May 2021

TABLE OF CONTENTS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review was Denied in the Following Case During the Month of May 2021

Secretary of Labor v. Jones Brothers, Inc., Docket Nos. SE 2016-0218, et al. (Judge Rae, April 15, 2021)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

May 07, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SIKES CONCRETE, INC.	Docket No. SE 2021-0011 A.C. No. 08-01429-519727

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the

Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 14, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2015-0644 A.C. No. 15-18870-387869A
ARNOLD HOSKINS	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 3, 2018, the Commission received from Arnold Hoskins a motion to reopen the above-captioned civil penalty proceeding. In the motion, Hoskins explains that he had filed a timely contest of a proposed penalty assessment in the amount of $4,800 for an alleged violation related to Citation No. 8400829-00019613A. He states that, although he was never afforded an opportunity for a hearing on the contest, he received a notice from the Department of Labor's Mine Safety and Health Administration informing him that he was delinquent in paying the $4,800 penalty.

On November 21, 2017, the Chief Administrative Law Judge issued an Order to Show Cause and Dismissal Order. In the order, the Judge directed the Secretary of Labor to submit a penalty petition and an explanation stating why he failed to initially submit the penalty petition in a timely fashion. The order further stated that if the Secretary failed to do so, on the thirty-first day after the November 21 order, the case would be dismissed. The Secretary failed to submit a petition, and the case was dismissed on December 22, 2017.

This case has been dismissed; the proposed penalty of $4,800 has not been assessed and no penalty is owed or collectible. Therefore, we deny Hoskins' motion to reopen as moot.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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May 14, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2020-0248-M A.C. No. 26-01089-507993
SOUTHWEST ENERGY LLC	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On April 21, 2020, the Commission received from Southwest Energy ("Southwest") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 24, 2020, and became a final order of the Commission on February 23, 2020. Southwest asserts that it timely contested the proposed penalty associated with Citation No. 9436503 but that it mistakenly sent the contest to P.O. Box 790390, St. Louis, Missouri, rather than to MSHA's Civil Penalty

Compliance Office in Arlington, Virginia. Upon discovering the mistake, the operator attempted to resend the contest to the correct address but was unable to do so due to mail issues associated with the pandemic. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are mailed to the correct address or filed electronically.

Having reviewed Southwest's request and the Secretary's response, we find that Southwest failed to timely contest the penalties through inadvertence or mistake, and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Arthur R. Traynor, III
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/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 14, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. JAMES IRVIN, AGENT OF RHINO EASTERN, LLC, EAGLE 3 MINE	Docket No. WEVA 2017-0561 A.C. No. 46-09427-442620A

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). On July 3, 2018, the Commission received from James Irvin, Agent of Rhino Eastern, LLC, Eagle 3 Mine ("Irvin"), a motion seeking to reopen a penalty assessment proceeding and relieve Irvin from the Default Order entered against him.

On November 7, 2017, the Chief Administrative Law Judge issued an Order to Show Cause in response to Irvin's perceived failure to answer the Secretary of Labor's September 21, 2017 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on December 14, 2017, when it appeared that Irvin had not filed an answer within 30 days.

Irvin explains that the reason that he did not send a contest of the proposed penalty assessment is that he received a letter from the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that all charges had been dropped. He disregarded subsequent letters as an oversight and mistakenly believed that the matter had settled. The Secretary does not oppose the request to reopen, but states that Irvin should take steps to ensure that any future penalty contests are timely filed and should take seriously all show cause orders issued by the Judge.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Irvin's request and the Secretary's response, we find that Irvin has sufficiently explained his failure to timely contest the citations at issue as the result of mistake, inadvertence, and excusable neglect. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

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May 19, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. AMERICAN SAND COMPANY, LLC	Docket No. SE 2019-0252-M A.C. No. 40-00798-492842

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY: Althen and Rajkovich, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 19, 2019, the Commission received from American Sand Company, LLC ("American Sand") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*").

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc*., 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc*., 17 FMSHRC 1529, 1530 (Sept. 1995).

The assessment at issue consists of four violations and their corresponding penalties.[1] The assessment was delivered to the operator on June 10, 2019. Subsequently, MSHA received a contest (a marked assessment form) from the operator for three of the penalties on June 28, 2019.[2] However, allegedly the fourth penalty, assessed for Citation No. 94228055, was not timely contested and therefore became a final order on July 10, 2019.

On August 15, 2019, the operator detailed its reasons for challenging the fourth penalty in a letter to the Commission; the letter was received by the Commission on August 23, 2019. Soon after, on August 26, 2019, MSHA mailed a delinquency notice to the operator; the delinquency notice was received by the operator on August 30, 2019.

The operator filed a motion to reopen the final order on September 19, 2019. The operator claims that the penalty at issue was timely contested. In support, the operator attaches a copy of the marked assessment form allegedly returned by the operator to MSHA. The Secretary filed an opposition to the motion to reopen on September 25, 2019, claiming that the operator failed to timely contest the penalty at issue, and that the operator informed MSHA that it would pay the penalty. In support, the Secretary attaches a different copy of the marked assessment form allegedly returned by the operator to MSHA.

The proposed assessment sent by MSHA contained four blank boxes, placed next to each corresponding violation and penalty. An operator could indicate a contest for any penalty by marking the corresponding blank box. The operator's version shows that all four boxes in the assessment were marked, indicating that all the penalties were timely contested.

In contrast, the Secretary's version shows that only three of the boxes were marked. In the Secretary's version, the fourth box for the penalty at issue remained unmarked, indicating that the fourth penalty was not timely contested.

However, only the Secretary's version included a page with the operator's signature, and a stamp which indicated the date and time of MSHA's receipt of the marked assessment. This shows that the Secretary's version is an accurate copy of the contest received by MSHA. Consequently, we find that the penalty at issue was not timely contested and therefore, became a final order of the Commission.

After reviewing the evidence, we nevertheless decide to reopen the final order because the operator implicitly provides a reasonable explanation for its delinquency and because it acted

[1] Assessment No. 000492842 consists of Citation Nos. 9428055, 9428056, 9428057, and 9428058. Despite this, the Secretary erroneously seems to imply that the assessment only covers two of these four citations ("MSHA's records show that Case Number 000492842 is for Citation Nos. 9428055 and 9428056, that were issued on June 6, 2019 (Attachment A)"). Sec's Opp. at 3.

[2] The Secretary mistakenly claims that MSHA received the operator's contest (the marked assessment form), which the Secretary characterizes as a hearing request, on July (rather than June) 28, 2019.

promptly after receiving the delinquency notice. In *Highland Mining Co.,* 31 FMSHRC 1313, 1317 (Nov. 30, 2009), the Commission required the operator to provide a reasonable explanation for its delinquency. The August 15 letter by American Sand to the Commission provides just such an explanation. The letter highlighted the operator's reasons for challenging the penalty for Citation No. 9428055, and was marked for Docket No. SE 2019-178, which was the related contest docket containing the other three violations.

The letter was sent after the assessment became a final order on July 10, 2019 but before the operator received the delinquency notice on August 30, 2019. The operator prepared the letter challenging the penalty and listed the letter under the related contest docket (SE 2019-178) because it was unaware that the penalty had become a final order. Therefore, the operator demonstrated a lack of knowledge of the final order and of the need to prepare a reopening request until it received the delinquency notice.

In *Pinnacle Mining Co.,* 38 FMSHRC 422 (Mar. 2016), we determined that the operator's unawareness that the penalty assessment was delinquent constituted a sufficient explanation for the operator's delay in filing a request to reopen. Similarly, here we determine that the operator's unawareness of the final order constitutes a reasonable explanation for its delinquency.

Moreover, under our precedent in *Highland,* 31 FMSHRC at 1316-1317, a motion to reopen is presumptively considered as having been filed within a reasonable amount of time if it is filed within 30 days of an operator's receipt of its first notification from MSHA of its failure to contest the penalty. As set forth above, the operator was unaware of the final order until it received the delinquency notice on August 30, 2019. The operator filed its motion to reopen on September 19, 2019. Therefore, the operator's motion to reopen was filed well within 30 days of the operator's receipt of its first notification from MSHA of the failure to contest the penalty.

Consequently, we find that the operator filed its motion to reopen within a reasonable amount of time. Having reviewed American Sand's request and the Secretary's response, we find that the operator's reasonable explanation for the delinquency and its request to reopen, filed fewer than 30 days after it received the delinquency notice, demonstrate the operator's good faith, and merit reopening of the case.

In the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further

proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Commissioner

Chair Traynor, dissenting:

I must conclude that the operator has failed to demonstrate that granting its motion would be in the interest of justice. The operator's filings do not indicate any reason the operator introduced what it purported to be the proposed assessment form it transmitted to the Secretary – a form showing the fourth box was 'checked' indicating the operator's intent to contest the citation at issue. The apparently authentic form provided by the Secretary - which includes the operator's signature and the Secretary's file stamp indicating the date the form was received - clearly shows the fourth box is not checked. The operator does not supply and I cannot see on the record before me a plausibly benign explanation for this discrepancy between the document the operator put forward and the authentic document provided by the Secretary.

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

Hanover Ins. Co. v. United States, 146 Fed. Cl. 447, 450 (2019) (quoting *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457 (4th Cir. 1993)).

Though the operator filed its motion in a timely fashion and might otherwise be entitled to the relief sought, the apparent attempt to introduce an inauthentic document prevents me from concluding the motion is made in good faith or that the interests of justice are served by granting the motion.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Chair

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ALVARO SALDIVAR, Complainant, v. GRIMES ROCK, , Respondent.	APPLICATION FOR TEMPORARY REINSTATEMENT Docket No. WEST 2021-0178-DM Mine: Grimes Rock, Inc. Mine ID: 04-05432

DECISION AND ORDER OF REINSTATEMENT

Appearances: Karla Malagon, Jessica Flores, and Bruce Brown, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for the Complainant

Peter Goldenring and Mark Pachowicz, Pachowicz & Goldenring PLC, Ventura, California, for the Respondent

Before: Judge Miller

This case is before me upon an application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act"), and 29 C.F.R. § 2700.45 et seq. On April 12, 2021, the Secretary filed the application on behalf of Alvaro Saldivar seeking his reinstatement as a lube and water truck/equipment operator at the Grimes Rock, Inc. Mine in Fillmore, California, pending the final disposition of Saldivar's discrimination complaint.

This case was originally assigned to Judge Richard Manning on April 13, 2021. Two days later, the Respondent requested a hearing on the application for temporary reinstatement. The parties agreed that the hearing could be set beyond the ten calendar days provided for by Commission Rule 45, and Judge Manning set the hearing for May 11, 2021.

The case was reassigned to my docket on May 4, 2021. A hearing was held via Zoom for Government videoconference on May 11, 2021. The parties presented witnesses and exhibits and each filed a brief following the hearing. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction until final disposition of the complaint on the merits.

I. SUMMARY OF THE EVIDENCE

Alvaro Saldivar, a miner under the Mine Act, testified that he worked for Grimes Rock on two separate occasions. He was first employed as a welder from May 2019 through July 2019. Tr. 16. After leaving, Saldivar was hired again as a service technician and an operator on October 5, 2020. Tr. 15-16. His employment was terminated on January 15, 2021.

Saldivar testified that, during his most recent stint of employment, he reported several safety issues to his direct supervisor as well as mine management. Many of the issues involved the water truck that he was tasked with operating. Saldivar was concerned with the condition of the tires on the truck, which he claims were "bad," "balding," and missing tread. Tr. 17. He stated that, as a result of the worn tires, he was involved in an accident on December 10, 2020 in which the truck lost traction as it drove uphill, ultimately sliding down the incline and hitting a cinder block. Tr. 19. Saldivar was also concerned about mechanical issues with the truck, including a long-term oil leak, leaking antifreeze, and a missing shock absorber. Tr. 20. According to Saldivar, he reported all of these issues to his direct supervisor Rene Garcia and general manager Ernie Melendez on multiple occasions. Tr. 18, 20. Saldivar testified his supervisors took no action to remedy these issues, and that he was required to continue using the truck in its poor condition. Tr. 18, 21.

Saldivar explained that he made reports regarding a variety of faulty equipment. He testified that he advised management of the bad brakes on an outdated motor grader, missing roll-over protection system (ROPS) labels on the DAL #1 and #2 dozers, and leaking diesel on service truck #40 at the mine. Tr. 22, 24, 26.

Saldivar also testified that he had complained about the lack of proper training received. While he signed documents stating that he received new miner training, Saldivar believed that he did not receive the required specific task training relating to the large equipment that he was required to operate. Tr. 21, 25-26, 28, 44; *see* Ex. R-C. He testified that he had continually asked for task training on the water truck, the motor grader, the dozers, and the service truck. Tr. 21, 25-26, 28. He said that he even made his requests in writing on his daily pre-shift reports. According to Saldivar, his requests for additional training went unaddressed. Tr. 22. On cross examination, Saldivar admitted that he received training from the Quinn Company, but asserted that the training did not relate to operation of the equipment but rather maintenance of certain equipment. Tr. 46-47, 74.

Grimes Rock issued five disciplinary warnings to Saldivar during his second tenure of employment at the mine. *See* Ex. K. For each warning, Saldivar testified that he did not commit the infraction as written on the discipline form, and that he signed the forms only to avoid losing his job. Tr. 49-50, 54-56, 59, 62-63, 64, 75. Saldivar also testified as to his belief that his supervisors were acting in a "malicious" manner towards him and that the discipline was being issued in retaliation for his frequent complaints about jobsite safety hazards. Tr. 28, 59.

On January 15, 2021, Saldivar was terminated by Grimes Rock. Tr. 27. He testified that his termination occurred just one day after he last reported a safety issue on January 14. Tr. 40.

II. DISCUSSION

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any protected right under the Act. The purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health they must be protected against . . . discrimination which they might suffer as a result of their participation." S. Rep. No. 95–181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

A miner that lodges a complaint of discrimination under section 105(c) is entitled to "immediate reinstatement . . . pending final order on the complaint" as long as the complaint was "not frivolously brought." 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement proceeding is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

In a temporary reinstatement hearing, a judge is tasked with evaluating the evidence of the Secretary's case and determining whether the miner's complaint appears to have merit. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary must prove only a nonfrivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id*. at 1088. Nevertheless, it may be "useful to review the elements of a discrimination claim" when gauging whether a claim is nonfrivolous. *Id*. Those elements include (1) that the complainant was engaged in a protected activity and (2) that the adverse action complained of was motivated in part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981).[1] The Secretary may establish the

[1] The Ninth Circuit recently rejected the *Pasula-Robinette* framework in *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). Specifically, the Court struck down the requirement that the adverse action was motivated "at least partially" by the protected activity in favor of a but-for causation standard. *Id*. at 1209-11. The Commission has not articulated a new standard in the wake of *Thomas*, but the case may require an examination of elements different than those set forth in current Commission case law. However, the standard for temporary reinstatement would not be affected. A miner shall be reinstated if the complaint was not frivolously brought, and the elements of a discrimination claim are merely "useful" guideposts under that standard. *Williamson*, 31 FMSHRC at 1088. Here I look to whether the alleged adverse action occurred "because [a] miner . . . filed or made a complaint . . . including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . .

(continued…)

motivational nexus between the protected activity and the adverse action with indirect or circumstantial evidence such as (i) the employer's knowledge of the protected activity, (ii) hostility or animus towards the protected activity, (iii) coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981).

While it is true that a judge may consider these factors, a temporary reinstatement case remains "conceptually different" than the underlying case of discrimination. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d at 744. The Mine Act envisions an "expedited basis" for a temporary reinstatement proceeding that does not permit full discovery or complete resolution of conflicting testimony. 30 U.S.C. § 815(c)(2); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012). In fact, Commission case law indicates that resolving credibility issues or conflicts in testimony is beyond the scope of a temporary reinstatement hearing. *Williamson*, 31 FMSHRC at 1089. Similarly, a judge is not permitted to weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. *Id*. at 1091.

Here, I find that Saldivar's complaint of discrimination was not frivolously brought. Saldivar testified that he made several safety complaints to both his immediate supervisor and the mine manager from October 2020 until the time he was terminated in January 2021. These complaints concerned the safety of several pieces of equipment that Saldivar was obliged to use on a daily basis, as well as the lack of task-specific training necessary to operate the equipment safely. Lodging these complaints constitutes a protected activity under section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). Saldivar also testified that he was fired by Grimes Rock on January 15, 2021, the day after he made a complaint about the safety of the truck he was told to drive. It is clear that Saldivar engaged in protected activity and that he suffered an adverse action.

There is also a sufficient motivational nexus between the protected activity and the adverse action to support Saldivar's temporary reinstatement. Saldivar testified that he made a final safety complaint on January 14, 2021 and that his employment was terminated the following day. The coincidence in time between the protected activity and the adverse action is evidence of a discriminatory motive. *Sec'y on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325 (Mar. 2000). Saldivar also testified that he had continuously made mine management aware of his safety complaints. The employer's knowledge of the protected activity is another factor that may establish a motivational nexus. *Chacon*, 3 FMSHRC at 2510. Additionally, Saldivar claimed that his supervisor treated him badly after he made complaints, and that he was ultimately fired in response to the number of complaints that he made, suggesting hostility towards the protected activity. *See id*. The Respondent, while disputing these points in its brief, did not introduce a witness to disprove Saldivar's claims or offer an

[1] (…continued)
mine . . . or because of the exercise by such miner . . . of any other statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1). If I were to use the but-for standard articulated in *Thomas,* the outcome does not change here.

alternative reasoning for his termination.[2] Regardless, it is not necessary to resolve conflicts between the parties' accounts at this stage in the proceedings. *Sec'y on behalf of Albu v. Chicopee Coal Company, Inc.*, 21 FMSHRC 717, 719 (July 1999). The Secretary has therefore introduced sufficient evidence to show that Saldivar's complaint was not frivolously brought. *See* 29 C.F.R. § 2700.45(d) ("[T]he Secretary may limit his presentation to the testimony of the complainant.").

The Respondent argues that it was denied a full hearing on the issue of temporary reinstatement, relying heavily on the recent Commission decision in *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC*, 42 FMSHRC __, slip op., No. WEVA 2021-0203 (Apr. 23, 2021). In *Rockwell,* the Commission determined that a judge must conduct a "full hearing" during the temporary reinstatement case, and that judges should admit any relevant evidence that is offered at hearing. *Id*. In this case, the Court issued an order that specifically approved two witnesses that the Respondent wished to call (one of whom was expected to be called to discuss animus) and repeatedly advised the Respondent at hearing that it was free to call witnesses to testify on relevant issues, such as the mine's motivation for terminating Saldivar. *See, e.g.*, tr. 53, 81. The Respondent elected not to call any witnesses. Further, no evidence that the Respondent presented at hearing was excluded.[3] There is therefore no indication that the Respondent was denied a full hearing.

The Respondent also contends in its brief that the exhibits showing disciplinary write-ups are enough to show that his claim is frivolous. I disagree. For one, the Respondent was asked at hearing whether the write-ups (Exhibit K) were being used to demonstrate that his employment was terminated based on those write-ups. The Respondent said no:

> Judge Miller: So you have submitted a number of exhibits that are disciplinary – are write-ups. So is it your position – your client's position that Mr. Saldivar was terminated based – because he received these write-ups? Is that your position?

---

[2] The Respondent did file a list of witnesses to be called at hearing as well as a lengthy list of exhibits, but chose not to call any witnesses in the end. Instead, the Respondent filed a "Post Hearing Griefing" (*sic*) that was combative, inflammatory, and relied solely on Saldivar's testimony on cross-examination and on evidence not in the record.

[3] Respondent did provide a list of exhibits, some of which were rejected prior to hearing because they either contained personal identifying information such as social security numbers, or they included reference to a criminal record of Saldivar which I deemed prejudicial. In its brief, the Respondent contends, for the first time, that evidence of Saldivar's criminal record should have been admitted under Federal Rule of Evidence 609. This rule allows the use of a felony record to impeach a witness for his character of truthfulness. The Federal Rules do not control evidentiary issues in front of the Commission, but they can be helpful when the policy supporting a rule is relevant. *See Leeco, Inc*., 38 FMSHRC 1634, 1639 (July 2016). However, a rule about attacking a witness's truthfulness is inapposite here because credibility is not at issue in a temporary reinstatement case. Since Respondent indicated that Saldivar was hired with full knowledge of his criminal background, there was no need to include such records and the inclusion would have been prejudicial.

> Mr. Goldenring: So it wasn't because he received the write-ups. He was terminated because he placed himself, others, and equipment at risk and damaged equipment and not for any animus or motivation about complaints about anything, Your Honor, and he has . . . no documents to substantiate that.

Tr. 51-52. In any event, Saldivar disputed what was written in those write-ups, and Grimes Rock presented no evidence to demonstrate that Saldivar was terminated for damaging equipment or that a certain number of disciplinary actions results in an employee's termination at its mine. The write-ups alone do not constitute proof that Saldivar's claim is frivolous.

III. ORDER

The application for temporary reinstatement is hereby **GRANTED**. Respondent is **ORDERED** to, immediately upon receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision. The employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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May 11, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BRANDON HALL, Complainant, v. WARRIOR MET COAL COMPANY, LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2021-0118 MSHA Case No.: SE-MD 2021-01 Mine: No. 7 Mine Mine ID: 01-01401

ORDER GRANTING TEMPORARY REINSTATEMENT OF BRANDON HALL

Before: Judge Sullivan

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, on April 30, 2021, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Brandon Hall ("Complainant") to his former position as a longwall operator with Warrior Met Coal Company, LLC ("Respondent") at its Mine No. 7. Here, the Secretary's application satisfies the procedural requirements of Commission Procedural Rule 45(b), as, among other things, it timely "states the Secretary's finding that the miner's discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary's reasons supporting his finding[,] and includes a copy of the miner's complaint to the Secretary . . ." 29 C.F.R. §2700.45(b).[1]

According to Commission Rule 45(c), a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. §2700.45(c). The application's certificate of service states that it was served on Respondent by electronic mail on April 30. On May 10, 2021, Respondent contacted the Court and stated that it does not intend to request a hearing on temporary reinstatement. Consequently, I review the contents of the Secretary's application to determine whether the complaint in this instance "was not frivolously brought." *Id.*

[1] The Discrimination Complaint ("Complaint") filed with the Secretary's Mine Safety and Health Administration by the Complainant is dated March 24, 2021. It was filed within 60 days of the Complainant's March 15 termination of employment. Section 105(c)(3) directs the Secretary to determine whether a section 105(c) violation occurred within 90 days, which in this instance would be no later than June 22, 2021.

Section 105(c)(1) of the Mine Act provides that "[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . ." 30 U.S.C. § 815(c)(1). In his Application, as supported by his investigator's affidavit, the Secretary alleges the following to establish the Complaint as having been not frivolously brought under section 105(c)(1) & (2):

(1) During his January 25, 2021 shift, the Complainant raised with Respondent's agents a number of safety issues with respect to the operation of the longwall that day, such as the lack of a required fire extinguisher, shearer bits that needed to be replaced, elevated methane levels, and thick gob in the pathway of the section where he worked. The foregoing adversely impacted the progress of the longwall shearer during the shift;

(2) Respondent's agents subsequently reacted negatively to the speed at which the Complainant was working throughout the shift; and

(3) At the end of the shift, Complainant was suspended for five days, with intent to discharge, for having "stopp[ed] coal production." That punishment was later reduced to a two-week suspension to be followed by a 30-working day probationary period. After returning to work on February 8, 2021, Complainant, on March 15, 2021 (thus apparently prior to the end of his probation), was fired for failing, at the end of a shift, to follow orders and personally clean a bus he and two other miners had been using.

There being no opposition to the Application, I agree with the Secretary that it establishes the Complaint to have been "not frivolously brought" in this instance. *See Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (in light of Mine Act legislative history and the Supreme Court's treatment of a similar whistleblower protection provision, interpreting the "not frivolously brought" standard to be the equivalent of a "reasonable cause to believe" standard and to be met when a miner's "complaint appears to have merit"). Accordingly, the Application is granted. I reach no conclusion beyond that regarding the merits of the Complaint.

ORDER

It is hereby **ORDERED** that **BRANDON HALL** be **immediately TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). Given that that the Mine Act directs that both the Secretary and the Commission act expeditiously in section 105(c) proceedings, the Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the

Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that the Respondent did not violate Section 105(c) of the Act.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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May 11, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TIMOTHY BARNES, Complainant, v. WARRIOR MET COAL COMPANY, LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2021-0119 MSHA Case No.: SE-MD 2021-02 Mine: No. 7 Mine Mine ID: 01-01401

ORDER GRANTING TEMPORARY REINSTATEMENT OF TIMOTHY BARNES

Before: Judge Sullivan

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, on April 30, 2021, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Timothy Barnes ("Complainant") to his former position as a longwall operator with Warrior Met Coal Company, LLC ("Respondent") at its Mine No. 7. Here, the Secretary's application satisfies the procedural requirements of Commission Procedural Rule 45(b), as, among other things, it timely "states the Secretary's finding that the miner's discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary's reasons supporting his finding[,] and includes a copy of the miner's complaint to the Secretary . . ." 29 C.F.R. §2700.45(b).[1]

According to Commission Rule 45(c), a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. §2700.45(c). The application's certificate of service states that it was served on Respondent by electronic mail on April 30. On May 10, 2021, Respondent contacted the Court and stated that it does not intend to request a hearing on temporary reinstatement. Consequently, I review the contents of the Secretary's application to determine whether the complaint in this instance "was not frivolously brought." *Id.*

[1] The Discrimination Complaint ("Complaint") filed with the Secretary's Mine Safety and Health Administration by the Complainant is dated March 24, 2021. It was filed within 60 days of the Complainant's March 15 termination of employment. Section 105(c)(3) directs the Secretary to determine whether a section 105(c) violation occurred within 90 days, which in this instance would be no later than June 22, 2021.

Section 105(c)(1) of the Mine Act provides that "[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . ." 30 U.S.C. § 815(c)(1). In his Application, as supported by his investigator's affidavit, the Secretary alleges the following to establish the Complaint as having been not frivolously brought under section 105(c)(1) & (2):

(1) During his January 25, 2021 shift, the Complainant raised with Respondent's agents a number of safety issues with respect to the operation of the longwall that day, such as the lack of a required fire extinguisher, shearer bits that needed to be replaced, elevated methane levels, and thick gob in the pathway of the section where he worked. The foregoing adversely impacted the progress of the longwall shearer during the shift;

(2) Respondent's agents subsequently reacted negatively to the speed at which the Complainant was working throughout the shift; and

(3) At the end of the shift, Complainant was suspended for five days, with intent to discharge, for having "stopp[ed] coal production." That punishment was later reduced to a two-week suspension to be followed by a 30-working day probationary period. After returning to work on February 8, 2021, Complainant, on March 15, 2021 (thus apparently prior to the end of his probation), was fired for failing, at the end of a shift, to follow orders and personally clean a bus he and two other miners had been using.

There being no opposition to the Application, I agree with the Secretary that it establishes the Complaint to have been "not frivolously brought" in this instance. *See Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (in light of Mine Act legislative history and the Supreme Court's treatment of a similar whistleblower protection provision, interpreting the "not frivolously brought" standard to be the equivalent of a "reasonable cause to believe" standard and to be met when a miner's "complaint appears to have merit"). Accordingly, the Application is granted. I reach no conclusion beyond that regarding the merits of the Complaint.

ORDER

It is hereby **ORDERED** that **TIMOTHY BARNES** be **immediately TEMPORARILY REINSTATED** to his former job at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). Given that that the Mine Act directs that both the Secretary and the Commission act expeditiously in section 105(c) proceedings, the Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the

Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that the Respondent did not violate Section 105(c) of the Act.

/s/ John T. Sullivan
John T. Sullivan
Administrative Law Judge

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