FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 18 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KEITH OVERFIELD, Complainant	DISCRIMINATION PROCEEDING Docket No. KENT 2014-483-D MSHA Case No.: MADI-CD-2014-13
v.	
HIGHLAND MINING COMPANY, LLC Respondent	Mine: Highland #9 Mine ID: 15-02709

DECISION AND ORDER REINSTATING KEITH OVERFIELD

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, Representing the Secretary of Labor

Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY
Representing Respondent

Before: Judge Lewis

On May 13, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.,* and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Keith Overfield ("Overfield" or "Complainant") to his former position with Highland Mining Company, LLC, ("Highland" or "Respondent") at the Highland #9 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Overfield on April 3, 2014, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Overfield to his former position and rate of pay.

On May 21, 2014 Respondent requested a hearing regarding this application via certified letter. A hearing was held in Evansville, Indiana on June 10, 2014. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

At the close of the hearing Respondent conceded that the miner's complaint had not been frivolously brought. However, Respondent maintained that the miners' discrimination claim should be barred because of untimely filing. In the alternative, Respondent further argued that any reinstatement order should be modified based upon the mine's shut down, tolling Respondent's Reinstatement obligation.

For the reasons set forth below, I grant the Secretary's application for temporary reinstatement of Overfield, find that Overfield's discrimination claim is not barred upon late filing, and find that there should be no tolling of Respondent's reinstatement obligation pending full hearing.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 623 (1978).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[1] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in*

[1] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that 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 sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and Overfield need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Stipulations

The parties stipulated to the following legal and factual propositions:

1. At all times relevant to this action, Highland Mining, LLC has extracted and produced coal in interstate commerce

2. Highland Mining, LLC owns and operates the No. 9 mine located in Union County, Kentucky

3. Highland Mining, LLC is an operator subject to the jurisdiction of the Federal Mine Safety and Health Administration and its Administrative Law Judges.[2]

4. Keith Raymond Overfield was employed by Highland Mining, LLC as a mine examiner at Highland No. 9 mine during the period from 12/5/2012 through September 30, 2013. He began at Highland on September 20, 2010.

5. Keith Raymond Overfield left employment at the Highland Mining, LLC No. 9 mine on September 30, 2013.

6. Keith Raymond Overfield filed a complaint with the Federal Mine Safety and Health Administration on April 3, 2014 alleging that he was wrongfully terminated from his employment at Highland Mining, LLC No. 9 Mine.

(Joint Exhibit 1).[3]

Contentions of the Parties

On April 3, 2014, McKinsey executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint on the same date. In this statement he alleged the following[4]:

> I feel I was discharged because I am a mine examiner and was finding numerous violations that I wrote in the exam book. They didn't want me to put all of them in the box but allow them to just take care of them. I couldn't do that so when I had to take leave for a medical condition, they used that to discharge me. I am asking for my job back with all back pay and benefits restored.

GX-1: *Application for Temporary Reinstatement* at Exhibit B, p. 2.

The Secretary also submitted the May 12, 2014 Declaration of Curtis Hardison, a Special Investigator employed by the Mine Safety and Health Administration, with the Application. Inspector Hardison wrote that he investigated Overfield's discrimination claim against Respondent. Based on his investigation, Hardison concluded the following relevant facts were true:

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[2] Clearly the parties intended to refer to the Federal Mine Safety and Health Review Commission's Administrative Law Judges. The undersigned takes no offense.

[3] Hereinafter Joint exhibits will be referred to as "JX" followed by the number. Government exhibits will be referred to as "GX" and Respondent's exhibits as "RX."

[4] The left-hand margin of the photocopied Discrimination Report filed by the Secretary was cut off. As a result, several words are either missing in whole or in part. These words have been recreated to the extent possible. Words and letters that are based on attempts to complete the document are included in brackets.

4. Based on the foregoing facts and other facts gathered during my investigation, I have concluded that Keith Overfield was terminated on September 28, 2013 by Highland because he made safety complaints and engaged in protected activity during the summer of 2013. Highland also engaged in activity that interfered with the miners' rights of examiners at the No. 9 mine, including Keith Overfield. This constructive discharge violated Section 105(c) of the Mine Act. Accordingly, the complaint filed by Mr. Overfield was not frivolous.

Id. at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. (GX-1). In addition, both Hardison and Secretary's counsel at hearing asserted that Overfield's late filing in this matter was excusable as arising from justifiable ignorance, mistake, inadvertence, or excusable neglect. (Transcript at 111-112)(GX-1: *Application for Temporary Reinstatement* at Exhibit A, p. 2).[5] Further the Secretary asserts that there is a non-frivolous issue as to whether a subsequent layoff properly included Overfield. (Tr. 118-120).

Respondent disputes the Secretary's claim that Overfield was terminated for making safety complaints, but concedes that the discrimination was not frivolously brought. (Tr. 110). However, Respondent argues that the discrimination complaint should not be considered because Overfield was impermissibly late in filing. (Tr. 111-116). Further, Respondent argues that even if reinstatement were appropriate, that Overfield would currently be laid off as a result of an unrelated accident that occurred at Respondent's Prep Plant. (Tr. 118-120).

Summary of Testimony

At the time of the hearing, Keith Overfield had last worked September 17, 2013 at the Highland #9 Mine as a certified mine examiner.[6] (Tr. 16). Overfield had started at the mine around September 20, 2010 as a roof bolter. (Tr. 16).

In November 2011, while a roof bolter, Overfield filled in for Respondent's mine examiner, Mark Burns. (Tr. 17). He did so because Burns was sick and, according to management, would not return to work. (Tr. 17). In that capacity Overfield examined the air courses and pre-shifted outby areas. (Tr. 17-18). To examine an air course, Overfield would travel an intake or return in its entirety and mark down any hazards or violations.[7] (Tr. 18). During examinations, Overfield would take air readings to ensure the air was flowing with the

[5] Hereinafter references to the transcript will be cited "Tr." with the page number.

[6] Overfield was present at the hearing and testified. (Tr. 15). Overfield had ten years of experience in underground mining and had held a Kentucky mine foreman certification since 2006. (Tr. 16-17, 60). At the time of the hearing Overfield was unemployed. (Tr. 15-16).

[7] Until the new law was passed in 2012, Overfield did not use the term "violation" to refer to conditions found in the mine. (Tr. 19). However, the way he conducted the examination did not change with the new law, he just changed the way he referred to conditions in the book. (Tr. 19).

necessary amount pressure and in the proper direction. (Tr. 18). Hazards, violations, and the course traveled were marked in a book at the surface, as was required by state and federal law. (Tr. 18-19). Most of the violations he found were pins (or roof bolts) out, pins sucking above the plates, or pins spread. (Tr. 20). Sometimes he found a substantial amount of these conditions. (Tr. 20). In a separate book, he would note the air readings. (Tr. 18-19).

Overfield examined about two miles a day in the air courses. (Tr. 21). In the returns, Overfield would use a permissible ride and in the intakes he would use a golf cart. (Tr. 21). Sometimes he was unable to get a ride because another miner, Darrell Bradshaw, would cut off the locks and take it. (Tr. 21, 65). These late starts would greatly affect his ability to conduct examinations. (Tr. 22). As a result, he would have to rush to complete the examinations in time and would not have the opportunity to do them properly. (Tr. 22). He rushed because this examination had to be completed before 12:00 a.m. Tuesday each week, or a violation would be issued. (Tr. 22-23). Overfield reported Bradshaw's thefts to "everybody" in management including the mine manager, the assistant mine manager, the safety department, the mine foreman. (Tr. 21-23). He even called the assistant mine foreman because he was stressed out trying to complete his job without the necessary tools. (Tr. 23). Overfield filed a harassment charge against Bradshaw. (Tr. 65). Both Overfield and Bradshaw were union employees, not management. (Tr. 66). Overfield was aware that he had the right go to the union representative and spoke to another miner, Larry Baker, about the situation. (Tr. 66).

In May 2012, Overfield went to the No. 2 unit's intake air course and found that his golf cart was missing again. (Tr. 24). Overfield attempted to reach the mine foreman, but he believed the foreman knew the reason for his called and chose to ignore it. (Tr. 24). The ride was eventually returned at 10:30, but the battery needed to be charged. (Tr. 24). Overfield then went to the foreman, Sleigh Kuykendall, and told him that the golf cart was dead and that he would not be able to complete the examination by midnight. (Tr. 24-25). Kuykendall said that he was tired of Overfield acting like he was a boss and that when Overfield returned to the pin crew he would show him who was boss. (Tr. 25). Overfield believed his job was permanent. (Tr. 25). He told Kuykendall that it was against the law to allow the air course to remain unexamined past 12:00 a.m. and that he was out of line. (Tr. 25).

The next day the Overfield's supervisor, assistant mine manager Aaron Farmer, told him that he would return to his duties as a roof bolter. (Tr. 20, 25-26). George Tudor was present as Overfield's union assistance. (Tr. 25). Farmer said he was not happy that Overfield had approached Kuykendall but Overfield believed he was just abiding by the law. (Tr. 26).

In November, Farmer told Overfield that examiners could not or would not finish the air course examination in seven days and Respondent was receiving citations for inadequate examination. (Tr. 26-27, 74-75). Farmer asked Overfield to apply for a soon-to-be posted examiner job.[8] (Tr. 26-27). Respondent wanted him to fix the problem by actually marking conditions in the book. (Tr. 75). Overfield bid for the permanent examiner job and was certified in December 2012, though he already had the proper paperwork before that point. (Tr. 27, 65).

[8] As this was a union mine, were required to be posted for bidding. (Tr. 27).

When Overfield returned to the examiner position, he was still working on air courses but two months later switched to the rotating crew examining belts.[9] (Tr. 27-28). This was the position he held until he left Highland. (Tr. 28). In that position he rotated between the day and second shift conducting the on-shift examination. (Tr. 28-29). When on day shift he examined the main north, main east, to No. 2 and 4 unit outby area of the mine for conditions in the belt entry. (Tr. 28, 30). He would cover around six miles in a day examining three main belts and two unit belts. (Tr. 29). He would check the belts and rollers, but also loose ribs, loose top, and pins out. (Tr. 29). He traveled mostly along the belt in a golf cart. (Tr. 29). During his pre-shift, Overfield would examine the outby travel supply roads. (Tr. 30). As a result, his name would be in both the pre-shift and on-shift book. (Tr. 30-31). Any condition he found were recorded and signed in on-shift book at the surface. (Tr. 29-30). If a condition required attention because it posed an immediate hazard or could not be corrected, Overfield would call out for repairs. (Tr. 30).

In December 2012, Overfield, along with three other examiners and some salaried personnel, received written reprimands for failure to complete his examination books properly. (Tr. 71-72, 74). Farmer informed him that he had failed to follow MSHA regulation and Respondent's policy because the examiners had failed to take air readings while moving a power de-energized power unit. (Tr. 71-72). MSHA Inspector Felix issued an Order for failure to include an air reading on three straight shifts on which the foreman signed off. (Tr. 72-73). Overfield did not believe that there was a hazard. (Tr. 72-73). He did not fail to include information; he misunderstood what was required under the law. (Tr. 72-73, 78). Overfield conceded that he should have known better but he also asserted that he followed the example of more senior examiners who had moved in this manner for as long as they could recall. (Tr. 72-74). Respondent had known about this practice long before the reprimand and had only disciplined the examiners after the violation was issued. (Tr. 77). Because of this, Farmer stated he did not want to discipline the examiners but that he was under pressure from MSHA to discipline them and the salaried personnel. (Tr. 74). Overfield believed Respondent should have corrected the problem rather than blaming the examiners. (Tr. 73).

Sometime after Overfield returned to examination, Farmer quit and was replaced by Les Hawkins. (Tr. 31). Hawkins and Overfield had numerous discussions regarding information recorded in the books. (Tr. 31, 34). Hawkins would ask Overfield to quit writing down pin violations and to write fewer conditions and then correct them the next day. (Tr. 31). Overfield believed that if something was recorded and it was not corrected or worked on within a certain number of shifts, MSHA would issue an order. (Tr. 33). Management said that in recording numerous pins in the supply and belt roads, that Overfield was doing MSHA's job for them. (Tr. 34). MSHA would see the recorded conditions, go to the recorded location, and then cite Respondent if the condition was not fixed. (Tr. 34-35). Overfield tried to comply with Hawkin's request, but it did not work out. (Tr. 31-32). A few times he did not record conditions, but later he or the foreman would write it up or tell another examiner about it. (Tr. 32). Most of the condition he did not record were damaged or spread pins. (Tr. 32). He would

[9] The problem with the locks continued. (Tr. 65).

not report conditions if he felt he was already overwhelming management with what he had found. (Tr. 32). For example, if he saw four conditions he might only record three. (Tr. 32-33).

In August 2013 Hawkins spoke with Overfield about 25 missing bolts that Overfield had recorded in the book following an examination. (Tr. 35). Hawkins asked Overfield "what the deal was" with writing down 25 pins. (Tr. 35). Overfield told him that he was doing his job. (Tr. 35). Hawkins said he was ruffling feathers, that he and Mike Jones, the overseer of mines, were unhappy about it, and that he should "watch it." (Tr. 35-36, 43). Overfield believed that MSHA wrote citations for this condition. (Tr. 35).

In addition to Hawkins, assistant mine foreman Randy Lehman, Luke Hunley, and Rodney Sims would heckle Overfield about writing up conditions. (Tr. 69-70). They would ask each day how many pins he wrote up. (Tr. 69-70). Terry Johnson would ask him "how much dumb shit did you write up today." (Tr. 70). That was all they said. (Tr. 70). Overfield felt that Johnson was joking and did not feel pressured as a result. (Tr. 70-71). No one else in management complained about what Overfield wrote or did not write in the books. (Tr. 71).

Overfield spoke with the union regarding management. (Tr. 66). In particular, he spoke with Baker (and perhaps others) in June 2013 about the fact that management "stayed on his butt" for writing up pins. (Tr. 67). However, Overfield did not file a grievance because he was still noting hazards he saw and he or someone else was correcting them. (Tr. 68). Baker told him to continue to write things up. (Tr. 68). Overfield was not aware of Baker speaking to anyone in management about the situation and did not ask him to. (Tr. 68). Nothing changed after he spoke with Baker, Hawkins continued to talk him about the conditions he noted. (Tr. 68-69).

Overfield felt pressure from management. (Tr. 36). He had been receiving treatment from neurologist Michael Mayron for depression and attention deficit disorder since 2008 (before working for Respondent). (Tr. 37, 58). Respondent was probably not aware that he was seeing Dr. Mayron, but they were aware of his condition. (Tr. 37). Overfield had separate conversations with Hawkins, Farmer, and Ezra French regarding his depression. (Tr. 38). Usually, he would discuss the condition when he was doing better. (Tr. 38). He was pretty sure that they knew he was on medication. (Tr. 38).

On September 17 Overfield returned from work and saw that his house had been robbed for the fourth time since June. (Tr. 36). He had filed two previous police reports but to no avail. (Tr. 36-37). When he saw his home he suffered a nervous breakdown. (Tr. 37). He then purchased a crossbow (because all of his guns were stolen), parked his car in the woods, and sat in the dark with the lights out for four days hoping to learn who had broken into his house. (Tr. 38). While there, Overfield was scheduled to work but did not attend. (Tr. 38-39). Instead, he called each day and left messages stating he was unable to go to work. (Tr. 39-40). He believed he could use his sick days and that he was not violating the attendance policy. (Tr. 40, 75). One day he told the mine foreman, Mickey Morris, that he would not be able to go to work and that he needed psychiatric help. (Tr. 39). He recognized that he was having a breakdown and that he was not fit to work. (Tr. 39-40, 76). Eventually, he called Dr. Mayron to set up an appointment

on the 25th, which was the earliest available date. (Tr. 40-41). He tried to call his family doctor but the doctor was out of town. (Tr. 40).

On Monday, Hawkins left a voicemail with Overfield asking him to do an air course examination. (Tr. 41). Overfield called back and said he had had a breakdown, that he had an appointment with a doctor the next day, and that he could not come in. (Tr. 41). Hawkins asked him to come in and said they would work something out. (Tr. 41). Overfield did not believe he had any business being there, but Hawkins knew Overfield would do anything if the mine was in trouble. (Tr. 41). As a result, Overfield went to the mine around 2:30 to talk to Hawkins. (Tr. 41-42). He did not clock in or wear the mining clothes he stored at the mine. (Tr. 42).

At the meeting Overfield informed Hawkins that he had a doctor's appointment the next day and did not believe he needed to be present, but that he would do an examination if necessary.[10] (Tr. 42-43). Hawkins told him to wait and then brought in Mike Jones and Tanya McCullough.[11] (Tr. 43, 100). When he arrived, Overfield did not anticipate that he would have a meeting with HR and management. (Tr. 44). The situation made Overfield's mental condition worse. (Tr. 44). Mike Jones asked Overfield what happened and Overfield said that he had had a nervous breakdown and was going to see a doctor. (Tr. 44). Mike Jones told him that he was going to be suspended with intent to discharge because he was absent for five days without a doctor's excuse and then gave him documents to that effect. (Tr. 44-45). Overfield asked for FMLA time and it was denied. (Tr. 44). When he said he had a doctor's appointment the next day, Jones said to bring a doctor's note in and they would see what they could do. (Tr. 46).

On the 25th, Overfield saw Dr. Mayron. (Tr. 46). He did not feel ready to go back to work and Dr. Mayron excused him from the 17th through the 26th. (Tr. 46, 76). The excuse verified that he was not able to work and he brought the note to HR. (Tr. 46-47). He did not know of any policy against a backdated doctor's excuses. (Tr. 75). Overfield felt on the 26th that he could return to work. (Tr. 77). He then called the mine and was told by McCullough that he was still suspended with intent to discharge. (Tr. 47).

On September 29, 2013 Overfield attended a meeting with Respondent. (Tr. 47-48). He first met with union officials, including Steve Jones, the District 12 Union Representative; Terry Miller, the Local 1793 President; George Tudor, the Local Union Treasurer; and Baker, Local Union Secretary and safety committee member. (Tr. 47-48). He then met with Mike Jones, Hawkins, and another human resources official (not McCullough). (Tr. 49, 100). At the

[10] While at the mine, Overfield checked the air course books to see if he was actually needed and saw that the area Hawkins had told him he would be examining already been checked. (Tr. 44-45). While he was there, no one talked about the examination. (Tr. 45).

[11] Tanya McCullough appeared at hearing and testified for Respondent. (Tr. 81). At the time of the hearing and in September 2013, McCullough was the manager of human resources for Respondent. (Tr. 81). In that capacity she was responsible for contract administration, attendance control, employee discipline, hiring benefits, and other duties. (Tr. 81).

meeting, they told Overfield that he was fired. (Tr. 49). The union did not say anything on his behalf but they told him to plead for his job or a last chance agreement.[12] (Tr. 49). The request was denied by Mike Jones and Hawkins. (Tr. 49). However, after speaking with the union, Respondent allowed Overfield to resign instead of being fired. (Tr. 51). Human resources drafted the resignation letter, Overfield signed and dated it on September 30, 2013, and it was witnessed by Steve Jones. (GX-2, Tr. 50-51). Overfield did not feel like he had any options because if he signed he got unemployment and a positive recommendation, but if he did not sign he would be terminated and his unemployment would be denied. (Tr. 51-52).

When Overfield signed the resignation letter, he believed he had been discriminated against and went to a lawyer about the issue. (Tr. 61-63). He contacted his attorney, Gary Gibbs, seeking legal advice but Gibbs did not represent miners in discrimination and wrongful termination proceedings. (Tr. 52-53). Gibbs referred Overfield to Amy Zachary but he was never able to meet with her. (Tr. 53, 62). She cancelled their first meeting at the end of October and later informed him that she no longer worked discrimination cases. (Tr. 53). He then spoke with attorneys in Evansville in December or January but they required a $2,500.00 retainer so he did not hire them. (Tr. 62-63). He considered other attorneys in Louisville. (Tr. 63). None of the attorneys Overfield spoke to suggested that he contact MSHA. (Tr. 55). Overfield did not approach MSHA because he did not know that he could. (Tr. 53, 55). In April, Overfield heard about a case involving David Woods and decided to call MSHA. (Tr. 53-54, 56). It was probably only one day between hearing about Woods' case and the filing of Overfield's complaint. (Tr. 56).

After his resignation, Overfield filed for unemployment benefits in Kentucky. (Tr. 63). Under the reason for the application he stated he was forced to resign because of a mental health crisis. (Tr. 63-64). He did not tell the unemployment office that he was discriminated against because he did not think it was relevant and because the mental health reason was on the one given by Respondent. (Tr. 64). Further, the form was very basic. (Tr. 64-65).

Overfield conceded that he attended annual refresher training in March. (Tr. 54). This occurred twice a year. (Tr. 54, 61, 105). During those trainings workers were instructed about miners' rights. (Tr. 54, 61, 105). Overfield testified that he did not recall learning about his right to go to MSHA with a discrimination complaint. (Tr. 54, 61). Randy Glen Duncan testified that the right to go to MSHA with a discrimination complaint was included in Respondent's miners' rights training.[13] (Tr. 106). However, Duncan was not sure if he had spoken with Overfield about miners' rights or even if Overfield was present for the training. (Tr. 107). He never told Overfield personally that if he was discriminated against, he should contact MSHA; that was the instructors' job. (Tr. 107). Duncan could not say how much time was devoted to miners' rights in the training, but he knew it was usually covered before lunch as part

[12] According to Overfield, a last chance agreement is a six month to one year period where a miner keeps his job but can be terminated for any run-ins with management. (Tr. 49).

[13] Randy Duncan appeared at hearing and testified for Respondent. (Tr. 103). At all relevant times he was safety manager with Patriot Coal, at Highland 9 mine. (Tr. 103-104).

of the safety meeting. (Tr. 108). In addition to the training, Duncan testified that MSHA regularly handed out miners' rights information and that the information, along with a phone number, was posted on a board at the mine. (Tr. 105-106). The discrimination protections were well known throughout the mining industry. (Tr. 106).

Back at the mine, on May 6 between 11:00 and 12:00, one of the floors of the Camp 9 prep plant collapsed. (Tr. 104). The Camp 9 prep plant is where the coal mined at Highland #9 is sent from underground to be cleaned and shipped to the terminal. (Tr. 104). The plant was idled from after MSHA inspector Coburn issued a (j) order (RX-F). (Tr. 104-105). With the prep plant down, coal production was impossible. (Tr. 83-84). Respondent continued to mine coal until May 9 and then, on the 10th the mine idled. (Tr. 84-85, 105). By May 12, no one was working. (Tr. 84).

On May 9, mine management personnel met with Steve Jones, the UMWA International District Representative, and Steve Earle, the International District Vice President and discuss how to get the employees through the layoff during the idle period. (Tr. 82-84, 100). (RX-A). (Tr. 82-83). Respondent and the UMWA made an agreement that they would retain the most senior employees in their respective job title during the period (RX-A). (Tr. 84, 86). Respondent determined the number of employees it still needed in each job title and then kept the most senior employees in each classification. (Tr. 84). Those employees would continue to work while the rest were idled. (Tr. 84). The job classification was the one that existed at the time of the layoff but the seniority calculation was from the time of hiring, not the time that the miner received that job classification. (Tr. 85-86). As operations ramped back up and more employees were needed, the same seniority rules would be used for call-back priority. (Tr. 85). Seniority and job classification would be the only issues considered during recall. (Tr. 85). At the time of this meeting, McCullough was aware that Overfield had filed the complaint, having learned of it in April. (Tr. 100). However, she asserted that the outstanding case with Overfield was not considered in making the agreement. (Tr. 100).

On May 12, Respondent had a meeting at Henderson Community college with the union and all of the employees. (Tr. 85, 105). Respondent explained that everyone would be off of work and then how everyone would be brought back. (Tr. 105).

According to McCullough, if Overfield still worked for Respondent, he would still be laid off. (Tr. 92-93). McCullough reviewed a list of workers classified as mine examiners and their seniority date. (Tr. 87). Even though Overfield was not employed in May 2014, he was included in the list at the No. 16 spot.[14] (Tr. 87-88). Because he was a mine examiner when he resigned, that was his classification used for determining the recall. (Tr. 87). The seniority ranking was placed automatically onto personnel information sheets based on information in the

[14] Tavon Polk and Overfield were both hired on the same day, September 20, 2010 (RX-C). (Tr. 86). As a result, a drawing was conducted to see who had the higher seniority. (Tr. 86). Polk drew the No.1 spot and Overfield the No. 2 spot for callback. (Tr. 86-87).

human resources data bank (RX-D).[15] (Tr. 88-90). At the time of the hearing, the ten most senior examiners had returned to work while the remaining examiners had not. (RX-E, Tr. 90-91). At No. 16 in seniority, five more examiners would be reinstated before Overfield. (Tr. 91-92). For example, Carl Rich was hired on December 16, 2009, before Overfield. (Tr. 90). Rich was ranked No. 13 on the seniority list of examiners and would be entitled to reinstatement before Overfield. (Tr. 90).

The personnel information used to determine seniority did not include previous job titles. (Tr. 96-97). One miner, David Reynolds, only became a belt examiner on September 25, 2013, around the same time Overfield left. (Tr. 97). However, McCullough could not say if Reynolds would not have been classified as a belt examiner if Overfield had not left, because Respondent added 60 new jobs between September 18 and 25 during a change in schedule. (Tr. 97-98). McCullough could not say which examiner was replacing Overfield, because of the change in staffing at Respondent's mine, however someone was replacing him. (Tr. 98-99). It is possible that someone would not be on the list if Overfield had not been laid off. (Tr. 99).

McCullough was familiar with the 2013 Coal Wage Agreement between Respondent and the UMWA and was aware that it was binding. (Tr. 93). The contract section regarding reduction and realignment allows senior miners to move into another job. (Tr. 93-94). However, McCullough believed that this was not a reduction because it was temporary. (Tr. 94). She believed the agreement with the UMWA ensured they followed the contract. (Tr. 100). No units were shut down due to economic reasons. (Tr. 94). Respondent simply had to idle the mine based upon the prep plant. (Tr. 94). If they had taken gone through a reduction, the 390 employees would have lost their jobs and health insurance in May and been forced to use the recall process to bid back into jobs when the mine started back up. (Tr. 94-95). Respondent and the UMWA were attempting to retain job titles and allow for extended benefits to minimize adverse effects. (Tr. 94-95).

McCullough also reviewed a list of roof bolters arranged by seniority date (GX-3). (Tr. 95-96). The list was highlighted for those roof bolters who had returned to work, including one with a seniority date of February 7, 2011). (Tr. 96). However, McCullough did not believe that this meant Overfield would be senior to the last recalled roof bolter because the agreement regarding recall superseded the contract. (Tr. 96). Under the terms of that agreement, it was not permissible for Overfield to return to another position, even if he was qualified. (Tr. 92, 101). Other employees with seniority over recalled workers have requested to change titled, but the call backs were based on seniority and job title, not just seniority. (Tr. 92-93). In fact, employees senior to Overfield were laid off despite being qualified to perform other jobs. (Tr. 101).

At hearing, Overfield's mental condition was still not good and he had been depressed since he lost his job. (Tr. 54, 58, 60). He had been depressed since he lost his job. (Tr. 54). He was unable to see Dr. Mayron or buy his depression medication (Pristiq) because he had lost his insurance and could not afford it. (Tr. 54, 58, 60). However, he was taking 30 milligrams of

[15] The sheet listed the employees' address, marital status, birth date, hire date, and title. (Tr. 88).

morphine twice daily, 10 milligrams of Oxycodone four times daily, and Adderall for attention deficit. (Tr. 56, 58-59). He was prescribed to take Adderall twice a day, but he could not afford to without insurance. (Tr. 56, 59-60). Instead, he would still take it if he required the ability to focus and pay attention. (Tr. 59-60). He had been on the pain medication since 2008 when he had the first of three back surgeries. (Tr. 56). The pain medications were generic and less expensive. (Tr. 60). This was the same medication he took while working. (Tr. 57). However, at hearing he felt that if he could take his medication, he could return to work. (Tr. 77).

Overfield believed that he was fired because he wrote too many conditions, including pin condition, in the book. (Tr. 55). He knew from being pulled aside by Hawkins that Respondent was unhappy that he recorded conditions. (Tr. 55). He believed they wanted an examiner who was not keen on finding hazards and violations. (Tr. 55).

Findings and conclusions

A. Timeliness

Both parties agree to the facts in this matter as it pertains to timeliness. Furthermore, the parties agree about the Commission's framework for determining timeliness. As a result, the only issue is the application of that framework to the instant matter.

Under §105(c)(2) of the Mine Act, a miner alleging discrimination has 60 days from the date of the discriminatory action to file a complaint with the Secretary of Labor. 30 U.S.C. §815(c)(2). As the parties agree, under settled Commission case law, the 60-day period is not jurisdictional. *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984); and *IMCO Services*, 4 FMSHRC 2135 (Dec. 1982). Instead, a judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" in order to determine whether a miner's late filing should be excused. *Arch of Illinois*, 21 FMSHRC 1381, 1386-1387 (Dec. 1999) *citing Hollis, supra.* To that end, a miner's late filing of a discrimination complaint may be excused on the basis of justifiable circumstances, including genuine ignorance, mistake, inadvertence, and excusable neglect. *Phillips Dodge Morenci*, 18 FMSHRC 1918, 1921-1922 (Nov. 1996) *citing Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). A consideration in determining whether a delay was justifiable is whether the operator suffered "material legal prejudice." *See Arch of Illinois, supra*; *see also Nantz v. Nally & Hamilton, Enters.*, 16 FMSHRC 2208, 2214-2215 (Nov. 1994) *overruled on other grounds Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996); *Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992); and *Lizza Indus.*, 6 FMSHRC at 13. Even a lengthy delay beyond the 60-day period can be permissible when it is justified by the circumstances and without prejudice to the operator. *See e.g. Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 905-06 (June 1986) (two year delay); *Nantz,* 16 FMSHRC at 2214-2215 (Nov. 1994) (four month delay).

In the instant matter, the parties agree that Overfield ceased his employment with Respondent on September 30, 2013. (GX-2, Tr. 50-51). Therefore, in order for his complaint to be considered timely, Overfield was required to file with the Secretary no later than November 29, 2013. However, Overfield did not file his discrimination complaint until April 3, 2014, 185 days after the adverse employment activity (and therefore, 125 days late for the 60-day deadline). (GX-1, Tr. 53-54, 56).

I find that Overfield's failure to file his discrimination complaint until April 4, 2014 was the result of genuine ignorance, mistake, inadvertence, or excusable neglect. I credit Overfield's testimony that he did not file with the Secretary because he did not know that he had that option. (Tr. 53, 55). While he conceded that he attended safety training that included miners' rights instruction, he stated that could not recall hearing that he had the right to bring discrimination complaints to MSHA. (Tr. 54, 61). While evidence suggested that some information on miners' rights was posted, nothing shows that Overfield had actual knowledge of his rights but failed to act. In fact, Respondent's witness, Duncan, could not state whether Overfield had actually received this information. (Tr. 107).

Overfield's genuine ignorance about the Mine Act's protective provisions is shown by his subsequent action. Specifically, he filed for his unemployment benefits and immediately sought out several attorneys in the field of wrongful termination and workplace discrimination. (Tr. 52-53, 61-63). Unfortunately for Overfield, none of these attorneys were aware of the Mine Act's provisions. (Tr. 52-53, 61-63). The Commission has considered the pursuit of related complaints when determining whether a delay is justifiable. *See Arch of Illinois*, 21 FMSHRC at 1387). The ignorance of these attorneys should not form a basis for punishing Overfield. The evidence shows that Overfield did not "sleep on his rights" but instead actively sought legal redress for the alleged wrong. He was simply genuinely unsure of how to do so. As a result, I find that Overfield's delay was justifiable.

I further find that no evidence was presented that indicated that Respondent suffered any prejudice from the delay. On the contrary, Respondent was able to vigorously defend its position through witnesses and documentary evidence without any perceivable hindrance.

In light of these circumstances, I find that a dismissal of Overfield's claim would be inappropriate, regardless of the delay.

B. Discrimination Claim

As noted, *supra*, at the close of hearing Respondent essentially conceded the miner's complaint was not frivolously brought. (Tr. 110). Therefore, only a brief discussion of this issue is deemed warranted. To support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action.

In the instant matter, Overfield testified that in his capacity as mine examiner, he often reported hazards and violations in the record books on the surface. (Tr. 18-20, 29-31).

Specifically, he testified that he reported broken, missing, or overly spaced roof bolts and other, similar conditions. (Tr. 20, 29). Therefore, there is evidence of protected activity.

Further, Overfield testified that he was pressured to resign on September 30, 2013. (Tr. 51-52). According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985). Constructive discharge is an adverse employment action for the purposes of the Act. *See e.g., Simpson v. FMSHRC,* 842 F.2d 453, 461 (D.C. Cir. 1988); and *Nantz*, 16 FMSHRC at 2210. Therefore, there is evidence of an adverse action.

In light of the evidence of protected activity and the evidence of adverse action, the question turns to whether there is a nexus between those two factors. The Commission recognizes that direct proof of actual knowledge is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC,* 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

With respect to hostility or animus, Overfield testified that members of management asked him to cease making safety complaints and to refrain from reporting conditions in the record books. (Tr. 31, 34-36, 43). Further, he testified that members of management would give him a hard time about his zeal for safety. (Tr. 35-36, 43, 69-71). With respect to knowledge, Overfield testified that he reported safety conditions in the record books reviewed by management and that management referenced his complaints in ordering him to "back off." (Tr. 31, 34-36, 43, 69-71). With respect to the coincidence in time, Overfield testified he made these complaints at all times during which he was a mine examiner from November 2011 to May 2012, and again from November 2012 until his discharge on September 30, 2013. (Tr. 18-20, 29-31). Finally, the Secretary presented no evidence of disparate treatment. Considering all of the factors together, there appears to be some evidence of nexus between the protected activity and the adverse employment action.

Respondent argued that it gave Overfield the choice between signing a letter of resignation because he had failed to follow the proper procedures for sick leave and missed five unexcused days. (Tr. 44-45, 51-52). However, given the low evidentiary bar at this level of the proceeding, Respondent conceded that Overfield's discrimination claim was not frivolously brought. In light of this fact, and the evidence summarized above, I find that Overfield's discrimination complaint was not frivolously brought. As a result, I find that temporary reinstatement is appropriate.

C. Tolling

While conceding that Overfield's discrimination complaint had some merit, Respondent argues that the temporary reinstatement should be tolled in light of intervening circumstances. Within the scope of a temporary reinstatement proceeding, the Commission has permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled. *Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394, *3 (Feb. 2013). The Commission recognized that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012)(citations omitted). When an operator seeks to toll a temporary reinstatement order based on a subsequent layoff, it bears the burden to demonstrate by a preponderance of the evidence that "the layoff properly included" the miner who filed the complaint of discrimination. *Ratliff*, 35 FMSHRC at *3-4 (*citing Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1055 (Oct. 2009)). However, if the objectivity of the layoff as applied by the miner is called into question during the temporary reinstatement proceeding, the judge must apply the "not frivolously brought" standard from §105(c)(2) of the Act to the miner's claim. *Id.* The Commission further clarified that under the "not frivolously brought" standard, the Secretary's burden of proof was "limited to establishing facts which *could* support the claim that any inclusion of the complaining miner in the layoff might have been based in part on the miner's protected activity." *Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 1183, *4 (May 2013)(emphasis in original). The Commission explained that the lower burden was appropriate because "the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action." *Id.* Therefore, if the claim that the layoff arose at least in part from protected activity is not frivolous, then the reinstatement should not be tolled. *Ratliff*, 35 FMSHRC at *3-4. If the Secretary then fails to establish any possibility that the miner's inclusion in the layoff was motivated by the miner's protected activity, then the burden reverts to the operator to show, by a preponderance of evidence, that tolling was justified. *Id.*

Therefore the Commission requires that when an operator raises the issue of tolling in a temporary reinstatement proceeding the judge must first determine whether the Secretary has "called into question" the objectivity of the layoff. If the Secretary has not called that objectivity into question, then the operator must prove by a preponderance of the evidence that the miner was properly included in the layoff. If the Secretary has called the objectivity of the layoff into question, then the judge must determine if facts exist which *could* support a claim that the layoff was based in part on the miner's protected activity. If the Secretary is able to present a non-frivolous argument regarding the discriminatory motivation of the layoff, then the tolling is inappropriate. However, if the Secretary is only able to provide frivolous arguments as to the discriminatory motivation of the layoff, then the Respondent must only prove by a preponderance of the evidence that the miner was properly included in the layoff.

In the instant proceeding, Respondent argued that the temporary reinstatement should be tolled because Overfield would have been included in a layoff that occurred on May 10, 2014. Specifically, it noted that on May 6, 2014, a floor in the mine's preparation plant collapsed, necessitating a complete shutdown of the mine on May 10, 2014. (Tr. 84-85, 104-105). Respondent and the UMWA developed a call-back procedure from that layoff based on seniority

and job title. (Tr. 82-84, 100). Miners were brought back to the mine based on their job titles at the time of layoff and their overall seniority at the mine. (Tr. 84-86). Respondent argues that under the terms of that agreement with the union, Overfield would still be laid off as there are five examiners with more seniority who had not yet been returned to work. (Tr. 92-93). Therefore, the tolling issue was raised.

Respondent argued that the Secretary failed to call into question the objectivity of the layoff. (Tr. 119). The Commission has not specifically defined what actions are necessary to "call into question" the objectivity of a layoff. In the instant matter, however, I find that the Secretary's actions were sufficient to call into question the objectivity of the layoff. There are several reasons for this determination. Perhaps most importantly, Secretary's counsel affirmatively stated that the Secretary wished to challenge the layoff's objectivity. (Tr. 119-120). In addition, the Secretary's counsel cross-examined Respondent's witnesses regarding the layoff and also introduced documentary evidence during that cross-examination. Given the fact that the layoff occurred three days before the Discrimination Complaint was filed (and the call-back procedure was announced the day before it was filed) and the Complaint was filed without knowledge of the layoff, there was no reasonable time for the Secretary to "call into question" the objectivity of the layoff before hearing. (Tr. GX-1, 50-51, 84-85, 105). In fact, Secretary's counsel only received copies of Respondent's documentation regarding the layoff at the hearing. (Tr. 79-81). Furthermore, even if the Secretary had knowledge of the layoff, the duty to "call into question" the objectivity of the layoff only arises when Respondent asserts that the reinstatement should be tolled. Therefore, the total record established that the Secretary reasonably called into question the objectivity of the layoff.

Having found that the Secretary "called into question" the objectivity of the layoff, the next issue is whether the Secretary presented facts which could support a claim that the miner's inclusion in the layoff was based in part on the miner's protected activity. In the instant matter, it appears that all the miners at the mine were laid off for several days after the collapse of the prep plant. (Tr. 83-85, 105). The issue here is whether facts exist that could support a claim that Respondent's failure to call Overfield back to work since such time was the result of his alleged protected activity. I find that such facts exist. Specifically, Respondent's witnesses testified that the layoff and callback procedure used at the mine differed in some ways from the collective bargaining agreement as it relates to reduction and re-alignment. (Tr. 92-94, 96, 101). If the collective bargaining agreement sections regarding reduction and re-alignment were followed, Overfield could have bid for the roof bolter position. (Tr. 93-94). At the time of the hearing a roof bolter position was filled by a miner with less seniority than Overfield. (Tr. 96). Further, McCullough testified that when Respondent and the union were negotiating this modified call-back procedure, that Respondent was aware of Overfield's discrimination complaint.[16] (Tr. 100). As discussed *supra*, Respondent was aware of Overfield's protected activity. (Tr. 31, 34-36, 43, 69-71). Therefore, I find that the Secretary has raised a non-frivolous issue as to whether the

[16] McCullough's inability to answer what specific miner had filled Overfield's position raised further questions as to the objectivity of the miner's continued inclusion in the layoff. (*See also Secretary's cross-examination* at Tr. 98-100).

call-back procedure was designed in part to prevent Overfield from being called back because of his protected activity.

Respondent's witnesses argued at hearing that Overfield was not considered in creating the call-back procedure. (Tr. 100). McCullough argued that the reduction and re-alignment sections of the collective bargaining agreement did not apply in this matter. (Tr. 94). Further, she stated that the motivation in creating the call-back procedure used was to protect the miners' benefits during the layoff. (Tr. 94-95). All of these assertions could very well be true. However, at this preliminary stage, it would be inappropriate to consider the conflicting evidence regarding the call back procedure. It is sufficient that the facts could support a claim that Respondent designed the call back procedure to prevent Overfield from returning to the mine. A full determination of the circumstances surrounding the layoff and call back will be made at the hearing on the merits.

Therefore, after careful review of the total record and above-cited case law, I find that the Secretary's claim was not frivolous that Overfield *may* not have been called back to work from layoff due to, in part, his past safety complaints. The Secretary mustered sufficient facts that *could* support the claim that any continuing inclusion of Overfield in the layoff following the shutdown *may* have been based in part on his protected activity. Therefore, given the burden would not in such case revert to the operator to show, by a preponderance of the evidence, that tolling was justified, I need not resolve whether Respondent proved that Overfield was properly laid off. Instead, I find that tolling is inappropriate in this matter. Therefore, immediate temporary reinstatement is warranted.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Overfield, as a mine examiner, at the same rate of pay, for the same number of hours worked, and with the same benefits, as at the time of his discharge.

John Kent Lewis
Administrative Law Judge

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