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April 6, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of Ronald D. Collins Complainant v. NEXT ENDEAVOR VENTURES, LLC Respondent	TEMPORARY REINSTATEMENT Docket No. VA 2023-0023 Mine: NEV # 1 Mine ID: 44-07394

ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Sharon H. McKenna, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Tony Oppegard, Esq., Lexington, KY, for the Complainant, Billy R. Shelton, Esq., Lexington, KY for the Respondent

Before: Judge William B. Moran

This case is before the Court upon application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"), and 29 C.F.R. § 2700.45 et seq. On March 1, 2023, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement for Ronald D. Collins, Complainant, to his former position as Superintendent/Foreman for Next Endeavor Ventures, LLC at Mine NEV #1, a surface mine.

The case was assigned to the Court on March 3, 2023. Due to schedule conflicts with the parties and the Court, the parties agreed that the hearing could be set beyond the ten calendar days provided for by Commission Rule 45. A virtual hearing, via Zoom for Government videoconference, was held on March 31, 2023. The parties also agreed that, should the Court find that the application was not frivolously brought, the date for reinstatement would be effective retroactively to March 22, 2023. For the reasons set forth below, the Court grants the application for temporary reinstatement and retains jurisdiction until final disposition of the complaint on the merits.

Applicable Law

> As noted by Judge Margaret Miller,
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> > 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 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).
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> *Grimes Rock,* 43 FMSHRC 287, 289, May 2021 (ALJ Margaret Miller) ("*Grimes* ALJ dec.")
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> > A miner that lodges a complaint of discrimination under section 105(c) is entitled to 'immediate reinstatement … pending final order on the complaint' as long as the complaint was 'not frivolously brought.' 30 U.S.C. § 815(c)(2). 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). This standard reflects a Congressional intent that 'employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.' *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).
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> *Grimes* ALJ*, Id.*
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> > 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 nonfrivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id*. at 1088. Nevertheless, it may be 'useful to review the elements of a discrimination claim' when gauging whether a claim is nonfrivolous. *Id*. Those elements include (1) that the complainant was 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).
>
> While it is true that a judge may consider these factors, a temporary reinstatement case remains 'conceptually different' than the underlying case of discrimination. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d at 744. The Mine Act envisions an 'expedited basis' for a temporary reinstatement proceeding that does not permit full discovery or complete resolution of conflicting testimony. 30 U.S.C. § 815(c)(2); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012). In fact, Commission case law indicates that resolving credibility issues or conflicts in testimony is beyond the scope of a temporary reinstatement hearing. *Williamson*, 31 FMSHRC at 1089. Similarly, a judge is not permitted to weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. *Id*. at 1091.

Grimes Rock, 43 FMSHRC 287, 289-290, May 2021 (ALJ Margaret Miller)

A wrinkle in Temporary Reinstatement Applications

Judge Miller took note that "[t]he Ninth Circuit recently rejected the *Pasula-Robinette* framework in *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). Specifically, the Court struck down the requirement that the adverse action was motivated 'at least partially' by the protected activity in favor of a **but-for** causation standard. *Id*. at 1209-11." *Grimes Rock,* 43 FMSHRC 287, n.1. (emphasis added).

In the same *Grimes Rock* case, the Commission subsequently spoke about the "**but-for"** standard in temporary reinstatement applications. *Grimes Rock*, 43 FMSHRC 299, 301 (June 2021) (Commissioners Althen and Rajkovich, Chairman Traynor *concurring in result only* that the complaint was not frivolously brought). There, the majority, consisting of Commissioners Althen and Rajkovich, noted:

> The Commission has recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought.' *See 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) ("*JWR*"); *Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, 2522 (Nov. 2015). The 'not frivolously brought' standard reflects a Congressional intent that 'employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *JWR*, 920 F.2d at 748, n.11.

> At a temporary reinstatement hearing, the Judge must determine 'whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d at 744. As the Commission has recognized, '[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Id. at 301.

As the majority, Commissioners Althen and Rajkovich then elaborated about the scope of temporary reinstatement proceedings in light of the **but-for** causation standard articulated by the Ninth Circuit, stating:

> Upon adopting the '*Marion approach*' in *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC* in which the scope of a temporary reinstatement hearing was at issue, the Commission held that a temporary reinstatement hearing must be a full evidentiary process. 43 FMSHRC___, slip op. at 9, No. WEVA 2021-0203 (Apr. 23, 2021), citing *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) (separate opinion of Acting Chair Althen and Commissioner Young). **During the proceeding, a Judge must consider any evidence which is relevant to the adverse action. *Id.* In other words, 'all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim.'** *Id*. (emphasis added).
>
> The *Marion approach* gives operators an opportunity to provide evidence that the complaint *was* frivolously brought. 43 FMSHRC___, slip op. at 9 (emphasis added [by majority]). **It is permissible, therefore, for a Judge to consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. However, such evidence may not serve as a basis for denial of reinstatement if it requires resolution of a credibility determination. *Id.* at 10. In a temporary reinstatement hearing, the Judge may not resolve credibility disputes or make rulings on credibility.**

Id. (emphasis added).

The reference above to the '*Marion approach*' requires some background in order to appreciate its foundation. As just noted, in *Grimes Rock*, 43 FMSHRC 299, (June 2021), the two-members constituting the majority in that case referenced three cases: *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) (separate opinion of Acting Chair Althen and Commissioner Young)

("*Marion*"), *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. April 14, 2021), ("*CalPortland*") and *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC* 43 FMSHRC 157 (Apr. 23, 2021) ("*Cook v. Rockwell Mining*").

Marion, the source for the '*Marion approach,*' involved a temporary reinstatement proceeding. It is noteworthy because, though four Commissioners were involved in that decision, separate opinions were issued – Commissioners Jordan and Cohen in one and Acting Chairman Althen and Commissioner Young in the other.

By dubbing the views of two commissioners as the '*Marion approach,*' Commissioners Rajkovich and Althen in effect elevated the opinion of two commissioners over the equally viable opinions of Commissioners Jordan and Cohen. This is significant because the two sets of Commissioners expressed very different views about what is needed to establish that an application is not frivolously brought.

For their part, Commissioners Jordan and Cohen expressed that the 'non-frivolously brought standard' in a section 105(c)(2) action may be likened to the "reasonable cause to believe" standard applied in other statutes. *Marion* at 41-42. They added that "[a]n important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting *evidence* between the parties. *Id*. at 42 (emphasis added).

Speaking to the temporary reinstatement hearing itself, they noted that "the Judge must determine 'whether the evidence mustered by the miner to date established that [his or her] complaint [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. … [and that] [i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in *testimony* at this preliminary stage of proceedings. *Id.* (emphasis added).

Last, those Commissioners remarked that evidence that the miner "was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. The Judge will need to resolve *the conflicting evidence in the context of the full discrimination proceeding*. *Id.* at 44.

In contrast, Commissioners Althen and Young agreed that the Secretary's burden was to show that the claim is not frivolous, but they added that to make that showing it is necessary to prove it by a preponderance of the evidence. *Id.* at 46. From their perspective that translated to the Secretary showing that that "the Secretary has demonstrated that it is more probable than not that the claim is not frivolous." *Id.* Under that view, those Commissioners added to the previously required showing, expressly stating that "[t]he burden of proof in a temporary reinstatement case, therefore, contains ***two legal standards*: "*preponderance of the evidence" and "non-frivolous*.**"** *Id.* (emphasis added).

Commissioners Althen and Young expanded upon the application of their view, stating that "all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- *even that which seems directed to an affirmative defense or rebuttal of the miner's claim.* While we 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. 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.* at 47. (emphasis added).

The second of the three cases cited by Commissioners Althen and Rajkovich in *Grimes* was *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. April 14, 2021). It should be recalled that *Grimes* was a temporary reinstatement case. In contrast, *CalPortland* was not a temporary reinstatement case. Instead, the Ninth Circuit's decision was a 105(c)(3) proceeding, often distinguished as a 'full' discrimination proceeding.[1] In matters of discrimination, the Mine Act clearly distinguishes between temporary reinstatement and full discrimination proceedings. *See,* 30 U.S.C. §§ 815 (c)(2) and (c)(3).

It is certainly true that the Ninth Circuit rejected the *Pasula-Robinette* framework *in a full discrimination action*.[2] However, nowhere in that decision will one find the words frivolous, temporary, or reinstatement or remedial. Again, the reason those words are absent is simple – that case did not involve temporary reinstatement. As such, any

[1] The 'full discrimination proceeding, also referred to as the "full evidentiary hearing" and 'the later discrimination proceeding,' are all terms used to distinguish such proceeding from the temporary reinstatement proceeding. *See, e.g., Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) and *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co*., 40 FMSHRC 39, 44 (Feb. 2018)

[2] The Ninth Circuit described the *Pasula-Robinette* framework as one where "a miner proves a prima facie case of discrimination by showing that: (1) he engaged in protected activity and (2) was subject to an adverse action motivated "at least partially ... by his protected activity. … " The mine operator may then rebut the prima facie case by showing: "(1) the miner was not engaged in any protected activity, or (2) the adverse employment action was not even partially motivated by the miner's protected activity." Or, if the mine operator cannot rebut the prima facie case, it may assert an affirmative defense by demonstrating—by a preponderance of evidence—that: (1) the adverse action was also motivated by the miner's unprotected activity; and (2) the adverse action would have been taken in response to the unprotected activity alone." citing *Secretary ex rel. Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (1980), *rev'd on other grounds sub nom., Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). *CalPortland* at 1208.

'**but-for**' references, are applicable only in a full discrimination proceeding, and therefore inapplicable in the very distinct temporary reinstatement proceeding.

The last of the three decisions referenced by the two-members constituting the majority in *Grimes Rock*, 43 FMSHRC 299, (June 2021) was *Sec*. obo *Cook v. Rockwell Mining*, 43 FMSHRC 157 (April 2021). That case involved a temporary reinstatement decision by the Commission, which produced an interesting result. Two Commissioners, Chairman Traynor and Commissioner Rajkovich, found that the complaint was not frivolous. Commissioner Althen voted to remand the matter "for the full hearing to which [Rockwell Mining] was entitled." *Id*. at 171. In that respect, Commissioner Rajkovich agreed with Commissioner Althen that the judge failed "to conduct a full hearing by excluding evidence offered by the respondent to prove it terminated the complainant as a result of a gross safety violation. Such evidence was relevant to the respondent's claim of no showing of animus and that unprotected activity supported the termination. The evidence was relevant and admissible. The failure to hear this evidence was an error." *Id*. at 169. Though Commissioner Rajkovich's decision appeared to have duality, agreeing with the conclusion that the complaint was not frivolous, while also agreeing with Commissioner Althen about the proper scope of a temporary reinstatement proceeding, he determined that the failure regarding the scope of the hearing was 'harmless.' *Id.* at 158, 167.

In reaching agreement with Commissioner Althen on the scope of a temporary reinstatement proceeding, Commissioner Rajkovich looked to *Sec'y of Labor on behalf of Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39 (Feb. 2018) as the law of the Commission. As discussed above, in that decision two Commissioners, Acting Chair Althen and Commissioner Young, held that "all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim." *Id.* at 47.

As also noted above, there were two separate opinions issued in *Marion.* Commissioners Jordan and Cohen did not buy into the views regarding the proper scope of the temporary reinstatement proceeding, as expressed by Commissioners Althen and Young. Thus, on the scope issue, there was no definitive Commission decision in *Marion*. It was in *Cook v. Rockwell Mining*, 43 FMSHRC 157 (Apr. 23, 2021) that Commissioner Rajkovich dubbed the views of Commissioners Althen and Young as "the *Marion* approach." *Id*. at 165. Accordingly, in *Rockwell Mining,* the views of Commissioners Althen and Rajkovich, adopted "the *Marion* approach" which then became the law of the Commission. *Id*. at 158.

The Court notes that the Application for Temporary Reinstatement in this matter, *Secretary obo Ronald Collins*, involves a mine located in Virginia. As such, apart from Commission law, when consulting decisions from the United States Courts of Appeals, it

is the Fourth Circuit Court of Appeals that one looks to for applicable law. Nevertheless, this decision encompasses both the Ninth Circuit's expression as well as the Fourth Circuit's and follows the Commission's decision in *Grimes Rock*, 43 FMSHRC 299, (June 2021), instructing application of the **but-for** review

Here, out of an abundance of caution, the Court applies the traditional test[3] for determining if an application for temporary reinstatement is frivolous, but in addition applies the **but-for** standard expressed in *Thomas.* Both applications produce the same result: the Secretary's Application for temporary reinstatement of Ronald D. Collins is not frivolously brought.

JOINT STIPULATIONS

1. Next Endeavor Ventures, Inc., is and was at all relevant times through this proceeding, the operator of Mine #1, Mine ID number 44-07394, located in Keokee, Virginia.

2. Mine #1 is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. At all times relevant to this proceeding, products of Next Endeavor Ventures, Inc., Mine #1 entered commerce, are the operations of products thereof of affecting commerce, within the means and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Next Endeavor Ventures, Inc., is an operator as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and is person as defined Section 3(f) of the Mine Act, 30 U.S.C. § 802(f).

5. Ronald Collins was previously employed by Next Endeavor Ventures, Inc. Ronald Collins is a miner within the meaning of Section 3(g), Mine Act, 30 U.S.C. § 302(g).

6. Ronald Collins was terminated from Next Endeavor Ventures, Inc., on November 19, 2022.

[3] The elements of a discrimination claim are useful guideposts in temporary reinstatement cases. Accordingly, the Court looks to whether the alleged adverse action occurred "because [a] miner … filed or made a complaint … including a complaint notifying the operator … of an alleged danger or safety or health violation in a … mine … or because of the exercise by such miner … of any other statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1). Stated differently, a prima facie case of discrimination under section 105(c) of the Act, a complaining 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 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

7. Next Endeavor Ventures, Inc., is subject to the jurisdiction of the federal mine safety and health review Commission. The presiding administrative law judge has the authority to hear this case and issue a decision regarding this case, pursuant to § 105 of the Act, 30 U.S.C. § 815, as amended.

SUMMARY OF THE TESTIMONIAL EVIDENCE

As mentioned above, a virtual hearing, via videoconference, was held on March 31, 2023. The hearing had but one witness, the Applicant/Complainant Ronald Dwayne Collins. He was last employed on November 19, 2022 and his employer was Next Endeavor Ventures ("NEV"). Tr. 36. The mine is a surface coal mine and is nonunion. Tr. 144. Collins has worked as a miner for 37 years and holds various certifications related to mining, including a first-class mine foreman, service foreman and an MSHA instructor card. Tr. 37. His employment with NEV began on August 29, 2022 at the NEV #1 mine. He was employed as a foreman. Tr. 39. As foreman his responsibilities included compliance with all MSHA and Virginia Energy safety regulations, the latter encompassing the Virginia Division of Mines, Minerals and Energy. Tr. 41. His supervisor was Wilk Renfroe. On August 29, 2022, Collins first day on the job, he had an accident, crushing one of his fingers. It required treatment at a medical facility, but he did not miss work because of it. Subsequently, a state inspector contacted Collins, asking if the accident had been reported. Eventually it was reported but, as it was filed late, the mine received both a state and federal violation. Tr. 46. About two to three days after Collins' accident, the State closed the mine for not having liability insurance. Tr.47.[4] Collins stated that as of the date of the hearing, the mine has yet to pay the medical bills arising from his workplace injury. Tr.49.

Collins then was asked about an MSHA inspection subsequent to his injury. This involved Brandon and Jonas Fleming. The two had been hired to run an auger at the mine. Tr. 52. Collins terminated the Flemings because, he alleged, the mine did not have an approved State and Federal ground control plan. Tr. 53-54. Collins stated that Renfroe was upset with him over the auger issue and the termination of the Flemings. Tr. 56-57. Significantly, Collins testified that Renfroe told him "that he needed that [work for] coal [ ] production, that [Collins] was gonna cost everybody their jobs, and that he was highly upset. If [Collins] didn't get with his program, [he'd] be terminated." *Id*. Collins stated that from that point on Renfroe was hostile towards him. Tr. 57.

Around October 28, 2022, Renfroe and Collins had a conversation about a new employee, Jeff Patterson, who would be operating an excavator. Tr. 58. Renfroe advised Collins that he needed Patterson to work on that weekend. Collins inquired if Patterson had his MSHA and State training and Renfroe advised he, Renfroe, would worry about that but that Patterson

[4] There were questions involving the mine's workers' compensation and whether the mine had a lapse in coverage and whether that impacted Collins' coverage for his injury. The Court considers this to be tangential to the issues in this proceeding.

had the certifications. Renfroe had a similar response to Collins' inquiring about whether Patterson had his preemployment drug test. Tr. 58. Without showing him documentation on those issues, which included showing that MSHA and state training had been done, Collins advised that he would not be signing that the employee was safe to work. Tr. 58-59. When Renfroe advised that he was going to work the Patterson anyway, Collins informed that he would not be a part of that and would not physically remain on the mine site. Tr. 63, 75. Renfroe and Collins had a heated exchange over these issues, and Collins maintained that Renfroe told him that he "was hindering his production ability with safety regs -- he said I was too strict on safety, and he was very belligerent about it. And I told Mr. Renfroe I was just trying to follow the letter of the law. He didn't like that." Tr. 72. Thus, Collins had multiple objections to allowing Patterson to work – he didn't have his Virginia miners' card, nor his drug test, nor his new employee miner training, nor his hazard and task training. Tr. 76. Because of those failings, Collins did not report for work on November 4, 2022. *Id.*

Following that, Collins received a telephone call from a state mine official, inquiring if he was aware that an employee was working at the mine illegally and that Collins' signature was on the pre-shift book. Collins informed that he had not been at the mine on that date and had not signed the pre-shift book. Tr. 79. Mr. Patterson was then removed from the mine site. Tr. 80. The state also issued a closure order at that time. Tr. 81.

On November 7, 2022, Collins went to the mine site and at that time read the alleged violation connected with the closure order. Tr. 84. The Virginia inspectors informed Collins that they were lifting the closure order but that stipulations were associated with the reopening.[5] *Id.* Collins alleged that on November 7th Renfroe's reaction to Collins' contacting the State mining agency about the preshift book issue as "the straw that broke the camel's back." Tr. 89, 95, 97. Collins reiterated to Renfroe that he would not be coming to work if Patterson was working. Tr. 97.

Collins and Renfroe had several heated conversations during the days in issue for this matter. In one, Collins asserted that Renfroe advised him that "listen you're [i.e. Collins] trying to be work safe is not going to work with this organization. I'm going to have to wash my hands of you. I'm going to have to move on. It's just getting to where it's unbearable." Tr. 101.

Collins also asserted that on November 17, 2022,[6] he had a conversation with JD Harrison, who was identified as a future foreman, along with Kelly Willis. Tr. 102. On that day,

[5] There were allegations swirling about the issue of whether Collins or someone else signed the preshift book. It is unnecessary to resolve this issue in the context of the temporary reinstatement application, as the central issue remains – is this application for reinstatement frivolous?

[6] Collins and Renfroe had another dispute on November 17. This related to whether an excavator required a cage to be installed on the machine. Tr. 116. Whether the excavator in fact

Collins asked Harrison if he had all his paperwork in order. According to Collins, Harrison responded that Renfroe said he was good to go. Tr. 103. Collins determined that Harrison did not have any of that paperwork. Tr. 104. Though Harrison maintained that inspector Herschel Fleming, a state inspector, informed that no additional drug test was needed. Tr. 104, 107. Upon checking with the inspector, Harrison's contention was rejected, and he had to leave the mine property. Tr. 105. Renfroe was angry with Collins requiring that Harrison have a drug test. Collins stated that during this exchange, Refroe uttered expletives and that he had to get rid of Collins. Tr. 106. Harrison did leave the mine to get a drug test. Tr.108. The following day Collins saw Harrison doing his training with Gary Whisman. Tr. 115.

In yet another incident, this time on November 18th, Collins observed an employee running a dozer with no one else present. Tr. 119. When Collins inquired of the employee whether he had his training and certifications, and drug test, the employee answered that he did not. Tr. 120. Collins had this employee leave the mine site as well. Tr. 120-121. However, not long after, Collins saw the same employee at the site. Not long after the second confrontation, the employee was back again, but on this occasion another employee was watching the miner operate the dozer. Tr. 121. Renfroe told Collins to leave the employee alone and if Collins didn't like it, Renfroe told him he could "go to the house," mine parlance for being fired. Tr. 121.[7]

On Saturday, November 19, 2022, Collins had a phone conversation with Jeff Patterson, at which time he was informed that the mine didn't need his services anymore. Tr. 129. Collins was also asked about one of the mine's owners, whom he identified as Emma. He was unsure if her last name was Vasquez or Marquez. Tr. 132. In any event, Collins met her at the mine on one occasion sometime in the middle of October that year when a State inspector was present as a complaint had been called regarding the mine. Collins recounted that Emma remarked that in her view there was a 'mole' at the mine and if she found out who it was, that individual would be fired. Tr.133. Renfroe too, Collins asserted, made a similar remark – if the mine found out "who was tipping the inspectors off on the safety issues" that person would be terminated. Tr. 134. Later, Renfroe told Collins that he suspected Collins was the person making the complaint. Tr. 135.

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required a cage was not resolved at the reinstatement hearing nor was the issue necessary to resolve. The only purpose in the context of the proceeding is to show yet another safety-related dispute between Collins and Renfroe.

[7] It is noted that during the hearing there were a few occasions when the exact date of an event was unclear. The Court has two observations about this. First, the exact dates were not crucial to the determination in this hearing – whether Collins' claim was non-frivolous. Second, of far greater importance, is that Mr. Collins had a number of safety issues while employed with the mine. The Respondent offered no witnesses to contradict Mr. Collins claims in that regard, leaving its challenges solely to the cross-examination of the Applicant.

During the hearing there was also a reference to a Ms. Kayleigh Mulkey. Collins knows her. Tr. 140. Ms. Mulkey was never employed at the Respondent's mine during the time of Collins employment there. *Id.* Instead, she was employed with a nearby mine, A&G Coal Corp. Tr. 140-141. This subject arises in the context of the Respondent's Answer to the reinstatement application wherein it alleges that Collins sexually harassed a woman in violation of the mine's sexual harassment policy. Respondent's Answer, Sixth Defense.

In that connection, Collins was asked about his employment packet when he began working for the Respondent. He contended that he never saw a sexual harassment policy as part of that packet. Tr. 141. He also denied ever having any conversations with the Respondent's ownership or management about that subject. Tr. 141-142. Later, Collins stated, he received the employment packet again via e-mail. One was sent to him by an administrative assistant with the mine, Amy Cutshaw. Tr. 142. Collins stated that when he was terminated by the Respondent, Mr. Patterson never told him that he was fired because of sexual harassment. Tr. 147.

On cross-examination, Collins agreed that Renfroe does not need a miner's card because he doesn't work on the site and because he is part of management. Tr. 151. Respondent's attorney questioned Collins about the particulars of the mine's ground control plan vis-à-vis the excavator and its proximity to the wall. Tr. 151-153. However, the Court would comment that such questions are extraneous in the context of a temporary reinstatement application because Collins was at least raising a safety issue. There is no indication in the record that his concern was pretextual or made in bad faith.

Collins was also questioned by Respondent's counsel about his first discrimination report and the subsequent discrimination report he signed some three weeks later. Tr. 156- 158. Respondent's counsel noted that the second report (i.e. Collins' amended complaint) added claims that were not made in his initial complaint. It is true that Collins filed an amended complaint on December 22, 2022, and that he added grounds for his complaint in that document. At the hearing, Collins testified to the grounds listed in his initial complaint and those asserted in his amended complaint. The Court would note that it is guided by the testimony at the hearing with regard to its assessment of Mr. Collins' testimony about his alleged safety issues, which assessment does not involve credibility determinations. Some areas of cross-examination, such as whether Collins submitted bills regarding his finger injury to Next Endeavor are not pertinent to the frivolous issue here.

Respondent's counsel also questioned Collins regarding his issues concerning employee training certifications and whether, for those tasks he could act as an instructor, he could've conducted the training himself. Two observations are made about this line of inquiry. First, Collins denied that he was certified to do all of the required training. Second, according to Collins' testimony, the dispute was connected with Renfroe's irritation that Collins was raising the training issues. At least on its face, that relates to the issue of whether Renfroe was upset

with Collins' safety concerns, an issue not to be resolved in the temporary reinstatement proceeding.

It is true enough, as Respondent's Counsel noted, that Collins's complaint, per the Secretary's Exhibit B, did not contain his allegations that Mr. Renfroe told him that this was the "last straw, or Wilk Renfroe cussing you, or Wilk Renfroe doing this or Wilk Renfroe bringing people to the mine site that weren't properly trained, or Wilk Renfroe bringing people to the site that didn't have their drug test," Tr. 164- 165. The Court is again guided by Collins' testimony at the hearing, which was effectively augmented by the absence of any rebuttal testimony, as the Respondent did not present any witnesses.[8]

In what the Court views as a subject that is not and cannot be resolved at this stage of Collins' safety complaint, Respondent's Counsel's foray into whether Collins was terminated for sexual harassment, it is noted that much time was expended concerning the location of *another* mine, which mine, it was conceded, was not part of Next Endeavor Ventures' operations. This was an attempt to somehow link Ms. Kaleigh Milkey, an employee of that *other* mine, with the sexual harassment claim Respondent was making against Collins. Tr. 165- 192. Being generous, the Court would say that, at least for the purposes of the temporary reinstatement application, this whole line of questioning went nowhere.

SUMMARY AND ADDITIONAL FINDINGS

The following observations are made about the detailed testimony from Mr. Collins, as set forth above. None of these observations involve credibility determinations by the Court. Instead, they are made strictly in the context of whether Collins' application for temporary reinstatement was frivolously brought. To be clear, the Court finds, without reservation or hesitation, that Collins application is not frivolous. Stated another way, the *totality of the evidence or testimony admits of only one conclusion* – Collins' complaint is not frivolous.

Collins raised several health and safety concerns to management. Each constituted protected activity. Some of these issues were also brought to the attention of the mine safety division within the state of Virginia as well as with MSHA. A miner's raising a safety or health issue of any sort is protected, whether tied to a particular provision under state or federal mining law or not. For example, as detailed above, Collins raised a safety concern with Wilk Renfroe concerning: an employee who did not have a pre-employment drug screening; the failure of an employee to have a Virginia miners card; and an alleged failure to have the requisite miner training before starting work.

[8] Respondent's Witness List identified four individuals: Michael Hughes, the MSHA investigator for this matter, the Complainant, Mr. Collins, Wilk Renfroe and Jeff Patterson. As noted, the only witness at the hearing was Ronald Collins.

There was also an issue related to the safety concerns Collins raised. This relates to whether Collins in fact signed the book on a given day or whether his signature was forged. That issue has not been resolved but it does tend to show possible employer animus towards Collins attributable to his refusal to sign the books. There was also an issue over the mine's alleged failure to file an accident report with MSHA in connection with an injury Collins incurred on the job.

Further, was also testimony from Collins that, on more than one occasion, he was admonished for not going along with the mine's wish that certain safety or health requirements be overlooked. Chiefly, these disputes involved Collins and Mr. Renfroe. The Court notes that Renfroe was present during the entire temporary reinstatement hearing, as the Respondent's designated company representative. This means that Renfroe heard nearly all of the testimony from Collins.[9] Yet, at the conclusion of the testimony from Collins, and noting that Collins was the sole witness for the Secretary, the Respondent elected to forego presenting testimony from any other witness, limiting its effort to cross-examination of Collins.

The Court notes and finds that the safety and health issues Collins testified about all occurred during a short period of time before Collins was terminated from employment with the mine. Therefore, a nexus established between Collins' protected activity and the adverse action – termination of his employment with NEV. Respondent's contentions are in the nature of claimed affirmative defenses and do not impact the issue in a temporary reinstatement proceeding.

Respondent contended that the Secretary didn't carry its burden of proof in this Application for temporary reinstatement. In making that argument, Respondent asserts that based on Mr. Collins first complaint he asserted only two grounds – that his hospital bills were not paid and the issue of whether his signature was fraudulently in the preshift book. The Court notes that nothing prohibits a complaint from being amended.

Respondent also contends that failure to have drug testing or the certificate to show the testing was done, is not a safety issue and that Collins other safety issues, as set forth above, are not cognizable. With regard to the latter, the Court notes that a miner need only have a reasonable, good faith belief in a safety hazard. *See, e.g*, *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, Apr. 1981), *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). Respondent further maintains that Collins' text messages to Ms. Mulkey, an employee at *another* mine, constituted sexual harassment and constituted the basis for his termination.

[9] There was a very brief period of time, involving only minutes, when Mr. Renfroe was not present during the virtual hearing, but Respondent's Counsel did not request that the hearing testimony pause until Renfroe returned.

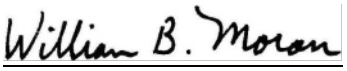
CONCLUSION

Upon consideration of the testimony of Ronald D. Collins, the Court finds that the testimony and exhibits in support of this application for temporary reinstatement amply support that it is not frivolously brought. The Court finds that the Complainant has raised a non-frivolous issue as to each element of the prima facie case and finds that, under the traditional non-frivolous test as well as any **but-for** analysis that may be applied, Complainant more than met his burden of proof.

ORDER

The Application for Temporary Reinstatement is hereby **GRANTED.** It is **ORDERED** that Ronald D. Collins be temporarily reinstated, retroactive to **March 22, 2023** to the position he held on the date of his discharge from Next Endeavor Ventures, LLC at the NEV #1 mine.

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. The Court retains 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.



William B. Moran
Administrative Law Judge

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