. 24. Collins testified that he tried to deal with the situation by simply following all orders that Jamison issued. Tr. 25.

As a mobile equipment operator, Collins routinely operated the Komatsu 250 front-end loader, a piece of machinery with which he was "very familiar," describing it as "pretty much my assigned equipment to run." Tr. 21-22, 27, 48-49. Collins' Certificate of Training was admitted as Respondent's Exhibit A. Tr. 49. Collins testified that it was issued after it was determined that he could operate the equipment listed. [3] Tr. 48. Based on his experience and expertise, Collins testified that for the task of loading the pan lines, the Komatsu 250 was not the proper equipment. Tr. 27.

In the middle of Collins' shift on June 14, 2023, at approximately 11:30 am, Jamison stopped Collins as he was coming from the bathhouse and ordered Collins to load the pan lines onto a truck. Tr. 25-26. Collins agreed to do so. Tr. 26. Jamison informed Collins that another employee was using the Cat loader, which is a larger loader, and Collins told Jamison that he did not feel comfortable loading the pan line with the 250 Komatsu loader. Tr. 26. Jamison replied that they "do it all the time." Tr. 26. Collins said that he understood, but repeated that he did not feel comfortable using the Komatsu loader for this task. Tr. 26. Jamison replied that the Cat loader was in use, "so I need you to go ahead and load the truck." Tr. 26. Collins told Jamison, "I'm going to tell you again, I don't feel comfortable doing it, but I will go ahead and do it." Tr. 26, 30. Collins testified that his telling Jamison that he did not feel comfortable using the Komatsu 250 loader to load the pan lines was his attempt to express that it was dangerous.[4] Tr. 28.

On June 14, 2023, Collins had just come off a 35-day suspension for a fender on a loader that got bent. Tr. 30, 52, 56. Collins was concerned that he could get suspended or lose his job

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Jamison has been Collins' supervisor. Tr. 59. He testified at hearing.

[3] Jamison described the training documented in Exhibit B as being issued after "the other operator [went] over with him just to refresh him on going on the preoperational checks, and then I watched him operate." Tr. 60. Jamison testified that Collins had his load against the mast and forks tipped up when he watched him operate the loader. Tr. 60. Jamison described Collins as "an experienced operator." Tr. 61.

[4] Jamison testified that Collins regularly said he did not feel comfortable loading or unloading things as "his excuse to get out of trouble for – if he messes up or gets someone else to do it." Tr. 64. Jamison testified that he did not take these statements to be invocations of Collins' miner's rights because it was "his escape goat. [sic]" Tr. 73.

for "any little thing that happened," so he followed Jamison's orders despite feeling it was unsafe.[5] Tr. 30.

Prior to June 14, 2023, Collins had loaded pan lines five or six times and usually used the Cat loader to load them. Tr. 22. Collins described the Cat loader as "heavy equipment" that was "stronger than the 250 Komatsu." Tr. 22. Prior to June 14, Collins had never used the Komatsu 250 front-end loader to load pan lines onto a haul truck. Tr. 22.

On June 14, the Komatsu loader was configured with a fork system, as depicted on page 42 of the Komatsu loader spec sheet.[6] Tr. 96. According to the spec sheet, the max tipping load was approximately 15,000 pounds.[7] Tr. 98. The weight of the pan line was over 11,500 pounds.[8] Tr. 68; Resp. Ex. E.

Collins testified that Jamison was aware that Collins didn't use the 250 Komatsu loader to load pan lines because in the past when he had to do so, he would switch the Komatsu loader for a co-worker's Cat loader. Tr. 26. Collins explained that he did this because the Cat loader was a stronger loader than the Komatsu. Tr. 26-27. Collins testified that this was not the first time Jamison tried to get Collins to load something heavy with the Komatsu 250 loader, and that Collins had previously told him that it was not the right equipment. Tr. 27.

Collins testified that the pan line "can be loaded [with the Komatsu 250 loader], but it's dangerous." Tr. 28. He explained that the pan line is too heavy for the loader, causing the loader to rock. Tr. 28. He testified that he only used the Komatsu loader to dig out pan lines, but never to lift them above a low level. Tr. 28. Once he would dig out the pan lines, Collins' coworker would come with the Cat loader to load them onto the truck. Tr. 28. Jamison was aware that this was the normal way of loading the pan lines, which is why he informed Collins that the Cat was unavailable on June 14. Tr. 29.

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[5] Collins disputed causing $22,000 worth of damage in that incident. Tr. 52-53. He stated that the investigation into whether the pump was damaged was inadequate. Tr. 53. Collins disagreed with the 35-day suspension but agreed to come back because he needed the job. Tr. 53. Collins testified that he's the only person who has ever received a 35-day suspension. Tr. 56. Koontz testified that the reason the suspension lasted for that long was due to problem in finding an arbitrator. Tr. 86.

[6] The Komatsu loader spec sheet was admitted into evidence as Respondent's Exhibit G. Tr. 96-97.

[7] When asked whether there was a difference between a static load and a safe working load for the Komatsu 250 loader weight capacity, general manager Eric Koontz stated that "it's very opinionated when you read the documents." Tr. 101. When asked if the appropriate inquiry is the maximum payload or maximum tipping load, Koontz replied, "it all depends on how you're – what task you're performing…There's so many different parameters involved there." Tr. 101-102.

[8] A scale ticket that stated that the pan weighed 11,560 pounds on August 09, 2023, was admitted into evidence as Respondent's Exhibit E. Tr. 90-91. The testimony at hearing did not establish whether the pan line was empty when it was weighed on August 09.

Collins described lifting the pan lines on June 14. Tr. 30. Collins took his time and was able to lift the first pan line and get it "kind of level." Tr. 30. However, the loader struggled in trying to lift the pan line. Tr. 30-31. Collins testified that the "guy moving the wood" on the truck said "lift up." Tr. 31. Collins lifted it, but when he could not lift it any further, he "just set it down on there." Tr. 31. He was able to lift the first pan line onto the truck, but described it as "kind of scary."[9] Tr. 31. He testified that when he was lifting the first pan line, he knew that the Komatsu 250 "wasn't a piece of equipment that could handle it…That's why I said I didn't feel comfortable doing it." Tr. 31.

After Collins loaded the first piece, Jamison left the location and did not see Collins load the second pan. Tr. 63. Collins then went to get the second pan line and tried to load it. Tr. 31. He testified that he kept it low so it wouldn't drop and that he tilted the load back when he got to the truck. Tr. 31. He lifted the pan line slowly and then the heavy load "took me straight down, and that's when the back end come up." Tr. 31. The pan line came off the loader when the back end of the loader was lifted off the ground. Tr. 32. Collins testified that he could not have done anything differently once the load started to destabilize the loader. Tr. 31-32. "They said I could have did [sic] something different. But at the – in the time in the moment, you're off the ground, I mean, I just try [sic] not to make no sudden move [sic] to hurt anybody. I didn't want to hurt myself neither."[10] Tr. 31-32.

After the pan line fell off the Komatsu loader, Collins had no trouble driving it. Tr. 35. He did not notice any damage to the vehicle or tires. Tr. 35. He proceeded to drive toward the dump to get his coworker with the Cat loader to help load the pan line onto the truck. Tr. 35. The task of loading the pan line onto the truck was completed using the Cat loader. Tr. 36.

Collins testified that he spoke to Jamison approximately 5 minutes after the pan line fell. Tr. 54. When Collins returned to the truck, Jamison had seen the pan line on the ground and asked Collins what had happened. Tr. 35. Collins responded, "I told you what was going to happen…I knew it was going to happen, Jeff."[11] Tr. 35. Jamison asked if Collins was okay and Collins responded, "Yeah, I think I'll be all right." Tr. 35. However, approximately five minutes later, Collins told Jamison to fill out an incident report because he felt he had injured his lower back. Tr. 36.

After watching the video, Jamison believed that Collins properly loaded the first pan, but that he could tell on the second pan that the pan line was not all the way against the mast on the forks and the forks were not tipped back.[12] Tr. 64. Jamison testified that as one watches the video one can see that the back tires come off the ground a little as Collins was approaching the truck, leading Collins to stop and level it out. Tr. 65. Jamison testified that because Collins did not straighten his load or tip it back more, the pan slid off the forks. Tr. 65.

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[9] The bed of the haul truck was approximately five to five and a half feet off the ground. Tr. 102.

[10] A video of Collins hauling the second pan line was admitted as Secretary's Exhibit 1. Tr. 42.

[11] Paul Jamison also goes by Jeff Jamison. Tr. 72.

[12] Still frames of the video were admitted into the record as Respondent's Exhibit C. Tr. 66.

Jamison testified that when the back wheels of the loader came off the ground, Collins "should have stopped, reevaluated his load and, if necessary, set it down and reposition[ed] it, and take[n] it back up and tilt[ed] it back." Tr. 67. Instead, he testified that Collins stopped, "sat there for a few seconds, and then he continued on toward the truck and raising the pan." Tr. 67. Jamison testified that the company felt that Collins "neglected to do it the right way. He endangered himself and the equipment and everybody around him." Tr. 67.

At some point after June 14, Eric Koontz was made aware by human resources that there was an incident involving Collins on the loader.[13] Tr. 89. He was shown a video and read the incident report and considered those actions as the start of the investigation. Tr. 89. Koontz spoke with Jamison and "other operators." Tr. 89. Koontz testified that he spoke with "every party involved," and decided to discharge Collins. Tr. 89-90.

Collins worked until June 23, when Jamison told Collins to see the mine manager, Jesse Avery, about his injury after completing several tasks. Tr. 36-37. Present in the June 23 meeting were Collins, Avery, the union representative Anthony Davis, and the human resources representative Chad McAtee. Tr. 37-38. During this meeting, Avery showed Collins the video of him loading the pan lines. Tr. 38-39. Avery told Collins that he "could have did this and did that," and Collins responded that "at the time in the moment…when it's in the air, ain't [sic] too much you can do." Tr. 39. Avery said Collins could have loaded from the cable side, but Collins explained that the loader can't pick up from that side. Tr. 39. Avery continued to tell Collins that he should have done something differently, but Collins responded that he was doing what his boss told him to do. Tr. 39. Collins told Avery that he had voiced concerns to Jamison that he felt uncomfortable using the Komatsu loader for the task. Tr. 39. Avery responded that it was not Jamison's job to know whether the load is appropriate for the loader and to stop blaming him. Tr. 39. Union representatives at the meeting also argued that Collins should not be discharged. Tr. 91-92. They viewed the video of the June 14 incident and did not see Collins acting recklessly in any way. Tr. 100. They argued that the blame should have been on Jamison, but Koontz dismissed this argument. Tr. 92.

Koontz asked Jamison about Collins' statements that he was not comfortable using the Komatsu loader to load the pan and Jamison stated that "post the suspension, once Mr. Collins returned, that he was using that phrase as, like, an insurance policy for everything, basically…every task he was assigned, 'I'm not – I'm not comfortable with that.'" Tr. 92.[14] Koontz believed that the Komatsu loader was appropriate to loan pans because Jamison has used it for that task. Tr. 92.

Collins asked Avery why so much time had passed between the accident and the meeting, and Avery said that it just came across his desk. Tr. 39-40. Jamison testified that he put the incident report in his truck and didn't turn it in to human resources until a few days later. Tr. 77.

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[13] Eric Koontz was the general manager of Crimson Oak Grove Resources. Tr. 80. Except for a few months in 2021, Koontz has served in this position since May 2019. Tr. 80. Koontz testified at hearing.

[14] Koontz testified that if Collins had a safety complaint he could have told him directly. Tr. 103-104. Koontz did not believe that Collins "invoked his rights" to Jamison. Tr. 104.

The human resources representative said that Collins could have hurt himself or someone else. Tr. 40. At the meeting, Avery suspended Collins pending an investigation. Tr. 40.

On June 26, Collins was called to a meeting with representatives from human resources present and Koontz on the phone. Tr. 40. Collins was told that he violated Rule Number 2 by being a danger to himself and others in the accident with the pan line.[15] Tr. 40. Collins does not believe that he had the second pan line loaded on the front-end forks in an unsafe manner. Tr. 40. He loaded it in the same manner that he had done previously. Tr. 41. Between June 26 and July 21, Collins remained on unpaid suspension. Tr. 41.

Two previous incidents were discussed at hearing. On March 23, 2023, Collins was unloading a truck with his coworker, and he hit it in some way leading to damage to the pump. Tr. 61. On April 13, 2023, the fender and steps of the Komatsu loader were damaged, and Jamison had not been informed about it. Tr. 62. Jamison testified that the evening shift operator pointed out the damage so Jamison asked Collins about it the following day. Tr. 62-63. Collins initially denied causing the damage, but later admitted to it. Tr. 63. Tr. 84. Koontz was involved in the March and April investigations involving Collins. Tr. 84. Koontz testified that he decided to pursue a discharge because of the two previous incidents and that he had offered Collins alternative work, and that Collins had become a risk to himself and others. Tr. 93. Koontz testified that he considered all aspects of the incident, including Collins' statements that he was uncomfortable, in making his discharge decision. Tr. 98.

On July 21, 2023, an arbitration was held and the arbitrator upheld Collins' termination.[16] Tr. 41. Collins filed a Charge of Discrimination with the EEOC on July 27, 2023, alleging discrimination based on race.[17] Tr. 51 In the section of the Charge titled, "The Particulars Are," was the EEOC representative's summary of what Collins told them. Tr. 50-51. Collins testified that he told the EEOC representative that he had voiced safety concerns to his supervisor. Tr. 57. Collins understood that the EEOC complaint focused on the treatment he received as a result of him being Black. Tr. 57.

Analysis

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any protected right under the Act. The purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health they must be

[15] The list of Employee Conduct Rules at the mine were admitted into the Record as Respondent's Exhibit D. Tr. 87. Rule Number 2 formed the basis for the discipline for the March and April incidents. The rule states: "In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including: Neglect or carelessness in the performance of assigned duties or in care or use of company property." Tr. 88; Resp. Ex. D.

[16] The arbitration decision was admitted into evidence as Respondent's Exhibit F. Tr. 95.

[17] Collins' July 27, 2023, Charge of Discrimination to the Equal Employment Opportunity Commission was admitted into evidence as Respondent's Exhibit B. Tr. 51.

protected against … discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 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." *Id.* at 624-25 (1978).

Section 105(c)(2) states in relevant part that any miner "who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). Following an investigation, "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." *Id.* The Commission has stated that the scope of a temporary reinstatement proceeding is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *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 (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 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' 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).

As a result, temporary reinstatement hearings have traditionally been considered preliminary proceedings that were 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).

In a temporary reinstatement hearing, a judge is tasked with evaluating the evidence of the Secretary's case and determining whether the miner's complaint appears to have merit. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary must prove only a non-frivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id*. at 1088. However, the Commission has stated that it may be "useful to review the elements of a discrimination claim" when gauging whether a claim is nonfrivolous.[18] *Id*. Those elements include (1) that the complainant was

[18] Though this Court follows the Commission's lead, it wonders whether this practice is indeed useful or if it inadvertently leads parties to conclude that the law requires the Secretary to make a

engaged in a protected activity and (2) that the adverse action complained of was motivated in 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*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981). The Secretary may establish the motivational nexus between the protected activity and the adverse action with indirect or circumstantial evidence such as (i) the employer's knowledge of the protected activity, (ii) hostility or animus towards the protected activity, (iii) coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981).

More recently, in *MSHA on behalf of Roger Cook v. Rockwell Mining*, 43 FMSHRC 157 (Apr. 2021), Commissioner Rajkovich, writing for a two-Commissioner majority on evidentiary issues in temporary reinstatement proceedings, adopted what he termed, "the *Marion* approach."[19] 43 FMSHRC 157, 165-166 (Apr. 2021). As described by Commissioner Rajkovich, the Marion approach requires the judge to "consider any evidence which is both relevant to the adverse action and does not require any credibility or value determinations." *Id.* at 165. He explains that:

> The *Marion* approach also gives operators a meaningful opportunity to provide undisputed evidence (i.e., evidence which does not require any credibility or value determinations) that the complaint was frivolously brought… I hold that the Judge can consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. Such evidence may not serve as a basis for denial of reinstatement if it requires resolution of an actual credibility determination.

Id. at 165-166. As examples of such instances, Commissioner Rajkovich explained:

> Scenarios exist where there is no conflicting evidence regarding the miner's unprotected misconduct, i.e., a scenario where the Judge is not presented with any credibility or value determinations regarding the alleged misconduct. For example, a document, which both parties agree is genuine, may show that the operator's decision to fire the miner was made in response to the miner's unprotected misconduct and prior to any identified protected activity. Under these circumstances, the Judge would not need to make any credibility or value determinations regarding this document. And although the document would technically relate to an affirmative defense, it would strongly support a contention that there was no motivational nexus between the protected activity and the adverse action at issue. In this scenario I would find that the Judge cannot only consider the

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prima facie case of discrimination in a Temporary Reinstatement proceeding.

[19] This approach cited a brief section of a separate non-majority opinion written by two Commissioners in *MSHA on behalf of Kevin Shaffer v. The Marion County Coal Co.*, 40 FMSHRC 39 (Feb. 2018).

uncontroverted evidence regarding the miner's misconduct but is required to consider such evidence when making his temporary reinstatement determination.

Id. at 166. Notably, Commissioner Rajkovich did not adopt the confusing legal standard discussed in the separate opinion in *Marion County Coal Co*., which stated that "The burden of proof in a temporary reinstatement case, therefore, contains two legal standards: "preponderance of the evidence" and "non-frivolous."" 40 FMSHRC 39, 46 (Feb. 2018) (separate opinion of Commissioners Althen and Young).[20] This stacking of burdens is confusing,[21] without precedent,[22] and unworkable at the trial level. When applying the preponderance of the evidence standard, it is required that there be meaningful discovery such that a trier of fact can truly weigh the totality of the evidence. However, a temporary reinstatement proceeding is so preliminary that there is usually little discovery or exchange of evidence.

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 an arguable connection, or nexus, to an adverse employment action. The initial issue here is whether Collins engaged in activity that triggered those protections.

On June 14, 2023, Collins was ordered to use a piece of machinery for a task which he in good faith believed was unsafe. He told his supervisor, Paul Jamison, that he did not feel comfortable loading the pan line with the Komatsu loader, and his supervisor was dismissive of his complaint. Tr. 26. Collins repeated his statement that he was uncomfortable using the

[20] In his concurrence in part and dissent in part, Commissioner Althen asserts through an enumerated list what the majority holdings of the case are "to ensure our Judges do not miss the crucial rulings of law." 43 FMSHRC at 168 (Commissioner Althen, concurring in part and dissenting in part). However, Commissioner Althen's enumerated rulings of law go much further than what is stated in Commissioner Rajkovich's decision, such that substantial portions of them—including the preponderance of the evidence standard imported from merits discrimination cases—are not part of the majority holding. *See Marks v. U.S.*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.")

[21] As defined in the separate decision, "preponderance of the evidence means the greater weight of the evidence." 40 FMSHRC at 46. Therefore, this Court could not determine whether the preponderance of the evidence standard raised or lowered the not-frivolously-brought burden.

[22] The separate opinion in *Marion County Coal* cited to a dissent by Commissioner Althen in *Sec'y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 154 (Feb. 2016), for the proposition that the secretary has the burden of proving by a preponderance of the evidence only that the claim is not frivolous. However, the cited dissent in no way discusses the burdens of proof and the only mention of the preponderance of the evidence standard is in reference to a merits discrimination case.

Komatsu loader for the task, and his supervisor told him that the larger loader was in use, so he would have to do so. Tr. 26. Collins told his supervisor a third time that he did not feel comfortable using the Komatsu loader to load the pans, but that he would relent. Tr. 26, 30. Collins testified that he had previously told his supervisor that he did not feel comfortable using the Komatsu loader to load pan lines and that he always switched it out for the larger Cat loader when loading pan lines. Tr. 26.

These repeated statements in the context of the work that was being ordered and Collins' previous refusals to use the Komatsu loader to load pan lines constituted the protected activity of making safety complaints. Despite Jamison and Koontz's assertions at hearing that Collins did not invoke his miner's rights, a miner need not state explicitly that he is invoking his 105(c) rights under the Mine Act. It is enough that the miner reasonably intended for his statements to be safety related, which in this case Collins did. Tr. 30, 31. It is of no moment that Jamison and Koontz were dismissive of Collins' safety complaints as attempts to get out of work. If a miner tells his supervisor that he is not comfortable performing a task involving heavy machinery where someone could be injured—and in this case someone was—it is incumbent that management take those concerns seriously.

Respondent referred to evidence in the form of testimony, photos, a video, and machinery spec sheet that attempted to show that it was safe to use the Komatsu loader to lift the pan lines and that the injury and termination were the result of Collins mishandling the equipment.[23] However, the evidence submitted proves no such thing. The video admitted into evidence showed the incident from an unhelpful angle and at a distance. See Sec. Ex. 1. Jamison testified that one can see in the video how the back tires of the loader come off the ground as the loader approached the truck, and that Collins did not tip the forks of the loader back. Tr. 64-65. However, this Court does not find that Jamison's testimony is an accurate description of what the video admitted into evidence shows. Without credible expert testimony interpreting the video in the context of the equipment used, the load handled, and the conditions on the ground, this Court is not in a position to attribute fault based on the video.

Respondent's attempts to prove that the pan lines were well within the weight range for the Komatsu loader were unconvincing. Respondent provided a scale ticket from almost two months after the incident to show that the pan line weighed 11,560 pounds. Resp. Ex-E. This is presumably the weight of an empty pan line. However, in the video, one can see that as the pan line fell, it was filled with coal or some similar material. See Ex. 1. Therefore, it is unclear if the pan line contained several hundred or several thousand pounds more than the 11,560 pounds weight of August 09. Respondent further submitted the Komatsu spec sheet to prove that the Komatsu loader could lift up to 15,000 pounds without tipping over. See Ex. G. However, without an expert witness that could provide evidence of what conditions the loader could haul and lift such weight, this Court is unable to appropriately interpret the spec sheet. Indeed, even

[23] Respondent essentially argued that the video was the type of scenario described by Commissioner Rajkovich in his exposition of the *Marion* approach, but this Court disagrees. Though there was no dispute that the video was genuine, it simply showed the incident. On its own, it did not show in any way if the miner handled the equipment incorrectly or if he was correct in his assertion that the pan line was too heavy for the Komatsu loader.

Koontz could not interpret the documents in a clear way. ("it all depends on how you're – what task you're performing…There's so many different parameters involved there." Tr. 101-102.)[24]

However, even if Respondent could make a post-hoc showing that it was safe to haul the pan lines with the Komatsu loader, the relevant question under 105(c) is whether the miner made a good faith safety complaint.

> So long as a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette,* 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). It is well established that a "good faith belief simply means [an] honest belief that a hazard exists." *Id.* Whether perceived hazards are *actually* unsafe is not determinative of the protected status of a complaint. *Sec'y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Alleged hazards are considered to be "related to" the Act, and are therefore protected by 105(c)(1). *Cullinan v. Peabody Twentymile Mining LLC*, 36 FMSHRC 205, 207.

Todd Descutner v. Nevada Gold Mines, LLC, 2023 WL 3790764 at *10 (May 25, 2023) (ALJ). *See also Patrick Shemwell v. KenAmerican Resources*, 2015 WL 9450196 at *9 (Dec. 16, 2015) (ALJ). In the instant case, whether the pan line (and any coal contained in it) was slightly below or slightly above the maximum allowable weight for the Komatsu loader is not dispositive. This Court finds that from Collins' perspective as an experienced operator, he reasonably believed and expressed that it was unsafe. Therefore, this Court finds that Collins' claim that he engaged in protected activity was not frivolously brought.

The next issue is whether Collins 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 Collins was suspended on June 26 and that his termination was approved in arbitration on July 21. Tr.40, 41. Therefore, Collins' claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Collins 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 termination. 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.[25] *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several

[24] It is certainly relevant how weight that is being hauled is balanced on the forks and how the machinery was maintained. See Tr. 101-102.

[25] However, in this case there was some direct evidence that Collins' protected activity played a role in his termination. Koontz, who made the ultimate decision to terminate Collins, was asked whether the "statements [Collins] made to Mr. Jamison [had] any impact on your decision to

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, Collins made his safety complaints directly to his supervisor, Paul Jamison. Tr. 26-28. Collins also reiterated those complaints to General Manager Eric Koontz. Tr. 39, 92. Additionally, Mine Manager Avery was told by Collins that he told his supervisor that he felt uncomfortable using the Komatsu loader to lift pan lines, and Avery's response indicates that he understood the statement as a safety concern. "It's your job to know whether or not it will be able to lift or not; you can't put this on the boss." Tr. 39. Here, Avery showed that Collins' statements about being uncomfortable with the task was a reference to safety and the ability of the Komatsu loader to lift pan lines. Therefore, I find that Collins has raised a non-frivolous issue as to whether Respondent had knowledge of his protected activity.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and 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 miner's 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 miner's 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, Collins made his safety complaints on June 14 and was suspended pending an investigation on June 26. This represents less than a two-week period, which would likely have

terminate him from his position." Tr. 98. Koontz responded: "I looked at all aspects of the investigation, *things that he had said and all relative points coming in from managers involved* and, ultimately based on this incident, previous incidents and entire body of work there, made a decision to move forward to discharge." Tr. 98-99 (emphasis added).

been even shorter had Koontz become aware of the incident sooner. Jamison testified that the incident report sat in his truck for a few days before he submitted it to human resources, and Koontz testified that the matter was delayed in reaching him, but that he acted on it as soon as he became aware. Tr. 39-40, 77. 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 and that the timing 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." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Here, the response to Collins' safety complaints was to dismiss them and find any reason not to treat them as safety related. Collins told his supervisor three times on June 14 that he did not feel comfortable using the Komatsu loader to load the pan lines, and in each instance, Jamison brushed aside his complaints. Similarly, Koontz accepted Jamison's assertion that Collins simply said that he was uncomfortable with every task he was assigned. Tr. 92. After Collins' injury, when he tried to explain to Avery that the blame should have been on his supervisor who ordered him to use a loader that was too small for the task, Avery responded that it was not his supervisor's responsibility to know whether the load was safe. Tr. 39. This level of dismissiveness and disregard for repeated safety concerns constitutes animus sufficient to meet the evidentiary standards of a temporary reinstatement.

Respondent submitted an arbitrator's decision to try to show that the termination was for a legitimate reason. This Court admitted the decision into the record, but upon review, finds that it has no probative value. The arbitrator's decision concerns contractual provisions between the operator and the union and has no relevance to a Mine Act discrimination complaint.

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 Collins 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 Collins' protected activity and the Respondent's subsequent adverse action.

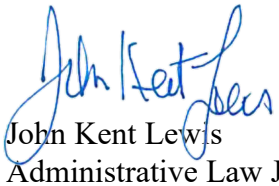
Conclusion

I find that there is reasonable cause to believe that Collins made safety complaints on June 14, 2023; that following such, Collins suffered an adverse employment action; that Respondent was aware of Collins' protected activity; that Respondent knew and showed animus toward the protected activity; and that there was a close connection in time between the alleged protected activity and Complainant's discharge. Therefore, given an arguable nexus between the Complainant's protected activity and Respondent's adverse employment action, the Secretary has carried its burden of proving the miner's complaint was not frivolously brought.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant John Collins 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.[26]

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this Court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.



John Kent Lewis
Administrative Law Judge

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[26] If the parties mutually agree, Collins may be reinstated to a job on the surface that does not require him to operate the Komatsu loader.