FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 22, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LEVI BUSSANICH	:	
v.	:	Docket No. WEST 2000-99-D
CENTRALIA MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), the Secretary of Labor on behalf of Levi Bussanich has filed a petition for review of Administrative Law Judge Richard Manning's January 27, 2000 order denying temporary reinstatement issued pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and 29 C.F.R. § 2700.45. 22 FMSHRC 107 (Jan. 2000) (ALJ). We grant the Secretary's petition for review and, for the reasons that follow, affirm the judge's order denying the temporary reinstatement of Bussanich.

I.

Factual and Procedural Background

Centralia Mining Company ("Centralia") operates the Centralia Mine, a surface coal mine in Lewis County, Washington. 22 FMSHRC at 108. Bussanich was employed at the mine for 14 years and worked as a welder for 5 years. *Id.* Before filing the complaint which is the subject of this proceeding, Bussanich filed three other complaints with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging discrimination in violation of section

105(c) of the Mine Act on February 11, 1997, February 19, 1999, and August 26, 1999.[1] *Id.* at 110-11.

On October 10, 1999, Bussanich injured his back at work and was placed on workers' compensation ("L&I leave"). *Id.* at 108. On November 4, 1999, after he had been absent more than two weeks, Rachel Woolley, Centralia's Human Resources Administrator, sent Bussanich a memorandum, pursuant to regular company policy, to determine whether he was taking leave subject to the Federal Family and Medical Leave Act ("FMLA"), and to ask him to complete an attached Department of Labor ("DOL") medical form. *Id.* When she did not receive a response from Bussanich, on November 17, 1999, she sent him a letter reminding him to have his physician complete the DOL medical form. *Id.*; Tr. 91; R. Ex. 2.

On November 30, 1999, Woolley received a phone call at her office. 22 FMSHRC at 108. According to Woolley, the caller identified himself as Bussanich, stated that he was on L&I leave rather than FMLA leave, that he "got another job, so [he] quit," that he would later pick up his tools, and that he needed his "401(k) money." *Id.* Woolley immediately discussed the call with Centralia's safety director, Ralph Sanich, and typed a brief memorandum describing her recollection of the conversation based in part on notes she took during the conversation. *Id.* at 108, 112.

Sanich telephoned Centralia's attorney, Thomas C. ("Tim") Means, who already represented Centralia with respect to Bussanich's other discrimination complaints. *Id.* at 113; Tr. 122. Means asked whether the mine accepted oral resignations from employment, and Sanich answered in the affirmative. 22 FMSHRC at 113. Means then advised him to treat Bussanich in the same manner that Centralia would treat any other employee. *Id.* Near the end of the conversation, Dave Kendrick, Bussanich's foreman, entered the room and was instructed to escort Bussanich to get his tools when he arrived at the mine that day. Tr. 131. Bussanich never came to retrieve his tools. Tr. 131-32.

On December 3, 1999, Sandy Wallace, Centralia's Senior Benefits Specialist, sent Bussanich a letter, acknowledging that he had quit on November 30, asking him to make arrangements to retrieve his tools, and reminding him to schedule an exit interview. 22 FMSHRC at 108. She enclosed with the letter Bussanich's final paycheck, and a check for his accrued vacation pay. *Id.* Bussanich deposited the checks on approximately December 9, 1999. *Id.*

[1] Although section 105(c)(3) requires the Secretary to inform a miner of the results of her investigation of the miner's complaint within 90 days after receiving the complaint, MSHA has not completed its investigation of these complaints. 22 FMSHRC at 110-11.

On December 7, 1999, Bussanich sent a letter to Wallace stating that he was under a doctor's care for an on-the-job injury, that he did not quit, and that he did not call Woolley on November 30. *Id.* Marjorie Taylor, the Senior Human Resources Administrator for Centralia, sent Bussanich a letter in reply, stating that Centralia considered him to have quit on November 30. *Id.* at 109.

On December 18, 1999, Bussanich filed a discrimination complaint with MSHA. *Id.* The complaint refers to Wallace's December 3 letter, his December 7 letter, and the reply he received from Taylor. *Id.* In addition, his complaint stated that "this is another attempt by the company to terminate my employment due to my earlier complaints due to safety at the mine." *Id.*

On or around December 21, 1999, Bussanich telephoned the mine to participate in an exit interview with Wallace. *Id.*; Tr. 166, 175; R. Ex. 7. That same day, Wallace signed a paper documenting the issues discussed during the exit interview and sent it to Bussanich, who signed it on December 23. Tr. 166, 175; R. Ex. 7. During the exit interview, Bussanich expressed interest in obtaining the funds from his 401(k) account and pension plan. 22 FMSHRC at 109. At the hearing, Bussanich testified that he elected the take the entire proceeds from his 401(k) account in cash because he could not withdraw only a portion of the funds due to two outstanding loans on the account, and because he needed the money to pay off household debts and support himself. *Id.*; Tr. 54, 68-69, 202. On approximately December 28, 1999, Bussanich received a check in the amount of $61,792, which were the net proceeds from his 401(k) account. 22 FMSHRC at 109. Although Bussanich testified that he used these proceeds for household debts and to support himself, he acknowledged that he also owed Bradley Whisnant, his business partner in an adult video store, $75,000. Tr. 45, 60-61, 210, 213.

On December 30, 1999, the Secretary filed an application for temporary reinstatement of Bussanich. Prior to filing the application, MSHA interviewed Bussanich and John Gift, Jr., another Centralia welder. 22 FMSHRC at 109. Centralia requested a hearing within 10 days of receipt of the Secretary's application, and the matter proceeded to hearing before Judge Manning on January 21. *Id.* at 107.

After the case was filed, Centralia served a subpoena on U.S. West, the local phone company, in order to determine the originating phone number of the call received by Woolley on November 30, as well as the originating number for another call on August 18, 1999,[2] relating to Bussanich's third, pending complaint. *Id.* at 109; Tr. 225; R. Ex. 12-13. Based on the information provided by U.S. West and GTE Northwest, another phone company, both calls

[2] This call was made to the mine on the same day and during the approximate time-frame that the mine received an anonymous call suggesting a search of Bussanich's truck for a stolen citizen's band radio. Tr. 186, 194, 224-25; R. Ex. 13. This search constituted the adverse action which formed the basis for one of Bussanich's earlier discrimination complaints. Ex. B-3 to Application for Temp. Reinstatement.

originated from a phone registered to Kim Whisnant, Bradley Whisnant's wife. 22 FMSHRC at 109; Tr. 196-97; R. Ex. 11-14. Centralia served subpoenas on Bradley and Kim Whisnant to testify at the temporary reinstatement hearing, but neither of the Whisnants complied with the subpoenas.[3] 22 FMSHRC at 109, 110.

At the hearing, Bussanich testified that Mr. Whisnant subsequently called him because he was upset about the subpoena. *Id.* at 110. Bussanich stated that Whisnant informed him that he (Whisnant) called the mine in November to inquire about Bussanich's employment status, and that he obtained Woolley's phone number from her FMLA correspondence, which Bussanich had thrown in the trash at the video store which Whisnant and Bussanich operated as partners.[4] *Id.*; Tr. 49-50, 212-13.

The judge concluded that the Secretary failed to establish that Bussanich's complaint had not been frivolously brought. 22 FMSHRC at 113. The judge noted that the parties had stipulated that Bussanich had engaged in protected activity, and that the sole issue for the hearing was whether there was a colorable claim that Bussanich had been discharged. *Id.* at 112. The judge assumed, for purposes of the proceeding, that Bussanich had not called Woolley to quit his job on November 30. *Id.* at 113. The judge found, however, that uncontroverted evidence established that Centralia sincerely believed that Bussanich had voluntarily quit his job on November 30, and that all of its actions from November 30 to the present were based on that belief. *Id.* The judge reasoned that, because Centralia understood that Bussanich quit his job, there was no colorable claim that he was discharged by Centralia because of his protected activity. *Id.* Finally, the judge rejected the argument that Centralia discriminatorily failed to rehire Bussanich after it received his December 7 letter. *Id.* at 113-14. The judge noted that the discrimination complaint does not contain such an allegation, the Secretary did not raise such an argument, and the record contained no evidence to support it since Centralia treated Bussanich in the same manner that it treated other employees who orally quit their jobs. *Id.* Accordingly, the judge denied the application and dismissed the proceeding.

On February 2, 2000, the Commission received from the Secretary on behalf of Bussanich a petition for review of the judge's order denying temporary reinstatement. First, the Secretary argues that the judge's finding that there is uncontroverted evidence which establishes that Bussanich voluntarily quit his job is not supported by the record. Pet. at 7-9. Second, the Secretary contends that Bussanich's December 7 letter should have been considered by the judge in the context of whether Centralia reasonably believed that Bussanich had quit his job. *Id.* at 9-10. Third, the Secretary argues that the record raises a colorable question concerning Centralia's

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[3] At the hearing, the Secretary opposed Centralia's motion to enforce the subpoenas. 22 FMSHRC at 110 n.1.

[4] Bussanich owned three businesses at the time he was working at the mine: a real estate business, an video store, and a welding business. Tr. 66.

motivation, and that the November 30 phone call was a pretext for discharging Bussanich. *Id.* at 10-14.

On February 9, the Commission received a response from Centralia, disputing the Secretary's arguments. C. Resp. at 13-22. In addition, it maintains that the judge's decision should be affirmed on the basis that the judge alternatively should have made a credibility determination against Bussanich, and on the basis that the Secretary failed in her duty to sufficiently investigate whether Bussanich's complaint was frivolously brought. *Id.* at 22-26.

II.

Disposition

As the Commission has previously recognized, "[t]he 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." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The phrase "not frivolously brought" is not defined in the Mine Act. 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. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624. The Commission and courts have approved the description of the "not frivolously brought" standard as being indistinguishable from the "reasonable cause to believe" standard applied in other statutes. *Secretary of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350 (separate opinion of Commissioners Holen and Riley), 1352 (separate opinion of Chairman Jordan and Commissioner Marks) (Aug. 1996); *Jim Walter Resources*, 920 F.2d at 747. In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard.[5] *See Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (applying substantial evidence standard); *Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993) (same); *cf. Jim Walter Resources*, 920 F.2d at 750 (applying court's traditional substantial evidence standard to Commission's order).

[5] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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 *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The judge recognized that the parties entered into several stipulations that narrowed the focus of the hearing. 22 FMSHRC at 112. Specifically, the judge noted that the parties had stipulated that Bussanich had engaged in protected activity. *Id.* In addition, he reiterated the parties' stipulation that "if there is a reasonable evidentiary basis that Centralia . . . has discharged Mr. Bussanich, then the allegation that Centralia . . . did so on account of Mr. Bussanich's protected activities is not frivolous. That, therefore . . . is the sole issue for hearing, whether there is a colorable claim that Bussanich was discharged." *Id.*

We conclude that substantial evidence supports the judge's conclusion that "there is no colorable claim that [Bussanich] was discharged by Centralia." *Id.* at 113. The evidence is undisputed that Woolley received a phone call on November 30 from his partner Whisnant's residence.[6] Tr. 91, 186-87; R. Ex. 12. Woolley testified that she believed that she had spoken with Bussanich because he had referred to FMLA leave, which had been the subject of her previous correspondence to him, and had spoken knowingly about his 401(k) plan and tools. Tr. 91-92, 95, 106. In addition, she believed that she recognized his voice. Tr. 95. After the phone call, it is undisputed that Woolley discussed the call with Sanich, Means, and subsequently with Taylor. Tr. 98, 102, 119, 180. On December 9, despite his contention in his December 7 letter that he had not quit, Bussanich deposited the final pay and accrued vacation checks sent to him by Centralia. Tr. 58, 183; R. Ex. 10. In addition, on December 21, Bussanich engaged in an exit interview during a phone call that he initiated, and he made additional calls to Centralia's record keeper about obtaining the proceeds from his 401(k) account. Tr. 166, 170-71; R. Ex. 8. On December 23, Bussanich signed and returned an exit interview checklist sent to him by Centralia with no indication he was signing the checklist under protest. Tr. 166, 174-75; R. Ex. 7. In addition, Bussanich deposited the proceeds from his 401(k) account after they were disbursed to him on December 22. Tr. 45, 69.

In light of all of the record evidence regarding the events of November and December, we conclude that substantial evidence supports the judge's finding that there was no colorable claim that Bussanich was discharged. With the one exception of his letter of December 7, Bussanich's actions were consistent with those of an employee who quit.[7] He proceeded to obtain nearly all

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[6] We note that Bussanich's testimony that Bradley Whisnant called him on January 18 and informed him that Whisnant had called the mine in November to inquire about Bussanich's employment status (Tr. 50-51), was contradicted by Paul Buchanan, local counsel for Centralia. Tr. 205. Buchanan testified that Whisnant had informed him that Whisnant had not told Bussanich about his phone call to the mine. Tr. 214.

[7] Although the judge considered the December 7 letter in the context of whether Centralia failed to rehire Bussanich, we nevertheless agree with the Secretary that the judge should also have considered the letter in the context of whether Bussanich had been discharged. Pet. at 9-10. The application for temporary reinstatement filed by the Secretary and Bussanich's initiating complaint filed with MSHA include in their allegations of discharge and disparate treatment, references to Bussanich's December 7 letter. *See* Ex. A., Aff. of Sandra Yamamoto at

of the financial proceeds to which an employee who resigned was entitled (at the time of the hearing, Bussanich had applied for but not received his pension funds, Tr. 46), never once stating that he was accepting them under protest or that he in fact wanted to return to work. His actions belie his claim that he did not wish to resign. Seen in the entire context of his actions over this period of time, his testimony and his December 7 letter are not sufficient to detract from all the evidence supporting the judge's finding. Substantial evidence supports the judge's conclusion that the Secretary failed to prove that the complaint was not frivolously brought.[8] Accordingly, we affirm the judge's denial of the Secretary's application.[9]

¶ 3f; Ex. B-4. Our consideration of the letter, however, does not alter our conclusion that substantial evidence supports the judge's determination that Bussanich did not make out a colorable claim of discharge.

[8] We emphasize that our holding is limited to the unusual facts of this case, and the narrow issue it presents, as stipulated by the parties. In addition, we note, as did the court in *Jim Walter Resources*, that "[w]e are required to uphold the [judge's] findings if we determine that they are supported by substantial evidence. . . . However, because our review . . . must be evaluated against the 'not frivolously brought' standard, this opinion has no bearing on the ultimate merits" of the case. 920 F.2d at 750 n.15.

[9] Given our holding, we need not reach the Secretary's argument that the record raises a colorable question concerning Centralia's motivation (Pet. at 10-14), or the operator's arguments relating to alternative grounds for affirming the judge's decision (C. Resp. at 22-26).

III.

Conclusion

For the reasons set forth above, we affirm the judge's order denying the temporary reinstatement of Bussanich.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

We dissent from the decision of the Commission majority to affirm the judge's denial of temporary reinstatement to miner Levi Bussanich based on his determination that there was no colorable claim that Bussanich was discharged by Centralia. In our view, the majority's decision is flatly inconsistent with the language and spirit of the provision for temporary reinstatement in section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), and further contributes to an unwarranted expansion of the scope of temporary reinstatement proceedings beyond the intent of Congress or the requirements of due process. In addition, we believe that the majority errs in affirming a judge's decision that fails to adequately consider the sole issue presented for his resolution, recognize the clear testimonial conflict presented on that question, comply with Commission precedent that prohibits the resolution of such conflicts at this preliminary stage of the proceedings, and that is not supported by the record evidence.

We begin our analysis with the express language of section 105(c)(2) of the Mine Act, which is omitted from the majority's decision. Section 105(c)(2) provides in 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. Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as [she] deems appropriate. . . . *[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*.

30 U.S.C. § 815(c)(2) (emphasis added).[1]

The provision for temporary reinstatement that later became part of section 105(c)(2) first appeared in section 106(c) of the bill reported out of the Senate Committee on Human Resources, S. 717, 95th Cong., *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 543-46 (1978) ("*Legis. Hist.*"). The report accompanying S. 717 explained:

> Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily

[1] The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (amended 1977) ("Coal Act"), the Mine Act's predecessor, contained no temporary reinstatement provision. *See* Coal Act § 110(b)(2).

> reinstating the complaining miner pending final outcome of the investigation and complaint. The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 36-37 (1977), *reprinted in Legis. Hist.* at 624-25. A report by the Conference Committee on the legislation further explained that temporary reinstatement was intended "[t]o protect miners from the adverse and chilling effect of loss of employment while [a discrimination complaint is] being investigated." S. Conf. Rep. No. 95-461, at 52 (1977), *reprinted in Legis. Hist.* at 1330.

Thus, the express language of section 105(c)(2) provides that temporary reinstatement *shall* be ordered "if *the Secretary* finds that [the] complaint was *not frivolously brought*." 30 U.S.C. § 815(c)(2) (emphasis added). In recognition of this express delegation of authority to the Secretary, Commission Procedural Rule 44 provided "a procedure for reinstatement of miners whose complaints of unlawful discrimination, discharge, or interference have been found by the Secretary not to have been frivolously brought." 44 Fed. Reg. 38,226, 38,226 (1979) (codified at 29 C.F.R. § 2700.44). Under the former Rule 44, an operator had no right to a hearing on an application for temporary reinstatement *before* an order of reinstatement was issued (commonly referred to as a "pre-deprivation hearing"). The rule also lacked any procedures for appealing a judge's temporary reinstatement order to the Commission. It included a standard of review under which an application for temporary reinstatement would be granted so long as the Secretary's "not frivolously brought" finding was not arbitrary and capricious.

The Commission subsequently revised its rules governing temporary reinstatement proceedings in response to due process concerns. In *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, the Commission, with no accompanying explanation, held that an operator's due process rights were violated by the "arbitrary and capricious" standard in Rule 44 governing Commission review of judges' orders. 3 FMSHRC 1707, 1708 (July 1981). In response to the *Gooslin* decision, the Commission switched the focus of Rule 44 to whether the complaint on which the Secretary's application is based was "frivolously brought." 46 Fed. Reg. 39,137, 39,137 (1981). In 1985, the Sixth Circuit held that the lack in Rule 44 of even "a minimal opportunity [for employers] to present their side of the dispute before temporary reinstatement is forced upon them" violated the due process rights of mine operators. *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 705 (6th Cir. 1985), *amended by* 781 F.2d 57 (6th Cir. 1986) ("*SOCCO*"). In response to the Sixth Circuit's decision, the Commission once again revised Rule 44 to include the "opportunity for an expeditious pre-reinstatement hearing that insures due process to all [affected] parties." 51 Fed. Reg. 16,022, 16,022 (1986). At the same time, the Commission added a new provision to the rule — subpart (e), the predecessor to the

current Rule 45(f) — affording parties the rights to appeal to the Commission a judge's order granting or denying an application for temporary reinstatement. *Id.* at 16,024.[2]

Following the 1981 and 1986 rules revisions, the U.S. Supreme Court issued its decision in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). In *Roadway Express*, the Court considered a due process challenge to a section of the Surface Transportation Assistance Act on temporary reinstatement similar to section 105(c)(2) of the Mine Act. Although the provision examined by the Court in *Roadway Express* did not provide for pre-deprivation hearings, the Court held that it satisfied due process. The Court reasoned that "[s]o long as the prereinstatement procedures establish a reliable 'initial check against mistaken decisions,' and complete and expeditious review is available," due process rights are not violated and "a prior evidentiary hearing is not otherwise constitutionally required." *Id*. at 263 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985)). The Court stated that "the minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, . . . and an opportunity to meet with the investigator and present statements from rebuttal witnesses." *Id*. at 264. It further explained that "presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceedings." *Id*. A very good argument could be made that *Roadway Express* implicitly overruled the Sixth Circuit's 1985 *SOCCO* decision, and made the 1986 amendments to the Commission's rules adding a requirement for a pre-reinstatement hearing unnecessary to satisfy due process requirements. *See Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987) ("The Commission's temporary reinstatement procedures exceed the constitutional minimum sanctioned in *Roadway Express*."), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

While we recognize the need to provide some check against erroneous decisions in temporary reinstatement proceedings, and to afford adequate due process to mine operators, we believe that the procedure followed by the judge and sanctioned by the majority in resolving the issue of eligibility for temporary reinstatement in this case improperly expands the scope of the proceedings envisioned by section 105(c)(2), and thereby undermines the underlying purpose of temporary reinstatement. While the majority pays lip service to the well-established principle that "[t]he scope of a temporary reinstatement hearing is narrow" (slip op. at 5), they affirm a judge's decision that is flatly inconsistent with that concept. In the underlying temporary reinstatement hearing held in this case, Centralia was afforded an opportunity to cross-examine Bussanich, subpoena other potential witnesses, introduce voluminous exhibits, and call at least ten witnesses, including an attorney who initially represented Centralia in this matter. This type of hearing far exceeds the minimum due process requirements established by the Supreme Court in *Roadway Express* and, by essentially providing for a preliminary adjudication of the merits of

[2] In a subsequent rulemaking finalized in March 1993, the Commission redesignated Rule 44 as Rule 45, and added, without comment, the following clause to the end of Rule 45(f): "In extraordinary circumstances, the Commission's time for decision may be extended." 58 Fed. Reg. 12,158, 12,169 (1993).

the underlying discrimination case, makes a mockery of the "not frivolously brought" standard set forth in the language of section 105(c)(2). In essence, it amounts to a "mini-trial" of the merits of the underlying discrimination claim that, as here, poses the risk of turning any subsequent investigation and litigation of the merits of that claim into a pointless formality.[3] It is fair to assume that any alleged discriminatee whose complaint is found by the judge and the Commission to have been "frivolously brought" for purposes of temporary reinstatement is not likely to prevail on the merits of his claim before the same trier of fact. Indeed, such a determination is likely to also discourage the Secretary from continuing to fully investigate and prosecute the miner's discrimination claim.

The most troublesome aspect of the judge's decision in this case, now endorsed by the Commission majority, is its resolution of a clear testimonial conflict as to the dispositive issue in the underlying proceeding — whether Bussanich was discharged or quit his job. While the judge

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[3] It is noteworthy that this was a potential danger identified by commenters on the Commission's 1981 amendments to its rule governing temporary reinstatement proceedings. For instance, the Office of the Solicitor warned that:

> the application of a test of frivolousness can result in a "mini-hearing," where the demarcation between questions going to the issue of frivolousness and questions going to the ultimate merits of the case becomes blurred. . . .
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> . . . .
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> . . . At this early stage of an investigation it would be inappropriate and contrary to the purpose of Section 105(c) to turn a temporary reinstatement proceeding into an in-depth inquiry into the merits of the case.

Comments submitted by Cynthia L. Attwood, Associate Solicitor, Division of Mine Safety and Health, dated September 28, 1991, at 2. The United Mine Workers of America expressed similar concerns, and identified another potential problem:

> Under the Commission's new procedural approach, however, it will be very difficult to have a hearing on whether a particular claim was frivolously brought, without getting into the merits of the entire case. . . . The operator should not be able to use the hearing as a fishing expedition to find out the basis for the Secretary's determination to issue a complaint.

Comments submitted by Attorney for United Mine Workers of America, dated September 28, 1991, at 9-10.

ostensibly assumed, for purposes of the temporary reinstatement proceeding, that Bussanich did not call Centralia and quit his job on November 30 (22 FMSHRC at 113), his finding that "there is no colorable claim that [Bussanich] was discharged by Centralia" (*id*.) necessarily involves a discrediting of Bussanich's testimony that he did not quit his job, but rather was discharged. This resolution of credibility conflicts, particularly as to dispositive issues, in the context of preliminary temporary reinstatement proceedings directly contravenes applicable precedent. The Commission itself has recognized that it "was not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). *See generally Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988) (in the context of temporary relief, stating that a court "need not concern itself with resolving conflicting evidence if facts exist which could support the [agency's] theory of liability" where the standard is merely one of frivolousness of the claim of liability). Likewise, the Supreme Court indicated in *Roadway Express* that the resolution of credibility conflicts is not appropriate in the context of temporary reinstatement proceedings, but rather appropriately reserved for a subsequent trial on the merits. 481 U.S. at 266. The Court explained:

> [T]he primary function of the investigator is not to make credibility determinations, but rather to determine simply whether reasonable cause exists to believe that the employee has been discharged for engaging in protected [activity.] . . . Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge [in a subsequent trial on the merits], before whom an opportunity for complete cross-examination of opposing witnesses is provided.

Id.

By affirming the judge's denial of temporary reinstatement to Bussanich, our colleagues in the majority are in essence departing from, and expanding, the "not frivolously brought" standard set forth in section 105(c)(2) and reflected in Commission Procedural Rule 45(d). Although the Secretarial burden for meeting that standard is very low, it reflects Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Resources*, 920 F.2d at 748 n.11; 29 C.F.R. § 2700.45(d) ("In support of [the] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant."). As the court explained in *Jim Walter Resources*, "the erroneous deprivation of an employer's right to control the makeup of his workforce . . . is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor." 920 F.2d at 748 n.11 (emphasis in original).[4]

[4] If temporary reinstatement was granted and the Secretary were to subsequently determine, after investigating Bussanich's complaint, that the provisions of section 105(c)(1) of

In addition to our concerns that the temporary reinstatement process has mutated far beyond that necessary to satisfy constitutional due process requirements and contemplated by Congress in the Mine Act, we cannot uphold the judge's denial of the merits of the temporary reinstatement application the Secretary brought on behalf of Bussanich. The record simply does not support the judge's determination that the complaint had been "frivolously brought."

As the majority recognizes, the "frivolously brought" standard is an extremely low one. *See* slip op. at 5. The term "frivolous" as it is used in a similar context — Federal Rule of Appellate Procedure 38's provision for damages and costs in the case of a "frivolous" appeal — has been interpreted by a number of courts to mean "*wholly* without merit." 20A James Wm. Moore, Moore's Federal Practice ¶ 338.20[1], at 338-7 & n.1 (3d ed. 1999) (emphasis added). A low standard is plainly appropriate, given that, at this preliminary stage of the proceedings, the Secretary has not even completed an investigation into whether a violation of section 105(c) occurred. Moreover, the standard reflects Congressional intent that employers bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *See* authorities cited *supra*, at 13.

The majority correctly recognizes that the stipulations of the parties narrowed the focus of the "frivolousness" inquiry to but a single issue: Bussanich's claim that he no longer is employed by Centralia as a result of adverse action taken against him by Centralia. Slip op. at 5-6. It is important to remember that the Commission has defined adverse action to be "an act *of commission or omission* by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984) (emphasis added). Moreover, "[d]eterminations as to whether an adverse action was taken must be made on a case-by-case basis." *Id*. at 1848 n.2.

The judge, while he initially acknowledged the frivolousness of Bussanich's claim as the sole issue before him (22 FMSHRC at 112), did not so limit his determination. Instead, the judge went to the ultimate merits of the adverse action claim, and made a finding of fact that Bussanich's separation from employment was not the result of his termination by Centralia. *Id.* at 113. We believe the judge's approach was improper as a matter of law and should be reversed.

The Commission majority, however, not only fails to recognize this error but compounds it by limiting its examination of the evidence to the evidence supporting Centralia's claim that it

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the Mine Act have not been violated, the Commission's procedural rules provide that the judge would be so notified, and that he would enter an order dissolving the order of reinstatement. 29 C.F.R. § 2700.45(g).

did not discharge Bussanich. *See* slip op. at 6. Such a review is of little value,[5] given that the issue before the Commission is whether it is "frivolous" for Bussanich to claim that the contrary is true, and that he was discharged by Centralia. The majority further errs by making its own credibility findings[6] and drawing conclusions from the evidence that contradict the undisputed evidence.[7]

Unlike the majority, we limit our inquiry to the only issue that Bussanich's application presents, and conclude that, when *all* of the evidence is considered, Bussanich's claim of discharge was not shown to be frivolous. Weighed against the evidence found by the majority to support the conclusion that Bussanich quit is the following: (1) in testimony that the judge did not discredit, Bussanich explained that he did not call Centralia's employee Woolley nor did he quit on November 30, and no one was authorized to call on his behalf (22 FMSHRC at 113; Tr. 26, 30, 47); (2) Woolley acknowledged on cross-examination that there was a possibility that she did not speak with Bussanich on November 30 (Tr. 107); (3) telephone records indicate that the November 30 phone call originated not from Bussanich's residence, but from the Whisnant's phone in Portland, Oregon (Tr. 195-97); (4) Bussanich testified that Bradley Whisnant had

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[5] The majority couches its analysis as one of whether "substantial evidence" supports the judge's decision. *See* slip op. at 6-7. However, because the judge did not properly limit his decision, the substantial evidence standard is hardly applicable. In any event, as the majority acknowledges, on review, the Commission is required to consider the entire record, especially anything in it that fairly detracts from the weight of the evidence that supports a challenged finding. Slip op. at 5 n.5 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[6] *See* slip op. at 7 (Bussanich's "actions belie his statements that he did not wish to resign"). As discussed above, the Commission and the courts, including the Supreme Court in *Roadway Express*, have clearly indicated that it is not appropriate at this preliminary stage of proceedings to resolve conflicts in evidence.

[7] Apparently in reaction to Bussanich's late December receipt of all of his net section 401(k) account funds, the majority alleges that Bussanich "obtain[ed] nearly all of the financial proceeds to which an employee who resigned was entitled . . . , never once stating that he was accepting them under protest or that he in fact wanted to return to work." Slip op. at 6-7. The majority completely ignores Bussanich's explanation that he took the 401(k) funds at that point only because Centralia was treating him as having quit, thus leaving him without a means to support himself. Tr. 45. Moroever, as Bussanich explained, he had no other choice but to take all of the 401(k) funds; taking just a portion was not an option. Tr. 45, 54. In second guessing Bussanich for not accepting his final pay and retirement checks and signing an exit interview checklist "under protest" (slip. op. at 6), the majority unfairly imputes a level of legal knowledge not common among lay individuals. Finally the majority, like Centralia, ignores the import of Bussanich's December 7 letter. How many times should Bussanich have reiterated that he had not quit before Centralia was required to listen to him? The answer to that question is not provided by the majority.

informed him that he had called the mine in November to inquire about Bussanich's employment status, and that Whisnant had obtained Woolley's number from her November 4 FMLA correspondence, which Bussanich had thrown in the trash (Tr. 50);[8] (5) Bussanich testified that he had no reason to quit because he was receiving workers' compensation, was getting four weeks of vacation per year, had 401(k) and retirement accounts, and was working on the day shift after 12 years of working on the night shift (Tr. 40); (6) Woolley and Centralia foreman Kendrick conceded that miners typically quit their employment by speaking to their foremen and that Bussanich never indicated to Kendrick that he had quit or was quitting (Tr. 105, 132-33); and (7) Bussanich never came by to pick up his tools, and his tools remained at the mine at the time of the hearing (Tr. 131-32).

It is also impossible to ignore the import of Bussanich's December 7 letter and how Centralia responded to it.[9] In the December 7 letter, Bussanich stated that he did not speak with Woolley on November 30, and that he did not quit. Gov't Ex. 1. It is undisputed that Centralia responded to Bussanich's December 7 letter by refusing to consider his allegations, and instead continued to rely upon the November 30 telephone call. Tr. 28, 164-65, 200; S. App. for Temp. Reinst., Ex. B-4.[10]

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[8] Further, Paul Buchanan, local counsel for Centralia, testified that Mr. Whisnant had informed him that Bussanich had not been in Whisnant's apartment on November 30, and that Mr. Whisnant may have made the call. 22 FMSHRC at 109; Tr. 212. He explained that Whisnant had obtained the mine number from the trash, called the mine, and ascertained that Bussanich was still employed. Tr. 213-14.

[9] As even the majority concedes, not only the events of November 30, but also evidence relating to the entirety of the employment separation process is relevant here. *See* slip op. at 6 & n.7. It is undisputed that Bussanich's separation from employment occurred over a period of time, beginning on November 30 and extending through at least the completion of his exit interview on December 23, 1999. We agree with the majority that the judge clearly erred in considering such evidence only in terms of Centralia's failure to rehire Bussanich. *See* 22 FMSHRC at 113-14.

[10] Tellingly absent from the 15 exhibits Centralia introduced below is the letter it sent Bussanich in reply to his December 7 letter.

At the very least, there are significant facts in this case supporting the notion that Bussanich's separation from employment ultimately resulted not from Centralia's belief that he was quitting, but rather from Centralia's adverse "act[s] of commission or omission." *Hecla-Day Mines*, 6 FMSHRC at 1847. Consequently, there is clearly more than enough evidence to establish that Bussanich's claim of discharge is not wholly without merit, and is therefore not frivolous. Based upon the parties' stipulations that if a colorable claim of discharge were found, Bussanich should be temporarily reinstated (22 FMSHRC at 112), we would reverse the judge's decision and order temporary reinstatement.

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