

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 6, 2023

SECRETARY OF LABOR, MSHA,
on behalf of VICTOR TORRES,
Applicant

v.

W. G. YATES & SONS
CONSTRUCTION COMPANY,
Respondent

APPLICATION FOR TEMPORARY
REINSTATEMENT

Docket No. WEST 2023-0256-DM
MSHA Case No. VACA MD 2023-06

Mt. Pass Mine & Mill
Mine ID 04-02542 G556

**ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT
& ORDER TOLLING TEMPORARY REINSTATEMENT**

Appearances: Natasha Magness, Esq., Office of the Solicitor, U.S. Department of Labor,
Seattle, Washington for Applicant;
McCord Wilson, Esq., Rader & Campbell, Dallas, Texas for Respondent

Before: Judge Manning

This case is before me on an Application for Temporary Reinstatement (the “Application”) filed by the Secretary of Labor on behalf of Victor Torres (“Torres”) against W.G. Yates & Son’s Construction Co., and all successors in interest (“Yates”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the “Mine Act”).¹ The Secretary’s Application alleges that on or about April 13, 2023, Yates terminated Torres from his position as a journeyman millwright in retaliation for “raising safety concerns including exercising his stop work authority.” App. Temp. Reinstatement 2-3. The Secretary requests an order directing Yates to temporarily reinstate Torres “to the position of Journeyman Millwright, or to a similar position at the same rate of pay and benefits and with all of the same seniority or other perquisites of the job, and with the same or equivalent duties assigned to him” pending final hearing and disposition on the discrimination complaint. *Id.* 1, 3.

The undisputed evidence establishes that MP Materials Corp. is restarting a surface rare earth mine in California near the Nevada border at a location known as Mountain Pass. A different operator mined rare earths at the mine in the past but it went out of business. Because of the strategic importance of rare earths, the Department of Defense is involved in restarting operations, presumably by providing at least some of the funding. The critical work to restart operations is to build a facility to separate the targeted rare earths from the mined material. This facility, known as the processing facility (the “facility”), is being built from the ground up. Due to the secretive nature of the equipment being installed and the processes to be used, taking photos at the facility is prohibited except by authorized personnel.

¹ The application was filed by the Secretary on June 2, 2023. Yates timely requested a hearing within 10 days of receipt of the application. 29 C.F.R. § 2700.45(c). At the request of the parties, the hearing was held on June 28, 2023.

Yates was a major contractor hired to construct the facility. The construction of the facility was put on a fast track and at the time of the hearing work was virtually complete. All that remained was testing the facility by running product through the facility and the commissioning of the facility. At the beginning of 2023, Yates employed between 800 and 1,000 people at the facility. About 110 of these employees were journeymen millwrights. On the date of Torres's termination, about 270 people worked for Yates including 15 millwrights. On the day of the hearing in this case, about 22 people worked for Yates at the facility, including two millwrights and a millwright supervisor. The millwrights and millwright supervisor were primarily on standby in case repairs needed to be made during testing and commissioning. As discussed below, Torres was assigned welding duties for much of his employment at Yates. There were no welders employed on the date of the hearing.

The Secretary contends that Torres was selected for termination on April 13 because of his safety complaint. Yates contends Torres was laid off along with other millwrights because his demonstrated skills were no longer needed at the facility.

The parties stipulated that (1) Yates is a mine operator under the Mine Act; (2) the Mountain Pass Mine & Mill, which includes the subject facility, is a mine under the Mine Act; (3) Torres is a miner under the Mine Act, and (4) the Commission has jurisdiction over this case. Tr. 10-11.

The parties presented testimony and documentary evidence at a hearing held via the Commission's secure video conferencing system. For the reasons set forth below, I find that the application for temporary reinstatement must be **GRANTED**, but that temporary reinstatement is **TOLLED**.

I. SUMMARY OF THE EVIDENCE

Each party offered two witnesses. A summary of each witnesses' testimony follows.

Victor Torres

Torres was hired by Yates on September 8, 2022, as a journeyman millwright at the facility.² Tr. 17. Torres's job duties as a millwright included making equipment layouts and aligning, assembling, and installing equipment. Tr. 20. According to Torres, millwrights normally bring their own tools to job sites, and he brought his own tools to the job at the facility. Tr. 50.

Although Torres's job title never changed while he was with Yates, at some point after he was hired, at Yates's request, Torres took a test to become a structural welder. Tr. 18-19. At that

² Torres testified he had eight years of experience as a millwright. Tr. 16. Prior to being hired by Yates, Torres was a 1099 independent contractor and spent time working for both Casey Industrial and Phoenix Industrial. Tr. 16. Torres earned \$35 per hour and worked approximately 60 hours per week for Yates. Tr. 18, 21. According to Torres, roughly 18 other millwrights were hired around the same time as him, and an additional 12 millwrights after he was hired. Tr. 18.

time there were only four other certified welders.³ Tr. 19. As a structural welder for Yates, Torres was tasked with fabricating equipment and making needed modifications. Tr. 20. Torres worked as a structural welder until that part of the project was completed and then switched back to being a millwright. Tr. 53-54.

Each day at the job began with a meeting of the crews and foremen during which Torres received his assigned tasks for the day. Tr. 21. Generally, Torres worked in one location on an assigned task until it was completed before moving to another location for his next task. Tr. 21.

On April 10, 2023, Torres was tasked with using a manlift to bring down pipe from an elevated rack. Tr. 26. According to Torres, the manlift manual says the lift should not be used as crane.⁴ Tr. 30. Torres believed it was not safe to bring down a pipe with the manlift. Tr. 30. Torres's crew requested a crane to safely complete the task, but the request was denied by Tyler Towns, an engineer with Yates and Torres's foreman at the time. Tr. 26-27. Towns instead instructed the crew to use the manlift for the task. Tr. 27. At that point Torres refused to complete the task and exercised his "stop work authority." Tr. 27-28. "Stop work authority" allows anyone to stop all work when they see something unsafe.⁵ Tr. 28. According to Torres, Towns said if Torres would not do the job as instructed then Towns would find someone else to do so and Torres would be removed. Tr. 28. Torres understood Towns's comment to mean that Torres would be fired. Tr. 28-29.

After Torres exercised "stop work authority" a group of supervisors came to the location and two other miners used the manlift to complete the task. Tr. 29. Torres used his phone camera to take photos of the miners completing the work for inclusion in a "stop work authority" report. Tr. 34; Sec'y Ex. 2 p. 1-3. According to Torres, he needed to take the photos for use as evidence when raising the safety concern so that this type of incident would not happen again. Tr. 34, 77-78. The photos show two individuals in an elevated manbasket with a length of pipe laying across the top rails of the basket. Tr. 29-32; Sec'y Ex. 2 p. 1-3. The pipe appears to be tied to the railing. Tr. 31. According to Torres, the procedure used by the miners was unsafe because the manlift should not have been used as a crane and the pipe could have exceeded the lift's weight limit and caused the lift to tip or hydraulics to fail, which could in turn cause an injury. Tr. 30.

At some point Torres traveled with Rumeagus Eaton, the general foreman, to Yates's office to fill out a report about the manlift incident. Tr. 35; Sec'y Ex. 3. Torres met with Bryan French, who Torres described as the project manager, Jimmy Hayes, the millwright superintendent, and others. Tr. 58-59. Torres testified that neither French nor Hayes said it was wrong for Torres to use his "stop work authority," but both talked to Torres about how using the phone to take photos

³ Only one other certified welder was left at the facility after April 13. Tr. 19.

⁴ On cross-examination Torres acknowledged there is an attachment approved by the manlift manufacturer that can be used to safely raise and lower pipe with the lift. Tr. 65-66. However, the attachment could not be found on April 10. Tr. 65.

⁵ Torres acknowledged that he was trained how to use "stop work authority." Tr. 72.

was against policy.⁶ Tr. 59, 63. On cross-examination Torres acknowledged employees had been terminated in the past for taking photos and that he could have been terminated for that reason. Tr. 64. However, Torres received no discipline that day. Tr. 64-65. Torres ultimately left the office and went back to work on a task at a different location than where the manlift incident occurred. Tr. 67.

During the morning task meeting on April 11, the day after the manlift incident, Jose Segovia, a Yates foreman, gave Torres a written list⁷ of tasks to complete in a different area of the facility than where Torres had worked on April 10. Tr. 36-38, 68; Sec’y Ex. 4. Torres’s crew included two employees that had worked with Torres on April 10 and had been involved in the manlift incident. Tr. 66-67. According to Torres, the task list surprised him because it included tasks not normally undertaken by millwrights, tasks which only certain other crews were allowed to complete, and tasks for which Torres was overqualified. Tr. 38-39. Moreover, when speaking to a coworker during his lunch break that day, Torres learned that other employees were performing tasks that normally would have been performed by Torres. Tr. 39-40.

During the morning task meeting on April 12, two days after the manlift incident, Torres was surprised to learn that he was again assigned tasks outside of his normal duties and was not provided the necessary materials to complete those tasks.⁸ Tr. 41-42. However, on cross-examination, Torres conceded the missing materials were things a millwright would use to install equipment and some of the tasks assigned on both April 11 and 12 were typical for a millwright. Tr. 73-74.

Torres testified that at some point on April 12 a coworker informed Torres that Eaton had told that coworker that people involved in taking photos of the manlift incident were going to be laid off. Tr. 44-45.

On April 13 Eaton pulled Torres and another individual from the morning task meeting and told them to gather their belongings because they were being laid off. Tr. 43. Both Torres and the other individual had exercised their “stop work authority” on April 10. Tr. 46. Eaton did not provide Torres with a reason for the layoff. Tr. 46.

At hearing, Torres stated he believed he was assigned tasks outside of his craft on April 11 and 12 and ultimately terminated because he raised safety concerns about the manlift and exercised his “stop work authority” on April 10. Tr. 42-43, 46-47. According to Torres, no one from Yates ever told him why he was laid off. Tr. 46. Torres filed his complaint of discrimination on April 19. Tr. 23; Sec’y Ex. 1.

⁶ At hearing, Torres conceded that he was aware there was a policy against taking photos at the facility and that he violated that policy on April 10. Tr. 53, 63-64.

⁷ Torres did not know who wrote the list. Tr. 68.

⁸ Some of the April 12 assigned tasks were included on the written list provided to Torres on April 11. Tr. 41-42. Torres testified that the tasks assigned on April 12 required bolts, hardware, flanges, and hoses that were not provided. Tr. 42, 73-74

Torres testified he was never told that his work was deficient, and he had no reason to believe Yates was dissatisfied with his work. Tr. 47. On cross-examination Torres acknowledged he had been disciplined by Yates in the past after multiple instances of absenteeism/tardiness. Tr. 59-62; Yates Ex. R2. Still, Torres testified he wants to return to work for Yates, and, based on seeing the car of one of his former millwright coworkers at the facility on June 19, believes there is still millwright work to be done at the facility. Tr. 48. However, on cross-examination Torres acknowledged that, given that he did not know what millwrights were still at the facility, he could not compare his skillset to the skillsets of those individuals. Tr. 70-71.

Torres acknowledged he knew the government was involved in the Mountain Pass project and Yates was building facilities for processing rare earth metals. Tr. 52-53. Further, he understood that the job was temporary and was approaching completion at the time of his layoff.⁹ Tr. 52, 68. Although he was aware many millwrights and structural welders were laid off prior to his termination, he did not expect to be laid off on April 13 because he was still getting millwright work.¹⁰ Tr. 74-75.

Torres testified he is not from the area and only relocated to the area when he started the job in September. Tr. 48-49. He has had difficulty meeting financial obligations since being terminated. Tr. 49.

Kyle Jackson

Kyle Jackson¹¹ was the MSHA Special Investigator charged with investigating Torres's complaint. Tr. 87-88; Sec'y Ex. 1. As part of his investigation, he contacted both Torres and personnel from Yates. Tr. 88. Based on his investigation, Jackson determined that Torres's complaint was made in good faith and not frivolously brought.¹² Tr. 88.

⁹ Torres conceded that at the time of the hearing he did not know the state of the project or if the equipment and machinery were in working order. Tr. 80-81.

¹⁰ Torres acknowledged there was not much welding work available at the time of his termination. Tr. 75. Torres was also aware that four millwrights were laid off the week after his termination, one of whom was involved in the manlift incident and three of whom were not. Tr. 75-76.

¹¹ Jackson has been with MSHA for 22 years. Tr. 85. As a special investigator, part of his job is to investigate discrimination cases brought under section 105 of the Mine Act. Tr. 86-87.

¹² Jackson testified regarding two citations issued to Yates for alleged violations of mandatory standards during a hazard complaint inspection. Tr. 89-93; Sec'y Ex. 5. According to Jackson, the condition or practice described in the two citations was the same as that which Torres used to justify exercising his "stop work authority" during the manlift incident. Tr. 92. Jackson explained that the first citation was issued to address the hazard of raising and lowering pipe with the manlift when the pipe is only tied off to the basket, while the second citation was issued to address the hazard of the person directing the work not being task trained on safe operation of the manlift. Tr. 93.

On cross-examination Jackson agreed that during his inspection he learned Yates's work at the facility was temporary and originally scheduled for completion in May of 2023. Tr. 95-96. Further, he agreed the number of Yates employees had drastically decreased in recent months, including a reduction in the number of millwrights from over 100 to less than five, a reduction to zero structural welders, and a reduction in the total number of employees from roughly one thousand to less than 25. Tr. 96, 99, 102, 25. Jackson further acknowledged that four millwrights were laid off the week after Torres's layoff, and only one of those individuals was involved in the manlift incident on April 10. Tr. 105-106. Jackson agreed those layoffs indicated that millwrights were not needed by Yates at that time. Tr. 106.

Jackson conceded he had no knowledge regarding the skillsets of the few remaining millwrights and did not try to compare Torres's skillset as a millwright or structural welder to the skillsets of those individuals still onsite. Tr. 99-101. Moreover, although Jackson testified he was aware of the of the general duties of millwrights in other industries, he acknowledged he was not aware of the typical duties of millwrights for Yates, including whether raising and lowering pipe was a normal millwright duty. Tr. 103.

On cross-examination Jackson agreed Yates had in place a policy against taking photos and Yates had terminated other employees for violating that policy. Tr. 97. Moreover, he agreed Torres violated that policy on April 10. Tr. 98.

During Jackson's investigation Yates provided him with a list of laid off employees. Tr. 93-94; Yates Ex. R4. At hearing, Jackson testified the list did not change his determination that Torres's complaint was not frivolously brought. Tr. 94, 106. Although Jackson agreed Yates was conducting mass layoffs, he testified Torres's layoff on April 13 could nevertheless have been discriminatory because it occurred within three days of Torres's protected activity. Tr. 107. Moreover, according to Jackson, Torres brought his claim to MSHA in good faith and believed the layoff was a result of his protected activity. Tr. 109.

Jimmy Hayes

Jimmy Hayes was Yates's millwright superintendent at the facility until June 8, at which point he was taken off the project due to downsizing.¹³ Tr. 113.

Hayes explained that Yates was contracted to build a rare earth mineral processing facility at the mine. Tr. 114. According to Hayes, the rare earth mineral processing facility will be only the second in the world, with the other being in China. Tr. 114. The Department of Defense runs the facility and, given the need to keep information about the facility from getting out, taking photos with phones is prohibited unless a person has proper clearance to do so. Tr. 114, 118. Hayes testified that employees have been terminated for violating this policy. Tr. 117.

¹³ Hayes is currently employed by Yates as a project superintendent, presumably at a different Yates job site. Tr. 112. Hayes has been with Yates for approximately 13 years and has worked in construction for 28 years. Tr. 112.

Hayes explained that Yates's project was originally scheduled to be completed in April of 2023.¹⁴ Tr. 115. Although the project has not yet been completed it has been winding down throughout 2023. Tr. 115. Hayes testified that, at the project's peak, Yates employed roughly 110 millwrights. Tr. 126. As of April 13, only 14 millwrights remained. Tr. 126. As of June 8, there were no structural welders and only four millwrights and one millwright foreman working on the project. Tr. 125-126. According to Hayes, the millwrights remaining on June 8 were "exceptional" and capable of doing every task. Tr. 126-127. Although Hayes is no longer working at the mine, he is aware that only two millwrights currently remain and there is no millwright work. Tr. 136-137. The remaining millwrights are essentially on "standby" in case there is an issue with a pump and are not doing true millwright work. Tr. 135-137. Hayes testified that Yates's contract ends on July 1, 2023, and, although extensions are possible, the plan is for all Yates employees to be gone on that date. Tr. 128, 160.

Hayes testified that on April 10 when he learned about the manlift incident he was not concerned about Torres's use of "stop work authority" but was concerned about Torres taking photos at the facility. Tr. 116. As a result, he had Torres come to the office to write a statement. Tr. 116-117.

Hayes and Bryan French, the project superintendent, met with Torres at the office. Tr. 119. Both Hayes and French agreed with Torres's use of "stop work authority." Tr. 119-120. According to Hayes, no one involved with the manlift incident was disciplined for exercising their "stop work authority." Tr. 119. Hayes explained that Torres was not terminated on April 10 for taking photos because the photos were taken in the interest of safety and did not show any processes. Tr. 117.

Following the meeting, Torres went back to work but was assigned tasks in a different area. Tr. 148-149. Hayes testified he did not want conflict among the employees and the job Torres was moved to, i.e., tank cleaning closures, was more important than the pipe task Torres had been assigned to at the time of the manlift incident.¹⁵ Tr. 149. Torres never complained about his assignments after the manlift incident. Tr. 133.

Hayes described the layoff process. According to Hayes, layoffs occur in rounds. Tr. 137. French is responsible for determining how many man hours of work remain at the job and then determining the number of workers needed to complete that work. Tr. 120-121. French then determines the number of employees that must be laid off that round and provides the number to Hayes. Tr. 120. Hayes, as the millwright superintendent, in turn decides which millwrights should be laid off. Tr. 120. Hayes makes his determination who to lay off based on the working

¹⁴ At the time Hayes left the project on June 8 Yates had assembled and tested everything and was just waiting on the mine operator to move product through all areas of the facility. Tr. 115.

¹⁵ Hayes testified the pipe task Torres was assigned to on April 10 was completed around April 15 or 16, and all pipe work, including fixing leaks, was completed at some point in April. Tr. 149-150. Although Torres was qualified to raise and lower pipe and fix leaks, Hayes testified that those tasks were not typical millwright duties but could be completed by a millwright. Tr. 150. However, because there was not enough millwright work at the time, Hayes was assigning millwrights tasks outside of their craft. Tr. 151.

knowledge of the remaining millwrights, whether those individuals have the tools necessary to complete the remaining work, and whether those individuals have issues with absenteeism or tardiness. Tr. 121, 142-143. According to Hayes, there is no written list of criteria or performance evaluation to determine an employee's skillset and most of that determination is made by Hayes when observing the millwrights work in the field. Tr. 144-145. Employees are not given advance notice of layoffs. Tr. 162. Rather, the general foreman notifies the employees that they are being laid off the same day. Tr. 161. The laid off employees then complete the necessary paperwork before warehouse personnel conduct a toolbox check, and then the employees clock out and leave. Tr. 161-162.

Hayes explained that Torres was laid off on April 13 as part of a reduction in force due to a decrease in work for Yates at the facility. According to Hayes, Torres's lack of the necessary skillset, lack of tools, and issues involving absenteeism/tardiness played a part in the decision to include Torres in that round of layoffs.¹⁶ Tr. 123-125, 143. Hayes acknowledged that the factors he considered were not weighted in any way and that, ultimately, it was his decision based on his own experience. Tr. 148.

Hayes testified that Torres lacked the necessary skillset and tools to remain employed at the project. According to Hayes, Torres was classified as a structural welder and all structural welding work had been completed.¹⁷ Tr. 121. Hayes explained that, although there had been no structural welding work for some time, because Torres had been hired as a millwright, Torres was kept on to complete millwright tasks associated with the startup portion of the job. Tr. 121, 140-141. However, once the project entered the startup and commissioning phases, which Hayes described as "fast-paced[,] "precision" work, Hayes did not believe Torres had the necessary knowledge or skillset to complete the remaining tasks. Tr. 124. Hayes did not believe Torres knew how to use a laser or indicator. Tr. 124. Hayes testified that, even if Torres had the necessary knowledge and skillset, he did not have the necessary tools¹⁸ and even if he did, it may only have helped Torres last another week given that there was very little millwright work and the millwrights that remained were having to work other crafts.¹⁹ Tr. 125, 146.

¹⁶ At least one other millwright and three pipe workers were included in the round of layoffs that included Torres. Hayes testified that the decision to lay off Torres and the other employees in that round was made at the same time even though the millwrights were laid off on the April 13 and the others were laid off on April 14. Tr. 152. The individuals laid off on April 14 were laid off on that date because they worked the night shift. Tr. 152; *See Yates Ex. R4 p. 8*. Moreover, according to Hayes the other millwright laid off the same day as Torres lacked the necessary skillset. Tr. 158.

¹⁷ Although one welder remained employed at the facility after Torres was laid off, that individual had much better welding qualifications than Torres, could read drawings, and had the ability to fabricate most anything. Tr. 122. That welder has since been laid off. Tr. 122.

¹⁸ Hayes testified there is a list of millwright tools. Tr. 146.

¹⁹ Hayes agreed that millwrights performed a wide range of tasks and were consistently asked to work on tasks outside of their craft, including changing pipes. Tr. 136.

Hayes also testified that over the course of Torres's employment Hayes generally selected other millwrights for work on critical tasks due to Torres's lack of knowledge. Tr. 141-142. Hayes knew Torres lacked knowledge in certain areas because of conversations with foremen and other employees, and the types of tools Torres had and did not have. Tr. 141-142. Further, Hayes testified that Yates offered voluntary training opportunities for employees to expand their skillsets, but Torres chose not to participate in those sessions. Tr. 142, 154-155.

Hayes testified that even if Torres had the necessary skills and tools, Torres would not have been kept on past April 13 because the remaining millwrights, all of whom had the necessary skills and tools, did not have the absenteeism/tardiness issues Torres had. Tr. 147-148.

Hayes testified that the week after he laid off Torres he had to lay off an entire crew of millwrights, as well as a millwright foreman, due to lack of millwright work. Tr. 123, 130-131; *See* Yates Ex. R4 p. 8. On cross-examination Hayes explained that Torres was not terminated with that group of millwrights because that group had been working with a vendor on a task involving conveyors, and Torres had never worked with that group on that task. Tr. 139. However, Hayes conceded he never asked Torres if he had the skillset for that task. Tr. 140.

Bryan French

Bryan French was, and currently is, Yates's job superintendent at the facility. Tr. 164. French described his position as "high level" and stated he is not involved in crew assignments. Tr. 169-170, 195.

French, like Hayes, testified that the facility is a Department of Defense job meant to compete with China. Tr. 165. Yates was contracted by the mine operator to put in new processes and procedures to extract rare earth minerals. Tr. 165.

French echoed Hayes's testimony that Yates's work at the facility is winding down because the project scope has been completed and Yates is now just waiting on the mine operator to deliver product through each part of the processing facility. Tr. 178. According to French, while there were between 800 and 1000 Yates employees at the facility at the beginning of 2023, that number has dwindled to 20 current employees, none of which are structural welders, and only three of which are millwrights, with one of those three being a supervisor.²⁰ Tr. 175-178; *See* Yates Exs. R3 (graph depicting total workforce) and R5 (job reports showing decline in number of millwrights during June 2023). French acknowledged that Yates is still performing limited work at the facility and estimated that the three remaining millwrights are working approximately 20 hours per week at present. Tr. 178, 183-184.

²⁰ French testified that on April 13 only a couple hundred Yates employees remained at the facility, with only 15 of those employees being millwrights. Tr. 176-177. At one point there were approximately 120 millwrights working for Yates at the facility. Tr. 179. The only remaining welder at the facility is a pipe welder capable of both pipe welding and structural welding. Tr. 180. Torres was designated as a structural welder and did not weld pipe. Tr. 180.

On April 10 French met with Torres in the safety office to discuss the manlift incident. Tr. 167. According to French, no one was disciplined for use of “stop work authority” and he even told Torres he agreed with the decision to exercise “stop work authority.” Tr. 168-169. Although French agreed he could have terminated or disciplined Torres for taking photos,²¹ he ultimately decided not to do so because the photos were just of the pipe, and not the process, and had been taken in the interest of safety. Tr. 168-169. At some point after meeting with Torres, French made the decision to swap out the crew working on the pipe project because a crane was being called over to complete the task. Tr. 170, 186-187. According to French, Torres was not a certified rigger or signal person and, as a result, was not qualified to work with the crane. Tr. 186-187. Instead, Torres was assigned cleaning and closing tasks that needed to be completed for commissioning.²² Tr. 170, 186. French explained that one of the reasons he swapped out the crew was because construction workers can be difficult at times, and occasionally workers need to be moved to a different task to get the most out of them and so that no one gets hurt. Tr. 186-187.

French explained that Yates started downsizing in March. Tr. 171. His role in that process involved evaluating the budget and man hours required and then determining how many people were needed in each craft to complete the work. Tr. 171-173, 189. French would then tell his craft superintendents how many of their employees needed to be laid off. Tr. 173. The superintendent then determined who needed to be laid off and justified that decision to French. Tr. 173-174, 189. On cross-examination French conceded there was no objective ranking or measuring system of employees. Tr. 190. French testified that advance notice of layoffs was not provided to hourly employees. Tr. 181.

Here, at some point prior to April 13, French provided the number of needed millwright layoffs to Hayes but did not tell Hayes who to lay off. Tr. 173. Hayes then evaluated his needs in the field and determined that Torres and another millwright should be laid off. Tr. 175, 191. According to French, Hayes justified Torres’s inclusion in the layoff because there was no more welding work and what work was left involved precision commissioning tasks that, as far as French knew, Torres did not have the skillset for. Tr. 174-175. Because Hayes worked closely with the employees in the field, French relied on Hayes’s evaluation of Torres’s skillset. Tr. 191. Although French did not know Torres’s skillset for millwright work, he was aware that when Torres was hired he did not have all the tools necessary for millwright work. Tr. 192. Like other hourly employees, Torres was not given advance notice of being laid off. Tr. 181-182. French testified that Torres’s use of “stop work authority” played no role in the layoff decision. Tr. 171.

Ultimately, French signed paperwork that indicates Torres was laid off as part of a reduction in force. Tr. 196; Yates Ex. R1. The same paperwork indicates that Torres’s job performance was rated as “good” and that Torres was recommended for rehire. Tr. 196-198.

²¹ French testified that photos cannot be taken at the facility. Tr. 165. French has had to terminate employees for taking photos. Tr. 166. According to French, the decision to terminate an employee for taking photos is “immediate.” Tr. 166.

²² According to French, Torres was not given less desirable jobs because of his use of “stop work authority.” Tr. 170. Moreover, Torres never complained about the assignments he was given. Tr. 170-171.

In addition to Torres, another millwright and a group of employees on the night shift were laid off together. Tr. 194-195. French described that round of layoffs as “tough” because he knew Yates was laying off “good help.” Tr. 195.

On cross-examination French acknowledged that millwrights can do a wide range of work. Tr. 183. However, he testified that the only millwright work currently left at the facility involves pumps, and he has not seen Torres work on pumps, nor does he know if Torres has the skillset to do so. Tr. 193.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act.²³ 30 U.S.C. § 815(c). A miner who believes they have been discriminated against may “file a complaint with the Secretary alleging such discrimination.” 30 U.S.C. § 815(c)(2). “[I]f 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.” 30 U.S.C. § 815(c)(2). The person against whom relief is sought may request a hearing on the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c).

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.”²⁴ 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) (“*JWR*”).

The “not frivolously brought” standard does not require a judge to determine whether sufficient evidence of discrimination exists to justify permanent reinstatement. *JWR* at 744. Rather, under the standard, the judge is tasked with evaluating the evidence of the Secretary’s case to determine whether the miner’s complaint of discrimination appears to have merit, i.e., a non-frivolous issue of discriminatory motivation. *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009).

²³ 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.”).

²⁴ Although narrow in scope, a temporary reinstatement hearing must be a “full evidentiary process,” during which the judge “must consider any evidence which is relevant to the adverse action[,] -- even that which seems directed to an affirmative defense or rebuttal of the miner’s claim.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021) (citing *Sec’y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 (Apr. 2021)).

Although the Secretary need not prove a prima facie case of discrimination in a temporary reinstatement proceeding, “it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test.” *Id.* at 1088. In order to prove a prima facie case of discrimination the Secretary has traditionally been required to establish that (1) a complaining miner engaged in protected activity and (2) that the adverse action complained of was motivated in part by that activity.²⁵ *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). Although direct evidence of a motivational nexus between a protected activity and adverse action is rarely available, the Secretary may establish discriminatory motive by circumstantial evidence such as (1) the operator’s knowledge of the 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 miner. *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-12 (Nov. 1981).

Unlike a discrimination proceeding in which a judge is tasked with resolving conflicting evidence, in a temporary reinstatement proceeding the judge should not make credibility determinations or weigh the operator’s evidence against that of the Secretary’s when determining whether to grant the application for temporary reinstatement. *Sec’y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011); *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (It 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.”). Moreover, although evidence directed at an affirmative defense or rebuttal is permitted at a temporary reinstatement hearing, that “evidence may not serve as a basis for denial of reinstatement if it requires resolution of a credibility determination.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 301 (June 2021).

A. The Secretary Established that the Complaint Was Not Frivolously Brought

The “not frivolously brought” standard imposes a low standard of proof upon the Secretary. Here, I find that the Secretary met that standard and that Torres’s complaint involves a non-frivolous issue of discriminatory motivation.

The Commission has held that if the Secretary shows that the mine operator had knowledge of protected activity and that the time between the protected activity and the adverse

²⁵ In 2021 the Ninth Circuit Court of Appeals rejected the Commission’s longstanding *Pasula-Robinette* framework and instead adopted a “but-for” causation standard for discrimination cases brought in the Ninth Circuit. *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021). Although the standard for proving discrimination cases in the Ninth Circuit has undoubtedly changed, the Commission has recognized that “the requirements for a full discrimination proceeding do not affect the ‘not frivolously brought’ standard in a temporary reinstatement case such as this.” *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 303 (June 2021).

action was short, she has met her burden in most temporary reinstatement cases.²⁶ Here, the Secretary introduced evidence that Torres engaged in protected activity when he raised safety concerns to Towns, a foreman, and exercised his “stop work authority.” Neither Hayes nor French, both members of Yates management, disputed that Torres engaged in that activity, and both confirmed they had knowledge of that activity on the day it occurred. Moreover, there is no dispute Torres was discharged three days after that activity. Given management’s knowledge of the alleged protected activity and the temporal proximity between that activity and Torres’s discharge, I cannot find that the discrimination complaint filed by Torres was frivolously brought. Rather, I find that Torres’s complaint appears to have merit.

In addition to the circumstantial evidence of discriminatory motivation discussed above, the Secretary introduced evidence that Torres was assigned undesirable tasks after engaging in protected activity. Namely, Torres testified he, among other things, was assigned tasks outside of his craft in a different area of the facility than where he had been working, was assigned tasks for which he was overqualified, and was not provided with materials necessary to complete some tasks. Further, Torres testified that prior to April 13 he heard from another employee that Yates planned to lay off employees involved in the April 10 manlift incident. In her closing argument the Secretary asserted that the events described by Torres “showed clear animus” toward Torres because of his protected activity. Tr. 205-207. Although Hayes and French offered testimony that disputes Torres’s assertions and provides possible justifications for the work assignment, I am prohibited from weighing that evidence against the Secretary’s evidence when determining whether to grant the application for temporary reinstatement. Accordingly, I find that the Secretary’s evidence on Yates’s alleged animas toward Torres further establishes that the complaint was not frivolously brought.

The Secretary did not discuss or attempt to establish that Torres was subject to disparate treatment. Nevertheless, I find that the circumstantial evidence discussed above establishes that the application for temporary reinstatement was not frivolously brought and that Torres must be **REINSTATED**.²⁷ However, for reasons set forth below, I find that Yates’s reinstatement obligation is tolled.

²⁶ “The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action.” *Sec’y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157, 162 (Apr. 2021) (citing *Sec’y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000)).

²⁷ In *Sec’y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018), Commissioner Althen and former Commissioner Young held that 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.” The opinion went on to state:

Thus, 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

B. Immediate Reinstatement is Not an Available Remedy

The present case is rather unusual because Yates was rapidly downsizing prior to Torres' discharge, at the time of his discharge, and after his discharge. Although I cannot weigh the evidence presented by the parties when determining whether to grant the application for temporary reinstatement, I can evaluate undisputed evidence concerning events that occurred at the facility in 2023 to determine whether Yates's reinstatement obligation should be tolled.

The Commission has held that certain types of events affect the availability of relevant work at a mine for the miner at issue and may toll an operator's temporary reinstatement obligation. *Sec'y of Labor on behalf of McGoughran v. Lehigh Cement Company LLC*, 42 FMSHRC 467, 470 (July 2020). For example, "changing circumstances," such as layoffs that result in a reduction of the work force, may toll the obligation. *Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009). "Operators bear the burden of showing by a preponderance of the evidence that tolling is justified." *McGoughran* at 470 (citing *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb. 2013)). "[I]n order for an operator to establish that temporary reinstatement should be tolled based on a subsequent layoff, the operator must demonstrate that 'the layoff properly included' the miner who filed the complaint of discrimination." *Ratliff* at 397 (citing *Gatlin* at 1055).

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. In addition, the opinion stated:

We may define a "non-frivolous" case as one that is "viable." At the conclusion of a temporary reinstatement proceeding, the Secretary must have shown *by a preponderance of the evidence the existence a claim of discrimination or interference that is capable of succeeding* — that is, a case which is not foreclosed by the evidence available and one for which there is a reasonable cause to believe the complainant may prevail.

Id. at 48 (emphasis added).

The Secretary objected to the evidence presented by Yates regarding the changed circumstances presented by the layoffs at the facility. I overruled the Secretary's objection and allowed Yates to present all of its evidence on this issue as supported by *Sec'y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 (Apr. 2021) and other decisions. Based on the record as a whole I cannot say that the testimony of Torres was "demonstrably false, patently incredible, or obviously erroneous."

It is undisputed that the work being performed by Yates at the Mountain Pass Mine & Mill was winding down starting in March-April 2023. I credit the undisputed testimony of Hayes and French that work for welders was mostly completed at the time of Torres's termination and that there was no remaining work for structural welders at the time of his termination. Torres had been a structural welder for much of his employment in 2023 and he was listed as a structural welder in Yates's list of laid off employees, Yates Ex. R4, and on a disciplinary form, Yates Ex. R2 p. 2

I also credit the testimony of Hayes and French as to the method used when selecting people for layoff. Most importantly, I credit their testimony that, in any event, Torres would not have been one of the two millwrights that were still working as of the date of the hearing in this case. That is, if Torres had never complained about using the manlift to move the pipe or exercised his "stop work authority," he would have been laid off prior to the date of the hearing. *See Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315 (Feb. 2017) (discussing a judge's "ability to review the totality of the evidence in determining whether the operator carried its burden of proving that the employee would have been included in the layoff for reasons wholly unrelated to protected activity."). I specifically credit Hayes's testimony that Torres lacked the skillset to be performing work at the facility during the testing and commissioning phase. The two millwrights who remained as of the date of the hearing had more experience and possessed the specific type of skills that were necessary during this phase. Further, according to Hayes, none of the remaining millwrights had the absenteeism/tardiness issues that Torres had. Hayes described the millwrights who remained after June 8 as "exceptional." Moreover, it is highly likely the two remaining millwrights will be laid off soon because Yates's work at the facility is almost completed. Indeed, Hayes, the millwright superintendent, became a victim of downsizing at the facility on June 8, 2023.

Finally, I credit the testimony of French that one of the currently employed millwrights would have to be laid off to accommodate Torres's reemployment. The remaining millwrights are working about 20 hours a week on standby in case they are needed during testing and commissioning. The undisputed evidence establishes that Hayes and French honestly believed that Torres was not as qualified to do that work as other employees. Once material from the mine has been successfully processed by the facility and commissioning is complete, Yates will apparently no longer have any presence at the mine. If that work has not been completed by the date of this decision, it will be completed very soon.

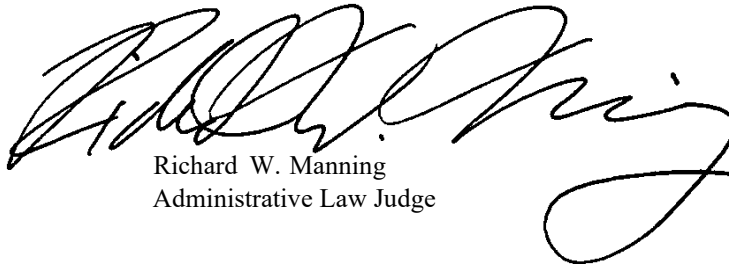
In *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, 396 (Feb. 2013), the Commission held that "[w]hile the scope of temporary reinstatement proceedings is limited to determining whether the complaint is frivolously brought, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled." There the Commission "reject[ed] the Secretary's argument that the judge . . . exceeded the scope of the temporary reinstatement hearing by considering whether the layoff tolled . . . [the operator's] obligation to temporarily reinstate" the applicant, and instead held that during a temporary reinstatement hearing a "judge may appropriately consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions or similar conditions." *Id.* at 397.

For the reasons stated above, I find that Yates demonstrated by a preponderance of the evidence, almost all of which was undisputed, that Torres would have been properly included in one of the many rounds of layoffs that occurred after April 13, 2023, even if he did not raise the safety issue involving the manlift or exercise his “stop work authority.” Given the rapidly dwindling Yates workforce at the facility, and the undisputed evidence that Torres lacked the skillset to be one of the remaining millwrights at the facility, I find that tolling is justified. I credit the testimony of Hayes and French on these facts. Their testimony was internally consistent, and they projected an honest demeanor.

Consequently, the obligation of Yates to reinstate Torres is **TOLLED**. If Yates recalls one or more journeyman millwrights or structural welders to work at the facility, Torres must be placed at the top of the recall list.²⁸

ORDER

For the reasons set forth above, I find that the Secretary established that Torres’s complaint of discrimination was “not frivolously brought,” as that term is understood in section 105(c)(2) of the Mine Act and, accordingly, the Application for Temporary Reinstatement is **GRANTED**. For the reasons discussed above, Torres’s reinstatement is **ORDERED** to be **TOLLED** until further notice. If Yates determines that it needs to rehire one or more journeyman millwrights or structural welders at the facility it **SHALL** give Torres the right of first refusal for the position. Both the Secretary and this court shall be notified if Yates determines that it needs to reinstate anyone to those positions. The Secretary **SHALL COMPLETE** her investigation of the underlying discrimination complaint as quickly as possible.²⁹ I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).



Richard W. Manning
Administrative Law Judge

²⁸ There is no evidence that Yates is performing work at any other location that is subject to MSHA jurisdiction.

²⁹ Under section 105(c)(3), the Secretary is required to complete her investigation within 90 days of receipt of the complaint of discrimination.

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