FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

March 9, 2018

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of HOLLY A COFFEY Applicant v. TXOMA MINING, LLC, Respondent	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. CENT 2018-0149-D DENV-CD-2018-02 Mine : P8 North Mine Mine ID: 34-02080

ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: John M. Bradley, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Applicant;
Kwame T. Mumina, Esq., Green, Johnson, Mumina & D'Antonio, Oklahoma City, Oklahoma, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Holly A. Coffey ("Coffey") against Txoma Mining LLC ("Txoma") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the "Mine Act"). The application was filed by the Secretary on or about February 6, 2018, and Txoma requested a hearing within 10 days of receipt of the application. The application alleges that Txoma discriminated against Coffey when she was terminated from her position as an administrative clerk on September 27, 2017 "because she engaged in protected activities by voicing her right to contact MSHA for Respondent's violations of the Act." The application states that the Secretary has determined that the underlying discrimination complaint filed by Coffey was not frivolously brought. The parties presented testimony and documentary evidence at a hearing held in Oklahoma City, Oklahoma. For the reasons set forth below, I find that the application for temporary reinstatement must be granted.

I. SUMMARY OF THE EVIDENCE

Txoma operates the P8 North Mine, an underground coal mine in Le Flore County, Oklahoma. L. Keller Smith is the owner and president of Txoma.

Coffey testified that she has worked in the mining industry for about six years. When she first started working at the P8 North Mine, it was operated by South Central Coal and then by Heat-X-Change, LLC. Txoma became the operator on February 6, 2017. Coffey, who described her position as the records and compliance clerk, testified that at some point in April 2017, she quit her job and was going to start a new job at another mine. She said that Txoma owner and president L. Keller Smith asked her to stay and she was given a raise of one dollar an hour. (Tr.

13-15). She testified that one of the reasons why Smith asked her to stay was because she had "such a good rapport with MSHA." (Tr. 15). Coffey testified that a significant part of her job was keeping MSHA mandated records and ensuring that Txoma complied with these record-keeping requirements. One type of record she maintained were records concerning testing for respirable dust ("dust"). Much of her work involved making sure that the dust pumps were accurately calibrated and that the required information was gathered for records and reports to MSHA. (Tr. 16-17). The records were all computerized. Another record she maintained was the record showing the results of self-rescue device testing. Coffey did not ordinarily conduct this testing, but she maintained the records of such testing on Txoma's computer system.

Coffey stated that she had developed a good working relationship with MSHA. (Tr. 19). MSHA inspectors would check in with her when they first arrived at the mine and she would show them the various record-keeping books for their review before they proceeded underground. (Tr. 55-56, 92). Coffey testified that MSHA inspectors trusted her and she trusted them. She further stated that, although Txoma's employee handbook stressed safety, she did not feel that safety was a top priority of mine management. (Tr. 20, 49-52, 106-07). She also testified that it was obvious that Keller Smith did not know much about coal mining. (Tr. 20-21).

Coffey's normal work day started at 8:00 am on weekdays and she stayed until the miners brought out the dust pumps. Txoma allowed her to come in a little late on Fridays so she could have breakfast with her mother and sisters. (Tr. 58). She testified that she only worked on Saturdays if something came up that made it necessary, which usually occurred when the mine was producing coal that day. (Tr. 59). She came to the mine about twice a month on Sundays to calibrate the MX4 gas monitors because the monitors were not in use on Sundays. Until sometime in April 2017, Coffey performed many of the human resources functions. In April, Smith hired Ms. Shelly Smedley to be the human resources ("HR") manager at the mine. Smedley and Coffey shared an office.

Coffey testified that she and her husband raised "performance horses." (Tr. 18). These horses participated in shows and Coffey also bought and sold these types of horses. Much of her weekends were devoted to these performance horses.

At some point in the spring of 2017, Smith fired Nick Chavez, who was the mine manager. (Tr. 23). This concerned Coffey because she worked well with Chavez. Coffey exchanged text messages with Smith on this subject and Coffey testified that Smith told her that changes are coming but not to worry because she is "part of the plan." (Tr. 25). Smith told Coffey during a subsequent meeting that he would be giving her additional responsibilities in the future including "tak[ing] over the mine rescue team by the first of the year [2018]." (Tr. 26).

On or about August 28, 2017, as the miners for the second shift were coming in, Coffey noticed that a self-rescuer had been crushed on one corner. She asked a miner to go get another self-rescuer to use underground. The indicator lights were bad on the second self-rescuer that the miner brought but the third one appeared to be working. (Tr. 27, 100-01). Coffey kept both defective self-rescuers in her office. Coffey testified that she grabbed a "purchase order request

form" to order ten new self-rescuers.[1] She testified that she ordered ten because it was her understanding that the mine did not have enough self-rescuers at that time and some miners were sharing them. (Tr. 27-28). She took the form to the warehouse and gave it to Paula Cash, the warehouse manager. (Tr. 28).

About a week or two later, Coffey went to the warehouse to ask about the status of the self-rescuer order. Cash told her that the self-rescuers were not ordered because Melissa Craig would not give her approval. (Tr. 29). Ms. Craig acted as a purchasing agent for Txoma. Coffey stressed how important self-rescuers are to the safety of miners, but Cash did not give her a reason why the order was not approved.

Upon hearing that the self-rescuers had not been ordered Coffey threw a fit. She told Cash and others who were standing next to Cash that this was "BS" and that "I bet [Craig] will [order them] when F-ing MSHA finds out." (Tr. 29). Coffey returned to her office and told Smedley and another employee the same thing. *Id.* Smedley suggested that perhaps they would be ordered after pillaring was completed. *Id.* Coffey replied, "[n]o, she will buy some now." (Tr. 30). Coffey never called or emailed Craig to ask why the self-rescuers had not been purchased and she did not ask anyone else with Txoma for an explanation. (Tr. 42, 82-83). Coffey testified that, based on past experience, she is sure that Keller Smith found out about these events from Smedley. (Tr. 31). She testified that she feared for her job. She admitted that since Txoma became the operator, she had not previously requested that self-rescuers be purchased. (Tr. 81).

Applicant did not present any evidence at the hearing to show that she contacted MSHA about Txoma's failure to order more self-rescuers.[2] Section 75.1714-8(b) of the Secretary's safety standards requires mine operators to report self-rescuers that are not functioning properly to MSHA.[3] 30 C.F.R. § 75.1714-8(b). Coffey testified that one of her job duties required her to file such reports to MSHA, which she did using MSHA online reporting system. She admitted that she never reported the two defective self-rescuers to MSHA because she "just hadn't got around to it yet." (Tr. 184).

Coffey admitted that her job did not involve checking the self-rescuers to make sure they were working properly; the fire bosses usually performed the actual safety checks. (Tr. 59-62; see also 132). She kept the records of the safety examinations of the self-rescuers and printed

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[1] Coffey testified that she filled out a "purchase order request" for the ten self-rescuers. It is not clear whether the term "purchase order" is the correct term because Coffey did not have the authority to issue purchase orders. As described below, purchase orders originated in the warehouse and were computer generated. In any event, Coffey testified that she requested that ten self-rescuers be ordered so the terminology used is not important.

[2] Applicant offered vague testimony to the effect that Coffey did call MSHA about a safety problem at some point in time, but she did not say that the call had anything to do with the self-rescuers. (Tr. 110-112).

[3] See also instructions at MSHA's website: https://www.msha.gov/support-resources/forms-online-filing/2015/04/15/self-contained-self-rescuer-scsr-inventory-and

out copies so that MSHA inspectors could review them when they came to the mine for inspections. (Tr. 60). She referred to these records as the 90-day checklist. (Tr. 66; Ex. 20).[4] If a miner or a fire boss told her that there was a problem with a self-rescuer, she would take it "out of the system" so it would not be used by mistake. (Tr. 65).

In the meantime, on August 1, 2017, President Keller Smith sent an email to key managers telling them that, given the "cash strapped" condition of the company, there would be a hiring freeze, workforce reductions, and other changes made. (Tr. 153; Ex. 16). Coffey testified that at that time she was not aware that Txoma was having financial problems. (Tr. 84). Sometime later in August or early September, Smith asked Coffey to make a list of all her job duties and told her that he wanted to meet with her. A meeting was scheduled for September 26 after an earlier meeting date had to be canceled due to a conflict in Coffey's schedule. At the meeting, which was also attended by Smedley, Smith presented Coffey with a new work schedule for her. (Tr. 33-34, 86-87; Ex. 15). It required her to work in the warehouse for a 12 hour shift on Saturday and a 12 hour shift on Sunday and two 8-hour shifts during the weekdays.[5] *Id.* Most of the work she would do in the warehouse would be clerical. (Tr. 104-05). Coffey testified that she was told that her schedule was changed due to restructuring but her first thought was that Smith wanted to get her "out of sight and sound of MSHA." (Tr. 34, 86).

Coffey told Smith that the new work schedule would not work for her. She testified that she said, "[t]his won't work. I can't work every weekend. I have other obligations. I can't run the dust on Saturday and Sunday. It has to be when they're running coal." (Tr. 34). Coffey testified that Smith handed the schedule to Smedley and told her that she and Craig would need to "redo the schedule." (Tr. 34, 88-90). Coffey took Smith's instruction to redo the schedule as a positive sign.

The next day, Coffey sent Smith an email with the list of her job duties attached. (Tr. 35-37; Ex. 22). In the email, Coffey stated, in part, "I am sorry but I can not work in the warehouse on the weekends." She gave several reasons. She stated that she has "Performance Horses (Farm Business) that I work around my job at Txoma." She then listed some other factors to justify her reasoning:

> Running Dust is a full time job in itself. If we are running coal, I need to be running dust. I understand we have other people certified in dust but know nothing about it. My Relationship with

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[4] The parties relied upon the same set of exhibits at the hearing. Although I admitted Exhibit 20 at the hearing, Coffey disputed the accuracy of any entries in the exhibit that showed her inspecting self-rescuers in September 2017. (Tr. 67-75). As a consequence, I have only used the exhibit to illustrate what information the 90-day checklist contained and I have not relied on any September entries.

[5] There is a conflict in the testimony as to what the new schedule was to be. Coffey testified that she was told that she would be working in the warehouse on Saturdays and Sundays from 6:00 pm until 6:00 am. (Tr. 33-34, 86-87). Smith testified that Coffey was told that her weekend hours would be from 6:00 am to 6:00 pm. This conflict does not affect my conclusions.

> MSHA should alone be enough to keep me where I am. I come in on Sunday's when I can whatever time I can to Calibrate MX4's and I do this twice a month. . . . I have worked at P8 for at least 3 years with no citations for any of the posting or records. I have helped in lowering citations and talked MSHA out of writing them for a high or more. MSHA wants to see me when they get here.

(Ex. 22). Nobody mentioned the issues surrounding Coffey's request to order new self-rescuers at the meeting and she did not mention it in her email to Smith. (Tr. 96). Coffey testified that her objection to the schedule change was mostly about the dust: "It's all on the dust. I mean that – this . . . email's about dust and how it cannot be done [with] me working two [week] days on my regular job." (Tr. 91). Coffey stated that she did not intend her email to be construed as an attempt to resign from her position. (Tr. 37). She testified that she was not refusing to comply with the new work schedule because she thought she would be presented with another more acceptable work schedule and that she was simply explaining why the schedule presented to her at the meeting would not work. (Tr. 38). She said that she did not intend her objection to the new schedule to be insubordinate. (Tr. 38).

Within 15 minutes of sending this email, she received a text message from Smith. The text message stated, in part:

> I have thought about our visit yesterday and your response to my request to change your job description and schedule to help Txoma weather these tough times. I understand that everybody has to look at these situations through their own eyes and make decisions and you did that. At the same time, I have [to] make calls on what is best for Txoma going forward and who is willing to sacrifice when needed.

(Tr. 38-39; Ex. 23). The text then states "Given the circumstances, I believe it is best for you to provide me with your resignation immediately and go ahead and get your things together and leave the property." *Id.* Coffey believes she was terminated because, in late August, she told Cash and Smedley that she was going to call MSHA to complain about Txoma's failure to order self-rescuers. (Tr. 38). Coffey testified that her daughter Cheyenne was terminated from her employment about two weeks later and about the same time Txoma fired her son-in-law. Coffey testified that at some point after she was terminated Mr. Mumina, counsel for Txoma, sent her a letter telling her not to contact MSHA. (Tr. 39-40). She thought the letter was threatening.[6]

Coffey believes that that there was a connection between her statements regarding the self-rescuers and MSHA and her termination "[b]ecause of the time frame." (Tr. 40). "It was too close together from when I said it. I didn't have any problems with Txoma Mining. I did a good job. I didn't get citations on my stuff ever." (Tr. 40-41).

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[6] This letter was not introduced at the hearing and there was no further testimony about it. The letter is referenced in the report prepared by MSHA's special investigator. (Ex. 2 ¶ 2(d)). I have not considered this evidence in rendering my opinion in this case.

Coffey testified that although others were certified to run respirable dust samples, she was the only person who knew how to keep the records on Txoma's computers. (Tr. 78). She did not normally go underground to take the samples but she was responsible for taking care of all the administrative duties surrounding the taking of dust samples.

Melissa Craig testified that she is the president of South Central Coal Company. She testified that South Central Coal has "an administration and consulting agreement to provide various functions for the mine as needed for the company." (Tr. 115). She testified that the warehouse has the authority to purchase most items but that purchases greater than $5,000 would typically be forwarded to her for approval. (Tr. 116). As the warehouse manager, Paula Cash was the person who ordered supplies for the mine. (Tr. 120). Other employees would generally have to ask Cash if they need anything. (Tr. 120-21).

Craig testified that she communicated with Coffey via email with some frequency. She testified that Coffey does not have any purchasing authority but she could directly request office supplies and dust sampling supplies from her. (Tr. 123). Official purchase orders are written on a computer and have an identifying number associated with it; there is no such thing as paper purchase orders. (Tr. 123-24). Craig also testified that the cost of ten self-rescuers would range between $6,000 and $8,000. (Tr. 127). Such a request would generate discussion with the warehouse about the "immediate need [and] prioritization." (Tr. 126). For example, can we reduce the order to five self-rescuers? *Id.* If there were not enough self-rescuers for employees to take underground, then there would be an immediate need to order more. Craig testified that she never received a request from Coffey or Cash to order self-rescuers in late August or early September 2017. (Tr. 128, 138). Craig also testified that she did have a conversation with Coffey in "mid-summer" about whether the expiration date of any self-rescuers were coming up so that, if so, new ones could be ordered. *Id.* Craig testified that Coffey never reported back to her with that information. *Id.*

Keller Smith also testified for Txoma. He does not work at the mine but works in Dallas, Texas. He travels to the mine at least once a month and communicates with mine personnel via email and telephone on a regular basis. He testified that he never received any safety complaints from Coffey. (Tr. 149). He said that Coffey had a wide range of duties but her duties did not include making purchase orders. *Id.* He also testified that, although one of Coffey's duties involved dust sampling, there were other employees who were certified to perform that task. (Tr. 150; Ex. 10). Smith testified that at the time he terminated Coffey he did not have any knowledge that she had asked to purchase self-rescuers. (Tr. 149-50).

Smith testified that by early August 2017, Txoma was having production problems and that he was going to have to get "aggressive about cost control, cost maintenance." (Tr. 153). Labor is one of the largest costs. His email of August 1 was widely distributed. (Tr. 154; Ex. 16). He instituted a hiring freeze and changed the work schedule of many employees.[7] (Tr. 157).

[7] Information at MSHA's website shows that in 2017 Txoma employed an average of 93 people during the second quarter, an average of 81 people during the third quarter, and an average of 78 people during the fourth quarter.

At the meeting on September 26, he advised Coffey that Txoma was restructuring the work schedules of its employees and that her job duties and schedule would be changing. (Tr. 159). The change in her schedule "represented a much heavier involvement and assignment for her in the warehouse area on Saturday and Sunday and . . . accommodated her Friday request." (Tr. 160; Ex 15). He said he knew that she had family obligations on Fridays so he was not going to schedule her on that day. He said he was flexible as to what other days she could work. *Id.* Craig and Smedley helped him develop the schedule. (Tr. 161). He said that when he described the change at the meeting, Coffey's reaction was "pretty chilly" and she quickly ended the meeting. (Tr. 162). He concluded that she did not have a positive "attitude about making changes and sacrificing and helping us push forward." (Tr. 165). Smith testified that he had asked Coffey for a list of her job duties several weeks before the meeting because she had a broad job description and he "wanted to try to see if there was a better way that we could move some of the things she was doing around or if there was an opportunity to free up some time, some money[.]" (Tr. 164).

Smith testified that he met personally with Coffey because her job duties were "changing more radically" than most employees. (Tr. 179-82). He also noted, however, that some employees were terminated and others had their work hours reduced. (Tr. 181).

Smith testified that he received an email from Coffey the next day that he believed confirmed her inflexible attitude. The first sentence read "I'm sorry that I cannot work in the warehouse on weekends." (Tr. 165; Ex. 22). Given that Coffey was already putting in some weekend hours, he regarded her statement to present a bit of a "conflict." (Tr. 166). Smith believes that weekend work is part of coal mining and she did not present any alternate proposals. Her reference to her performance horses communicated to him that she has "priorities that trump what the business needs." (Tr. 167). The fact that she works well with MSHA was a "bit of a head scratcher" for him because he has worked in regulated industries for many years and makes sure that all of his employees are trained to be "civil and courteous" to regulators. (Tr. 168). She did not mention any safety concerns or issues surrounding self-rescuers at the meeting or in the email. (Tr. 169).

Smith said he texted her soon after he received her email to inform her that she was being terminated from her employment. (Tr. 170; Ex. 23). Before he sent the text, Smedley apparently told Smith that Coffey told her that she was not going to resign. *Id.* Smith testified that he chose to terminate her because he "was looking for change, for tightening of the belts, people who were willing to sacrifice and do what was needed to make the business work." (Tr. 171). He stated that the changes "covered a host of people out of 85 folks that we had working for us." *Id.* Smith testified that his decision to terminate her had nothing to do with any safety complaints Coffey might have made. He alone made the decision. *Id.* He further testified that he had no knowledge of Coffey's request to purchase self-rescuers until she filed her discrimination complaint with MSHA. (Tr. 172).

In the official termination form, Smith set forth the following as the reason for Coffey's termination:

> Previous job description was changed due to general workforce restructuring. Employee was offered position with amended job duties and hours. She rejected & chose not to resign & was then terminated. After her leaving & existing staff follow up, it was discovered that several assigned work duties were not being properly performed.

(Tr. 173; Ex. 24).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Each party presented evidence to supports its version of what happened in August and September 2017. The Secretary sought to establish that Coffey was terminated because, after she learned that Txoma had not ordered new self-rescuers, she told several people in the company, including the HR director, that the company will be required to order self-rescuers when "MSHA finds out." She contends that she was given an unacceptable work schedule so as to minimize her opportunity to interact with MSHA. She believes this change in the terms and conditions of her employment was in retaliation for her protected activity and ultimately resulted in her termination.

Txoma, on the other hand, sought to establish that Coffey was asked to resign after she told Txoma's president that she would not work weekends because it would interfere with her performance horse business and it would prevent her from doing some of her job duties, especially her work in "running dust." Txoma argues that her claim that she was the only person who was qualified to perform the respirable dust work was clearly not true. Txoma also presented evidence that the work schedules of other employs were changed at the same time due to production problems and that some employees were terminated. It presented evidence that there was no animus toward her alleged protected activity and no nexus between her alleged protected activity and her termination.

Section 105(c)(2) 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. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("Legis. Hist.").

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and 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." The Commission's procedural rules and case law are clear that the scope of a hearing on an application for temporary reinstatement is narrow and "limited to a determination as to whether the miner's complaint was frivolously brought." 29 C.F.R. § 2700.45(d); *Sec'y of Labor on behalf of Price*

v. Jim Walter Resources, Inc., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

The "not frivolously brought" standard does not require a judge to determine whether sufficient evidence of discrimination exists to justify permanent reinstatement. *Jim Walter Resources*, 920 F.2d at 744. Rather, the courts and the Commission have equated the "not frivolously brought" standard with the "reasonable cause to believe" standard at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), as well as the "not insubstantial" standard in *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it "appears to have merit." Legis. Hist. at 624-25. When applying the standard the judge should not undertake to resolve disputes of fact or credibility. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717,719 (July 1999).

In order to establish a prima facie case of discrimination a miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 19080), *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).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination at this stage, she may satisfy the "not frivolously brought" standard by establishing that there is "reasonable cause to believe" that she engaged in protected activity, suffered an adverse action, and that there is a nexus between the alleged protected activity and the adverse action. The Commission has recognized that although direct evidence of discriminatory intent is rarely available, a nexus between the protected activity and adverse action may be inferred where indicia of discriminatory intent exist, including (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the Applicant. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009); *see also Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission's recent decision in *Sec'y on behalf of Kevin Shaffer v. The Marion County Coal Company* is instructive, 40 FMSHRC ____, No. WEVA 2018-117-D (February 8, 2018). The Commission affirmed the administrative law judge's decision that granted temporary reinstatement to the complaining miner, but issued two separate opinions that highlighted different aspects of the analysis used in temporary reinstatement cases. Commissioners Jordan and Cohen emphasized that "[r]eqiring the Judge to resolve conflicts in testimony . . . when the parties have not yet completed discovery would improperly transform the temporary reinstatement hearing into a hearing on the merits." Slip op. at 6 (citation omitted). That opinion stated that the "not frivolously brought standard" reflects the intent of Congress that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." Slip op. at 3 (quoting *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990). It further emphasized that the scope of any hearing is whether the complaint is "nonfrivolous, not whether there is sufficient evidence of discrimination to justify

permanent reinstatement." Slip. Op. at 4. This opinion relied upon the black letter law used in temporary reinstatement cases, as cited above.

The opinion of the Acting Chairman Althen and Commissioner Young emphasize that there is "no presumptive right to temporary reinstatement." Slip op. at 8. If the operator requests a hearing in a temporary reinstatement case, "the hearing is a full judicial proceeding." Slip op. at 8. Their opinion stated that the employer in a temporary reinstatement proceeding "has the opportunity to test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement[.]" Slip op. at 9 (quoting *Sec'y on behalf of Gray v. North Fork Coal Corp.* 33 FMSHRC 27, 42 (Jan 2011). The opinion goes on to state that the statute grants the operator "the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal." *Id.* Most importantly, this opinion states:

> If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.

Slip op. at 9. The opinion concludes by stating that "[w]e agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve." *Id.* However, "it is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences." *Id.*

III. ANALYSIS

Looking only at the evidence presented by the Applicant, the following is of note:

- Coffey started working for Txoma in February 2017. A significant part of her work involved MSHA compliance. She decided to quit sometime around April 2017 but was talked out of it by Smith because, in part, she had a good relationship with MSHA.
- On August 28, Coffey noticed that two self-rescuers were defective and pulled them aside. She asked Paula Cash to order ten new self-rescuers.
- About a week later when she asked Cash about the self-rescue order, she was told that the self-rescuers had not been ordered.
- Coffey testified that she told Cash, Smedley and others that the self-rescuers would be ordered when MSHA finds out.
- Coffey never asked Melissa Craig or anyone else why self-rescuers had not been ordered.
- No evidence was presented to show that Coffey contacted MSHA about any issues surrounding self-rescuers in the weeks that followed. She removed the two defective

self-rescuers from service but she admitted that she did not report the problem with the two self-rescuers to MSHA as required by the Secretary's regulations.

The following uncontested evidence presented by Txoma is of note:

- Ordering ten new self-rescuers would cost Txoma between $6,000 and $8,000 and such a large order would require a thorough analysis.
- On August 1, Txoma announced that, because it had been unable to meet its production goals, it would be implementing cost controls. These controls included a hiring freeze, workforce reductions, and overtime management.
- Many of the employees working at the P8 North mine had their work schedules changed in September 2017 or shortly thereafter. Other employees were terminated or had their hours reduced. Coffey's job duties and her shift schedule were to be significantly changed.

I agree with Acting Chairman Althen and Commissioner Young that there is no presumptive right to temporary reinstatement and that improvidently granting temporary reinstatement amounts to a deprivation of the operator's property interest. Indeed, I have denied temporary reinstatement following a hearing in at least two cases since I became an administrative law judge with the Commission.

Here, Coffey protested the failure to order self-rescuers by telling Cash and Smedley that Txoma would be forced to order them when MSHA finds out. She testified that she made it clear to them that the failure to order self-rescuers created a serious safety issue, yet there is no evidence that she actually notified MSHA and she admitted that she did not report the defective self-rescuers to MSHA . Txoma presented evidence that the terms and conditions of Coffey's employment were changed for reasons unrelated to her threat to call MSHA and that her subsequent termination was also unrelated to her threat to call MSHA. There is no dispute that Txoma was experiencing production and cost control problems in the summer of 2017.

I find Coffey's threat to call MSHA because Txoma refused to purchase more self-rescuers to be protected activity. She testified that there was a shortage of self-rescuers at the mine at that time and Txoma did not offer any evidence to refute her testimony. Her failure to actually contact MSHA about this problem likely arose from her fear of being terminated. She suffered an adverse action when the terms and conditions of her employment were changed by scheduling her to mostly work on the weekends so that she would not be able to perform many of her MSHA related duties that she previously performed, such as handling the respirable dust functions. She also suffered an adverse action when she was terminated from her employment on September 27, 2017. These two adverse actions are linked because if her work schedule and work duties had not been so drastically changed, it is unlikely that she would have resisted the changes that led to her termination.

The issue here is whether there is reasonable cause to believe that there was a nexus between her protected activity and the adverse actions. There was clearly a coincidence in time between the protected activity and the adverse actions. There was also, however, a coincidence in time between Smith's decision to restructure the staff at the mine as evidenced by his August 1

memo and the adverse actions. There is some showing of disparate treatment because Smith acknowledged that Coffey's job duties were being changed more radically than most employees. On the other hand, the proposed reorganization resulted in other employees being terminated or having their hours reduced.

The next factor is knowledge of the protected activity. Smith testified that he had no knowledge of Coffey's threat to call MSHA when Txoma did not order new self-rescuers. Indeed, he testified that he did not know that Coffey had requested that self-rescuers be ordered. I am not required to resolve conflicts in testimony in this temporary reinstatement case. Coffey testified that Smedley knew about these events and, as a consequence, Smith would have as well. Coffey testified that Smedley was, in essence, Smith's spy at the mine, although she did not use that word. Smith testified that his primary contact at the mine was Smedley. (Tr. 144). Smith testified that Smedley and Craig were involved in developing the new schedule for employees in the warehouse and other surface areas. (Tr. 161). Even if I credit Smith's testimony that he had no knowledge of Coffey's actions with respect to self-rescuers, it is quite possible that Coffey's protected activity contributed to the adverse actions in any event. Smedley and Coffey worked in a very small office. Smedley would have known that Coffey would not be willing to accept a schedule that required her to work in the warehouse for two 12 hour shifts every weekend with radically different job duties and that Coffey would raise a stink about it. Smedley was the human resources manager at the mine and it is possible that she used her knowledge of the protected activity and Coffey's predilections to suggest this work schedule to Smith. Smedley could have been motivated to do so, at least in part, by Coffey's protected activity. Smedley could have taken these steps without Smith's knowledge. Smedley did not testify at the hearing. If the Secretary files a discrimination complaint on behalf of Coffey, the Secretary would be required to establish knowledge of the protected activity by a preponderance of the evidence.

The final element is hostility toward the protected activity. There is no specific evidence showing hostility toward the protected activity involved here. It was a rather unusual situation because Coffey was not responsible for ordering new self-rescuers so she had never done so since Txoma because the operator. Txoma had not shown any hostility towards Coffey's close relationship with MSHA. Indeed, Coffey testified that Smith asked her to stay with Txoma when she was going to quit because, in part, of her "good rapport" with MSHA. (Tr. 15). Applicant did not produce any evidence that anyone said anything negative to Coffey about her threat to call MSHA or that anyone commented about it at all. It appears that her threat to call MSHA was ignored at least until September 26. Coffey testified that Txoma discouraged its employees from making safety complaints to MSHA or anyone else. In her opinion, despite the language in the employee manual, Txoma stressed production over safety. I find that there is some evidence to support hostility toward the protected activity.

The opinion of Acting Chairman Althen and Commissioner Young in *Kevin Shaffer* states that if two versions of the events are presented at a hearing without dispositive proof of either, "the outcome at the reinstatement stage may not rest upon a choice between the versions and the miner must be reinstated." Slip op. at 9. I find that this case presents two versions of the events and that the Secretary met the minimal burden of proof necessary to require temporary reinstatement of Holly Coffey.

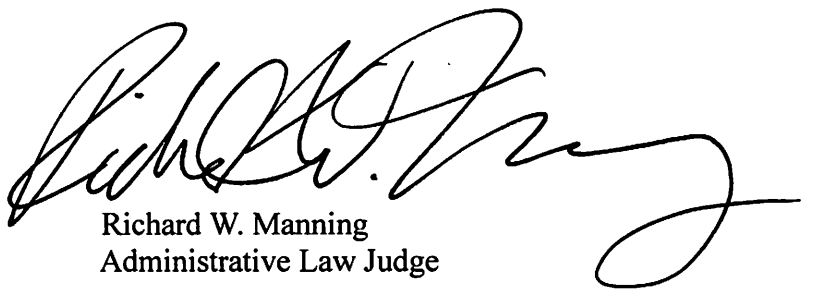
Based on the evidence, as summarized above, I conclude that the discrimination case involved here was not frivolously brought. In reaching this conclusion I am influenced by the fact that many if not most of Coffey's job duties involved safety and MSHA matters. The most significant aspect of her reassignment is that she would no longer be able to devote much time, if any time, to safety and MSHA issues. It is not clear from the record exactly what she would have been doing in the warehouse during the weekends if she had accepted the reassignment or who would have taken over many of the safety related duties during the week. Coffey testified that Txoma wanted get her out of "sight and sound of MSHA." (Tr. 34, 86). I am not making any findings of fact in this regard but I do find that her concerns are not frivolous. I have determined that there is reasonable cause to believe that Coffey's termination was, at least in part, related to her safety activities including her threat to report Txoma's failure to order self-rescuers to MSHA.

Smith testified that the mine is not fully operational but is currently on an inactive status. Txoma hopes to get the mine back into production in two to three weeks from February 27. (Tr. 142-43, 175-76). Many employees are on furlough but others are still working, including Ms. Smedley. It is not clear whether Coffey would be working if she had not been terminated from her position. The Commission recognizes "that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee." *Sec'y on behalf of Anderson v. A&G Coal Corp. et al*, 39 FMSHRC 315, 319 (Feb. 2017) (citations omitted). In such an instance, the mine operator must "establish that temporary reinstatement should be tolled based on a . . . layoff [and] . . . that 'the layoff properly included' the miner who filed the complaint of discrimination." *Sec'y on behalf of Ratliff v. Cobra Natural Resources, LLC,* 35 FMSHRC 394, 397 (Feb. 2013) (citation omitted). The operator must "affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Id.* Although Txoma presented some evidence on this issue at the hearing, I find that Txoma did not meet its burden of proof on the tolling issue.

IV. ORDER

The Secretary's application for temporary reinstatement is **GRANTED** and it is **ORDERED** that Holly A. Coffey be immediately temporarily reinstated to her former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits she was receiving at the time of her discharge. If Txoma believes that temporary reinstatement should be tolled for a period of time, it must either file a motion with this court seeking such tolling accompanied by supporting affidavits or it must reach agreement with the Secretary as to a mutually acceptable date for the commencement of temporary reinstatement. The filing of a motion seeking to toll temporary reinstatement does not act to postpone reinstatement. Reinstatement will only be postponed upon an order of this court. In the alternative, the parties may agree upon temporary economic reinstatement but any agreement between the parties with respect to temporary economic reinstatement must be approved by this court.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint **as soon as possible**. Immediately upon completion of the investigation, the Secretary **SHALL** notify counsel for Txoma and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Txoma Mining did not violate Section 105(c) of the Act.



Richard W. Manning
Administrative Law Judge

Distribution:

John M. Bradley, Esq., Office of the Solicitor, U.S. Dept. of Labor, 525 S. Griffin Street, Suite 501, Dallas, TX, 75202 (Via email and Certified Mail)

Kwame T. Mumina, Esq., Green, Johnson, Mumina & D'Antonio, Attorneys at Law, 400 N. Walker Ave., Suite 100, Oklahoma City, OK, 73102 (Via email and Certified Mail)

RWM