

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 2014

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of JOSHUA D. BURKHART
Petitioner

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. LAKE 2014-342-D
VINC-CD 2014-01

v.

PEABODY MIDWEST MINING, LLC,
Respondent

Mine ID: 12-02295
Mine: Francisco Underground Pit

**ORDER GRANTING SECRETARY'S MOTION TO EXCLUDE EVIDENCE OUTSIDE
THE SCOPE OF TEMPORARY REINSTATEMENT HEARING**

Before: Judge Rae

This case is before me upon an application for temporary reinstatement under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent has requested a hearing on the application for temporary reinstatement and a hearing date of April 29, 2014 has been set. On April 22, 2014, the Secretary filed a motion in limine to exclude Respondent's evidence extending beyond the scope of the temporary reinstatement hearing.

Pursuant to section 105(c)(2), if the Secretary finds that a complaint of discrimination was not frivolously brought, the Commission shall, upon an expedited basis on application, order the immediate reinstatement of the miner pending a final order on the complaint. 30 U.S.C. § 815(c)(2). The scope of a temporary reinstatement hearing is limited to a determination by the judge as to whether a miner's discrimination complaint was frivolously brought; it is not the judge's duty to resolve conflict in testimony. *Sec'y o/b/o Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012); *Sec'y o/b/o Billings v. Proppant Specialists*, 33 FMSHRC 2383, 2384 (Oct. 2011); *Sec'y o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In determining whether the discrimination complaint was frivolously brought, the judge should evaluate evidence of the Secretary's prima facie case to determine whether it appears to have merit and that a non-frivolous issue exists. *CAM Mining, LLC*, 31 FMSHRC at 1089, 1091; *Argus Energy WV, LLC*, 34 FMSHRC at 1877; S. Rep. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The Commission has found that a judge errs by assigning a greater burden of proof than required when weighing the operator's affirmative defense and rebuttal evidence against the Secretary's evidence of a prima facie case

in a temporary reinstatement proceeding. *CAM Mining, LLC*, 31 FMSHRC at 1091. It has also stated that the temporary reinstatement hearing determines “whether the evidence mustered by the miners . . . established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Sec’y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999); *Argus Energy WV, LLC*, 34 FMSHRC at 1878.

The Secretary argues that in its request for hearing, Respondent offers evidence to justify Burkhart’s termination and an affirmative defense and that such evidence for the purpose of creating testimonial conflict or establishing a rebuttal or affirmative defense should be excluded.

Based on the case law discussed above, evidence that tends to show a rebuttal or affirmative defense and evidence that requires a determination of credibility of a witness will not be admitted for the purpose of the hearing on temporary reinstatement.

It is hereby **ORDERED** that the Secretary’s motion to exclude evidence beyond the scope of the temporary reinstatement hearing is **GRANTED**.



Priscilla M. Rae
Administrative Law Judge

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