# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JEFFREY PAPPAS | : | |
| v. | : | Docket No. WEST 2016-156-DM |
| CALPORTLAND COMPANY | : | |

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura and Althen, Commissioners

## DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 12, 2016, a Commission Administrative Law Judge issued a decision granting an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Jeffrey Pappas against CalPortland Company pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[1] 38 FMSHRC _____, slip op. at 13, No. WEST 2016-156-DM (Jan. 12, 2016). The operator subsequently filed a timely petition for review of the Judge's grant of temporary reinstatement. For the reasons that follow, we affirm the Judge's decision, pursuant to Rule 45(f) of the Commission's procedural rules, 29 C.F.R. 2700.45(f).

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[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> *Any miner or applicant for employment or representative of miners* who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement *of the miner* pending final order on the complaint . . .

(emphases added).

## I.

## Factual and Procedural Background

### A. Factual Background[2]

Martin Marietta owned the Oro Grande cement plant in San Bernardino County, California through a subsidiary named Riverside Cement. Tr. 82–83. On October 1, 2015, Martin Marietta completed the sale of nearly all the assets of Riverside Cement, including the Oro Grande Quarry and cement plant, to CalPortland. Slip op. at 3; Tr. 83–84.

Jeffrey Pappas worked at the Oro Grande cement plant for 16 years. Tr. 24–25. In his time there, Pappas worked in nearly every hourly-wage position at the plant, excluding managerial positions. Tr. 25–26. In early 2014, Pappas grew concerned about a dangerous situation caused by a supervisor's potentially unsafe directions. Tr. 26. Pappas brought his concerns to mine management's attention, but management dismissed his concerns without fully addressing them. Tr. 26. Pappas later pointed out the problems to an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") who investigated and, in turn, issued citations to the mine for safety violations and caused changes in Oro Grande's safety policy. Tr. 26–27. Pappas's relationship with his managers and colleagues deteriorated sharply after MSHA issued the citations, and Martin Marietta eventually fired Pappas. Tr. 27.

On April 21, 2014, Pappas filed a section 105(c) discrimination complaint with MSHA against Martin Marietta. Slip op. at 4; Tr. 27. Following depositions in that discrimination case during December 2014, Martin Marietta and Pappas reached a Commission-approved settlement permanently reinstating Pappas at the Oro Grande mine; Pappas returned to work as a laborer at the cement plant in January 2015. Slip op. at 4; Tr. 27, 34–35. Upon Pappas's return to work, however, Pappas's direct supervisor and his coworkers harassed Pappas about his discrimination case and prior safety complaints. Tr. 29, 33–34. Pappas asked the mine's upper management, including human resources manager Jamie Ambrose (née Rowe), to intervene and stop the harassing behavior. Tr. 28, 29, 34. Ambrose and the other mine officials did not address Pappas's repeated complaints about the harassment. Tr. 30.

In August 2015, officials from CalPortland began visiting the Oro Grande Quarry to determine whether CalPortland should purchase the cement plant and three related assets from Martin Marietta. Slip op. at 4; Tr. 30. In a limited asset sale agreement, CalPortland agreed to purchase the Oro Grande Quarry, including the cement plant and other facilities. Slip op. at 4;

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[2] The facts in this temporary reinstatement proceeding are based on the Judge's findings, which accept the allegations made by the complainant as true, unless otherwise controverted by irrefutable evidence. As the Commission has noted, it is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citation omitted). In reviewing a judge's temporary reinstatement order, we apply the substantial evidence standard. *See id.*; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

Tr. 83–84. The asset sale agreement did not include the labor force at these facilities because CalPortland did not want to be bound by the collective bargaining agreement Martin Marietta and the United Steelworkers Union had negotiated at the facilities. Slip op. at 4; Tr. 110–11. CalPortland and Martin Marietta agreed to fire all of the workers at four locations at 12:00 midnight on September 30, 2015. Tr. 111–12. Immediately thereafter, on October 1, CalPortland would rehire the employees it wanted at the cement plant. Slip op. at 4; Tr. 86–87, 112–13, 135–36, 146.

Because CalPortland wanted to take control of the Oro Grande cement operation without shutting down the plant's kiln, the company began the process of staffing the plant early. Tr. 135–137. In mid-August, CalPortland's vice president for human resources, Steve Antonoff, contacted Martin Marietta's human resources manager Ambrose, for advice on hiring decisions at the facilities. Tr. 105, 146–47. In a statement to MSHA Investigator Jackson, Antonoff recalled comments that Ambrose had made to Antonoff about which workers she would not hire. Tr. 149–50. In late August, Antonoff offered Ambrose the human resources manager position at the Oro Grande mine following CalPortland's takeover. Tr. 147. She accepted that offer.

In September 2015, CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the facilities. Tr. 36–37. Nearly all of the miners applied to work for CalPortland, including approximately 120 of the roughly 125 miners working at the Oro Grande cement plant. Slip op. at 5; Tr. 45, 112-13; 127. According to Antonoff, CalPortland arranged interviews for all of the miners applying to work for them. Tr. 112–13. Each miner's interview was brief, with some lasting less than five minutes. Slip op. at 5; Tr. 38. CalPortland's interviewers had a list of six questions for each miner regarding the miner's honesty and workplace relationships but not examining the miner's prior work performance. Tr. 38–40, 53–54. CalPortland did not receive Martin Marietta's personnel files from the four facilities. Tr. 118, 156.

On September 26, 2015, CalPortland extended employment offers for the Oro Grande cement plant to approximately 115 miners. Tr. 113. Two days later on September 28, 2015, CalPortland informed the remaining miners that they would not be brought back to the mine. Tr. 41–42. Pappas was among ten hourly workers who were told that day they did not receive an offer of employment from CalPortland and were thus terminated. Tr. 41–42, 63–64. Martin Marietta told those miners to leave the plant immediately and not return for their shifts the following two days. Tr. 41. The miners were still paid through September 30, despite not coming to work. Tr. 41-42. As part of the asset purchase agreement, Martin Marietta and CalPortland arranged severance packages for Oro Grande miners whom CalPortland did not hire. Tr. 89-90.

Because CalPortland hired so many of Martin Marietta's miners, the company did not advertise the Oro Grande positions to the general public. Tr. 146. CalPortland renamed a few positions at the mine and changed or combined job responsibilities for some hourly positions. Tr. 141–42. Most of the job positions remained unaltered. Slip op. at 6; Tr. 143–45. The plant now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. Tr. 144–45, 171–72. CalPortland continues to sell its cement to many of

Martin Marietta's former customers with some changes in the customer base. Slip op. at 6; Tr. 168.

**B. The Judge's Decision**

Citing Commission caselaw, the Judge recognized that temporary reinstatement is limited to "miners" and that "applicants for employment" are not eligible for temporary reinstatement. Slip op. at 6. The Judge then found, as a threshold matter, that Pappas was a "miner" for purposes of the temporary reinstatement provision in section 105(c)(2) of the Mine Act. In this regard, the Judge focused on whether Pappas, when he applied for a job with CalPortland in September 2015 and was denied an offer of employment, was a "miner" or instead an "applicant for employment."

The Judge concluded that Pappas was a "miner" when he applied for a job with CalPortland, finding that:

> Pappas was no stranger off the street applying for a position at the Oro Grande cement plant but had an extensive employment history at the mine. Pappas's discrimination complaint relates back to decisions made while he was still employed at the mine . . . . CalPortland's structured termination and application process for the Oro Grande workforce does not materially alter Pappas's status as a miner eligible for temporary reinstatement under section 105(c)(2) of the Mine Act.

*Id.* at 8 (footnotes omitted).

The Judge also concluded that CalPortland could be liable for Martin Marietta's discriminatory actions as a successor-in-interest. *Id.* Finally, he ruled that the Secretary had submitted sufficient evidence to establish that Pappas's discrimination claim against CalPortland was not frivolously brought.[3] *Id.* at 13.

## II.

## Disposition

**A. Whether Pappas was a "miner" or an "applicant for employment?"**

The Commission has held that temporary reinstatement under section 105(c)(2) is limited to "miners," as defined in section 3(g) of the Mine Act, 30 U.S.C. § 802(g).[4] *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 930 (Sep. 1998).

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[3] On January 18, 2016, CalPortland filed a motion to stay the Judge's reinstatement order. The Secretary filed an opposition to that motion on January 20, 2016.

[4] Section 3(g) of the Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

Accordingly, "applicants for employment" are not eligible for temporary reinstatement under section 105(c)(2). *Id.*; *Sec'y of Labor on behalf of Piper v. KenAmerican Res. Inc.*, 35 FMSHRC 1969, 1972 (July 2013). The Commission has considered the question of whether a complainant is a miner or an applicant as a threshold issue in temporary reinstatement proceedings. *See Lone Mountain*, 20 FMSHRC at 932 n.5.

The Judge found that, during August 2015, Pappas was a "miner" employed by Martin Marietta. Slip op. at 7, 8. Moreover, the Judge found that CalPortland's vice president for human resources, Steve Antonoff, contacted Martin Marietta's human resources manager, Jamie Ambrose, for advice on hiring decisions at the mine. Slip op. at 5, Tr. 146–47. In a statement to Investigator Jackson, Antonoff recalled that Ambrose had made comments about which workers she would not hire. Tr. 149–50; slip op. at 5. Subsequently, CalPortland made the decision not to retain Pappas as an employee.

Under the Mine Act, "no person shall discharge or in any manner discriminate against" any miner because that miner engaged in protected activity.[5] Based upon the specific facts in this case, we conclude that there is a nonfrivolous claim that Pappas was a "miner" for purposes of the temporary reinstatement provisions of section 105(c)(2) during the time that he was allegedly being discriminated against. The record indicates that CalPortland began making its miner retention decisions in August 2015 as part of a process that lasted until September 26, 2015, when it announced which miners at the Oro Grande plant would be retained. Slip op. at 5; Tr. 70, 113, 147. Unquestionably, during this period Pappas was a "miner."

The hearing testimony establishes that CalPortland's decisions were based, at least in part, on the advice of Ambrose, Martin Marietta's human resources manager at that time, whose recommendations were initially made in August 2015. Tr. 70, 147. CalPortland contacted Ambrose to discuss which miners to retain at the Oro Grande plant a month before the hourly workers even applied for their positions. Tr. 36-37, 146-47. Ambrose's participation in this process was significant because she was aware of Pappas' previous protected activities and his reinstatement in January 2015, following settlement of his previous discrimination claim under the Mine Act. Tr. 27-28. Ambrose was also aware that since his reinstatement, Pappas had alleged a pattern of harassment by his supervisor and co-workers, and that Pappas had filed grievances against three management officials, including Ambrose herself, alleging that they failed to act after he reported the harassment. Tr. 29-31, 34; slip op. at 4.

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[5] Section 105(c)(1) of the Mine Act provides, in relevant part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act] . . . .

30 U.S.C. § 815(c)(1).

Ambrose not only provided miner retention recommendations to CalPortland, but she also accepted CalPortland's offer for her to become the human resources manager for CalPortland at the mine. CalPortland extended the offer to Ambrose towards the end of August. Tr. 147. Therefore, Ambrose presumably continued to be involved in preparing the September 26 final list of miners who would not be retained by CalPortland. Under these circumstances, Ambrose's knowledge of Pappas' previous protected activities and his reinstatement must be imputed to CalPortland. *See, e.g., Turner v Nat'l Cement Co. of CA,* 33 FMSHRC 1059, 1067-68 (May 2011); slip op. at 12. Indeed, the Judge expressly found that "CalPortland, through Ambrose, had full knowledge of Pappas's prior discrimination complaint and reinstatement." Slip op. at 8.

The record reflects additional evidence that the decision-making process relating to CalPortland's rehiring of the miners was done in conjunction with Martin Marietta and occurred while Pappas was still a miner. For example, on September 28, prior to the transfer of mine assets, Martin Marietta instructed miners who CalPortland did not rehire to in effect "clean out their lockers," requiring them to leave the mine immediately and not return for their shifts the following two days (although Martin Marietta continued to pay them). Tr. 41-42. Thus, Martin Marietta differentiated between the miners who would be retained by CalPortland and those who would not. Hence, Pappas experienced the effect of CalPortland's decision not to hire him while he was still a miner working for Martin Marietta.

In addition, although CalPortland contends that "[t]here was no transfer of the labor force," PTR at 3, it arranged with Martin Marietta, pursuant to the asset purchase agreement, to provide severance packages for miners whom CalPortland did not hire. Tr. 89-90. The miners who continued to work at the mine for CalPortland did not receive severance pay. This calls into question the assertion that they were actually terminated by Martin Marietta, while it is clear that those who received severance packages (including Pappas) certainly were.

We reject our dissenting colleague's central point that Pappas was an applicant because he had no legal relationship (and thus no legal rights) vis-a-vis CalPortland. Longstanding principles of labor law rebut this contention.

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), relied upon by our dissenting colleague, the Supreme Court upheld the right of union employees to be able to bargain with a successor company. *Id.* at 279. In subsequent cases since *Burns* was decided, the National Labor Relations Board has also routinely upheld the principle that a successor employer inherits the collective bargaining obligation of its predecessor if a majority of the successor's employees in an appropriate bargaining unit were employed by the predecessor, and if there exists "'substantial continuity between the enterprises.'" *Specialty Hosp. of Washington-Hadley, LLC,* 357 N.L.R.B. No. 77 (2011) (citations omitted). This is true even when a predecessor's bargaining unit has been changed or diminished in size. *Id.; see also Golden State Bottling Co.,*

*Inc. v. NLRB,* 414 U.S. 168, 180 (1973) (ordering purchaser of a business to reinstate an employee with backpay in order to remedy the seller's unfair labor practice).[6]

Thus, in the context of federal labor law, the courts have rejected the stark distinction our colleague attempts to make between an asset seller and purchaser. Instead, the courts have taken a realistic view of these transactions, and acknowledged that employees caught up in these corporate changes nevertheless may be protected. These concepts are especially pertinent in this case, where the transition from Martin Marietta to CalPortland was almost seamless. Most of the CalPortland employees were working at the same mine, and at the same jobs that they held when Martin Marietta owned the assets, and the human relations director remained the same.[7]

*Lone Mountain,* relied upon by our dissenting colleague, is clearly distinguishable. In that case, the complainant had no prior relationship with the operator who was alleged to have committed the discriminatory act, nor had he ever worked at the mine at which the discrimination was alleged to have occurred.

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[6] For example, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the Supreme Court ruled that a corporate employer was required to arbitrate with a union pursuant to a collective bargaining agreement between the union and another corporation which had merged with the corporate employer. The Court reasoned:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the wellbeing of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

*Id.* at 549.

[7] This type of continuity, wherein most employees could probably discern very little difference between working conditions in their jobs under their former employer and their current employer, was relied on by the 4th Circuit in *Overnite Transportation Company v. NLRB*, (cited by the Supreme Court in *Burns,* 406 U.S. at 293), which noted that "[t]he record shows that Overnite [the new employer] continued Rutherford's [the old employer's] business and, with respect to the pertinent . . . terminals, made no significant changes in their operation. The . . . drivers, who punched in on a Rutherford time card the morning of November 19, punched out on an Overnite time card that afternoon." 372 F.2d 765, 768 (4th Cir. 1967), *cert. denied*, 389 U.S. 838 (1967).

Here, in contrast, Pappas has alleged that he was the victim of a joint decision-making process involving Martin Marietta and CalPortland. Under that process, CalPortland relied upon the advice of Ambrose (human resources manager for Martin Marietta and subsequently human resources manager for CalPortland) regarding which miners should not be retained.

Although the Commission concluded it was not appropriate to order temporary reinstatement in *Lone Mountain*, here we deem such relief to be warranted. Temporary reinstatement was designed to maintain the status quo while miners proceed with their discrimination claims. Permitting Pappas, who had worked at the Oro Grande cement plant for 16 years, to continue working at that plant pending the resolution of this matter, is consistent with this underlying Congressional intent. The purchase by CalPortland under the totality of the circumstances described herein does not merit depriving Pappas of this remedy.

In summary, we conclude that the record establishes that there is a nonfrivolous claim that CalPortland's decision not to retain Pappas at the Oro Grande cement plant was made while Pappas was working as a miner at that same operation, prior to the October 1 transfer of assets. We further conclude that there is a nonfrivolous claim that CalPortland's decision not to retain Pappas as a miner at the same plant was based at least in part on unfavorable recommendations made by Ambrose as human resources manager for Martin Marietta and then human resources manager for CalPortland. As a result, CalPortland was aware of Pappas' previous protected activity and reinstatement. Because CalPortland was aware of Pappas' employment history and allegedly decided not to retain him during the time that he was still working as a "miner," we conclude that Pappas is a "miner" for purposes of the temporary reinstatement provisions of section 105(c)(2). The fact that Pappas's employment was officially terminated on September 30 and he was not "rehired" the next day does not alter the fact that he was a miner when these decisions were made.

**B. Whether Pappas' discrimination claim was not frivolously brought?**

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), (citations omitted) *aff'd*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*"). The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. No. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" 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." *JWR*, 920 F.2d at 748, n.11.

At a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not

whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d at 744. As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Chicopee*, 21 FMSHRC at 719.

In this regard, we address the Judge's finding that Pappas' complaint was not frivolously brought. The elements of a discrimination claim are that (1) the complainant engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (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, 817 (Apr. 1981). The Commission applies the substantial evidence standard in reviewing a Judge's factual determinations.[8]

Indisputable evidence supports a finding that Pappas engaged in protected activity when he filed his section 105(c) discrimination complaint against Martin Marietta in April 2014, and when, as a result of settlement of that complaint, he was reinstated by Martin Marietta in January 2015. Tr. 26-27, 34-35, 68. Pappas has additionally made the nonfrivolous claim that after he was reinstated, he was harassed by his supervisor and co-workers as a result of his prior safety complaints, and that management officials, including Ambrose, failed to respond when he reported the harassment. Tr. 29, 30, 33-34; Slip op. at 4. Making complaints about harassment due to a previous safety complaint is itself protected activity. *See E.E.O.C. v. New Breed Logistics,* 783 F.3d 1057, 1067 (6th Cir. 2015) (in a Title VII case involving sexual harassment of female workers by a male supervisor, where a male co-worker of the harassed female workers complains about their treatment to the supervisor and is then fired, his complaint about the harassment of his co-workers constitutes protected activity). Furthermore, as stated above, we find that Pappas has made a nonfrivolous claim of an "adverse action" by CalPortland, specifically the decision not to continue his employment as a miner at the Oro Grande plant. Thus, the only remaining issue is whether substantial evidence supports the Judge's conclusion that Pappas asserted a nonfrivolous "nexus" between the protected activity and the adverse action.

The Commission recognizes that discriminatory motive may be shown by indirect evidence establishing a nexus between the miner's protected activities and the adverse actions. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission in *Chacon* stated that discriminatory intent can be established by circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the

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[8] *E.g.*, *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidation. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510.

In its petition, CalPortland continues to deny that it had any knowledge of Pappas's protected activity. However, as the Judge found, a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment. *See Nat'l Cement*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions"). The Secretary presented evidence that in August 2015, CalPortland's vice president for human resources, Antonoff, consulted with Martin Marietta's Ambrose about whom CalPortland should hire after taking over the Oro Grande cement plant. Tr. 146–47, 149–50. Moreover, Ambrose received an employment offer from CalPortland in August 2015 which she subsequently accepted. Tr. 147. Therefore, we agree with the Judge that the Secretary has raised a nonfrivolous claim that CalPortland had imputed knowledge of Pappas's protected activities and has thus met his evidentiary burden.

We also consider whether the Secretary provided sufficient evidence of a close temporal relationship between Pappas's protected activities – the April 2014 section 105(c) complaint and his subsequent reinstatement to the mine, and his subsequent complaints about harassment – and CalPortland's allegedly discriminatory decision not to retain him. As a result of the settlement of his discrimination complaint against Martin Marietta, it reinstated Pappas to the mine in January 2015, and the alleged harassment continued through August 2015. Tr. 27, 29, 33, 35. In August 2015, Ambrose advised CalPortland on hiring decisions at the mine, and the decision not to continue Pappas' employment was made in September. Tr. 41-42, 63-64, 146-47, 149-50. The Judge found that CalPortland, through Ambrose, knew of Pappas' prior discrimination complaint and reinstatement. Slip op. at 8. Accordingly, we find that the Secretary's evidence demonstrates a satisfactory coincidence in time under the standard of review for these limited proceedings between Pappas' protected activities and CalPortland's decision not to retain him.

Next, we consider whether animus existed because of Pappas' prior section 105(c) complaint and subsequent reinstatement. The Secretary presented evidence that Pappas was harassed by his direct supervisor and co-workers after his prior reinstatement at the mine. Tr. 29, 33-34. Moreover, the Secretary presented evidence that Martin Marietta's managers were indifferent to Pappas's complaints about this harassment. Tr. 30. Animus may be shown by evidence suggesting supervisors were indifferent to or angered by a miner's protected activity. *See Nat'l Cement*, 33 FMSHRC at 1069 (discussing supervisors' negative reactions to miner's safety complaints); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1085, 1089–90 (Oct. 2009). We therefore determine that sufficient evidence exists that Martin Marietta's management, in failing to address the regular harassment of Pappas, signaled a distinct animus toward his section 105(c) complaint and subsequent reinstatement. Because CalPortland's retention decisions were allegedly based on Ambrose's recommendations, that animus can be attributed to CalPortland as well.

Finally, we consider whether Pappas was subjected to disparate treatment. We determine that the Secretary has presented sufficient evidence to sustain a nonfrivolous claim that Pappas was treated disparately from other miners when CalPortland decided not to retain Pappas at the cement plant. The fact that 120 miners sought positions at the mine and Pappas was one of only ten miners who were not retained, strongly suggests that CalPortland's decision was based on unfavorable information concerning his employment history.

We conclude that Pappas' discrimination complaint was not frivolously brought, and that Pappas is eligible for temporary reinstatement at the Oro Grande cement plant. We note that the question of whether Pappas was discriminated against in connection with the firing and hiring of miners at the plant, and whether he is entitled to permanent reinstatement, has yet to be resolved. We express no view regarding the merits of Pappas' discrimination claim.

## III.

## Conclusion

For the reasons stated above, we affirm the Judge's decision. We also deny CalPortland's motion to stay the Judge's temporary reinstatement order.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Althen dissenting:

Prior to today's decision, the line between a "miner" and an "applicant for employment" for purposes of section 105(c) was clear. If a miner's employer *discharged him* and the miner had a non-frivolous claim that the discharge was motivated by protected activity, the miner was entitled to temporary reinstatement. If an operator *refused to hire* an applicant for employment based on protected activities in which the individual had engaged, the individual was entitled to file a complaint and receive relief under section 105(c). However, an *applicant for employment* with an operator, not having any employment relationship, could not obtain temporary reinstatement – he simply has not had a job with the potential new employer to which he may be "reinstated." With today's ill-considered decision, the Commission makes a muddled mess of the distinction between a miner and an applicant for employment for purposes of temporary reinstatement proceedings. The only guarantee from the Commission's decision is that we will now spend years trying to differentiate decisions on an issue that, until today, was in accord with the plain language and obvious purpose of section 105(c) and was perfectly clear. I respectfully dissent.

## DISCUSSION

My disagreement with the majority is easily stated. The majority finds that, for purposes of an application for temporary reinstatement under section 105(c) of the Mine Act, Mr. Pappas was a miner for CalPortland. Of course, in reality, it is undisputed that Mr. Pappas was not a miner for CalPortland. Mr. Pappas was not working for CalPortland. He never worked for CalPortland. He was an applicant for employment and was not entitled to temporary "reinstatement" to a position he had never occupied.

Section 105(c) of the Mine Act delineates three classes of individuals entitled to the protection of the section – "miners," "applicants for employment," and "miners' representatives." The section also clearly provides two types of procedures for resolution of discrimination complaints – regular processing of complaints and an application for temporary reinstatement. There are distinct differences between the processes.

First, only the Secretary may file an application for reinstatement. Although an individual may press a discrimination case on his own behalf, the individual may not seek temporary reinstatement on his own behalf. Second, and of ultimate importance here, the Secretary may not maintain an "application for reinstatement" on behalf of an individual who claims she was denied employment on the basis of protected activity. *Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.* 20 FMSHRC 927 (Sept. 1998) ("*Lone Mountain*").[1]

[1] I emphasize that, if the Secretary or Mr. Pappas can prove by a preponderance of evidence that CalPortland refused to hire him based on protected activity, he will be entitled to full relief under section 105(c). In its present posture, this case has nothing to do with the right of an applicant for employment to the protection of section 105(c). It only involves whether an individual who clearly was an applicant for employment may require a new employer to provide a position to him via a purported "reinstatement."

The majority and I agree that whether the complaint was an "applicant for hire" is a threshold decision under an application for temporary reinstatement. Here, there is essentially no question. Clearly, Mr. Pappas was an applicant for employment.

The majority cannot and does not contend that CalPortland ever employed Mr. Pappas. Commission law and labor law case law make that completely clear. The Commission can incorrectly order CalPortland to hire Mr. Pappas; it cannot order CalPortland to reinstate him at CalPortland. He never had a position with it. Indeed, the majority recognizes that the transaction did not include the labor forces at the acquired facility, saying that CalPortland "extended offers of employment." Slip op. at 3.[2]

*Lone Mountain* is directly on point. There, the Commission ruled that "applicant[s] for employment" are not eligible for temporary reinstatement under section 105(c)(2) of the Act. In that case, the complainant, as here, was actively working for a different coal operator. In anticipation of a layoff from his current active employment as a miner with a different employer, he applied for a job with Lone Mountain. Lone Mountain gave him a roof-bolting test as part of the employment application process. Subsequently, Lone Mountain did not extend a job offer to the complainant alleging that he had failed to meet the minimum requirements of the roof-bolting test. The complainant filed a non-frivolous complaint. He alleged that he failed to meet the minimum requirements of the test because he encountered unsafe conditions during the test that he brought to the attention of the operator. Therefore, the complainant claimed that the operator's failure to hire him was a result of discrimination prohibited under the Mine Act. The Secretary filed an application for temporary reinstatement on his behalf. The Commission found that the complainant was an "applicant for employment." 20 FMSHRC at 927-32. On that basis, it denied the application for temporary reinstatement.

The Commission based its decision on a careful and sound reading of the plain language of section 105(c). It noted that the temporary reinstatement clause is one of only two instances in which "miner" is used as a stand-alone term in section 105(c)(1) and (2). Further, Congress recited versions of the phrase "miner, applicant for employment, or representative of miners" eight times – in six instances before mentioning temporary reinstatement and two instances afterward.

Obviously, the applicant in *Lone Mountain* was a "miner" in the sense he was actively working as a miner for a different coal operator. However, the unmistakable purpose of the

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[2] Elsewhere, the majority mischaracterizes to the point of tediousness CalPortland's hiring decisions as "retention" decisions or a decision to "retain." The majority knows and should deal with the fact that they were "hiring" decisions. For example, the majority states, "CalPortland informed all of the miners at the Martin Marietta facilities that they would need to reapply for positions at the facilities." Slip op. at [3] (citing Tr. 36–37). In fact, Mr. Pappas testified that he was told, "You should be receiving applications any day. Fill them out, and do what the application says. Call -- there's a number for you to call and set up the interview for the following week." Tr. 37. Fortunately, as set forth above, at other points the majority properly recognizes the true nature of CalPortland's hiring decisions.

reinstatement provision in section 105(c) is to prevent employers from discriminating against their miner employees. If they do discriminate to the point of discharge, an immediate remedy is imperative. The former employee is entitled to reinstatement upon a non-frivolous showing of discrimination. The reinstatement provision and the extraordinarily low threshold of proof arise from Congress' reasonable demand that operators not discharge their miners in retaliation for protected activities.

In *Lone Mountain*, the Commission correctly observed that, if a prospective employer denies employment based on protected activity, section 105(c) provides relief to the applicant, but an applicant for employment is not entitled to force the prospective employer to hire her temporarily. There is no previously held position to which the prospective employer may reinstate the applicant. The clear distinction for an application for temporary reinstatement is that it is an immediate remedy for an unwarranted discharge.

Indeed, the plain language of section 105(c) makes it obvious that the "reinstatement" provision does not apply to hiring individuals that did not, and do not, have an employment relationship with the operator. The remedy is not an "application for temporary ***employment***." It is an "application for temporary ***reinstatement***. The word "reinstatement" means "To place again in a former state or position; to restore." *Webster's Third New International Dictionary* 1915 (1993) defines "reinstatement" as "the action of reinstating (as in a post or position previously held but relinquished)." *The Random House Webster's Unabridged Dictionary* 1625 (2d ed. 1998) defines "reinstate" as "to put back or establish again, as in a former position or state."

Going further, the Commission frequently turns to decisions of the National Labor Relations Board and labor cases generally for assistance in resolving issues, including cases of alleged discrimination. *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7-11 (Jan. 2005); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990). In this case, labor cases dealing with asset transfers amply demonstrate that, in the context of an asset transfer, employees of the seller are not "transferred" as employees by the buyer. The employees of the seller are not employees of the buyer. The buyer may offer them an opportunity to apply for jobs and, then, they are either offered or not offered jobs.

The Judge here cited, but misconstrued, the importance of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). *Burns* dealt with whether the obligations of a labor agreement apply to an unrelated company that purchases the assets of a company signatory to a union contract. Under *Burns*, if an asset purchaser does not take the terms of the existing labor contract, then it is free to establish its own initial terms and conditions of employment. That principle is significant here because it establishes that employees hired to work at the same facility in an asset transaction have a new employment relationship. In every factual and legal sense, they apply for employment and then are hired or not hired by the new owner. The employees fill out employment applications and the buyer makes individualized decisions whether to hire each former employee of the seller. The applicants may choose to work for the new employer under the new terms or may decline an offer of employment. In fact, here, ten to 15 of the applicants to whom CalPortland offered employment refused to accept it. Tr. 113. Apparently, the new terms of employment were not sufficient for those former employees of Martin Marietta to accept employment offers from CalPortland.

As applied to the mining industry, NLRB case law makes it evident that if a seller has a contract with the union and a buyer purchases the assets of the seller and is careful not to take the union contract, the buyer is free of all existing employment obligations to employees. Indeed, it need not hire any of the employees.[3] Of course, the buyer may not discriminate in making hiring decisions but no employment relationship or obligation to hire any employee arises from the sale of the mine. The point here is that the rights of employees run with the employer not with the land.

CalPortland made it clear in the terms of the purchase agreement that it was not taking any obligations to the existing employees of Martin Marietta and was not "transferring" any of Martin Marietta's employees to CalPortland. Each person discharged by Martin Marietta had a right to apply for employment but there was no guarantee CalPortland would hire the applicant. An applicant for hire may obtain a job at CalPortland if, after a hearing, the Commission determines the applicant was refused employment for discriminatory reasons. However, Congress chose not to provide applicants for employment with temporary "reinstatement" to jobs they never had.

The majority makes an unavailing effort to turn directly adverse labor law to its favor. To do so, the majority notes the well-known principle that if an asset purchaser has hired a majority of its workforce from the discharged employees of the predecessor when it has hired a substantial and representative complement of employees, it takes on a bargaining obligation. *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987). *Fall River* and many other asset transaction cases demonstrate beyond question, that employees hired by the asset buyer are first applicants and, then, if hired, employees. The majority even goes so far as to quote a passage from *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), a case decided eight years before *Burns.*[4] Indeed, *Burns* distinguished the *Wiley* case in terms meaningful for this case. The Court said, "Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8(a)(5) and § 9(a)." 406 U.S. at 286. Notice the precise wording of the Court, "merely hired enough of Wackenhut's employees."[5] Here, there is

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[3] Of course, the failure to hire any employees would create a strong likelihood of anti-union animus. If that were the case, the terminated employees could be awarded jobs after a full hearing.

[4] *Wiley* involved a merger; the case bears no resemblance to the asset transfer involved in this case. In any event, *Burns* clearly establishes that an asset buyer hires or does not hire employees of the seller.

[5] The majority cites, without argument, *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973). Ultimately, that case involved a successor-in-interest theory, a theory the majority cannot and does not embrace as having relevance to this case where there has been no showing at this point of any misconduct by the predecessor. It is notable, however, that the Court did provide instructions on the due process concerns of attempting to apply liability for wrongs by one party upon a third party saying,

no doubt that labor law cases confirm that CalPortland was making hiring decisions with respect to Martin Marietta's workforce. This is not the "stark distinction" pejoratively proclaimed by the majority. It is the legal distinction between hiring and reinstating. It is a distinction made by the Supreme Court in *Burns* and numerous other labor cases for over fifty years.

Finding nothing of use in labor law cases that are, in fact, contrary to its position, the majority turns to an ill-conceived attempt to distinguish the Commission's *Lone Mountain* decision. It does not overrule *Lone Mountain. Lone Mountain* is clearly correct and precedential regarding the plain meaning and purpose of temporary reinstatement under section 105(c). The attempted distinction is baffling. The majority bases its attempted distinction on the ground that Ms. Ambrose was an employee of Martin Marietta when she provided some unknown input about the Martin Marietta employees. [6]

The majority attaches decisive importance to the fact that subsequently CalPortland hired Ms. Ambrose. The majority provides no cogent explanation of why Ms. Ambrose change of employment changes the status of Mr. Pappas as an applicant for employment with CalPortland. If anything, the majority's analysis that Martin Marietta employed Ms. Ambrose and that she subsequently left to become a new employee of CalPortland confirms that Martin Marietta employees were applying for work with CalPortland.

Indeed, *Lone Mountain*, where the Commission established that the plain meaning of section 105(c) meant that the temporary reinstatement did not apply to applicants for hire, presented a more favorable set of facts for the claimant. In *Lone Mountain*, Lone Mountain both

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> Moreover, procedures were announced in Perma Vinyl which provide the necessary procedural safeguards. There will be no adjudication of liability against a bona fide successor 'without affording (it) a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices.

*Id.* at 180.

[6] At the outset of its attempted justification, the majority makes a number of suggestions that truly are frivolous. It suggests that the fact that miners whom CalPortland hired did not get severance "calls into question that they were actually terminated by Martin Marietta . . . ." Slip op. at 7. Is the majority kidding? What employer gives employees severance when it knows the employee is immediately moving to a new job. The majority also states that there may be some importance to the fact that Martin Marietta fully paid the 17 employees not hired by CalPortland but did not require them to report to work on the 29th or 30th. Again, has the majority no business experience whatsoever? You have informed 17 workers that after the asset transfer, the new owner has not decided not to hire them. Out of concern for those workers and reasonable concern for having potentially disgruntled workers present, they were not required to work. That is not evidence of anything with regard to the applicant for employment issue. It is merely a good business practice.

gave the test where the alleged protected activity occurred and made the decision not to hire Mr. Young. Therefore, in *Lone Mountain*, there was never a question that, if discrimination occurred, a then current employee of Lone Mountain made such discriminatory decision. The Commission found that Mr. Young was an applicant for hire with respect to Lone Mountain rather than a miner. If an employee of Mr. Young's current employer had called to suggest not hiring him because he was active in safety matters, that advice, which would be similar to what the majority says is non-frivolously claimed here, would not have changed his status as an applicant for hire. "Temporary reinstatement" to Lone Mountain was not available.

In *Lone Mountain*, the miner could cite test conditions at Lone Mountain as evidence of discrimination; here, Mr. Pappas may cite his work for Martin Marietta. In neither case, does such evidence give Mr. Young or Mr. Pappas any legal relationship other than an applicant for hire.

Going further, Mr. Young was a working miner. However, he was not, and had not been, a working miner for Lone Mountain. This also is Mr. Pappas' situation. As we have noted, repeatedly, the purpose of temporary reinstatement under section 105(c) is to prevent a miner's employer from terminating him because of protected activity. As a legal matter, Mr. Pappas had no closer relationship to CalPortland than Mr. Young had to Lone Mountain.

Going another step further, as we have explained, the fact that Mr. Pappas was applying for a job with a new employer who had purchased the assets of his former employer certainly makes Mr. Pappas' status an applicant for employment. The majority cites no case for the proposition that a purchaser of assets must decide to employ all or even any employee of the former owner.

Indeed, in the coal industry, when an employer's current coal reserve is nearing exhaustion, it is not uncommon at all for a productive operator to purchase the assets of a less productive operator and move its workforce to the newly purchased assets. Obviously, such transactions do not present overtones of discrimination, but they do fully illustrate that asset buyers hire their own employees whether those employees are existing employees of the buyer, workers hired from the street, or workers whom the seller previously employed. To find otherwise, would be essentially to find that employees are encumbrances that run with the land. Working at a particular location does not create employment rights; working with an employer creates and protects employment rights. *Burns, supra*, and many other NLRA cases firmly establish that principle. If the Secretary files a complaint claiming CalPortland discriminated against Mr. Pappas and if the Secretary or Mr. Pappas on his own prevails, Mr. Pappas will be compensated fully for his damages.

Under *Burns*, after an asset transfer employees hired by the buyer still work at the facility but they have no employment relationship with the seller of the assets; they have a newly-hired employment relationship with the buyer. The site at which a person is working or desires to work does not determine if the person is an applicant for hire. That determination depends solely upon whether the person has any existing work relationship with the employer from whom he seeks employment.

Status as an applicant for employment is a legal matter that is a prerequisite for maintaining an application for temporary reinstatement. The Judge and Commission make that decision to determine whether the application for temporary reinstatement may be considered. Is the Commission saying that we must first reinstate an applicant for employment who claims to be a miner and then determine whether the person can pursue reinstatement? Although the standard of proof is low at a temporary reinstatement hearing, the Secretary bears the burden of proof. Part of that burden is to establish that the applicant for reinstatement has a right to file the petition for temporary reinstatement. In any event, the majority's assertion that Mr. Pappas has a non-frivolous claim of having had an employment relationship with CalPortland is flat out wrong. As has been repeatedly demonstrated above, Mr. Pappas never had any such relationship. Any claim otherwise is indeed wholly frivolous.

The majority cannot and does not articulate the basis for any employment relationship between Mr. Pappas and CalPortland. Because it is impossible to find any principled basis for the majority's decision, it is also impossible to imagine the possible ramifications of the decision regarding future cases where an applicant has never worked for an operator to whom he applies for a job. The majority throws the law related to temporary reinstatement into an unnecessary, unwarranted, and unfathomable state of confusion. If Ms. Ambrose had quit Martin Marietta and found other employment but voluntarily agreed to speak to CalPortland, would Mr. Pappas be "entitled" to reinstatement? If CalPortland had not asked for her comments until she worked for it, would that make a difference? If CalPortland called a former employee of Martin Marietta about candidates for hire and that person, who knew of Pappas protected activity at Martin Marietta, gave a negative reference (for unknown reasons) would Pappas be entitled to reinstatement? What if a fellow employee of Mr. Pappas made an unsolicited call to CalPortland and said he did not want to work with him? Would CalPortland be compelled to hire him on a temporary basis through a "reinstatement" proceeding? What if CalPortland spoke with some person completely unrelated to Martin Marietta but who knew of Mr. Pappas protected activity at another mine, would "reinstatement" follow?

In all those examples, employees of Martin Marietta would have worked at the facility until the closing date of the purchase. In none of the above examples would the timing of the sale or the timing of the job offers determine whether a person was an applicant for employment with CalPortland.

Of course, avoiding confusion within the law cannot be a driving factor in a decision affecting individual rights. However, prior to this decision, the Commission was clear, precise, and correct in its interpretation. The Commission based temporary reinstatement upon an employment relationship between the individual and the affected employer – that is why it is "reinstatement." This case presents no basis for muddling the law.[7]

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[7] I do not understand why the Secretary could not and/or did not actually pursue Mr. Pappas' former employer if it took an adverse action against him (perhaps an adverse employment review), based upon protected activity, that resulted in loss of employment. Obviously, Martin Marietta could not obtain employment for Mr. Pappas with CalPortland as CalPortland made its hiring decisions. However, the Commission recognizes, accepts, and orders economic reinstatement in temporary reinstatement proceedings.

The majority attempts to muster every fact in the record that might support a discrimination claim by Mr. Pappas. With all respect to the majority, it needs to be clear that allegations supporting possible discrimination have nothing whatsoever to do with whether Mr. Pappas was an applicant for employment. Surely, the Secretary will use such facts, if he chooses eventually to file a discrimination complaint, in support of his case. They are not relevant to the applicant for hire question.

Finally, the concluding paragraph in the section of the majority's opinion dealing with the applicant for employment issue manages to recapitulate virtually all the errors of its decision. The majority first states, "there is a non-frivolous claim Cal Portland's decision not to retain Pappas at the Oro Grande Cement Plant was made while Pappas was working as a 'miner' at the Oro Grande plant, prior to the October 1 transfer of assets." Thus, the majority again mistakenly refers to CalPortland's hiring decisions through the term "retain." More importantly, it actually is undisputed that CalPortland made its hiring decisions while Martin Marietta's employees were still working for Martin Marietta. As demonstrate above, that is not relevant to the fact that these were hiring decisions by CalPortland regarding applicants for employment. Certainly, the majority cannot be suggesting seriously that it makes a difference whether a new employer makes a job offer while the applicant is working for his/her current employer. If CalPortland had waited until closing to offer jobs to the new employees that would make no difference to the employment issue upon this case turns and only would cause disruption of operations and loss of income to the newly hired workers.

The majority also states that the decision not to hire Mr. Pappas may have resulted from knowledge that he had engaged in protected activity. As repeatedly stated here and as established in *Lone Mountain*, the possibility that the hiring decision was discriminatory is not relevant to whether the applicant is eligible to seek reinstatement. Perhaps in the *Lone Mountain* case, Lone Mountain's decision not to hire its applicant, Mr. Young, may have been discriminatory; that was not relevant to a temporary reinstatement petition. Young did not, and had not, worked for Lone Mountain. Therefore, he could not be "reinstated" at Lone Mountain. He was an applicant for hire.[8] The same conclusion should apply here.

## CONCLUSION

As demonstrated, the majority's decision conflicts with the plain language and obvious purpose of section 105(c); it conflicts with established Commission case law; it conflicts with basic labor law principles governing the termination and commencement of employment relationships in asset transfers; and, it conflicts with the public interest in the clear and understandable application of Mine Act provisions. Congress was properly mindful of the right of applicants for employment in mining positions to be free from discrimination based upon

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[8] The majority makes the inconsequential and obvious observation by footnote that Martin Marietta coordinated with CalPortland to make a smooth change of ownership of the purchased facilities. That is not meaningful. Any other actions by sophisticated entities would be surprising.

protected activities by empowering and directing the Secretary to pursue claims the Secretary determines to be valid. Congress, however, understandably and intentionally stopped short of forcing employers to hire applicants for employment without a full hearing. Mr. Pappas was an applicant for employment with CalPortland and, therefore, in accordance with Congress' purpose and the express terms of section 105(c), he was not eligible for reinstatement to a position with an employer for whom he had never worked.

Result driven decisions are not necessarily wrong, and they need not create bad and confusing law. Unfortunately, the Commission's decision in this case is both wrong and harmful to the proper administration of section 105(c) of the Mine Act. I respectfully dissent.

William I. Althen, Commissioner

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