FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 23, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ROGER COOK	:	
v.	:	Docket No. WEVA 2021-0203
ROCKWELL MINING, LLC	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Rajkovich, Commissioner:[1]

I.

Introduction

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is a Judge's decision on April 2, 2021, granting the Secretary of Labor's application for temporary reinstatement of a miner, Roger Cook. Roger Cook was suspended by the operator on January 21, 2021 and terminated on January 25, 2021. On February 1, 2021, Cook filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") over his termination on January 25. Ex. S-1.

On March 10, 2021, the Secretary filed an application for temporary reinstatement on behalf of Cook, pursuant to section 105(c)(2) of the Mine Act.[2] 30 U.S.C. § 815(c)(2). The Secretary argued that Cook should be reinstated because his complaint was not frivolously

[1] Commissioner Rajkovich's separate opinion is part of the majority on every issue presented on appeal. As discussed more fully on the following page, Chair Traynor and Commissioner Althen each write separately, concurring in part and dissenting in part with Commissioner Rajkovich's opinion.

[2] 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).

brought.[3] Rockwell Mining, LLC ("Rockwell") opposed the Secretary's application for temporary reinstatement, arguing that Cook's complaint was frivolous.

On March 29, 2021, the Judge presided over a hearing in this matter. On April 2, 2021, the Judge issued a decision granting the Secretary's application for temporary reinstatement and directing temporary reinstatement of the miner. 43 FMSHRC ___, slip op. at 1, No. WEVA 2021-0203 (Apr. 2, 2021) (ALJ) ("ALJ Dec."). The Judge applied the not frivolously brought standard to Cook's claim that he had engaged in protected activity that had motivated the adverse actions at issue.

On April 7, 2021, Rockwell filed a petition for review of the Judge's temporary reinstatement decision. On appeal, the operator argues that the Judge erred in finding that the operator's knowledge of Cook's protected activity and temporal proximity between the protected activity and the adverse actions were sufficient to establish a non-frivolous issue of discriminatory motivation. In addition, the operator argues that the Judge erred in declining to consider and weigh the operator's evidence regarding the operator's absence of animus and Cook's unprotected misconduct. The operator proposes a new "rule" which would require Judges to consider and analyze all evidence relating to a motivational nexus between a miner's protected activity and the adverse actions. Finally, the operator argues that prior to the hearing, the Judge erroneously excluded evidence of Cook's unprotected misconduct, denying the operator due process.

Upon review, a majority of Commissioners affirms the Judge's decision, while a separate majority affirms language in *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) as the law of the Commission.

Commissioner Rajkovich finds error in the Judge's decision to exclude evidence; however, he finds such error harmless and forms a majority to affirm the Judge's decision in result with Chair Traynor, and a majority to affirm language in *Marion Cty.* with Commissioner Althen.

Chair Traynor concurs in result only with Commissioner Rajkovich. Commissioner Althen concurs in part and dissents in part with Commissioner Rajkovich.

II.

Factual Background

Roger Cook was employed as a fire boss at the Eagle #3 Mine operated by Rockwell Mining in Wyoming County, West Virginia from March 2017 until his termination on January

[3] In her decision, the Judge considered whether there was a non-frivolous motivational nexus between Cook's protected activity and two adverse actions - his suspension on January 21 and his termination on January 25. 43 FMSHRC ___, slip op. at 4-5, No. WEVA 2021-0203 (Apr. 2, 2021) (ALJ). Therefore, in reviewing the Judge's decision, I will consider both adverse actions.

25, 2021. At the time of his termination on January 25, 2021, Cook was classified as a salary outby foreman. Prior to his suspension and termination in January 2021, Cook had expressed various safety related concerns to mine management. In August 2020, Cook had filed an accident report claiming to have suffered respiratory problems as a result of spraying gunite[4] during his work during the prior February. Subsequently, in December 2020, a month prior to his termination, he voiced concerns about the manner of building certain stoppings in the mine. In January 2021, Cook expressed concern to management regarding an allegedly unsafe number of individuals on a man trip and informed management about a safety concern regarding a flat car.

In addition, on January 20, 2021, while he was conducting an airway examination, Cook noticed that the ground check monitor circuit on the cathead plug for the P-70 pump had been bypassed. Cook discovered that someone had installed a jumper to override the ground check monitor circuit, a protective device. In response to this unsafe condition, Cook locked and tagged out the cathead and left a note in the area with the words "No monitor, had wire under cathead[.] Dusty Cook 1-20-21 11:04 AM Shame[,] Shame" on it. Ex. S-2. Later the same day, Cook informed MSHA Inspector John Stone that he had found that the cathead at issue was plugged in while the ground monitor circuit on the active pump was bypassed. Inspector Stone issued Order No. 9247364 for this condition.

The order stated in relevant part that "[t]he Old 6 Head Return P-70 pump . . . has been in operation without the ground check monitor circuit working. When checked it has been determined and evidence indicates a jumper has been installed to bridge/override this protective device." Ex. S-3. This is consistent with testimony at the temporary reinstatement hearing that "the pump had been . . . jumped out or overrode . . . the ground run had been defeated to allow this pump to run in an unsafe condition." Tr. 82.

The operator alleges that Cook engaged in misconduct at the mine a few days prior to his January 20 conversation with the MSHA inspector. Specifically, the operator alleges that between January 15 and 16, 2021, Cook knew but did not inform management that the No. 6 scoop at the mine had an unsafe condition – a malfunctioning panic bar. In addition, the operator alleges that despite knowing of the defective condition, Cook instructed another miner, Charles Quarles, to operate the scoop on January 15.[5] However, Cook disputes that he knew about the unsafe condition claiming that "I did not know that the panic bar wasn't working [during the relevant time period]." Tr. 57, 101.

On January 21, Cook was suspended. The suspension occurred a few days after Cook's alleged misconduct between January 15-16, but the day after his conversation with the MSHA inspector. On January 25, 2021, four days after his suspension, Cook was terminated from his employment at the mine. On February 1, Cook filed a discrimination complaint with MSHA

[4] Gunite is generally made of cement and is sprayed on pneumatically.

[5] The operator sought to introduce a written statement from Quarles to this effect. Resp't Proposed Ex. 1. The Judge refused to allow testimony on the matter and did not accept the proffered note into evidence.

over his termination. On March 10, the Secretary filed an application for temporary reinstatement on behalf of Cook.

III.

The Judge's Decision

On March 26, a few days prior to the March 29 hearing, the Judge issued an order which excluded evidence relating to the operator's allegations of Cook's unprotected misconduct. The operator alleged that on January 15-16, 2021, Cook knew that the No. 6 scoop at the mine had a malfunctioning panic bar but failed to inform management of the issue, and failed to prevent another miner, Quarles, from operating the defective scoop. The operator alleges that this unprotected misconduct was the sole basis for Cook's suspension and termination. However, the Judge ruled that the proposed evidence was beyond the scope of the temporary reinstatement proceeding because it concerned an affirmative defense and raised issues of credibility. The Judge repeated this ruling in her post-hearing decision.[6] ALJ Dec. at 3 n.2.

On March 29, the Judge presided over a hearing in this matter. On April 2, the Judge issued a decision granting the Secretary's application for temporary reinstatement and directed that Cook be reinstated.

In her decision, the Judge found that Cook had engaged in protected activity. Furthermore, the Judge ruled that there was a non-frivolous issue that Cook's protected activity on January 20 had motivated the adverse actions – his suspension on January 21 and his termination on January 25.[7] The Judge found that the extremely short period of time between the January 20 cathead incident and Cook's suspension and termination on January 21 and January 25 respectively was sufficient to establish "a temporal nexus between the protected activity and the adverse action[s]." ALJ Dec. at 4-5. In addition, the Judge found that because management witnessed Cook's discussion with Inspector Stone regarding the cathead on January 20, there was "a non-frivolous issue that management was aware of the [cathead] incident and that [the operator] had knowledge of Cook's protected activity." *Id.* at 4.

Therefore, the Judge found that the Secretary had established the operator's knowledge of Cook's protected activity and temporal proximity between the protected activity and the adverse actions. On this basis, the Judge found a nexus between Cook's protected activity and the adverse actions sufficient to warrant reinstatement under the non-frivolous standard. Consequently, the Judge granted the Secretary's application for temporary reinstatement.

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[6] The operator filed a Motion to Reconsider the Judge's March 26 Order which the Judge also denied. ALJ Dec. at 3 n.2.

[7] Although the Judge briefly mentioned other instances of protected activity, she focused on Cook's protected activity on January 20, 2021. On that day, Cook engaged in protected activity when he informed an MSHA inspector why he had locked and tagged out the cathead on the P-70 pump. ALJ Dec. at 4-5.

IV.

Legal Principles

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 applied the substantial evidence standard to review a Judge's temporary reinstatement order. *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC,* 31 FMSHRC 1085, 1088 (Oct. 2009).

The Commission has repeatedly 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), *aff'd*, 920 F.2d 738 (11th Cir. 1990). At a temporary reinstatement hearing, the question is whether the complaint is frivolous, "not whether there [was] sufficient evidence of discrimination to justify permanent reinstatement." 920 F.2d at 744.

In a temporary reinstatement proceeding, the Judge should "evaluat[e] the evidence of the Secretary's . . . case and determin[e] whether the miner's complaint . . . 'appear[ed] to have merit.'" *Williamson,* 31 FMSHRC at 1089. During a temporary reinstatement proceeding, the Secretary need not prove a prima facie case of discrimination but must simply prove a non-frivolous issue of discriminatory motivation. However, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at the temporary reinstatement stage meets the non-frivolous test. *Id.* at 1088. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity (i.e., that a motivational nexus existed between the protected activity and the adverse action). *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).[8]

The Commission has recognized that discriminatory motive may be shown by indirect evidence establishing a motivational 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)). The Commission in *Chacon* stated that discriminatory motive can be established by

[8] In a decision issued on April 14, 2021 the United States Court of Appeals for the Ninth Circuit rejected the *Pasula-Robinette* test for violations of section 105(c). *Thomas v. CalPortland Co.*, No. 20-70541 ___ F.3d ____, 2021 WL 1396753 (9th Cir. April 14, 2021). Here, neither party challenged the *Pasula-Robinette* test before the Administrative Law Judge, and it is not before the Commission in this decision. It should also be noted that this mine is not domiciled within the Ninth Circuit jurisdiction.

circumstantial evidence of: (1) knowledge of the protected activity, (2) hostility or animus towards the protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510-12. The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action. *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000).

Commission Rule 45(d) addresses procedures for temporary reinstatement hearings, stating that "the Secretary may limit his presentation to the testimony of the complainant. The respondent [operator] shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

In contrast to a discrimination proceeding where the Judge must resolve conflicting evidence, the Commission has held that the Judge should not make credibility determinations during a temporary reinstatement proceeding. *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). In *Williamson*, 31 FMSHRC at 1089, the Commission determined that the Judge made "credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at [the temporary reinstatement stage]." And in *A&K Earth Movers*, 22 FMSHRC at 325-26, the Commission determined that during a temporary reinstatement proceeding, the Judge is not obligated to resolve testimonial conflicts regarding knowledge even if the operator claims that it has no knowledge of protected activity. In addition, the Judge should not weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. In *Williamson*, 31 FMSHRC at 1091, the Commission held that the Judge erroneously increased the Secretary's burden in a temporary reinstatement proceeding by "weigh[ing] the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case."

V.

Operator's Petition for Review

On April 7, 2021, the operator filed a petition for review of the Judge's temporary reinstatement decision. On April 13, 2021, the Secretary responded to the operator's petition.[9]

In its assignments of error, the operator's petition sets forth three alleged errors by the Judge. First, the operator alleges that the Judge erred in refusing to consider and weigh each element of nexus between the protected activity and adverse actions in determining whether the Secretary had met his burden of proof. The four nexus factors consist of the operator's

[9] On April 15, 2021, the operator filed an unopposed motion with the Judge to substitute economic reinstatement for Cook's actual physical reinstatement, pursuant to an agreement with the Secretary and Cook for such economic reinstatement. The Judge issued an order granting this motion on April 16, 2021.

knowledge of Cook's protected activity, temporal proximity between the protected activity and the adverse actions, the operator's hostility/animus towards Cook's protected activity, and any disparate treatment of Cook.[10]

Second, the operator alleges that the Judge erred in excluding evidence of Cook's unprotected misconduct. The operator alleges that between January 15-16, 2021, Cook knew but did not inform management that the No. 6 scoop at the mine had an unsafe condition – a malfunctioning panic bar, and that despite knowing of the defective condition, Cook instructed another miner, Charles Quarles, to operate the scoop on January 15. Resp't Proposed Ex. 1. As previously noted, exhibits related to this alleged event were excluded by the Judge prior to the hearing. Tr. 127-28; ALJ Dec. at 3 n.2.

Third, the operator alleges that it was denied due process by the Judge's improper exclusion of evidence.

A. Knowledge and Temporal Proximity

As stated above, in a temporary reinstatement proceeding, the four elements to be considered in determining whether a complaint is non-frivolous are whether the operator had knowledge of the protected activity, whether there was a close temporal proximity between the protected activity and the adverse action, whether the operator had animus towards the protected activity, and whether the complainant suffered disparate treatment. In this case, the operator does not dispute that it had knowledge of Cook's protected activity, i.e., Cook's discussion of the cathead with the MSHA inspector in January 2021. In addition, the operator does not dispute that protected activity took place on January 20, and that Cook was suspended and terminated in the following days – on January 21 and January 25.

Rockwell argues that its knowledge of the protected activity and temporal proximity between the protected activity and adverse actions are insufficient generally and especially in this case to show a motivational nexus. Regarding the specific facts presented here, the operator argues that its knowledge of the protected activity and temporal proximity between the protected activity and adverse actions are nullified by an absence of any evidence of animus towards Cook's protected activity.

However, under Commission precedent addressing temporary reinstatement, knowledge of protected activity and temporal proximity can be sufficient by themselves to establish a nexus between the protected activity and the adverse action. *A&K Earth Movers*, 22 FMSHRC at 325-26. In addition, the Commission has "never held that hostility is a prerequisite to a finding that a

[10] During its discussion of this alleged error, the operator argues that its knowledge of Cook's protected activity and temporal proximity between his protected activity and the adverse actions are insufficient to establish a non-frivolous motivational nexus, and that the Judge failed to consider and weigh its evidence regarding the absence of animus and Cook's unprotected misconduct. Moreover, the operator proposes a rule which would require a Judge to consider all evidence regarding the operator's motivation and the miner's unprotected misconduct before granting temporary reinstatement.

complaint is not frivolous. Rather, such evidence is but one of several circumstantial indicia of discriminatory intent that may be offered to show that a complaint is not frivolous."[11] *Id.* at 323 n.2. Therefore, it is clear that knowledge and temporal proximity are sufficient to establish a non-frivolous claim of motivational nexus which is not automatically nullified by an absence of evidence of operator animus towards the protected activity.

I decline to overturn our caselaw holding that knowledge and temporal proximity can be sufficient by themselves, in the absence of any other evidence of animus, to support a non-frivolous motivational nexus. Therefore, I reject the operator's argument that its knowledge of Cook's protected activity and temporal proximity between Cook's protected activity and the adverse actions were insufficient to demonstrate a non-frivolous claim. I conclude that the Judge properly found that the complaint was not frivolously brought, given the record evidence of operator knowledge and temporal proximity.

B. Credibility Determinations

In a temporary reinstatement proceeding the Judge may evaluate the Secretary's evidence of a motivational nexus between the protected activity and the adverse action. *Williamson*, 31 FMSHRC at 1089. However, the operator goes further, arguing that the Judge must resolve conflicts in the evidence (i.e. make credibility determinations) during temporary reinstatement proceedings.

In *Williamson*, 31 FMSHRC at 1089-90, and *A&K Earth Movers*, 22 FMSHRC at 325-26, the Commission ruled that the Judge should not resolve conflicts in the testimonial evidence (i.e., make credibility determinations) during a temporary reinstatement proceeding. I decline to overturn our caselaw prohibiting credibility determinations in a temporary reinstatement proceeding.

C. Weighing the Operator's Evidence

In its Petition for Review, the operator proposes that the Commission enact a rule whereby the Judge "is required to either consider and analyze each element [regarding the motivational nexus] set forth in *Chacon* . . . as well as whether there was independent misconduct by the Complainant to determine whether the case is frivolous or articulate why the ALJ decided against considering a specific element." Pet. for Rev. at 9. This rule would require the Judge to analyze (i.e., weigh) the operator's evidence regarding the motivational nexus and Cook's unprotected misconduct against the Secretary's evidence demonstrating knowledge and temporal proximity.

Commission caselaw prohibits the Judge from weighing the operator's evidence against the Secretary's evidence in a temporary reinstatement proceeding. In *Williamson*, 31 FMSHRC

[11] The operator analogizes this case to a Judge's determination in *Sec'y of Labor on behalf of Fletcher v. Frontier Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ). An Administrative Law Judge's decision is not binding on the Commission. 29 C.F.R. § 2700.69(d).

at 1091, the Commission held that "evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense" and that the Judge erroneously increased the Secretary's burden in a temporary reinstatement proceeding by "weigh[ing] the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case."

I emphasize that the operator's proposed rule requires the Judge to weigh the operator's evidence as would be appropriate to a final decision on the merits. I decline to overturn our caselaw prohibiting the Judge from weighing the operator's evidence in a temporary reinstatement proceeding. Consequently, I conclude that the Judge did not err in declining to weigh the operator's evidence during the temporary reinstatement proceeding.

D. Exclusion of Evidence

As noted, the operator sought to submit evidence regarding alleged unprotected misconduct by Cook. However, on March 26, a few days prior to the hearing, the Judge issued an order excluding such evidence.

It is clear that evidence of unprotected misconduct would relate to the adverse actions by providing alternative legitimate reasons for Cook's suspension and termination. It is also clear that if a Judge could not consider all evidence relating to the adverse action(s), the operator would lack a meaningful right to "present testimony and documentary evidence in support of its position that the complaint was frivolously brought." 29 C.F.R. § 2700.45(d).

In a prior case, two Commissioners addressed this issue, finding that a temporary reinstatement hearing must be a full evidentiary process, and during such a proceeding a Judge should consider any evidence which is both relevant to the adverse action and does not require any credibility or value determinations. *Marion Cty.*, 40 FMSHRC at 47 (separate opinion of Acting Chair Althen and Commissioner Young). The Commissioners stated:

> [A]ll evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve.

Id.[12]

Under this approach – hereinafter referred to as the *Marion* approach – the Judge can only consider evidence which does not require any credibility or value determinations. Therefore, this approach is consistent with the limited nature of a temporary reinstatement

[12] Commissioner Althen, as set forth in his separate opinion, joins Commissioner Rajkovich to affirm this holding as the law of the Commission.

proceeding. The *Marion* approach also gives operators a meaningful opportunity to provide undisputed evidence (i.e., evidence which does not require any credibility or value determinations) that the complaint was frivolously brought. Therefore, it is consistent with the purpose of Commission Rule 45 which seeks to provide operators with a meaningful opportunity to present their arguments at a temporary reinstatement hearing. I hold that the Judge can consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. Such evidence may not serve as a basis for denial of reinstatement if it requires resolution of an actual credibility determination.

Scenarios exist where there is no conflicting evidence regarding the miner's unprotected misconduct, i.e., a scenario where the Judge is not presented with any credibility or value determinations regarding the alleged misconduct. For example, a document, which both parties agree is genuine, may show that the operator's decision to fire the miner was made in response to the miner's unprotected misconduct and prior to any identified protected activity. Under these circumstances, the Judge would not need to make any credibility or value determinations regarding this document. And although the document would technically relate to an affirmative defense, it would strongly support a contention that there was no motivational nexus between the protected activity and the adverse action at issue. In this scenario I would find that the Judge cannot only consider the uncontroverted evidence regarding the miner's misconduct but is required to consider such evidence when making his temporary reinstatement determination.[13]

On appeal, the operator asserts that Cook engaged in unprotected misconduct. The operator contends that Cook failed to inform management of the malfunctioning panic bar on the No. 6 scoop and failed to prevent, in fact knowingly permitted, another employee, Quarles, from operating the scoop despite knowing of the defective condition. Therefore, Cook's alleged misconduct is predicated on his knowledge of the malfunctioning panic bar. In support, the operator desired to offer the testimony of its mine superintendent and a note from the equipment operator, miner Charles Quarles, confirming Cook's knowledge of the defect and authorization for its use in the defective condition.

In contrast to the operator's allegations, Cook disputed that he knew about the unsafe condition on the scoop. Cook testified that "I did not know that the panic bar wasn't working" during the relevant time period. Tr. 57. In order to resolve the conflicting evidence, the Judge would have had to make credibility determinations, which the Judge cannot do. *Marion Cty.*, 40 FMSHRC at 44, 47 (all four Commissioners, in their separate opinions, agreed that the Judge cannot make credibility determinations during a temporary reinstatement proceeding).

Given the statutory and constitutional importance of an operator's right to a full hearing, the Judge erred in excluding evidence of Cook's alleged misconduct. I believe that the proper approach for the Judge would have been to allow evidence of Cook's misconduct during the hearing. Then, in her post-hearing decision, the Judge could have determined whether the

[13] I note that there may be other factual scenarios which similarly do not involve any credibility or value determinations. However, it is not necessary to consider such hypothetical scenarios for the purpose of this proceeding.

evidence required her to make any credibility or value determinations, as set forth in *Marion Cty.*, at 47.

However, as stated above, it appears to me that the conflicting evidence regarding Cook's misconduct would have required the Judge to make credibility determinations. I find that even if the Judge had allowed such evidence of misconduct during the hearing, she would have been prohibited from considering it in her post-hearing decision. Therefore, because the evidentiary exclusion would not have affected the Judge's post-hearing decision, I conclude that the Judge's evidentiary exclusion constituted harmless error.[14]

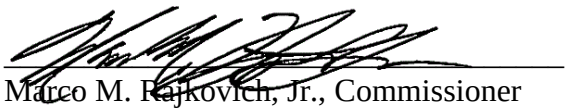
E. Due Process

Lastly, the operator argues that the Judge denied it due process by characterizing the operator's evidence as an affirmative defense or as an effort to dispute credibility and by excluding the operator's evidence. In this regard, the operator's due process argument does not find fault with any specific Commission procedure but focuses on evidence the Judge declined to consider. As stated above, the Judge cannot make credibility determinations in a temporary reinstatement proceeding. Therefore, it is unnecessary to further consider the operator's due process argument.

VI.

Conclusion

For the reasons stated above, I affirm the Judge's decision.



Marco M. Rajkovich, Jr., Commissioner

[14] I am troubled by the Judge's order excluding evidence of Cook's unprotected misconduct. I note that such evidentiary exclusions may deny the operator an opportunity to introduce relevant evidence on its behalf during a temporary reinstatement proceeding.

Commissioner Althen, concurring in part and dissenting in part: [1]

Commissioner Rajkovich does an excellent job of covering the breadth of precedents bearing upon the adjudication of temporary reinstatement proceedings, and I concur with his holdings regarding such proceedings and the correctness and affirmance of the opinions of Acting Chairman Althen and Commissioner Young in *Sec'y of Labor on behalf of Shaffer v. The Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018). To ensure our Judges do not miss the crucial rulings of law, I explicitly concur with Commissioner Rajkovich that:

1. A temporary reinstatement hearing is an expedited hearing but is a full hearing.

2. Respondents in temporary reinstatement proceedings are entitled to a full hearing of issues related to the allegation of discrimination, including grounds for an affirmative defense and whether animus motivated any adverse action. The Judge then reviews evidence on such matters and all other evidence under the non-frivolous standard of proof set forth in section 105(c)(2) of the Mine Act. 30 U.S.C. § 815(c)(2).

3. A "non-frivolous" case is a claim that is "viable." Thus, the Secretary must prove by a preponderance only that the claim of discrimination or interference may succeed.

4. If versions of events diverge without dispositive proof of either parties' version (including affirmative defenses), the outcome at the reinstatement stage may not rest upon a choice between credibility or the differing versions of events. However, the Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.

To restate these principles briefly, the Judge may not decide genuine disputes of fact or credibility arising at a reinstatement hearing. However, the dispute must be genuine. If the evidence demonstrates that one party's version of the "dispute" lacks any credibility, the Judge need not abandon commonsense and ignore established facts. Judges are not required to accept testimony demonstrated positively to be false. Suppose a picture properly introduced into evidence indisputably shows a witness present at a specific scene and such presence is confirmed by witnesses. In that case, the Judge need not accept the witness' protestation that he/she was not present.

[1] This opinion does not express any opinion regarding the merits of the complaint or defense. It treats only the rights of the respondent to a fair hearing. Presumably, MSHA is conducting its investigation into the claims of both parties. Indeed, because the complaint was filed on February 1, 2021, MSHA should have made its determination whether to proceed with a case by now or should make such determination within a few days of the issuance of this decision. 30 U.S.C. § 815(c)(3).

A respondent also may introduce evidence going to the absence of a demonstration of animus. If the evidence shows the absence of a viable claim, it means the claim is frivolous.[2]

Commissioner Rajkovich correctly describes the failure of the Judge below to conduct a full hearing by excluding evidence offered by the respondent to prove it terminated the complainant as a result of a gross safety violation. Such evidence was relevant to the respondent's claim of no showing of animus and that unprotected activity supported the termination. The evidence was relevant and admissible. The failure to hear this evidence was an error.

Turning to the disposition, however, I find myself compelled to disagree with affirming the reinstatement notwithstanding the clear denial of statutory and constitutional rights. Commissioner Rajkovich recognizes the error but finds the error harmless.

I disagree that the denial of fundamental statutory and constitutional rights may be swept aside as a harmless error. Such a finding repeats and reinforces the error by the Judge. Worse, it may encourage other Judges to shorten hearings on temporary reinstatement, believing that the deprivation of statutory and constitutional rights will be "harmless."

This expedited review is not a suitable place for an extended discourse on harmless error. Rather than engaging in a lengthy discussion of harmless error following *Chapman v. California*, 386 U.S. 18 (1967) and its numerous progeny, I simply state I find underlying considerations militate in favor of remand.[3]

First, applying developed concepts of harmless error, I cannot find the error harmless in this case. The Judge's action is more than a "trial error." Denial of the respondent's rights to present its case interfered with the substantial rights of the respondent, and the absence of

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[2] I do not understand the failure to discuss the excellent ALJ decision in *Sec'y of Labor on behalf of Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ). I do not believe Commissioners have any greater knowledge or understanding of the Mine Act than Commission ALJs. Commission ALJ decisions are worthy of consideration even if not precedential. In the *Fletcher* case, there was a temporal connection between the complainant talking to an MSHA inspector and the termination of his employment. Nonetheless the evidence did not provide an element of animus to the employer's action. The Judge denied temporary reinstatement finding that there was no evidence of animus or disparate treatment. *Id*. at 2219-20.

Though stated in terms of animus, the Judge could have alternatively stated that the respondent demonstrated a proper motive for termination. Under either wording, the complainant's claim was not viable – that is, was frivolous

[3] In *Chapman*, the Court referred to "small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 21-22. These are categorized as "trial errors." The error here certainly was not "harmless beyond a reasonable doubt" as described in *Chapman*. 386 U.S. at 24.

evidence and testimony may have substantially interfered with the potential outcome of the hearing. Such error is not harmless.

Second, the "non-frivolous" standard of proof for reinstatement is as low a standard of "proof" as may be stated. Further, reinstatement deprives a person of its property and the right to manage its workforce. For that reason, Congress necessarily gave operators the right to a hearing. The hearing must be full and robust; it must not be illusory.

If the operator is not allowed to introduce evidence of the absence of animus or a lawful basis for its action, the right to a hearing becomes merely a nod at due process rather than meaningful enforcement of constitutional rights. The only way to provide a measure of due process is to afford respondents full and fair hearings. By requiring Judges to hold proper hearings, the Commission assures full rights to respondents. If every error is "harmless," there is little incentive to accord respondents their full rights.[4]

Third, we should consider the error in this case in the context of the alleged actions of the claimant. Judges must not be legal automatons aware only of the law and unaware of the allegations. Respondent alleges that the complainant, a foreman and mine examiner, knowingly ordered or permitted an hourly employee to operate a scoop with an inoperable safety device. MSHA issued a citation for the operation of the defective equipment asserting an S&S violation and a likelihood of a fatality. For a foreman to knowingly authorize or order a miner to use a scoop with a defective safety device would be serious, potentially criminal, misconduct. Section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Certainly, MSHA must be investigating that possibility thoroughly.

Again, I do not express any opinion regarding the claims made by the complainant or respondent. However, it is relevant that this case involves more than an allegation that an hourly employee cursed at a supervisor, had an unexcused absence, or violated a work rule. Of course, due process and statutory rights apply to all cases. However, reinstatement of a mine inspector who allegedly authorized a miner to use unsafe equipment requires an especially vigorous review of the evidence.

[4] Just as this opinion offers no opinion on the outcome of this discrimination claim, it also offers no criticism of the respected Administrative Law Judge who presided at the hearing. The low standard of review may incentivize cutting through "red tape" to reach a decision that may seem inevitable. That incentive likely extends to all Judges and to the Commissioners.

In summary based upon the foregoing, I concur that the Judge erred in excluding evidence proffered by the respondent. I would not find such error harmless, and I would remand for the full hearing to which the respondent was entitled.[5]

William I. Althen

William I. Althen, Commissioner

[5] Chair Traynor's opinion warrants only a footnote. Respondent's Petition for Review challenged the exclusion of evidence relevant to its affirmative defense and the failure of the Judge to accept evidence that would fully undermine the complainant's trial claim. We granted that Petition and reviewed those issues. Those were the issues before us for decision. We have held the Judge erred and that the evidence was admissible. That is the holding in this case and the law of the Commission.

Chair Traynor, concurring in result only:

I join Commissioner Rajkovich's decision affirming the Judge's application of the "not frivolously brought" standard to temporarily reinstate the miner claimant's employment pending full litigation of the merits of his claim. I wish I could join his opinion and would have, but for his decision to join Commissioner Althen's foray into dicta addressing issues Commissioner Rajkovich and I did not reach and do not need to reach in order to affirm the decision below.

In their opinions, my colleagues attempt in vain to make big changes to the not frivolously brought standard – changes that are not necessary to resolution of this case. *See Export Group v. Reef Indus., Inc*., 54 F.3d 1466, 1472 (9th Cir.1995) (explaining that statements not necessary to the decision are dicta and thus are not binding precedent). Specifically, they seek in this case to resolve a split in one of our earlier cases.

In *Secretary of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39 (Feb. 2018) ("*Marion*"), the Commission issued a 2-2 decision that unanimously held that during a temporary reinstatement hearing a Judge is not to make credibility determinations. Commissioners Jordan and Cohen issued a decision noting that evidence relating to whether the complainant was discharged for unprotected activity relates to the operator's rebuttal or affirmative defenses and thus is not appropriate to be considered in the temporary reinstatement decision. *Id*. at 44. Acting Chair Althen and Young concluded that evidence that may relate to the operator's defense is relevant in a temporary reinstatement decision, but if that evidence creates a conflict or requires a credibility determination, the Judge is not to resolve it at the temporary reinstatement stage.[1] Id. at 47.

In the case at hand, the majority attempts to cement the Althen/Young opinion into law, even though it is entirely unnecessary to the decision Commissioner Rajkovich and I reach to affirm the Judge in this case. Commissioner Rajkovich and I have produced a holding; their efforts produce only dicta. The current Black's Law Dictionary observes that "*obiter dictum"* is Latin for "something said in passing" and refers to:

> a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to dictum or, less commonly, obiter.

Dictum, Black's Law Dictionary (11th ed. 2019). The same dictionary defines "judicial dictum" as:

[1] Acting Chair Althen and Commissioner Young's separate evidentiary rule is impossible to apply in a temporary reinstatement proceeding. Evidence that may allegedly demonstrate that the miner either did not engage in protected activity or that the operator was motivated by non-protected activity creates a conflict in the evidence and therefore cannot be considered. They seem to simultaneously require the Judge to admit the evidence, but to exclude it from her consideration as to whether the case has been frivolously brought.

> An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.

Id. Dicta is not law. *United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir.2003) (en banc) (stating that dicta "cannot serve as a source of binding authority in American jurisprudence.")

My colleagues both find error with the Judge's exclusion of evidence proffered in support of the operator's affirmative defense. But one - Commissioner Rajkovich - correctly decides such error is harmless because the Judge would not have been permitted to resolve credibility issues raised by the excluded evidence.[2] Slip Op. at 11. Accordingly, and because I also vote to affirm, the decision of the Judge is affirmed without need to consider or resolve the issue on which the Commission split 2-2 in *Marion*, i.e., whether a Judge can consider an operator's rebuttal or affirmative defense when applying the not frivolously brought standard to a claim for temporary reinstatement.

Not only are my colleagues' dicta not binding, their musings on the admissibility of evidence offered to prematurely substantiate an operator's affirmative defense or rebuttal case are unpersuasive.[3] I do not understand why they wish to require our Judges to conduct temporary reinstatement hearings in such a cumbersome manner, requiring the introduction of evidence that cannot be considered in the decision. Why would we require our Judges to unnecessarily prolong temporary reinstatement hearings in order to receive potentially extensive evidence as to the operator's affirmative defenses or rebuttal case, only to exclude the evidence from consideration? Only once the case proceeds to a decision on the merits will the claimant or Secretary of Labor have had a full opportunity to conduct discovery and develop their evidence.[4] And our Judges would then need to once again take evidence as to the operator's rebuttal and affirmative defenses. Judges should only take evidence germane to the decision at hand. In this case, at this stage, that is limited to evidence going to whether the discrimination claim – looking at preliminary evidence only as to each element necessary to establish the claimant's prima facie case – is frivolously brought.

Commission Judges should continue to exclude from their decision-making in temporary reinstatement proceedings any evidence offered solely to support an operator's affirmative

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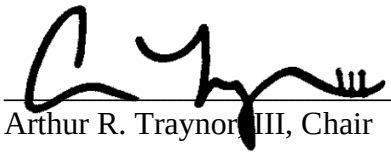
[2] The Judge determined that the evidence proffered by the operator would require a credibility determination and thus it was beyond the scope of the temporary reinstatement hearing. ALJ Dec. at 3 n.2; Unpublished Order dated Mar. 26, 2021.

[3] I do not find it necessary to rebut Commissioner Althen's contention that our precedents precluding premature consideration of affirmative defenses and rebuttal cases at this stage violates any legally cognizable operator's "right to manage its workforce." Slip Op. at 14.

[4] Commission Rule 45 provides that a hearing on a petition for temporary reinstatement must occur very quickly after a petition requesting such relief is filed and without opportunity for either the claimant or operator to take discovery.

defense or rebuttal. Evidence that may not be considered in a temporary reinstatement decision should not be permitted to burden the docket and prolong proceedings. My colleagues' non-binding preference notwithstanding, we continue to prohibit not only untimely credibility determinations, but also any premature weighing of evidence offered in support of an operator's affirmative defense against or rebuttal to the claimant's prima facie discrimination claim.

I join Commissioner Rajkovich to affirm the decision below.



Arthur R. Traynor, III, Chair

Distribution (by e-mail):

Christopher D. Pence, Esq.
Hardy Pence, PLLC
10 Hale Street, 4th Floor
PO Box 2548
Charleston, WV 25329-2548
cpence@hardypence.com

LaShanta Harris, Esq.
U.S. Department of Labor
201 12th Street South, Suite 401,
Arlington, VA, 22202-5450
Harris.LaShanta@dol.gov

Archith Ramkumar, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202
Ramkumar.Archith@dol.gov

April Nelson, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Nelson.April@dol.gov

Administrative Law Judge Priscilla Rae
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
prae@fmshrc.gov

Melanie Garris
Office of Civil Penalty Compliance
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202-5452
Garris.Melanie@DOL.GOV