FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 13 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LUCERO ZAMBONINO, Petitioner v. COLONIAL MINING MATERIALS, LLC, and INFINITY MINING MATERIALS, LLC, Respondents	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2014-196 DM MSHA Case No. SE-MD-14-05 TR Mine: Williams Farms Sand & Shell, Inc. Mine ID: 08-01331

AMENDED DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Tara E. Stearns, Esq., Office of the Solicitor, Washington, DC and Channah S. Broyde, Esq., Office of the Solicitor, Atlanta, GA for Petitioner

Mark N. Savit, Esq., and Ross J. Watzman, Esq., Jackson Lewis P.C., Denver, Colorado for Respondents

Before: Judge McCarthy

I. Statement of the Case

This case is before me upon the Secretary of Labor's Amended Application for Temporary Reinstatement filed on behalf of Complainant, Lucero Zambonino, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against Colonial Mining Materials, LLC ("CMM"), and its putative successor-in-interest, Infinity Mining Materials, LLC ("IMM").[1] The Secretary seeks an Order holding Respondents jointly and severally liable to reinstate Zambonino to her ticketing agent (scale

[1] At the outset of the hearing, after review of the Secretary's Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof, Respondent's Opposition and Authorities in Support Thereof, and after hearing oral argument on the issue, I granted the Secretary's Motion to Amend Application for Temporary Reinstatement because the Secretary timely filed the Amended Application before the commencement of the hearing and Respondents have failed to demonstrate prejudice and have had ample opportunity to research the successorship issue, file an Opposition, and make oral argument. Tr. 36.

clerk) position held immediately prior to her December 20, 2013 alleged termination, or to a similar or substantially position at the same rate of pay, benefits, and hours, with the same or equivalent duties. Amended Appl. at 4; *see also* Tr. 45.

II. Jurisdiction

Respondents stipulated to jurisdiction in this matter. Tr. 9-10. Jurisdiction exists because Respondents, Colonial Mining Materials, LLC and Infinity Mining Materials, LLC are or were the operators of the Williams Farms Sand and Shell, Inc., (the "Mine") a mine within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 803, and the products of the subject mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. § 804. Respondents are covered by the Mine Act because the Mine's activities affect interstate pricing and demand. *See D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004); *United States v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993). In addition, CMM and IMM are "person[s]" within the meaning of sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 803(f) and 815(c).

III. The Application's Procedural History

On March 14, 2014, the Secretary filed an Application for Temporary Reinstatement against Respondent CMM and served a copy of the Application on CMM by first class mail. On March 18, 2014, IMM registered with MSHA as the operator of the Williams Mine. (R. Prehearing Report, 12; Sec'y Mot. to Amend, Ex. B). On March 24, 2014, CMM filed a request for a hearing.

On April 1, 2014, the undersigned convened a conference call with the parties. The parties requested that an expedited hearing be postponed to allow them time to work out stipulated facts on the successorship issue and submit cross motions on summary decision. Although expressing skepticism that the parties would arrive at agreement, the undersigned allowed them to try. On April 3, 2014, the parties executed an agreement to waive the hearing and provide the undersigned with stipulated facts by April 11, 2014, and cross motions for summary decision by April 18, 2014.

As deadlines approached, the parties informed the undersigned that they could not agree on stipulated facts and that a hearing would be necessary. Accordingly, during a conference call with the parties on April 24, 2014, the undersigned set an expedited hearing date for April 30, 2014 in Fort Myers, Florida. During that call, the Secretary advised that she would be filing a Motion to Amend Application for Temporary Reinstatement.

On April 25, 2014, the Secretary filed a Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof to add IMM as a Respondent successor. On April 29, 2014, Respondents' Opposition was filed.

An expedited hearing was held on April 30, 2014 in Fort Myers, Florida. Witnesses were not sequestered as credibility is not at issue in a temporary reinstatement proceeding. *See, e.g., Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089, 1091 (Oct. 2009). The parties filed simultaneous post-hearing briefs on May 7, 2014.

At the hearing, Respondents stipulated that Ms. Zambonino's January 14, 2014 discrimination complaint was not frivolously brought. Tr. 44, 58-59, 156.

The Secretary called two witnesses, Complainant, Lucero Zambonino, and MSHA Special Investigator, Michael Larue. At the close of the Secretary's case, the undersigned denied Respondents' motion to dismiss, as more fully explained below.

Respondent then called one witness, Randall Bono. Bono, a retired lawyer and judge, is the managing member of Pantheon Management, LLC, which is the managing member and part owner of Gravitas, LLC ("Gravitas"), the parent company of CMM, IMM, and Colonial Concrete Construction Precast, LLC ("C³P"). Bono testified that Gravitas is the majority partner of IMM for tax purposes. Bono is also the managing member and owner representative of both CMM and IMM. Tr. 176, 224-225, 250. Bono also owns Frugalitas, LLC, which wrote an (unsigned) $500,000 check on behalf of IMM on February 25, 2014 to execute the purchase of 500,000 tons of rock, sand, shell, and other material from the Mine. Sec'y Ex. 2; Tr. 230-31.

Respondent called Bono primarily in an effort to show that the Secretary failed to establish a non-frivolous claim that IMM is a successor-in-interest jointly and severally liable for discriminatory actions of CMM and that temporary reinstatement should be tolled because the alleged layoff of Zambonino and the subsequent elimination of her position was motivated solely by economic conditions.

After close of Commission business on Friday, May 9, 2014, Respondents filed a motion to strike section IV(B) of the Secretary's post-hearing brief, which summarizes the facts alleged by MSHA Special Investigator Michael LaRue in a sworn declaration, attached to the Secretary's original and amended Application for Temporary Reinstatement. On Monday, May 12, 2014, the Secretary filed an Opposition to Respondents' Motion to Strike.

On Monday, May 12, 2014, the undersigned convened two conference calls with the parties and *sua sponte* re-opened the record until close of business that day for proffer and receipt of, and objection to, all pleadings in this matter, including, inter alia, the Secretary's Application for Temporary Reinstatement, with attached exhibits; Respondent's Request for Hearing; the Secretary's Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof, with attached exhibits; Respondent's Opposition to the Secretary's Motion to Amend Application For Temporary Reinstatement, with attached Exhibits; the Parties' respective Pre-hearing Reports, with attached exhibits; Respondents' Motion to Strike; and the Secretary's Opposition. By close of business May 12, 2014, the Secretary filed a Motion Responsive to the Court's Telephonic Order and Respondent filed a e-mail proffer, which attached, inter alia, "R-

7," a document showing CMM employees, job titles and termination dates.

Minutes before close of business that day, and one minute after I issued my original decision in this matter at 4:54 p.m., the Secretary objected to "R-7," arguing that the document, unlike the other documents proffered by the parties, had previously not been submitted to the undersigned prior to the hearing. On May 13, 2014, the undersigned convened a conference call with the parties to discuss the Secretary's objection. During that call, Respondent withdrew its proffer of "R-7."

I receive all of the other documents set forth above and previously submitted to the undersigned before hearing into the record in this matter. Accordingly, Respondent's Motion to Strike is denied.

The undersigned emphasizes that it is best practice at the outset of all Commission litigation, including discrimination and civil penalty proceedings, to proffer the pleadings or formal papers at issue, and any position statements or alleged admissions against interest at the outset of the hearing. After all, as in other administrative litigation, it is the pleadings that join the issues to be litigated by the parties before the administrative law judge and these should be part of the record. Unfortunately, this practice is rarely followed in Commission proceedings.

IV. The Disputed Issues

According to Respondents, the issues that remain to be litigated are:

1. Whether IMM is a successor-in-interest jointly and severally liable for the alleged discriminatory action of CMM under the test adopted by the Commission in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980), *aff'd in relevant part sub nom., Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom., Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983)?

2. Whether temporary reinstatement is appropriate because Zambonino's former job at CMM has been eliminated and Respondent IMM claims that it does not intend to hire someone to perform that job in the future?

3. Whether Respondent IMM is required to create a position for temporary reinstatement of Zambonino given the Administrative Law Judge's decision in *Sec'y of Labor on behalf of Haynes v. Decondor Coal Co.,* 10 FMSHRC 1810, 1814 (Dec. 1988) (ALJ),which denied immediate reinstatement to complainant's former position because that job had been eliminated due to a layoff "necessitated by business reasons," but ordered temporary reinstatement once any position became available that complainant was qualified to perform by training or work experience?

4. Whether temporary reinstatement should be granted because the alleged layoff of

Zambonino and subsequent elimination of her position was motivated solely by economic conditions?

According the Secretary, the issues that remain to be litigated are:

1. Whether IMM is a successor-in-interest jointly and severally liable for the discriminatory discharge of Zambonino on December 20, 2013 by predecessor CMM?

2. Whether temporary reinstatement should be ordered and not tolled, notwithstanding Respondents' claim that Zambonino would have been included in a subsequent economic layoff, because there is still work available for her, and the evidence, as a whole, supports a non-frivolous finding that her inclusion in any such layoff might have resulted, at least in part, from her protected activity?

V. Stipulated or Disputed Facts at Hearing

At the hearing, the parties stipulated to the facts described in paragraphs 1, 2, 3, 4, 6, 8, 12, 15, 16, 17, 19, 23, 24, 26, 27, and 28, and the second two sentences of paragraph 30 of Respondents' Prehearing Report. Tr. 11-18. Those stipulated or disputed facts are summarized below.

1. CMM is a wholly owned subsidiary of Gravitas. Gravitas is the principal owner of eighteen other companies involved in: commercial real estate holdings, private lending and capital investment, multi-family/condo development, residential custom home building, hotel development and management, hollowcore manufacturing, concrete manufacturing, and aggregate mining.

2. CMM entered into an Excavation Agreement with Williams Farms Partnership on June 28, 2013 for the purpose of excavating, removing, processing, marketing, and selling sand, rock, shell, and other materials from the Mine.

3. The Mine is a sand and shell mine located in Punta Gorda, Florida.

4. Complainant worked as a ticketing agent at the Mine from July 2013 to December 2013.

5. Respondents contend that Zambonino was *laid off* from her position as a ticketing agent on December 20, 2013 by the Mine's manager, Wayne Filyaw, and Gravitas representative, Randall Bono. The Secretary claims that Zambonino was *terminated* on said date by Filyaw for making safety complaints. Tr. 11.

6. On January 8, 2014, Zambonino filed a discrimination complaint with MSHA. After receiving the complaint, MSHA Special Investigator Michael LaRue conducted an

investigation of Zambonino's discrimination claim against Respondent. The Secretary subsequently filed an Application for Temporary Reinstatement on March 14, 2014.

7. CMM contends that it laid off two other employees before Zambonino and eight other employees following Zambonino's alleged layoff. The Secretary disputes this and argued at hearing that requested personnel records were not provided. Tr. 13.

8. On February 25, 2014, Williams Farms Partnership and CMM executed a Release Agreement and Covenant Not to Sue whereby the parties agreed to terminate the Excavation Agreement dated June 28, 2013.

9. CMM claims that it operated the Mine until it ceased all excavation activities on February 28, 2014. The Secretary disputes this and argued at hearing that MSHA's data retrieval system shows that IMM did not register as operator of the Mine until March 18, 2014, and that CMM did not assign its machine repurchase agreements to IMM until March 12, 2014, and did not assign its long-term equipment lease agreements to IMM until March 21, 2014. Tr. 11-12; R. Opposition, Ex. 2.

10. CMM contends that it shut down on February 28, 2014 due to: (1) losses of approximately $800,000 in its eight months of operation, and (2) the wash plant located at the Mine was unable to provide useable sand. Respondent contends that it currently has approximately $800,000 in debt and $25,000 in accounts receivable. The Secretary disputes this and argued at hearing that audited financial information was not provided to substantiate CMM's contentions. Tr. 12-13.

11. IMM contends that it commenced operations at the Mine on February 28, 2014. The Secretary disputes this and implicitly argues that IMM could not legally commence operations until it registered with MSHA on March 18, 2014. Tr. 13, 16. IMM contends that 30 C.F.R. § 41.11 permits a 30-day grace period from commencement of operations to submit a legal identity report. Tr. 16.

12. On March 18, 2014, Respondent completed and filed MSHA ID form (2000-7) transferring operations of the Mine to IMM.

13. CMM contends that it had a maximum of fifteen employees at one time during its period of operation, but was down to seven employees at the time it shutdown. Three of the seven employees were re-hired by IMM. The Secretary disputes this. Tr. 13.

14. Two of the re-hired employees were equipment operators and one was a working foreman. One of the equipment operators was re-hired as a part-time employee. The Secretary disputes and notes that personnel records were not provided. Tr. 13.

15. Mr. Filyaw is now employed as the mine manager of IMM.

16. Ms. Zambonino is currently employed by Home Depot in Fort Myers, Florida.

17. Amanda Miller, Ms. Zambonino's former coworker, is no longer employed as a scale clerk (ticketing agent) at the Mine. She is now working in accounts payable at C^3P, a Hollowcore manufacturing company owned by Gravitas.

18. There are no plans or agreements for further excavation at the Mine by a Gravitas subsidiary. Additionally, there are no plans to resume use of scales by anyone other than a manager or foreman at the Mine or any other mine owned by a Gravitas, LLC subsidiary. The Secretary declined to stipulate to this. Tr. 14.

19. CMM is no longer engaged in mining operations in the United States.

20. Infinity Lake, LLC, a wholly owned subsidiary of Gravitas, LLC, was formed on July 16, 2013 and purchased the Infinity Lake Mine, in Punta Gorda, Florida on July 26, 2013. The Secretary declined to stipulate to this. Tr. 14.

21. IMM was formed on August 27, 2013 for the purpose of operating the Infinity Lake Mine. The Secretary declined to stipulate to this. Tr. 14.

22. Infinity Lake Mine is not currently operational as it does not have all of the necessary permits required to excavate. As such, it does not have a registered Mine ID at this time, and has no employees. The Secretary declined to stipulate to this. Tr. 14.

23. IMM is owned 70% by Gravitas LLC, 15% by Wayne Filyaw, and 15% by Phil Morris.

24. On January 1, 2014, IMM entered into a lease with Williams Farms Partnership allowing IMM to store, stockpile, process, load, weigh, and remove from the property the quantity of material acquired by IMM.

25. IMM does not engage in any extraction activities. The Secretary declined to stipulate to this. Tr. 14.

26. On February 25, 2014, IMM and Williams Farm Sand and Shell, Inc. executed a Bill of Sale in which IMM bought approximately 500,000 tons of rock, sand, pre-excavated shell, and other material located at the Mine for $500,000.

27. IMM is processing raw rock material into mostly #89 and some #57 stone. Approximately 100% of the #89 stone and 25% of the #57 stone is delivered to Coast Concrete Company, a Gravitas subsidiary. The remainder of the #57 stone is sold to multiple entities.

28. Neither CMM nor IMM owned any of the extraction, washing, crushing, or screening equipment on the site. CMM leased its equipment from a third party.

29. IMM has four employees, including one manager, one working foreman, and two equipment operators. The Secretary declined to stipulate to this. Tr. 14-15.

30. IMM does not have a ticket agent employed at either the Mine or the Infinity Lake Mine, and does not intend to hire one in the future. While DOT regulations require the trucks to be weighed upon leaving the Mine, the manager and/or foreman are responsible for completing this task before the material is sold. Typically, only ten to fifteen trucks leave the mine per day. The Secretary declined to stipulate to the first sentence since it addressed future intent. Tr. 15.

31. IMM lost approximately $43,000 from January through March 2014. The Secretary declined to stipulate to this. Tr. 15.

VI. Summary of Testimony

A. Randall Bono's Testimony and Respondents Minimal Financial Documentation

Randall Bono testified that CMM was formed about late 2011 or early 2012 to operate the Quality Mine on a royalty basis to supply sand, shell, and other material to Colonial Concrete Company, which ran a redi-mix plant located about two miles from the Quality Mine. Tr. 177-79.

Bono testified that IMM was formed about June 2013. Tr. 194. No documentation was proffered to support this. As noted, IMM is majority owned (70%) by Gravitas. IMM has two minority shareholders, Wayne Filyaw and Phillip Morris, who each own 15%. Tr. 213. Bono is Gravitas' majority owner representative to IMM. Tr. 212.

CMM operated the Quality Mine until September 2013, when the mine ran out of viable material. Tr. 1178-79. CMM began looking for other sources of sand, rock, and shell material. Tr. 179. Although Gravitas had acquired another mine called Infinity Lake Mine, it was not yet operational because permits were not in place. Tr. 179.

Bono testified that Mr. Williams, the owner of the Williams Farms Sand and Shell Mine, had about 500,000 to 600,000 tons of pre-mined sand and rock stockpiled and approached "us" about negotiating a deal. Tr. 179-80. On June 28, 2012, CMM executed two agreements with the owner of the Williams Mine. Tr. 180; Sec'y Ex. 4. The Excavation Agreement granted CMM the right, inter alia, to excavate rock, sand, and shell on 400 acres at the Williams Mine, in exchange for a $2/ton royalty. *Id.* The Excavation Agreement was effective August 1, 2013 through July 31, 2014 and allowed either party to terminate the agreement without cause one year after the effective date. Sec'y Ex. 4. The other agreement granted CMM the right, inter alia, to

buy from Williams' stockpile of mined rock and mined and washed sand, all the rock and washed sand that CMM could process, sell and/or use for a $3/ton royalty as weighed at the Williams scale, a fixture on the property. Tr. 180; Sec'y Ex. 4. Bono signed both agreements on behalf of CMM. Sec'y Ex. 4.

Bono testified that CMM expected to produce 100 to 150 tons of crushed rock per hour at the Mine, but only managed to produce 75 tons per hour. Tr. 183. In December 2013, CMM started trying to produce washed sand, but it did not meet specifications due to problems with the wash plant. Tr. 183-84.

Bono testified that he approached Williams in December 2013 about buying the rock and sand stockpile for $1 a ton. Tr. 197. Bono testified that IMM purchased the stockpile because they still needed rock their concrete companies. When asked by the undersigned why he wanted to purchase the stockpile if he was losing money, Bono testified that "we were paying him $3 a ton royalty for the rock and sand, and if we were able to get it down to $1 a ton, we figured we might be able to make this thing work. We would be closer, which we are closer. Okay?" *Id.*

Bono started negotiating the purchase of the material when CMM was still the operator of the Williams Mine. Tr. 197-98, 236. The lease was initially drafted as an agreement between CMM and the Williams Farm Partnership. Tr. 237. CMM's name was subsequently crossed out by hand and IMM's name was inserted on the tenant signature line. Sec'y Ex. 3; Tr. 237. While describing the negotiations with Williams, Bono did not refer to CMM or IMM as separate entities, rather he used the term "we." Tr. 198.

Bono testified that in early to mid-January 2014, CMM attempted excavating shell at the mine. Tr. 182-83. Bono testified, however, that the MSHA inspection on December 16, 2013, further discussed below, caused a two-week delay because the area that CMM intended to excavate remained flooded after MSHA allegedly shut the mine down. Tr. 187-88. He further testified that eventually CMM was able to begin excavating and it spent "most of January just putting product on the ground." Tr. 188. Bono testified, without explanation, that there was "no market" for the product CMM excavated. Tr. 188.

Respondents submitted unaudited profit and loss statements from CMM from January through December 2013 and from January through cessation of operations in late February 2014, purporting to show approximately $750,000 in losses from January 2013 to April 2014. Tr. 193; R. Ex. 5. That financial information, however, partially encompassed CMM's operation, revenue and fees from the Quality Mine. Tr. 191; R. Ex. 5. Respondent also submitted unaudited balanced sheets for CMM as of December 31, 2013 and February 28, 2014, the date CMM ceased operations. R. Ex. 5. That financial information, however, includes long-term loans payable to Frugalitas of $600,000 and $735,000, respectively.

On February 25, 2014, Frugalitas, LLC, a financing company that Bono personally owns, purchased 500,000 tons of rock, sand, shell, and other material from Williams Farms Sand and

Shell, LLC on behalf of IMM. Sec'y Ex. 2; Tr. 230-31. No balance sheet, audited or otherwise, was proffered for IMM. Respondents did admit into evidence an IMM profit and loss statement from January through March, 2014, even though Bono testified that IMM did not commence operations until March 3, 2014. R. Ex. 6; Tr. 213. Although not proffered in evidence, Bono testified that he had reviewed IMM's profit and loss statement through the end of April 2014, which shows losses are down to $24,000 and IMM may have actually made a little bit of money. Tr. 218.

Bono testified that CMM ceased operations on February 28, 2014 because it could not sustain the losses it was suffering and could not afford its leases on equipment. Tr. 194. Bono testified that Williams let CMM out of the Excavation Agreement, but Gravitas did not walk away from the Williams Farms Sand and Shell Mine because "we still needed the rock." Tr. 196.

As noted, on February 25, 2014, Bono executed an agreement to have IMM purchase the entire pre-mined stockpile at the Williams Mine. Tr. 223; Sec'y Ex 2. Also on February 25, 2014, Bono executed a 20-acre lease with typewritten date of January 1, 2014, under which Williams Farms Partnership granted IMM the right to crush and process the stockpile at the mine for the earlier of 60 months or the date on which the material had been completely processed. Tr. 133; Sec'y Exs. 2-3.

Bono testified that IMM began operating the Mine in place of CMM on March 3, 2014, although CMM as a corporate entity still exists. Tr. 193, 215. Wayne Filyaw, Mine Manager for both CMM and IMM did not change the mine operator ID with MSHA until March 18, 2014, four days after the Secretary served a copy of the Application for Temporary Reinstatement on Respondents by first-class mail. Sec'y Application for Temporary Reinstatement; Sec'y Mot. to Amend, Ex. B; R. Opposition at para. 4. CMM assigned its machine repurchase agreements to IMM on March 12, 2014. CMM assigned its long-term equipment lease agreements to IMM on March 21, 2014. R. Opposition, Ex. 2. Bono testified that other equipment, such as the Sandvik crusher, has yet to be assigned, although "we're trying to get Sandvik assigned." Tr. 185, 254.

Bono testified that CMM had seven or eight employees at the end of February 2014, and IMM employs four of these former CMM employees, one on a part-time basis. Tr. 201-02. These miners are Wayne Filyaw, Mine manager; John David Hardee, foreman; Jason Mosley, full-time operator; and Floyd Layport, part-time operator. Tr. 200; Sec'y Mot. to Amend, Exs. A, B; R. Opposition, Ex. 3. Filyaw is the manager, salesman, ticket agent, and office sweeper at the Williams Mine for IMM. Tr. 200. Bono further testified that one or two of the other employees were employed by other subsidiaries of Gravitas including Amanda Miller, former ticket agent, who was employed by C³P without training as a receptionist when her predecessor resigned right before CMM ceased operations. Tr. 202. Bono testified that Gravitas rehired "[a]s many as we could, and I think it was one or two." *Id.* Accordingly, based on Bono's own testimony, five or six of the seven or eight CMM employees in late February 2014 retained employment with Gravitas subsidiaries.

IMM crushes and screens from the same pre-excavated stockpile that CMM crushed and sold. IMM produces and sells 89 stone used for pump mixes that are poured from trucks, and a larger 57 stone used in pouring concrete. Tr. 199, 217. Colonial Concrete Company uses 100% of the 89 stone and about 25-30% of the 57 stone. Tr. 216. Bono testified that IMM has been unable to sell the remaining 57 stone because they do not have certification from the Florida Department of Transportation (FDOT), but IMM is expecting to receive FDOT certification any day. Tr. 216-17. IMM's crushing operation is currently producing about 75 tons an hour, the same rate of production as when CMM operated the Mine, but a rate that Bono testified was insufficient to make crushing rock "solely a possibility." Tr. 183, 216.

Bono testified that IMM weighs an average of about ten trucks a day at the Williams Mine, which takes 15-20 minutes for Filyaw or foreman Hardee to perform. Tr. 204-05. Respondents' Pre-hearing Report states that the average number of trucks weighed per day is 10-15. R. Prehearing Report at 30. Bono testified that he anticipates a 20-40% increase in truck volume once IMM obtains FDOT certification. Tr. 218. He further testified that IMM will be a very profitable business once it obtains FDOT certification for the 57 stone and is able to wash the sand and make a usable product, but as things currently stand, IMM would not be profitable if it hired more people. Tr. 219.

Bono testified that IMM is still trying to open the Infinity Lake mine: "We're working on that as we speak trying to get the permits." Tr. 201. He explained that IMM does not currently excavate or sell sand or shell at the Williams Mine, although it wants to sell sand. Tr. 205. IMM hopes to open the wash plant at the Infinity Mine and take its sand there to wash it and get the fines out. Tr. 216.

B. Complainant Zambonino's Testimony and MSHA's Special Investigation of Her Safety Complaints

Zambonino testified that on July 1, 2013, she completed an application for employment at C³P's main office in Placida, Florida after Wayne Filyaw told her about a job in e-mail correspondence during June 2013. Tr. 60-61, 70, 105; Sec'y Ex. 1 (page one of a multi-page application); *see also* Tr. 68-69. Zambonino testified that she was absolutely sure that the handwritten notation "CMM" was not present of the top of the application when she completed it. Tr. 105.

Filyaw told Zambonino that "he was going to be working from a mine that they were leasing, and they were going to open the Infinity Lakes mine that he used to work from before, and he was going to need several people. He was going to have to staff both mines, and he needed bilingual ticketing agents to work at both mines . . . ." Tr. 79-81; *see also* Tr. 127 (Zambonino testified on questioning from the undersigned that "[t]hey were planning to open [the Infinity Lakes mine] again because Mr. Bono had bought it . . . he needed to staff both mines; the Williams Farm mine and the Infinity Lakes mine. So he needed to staff both mines, and he needed bilingual ticketing agents for that.").

When mine manager Filyaw hired Zambonino, he told her that he worked for C³P and gave her a business card that said project manager for C³P. Tr. 69. Zambonino testified that she assumed that she was being hired by C³P. Tr. 70. Zambonino was paid by a payroll company. Tr. 106. Filyaw, who reported to Bono, supervised Zambonino, and hired her about July 1, 2013, as a bilingual ticket agent to work at the Williams Farms Sand and Shell Mine. Tr. 70, 78.

Zambonino testified that there were about four or five employees working at the Mine at that time, and others coming and going. Tr. 96, 115. Filyaw was present at the Mine on a daily basis. Tr. 102. He did not testify in this matter, although he was present in the courtroom.

Zambonino testified that people were constantly applying for jobs at the CMM trailer during September, October, and November 2013, and most of them were hired. Tr. 103. Zambonino testified that CMM equipment operator, Louis Blackwelder, was hired in October, but then went out on workers' compensation disability because of an accident he had at the Mine. Tr. 84, 116. Zambonino testified that she learned from speaking to Filyaw that operator John Murawski was also not laid off. Rather, he was let go after his equipment broke down and he refused to load trucks as directed by Filyaw. Tr. 84, 122.

In October 2013, about four months after hiring Zambonino, Filyaw hired Amanda Miller, another ticket agent so that Zambonino could train her to work at the Infinity Lakes mine when it opened. Tr. 79-80, 120. Miller did not speak Spanish. Tr. 83, 121. Miller also received some quality control training from CMM to ensure that samples from stockpiled material were up to standards. Tr. 95. According to Zambonino, Miller worked at the Infinity mine on December 12 or 13, 2013 generating tickets for trucks loaded with dirt fill to be sold to a landfill company. Tr. 80-81, 120-21.

Zambonino described her ticket agent job duties as printing out computerized tickets from the scale house, which showed the weight of the trucks as they crossed the scale before leaving the Mine. Tr. 71. Zambonino spoke to the truck drivers in Spanish, and sometimes was asked to take or make calls in Spanish. Tr. 78. She testified that her other duties included compiling daily and weekly reports regarding the number of loads that were broken down by material or truck number, answering and making phone calls in Spanish, researching on the Internet to find prospective customers, and cleaning the office trailer. Tr. 71, 78. She testified that an average of about fifteen loaded trucks left the mine each day, although Zambonino recalls a five to eight day busy period during October 2013 when about thirty to forty trucks left the mine. Tr. 75-76. It took Zambonino about a minute or two per truck to generate a ticket. Tr. 130.

Zambonino would send her tickets and reports through interoffice envelopes to a lady named Mandy Pittman at Colonial Coast Concrete Company (CCC), the main customer and accounting entity for CMM. Tr. 72-75. CCC purchased CMM's raw stockpile material such as sand and rock, which was crushed and washed into crushed concrete and sold to CCC for about $5 a ton. Tr. 77-78.

According to the sworn declaration of MSHA Special Investigator, Michael Larue, which is attached to the Secretary's initial Application, the Secretary alleges the following:

On November 12, 2013, Filyaw directed Zambonino and Miller to clean out the officer trailer located on the Infinity Mine, an abandoned mine in Punta Gorda, Florida, which Respondent CMM planned to reopen. Upon arriving at the Infinity Mine, Zambonino observed rat feces, urine and nests inside the trailer and she complained to Filyaw that the trailer was unsafe. Filyaw told Zambonino to either go home or clean the trailer.

On December 6, 2013, Zambonino submitted a written complaint to OSHA describing the conditions inside the Infinity Mine trailer and requesting an inspection. In her complaint, Zambonino also alleged that the heavy equipment operators at the Williams Mine did not have access to restroom facilities. Zambonino had previously complained to Filyaw about the lack of restroom facilities at the Williams Mine.

On December 9, 2013, OSHA forwarded Zambonino's complaint regarding the lack of facilities at the Williams Mine to MSHA. On December 10, 2013, an OSHA compliance officer arrived at the Williams Mine, privately interviewed Zambonino, Miller, and Filyaw, and then went to the Infinity Mine and inspected the trailer.

On December 16, 2013, MSHA inspected the Williams Mine and issued two citations and ordered CMM to withdraw two miners who had not been trained.

On December 17, 2013, Zambonino reported for work at the Williams Mine and Filyaw told her that the mine had been shut down. Zambonino and all the other employees left the Mine. Later that day, Filyaw discussed the situation with Bono, who told Filyaw to "cut back the staff now."

On December 18, 2013, Filyaw called all employees back to the Williams Mine for training, except Zambonino. On December 19, 2013, after the training was completed, MSHA terminated the citations and order and the Mine resumed operations. That same day, Filyaw informed Zambonino that her services as a bilingual ticket agent were no longer needed. On December 20, 2013, Zambonino was officially terminated. At C³P, Filyaw continues to employ Miller, who has less seniority, experience, and education than Zambonino.[2]

Based on the foregoing, Special Investigator Larue concluded that Zambonino's claim that she was *terminated* by Respondent CMM because she filed a safety complaint with MSHA was not frivolously brought. *See* Application For Temporary Reinstatement, Ex. A.

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[2] Zambonino did not know whether Miller made complaint to OSHA or MSHA. Tr. 121.

As noted, at hearing, Respondents stipulated that Zambonino's January 14, 2014 discrimination complaint was not frivolously brought. Tr. 44, 58-59, 156.

Zambonino testified that on Tuesday, December 17, 2013, when she reported for work and was entering the open door to the trailer, foreman John David Hardee was talking to foreman Rodney Flint and mine manager Filyaw. Tr. 85-87, 96, 100, 111. Zambonino heard Hardee tell Flint and Filyaw that it would be really nice to find out who the rat was that told on us so we can crush it. Zambonino testified that Hardee looked into her eyes when he uttered these words. Tr. 86.[3] At that point, Filyaw approached Zambonino from his desk and told her that he had "bad news, that MSHA had come the day before, and they had cited them for violations and that they (MSHA) had shut down the mine." Tr. 85, 89. Filyaw further told Zambonino that "[w]e can no longer operate, have any trucks carrying material. So I need to send all the employees home." Tr. 89. On cross, Zambonino testified that Filyaw told her that MSHA had shut them down. Tr. 106, 113; R. Ex., 13, line 3.

At that point, Zambonino asked to see the papers that Filyaw was holding and he showed such papers to her. Tr. 89-90. Zambonino then told Filyaw that since the mine had been shut down by MSHA, she understood that she no longer had a job, and she asked Filyaw for copies of the papers for unemployment purposes. Filyaw told her that she did not need to have a copy of the documents, and if anybody needed any information, they could call him. Tr. 90.

Zambonino testified that she assumed that day was the last day of operations so she finished up pending reports and went home. Tr. 90. Before Zambonino left, she overheard Filyaw tell Hardee and Flint that CMM was losing money and that Bono was sick of all the problems they were having (including problems with MSHA), and that Bono wanted to pull the plug and close down the Mine for good. Tr. 112, 128, 130.

Zambonino testified on aggressive cross that Filyaw did *not* say ". . . no, we're not closing. We're going to open. You still have a job here." Zambonino explained that Filyaw led her to belief that she did not have a job anymore. Tr. 113.

Later that day, Zambonino called Filyaw from home because she was not completely sure that CMM was going to close for business. So, Zambonino asked Filyaw when she could return to work. Tr. 91. Filyaw told Zabonino that he was going to turn in his resignation in the morning and he would not be able to tell Zambonino "if they were going to ever open again," but she could call Mandy Pittman to find out when she can go back to work if they ever open again. Tr. 91, 107.

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[3] On cross, counsel established Zambonino did not mention Hardee's alleged statement in her complaint to MSHA. Tr. 110-111.

The next day, Wednesday, December 18, 2013, Zambonino called the Mine because she still was not sure that they were out of business. Tr. 91. Ticketing agent Miller answered the phone. Zambonino hung up. Tr. 92.

Later that same day, Zambonino called Pittman to ask if Zambonino could work. Tr. 92. Zambonino told Pittman that she was calling because Filyaw had told Zambonino that he was going to turn in his resignation, and that if Zambonino wanted to go back to work, that she should call Pittman. Tr. 93. Pittman told Zambonino that she was not aware that Filyaw was resigning, that the mine was going to open after the miners were trained, and that Miller was not there either. Tr. 93.

Filyaw never called Zambonino back for training. Tr. 94.

On Thursday, December 19, 2013, Zambonino called Filyaw about coming back to work. Filyaw told Zambonino that "they were doing fine without a bilingual ticket agent and not to [come] back." Tr. 94; *see also* R. Ex. 13 (Zambonino's January 14, 2014 MSHA discrimination complaint stating, inter alia, "[o]n December 19, . . . Filyaw . . . told me 'things are working out well without a bilingual ticketing agent' and that I was not to go back to work." Zambonino understood Filyaw's comments to mean that there was no longer a job for her. Tr. 94. It was obvious to Zambonino that Filyaw had not resigned. Tr. 121.

Zambonino testified that she was willing to do any training if it would help her get her job back. Tr. 95. Zambonino testified that about ten people worked at the mine at the time she was let go, and Zambonino was not aware of more than ten people working at the mine at any time that she was employed. Tr. 117, 118.

C. Special Investigator Larue's Testimony and Bono's Rejoinder

MSHA inspector and special investigator Michael Larue testified that he was assigned Zambonino's discrimination complaint. On January 23, 2014, he interviewed Filyaw, at Gravitas offices in Sarasota, Florida in the presence of Bono and the intermittent presence of Gravatis CEO Flynn. Tr. 134-35; Sec'y Prehearing Report at 3, para 17. Based on his investigation, Larue understood that the rank and file miners at CMM reported to a foreman, who reported to mine manager Filyaw, who reported to CMM representative for Gravitas, Randall Bono. Tr. 136.

After Filyaw's interview of Filyaw, while the group was waiting for portable toilets to arrive at the Mine site, Larue explained to Filyaw and Bono that MSHA did not shut the Mine down, but only withdrew two miners under a 104(g)(1) Order until proper training had been provided, at which point the Mine could continue operating. Larue testified that Bono then made a comment that insinuated that he was a direct decision maker in Zambonino's termination. Tr. 137, 144. Larue testified that Bono exhibited frustration because he had received information from Filyaw that MSHA had shut him down, and Bono pointed at Filyaw and told Larue that upon receiving that news he had told Filyaw to cut the staff now (immediately). Tr. 138.

Bono testified, "I don't recall saying that. I'm not denying it, but it's certainly true that we decided to start cutting staff in November, and then, after the episode in December with the MSHA inspection and shutdown of the mine, I said we can't keep doing this. We're getting killed. We got to start cutting back." Tr. 220. Respondents' counsel then asked Bono:

> Q. And was there a time when maybe you even thought about dare I say pulling the plug on the entire operation?
>
> A. That was under consideration as early as November.
>
> Q. Did Mr. Filyaw ever offer to resign?
>
> A. Yes, sir.
>
> Q. Did he offer you his resignation?
>
> A. Yes, sir.
>
> Q. And what happened?
>
> A. The MSHA inspection occurred, as I understand it, at 3:50 in the afternoon on Monday, [December] January 16. I didn't know anything about it until Tuesday morning when I got a call from the crusher salesman out there. He had brought people in from the Northeast to repair the crusher that was shut down or wasn't working appropriately, and he told us that the MSHA inspector had shut the mine down and they got kicked off the property and he couldn't do the repairs.
>
> I didn't know anything about the MSHA inspection or the repairs or anything going on at that point in time. I was distraught that Wayne hadn't called me and told me the mine had been shut down by MSHA. I called Wayne up and not politely asked what was going on, and Wayne then informed me at that time, and I asked Wayne what happened. He said MSHA shut us down. I wasn't here. He was out making a sales call. There was no management staff there at the time of the MSHA inspection according to Wayne, and he didn't know what happened, and he was trying to reach the MSHA inspector, was unable to reach him, and didn't reach him -- another MSHA representative sometime that afternoon, as I recall, to find out what was going on and what had happened.

Q. Did anyone at the mine tell you or did you ever hear that they were given a piece of paper that evidenced that the inspection was made as a result of an employee complaint?

A. Never. The first time we ever saw that document -- and we still haven't seen it to this day -- it was flashed by this investigator in front of Mr. Filyaw, and he said did you ever see this before, and Wayne said no, and I still haven't seen it to this day.

THE COURT: Who? By Mr. LaRue?

THE WITNESS: Yes, sir. That was during the interview. We had no notice that anyone had ever filed a complaint. The MSHA inspector never told us. We never got any notice, and whoever he told, if he told anybody, it wasn't an officer, manager, or anything to do with the management of that company because none of them were there that day.

BY MR. SAVIT:
Q. Fair to say, Mr. Bono, that all of the decisions to lay people off or not replace them were economic at Colonial and –

THE COURT: Well, you're leading.

MS. STEARNS: Objection.

MR. SAVIT: Okay.

THE COURT: In a critical area I might add.

MR. SAVIT: I will withdraw that question. I'm very sorry.

BY MR. SAVIT:
Q. Can you tell me what your reasons were for not replacing people after October of 2013 at Colonial Mining?

A. It was all economic. We were losing our backsides, and we couldn't continue those kind of losses. We had to figure out a way to cut it down to try to save as many jobs as we could.

Q. Same reason for layoffs during that period?

A. Yes, sir.

MR. SAVIT: I don't have anything further.

Tr. 220-223.

Larue testified that he understood Bono's December 17, 2013 directive to Filyaw, i.e., cut the staff now, to mean that Bono was upset that MSHA had shut him down, and given the time line of events, Bono was "eliminating" Zambonino because he believed that she may have made the complaint that brought MSHA out to the Mine site. Tr. 138, 142.

On cross, Larue conceded that Bono did not explicitly say anything in connection with cutting the staff now that had anything to do with a complaint being made to MSHA. Tr. 139. Rather, Larue testified that he drew an inference based on Bono's comment that after learning from Filyaw that MSHA shut the mine down, Bono had ordered Filyaw to cut the staff immediately because MSHA was on the scene. Larue conceded that he did not formally interview Bono or ask him to explain his comment. Tr. 139, 142. On further cross, Larue testified that he had reason to doubt that the reason for the shutdown was financial, but had no reason to doubt Zambonino's testimony that Filyaw stated on December 17 that the reason Bono said that he was pulling the plug was in part because of financial reasons and in part because Bono believed that MSHA had shut them down. Tr. 140-42. Larue further conceded, however, that Bono may have been under the mistaken impression that MSHA had indeed shut him down. Tr. 144. Larue did not recall whether he asked CMM for overall financial statements and did not recall receiving any. Tr. 145.

On questioning from the undersigned, Larue testified that he reviewed e-mail correspondence between Filyaw and Zambonino in which Filyaw indicated that he had a need for a bilingual ticket agent, but that Filyaw did not indicate that both mines needed to be staffed with bilingual agents. Tr. 146. The Secretary did not offer the e-mail colloquy.

On February 13, 2014, MSHA apparently issued citations to CMM for defective brake lights on a loader, improper containment of fuel storage tanks, and failure to regularly inspect fire extinguishers. Sec'y Prehearing Report at 13, para. 18.

VII. Respondent's Motion to Dismiss

At the close of the Secretary's case, the Respondents moved to dismiss the Amended Application for Temporary Reinstatement because the Secretary allegedly produced no evidence to show that the elimination of Zambonino's ticket agent job was in any part motivated by discriminatory as opposed to financial reasons, that the evidence established that CMM's largest miner complement was in October 2013 after which there were work force reductions supporting Respondents' argument that there was no need for two ticket agents, and that ticketing agent Miller was hired to work at another mine, which did not ever open. Tr. 152-53.

The Secretary responded that the burden of proof to establish a tolling defense is on the operator and the Secretary's obligation to establish a non-frivolous claim that the so-called economic layoff tolls the reinstatement obligation does not even come into play until the operator has made a showing concerning tolling. Furthermore, the Secretary noted that in the Commission's *Cobra* decision (cited below), the Secretary offered no evidence whatsoever, and the Commission looked at the evidence provided by the operator to determine that there was a non-frivolous reason to think that the layoff that supposedly would have included the miner might have been motivated, at least in part, by the miner's protected activity. Therefore, the Secretary reserved the right make her case at the end of the hearing after cross examination of Respondent's witnesses. Tr. 153-54.

The undersigned denied Respondents' Motion to Dismiss, noting the parties' stipulation that Zambonino's discrimination complaint was non-frivolous. The undersigned found that the Secretary established a non-frivolous case that IMM is a successor to CMM based on facts concerning substantial continuity in the business entity going forward. The undersigned further found that the Secretary established a non-frivolous claim that IMM may be a *Golden State* successor with notice of the MSHA complaints that Zambonino filed and therefore jointly and severally liable for Zambonino's termination. Even assuming that the undersigned needed to reach the tolling issue based on a layoff for economic reasons, the undersigned found that the Secretary has put on a non-frivolous case establishing facts that could support the inference that Zambonino was fired and not laid off. Finally, the undersigned found that should it be necessary to reach the tolling issue, the Secretary has provided sufficient evidence in this temporary reinstatement record to support a non-frivolous claim that Zambonino's selection for or inclusion in any layoff or the elimination of her ticketing agent position was motivated (at least in part) by her protected activity. Accordingly, the undersigned denied the motion to dismiss. Tr. 156-57.

VIII. Legal Analysis

A. Applicable Temporary Reinstatement Precedent

As noted, Respondents have stipulated that Zambonino's discrimination complaint was not frivolously brought. The Commission has recognized, however, that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012) (citations omitted). Consistent with the narrow scope of temporary reinstatement proceedings, the Commission permits a limited inquiry into whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous. *See Sec'y on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009) (temporary reinstatement order does not require that a miner is owed reinstatement under every circumstance, regardless of changes that occur at the mine after issuance of the order). In *Gatlin*, the Commission held that the duration of a miner's temporary reinstatement may be modified if the operator can prove that the miner's inclusion in a subsequent layoff was entirely unrelated to his protected activity. *Id.* at 1055.

The Commission addressed this issue again in *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394 (Feb. 2013), *dismissed for lack of jurisdiction, Cobra Natural Res., LLC v. FMSHRC*, 742 F.3d 82, 83 (4th Cir. 2014). The Commission reiterated that when an operator attempts to demonstrate that a layoff properly included a reinstated miner (or would have included the miner if he or she had not been discharged previously, in the case of a complaining miner whose case is being heard), the Secretary may "assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner." *Id.* at 397. Given that the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action, the Commission held that "if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the 'not frivolously brought' standard contained in section 105(c)(2) of the Mine Act to the miner's claim [regarding the layoff]. . . In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous." *Id.*

The Commission most recently affirmed this precedent in *Sec'y on behalf of Dustin Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183 (May 2013). The Commission reiterated that the inquiry into tolling must be limited, consistent with the scope and spirit of a temporary reinstatement proceeding. The Commission stated:

> . . . the Secretary shall be allowed to present the rebuttal evidence he indicated he was prepared to introduce on the issue of tolling at the original hearing. (Tr. citations omitted). The Secretary can also introduce evidence and cross-examine witnesses to question the objectivity of the layoff as it would have applied to Rodriguez. If the Secretary pursues that issue, the judge shall determine whether the evidence, as a whole, supports a "non-frivolous" claim that such a layoff might have been motivated in any way by the miner's protected activity. If it does, the operator's request that reinstatement be tolled must be denied. *See Cobra*, [35 FMSHRC at 397]. Because it is inappropriate to resolve conflicting testimony at this stage, the Secretary's burden of proof is 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.
>
> Should the Secretary fail to sufficiently establish the possibility that any inclusion of Rodriguez in the layoff might have been motivated by the miner's protected activity, the judge must then consider the entire record and determine whether the operator has proven by a preponderance of the evidence that the layoff of local miners, which the operator alleges took place no later than February 22, justifies tolling its obligation to temporarily reinstate Rodriguez. If the

> operator succeeds in proving that tolling is justified, the judge shall determine the period of time for which the layoff would have properly included Rodriguez and shall limit any tolling to that period.

Id. at 1187-88.

In the instant case, the tolling issue is presented by Respondents CMM and IMM and its obverse is presented by the Secretary, i.e, that alleged successor IMM is jointly and severally liable for CMM's alleged discrimination. Accordingly, I apply the non-frivolous standard to both the successorship issue and the tolling issue.

B. The Secretary Has Established a Non-Frivolous Claim that IMM is CMM's Successor, Jointly and Severally Liable for Zambonino's Termination

In *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court, after noting that the successor company acquired the predecessor with notice of unfair labor practice litigation, and continued the business without substantial interruption or change in operations, employee or supervisory personnel, upheld the Board's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award.

Quoting with approval from *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967), *enforced sub nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968), the Court stated:

> 'To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.
>
> 'In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change

> in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'

414 U.S. at 171-172, n. 2.

Thereafter, in addressing the remedies available under the National Labor Relations Act (NLRA), the Court determined that the Act's remedies may not be thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *Id.* at 188. Rather, the purpose of reinstatement is to restore the economic status quo that would have obtained but for the (alleged) wrongful discharge. *Id.*

In *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d. 1086 (6th Cir. 1974), the Sixth Circuit expressed the view that the considerations set forth by the Supreme Court in *Golden State* as justifying a successor doctrine to remedy unfair labor practices were *mandated* in the Title VII context, which was designed to eliminate discrimination in employment by giving courts broad equitable powers to eradicate the present and future effects of past discrimination. *Id.* at 1092 (citations omitted). The court held that successor liability must be determined on the facts of each case by balancing the purposes of the statute with the legitimate and often conflicting interests of the employer and the discriminatee, and that a successor may be liable for some purposes and not for others. *Id.* at 1091-92 (citations omitted).

The court reasoned that the failure to hold a successor employer liable for the discriminatory employment practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without remedy or with incomplete remedy. For example, where the predecessor no longer had any assets, monetary relief would be precluded, thus encouraging evasion in the guise of corporate transfers of ownership. Similarly, where relief involves seniority, reinstatement or hiring, only the successor could provide it. The court emphasized that the equities favor successor liability because the successor benefitted from the discriminatory employment practices of its predecessor. The court observed that although the

nature and extent of liability is not subject to any formula, the primary concern is to provide the discriminatee with full relief, and such relief may be awarded against the successor, albeit the ability of the predecessor to provide relief will be a necessary inquiry. *Id.*

The Sixth Circuit further determined that courts considering the successorship issue in a labor context have found a multiplicity of factors to be relevant, including: 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production, and 9) whether he produces the same product. *Id.* at 1094 (citations omitted).

The Commission with D.C. Circuit approval has found these nine factors to provide a useful framework for resolving successorship and successor liability under the Mine Act. *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980) ("*Munsey*"), *aff'd in relevant part sub nom., Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom., Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983); *see also Sec'y of Labor on Behalf of Keene v. Mullins,* 888 F.2d 1448, 1453 n. 15 (D.C. Cir. 1989).

Applying the above precedent and nine-factor test to the facts of this case, the Secretary has established a non-frivolous claim that IMM is CMM's successor and thus jointly and severally liable for Zambonino's termination.

First, IMM had notice of MSHA proceedings which could lead to successor liability because Filyaw, who controlled day-to-day operations at IMM and CMM, was mailed a copy of Zambonino's January 14, 2014 discrimination complaint. In addition, Bono was present during MSHA special investigator Larue's interview of Filyaw on January 23, 2014, as was Susan Flynn, CEO of Gravitas, LLC, the parent of both entities. *See Munsey*, 2 FMSHRC at 3466 (notice of proceedings which could lead to liability is the critical factor).

Second, CMM has no ability to provide temporary reinstatement relief since it no longer operates the Mine.

Third, there has been substantial continuity of business operations between CMM and IMM. The same surface Mine is now operated without any significant hiatus by IMM, which is engaged in some of the same operations (crushing and screening) as CMM, and uses some of the same leased equipment. Respondents admit that IMM uses the same screening and crushing equipment that CMM had used. CMM assigned its machine repurchase agreements to IMM on March 12, 2014. CMM assigned its long-term equipment lease agreements to IMM on March 21, 2014. R. Opposition, Ex. 2. Respondent IMM also admits that it leases the same scale and scale house leased by CMM, which are integral to the Mine's weighing operations. R.

Opposition at para. 7. Although IMM does not engage in extraction or washing activities at the Mine, IMM purchased 500,000 tons of rock, sand, shell and other material at $1 per ton from Williams Farms, who previously had mined and sold substantial quantities of washed sand and rock from its stockpile to CMM at $3 per ton. Sec'y Ex. 2; Sec'y Mot. to Amend, Ex. F. Furthermore, Respondent's own documentation indicates that both IMM equipment operators (John Mosley and Floyd Layport) perform duties that involve escavator operation. R. Opposition, Ex. 3 (IMM Employees - Job Assignments).

Fourth, as noted, IMM uses the same Mine (plant) that CMM used without any significant hiatus in the substantial continuity of business operations.

Fifth, IMM's four employees are all former CMM employees, including IMM equipment operators (Jason Mosley, full-time and Floyd Layport, part-time), foreman (Jason David Hardee), and mine manager (Wayne Filyaw). In addition, Randall Bono is the Gravatis representative for both CMM and IMM. Although Respondents assert that CMM had as many as fifteen employees at the height of its operations, the extent of workforce reduction or carryover cannot be reliably established, absent personnel and payrolls records from CMM and IMM, which Respondents did not provide. In fact, Bono testified that CMM had only seven or eight employees when it ceased operations at the end of February 2014, and IMM employs four of these former CMM employees. Tr. 201-02. Concededly, CMM had two scale house operators or ticket agents (Zambonino and Miller), whereas IMM has none. But Miller, who apparently did not file a complaint with MSHA, was offered a receptionist job at C³P after Zambonino filed her discrimination complaint with MSHA and after the Secretary began its special investigation with the knowledge of Filyaw, Bono and Flynn. Furthermore, after Zambonino's MSHA discrimination complaint, the duties of scale house operator were allegedly subsumed into IMM Mine manager Filyaw's and foreman John David Hardee's jobs, so the scale operator or ticketing agent job function still exists. *See* R. Opposition, Ex. 3 (IMM job assignments). Zambonino testified, however, that Filyaw stated at the outset of her employment that he needed ticket agents to staff both mines. In these circumstances, I conclude that IMM employs substantially the same miner complement that CMM employed when it ceased operations.

Sixth, IMM uses the same or substantially the same supervisory personnel since Filyaw was/is the day-to-day Mine manager at CMM and IMM, Hardee was/is the foreman for CMM and IMM, and Bono is the Gravatis representative for both CMM and IMM.

Seventh, as noted with respect to the fifth factor above, although the same jobs do not exist, the same essential job functions exist under substantially the same working conditions, and, as further explained below, the Secretary has established a non-frivolous claim that the workforce reduction may have been motivated, in part, by Zambonino's MSHA complaint, MSHA's subsequent investigation, and Zambonino's discrimination complaint filed on the heels of her termination.

Eighth, as more fully explained with respect to the third factor above, IMM uses some of the same machinery, assigned equipment leases, scale and scale house, stockpile and partial methods of production (crushing and screening).

Ninth, IMM mines, processes and sells or intends to sell the same product and materials (rock, sand, shell and other material) that were mined, processed and sold by CMM.

Given all these circumstances, Respondents' reliance on the D.C. Circuit's decision in *Sec'y of Labor on Behalf of Keene v. Mullins,* 888 F.2d 1448 (D.C. Cir. 1989) is inapposite and unpersuasive. In that case, the court found substantial evidence to affirm the Commission holding that two operations were so dissimilar as to negate successor liability for an act of alleged discriminatory discharge by the predecessor. The alleged successor operated a surface mining operation, whereas the predecessor operated an underground mining operation. The successor's mine was located a mile and one-half from the predecessor's mine. The different mines operated under different coal leases. Only two of the alleged successor's eight employees were employed by the predecessor. The two companies employed different supervisors. The machinery, equipment and mining methods were not the same. *Id.* at 1454.

In this case, by contrast, there is substantial evidence in this record, even prior to discovery and a full-blown hearing on the merits, that IMM is CMM's successor, who is jointly and severally liable for Zambonino's non-frivolous complaint of discriminatory discharge. Certainly, it cannot be gainsaid that the Secretary has established a non-frivolous claim that IMM is CMM's successor and thus jointly and severally liable for Zambonino's termination.

C. Respondents Have Failed to Prove by a Preponderance of the Evidence that Zambonino Would Have Been Laid Off for Economic Reasons When CMM Ceased Operations Thereby Tolling Temporary Reinstatement

At the outset, I find that the Secretary has established a non-frivolous claim that Zambonino was fired on December 20, 2013, and not laid off, as Respondent contends. Tr. 94; R. Ex. 13; *see also Pride Ambulance Co.*, 356 NLRB No. 128, slip. op. at 3-4 (2011) (when employer's words or actions lead an employee to reasonably believe that she has been discharged, a termination has occurred regardless of actual employment status). Nevertheless, Respondents argue that temporary reinstatement should be tolled to February 28, 2014, the date that CMM ceased operations purportedly for economic reasons because Zambonino would have been laid off on that date even if she had not been terminated on December 20, 2013.

I reject this argument. The evidence supports the Secretary's non-frivolous claim that Respondents' decision to eliminate Zambonino 's job might have been motivated, at least in part, by Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014.

As the Secretary points out in her post-hearing brief at 21-22, Respondents do not contend that the mine where Zambonino was employed has been idled or that her job duties are no longer being performed. *Cf. Gatlin*, 31 FMSHRC at 1055. Nor do they contend, like the operator in *Cobra*, that Zambonino would have been included in an across-the-board reduction in force based on layoff criteria that was applied to all employees. *Cf. Cobra,* 35 FMSHRC at 395. Rather, Respondents allege that the same mine management who were involved in Zambonino's non-frivolous retaliatory termination decided to eliminate her position when IMM began operating the Mine, in an effort to reduce costs. For the reasons set forth below, the undersigned concludes that temporary reinstatement should be ordered and not tolled because the evidence supports a non-frivolous claim that these managers might have made any such decision, at least in part, because of Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014, and to avoid having to reinstate Zambonino, the alleged "rat."

Given Respondents' contention that Zambonino would have been included in a subsequent layoff or reduction in force (RIF), the subsequent layoff or RIF "must at that point be evaluated as a potentially wrongful adverse action." *Cobra*, 35 FMSHRC at 397. In such circumstances, the traditional circumstantial evidence of discriminatory motivation is relevant in evaluating whether the subsequent adverse action may have resulted, at least in part, from the miner's protected activity. Accordingly, the Commission looks to knowledge by the operator of the protected activity; hostility or animus toward the protected activity; temporal proximity between the protected activity and the adverse action(s); and disparate treatment of the complainant as compared to other miners. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom Donovan v. Phelps Dodge Corp.*, 709 F2d 86 (D.C. Cir. 1983). Furthermore, an operator's apparent disinclination to subject itself to MSHA jurisdiction and the involvement of the same managers who were aware of the miner's protected activity in the layoff or subsequent adverse action may be relevant factors with respect to motivation. *See Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 1464, 1471 (June 2012) (ALJ), *aff'd*, 34 FMSHRC 1580, 1582-83 (July 2012). These indicia of discriminatory motivation are present here.

Bono admitted that he and Filyaw were involved in the decision to terminate Zambonino.

> Q. Okay. So it's true that you were involved in the decision to terminate Miss Zambonino; correct?
>
> A. Ultimately the decision was mine to start cutting down on staff. I had been wanting to get rid of at least one of the ticket agents long before the 16th, and Wayne and Phil said no. This thing's going to work. It's going to work. We need to keep them here in case this works.

> Then, after we got shut down by MSHA, I said it's time to cut back. We got to do it now. And I didn't take lightly falling two further weeks behind in being able to excavate.
>
> So yes. I did not say Lucy had to go or Amanda had to go. Wayne got to choose which one, but we said we had to cut back, and we just didn't have the trucks coming through to justify one, much less two.

Tr. 247.

These same mine managers, Bono and Filyaw, who had knowledge of and were involved in Zambonino's December 20, 2013 termination, were aware of her subsequent discrimination complaint and MSHA's concomitant investigation and any subsequent layoff or restructuring decision. Tr. 137-38; 204. Bono testified that '. . . in cost-saving measures we got rid of all ticket agents in February . . ." Tr. 204. Respondents' decision to eliminate the ticket agent position still being performed by Miller, who did not speak Spanish and had less seniority, experience, and education than Zambonino, occurred six weeks after Zambonino filed her discrimination complaint, and only about a month after LaRue's special investigatory interview. The Mine operator ID was not changed until March 18, 2014, four days after the Secretary served a copy of the original Application for Temporary Reinstatement by first class mail. Certainly, the close temporal proximity of events could reflect a discriminatory motive. *See Sec'y v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (citing *Chacon, supra*, 3 FMSHRC at 2511) ("[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive . . .").

The Secretary also presented evidence that agents of Respondents harbored animus toward Zambonino's protected activity and MSHA's inspection(s) and special investigation. Zambinino heard Respondents' agent Hardee, foreman for both CMM and IMM, tell Mine manager Filyaw and CMM foreman Flint that it would be really nice to find out who the rat was who told on us so we can crush it. Zambonino testified that Hardee looked into her eyes when he uttered these words. Tr. 86. Immediately thereafter, Filyaw told Zambonino that he had "bad news, that MSHA had come the day before, and they had cited them for violations and that they (MSHA) had shut down the mine." Tr. 85, 89. Before Zambonino left, she overheard Filyaw tell Hardee and Flint that Bono was losing money and sick of all the problems they were having and that Bono wanted to pull the plug and close down the mine for good. Tr. 112, 128, 130. Thereafter, Filyaw led Zambonino to believe that he had resigned and she had been terminated. He never called her back for training with other employees. When she persisted in an effort to get her job back, he told her that "things are working out well without a bilingual ticketing agent" and that she would not go back to work. Tr. 90-91, 94, 107.

At the hearing, Bono expressed several instances of apparent disdain toward the MSHA inspection resulting from Zambonino's safety complaint and MSHA's conduct during the subsequent discrimination investigation. When asked on cross why he did not require proof of

compliance with MSHA regulations from Filyaw, Bono testified, "I think that would be an impossibility because there are so many MSHA rules and regulations that he would have to bring me volumes of books and show me compliance, compliance, compliance." Tr. 246. Bono insisted that MSHA, not CMM or its alleged non-compliance with mandatory MSHA safety and health standards, "shut us down." Tr. 187. He blamed the MSHA inspection for a two-week delay in CMM's attempt to engage in shell production and excavation activities because the lake filled up with water when the pumps were shut down and it took CMM two weeks to pump down the lake to get to the area of excavation. Tr. 187-88. Bono "didn't take lightly falling two further weeks behind in being able to excavate." Tr. 247. As noted, Bono testified that "after the episode in December with the MSHA inspection and shutdown of the mine, I said we can't keep doing this. We're getting killed. We got to start cutting back." Tr. 220. When asked whether he had seen Zambonino's hazard complaint, he testified not until it was "flashed by this investigator in front of Mr. Filyaw" during the discrimination interview. Tr. 222. Bono's testimony suggests animus towards MSHA's regulatory activity and Zambonino's safety complaints and discrimination complaint, which initiated MSHA's regulatory activity and special investigation.

Regarding disparate treatment, Bono testified that nearly all the other employees who were "laid off" when CMM ceased operations were rehired by IMM or by another subsidiary controlled by Bono and Gravitas, majority owner of IMM. Tr. 201-02. Perhaps most importantly, Bono testified that "we offered" Miller a position as receptionist at C³P, without any training. Tr. 202. Accordingly, there is evidence that other employees purportedly laid off when CMM ceased operations were treated more favorably than Respondents claim that Zambonino would have been treated.

In sum, there is sufficient evidence to support a non-frivolous claim that Respondents' decision to eliminate the ticketing agent position might have been motivated, at least in part, by Zambonino's safety complaints and discrimination complaint, which initiated MSHA's regulatory activity and special investigation. Although Respondents submitted evidence of economic difficulties, Respondents failed to demonstrate by a preponderance of the evidence that economic reasons were the sole motivation for eliminating the ticketing agent position or that Respondents adverse actions were in no part motivated by Zambonino's protected activities.

Respondents provided incomplete and cursory evidence of the economic reasons purportedly causing them to eliminated the ticketing agent position at the end of February 2014. Bono failed to explain why the rock crushing operation did not meet economic projections, nor establish by documentation or otherwise, the decision making process that led to the alleged financial curtailment. As noted, unaudited profit and loss statements from CMM from January through December 2013 and from January through cessation of operation in late February 2014, purport to show approximately $750,000 in losses from January 2013 to April 2014. Tr. 193; R. Ex. 5. That financial information, however, partially encompassed CMM's operation, and its revenue and fees from the Quality Mine. Tr. 191; R. Ex. 5. Respondent also submitted unaudited balanced sheets for CMM as of December 31, 2013 and February 28, 2014, the date CMM ceased operations. R. Ex. 5. That financial information, however, includes long-term

loans payable to Frugalitas of $600,000 and $735,000, respectively. As noted, on February 25, 2014, Frugalitas, the lending company Bono personally owns, purchased 500,000 tons of rock, sand, shell, and other material from Williams Farms on behalf of IMM. Sec'y Ex. 2; Tr. 230-31. No balance sheet, audited or otherwise, was proffered for IMM. Respondents did admit into evidence an IMM profit and loss statement from January through March, 2014, even though Bono testified that IMM did not commence operations until March 3, 2014. R. Ex. 6; Tr. 213. Although not proffered in evidence, Bono testified that he had reviewed IMM's profit and loss statement through the end of April 2014, which shows losses are down to $24,000 and IMM may have actually made a little bit of money. Tr. 218.

Although Bono testified that CMM ceased operations on February 28, 2014 because it could not sustain the losses it was suffering and could not afford its leases on equipment (Tr. 194), Bono did not walk away from the Williams Mine at the time of alleged economic layoff or retrenchment. Rather, through Frugalitis, he provided $500,000 for IMM to purchase 500,000 tons of stockpile around the same time Respondents would have terminated Zambonino for financial reasons. Tr. 223, 231; Sec'y Ex 2. Bono testified that IMM began operating the Mine in place of CMM on March 3, 2014, although CMM as a corporate entity still exists. Tr. 193, 215. CMM's long-term debt apparently is owed to Frugalitas. Tr. 31; R. Ex. 5. As the Sixth Circuit alluded to in *EEOC v. MacMillan Bloedel*, IMM's purchase "could encourage evasion in the guise of corporate transfers of ownership," and it casts doubt on the veracity of Respondents' economic tolling arguments. 503 F.2d at 1092. Furthermore, Respondents did not submit personnel records showing which employees were allegedly laid off due to CMM's economic losses. Bono could not identify any of them. Tr. 242. In these circumstances, Respondents have failed to prove its economic tolling defense by a preponderance of the evidence. *Cf. Sec'y on behalf of Pilon v. ISP Minerals, Inc.*, 2013 WL 1385626 at *2 (Feb. 28, 2013) (ALJ) (bona fide economic retrenchment in workforce not established given absence of evidence concerning sales volumes, personnel files, or other financial information).

Respondents' reliance on *Sec'y on behalf of Haynes v. Deconder Coal Co.* 10 FMSHRC 1810 (Dec. 1988) (ALJ) is non-precedential and superseded by recent Commission precedent in *Cobra,* 35 FMSHRC at 397, *and C.R. Meyer,* 35 FMSHRC at 1187, holding that when an operator asserts that a miner would have been included in a post-termination layoff, temporary reinstatement must be granted if there is a non-frivolous claim that such layoff might have been motivated in any part by the miner's protected activity. As explained above, that non-frivolous claim has been established here. Moreover, the judge's decision in *Deconder* was based on credibility determinations, which are not appropriate in a temporary reinstatement hearing. *Sec'y on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).

This case is also sharply distinguishable from *Sec'y v. Argus Energy*, 2014 WL 586885 (Jan. 16, 2014) (ALJ). In that case, the judge tolled temporary reinstatement based on changed circumstances not applicable here. The mine completely ceased operations due to "the collapse of the Central Appalachian coal market" and 56 of the 62 miners were laid off without any transfer to other facilities. *Id.* at *1. Six employees were retained for removal and transportation

of equipment, and for clean up of remaining coal. These miners were selected based on seniority, experience and skill, respondent documented the selection process, and the laid-off complainant had fewer certifications and less seniority than those retained. *Id.* at *2. The judge emphasized an "exceptional case" where the discrimination complaint had already been denied, there was complete closure of the mine, and the Secretary submitted no evidence opposing Respondent's claims. *Id.* at *4 n.6.

Here, Zambonino's discrimination complaint is viable, the mine where she worked has not been shut down, and the Secretary has established a non-frivolous claim that there is substantial continuity in the business enterprise with profitability looming on the horizon. Tr. 218-19. Most importantly, the evidence as a whole suggests that Respondents may have eliminated the ticketing agent position, at least in part, to avoid reinstating Zambonino after the MSHA problems she engendered.

It is noteworthy that Zambonino did more than weigh trucks at the extant scale house, a task now performed by managers, who exhibited animus towards her. Zambonino also printed reports, researched potential customers, cleaned, and spoke Spanish with truck drivers or on phone calls. Tr. 71, 78. Respondents have not shown Zambonino's former duties no longer exist, or are no longer needed. Respondents have denied Zambonino the opportunity to perform her duties, which contrasts starkly with treatment of Miller, the other ticketing agent, with less seniority. CMM trained Miller to perform quality control work and continued to employ her as a ticketing agent until CMM ceased operations about February 28, 2014. Tr. 95, 201-02. At that time, Miller was offered a job as a receptionist with C^3P, one of Bono's other Gravitas companies, where other CMM miners also worked. Tr. 202, 60, 64, 96-97, 225.

Respondents argue that Zambonino's temporary reinstatement should not be ordered because Miller was transferred to a position not covered by the Mine Act and Zambonino's ticket agent position no longer exists. This argument must fail. The evidence as a whole suggests that Respondents may have eliminated the ticketing agent position, at least in part, to avoid reinstating Zambonino because of Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014. MSHA's investigation is ongoing and its theories of liability and discrimination may expand to the layoff or elimination of the ticket agent position, or to other employees affected by such action.

Finally and most importantly, the purpose of temporary reinstatement under the Mine Act is to restore a miner like Zambonino to the economic status quo prior to the alleged discrimination against her, once it has been established, as stipulated here, that her discrimination complaint is not frivolously brought. *Jim Walter Res., Inc., v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990); *cf.*, *Golden State*, 414 U.S. at 188 (the purpose of reinstatement under the NLRA is to restore the economic status quo that would have obtained but for the wrongful discharge). It is undisputed that Zambonino was a miner covered by the Mine Act at the time of her non-frivolous discriminatory discharge. Accordingly, the remedial principles articulated above in *Jim Walter*

Resources and *Golden State* apply. The Mine Act's temporary reinstatement remedy may not be thwarted by the fact that Zambonino, who was within the Act's protections when the non-frivolous claim of discrimination occurred, would (or may) have been promoted or transferred to a position not covered by the Act if she had not been allegedly discriminated against. *Id.*; *see Munsey, 2 FMSHRC 3463* (citing *Golden State* with approval in a case involving a successor's joint and several reinstatement liability). Therefore, to restore Zambonino to the status quo ante her non-frivolous discriminatory discharge, Respondents should be required to reinstate Zambonino to her former ticketing agent position or provide her with a job similar to the one provided to Miller.

The undersigned intimates no view on the ultimate merits of Zambonino's discrimination complaint.

IX. Temporary Reinstatement Order

Colonial Mining Materials, LLC and its putative successor-in-interest Infinity Mining Materials, LLC are jointly and severally **ORDERED** to immediately reinstate Lucero Zambonino to her former position that she held immediately prior to her December 20, 2013 termination, or to a substantially equivalent or similar position, at the same rate of pay, hours, benefits, and job responsibilities or equivalent duties.

Ms. Zambonino's reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent and this tribunal.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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