November 2023

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

November 28, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ALVARO SALDIVAR	
v.	Docket No. WEST 2021-0178-DM
GRIMES ROCK, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This case arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act").[1] It involves the granting of temporary reinstatement for a miner employed by Grimes Rock, Inc. On January 17, 2022, the Commission received a petition for discretionary review challenging an Administrative Law Judge's order denying the operator's motion to toll temporary reinstatement. On July 13, 2022, the Commission received cross-petitions from the Secretary of Labor and Grimes Rock, challenging different parts of the Judge's June 17, 2022 order enforcing temporary reinstatement.

For the reasons that follow, we affirm the Judge's order denying the operator's motion to toll temporary reinstatement and affirm in part and reverse in part the Judge's order enforcing temporary reinstatement.

I.

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

> Any miner . . . 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 forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if 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.

I.

Factual and Procedural Background

Complainant Alvaro Saldivar was a miner at Grimes Rock's mine on two separate occasions. First, he was employed as a welder from May 2019 through July 2019. Then he was employed as a service technician from October 5, 2020 to January 15, 2021. Tr. 16. When Grimes Rock hired Saldivar the second time, Saldivar made the operator aware that he had a criminal record. Saldivar alleged that while employed at Grimes Rock the second time, he made approximately eight safety complaints to his direct supervisor Rene Garcia and general manager Ernie Melendez. Most of his complaints involved alleged bald tires on the water truck he operated, but they also included a complaint about a lack of proper training. Tr. 17-27.

During this period, Saldivar received five disciplinary warnings from Grimes Rock. The operator eventually terminated Saldivar on January 15, 2021, just one day after his last safety complaint. Saldivar filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration ("MSHA") over his termination, and the Secretary subsequently brought a section 105(c)(2) action and sought temporary reinstatement on Saldivar's behalf. Temporary reinstatement was granted by a Commission Administrative Law Judge on May 18, 2021. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 287 (May 2021) (ALJ). Grimes Rock petitioned for review of the Judge's decision, which was subsequently affirmed by the Commission. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299 (June 2021).

While Grimes Rock's appeal was pending, however, the parties agreed to temporary economic reinstatement. The Judge approved the agreement on May 28, 2021. Under the agreement, because Saldivar had found work with another employer, Grimes Rock was responsible for paying the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock. The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. In July 2021, the Secretary filed a discrimination complaint on Saldivar's behalf (Docket No. WEST 2021-0265).

While the parties awaited the Judge's decision on the merits of Saldivar's discrimination complaint, Saldivar was incarcerated on two occasions. Although the agreement was also silent on what would happen if Saldivar was unavailable for work, the Secretary agreed to toll Grimes Rock's payments during these periods. After Saldivar's first incarceration, Grimes Rock filed a motion to toll or permanently terminate the economic reinstatement, arguing the applicability of the "after-acquired evidence" doctrine and a "change in circumstances." G.R. PDR 1 at 2-4. On January 7, 2022, the Judge denied the operator's motion and Grimes Rock filed a petition challenging the Judge's determination, which we granted and will consider here.

After Saldivar was released from his first incarceration, around November 2021, Grimes Rock resumed making payments. However, at that time the parties disputed what amounts were then owed pursuant to the temporary reinstatement order. Saldivar's second incarceration ended

in May 2022. After the miner's second release, Grimes Rock did not resume its payments.[2] On May 27, 2022, the Secretary filed with the Judge a motion to enforce the settlement agreement, which was granted on June 17, 2022. The Judge ordered Grimes Rock "to pay Saldivar the full wages as required by the temporary reinstatement order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC 497 (June 2022). Simultaneous with her order granting enforcement, the Judge issued her decision on the merits of the discrimination complaint, concluding that Grimes Rock did not violate the discrimination provisions of the Mine Act and dismissed the case. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC 473 (June 2022) (ALJ). Consequently, the Judge ordered the dissolution of the temporary reinstatement order. She ordered that the dissolution occur on the same date that she issued the decision on the merits.

On July 13, 2022, the parties filed cross petitions challenging different parts of the Judge's June 17 order. Specifically, the Secretary challenges the Judge's decision to terminate the temporary reinstatement order instantly, upon issuance of her decision on the merits of the discrimination complaint. Sec'y PDR. In turn, Grimes Rock takes issue with the duration of the temporary reinstatement and challenges the Judge's enforcement order. G.R. PDR 2. The Commission has granted review of both petitions.

Finally, on August 15, 2022, MSHA issued a section 104(a) citation to Grimes Rock for its refusal to make the required payments in violation of the Judge's order to enforce. 30 U.S.C. § 814(a). On August 17, 2022, Grimes Rock filed a request for an immediate stay of the Judge's June 17 order granting enforcement, which was subsequently denied by the Commission. The Secretary subsequently filed a 104(b) Order, 30 U.S.C. § 814(b), for the operator's failure to comply with the Judge's enforcement order. On August 22, 2022, following the issuance of that order, Grimes Rock finally made the payments required under the temporary reinstatement order.[3] Three days later, the Secretary filed a motion for interest and consequential damages for the wages Saldivar was not able to access during the periods Grimes Rock refused to pay. Sec'y Mot. for Interest.

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[2] On April 7, 2022, Grimes Rock filed an "update" with the Commission informing it of Saldivar's second incarceration. That same day, it also filed with the Judge a renewed "Motion to Toll and Terminate the Economic Temporary Reinstatement Order," putting forth the same new information offered in its update to the Commission and requesting permanent termination of temporary economic reinstatement. On April 19, the Judge granted the operator's second request to toll the temporary economic reinstatement from the date of her order until Saldivar was once again available for work. Order Granting Mot. to Toll at 3. The Judge denied the operator's request for reimbursement of funds already paid to the Complainant. *Id*. at 4. The Judge did not address the operator's request to permanently terminate the economic reinstatement order.

[3] In addition to Citation No. 9619114 (the 104(a) Citation issued on August 17, 2022) and Order No. 9619115 (the 104(b) Order issued on August 22, 2022), a second citation, No. 9619116, was issued on August 22, 2022, alleging that Grimes Rock continued to conduct work at the mine site despite its non-compliance with Order No. 9619115. *See* WEST 2022-0333, WEST 2022-0334, and WEST 2022-0335.

II.

Disposition

A. Grimes Rock's petition challenging the Judge's denial of its motion to toll the Judge's Order of Temporary Reinstatement

For the reasons below, we conclude that the Judge did not err when she denied the operator's motion to permanently toll the order of temporary reinstatement.

1. Grimes Rock failed to establish that tolling was justified.

The Mine Act directs the Commission to reinstate a miner during the pendency of his/her discrimination complaint as long as he or she can prove that the complaint was not frivolously brought. The scope of a temporary reinstatement hearing is narrow, and the Judge is limited to determining "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *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, 744 (11th Cir. 1990) ("*JWR*"); *Sec'y on behalf of Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, 2522 (Nov. 2015).

While the scope of temporary reinstatement proceedings is limited to determining whether the complaint is frivolously brought, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled due to a "change in circumstances." *Sec'y on behalf of Gatlin v. Ken American Res., Inc*., 31 FMSHRC 1050, 1054-56 (Oct. 2009) (concluding that the duration of a temporary reinstatement of a miner may be modified if the operator can prove that the complainant's inclusion in a layoff, at an idled mine, was entirely unrelated to his protected activity).

In previous cases, the only types of "events" that we have found may justify tolling are those which affect the availability of relevant work at the mine for the miner at issue, such as a layoff due to business contractions or similar conditions and mine closure. *Id*.; *see, e.g., Sec'y on behalf of Russell Ratliff v. Cobra Natural Res*., 35 FMSHRC 394 (Feb. 2013) (affirming the Judge's order finding that the operator's obligation to reinstate Ratliff was not tolled by a layoff because the operator continued to mine coal, and work was available for shuttle car operators). *See also Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315, 319-20 (Feb. 2017); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183, 1187-88 (May 2013); *Sec'y of Labor on behalf of McGaughran v. Lehigh Cement Co*., 42 FMSHRC 467, 471 n.6 (July 2020). The Commission has held that "[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Cobra Natural Res., LLC*, 35 FMSHRC at 397. Additionally, the tolling inquiry is bound by the same evidentiary standards as the initial temporary reinstatement proceeding; the Judge is not permitted to make credibility determinations or resolve conflicts in the evidence. *Id*. 98 n.3.

Grimes Rock has not established that work at the mine was unavailable for Saldivar. Indeed, the operator offers *no evidence* regarding availability of work. Instead, Grimes Rock

argues that the Commission's doctrine on tolling should be extended to include a situation where the operator no longer wishes to offer employment to a miner. Specifically, Grimes Rock argues that tolling is justified because it no longer desires to employ Saldivar due to his periods of incarceration and the criminal allegations against him.[4] G.R. PDR 1 at 9-12. Neither the Mine Act nor Commission precedent support the extension of the Commission's tolling doctrine to include the position advanced by Grimes Rock.

Congress directed that temporary relief be ordered "pending the final order on the complaint." 30 U.S.C. § 815(c)(2). Congress did so because it determined that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748; *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012). The Commission has traditionally allowed exceptions to that statutory mandate only in narrow circumstances.

It is axiomatic that an operator defending its decision to discharge a miner in a section 105(c) proceeding no longer wishes to employ that miner. An operator's desire not to employ a temporarily reinstated miner, in and of itself, is never sufficient to justify tolling. [5] If it were, every operator would be justified in discharging every miner granted a temporary reinstatement.[6]

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[4] Grimes Rock also argues that temporary reinstatement should be dissolved because it can show that Saldivar lied about his safety complaints and elements of his criminal record. G.R. PDR 1 at 12, 15. Consideration of such evidence is appropriate at the discrimination hearing on the merits, not during the temporary reinstatement phase of the proceeding.

[5] Commissioner Rajkovich joins the majority regarding all its substantive holdings. In addition, he also notes that the Secretary in this case accepted Saldivar's physical unavailability for work (during his incarceration) as sufficient justification for tolling. He would find it reasonable to consider changes in a miner's circumstances on a case-by-case basis. However, the operator must still prove unavailability, i.e., that because of those changed circumstances the miner *could not work at the mine*. Here, Grimes Rock offered no indication of a company policy or history of barring miners with criminal records from employment. Oral Arg. Tr. at 8. Nothing the operator has presented suggests that work was unavailable to Saldivar because he had previously been incarcerated.

[6] Our dissenting colleague argues that at-will employment principles should apply to miners who are employed on a temporary reinstatement. Slip op. at 20-21. As the dissent notes, under at-will employment principles an employee not covered by an employment contract may be terminated for a good reason, bad reason, or no reason at all. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 606 (2008). Here, however, we are dealing with the Mine Act, in which Congress enacted specific statutory requirements to govern temporary reinstatement. The Commission's role is to interpret the Mine Act so as to "give practical effect to Congress's intent, rather than frustrate it." *U.S. v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006) *citing United States v. Am. Trucking Assn's*, 310 U.S. 534, 542 (1940). As noted above, Congress created temporary reinstatement to ensure miners would receive relief pending a decision on the

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Allowing such a justification would defeat the purpose of temporary reinstatement, which is to "provide the miner with an income through a return to work until the [merits] complaint is resolved." *North Fork*, 33 FMSHRC at 592. Grimes Rock provided no other basis for tolling Saldivar's temporary reinstatement. Therefore, we decline to extend our tolling doctrine to include the facts present here.[7]

Tolling, in this case, was not appropriate. The Judge did not err by declining to grant it.

2. "After-Acquired Evidence of Wrongdoing" is not relevant in temporary reinstatement proceedings

Grimes Rock argues that tolling is justified because it unearthed evidence of "wrongdoing" by Saldivar while preparing for the merits hearing. It then sought to introduce this "after-acquired evidence" as justification for tolling the temporary reinstatement.

The Judge refused to toll the temporary reinstatement, instead finding that the evidence was relevant to the hearing on the merits. We find that the Judge's actions were not in error.

To support its position that a temporary reinstatement can be tolled based on after-acquired evidence, Grimes Rock relies on *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In that case, the Supreme Court held that evidence of wrongdoing that occurred during the employee's period of employment—but uncovered by the employer while conducting

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[6] (…continued)
merits of their claims. 30 U.S.C. § 815(c)(2). If the dissent's view is correct, temporary reinstatement provides no protection to miners whatsoever, they could be fired for "no reason." Allowing operators to discharge miners on temporary reinstatement for "no reason at all" would substantially undermine Congress' intent to have employers bear a disproportionately greater share of the burden of an erroneous decision in a temporary reinstatement proceeding. *See, e.g., JWR*, 920 F.2d at 748. We also note that Grimes Rock provided no evidence that it generally discharged miners with criminal records, nor that it maintained any policy to that effect.

[7] Our decision does not, as our dissenting colleague suggests, provide absolute "immunity" from discipline for miners receiving temporary reinstatement. Our ruling is not intended to provide a broad, advisory statement regarding the scope of temporary reinstatement. As is appropriate, we considered only the relevant facts in this particular case. *See Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1877-78 (Sept. 2015) (holding that the Commission, like Federal Courts, does not issue advisory opinions). Based on those facts we determined that the tolling doctrine should not be extended to include the instant circumstances. We take no position on whether our narrow tolling doctrine could be extended to other fact patterns not raised by this case. Further, we stress that the factual allegations raised by the operator were relevant to, and were consider by the Judge in, the case on the merits, where the operator prevailed.

In addition, our dissenting colleague implies that this footnote, and other sections of the majority decision, solely represent the views of Chair Jordan and Commissioner Baker. Slip op. at 23. That is not accurate. This footnote, and the other portions of this decision, are the joint opinion of the majority unless otherwise expressly stated.

discovery regarding an Age Discrimination in Employment Act complaint—may limit available remedies for the violation. Notably the Court did not find that it completely shields the employer from liability under the ADEA. Instead, the Court found that such evidence may limit available remedies to an employee, provided that the employer can first establish "that the wrongdoing was of such severity that the employee would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id*. at 362-63.

For the reasons which follow, we find that *McKennon* is not applicable to temporary reinstatement proceedings under the Mine Act.

Temporary reinstatement, pending a determination on the merits of the complaint, is awarded if the Secretary demonstrates that the miner's complaint is not frivolous. *See Jim Walter*, 9 FMSHRC at 1306; *Kingston Mining, Inc*., 37 FMSHRC at 2522 (the "scope of a temporary reinstatement is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought.").

However, temporary reinstatement is not a remedy for a violation of the Mine Act.[8] Instead, temporary reinstatement is awarded *pending a determination on the merits of the complaint*. If the miner prevails on the merits of the complaint, and the Judge finds that the operator violated the Mine Act, only then does the Judge consider remedies for the violation. The Commission has differentiated temporary reinstatement from remedies and awards by recognizing that "the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard." *Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 592 (Mar. 2011) (citations omitted); *McGaughran*, 42 FMSHRC at 470 n.4. [9]

Moreover, the after-acquired evidence doctrine requires the employer to demonstrate that based on the new evidence of wrongdoing, the employer would have fired the employee at the time it occurred if the employer would have known about it. This standard requires that a Judge make credibility determinations and resolve conflicts in the evidence, which is inconsistent with the limited nature of a temporary reinstatement hearing. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999) ("[i]t [is] not the Judge's duty, nor is it

[8] In this case the parties agreed to economic reinstatement. However, in the absence of such an agreement and pursuant to the Mine Act, a miner ordinarily returns to his former position and the mine operator receives the benefits of his labor.

[9] There was evidence that Saldivar might have been less than forthcoming on his employment application about the full extent of his criminal history. But there is also evidence that the company may have chosen not to further investigate after being placed on notice that Saldivar had a criminal past. Regardless, this evidence would have required the Judge to weigh potentially conflicting evidence and make credibility and value determinations, which are not appropriate actions to take during the temporary reinstatement phase. *Rockwell Mining, LLC*, 43 FMSHRC at 165-66, 168.

the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.").[10]

For these reasons, an operator is not permitted to use evidence it acquires while preparing for the case on the merits, or even relevant evidence it failed to submit for the original hearing on temporary reinstatement, to repeatedly relitigate the case against temporary reinstatement. *See JWR*, 920 F.2d at 748 n.11 (the "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.").[11]

Simply put, after-acquired evidence of wrongdoing may be admissible in a full hearing on the merits of a discrimination complaint but is not a basis to toll a temporary reinstatement order. The Judge did not err.

3. Due Process and Prejudice

Grimes Rock contends that the Judge deprived it of its due process right to a meaningful hearing on its motion to terminate the temporary economic reinstatement. G.R. PDR 1 at 16-18. We do not agree.

The motion to toll filed with the Judge did not include a request for a separate hearing on its motion, nor was Grimes Rock entitled to one.[12] The Commission has recognized limited circumstances in which a Judge, prior to the hearing on the merits, may appropriately order an

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[10] However, Grimes Rock knew at the time that it hired Saldivar that he had some criminal history. Therefore, any hearing on the after-acquired evidence regarding other unlawful activity would require the ALJ to determine whether the operator's claim that it sought to discharge Saldivar solely because of his newly disclosed unlawful behavior was credible. Put simply, the Judge would have to determine whether the operator sought to discharge Saldivar because of his criminal behavior or if it was motivated (or partially motivated) by his protected activity. That would require making credibility determinations and resolving conflicts in evidence, which is not appropriate at the temporary reinstatement stage.

[11] Our dissenting colleague cites to *Secretary on behalf of McKinsey v. Pretty Good Sand Co., Inc.*, 36 FMSHRC 2843, 2870 (Nov. 2014) (ALJ) for the proposition that after-acquired evidence is relevant in a temporary reinstatement proceeding. Slip op. at 26. However, we note that that decision concerns a determination on the merits of a 105(c) case. As we note elsewhere, after-acquired evidence may be relevant at that stage of the proceeding. *See infra* at 9.

[12] The Commission recently issued *Sec'y on behalf of Collins v. Crimson Oak Grove Resources, LLC*, 45 FMSHRC____, SE 2023-0235 (Oct. 11, 2023) in which we set forth the due process requirements for temporary reinstatement proceedings. In that case we noted that a single, pre-deprivation hearing in which the ALJ does not weigh disputed evidence has long been held as "far exceeding" the Constitutional requirements of due process. *Id*. *citing Brock v. Roadway Exp.*, 481 U.S. 252 (1987) and *JWR*, 920 F.2d 738 (11th Cir. 1990). In light of that holding, there is no basis for the assertion that an operator is constitutionally entitled to additional hearings on motions within the temporary reinstatement proceeding.

intermediate hearing regarding changed circumstances. However, in the temporary reinstatement phase of the litigation, during which the parties may not have completed discovery, the burdens of proof and the standard against which the evidence is evaluated should be no different than if the issue had been heard during the initial temporary reinstatement hearing. *Cobra Natural*, 35 FMSHRC at 398 n.3. The ultimate determination concerning the appropriate remedy for any alleged discrimination, including the duration of an operator's reinstatement obligation, if any, is made in the proceeding on the merits.[13] *Id*. at 398.

Grimes Rock also contends that continuing the temporary economic reinstatement despite the emergence of new undisputed evidence caused prejudice. G.R. PDR 1 at 19. As discussed above, after-acquired evidence is not appropriate at the temporary reinstatement stage. We further reject any claim of economic prejudice. Congress, in enacting the "not frivolously brought" standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *JWR*, 920 F.2d at 744, n.11. Moreover, the Commission has indicated that the goal of the Mine Act's discrimination provision is to make the miner whole until the case can be decided on the merits. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt*, *Inc*., 19 FMSHRC 1254, 1258 (July 1997) (discussing pertinent legislative history); *Sec'y of Labor on behalf of Totten v. Tk Mining Services, LLC*, 37 FMSHRC 2217, 2218-19 (Sept. 2015).

We hold that evidence of prior behavior uncovered after the miner's discharge but offered after a decision granting or denying temporary reinstatement has been reached is not appropriate for review prior to the hearing on the merits.

B. The Secretary's petition challenging the Judge's dissolution of the order of temporary reinstatement contemporaneous with her decision finding that Grimes Rock did not violate section 105(c)

The Secretary argues that the Judge abused her discretion by terminating Saldivar's temporary reinstatement on June 17, 2022, because the merits decision was not yet a final order. Sec'y PDR at 2. We agree and conclude that the Judge erred when she dissolved the temporary reinstatement order prior to the conclusion of the Commission's opportunity to direct review.

If the Secretary can show that the discrimination complaint was not frivolously brought, section 105(c)(2) of the Mine Act states that "the Commission . . . shall order the immediate reinstatement of the miner *pending final order* on the complaint. . . ." 30 U.S.C. § 815(c)(2) (emphasis added). An order issued after a determination on the merits is not final directly upon its issuance. We have previously held that a Judge cannot terminate a temporary reinstatement order concurrently with a decision on the merits. In *Reading Anthracite*, the Commission determined that "the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision." *Secretary ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999) (holding that "the time had not yet passed for the Commission to review the judge's decision on the merits . . . .

[13] During the pendency of this PDR, the Judge held the merits hearing in the discrimination case on January 25-27, 2022 and issued her decision on June 17, 2022. *See* Docket No. WEST 2021-265.

Accordingly, the judge's decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review."); *Sec'y of Labor on behalf of Noe v. J & C Mining, LLC, and Manalapan Mining Co*., 22 FMSHRC 705, 706 (June 2000).

In the instant matter, the Judge erred by terminating the temporary reinstatement before this Commission could direct review of her merits decision. Furthermore, temporary reinstatement ends only after the merits case has become final.[14] Neither scenario had occurred here when the Judge issued her order of termination.

Accordingly, the Judge erred when she ended the order of temporary reinstatement concurrently with her merits decision. This issue is remanded to the Chief Administrative Law Judge for recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final.[15]

C. Grimes Rock's petition challenging the Judge's order granting the Secretary's motion to enforce

Grimes Rock argues that the Judge abused her discretion by retroactively modifying the economic reinstatement agreement and ordering the operator to pay the full reinstatement amount after Saldivar lost his other employment. It notes that Grimes Rock only agreed to pay the difference between Saldivar's earnings at the job he secured after being terminated by Grimes Rock and what he would have been earning at Grimes Rock. G.R. PDR 2 at 14; G.R. Reply Br. at 3-5. The operator asserts that the Judge improperly interpreted the agreement to include implied terms that should only have been considered upon the Secretary's proper filing of a motion to modify the existing order. G.R. Br. at 27-31.

We conclude that the Judge did not err in granting the Secretary's motion to enforce and in finding that Grimes Rock was obligated to pay Saldivar all wages required to make the miner whole under the original order of temporary reinstatement.

Under section 105(c)(2) of the Mine Act, if it is found that a miner's complaint of discrimination is not frivolously brought, "the Commission, on an expedited basis upon application of the Secretary, shall order the immediate *reinstatement* of the miner pending final

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[14] Our dissenting colleague discusses, at length, concerns regarding prolonged periods of temporary reinstatement during the appeals process after a hearing on the merits in which an operator prevails. Slip op. at 19-25. In the instant case, Grimes Rock prevailed on the merits case and that decision was not appealed. 44 FMSHRC 473 (June 2022) (ALJ). Saldivar's temporary reinstatement has now ended. As a result, we do not believe that our colleague's concerns regarding lengthy appeals are implicated here.

[15] Whether the final termination date of temporary reinstatement is properly determined by the 30-day language in section 105(c)(2), 30 U.S.C. § 815(c)(2), or by the 40-day language in section 113(d)(1), 30 U.S.C. § 823(d)(1), is currently under consideration before the Commission in *Jason Hargis v. Vulcan Construction Materials Incorporated*, SE-2021-0163.

order on the complaint." 30 U.S.C. § 815(c)(2) (emphasis added). While temporary "reinstatement" means to place the miner back to work at the mine during the pendency of the discrimination case, the Commission has deemed economic reinstatement an acceptable alternative. Economic reinstatement is negotiated by joint agreement, which may be accepted by the Judge in lieu of actual reinstatement. A Judge may not order economic reinstatement on his or her own initiative. *Sec'y on behalf of McGoughran v. Lehigh Cement Co., LLC*, 42 FMSHRC 467, 469 (July 2020); *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp*., 33 FMSHRC 589, 593 (Mar. 2011), *rev'd on other grounds*, 691 F.3d 735 (6th Cir. 2012). In addition, parties may renegotiate, or Judges may modify economic reinstatement agreements to allow for the offsetting of the temporary reinstatement award by the amount of wages earned by the miner from other employment during the reinstatement period. *North Fork Coal Corp*., 33 FMSHRC at 595-96.

Congress stated that: "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 (emphasis added). Congress also stated 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; *Sec'y on behalf of Bussanich v. Centralia Mining Co*., 22 FMSHRC 153, 161–62 (Feb. 2000).

Consistent with the legislative history, the Commission has held that "the purpose of the temporary reinstatement provisions is to put the miner, during the time he [or she] pursues [a] discrimination claim, *in no worse a position than he [or she] was while working for the operator.*" *See North Fork*, 33 FMSHRC at 597-98 (emphasis added). We have noted that a "Judge may defer ruling on a temporary reinstatement application or implementing a temporary reinstatement order in light of an economic reinstatement agreement between the parties *that is consistent with the purposes of section 105(c)*." *Lehigh Cement*, 42 FMSHRC at 469 (emphasis added).

A miner is not "reinstated" if the miner is receiving less pay than what he or she would have received if the termination had not occurred. Under an order of temporary reinstatement, it is the operator's responsibility to ensure that the miner is no worse off than when employed by the operator prior to the discrimination complaint. This status quo requirement remains even when the miner no longer has any alternative employment to offset the operator's payment. Here, when the Judge first awarded Saldivar temporary reinstatement, her decision specifically reinstated "Mr. Saldivar to his former position at the mine . . . at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." *Grimes Rock*, 43 FMSHRC 287, 292 (May 2021). The decision was subsequently affirmed by the Commission. *Grimes Rock*, 43 FMSHRC 299 (June 2021). The parties then agreed to economic reinstatement and because Saldivar had secured other employment at that time, Grimes Rock's payments were set at the difference between Saldivar's earnings at his new job and what he would have been making at Grimes Rock.

Although the agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments, interpreting that silence to mean that Grimes Rock is responsible for something less than what is required to "reinstate" Saldivar would not be "consistent with the purposes of section 105(c)." It is also difficult to believe that the Secretary and miner would agree to any compensation that was less than what the Judge had already awarded or to any terms that would "put [Saldivar] . . . *in [a] worse [] position than he was while working for the operator*." *See North Fork*, 33 FMSHRC at 597-98. There is no indication in the record that Saldivar intended to waive any portion of the full wages to which he was statutorily entitled.[16] Likewise, we see no sign in the Judge's decision approving settlement that she intended to approve any agreement that would run afoul of the Mine Act by placing the miner in a situation that would make him less than whole.

In fact, in the Judge's Order granting the Secretary's motion to enforce, she stated that: "The Economic Reinstatement Order was issued in the shadow of the initial Reinstatement Order, which mandated full and total reinstatement for Saldivar at this previous rate of pay. I approved the parties' settlement agreement insofar as it adequately made Saldivar whole while his discrimination case was pending." ALJ Ord. Gr. Sec'y Mot. to Enforce at 2 (June 17, 2022). She further noted that her initial order was issued to accomplish the goal of the temporary reinstatement provision and the order approving economic reinstatement simply "'described how the parties proposed to implement relief ordered by the Judge pursuant to the Mine Act.'" *Id*., *quoting North Fork*, 33 FMSHRC at 592.

We conclude that any economic reinstatement agreement and any order issued by a Judge must be consistent with the purpose of the temporary reinstatement provision of the Mine Act, which is to make the miner whole. See *North Fork*, 33 FMSHRC at 593; *Lehigh Cement*, 42 FMSHRC at 469.

Grimes Rock argues that California statutory rules of contract interpretation govern the temporary reinstatement agreement, therefore any ambiguity in the agreement as to the operator's payment obligations in the event of Saldivar's loss of alternative employment must be construed against the Secretary. G.R. PDR 2 at 18-23. We reject this argument. The parameters of any temporary reinstatement agreement are first dictated by the statute, and any ambiguity shall be interpreted to further the purposes of the Mine Act.[17] A private agreement simply cannot trump a valid order of temporary reinstatement issued pursuant to section 105(c). In light of this, it would have been reasonable for all involved to assume that in the event Saldivar no longer had other employment, Grimes Rock's payments would automatically revert to the full amount under the Judge's original order, which was still in place.

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[16] This is not to suggest a miner could waive a statutory entitlement through an economic temporary reinstatement agreement.

[17] The Commission has previously rejected the argument "that the issue raised . . . should be decided solely by reference to contract law." *North Fork*, 33 FMSHRC at 592. We reasoned that we cannot ignore the Mine Act in determining the construction, application, and effect of an economic reinstatement agreement. *Id*.; s*ee also R. Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citations omitted) (reasoning that "we do not decide cases in a manner which permits parties' private agreements to overcome . . . miners' protected rights").

Conversely, Grimes Rock goes on to assert that it was implied in the agreement that "Mr. Saldivar would act in good faith and exercise reasonable efforts at maintaining an employable status," which he failed to do. G.R. PDR 2 at 11. We reject this notion as the Mine Act does not require a miner to mitigate an operator's temporary reinstatement obligation, which includes agreeing to offset an operator's payments due to other employment. A miner's only obligation to mitigate in a section 105(c) proceeding is limited to the consideration of backpay in the merits case. However, we have already distinguished backpay awards from wages owed under temporary reinstatement. *North Fork*, 33 FMSHRC at 592.

We also find unpersuasive Grimes Rock's argument that it would not have agreed to full economic reinstatement. G.R. PDR 2 at 21. Given the mandates of the Mine Act and the Judge's original reinstatement order, the operator's agreement was not necessary. If Grimes Rock had not opted for economic reinstatement, it would have had to physically reinstate Saldivar at his full pay. In any event, Saldivar was entitled to receive his full wages. "Economic reinstatement" allows the miner the benefit of receiving his or her normal pay, while permitting the operator to avoid bringing the miner back into the workplace. See *Lehigh Cement*, 42 FMSHRC at 469.

We conclude that an economic reinstatement agreement must work in tandem with any existing order of temporary reinstatement and cannot deprive a miner of the full wages owed under and intended by the Mine Act's temporary reinstatement provision.[18]

Finally, Grimes Rock maintains that it was deprived of its due process right to a hearing, which it contends it was entitled to if the Judge was going to impose an increased payment amount. We disagree. A temporary reinstatement hearing was held and an order issued temporarily reinstating Saldivar "at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." *Grimes Rock*, 43 FMSHRC at 292. As we have stated, the settlement agreement could not divest Mr. Saldivar of any pay owed to him under the original order and served only to describe his manner of reinstatement. Finally, contrary to Grimes Rock's assertion, the Judge did not increase the amount Grimes Rock owed to Saldivar. The operator simply lost the benefit of Saldivar's other employment offsetting its payments. The operator was due no additional hearing.

[18] Our dissenting colleague would hold that the parties' agreement to economically reinstate a miner would supersede the requirements of the Mine Act. Slip op. at 28-31. In short, the dissent would allow the economic reinstatement agreement to set the terms of the parties' relationship during the temporary reinstatement. For the reasons outlined in this section, we disagree. However, we would also note that given this conclusion, the dissent is not internally consistent. Specifically, the parties' temporary economic reinstatement agreement did not contain any provision that allowed Grimes to terminate or discipline Saldivar. Further, it does not expressly create an employment relationship; it creates an obligation for Grimes to pay Saldivar regardless of work. If the parties' agreement alone sets the terms for the parties' relationship, it is unclear how our dissenting colleague reached his other conclusions in this case: that is, that Saldivar was an employee of Grimes and Grimes was entitled to discharge him for alleged misconduct.

Accordingly, we reject the notion that the Judge retroactively modified the parties' settlement agreement and conclude that the Judge did not err in granting the Secretary's motion to enforce.

D. Secretary's motion for interest and consequential damages

The Commission grants the Secretary's motion for interest. Specifically, Grimes is obligated to pay interest, pursuant to section 105(c)(2) of the Mine Act, on any yet unpaid backpay wages owed to Saldivar. In addition, Grimes is obligated to pay interest on any backpay wages that were paid late to Saldivar. On remand, the Judge should determine the amounts of any remaining backpay owed as well as interest owed.

Additionally, on remand, the Judge should determine whether consequential damages as a result of Grimes' failure to timely comply with the Judge's orders are appropriate. *See e.g., Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's order denying the operator's motion to toll temporary reinstatement. We vacate the Judge's order dissolving the temporary reinstatement as of the date of her order and decision, and remand it for assignment to a Judge for recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final. We affirm the Judge's order enforcing temporary reinstatement. Finally, we grant the Secretary's motion for interest and consequential damages and remand this matter for a determination of any remaining backpay and interest owed as well as a determination on whether consequential damages are appropriate.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Althen, dissenting:

I respectfully dissent.

I.

FACTUAL BACKGROUND

On October 6, 2020, Saldivar submitted an employment application to Grimes. The application signed by Saldivar asked: "Have you ever been convicted of, plead guilty/no contest to a crime?" Saldivar responded, "possession of a loaded firearm." G.R. PDR 1, Decl. of Pachowicz, Ex 6. Saldivar certified that the answers were true and acknowledged that falsification would be grounds for dismissal. Despite his certification and acknowledgment, it is now indisputable that Saldivar lied on the application.

In 2021, the Secretary requested temporary reinstatement on behalf of Saldivar. An Administrative Law Judge ("ALJ") temporarily reinstated Saldivar on May 18, 2021. Afterward, the parties entered into an economic reinstatement agreement explicitly prescribing the terms of his reinstatement – namely, the monies Saldivar would receive from Grimes. This prescribed amount was the difference between the salary Grimes had paid Saldivar and the amount Saldivar earned at a new job.[1] The ALJ accepted the parties' agreement and entered an Order containing the terms of the agreement.

[1] The parties' agreement explicitly provided,

> Respondent agrees to pay Mr. Saldivar the difference in earnings at his present place of employment Wayne J. Sand and Gravel Inc. and Grimes Rock Inc. . . . Based on these calculations, Grimes Rock Inc. will pay Mr. Saldivar $2,136.78 on a bi-weekly basis.

Sett. Agreement and J. Mot. for Temp. Econ. Reinst. at 3 (May 27, 2021).

An ALJ does not have authority to order temporary economic reinstatement. *Sec'y on behalf of James McGoughran, v. Lehigh Cement Co.*, LLC, 42 FMSHRC 467, 469 (July 2020). ("A Judge may not order economic reinstatement on his or her own initiative."). Because an ALJ may not order economic reinstatement on his or her own initiative, the terms of the parties' settlement govern the terms for economic reinstatement. It is useful to repeat, therefore, that based upon mutual agreement of the parties, the ALJ ordered Grimes to pay the specific amount of $2,134.78 per pay period. If Saldivar had found work paying more than his other employer at the time of the agreement, the Commission would not hear an argument by Grimes for an "implicit" offset to keep Saldivar's compensation the same as he was making at Grimes. *See Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 594 (Mar. 2011).

After Saldivar's discrimination complaint, Grimes acquired evidence that contrary to Saldivar's certified statement the prior year, Saldivar previously was convicted of, among other things:

a. Willfully causing or permitting a child to be placed in a situation where his or her person or health is endangered,
b. Being under the influence of cocaine, cocaine base, heroin, methamphetamine, or phencyclidine while in the immediate personal possession of a loaded, operable firearm,
c. Commission of a felony after release on bail of own recognizance,
d. Possessing an assault weapon.
e. Possession of a controlled substance while armed with a loaded, operable firearm,
f. Possessing a sawed-off shotgun or rifle, and
g. Carrying a loaded firearm in a vehicle [2]

People v. Saldivar, Case No. 2016002309, Superior Court of California, County of Ventura, available at https://secured.countyofventura.org/courtservices/Information/CaseInformationSearch.aspx (last visited Aug. 28, 2023).[3]

While on temporary reinstatement, on September 16, 2021, Saldivar pled guilty to a theft charge. He subsequently spent 75 days in the Ventura County, California jail. The Secretary recognized that Saldivar committed the crime and agreed that Grimes need not make temporary reinstatement payments to Saldivar during his incarceration.

On November 29, 2021, Grimes filed a motion to toll temporary reinstatement. Grimes made several arguments, including (1) after-acquired evidence that Saldivar failed to disclose prior severe crimes on his certified employment application despite notice that a failure to report fully could cause discharge and (2) Saldivar's criminal misconduct after his reinstatement. On January 7, 2022, the ALJ denied Grimes's motion to toll without a hearing. The ALJ failed even to consider Saldivar's post-reinstatement criminality. Indeed, the ALJ neither considered nor ruled on the impact of Saldivar's criminality upon reinstatement.

As a result, this case does not present the Commission with the normal process of reviewing factual findings for substantial evidence. The ALJ made no factual findings related to

[2] My colleagues say, "Grimes Rock knew at the time that it hired Saldivar that he had some criminal history" (Slip op. at 8 n.10), thereby wholly ignoring the gross disparity between the minimal statement on the application and Saldivar's later demonstrated criminal record. "Some criminal history" understates and minimizes Saldivar's crimes set forth above. More importantly, under their line of reasoning, no crimes by Saldivar before or after reinstatement would suffice to permit discharge through tolling.

[3] See also CAL PENAL § 273a(a) (child endangerment); CA HLTH & S § 11550(e)(1) (under the influence with firearm); CAL PENAL § 12022.1(b) (commission of felony on bail); CAL PENAL § 30605(a) (assault weapon); CA HLTH & S § 11370.1 (possession of controlled substances with a firearm); CAL PENAL § 33215 (sawed-off shotgun or rifle); CAL PENAL § 25850(a) (loaded firearm in vehicle).

Saldivar's criminality to review. However, the commission of the crimes is undisputed. Further, the ALJ's denial of the motion to toll did not discuss the legal effect of post-reinstatement criminality. Therefore, the ALJ decision made no legal findings relevant to the Commission's review.

On January 17, 2022, the Commission granted a Petition for Discretionary Review challenging the ALJ's denial of tolling. In early 2022, Saldivar again went to jail – this time, for failure to appear. Grimes again filed a motion to toll. Saldivar spent sixty-five days in jail. The ALJ granted tolling only for the period Saldivar was in jail. Again, Grimes filed a Petition for Discretionary Review of the ALJ's refusal to toll, and the Commission granted review. The Commission issues its decision on tolling today, long after the ALJ absolved Grimes from the discrimination claim and long after Grimes paid Saldivar tens of thousands of dollars.

On June 17, 2022, five months after a remote hearing, the ALJ found Grimes had not discriminated against Saldivar and dissolved the Temporary Reinstatement Order. That same day, six months after Saldivar's release from jail, the ALJ granted the Motion to Enforce filed by the Secretary in May. The ALJ's Enforcement Order explicitly required Grimes to pay Saldivar $12,533.94. The Secretary expressly requested this amount, subject to minor adjustments after the filing. The Secretary did not seek any consequential damages, and the ALJ never considered a claim for consequential damages. See Sec'y Motion to Enforce (May 27, 2022).

On July 13, 2022, the Secretary filed a Petition for Review challenging the ALJ's dissolution of temporary reinstatement on June 17, arguing the Mine Act entitled Saldivar to continue temporary reinstatement until the expiration of any period of appeal or thirty days after the ALJ's decision if neither the Secretary nor Saldivar filed an appeal. On July 13, 2022, Grimes filed a Petition for Review challenging the ALJ's grant of the Secretary's motion to enforce. The Commission granted both petitions.

On August 25, 2022, approximately 69 days after the ALJ found no discrimination and 39 days after the period for filing a Petition for Review, the Secretary filed a Motion for Consequential Damages directly with the Commission.

II.

TOLLING REINSTATEMENT

A. The commission of crimes during temporary reinstatement and after-acquired evidence of dischargeable misconduct warranting termination may limit compensation

The Supreme Court has recognized that after-acquired evidence warranting termination may limit compensation to the period before a defendant obtains such evidence. Further, dischargeable misconduct during regular employment, permanent reinstatement, or temporary reinstatement warrants termination of employment.

In *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995), the Supreme Court considered new facts supporting termination, which the employer only learned about after discharging the employee. The Court held that compensation would cease when the employer learned of the employee's actions justifying termination. It stated that:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing, must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case. We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. ***It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.***
> . . .
> ***Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information***, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.

Id. at 361-62 (emphasis added).[4]

The majority's position on Grimes's presentation of new crimes and after-acquired evidence flouts this Supreme Court precedent. The Court has cogently and directly held that after-acquired evidence makes it inequitable and pointless to continue the reinstatement of someone the employer would have terminated, and will terminate, in any event, upon lawful grounds. Necessarily, this principle applies equally to new misconduct,

The majority "stresses" that the factual allegations raised by the operator "were relevant to, and were considered by the Judge in, the case on the merits, where the operator prevailed." Slip op. at 6 n.7. In so doing, the majority recognizes that the factual allegations of new misconduct and after-acquired evidence may point to denial of reinstatement. However, despite the Supreme Court's instruction, they are satisfied to allow such new events to linger unreviewed until a hearing on the merits. Here, the delay was for eight months.

Moreover, the ALJ did <u>not</u> consider the after-acquired evidence and new misconduct in her decision issued in June 2022. The majority's misstatement that the ALJ considered such evidence and the ALJ's failure to consider the evidence demonstrates the wrongfulness of the

[4] The Court considered the possibility of an employer doing discovery into a discharged employee's background to obtain after-acquired evidence. However, such consideration did not alter its decision. *McKennon*, 513 U.S. at 363.

majority's willingness to accept a delay of many months to assess post-reinstatement events and evidence disqualifying Saldivar from permanent reinstatement. Having recognized that the new evidence and events are relevant to continued employment, the majority endorses the "inequitable and pointless" process of not permitting a hearing regarding a complainant whom the operator could terminate based on after-acquired evidence or post-reinstatement misconduct.

B. The Commission Errs by Refusing to Consider Evidence of Misconduct After Reinstatement and After-Acquired Evidence

1. Criminal activity by a reinstated person after reinstatement justifies discharge.

The Mine Act provides crucial safety and health protection for miners. Section 105(c) of the Act supports those protections. There, the Act prohibits discrimination against a miner because of the exercise of any of the protections of the Act. Section 105(c) further seeks to assure that miners will not suffer a temporary loss of employment because of exercising a protected right. It provides for the temporary reinstatement of a miner if the Secretary presents a "non-frivolous" claim of discrimination.[5] These are essential rights.

The Mine Act, however, does not exempt miners from the obligation of all workers to observe the legally required norms of society at work and away from work. In this case, undisputed evidence demonstrated that Saldivar engaged in criminal misconduct for which he served two jail sentences totaling several months and lied on his employment application.

This case presents a significant issue of first impression for the Commission: Does temporary reinstatement protect a reinstated complainant from discipline if the complainant engages in criminal wrongdoing, resulting in incarceration after reinstatement? The specific criminal wrongdoing in the case is theft, followed by failure to appear. However, as a case of first impression, the case also presents the broader question of the effect of criminal misconduct by or incarceration of a reinstated complainant after reinstatement.

After temporary reinstatement, Saldivar committed crimes of theft and failure to appear. There is no dispute over his guilt or his jail terms. The Secretary does not dispute that such crimes occurred and agrees that Saldivar was not entitled to pay while in jail.[6]

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[5] The Commission has not defined "non-frivolous." The United States Court of Appeals for the Eleventh Circuit analogized the "non-frivolous" standard to a reasonable cause to believe standard. It held "there is virtually no rational basis for distinguishing between the stringency of this standard [non-frivolous] and the 'reasonable cause to believe' standard that was implicitly upheld in *Roadway Express." Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990).

[6] This does not mean that the Secretary was not entitled to a hearing to address the issues. Indeed, the Commission very recently unanimously recognized the reason for and right to a hearing in a tolling case. *Sec'y of Labor on behalf of Torres v. W.G. Yates & Sons Constr. Co.*, 2023 WL 5170092 **(**July 2023).

The Mine Act does not differ from general employment law for discipline motivated by a reason other than protected activity. Unless employees have a contract, employers may discharge employees for any reason that is not unlawful. *Engquist v. Oregon Dept. of Agr*., 553 U.S. 591, 606 (June 2008) ("The basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all." (citing *Andrews v. Louisville & Nashville R. Co*., 406 U.S. 320, 324 (May 1972))). Employment at-will is the law in California. *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 335 (Oct. 2000); *Cittadino v. BrandSafway Services, LLC*, 2023 WL 3440407 (E.D. Cal May 2023) ("Under California law, there is a strong statutory presumption of 'at will' employment."). There is no doubt that absent a claim of discrimination or other legal impediments, the employer could refuse to re-employ the worker.

In this case, the issue is whether a reinstated worker has a right to return to reinstatement if the attempt to return is after a jail term for theft. Does a reinstated worker have more rights than a regular employee? Does the Secretary's presentation months earlier of a non-frivolous claim protect a complainant from the ordinary prospect of discipline for post-reinstatement misconduct warranting discharge or after-acquired evidence of misconduct warranting discipline? Is a reinstated complainant legally entitled to engage in crimes or other unsafe or dangerous actions and retain or regain reinstatement with no questions asked by his employer?

A diligent review does not disclose any dispensation in the Mine Act for crimes committed by reinstated employees. Reinstated employees should and must follow the lawful requirements imposed upon all workers. One does not suppose that even the majority would support continued reinstated employment if the reinstated complainant stopped coming to work or committed safety violations in the workplace. It would not matter whether such conduct is a "change of circumstances" or simply "misconduct."[7] The availability of discipline would be the same.

Unfortunately, the majority decision fails to fulfill the most fundamental requirements of appellate adjudication—a fair representation of the appellant's argument and presentation of a principled legal basis for the appellate decision.

The majority bases its decision regarding tolling upon a misrepresentation of Grimes's position and the issue in the case. The majority says Grimes seeks to extend tolling to "a situation where the operator no longer wishes to offer employment to a miner. Specifically, Grimes Rock argues that tolling is justified because it no longer desires to employ Saldivar due to his periods of incarceration and the criminal allegations against him." Slip op. at 5.

The assertion that Grimes argues that it simply no longer wished to employ Saldivar is wrong – a makeweight for an erroneous decision. Grimes bases its argument upon Commission case law that a "change of circumstances" may warrant tolling. Indeed, elsewhere, in its opinion, the majority expressly notes that a "change of circumstances" is a reason for tolling. Slip op. at 4.

[7] Nonetheless, it is entirely accurate to refer to the commission of crimes, safety violations, repeated absences, etc. as a "change of circumstances." When a worker deviates from the normal and routine duties, it is a change of circumstance.

Grimes argues that criminal misconduct by a complainant after temporary reinstatement is a "changed circumstance" that warrants tolling the employment of the miscreant complainant. This argument claims that reinstatement does not make a complainant immune from the consequences of criminal misconduct after reinstatement. Grimes does not assert that temporary reinstatement may be tolled based upon a "wish" but rather on the confessed criminal misconduct of the complainant after reinstatement.

Grimes correctly contends that just as an employer may terminate the position of a regular employee or a permanently reinstated employee for criminal misconduct, temporary reinstatement does not create a haven from the results of criminal mischief that occurs after the temporary reinstatement. Discipline may occur when a reinstated employee engages in post-reinstatement misconduct warranting discipline.

This same logic applies to Saldivar's time in jail when he would not have been able to work. An employee would not expect to maintain employment after being absent due to a jail sentence. Moreover, neither the majority nor the Secretary dares go as far as to assert that Saldivar should have received temporary reinstatement while in jail. They both say that the Mine Act demands an operator rehire an individual after a stint of unavailability to work due to the individual's intentional misconduct.

The majority doubles down on its misinterpretation of Grimes's argument by finding that Grimes's claim that an operator may discipline a temporarily reinstated complainant who engages in post-reinstatement criminal misconduct would mean that in every instance, an operator could discharge any temporarily reinstated worker, regardless of the occurrence of misconduct. Slip op. at 5. That finding drawn from its misstatement of Grimes's argument is facially incorrect—another makeweight for error.

The fundamental issue is whether misconduct by a temporarily reinstated complainant may constitute a circumstance permitting discipline. The specific misconduct in this case is theft and failure to appear. Here, a temporarily reinstated complainant committed crimes after reinstatement for which an operator normally could, and almost certainly would, discipline a permanently reinstated worker or regular employee. It is senseless to find that the operator must wait for perhaps many months for a decision on the merits of the discrimination claim before acting on the new misconduct.[8] In this case, the gap between misconduct and a final decision was eight months. In another currently pending case, the gap between reinstatement and a finding on the merits was 17 months, and the case has been pending upon review for nearly a year. *Sec'y on behalf of Hargis v. Vulcan Constr. Materials, LLC*, SE 2021-0163, 2022-001, 2022-013.

[8] The majority triples down on its misstatement of Grimes argument by asserting that this dissent's mention of "at-will" principles means the dissent would construe the Mine Act as providing "no protection" because reinstatement could be tolled "for no reason at all." Slip op. at 5 n.6. The issue before the Commission is whether post-reinstatement misconduct may permit tolling of reinstatement. It is a serious issue. The majority should such eschew obvious and trivial misrepresentations based upon the unremarkable observation that an employer ordinarily may discharge an employee who seeks to return to work after several months in jail for theft.

As stressed above, Grimes' argument and the undisputed facts of Saldivar's crimes present a case of first impression regarding the consequences of post-reinstatement misconduct. Saldivar's specific acts of post-reinstatement misconduct were theft and failure to appear, both of which resulted in many weeks of incarceration. The case raises an important legal question of the effect of post-reinstatement misconduct.[9]

Nonetheless, the majority states it is not ruling on this seminal question and issues no principled guidance regarding tolling for post-reinstatement misconduct. The majority proclaims its lack of principled reasoning: "We take no position on whether our narrow tolling doctrine could be extended to other fact patterns not raised by this case." Slip op. at 6 n.7.

The majority does not explain why a reinstated complainant may commit crimes or other acts warranting discipline without any disciplinary consequence. The majority does not base its decision on any legal principle or reasoning. By doing so, in derogating proper appellate adjudication, the majority fails to provide any principled legal basis for its decision or guidance to ALJs. It simply says, "no discipline" in this case.

By not taking any position on the possibility of discipline for misconduct, the majority decision is simply an arbitrary and unreasoned refusal to permit any adverse consequences to flow from Saldivar's criminal conduct.[10] Because this decision is limited to Saldivar and Saldivar alone, readers and ALJs may draw no legal principle from the majority decision. It is a decision without any underlying principle.

Moreover, the opinion does not appear to be a "majority" decision. In footnote 5, the opinion states that Commissioner Rajkovich, perhaps writing only for himself, would find it reasonable to consider changes in a miner's circumstances on a case-by-case basis. Apparently or possibly, unlike the Chair and Commissioner Baker, he recognizes a right to impose discipline for misconduct.

The decision states that Commissioner Rajkovich fully joins the entire opinion. However, it does not state whether Chair Jordan and Commissioner Baker agree with Commissioner Rajkovich's opinion. It appears Chair Jordan and Commissioner Baker neither deny nor affirm that post-reinstatement misconduct can warrant tolling. They "take no position on it." Slip op. at 6 n.7. However, Commissioner Rajkovich finds that the tolling doctrine extends to discipline for

[9] It bears repeating that the Supreme Court has cogently established a point regarding after-acquired evidence that is equally applicable to post-reinstatement misconduct—namely, that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *McKennon*, 513 U.S. at 361.

[10] The majority incorrectly asserts that the Administrative Law Judge considered Saldivar's criminality in making a final decision on the underlying discrimination claim. The ALJ did not even take Saldivar's criminality into account in considering the motion to toll let alone the final decision on the merits.

misconduct. Do Chair Jordan and Commissioner Baker join Commissioner Rajkovich?[11] The Commission leaves the public and ALJs with a unanimous decision but without a majority decision on whether an employer may terminate a reinstated employee for crimes of theft and failure to appear. The majority opinion is a refusal to explain its joint decision and an "add-on" opinion by Commissioner Rajkovich about which Chair Jordan and Commissioner Baker express no opinion.

The result is a tottering legal standard that cannot stand on its own weight. Worse yet, these flaws are by design. The majority appears to want to craft an amorphous standard for tolling that allows for ad hoc review whereby the result can be bent to suit the desires of the Commission without regard for any underpinning legal rule. How can the regulated community, the Secretary, or Commission ALJs know whether temporary reinstatement can be tolled in a particular situation? One can only guess. Without a principled finding, they will find no help in the majority's decision.

Finally, as discussed further below, the majority's finding that Grimes was not entitled to a hearing is contrary to due process and recent Commission precedent. In *Secretary of Labor on behalf of Torres v. W.G. Yates & Sons Construction Company***,** the Commission unanimously found that the Secretary was entitled to a hearing on tolling at which she could present evidence concerning the tolling of reinstatement. 2023 WL 5170092 **(**July 2023). The Commission required an appropriate hearing to provide "the parties with the opportunity to present evidence on tolling outside of the initial temporary reinstatement hearing." *Id*. at 4 n.4.[12] Obviously, it is wrong for the Commission to accord the Secretary greater rights to defend against tolling than

[11] Having recognized the possible right of an employer to toll reinstatement for post-reinstatement misconduct, Commissioner Rajkovich writes that Grimes did not positively "prove" in its motion that it would discharge a worker for theft. Thus, he asserts the novel proposition that the proponent of a motion must prove its claim to a level of summary disposition on the face of the motion. Undisputed evidence proved Saldivar's lies and crimes—suitable reasons for discharge. The Secretary had a right to challenge Grimes's claim. Moreover, Commissioner Rajkovich errs in saying Grimes's "offered no indication of a company policy." Slip op. at 5 n.5. Grimes introduced its employment application warning applicants that they could be fired for lying on the application. That is the proof, however unnecessary at this stage, of Grimes's policies. It should suffice. Moreover, Commissioner Rajkovich suggestion would require an employer to have a "one-size-fits-all" discipline program. That is not correct. An employer may and should mete out discipline according to the offense and the employee's record. To illustrate, unless unlawful discrimination is the basis for differing treatment, an employer may discharge one employee for misconduct and retain a different employee who engages in the same misconduct. Job performance, history with the employer, circumstances of the event, and many other factors may result in different consequences for the two employees. Finally, one may rightly suggest that not many handbooks explicitly say: "We will discharge you for going to jail for theft."

[12] This puts to rest the fallacious argument by the majority that all issues regarding reinstatement must be resolved in the initial hearing.

operators have in asserting tolling. Such inconsistent decisions may raise questions regarding the impartiality of Commission decisions.

By reflexively neutering the right of an operator in a position such as Grimes to discipline a temporarily reinstated worker for misconduct after initial reinstatement, the majority effectively opts for the immunization of reinstated workers from redress for misconduct. Such a decision is not acceptable.

2. Indisputable Evidence Demonstrates That Saldivar Told Material Lies in Applying for Employment with Grimes.

Documentary evidence submitted by Grimes demonstrates that Saldivar's employment application asked if he had been convicted of or pled guilty to a crime. Saldivar replied that he had been convicted of "possession of a loaded firearm." Grimes hired Saldivar despite such a confessed conviction. Court records found and submitted after reinstatement disclosed that Saldivar lied on the application. He had been convicted of several felonious crimes far more severe than possessing a firearm. Saldivar's lie on his application meets an expressly written condition for discharge.

Saldivar had pled guilty or admitted to multiple felonies: (1) carrying a loaded firearm in a vehicle, (2) child endangerment (two counts), (3) possession of an assault weapon, (4) committing a crime while on bail, (5) the offer for sale/transfer/possession of a short-barreled rifle or shotgun, and (6) possession of a controlled substance while in possession of a firearm. *People v. Saldivar*, Case No. 2016002309 Superior Court of California, County of Ventura.

The Commission permits post-temporary reinstatement hearings on whether changed circumstances warrant tolling. *Sec'y on behalf of Ratliff v. Cobra Nat. Res., LLC*, 35 FMSHRC 394 (Feb. 2013). It is insensible to read the Mine Act to permit tolling on changed circumstances through the closure of a mine or layoffs but not to permit such hearings when the operator discovers dispositive evidence after the initial hearing of new and different gross misconduct by the complainant.

An operator may not attempt to relitigate the temporary reinstatement hearing by asserting new evidence to show the miner did not engage in the protected activity claimed at the initial hearing or that the operator's original reason for terminating the miner was not motivated by protected activity.[13] However, in this case, the after-acquired evidence does not relate to an

[13] Delays within the Commission means that an operator may have to maintain a properly discharged individual in its workforce or pay significant amounts to an undeserving complainant for extended periods. Correctly expedited decisions by the Commission would get miners back to deserved status or save operators the problem of maintaining a discharged worker at its worksite or making tens of thousands of dollars in unrecoverable payments to an undeserving individual.

alleged protected activity or the motivation for the initial discipline. It is free-standing, newly acquired evidence for which Grimes may disqualify Saldivar from resumed employment.[14]

Courts have recognized the application of after-acquired evidence to a variety of statutes. *Russell v. Microdyne Corp.,* 65 F.3d 1229, 1240 (4th Cir. 1995); *Mardell v. Harleysville Life Ins.* Co., 65 F.3d 1072, 1073-74 (3rd Cir. 1995); *Wallace v. Dunn Constr. Co.*, 62 F.3d 375, 378 (11th Cir. 1995); *Wehr v. Ryan's Family Steak Houses, Inc*., 49 F.3d 1150, 1153 (6th Cir. 1995); *Manard v. Fort Howard Corp*., 47 F.3d 1067, 1067 (10th Cir. 1995). *See also LA Film School, LLC & Its Branch, La Recording Sch., LLC & California Fed'n of Teachers & Brandii Grace*, 358 NLRB 130, 141-42 (Mar. 2012), *John Cuneo*, 298 NLRB 856 (June 1990); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (Jan. 1993), *aff'd in relevant part*, 39 F.3d 1312 (5th Cir. 1994) (NLRA); *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1021 (11th Cir. 2001) (Title VII); *Miller v. AT&T Corp.*, 250 F.3d 820, 837 (4th Cir. 2001) (Family and Medical Leave Act); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995) (Title VII and the Equal Pay Act).

ALJ Lewis applied the after-acquired evidence principle in *Sec'y of Labor on behalf of McKinsey v. Pretty Good Sand Co., Inc*, 36 FMSHRC 2843, 2870 (Nov. 2014). Although the operator failed to mount an effective affirmative defense, the ALJ found that an independent ground existed for dismissal. Prior threats made by the miner were of such a nature as to render the complainant unfit for employment. Therefore, the ALJ limited backpay to the date the operator learned of the threats.[15] *Id*. The critical point is that the complainant did not have any right to damages or, in this case, to reinstatement for a period after new evidence demonstrated that the operator would have discharged him legitimately for proscribed conduct. As the Supreme Court said in *McKennon*, waiting months for an inevitable termination of an

[14] It is undisputed that Saldivar committed post-reinstatement crimes. If an operator would lawfully fire the charged miner for those actions, the discrimination claim cannot be won and is, therefore, frivolous. *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018).

[15] The majority asserts that *Pretty Good Sand* is not relevant because it was decided after a hearing. Slip op. at 8 n.11. Of course, that is a convincing argument for why the ALJ should have held a hearing in this case. The decision shows a complainant is not entitled to continued pay or backpay past the point of acquisition of the new evidence of misconduct. If "after-acquired" evidence cannot be used before a final hearing, the principle becomes meaningless because at that point the operator will have paid the complainant undeserved monies but will not have any opportunity for recapture. The *raison d'etre* of after-acquired evidence is that the complainant is not entitled to compensation after acquisition of evidence justifying the termination.

undeserved benefit is inequitable and unfair. That is especially true when, as here, the operator may not recapture the undeserved payments.[16]

III.

GRIMES WAS ENTITLED TO BE HEARD ON ITS MOTIONS TO TOLL.

Due process requires a hearing at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319 (1976). Most often, litigants think of a hearing as an appearance before a tribunal during which witnesses testify and introduce evidence. However, at its most fundamental level, *Mathews* means a right to be "heard" – a right for an impartial tribunal to listen to a party's arguments and reach a reasoned and impartial decision.

In this case, the ALJ did not merely fail to hold an evidentiary hearing; the ALJ struck the entire "fact" section of Grimes' argument from the record and further struck from the record Grimes' argument based on those facts. She ordered:

> It is **ORDERED** that Section III [the facts section] of Respondent's Motion to Toll, as well as any other portion of the motion or other document filed that recites or relies upon those "facts," be **STRIKEN** from the record.

Order at 4 (Jan. 7, 2022). Thus, the ALJ did not even consider Grimes' argument that forms of post-reinstatement misconduct, such as theft, may warrant tolling. The ALJ found that only a lack of work for the reinstated individual warrants tolling. She did not listen to – that is, hear Grimes' position.

If Chair Jordan and Commissioner Baker mean to imply that only the absence of available work can cause tolling so that crimes, unsafe acts, threats of violence, refusal to perform work, and other such actions do not permit tolling, then the ALJ did not need to hear Grimes' argument because no crimes or safety violations could warrant tolling. As seen above, however, such a ruling would be repugnant to the purposes of the Mine Act and employment law generally in the face of after-acquired evidence of misconduct and post-reinstatement misconduct.

Crimes by an employee constitute a legitimate reason for discharge unless a claimant proves discrimination. Moreover, even if, as Commissioner Rajkovich would require, a pre-existing "policy" was necessary to discharge an employee for criminality, how could Grimes

[16] For some reason, my colleagues stray into an erroneous irrelevancy by writing that temporary reinstatement is not a remedy for violation of the Mine Act. The Mine Act prohibits discrimination, and discrimination is a violation of the Mine Act. Temporary reinstatement is a remedy for a nonfrivolous assertion of a violation of the Mine Act rather than a proven violation. Separately, my colleagues show sympathy to Saldivar by deliberately downplaying the blatant lying on his employment application. They write "Saldivar might have been less than forthcoming on his employment application about the full extent of his criminal history." Slip op. at 7 n.9.

have "proved" that fact without an adversarial, evidentiary hearing? It did "prove" its policy to discharge lying job applicants. Indeed, as seen above, the Commission has held that the Secretary is entitled to a hearing. *Cobra Natural Res.,* 35 FMSHRC at 397. Not only was Grimes not given a chance to provide such proof, but as set forth above, the ALJ refused even to hear the argument or permit the attachment of evidence to its motion. It is impossible to discern how Grimes failed to "prove" its position when the ALJ neither listened to Grimes' position nor permitted the admission of any evidence regarding its position to the record.

Finally, we need only point to *W.G. Yates & Sons, supra*, to show that the Commission has unanimously recognized entitlement to a hearing in tolling cases. 2023 WL 5170092 at 4 n.4. If the Secretary must have a legal right to challenge tolling based upon undisputed facts, the operator must have a right to present facts, even though undisputed, warranting tolling.

The majority does not have principled grounds for finding Grimes was not entitled to even the possibility of tolling Saldivar's reinstatement. They cannot explain why. They do not permit any disruption in the reinstatement of a confessed criminal.

In *Secretary on behalf of Robert Gatlin v. KenAmerican Resources, Inc.* 31 FMSHRC 1050, 1054 (Oct. 2009), the Commission found that "the Judge abused her discretion when she determined that a temporary reinstatement order requires a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order." The Commission violates its own well-stated principle without hearing Grimes' argument.

IV.

THE MOTION TO ENFORCE WAS IMPROPERLY GRANTED.

A. Facts Related to the Motion to Enforce

On May 18, 2021, the ALJ issued an Order requiring Grimes to reinstate Saldivar temporarily. After that, the parties negotiated a "settlement agreement" providing economic reinstatement for Saldivar instead of actual temporary reinstatement. On May 27, 2021, the Secretary and Grimes filed a "Settlement Agreement and Joint Motion for Temporary Economic Reinstatement."[17] In the attached proposed Decision Approving Settlement, the parties mutually agreed upon a settlement that stated:

> Respondent shall economically reinstate Mr. Saldivar to his position as a miner starting May 19, 2021, effective as of the entry of this Decision and Order. Respondent shall pay the difference between Mr. Saldivar's earnings at his present place of employment Wayne J. Sand and Gravel and Grimes Rock Inc. based on the average amount of hours worked at each place of

[17] As the representative of Saldivar, the Secretary negotiated the settlement agreement with Grimes.

> employment at his regular rate of pay for the first forty hours and at the overtime rate for any hours over forty. Based on these calculations, Respondent shall pay $2,136.78 per pay period (bi-weekly, every 2 weeks) subject to normal deductions. Mr. Saldivar will not report for duty with Grimes Rock Inc. during the temporary economic reinstatement period.

On May 28, 2021, the ALJ entered an "Order Approving Settlement Order of Temporary Economic Reinstatement." The Order stated,

> I accept the representations and modifications of the Secretary as set forth in the motion. I have considered the documentation submitted, find that the terms are reasonable, and conclude that the proposed settlement is appropriate under the Mine Act. The joint motion for temporary economic reinstatement is hereby **GRANTED**. The Respondent is **ORDERED** to pay Mr. Saldivar $2,134.78 per pay period (every two weeks), subject to normal deductions, and to otherwise comply with the terms of the settlement agreement.

Order at 2 (May 2021).

The Secretary and Grimes submitted a proposed economic reinstatement Order to the ALJ under which payments would cease if Saldivar obtained employment at an equal or higher pay rate. However, the settlement agreement between the parties did not contain such a provision. The ALJ's Order accepted the terms of the settlement agreement and did not take any note of or provide for that condition in the parties' Proposed Decision. Thus, the ALJ's Order followed the terms of the settlement agreement rather than the proposed order.

After Saldivar's release from prison in November 2021, understandably, Saldivar lost his then-current employment. Grimes continued to obey the settlement agreement and Order to make payments of 2,134.78 per pay period to Saldivar. The Secretary did not seek to amend the Economic Temporary Reinstatement Order entered at Grimes' and the Secretary's mutual request. Instead, *months* after Saldivar lost his active employment, the Secretary filed a "motion to enforce" in which the Secretary argued that, although Grimes had been paying the amount explicitly required by the ALJ's Order, that Order "implicitly" required additional payments from Grimes.[18]

[18] The Secretary bases much of her argument on allegations related to California contract law and particularly on a complicated and irrelevant California family court decision between quarreling divorcees. Grimes continued to obey the ALJ's Order and parties' mutual agreement. The Secretary failed for months to take the appropriate action by filing a motion to modify the original Order. Any economic injuries suffered by Saldivar between November and June are attributable to the Secretary's lassitude rather than to Grimes adherence to the ALJ's Order.

The ALJ found no discrimination; she granted the motion to enforce on the same day. Subsequently, Grimes filed a Petition for Discretionary Review with the Commission, challenging the ALJ's decision on the motion to enforce. The Commission granted the Petition. However, the Secretary did not wait for the Commission to act on Grimes' Petition.

On August 15, 2022, the Secretary issued a section 104(a) citation to Grimes for failing to make the required payments, violating the Judge's Order to enforce. 30 U.S.C. § 814(a). The suddenly aroused Secretary waited only two days. On August 17, 2022, MSHA issued another 104(a) citation against Grimes. Subsequently, on August 22, 2022, MSHA issued a 104(b) Order. At that time, MSHA informed Grimes that it faced penalties of $10,000 a day and/or closure of the mine. MSHA, having applied the heavy hand of government coercion from which there could be no redress, Grimes capitulated and paid the sum required by the decision on enforcement.[19]

B. Discussion

The majority decision does not cite any case for accepting the Secretary's argument that a clear, precise, and explicit settlement agreement between the parties implemented by an ALJ Order contains implicit or unwritten obligations. Moreover, Commission precedent demonstrates that any such implicit agreement would only flow one way. *Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 594 (Mar. 2011). There, the Commission enforced the wording of the settlement agreement and did not find any implicit agreement that the settlement should be enforced only to make the complainant whole. "Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties." *Id*. at 593.

The Commission refused an additional offset for the employer. *Id*. at 595. In this case, the Commission finds it would not enforce the negotiated agreement and subsequent order embodying the agreement.[20]

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[19] On August 17, 2022, Grimes filed a motion to stay the ALJ's enforcement decision. The Commission meaninglessly denied the stay on August 30, 2022, days after Grimes had fallen to government might.

[20] In economic reinstatement, the discharged employee agrees to forego actual reinstatement provided the employee receives satisfactory economic reinstatement. Such agreements vary because they are negotiated agreements in which each party seeks to obtain benefits from avoiding actual reinstatement. We easily understand the benefits each party seeks. The discharged employee gets money without any obligation to work. The employer avoids bringing a discharged employee back into the workforce. The parties may contemplate that the employee may get another job thereby doubling his income or, conversely the employee may lose existing alternative employment reducing total income. The strength of the of the parties' desires for a return to employment determines the content of an economic reinstatement agreement. The Commission decision today turns this good faith negotiation in which each party may make concessions into a secret "heads I win, tails you lose" negotiation for the discharged employee.

Here, the Commission holds that bitter medicine for the operator is a sweet relief for the complainant. It accords no weight to the fact that an explicit settlement with potential benefits for both sides was negotiated between the parties and then embodied in an "Order" by the Judge. The agreement of the parties and the complementary Order by the ALJ are irrelevant to the majority's decision. Again, the Opinion does not cite any authority for changing an explicit agreement of the parties based upon a finding of what the parties must have implicitly decided. The Opinion finds that the Order did not need to be modified to require a change of terms. Under the Opinion's reasoning, a complainant could negotiate an agreement with an offset to avoid returning to the job. Then, immediately after obtaining the Judge's Order, the employee could quit the offsetting job and be entitled to full pay from the operator.

The Mine Act neither recognizes nor endorses economic reinstatement instead of actual reinstatement. Economic reinstatement is a non-statutory procedure through which the Commission permits the parties to substitute a private agreement for the prescribed statutory right to actual reinstatement. Both had competent counsel. However, that private, negotiated agreement becomes an enforceable Order by dint of the ALJ's Order. Thus, a complainant does not need to go to state court to enforce the agreement between the parties.

Because such agreements are non-statutory, the ALJ does not help negotiate a mutually acceptable agreement. The Mine Act does not authorize Commission Judges to substitute economic reinstatement for actual reinstatement. For that reason, such agreements, as in this case, are often styled as a "settlement" of an Order to Temporarily Reinstate.

The Commission has held:

> The obligation to comply with the terms of that order as written, with no offset, will continue unless and until the parties negotiate a new agreement and it is entered as a superceding [sic] order by the judge, or either party invokes the judge's continuing jurisdiction and the judge modifies or rescinds the existing order. In the event a motion is submitted to modify or rescind the previously entered consent order, the judge is required to examine all the relevant circumstances, in accordance with section 105(c) of the Mine Act, and not just whether the miner or operator still consents to it.

North Fork, 33 FMSHRC at 595.

In short, the Commission endorses the loss of Grimes's position on two critical matters without a hearing or any motion before the Commission to modify an explicit Order based upon mutual agreement of the parties. This decision is a profound setback for due process before the Commission.

V.

THE SECRETARY'S MOTION FOR CONSEQUENTIAL DAMAGES IS UNTIMELY AND BEYOND THE COMMISSION'S JURISDICTION.

A. Relevant Facts

The Mine Act grants the Commission specific jurisdiction. The Commission does not have jurisdiction over a motion filed directly with it over unlitigated claims. Further, the Secretary's attempt to obtain consequential damages from the Commission is untimely. Finally, the Secretary has not even attempted to show good cause or any justification for seeking extraordinary relief through a motion to file a new claim directly before the Commission. The Opinion does not even consider the issues.

Upon filing the complaint on behalf of Saldivar, the Secretary became his legal representative. Immediately, the Secretary negotiated and submitted a written settlement agreement on Saldivar's behalf calling for Grimes to pay Saldivar a specific dollar amount. The ALJ subsequently entered an Order confirming the requirement for Grimes to pay Saldivar $2,134.78 per pay period. As discussed above, the Secretary asserts Grimes should have known the agreement and subsequent ALJ Order did not mean what they said because the law imposed an obligation upon Grimes to pay more if Saldivar lost his job regardless of a binding Order agreed upon by the parties with the assistance of counsel.

When Saldivar left jail in November 2021, Grimes continued to comply with its mutually agreed upon settlement and ALJ's Order's explicit terms—a position logical to all but the Secretary and Commission. Moreover, despite being Saldivar's representative, the Secretary took no action.

The Secretary waited five months and then filed a motion to change the settlement agreement and the Order by claiming an implied obligation. Given that the Secretary's Solicitor served as counsel for Saldivar, if the Secretary thought Saldivar was entitled to larger payments, she immediately should have filed a motion to amend the ALJ's Order. Instead, the Solicitor sat on her hands, allowing his damages to accrue. Only now, after completing the case before the ALJ, claims Grimes should pay monetary damages.

The Secretary now asserts any harm is Grimes' fault because it should have known the Order did not mean what it said but carried an implicit obligation to increase payments. In fact, of course, if Saldivar suffered consequential harm due to the Secretary's inaction, it is due to the Secretary's failure as his representative.[21]

[21] The Secretary fails to note that Saldivar spent at least 140 days in jail and, consequently, missed at least ten pay periods of $2,136.78—that is, a total of $21,367.80. Plus, he missed at least six pay periods from the other employer during the initial incarceration at approximately $1,000 a pay period. Therefore, Saldivar's own criminal conduct caused him to lose three times as much income as the amount "lost" by Grimes' adherence to the ALJ's Order.

B. The Commission does not have jurisdiction to hear the Secretary's Untimely Motion.

The Mine Act grants the Commission specific jurisdiction. Section 113(d)(2)(A)(i) states:

> Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

30 U.S.C. § 823(d)(2)(A)(i).

Section 113(d)(2)(A)(ii) provides:

> Petitions for discretionary review shall be filed only upon one or more of the following grounds:
>
> > (I) A finding or conclusion of material fact is not supported by substantial evidence.
> > (II) A necessary legal conclusion is erroneous.
> > (III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
> > (IV) A substantial question of law, policy or discretion is involved.
> > (V) A prejudicial error of procedure was committed.

30 U.S.C. § 823(d)(2)(A)(ii).

The Commission is an institution of appellate review. Ignoring the jurisdictional prerequisite for Commission jurisdiction, the Secretary does not seek to obtain a review of an ALJ decision but instead asserts a new claim not raised before the ALJ. Indeed, the Secretary does not cite any of the jurisdictional prerequisites of the Mine Act for Commission jurisdiction. The Secretary did not file a timely Petition for Discretionary Review because the ALJ had given Saldivar everything the Secretary sought in granting the Motion to Enforce. The Secretary does not press an assignment of error by the ALJ. She filed a new claim against Grimes directly with the Commission.

Having failed to seek a modification of the Judge's temporary reinstatement order and waiting six months to take any enforcement action, the Secretary failed to make any claim for consequential damages. There is no decision of fact or law by the ALJ for the Commission to review.

Finally, the Secretary does not attempt to provide any excuse, let alone good cause, for the failure to present any issue of other damages to the ALJ. Saldivar forfeited any claim for damages not pressed before the ALJ.

In summary, the Secretary failed to file a Petition for Discretionary Review as required by the Mine Act, failed to identify any of the jurisdictional grounds in section 113(d)(2)(A)(ii), failed to identify any assignment of error, failed to present the issue to the ALJ, and failed to provide any reasonable cause for such failures. Sometimes, parties must live with the action or inaction of their counsel. This case is one of those times.

VI.

CONCLUSION

In summary, the majority misrepresents the issues presented. It presents a willful and unexplained refusal to accept that Saldivar's crimes may have consequences. It does not establish any principled guidance for ALJs to apply in future cases. No legal principle may be gleaned from the majority's decision, especially considering Commissioner Rajkovich's separate comment. The majority does not rule whether post-reinstatement crimes or theft may warrant discipline or tolling. It finds only, and without explanation, that Saldivar's crimes could not toll temporary reinstatement in this case.

I respectfully dissent.

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

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November 28, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ALVARO SALDIVAR	
v.	Docket No. WEST 2021-0178-DM
GRIMES ROCK, INC.	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION[1]

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This case arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2018) ("Mine Act").[2] It involves the granting of temporary reinstatement for a miner employed by Grimes Rock, Inc. On January 17, 2022, the Commission received a petition for discretionary review challenging an Administrative Law Judge's order denying the operator's motion to toll temporary reinstatement. On July 13, 2022, the Commission received cross-petitions from the Secretary of Labor and Grimes Rock, challenging different parts of the Judge's June 17, 2022 order enforcing temporary reinstatement.

[1] Due to a clerical error, this Decision is being amended pursuant to 29 C.F.R. § 2700.79.

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

> Any miner . . . 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 forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if 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.

For the reasons that follow, we affirm the Judge's order denying the operator's motion to toll temporary reinstatement and affirm in part and reverse in part the Judge's order enforcing temporary reinstatement.

I.

Factual and Procedural Background

Complainant Alvaro Saldivar was a miner at Grimes Rock's mine on two separate occasions. First, he was employed as a welder from May 2019 through July 2019. Then he was employed as a service technician from October 5, 2020 to January 15, 2021. Tr. 16. When Grimes Rock hired Saldivar the second time, Saldivar made the operator aware that he had a criminal record. Saldivar alleged that while employed at Grimes Rock the second time, he made approximately eight safety complaints to his direct supervisor Rene Garcia and general manager Ernie Melendez. Most of his complaints involved alleged bald tires on the water truck he operated, but they also included a complaint about a lack of proper training. Tr. 17-27.

During this period, Saldivar received five disciplinary warnings from Grimes Rock. The operator eventually terminated Saldivar on January 15, 2021, just one day after his last safety complaint. Saldivar filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration ("MSHA") over his termination, and the Secretary subsequently brought a section 105(c)(2) action and sought temporary reinstatement on Saldivar's behalf. Temporary reinstatement was granted by a Commission Administrative Law Judge on May 18, 2021. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 287 (May 2021) (ALJ). Grimes Rock petitioned for review of the Judge's decision, which was subsequently affirmed by the Commission. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299 (June 2021).

While Grimes Rock's appeal was pending, however, the parties agreed to temporary economic reinstatement. The Judge approved the agreement on May 28, 2021. Under the agreement, because Saldivar had found work with another employer, Grimes Rock was responsible for paying the difference between Saldivar's earnings at his present job and his earnings at Grimes Rock. The agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments. In July 2021, the Secretary filed a discrimination complaint on Saldivar's behalf (Docket No. WEST 2021-0265).

While the parties awaited the Judge's decision on the merits of Saldivar's discrimination complaint, Saldivar was incarcerated on two occasions. Although the agreement was also silent on what would happen if Saldivar was unavailable for work, the Secretary agreed to toll Grimes Rock's payments during these periods. After Saldivar's first incarceration, Grimes Rock filed a motion to toll or permanently terminate the economic reinstatement, arguing the applicability of the "after-acquired evidence" doctrine and a "change in circumstances." G.R. PDR 1 at 2-4. On January 7, 2022, the Judge denied the operator's motion and Grimes Rock filed a petition challenging the Judge's determination, which we granted and will consider here.

After Saldivar was released from his first incarceration, around November 2021, Grimes Rock resumed making payments. However, at that time the parties disputed what amounts were

then owed pursuant to the temporary reinstatement order. Saldivar's second incarceration ended in May 2022. After the miner's second release, Grimes Rock did not resume its payments.[3] On May 27, 2022, the Secretary filed with the Judge a motion to enforce the settlement agreement, which was granted on June 17, 2022. The Judge ordered Grimes Rock "to pay Saldivar the full wages as required by the temporary reinstatement order during the periods of his availability to work between May 18, 2021 and June 17, 2022, offset by his wages earned from alternative employment during that period." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC 497 (June 2022). Simultaneous with her order granting enforcement, the Judge issued her decision on the merits of the discrimination complaint, concluding that Grimes Rock did not violate the discrimination provisions of the Mine Act and dismissed the case. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc*., 44 FMSHRC 473 (June 2022) (ALJ). Consequently, the Judge ordered the dissolution of the temporary reinstatement order. She ordered that the dissolution occur on the same date that she issued the decision on the merits.

On July 13, 2022, the parties filed cross petitions challenging different parts of the Judge's June 17 order. Specifically, the Secretary challenges the Judge's decision to terminate the temporary reinstatement order instantly, upon issuance of her decision on the merits of the discrimination complaint. Sec'y PDR. In turn, Grimes Rock takes issue with the duration of the temporary reinstatement and challenges the Judge's enforcement order. G.R. PDR 2. The Commission has granted review of both petitions.

Finally, on August 15, 2022, MSHA issued a section 104(a) citation to Grimes Rock for its refusal to make the required payments in violation of the Judge's order to enforce. 30 U.S.C. § 814(a). On August 17, 2022, Grimes Rock filed a request for an immediate stay of the Judge's June 17 order granting enforcement, which was subsequently denied by the Commission. The Secretary subsequently filed a 104(b) Order, 30 U.S.C. § 814(b), for the operator's failure to comply with the Judge's enforcement order. On August 22, 2022, following the issuance of that order, Grimes Rock finally made the payments required under the temporary reinstatement order.[4] Three days later, the Secretary filed a motion for interest and consequential damages for the wages Saldivar was not able to access during the periods Grimes Rock refused to pay. Sec'y Mot. for Interest.

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[3] On April 7, 2022, Grimes Rock filed an "update" with the Commission informing it of Saldivar's second incarceration. That same day, it also filed with the Judge a renewed "Motion to Toll and Terminate the Economic Temporary Reinstatement Order," putting forth the same new information offered in its update to the Commission and requesting permanent termination of temporary economic reinstatement. On April 19, the Judge granted the operator's second request to toll the temporary economic reinstatement from the date of her order until Saldivar was once again available for work. Order Granting Mot. to Toll at 3. The Judge denied the operator's request for reimbursement of funds already paid to the Complainant. *Id*. at 4. The Judge did not address the operator's request to permanently terminate the economic reinstatement order.

[4] In addition to Citation No. 9619114 (the 104(a) Citation issued on August 17, 2022) and Order No. 9619115 (the 104(b) Order issued on August 22, 2022), a second citation, No. 9619116, was issued on August 22, 2022, alleging that Grimes Rock continued to conduct work at the mine site despite its non-compliance with Order No. 9619115. *See* WEST 2022-0333, WEST 2022-0334, and WEST 2022-0335.

II.

Disposition

A. Grimes Rock's petition challenging the Judge's denial of its motion to toll the Judge's Order of Temporary Reinstatement

For the reasons below, we conclude that the Judge did not err when she denied the operator's motion to permanently toll the order of temporary reinstatement.

1. Grimes Rock failed to establish that tolling was justified.

The Mine Act directs the Commission to reinstate a miner during the pendency of his/her discrimination complaint as long as he or she can prove that the complaint was not frivolously brought. The scope of a temporary reinstatement hearing is narrow, and the Judge is limited to determining "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *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, 744 (11th Cir. 1990) ("*JWR*"); *Sec'y on behalf of Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, 2522 (Nov. 2015).

While the scope of temporary reinstatement proceedings is limited to determining whether the complaint is frivolously brought, we have permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled due to a "change in circumstances." *Sec'y on behalf of Gatlin v. Ken American Res., Inc*., 31 FMSHRC 1050, 1054-56 (Oct. 2009) (concluding that the duration of a temporary reinstatement of a miner may be modified if the operator can prove that the complainant's inclusion in a layoff, at an idled mine, was entirely unrelated to his protected activity).

In previous cases, the only types of "events" that we have found may justify tolling are those which affect the availability of relevant work at the mine for the miner at issue, such as a layoff due to business contractions or similar conditions and mine closure. *Id*.; *see, e.g., Sec'y on behalf of Russell Ratliff v. Cobra Natural Res*., 35 FMSHRC 394 (Feb. 2013) (affirming the Judge's order finding that the operator's obligation to reinstate Ratliff was not tolled by a layoff because the operator continued to mine coal, and work was available for shuttle car operators). *See also Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315, 319-20 (Feb. 2017); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183, 1187-88 (May 2013); *Sec'y of Labor on behalf of McGaughran v. Lehigh Cement Co*., 42 FMSHRC 467, 471 n.6 (July 2020). The Commission has held that "[a]n operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Cobra Natural Res., LLC*, 35 FMSHRC at 397. Additionally, the tolling inquiry is bound by the same evidentiary standards as the initial temporary reinstatement proceeding; the Judge is not permitted to make credibility determinations or resolve conflicts in the evidence. *Id*. 98 n.3.

Grimes Rock has not established that work at the mine was unavailable for Saldivar. Indeed, the operator offers *no evidence* regarding availability of work. Instead, Grimes Rock argues that the Commission's doctrine on tolling should be extended to include a situation where the operator no longer wishes to offer employment to a miner. Specifically, Grimes Rock argues that tolling is justified because it no longer desires to employ Saldivar due to his periods of incarceration and the criminal allegations against him.[5] G.R. PDR 1 at 9-12. Neither the Mine Act nor Commission precedent support the extension of the Commission's tolling doctrine to include the position advanced by Grimes Rock.

Congress directed that temporary relief be ordered "pending the final order on the complaint." 30 U.S.C. § 815(c)(2). Congress did so because it determined that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748; *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012). The Commission has traditionally allowed exceptions to that statutory mandate only in narrow circumstances.

It is axiomatic that an operator defending its decision to discharge a miner in a section 105(c) proceeding no longer wishes to employ that miner. An operator's desire not to employ a temporarily reinstated miner, in and of itself, is never sufficient to justify tolling.[6] If it were, every operator would be justified in discharging every miner granted a temporary reinstatement.[7]

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[5] Grimes Rock also argues that temporary reinstatement should be dissolved because it can show that Saldivar lied about his safety complaints and elements of his criminal record. G.R. PDR 1 at 12, 15. Consideration of such evidence is appropriate at the discrimination hearing on the merits, not during the temporary reinstatement phase of the proceeding.

[6] Commissioner Rajkovich joins the majority regarding all its substantive holdings. In addition, he also notes that the Secretary in this case accepted Saldivar's physical unavailability for work (during his incarceration) as sufficient justification for tolling. He would find it reasonable to consider changes in a miner's circumstances on a case-by-case basis. However, the operator must still prove unavailability, i.e., that because of those changed circumstances the miner *could not work at the mine*. Here, Grimes Rock offered no indication of a company policy or history of barring miners with criminal records from employment. Oral Arg. Tr. at 8. Nothing the operator has presented suggests that work was unavailable to Saldivar because he had previously been incarcerated.

[7] Our dissenting colleague argues that at-will employment principles should apply to miners who are employed on a temporary reinstatement. Slip op. at 20-21. As the dissent notes, under at-will employment principles an employee not covered by an employment contract may be terminated for a good reason, bad reason, or no reason at all. *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 606 (2008). Here, however, we are dealing with the Mine Act, in which Congress enacted specific statutory requirements to govern temporary reinstatement. The Commission's role is to interpret the Mine Act so as to "give practical effect to Congress's intent, rather than frustrate it." *U.S. v. Heckenliable*, 446 F.3d 1048, 1051 (10th Cir. 2006) *citing*

(continued…)

Allowing such a justification would defeat the purpose of temporary reinstatement, which is to "provide the miner with an income through a return to work until the [merits] complaint is resolved." *North Fork*, 33 FMSHRC at 592. Grimes Rock provided no other basis for tolling Saldivar's temporary reinstatement. Therefore, we decline to extend our tolling doctrine to include the facts present here.[8]

Tolling, in this case, was not appropriate. The Judge did not err by declining to grant it.

2. "After-Acquired Evidence of Wrongdoing" is not relevant in temporary reinstatement proceedings

Grimes Rock argues that tolling is justified because it unearthed evidence of "wrongdoing" by Saldivar while preparing for the merits hearing. It then sought to introduce this "after-acquired evidence" as justification for tolling the temporary reinstatement.

The Judge refused to toll the temporary reinstatement, instead finding that the evidence was relevant to the hearing on the merits. We find that the Judge's actions were not in error.

To support its position that a temporary reinstatement can be tolled based on after-acquired evidence, Grimes Rock relies on *McKennon v. Nashville Banner Publishing Co.*, 513

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[7] (…continued)
United States v. Am. Trucking Assn's, 310 U.S. 534, 542 (1940). As noted above, Congress created temporary reinstatement to ensure miners would receive relief pending a decision on the merits of their claims. 30 U.S.C. § 815(c)(2). If the dissent's view is correct, temporary reinstatement provides no protection to miners whatsoever, they could be fired for "no reason." Allowing operators to discharge miners on temporary reinstatement for "no reason at all" would substantially undermine Congress' intent to have employers bear a disproportionately greater share of the burden of an erroneous decision in a temporary reinstatement proceeding. *See, e.g., JWR*, 920 F.2d at 748. We also note that Grimes Rock provided no evidence that it generally discharged miners with criminal records, nor that it maintained any policy to that effect.

[8] Our decision does not, as our dissenting colleague suggests, provide absolute "immunity" from discipline for miners receiving temporary reinstatement. Our ruling is not intended to provide a broad, advisory statement regarding the scope of temporary reinstatement. As is appropriate, we considered only the relevant facts in this particular case. *See Wade Sand & Gravel Co.*, 37 FMSHRC 1874, 1877-78 (Sept. 2015) (holding that the Commission, like Federal Courts, does not issue advisory opinions). Based on those facts we determined that the tolling doctrine should not be extended to include the instant circumstances. We take no position on whether our narrow tolling doctrine could be extended to other fact patterns not raised by this case. Further, we stress that the factual allegations raised by the operator were relevant to, and were consider by the Judge in, the case on the merits, where the operator prevailed.

In addition, our dissenting colleague implies that this footnote, and other sections of the majority decision, solely represent the views of Chair Jordan and Commissioner Baker. Slip op. at 23. That is not accurate. This footnote, and the other portions of this decision, are the joint opinion of the majority unless otherwise expressly stated.

U.S. 352 (1995). In that case, the Supreme Court held that evidence of wrongdoing that occurred during the employee's period of employment—but uncovered by the employer while conducting discovery regarding an Age Discrimination in Employment Act complaint—may limit available remedies for the violation. Notably the Court did not find that it completely shields the employer from liability under the ADEA. Instead, the Court found that such evidence may limit available remedies to an employee, provided that the employer can first establish "that the wrongdoing was of such severity that the employee would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *Id*. at 362-63.

For the reasons which follow, we find that *McKennon* is not applicable to temporary reinstatement proceedings under the Mine Act.

Temporary reinstatement, pending a determination on the merits of the complaint, is awarded if the Secretary demonstrates that the miner's complaint is not frivolous. *See Jim Walter*, 9 FMSHRC at 1306; *Kingston Mining, Inc*., 37 FMSHRC at 2522 (the "scope of a temporary reinstatement is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought.").

However, temporary reinstatement is not a remedy for a violation of the Mine Act.[9] Instead, temporary reinstatement is awarded *pending a determination on the merits of the complaint*. If the miner prevails on the merits of the complaint, and the Judge finds that the operator violated the Mine Act, only then does the Judge consider remedies for the violation. The Commission has differentiated temporary reinstatement from remedies and awards by recognizing that "the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard." *Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 592 (Mar. 2011) (citations omitted); *McGaughran*, 42 FMSHRC at 470 n.4. [10]

Moreover, the after-acquired evidence doctrine requires the employer to demonstrate that based on the new evidence of wrongdoing, the employer would have fired the employee at the time it occurred if the employer would have known about it. This standard requires that a Judge make credibility determinations and resolve conflicts in the evidence, which is inconsistent with the limited nature of a temporary reinstatement hearing. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999) ("[i]t [is] not the Judge's duty, nor is it

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[9] In this case the parties agreed to economic reinstatement. However, in the absence of such an agreement and pursuant to the Mine Act, a miner ordinarily returns to his former position and the mine operator receives the benefits of his labor.

[10] There was evidence that Saldivar might have been less than forthcoming on his employment application about the full extent of his criminal history. But there is also evidence that the company may have chosen not to further investigate after being placed on notice that Saldivar had a criminal past. Regardless, this evidence would have required the Judge to weigh potentially conflicting evidence and make credibility and value determinations, which are not appropriate actions to take during the temporary reinstatement phase. *Rockwell Mining, LLC*, 43 FMSHRC at 165-66, 168.

the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.").[11]

For these reasons, an operator is not permitted to use evidence it acquires while preparing for the case on the merits, or even relevant evidence it failed to submit for the original hearing on temporary reinstatement, to repeatedly relitigate the case against temporary reinstatement. *See JWR*, 920 F.2d at 748 n.11 (the "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.").[12]

Simply put, after-acquired evidence of wrongdoing may be admissible in a full hearing on the merits of a discrimination complaint but is not a basis to toll a temporary reinstatement order. The Judge did not err.

3. Due Process and Prejudice

Grimes Rock contends that the Judge deprived it of its due process right to a meaningful hearing on its motion to terminate the temporary economic reinstatement. G.R. PDR 1 at 16-18. We do not agree.

The motion to toll filed with the Judge did not include a request for a separate hearing on its motion, nor was Grimes Rock entitled to one.[13] The Commission has recognized limited circumstances in which a Judge, prior to the hearing on the merits, may appropriately order an

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[11] However, Grimes Rock knew at the time that it hired Saldivar that he had some criminal history. Therefore, any hearing on the after-acquired evidence regarding other unlawful activity would require the ALJ to determine whether the operator's claim that it sought to discharge Saldivar solely because of his newly disclosed unlawful behavior was credible. Put simply, the Judge would have to determine whether the operator sought to discharge Saldivar because of his criminal behavior or if it was motivated (or partially motivated) by his protected activity. That would require making credibility determinations and resolving conflicts in evidence, which is not appropriate at the temporary reinstatement stage.

[12] Our dissenting colleague cites to *Secretary on behalf of McKinsey v. Pretty Good Sand Co., Inc.*, 36 FMSHRC 2843, 2870 (Nov. 2014) (ALJ) for the proposition that after-acquired evidence is relevant in a temporary reinstatement proceeding. Slip op. at 26. However, we note that that decision concerns a determination on the merits of a 105(c) case. As we note elsewhere, after-acquired evidence may be relevant at that stage of the proceeding. *See infra* at 9.

[13] The Commission recently issued *Sec'y on behalf of Collins v. Crimson Oak Grove Resources, LLC*, 45 FMSHRC____, SE 2023-0235 (Oct. 11, 2023) in which we set forth the due process requirements for temporary reinstatement proceedings. In that case we noted that a single, pre-deprivation hearing in which the ALJ does not weigh disputed evidence has long been held as "far exceeding" the Constitutional requirements of due process. *Id*. *citing Brock v. Roadway Exp.*, 481 U.S. 252 (1987) and *JWR*, 920 F.2d 738 (11th Cir. 1990). In light of that holding, there is no basis for the assertion that an operator is constitutionally entitled to additional hearings on motions within the temporary reinstatement proceeding.

intermediate hearing regarding changed circumstances. However, in the temporary reinstatement phase of the litigation, during which the parties may not have completed discovery, the burdens of proof and the standard against which the evidence is evaluated should be no different than if the issue had been heard during the initial temporary reinstatement hearing. *Cobra Natural*, 35 FMSHRC at 398 n.3. The ultimate determination concerning the appropriate remedy for any alleged discrimination, including the duration of an operator's reinstatement obligation, if any, is made in the proceeding on the merits.[14] *Id*. at 398.

Grimes Rock also contends that continuing the temporary economic reinstatement despite the emergence of new undisputed evidence caused prejudice. G.R. PDR 1 at 19. As discussed above, after-acquired evidence is not appropriate at the temporary reinstatement stage. We further reject any claim of economic prejudice. Congress, in enacting the "not frivolously brought" standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. *JWR*, 920 F.2d at 744, n.11. Moreover, the Commission has indicated that the goal of the Mine Act's discrimination provision is to make the miner whole until the case can be decided on the merits. *Sec'y of Labor on behalf of Rieke v. Akzo Nobel Salt*, *Inc*., 19 FMSHRC 1254, 1258 (July 1997) (discussing pertinent legislative history); *Sec'y of Labor on behalf of Totten v. Tk Mining Services, LLC*, 37 FMSHRC 2217, 2218-19 (Sept. 2015).

We hold that evidence of prior behavior uncovered after the miner's discharge but offered after a decision granting or denying temporary reinstatement has been reached is not appropriate for review prior to the hearing on the merits.

B. The Secretary's petition challenging the Judge's dissolution of the order of temporary reinstatement contemporaneous with her decision finding that Grimes Rock did not violate section 105(c)

The Secretary argues that the Judge abused her discretion by terminating Saldivar's temporary reinstatement on June 17, 2022, because the merits decision was not yet a final order. Sec'y PDR at 2. We agree and conclude that the Judge erred when she dissolved the temporary reinstatement order prior to the conclusion of the Commission's opportunity to direct review.

If the Secretary can show that the discrimination complaint was not frivolously brought, section 105(c)(2) of the Mine Act states that "the Commission . . . shall order the immediate reinstatement of the miner *pending final order* on the complaint. . . ." 30 U.S.C. § 815(c)(2) (emphasis added). An order issued after a determination on the merits is not final directly upon its issuance. We have previously held that a Judge cannot terminate a temporary reinstatement order concurrently with a decision on the merits. In *Reading Anthracite*, the Commission determined that "the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision." *Secretary ex rel. Bernardyn v. Reading Anthracite Co*., 21 FMSHRC 947, 949 (Sept. 1999) (holding that "the

[14] During the pendency of this PDR, the Judge held the merits hearing in the discrimination case on January 25-27, 2022 and issued her decision on June 17, 2022. *See* Docket No. WEST 2021-265.

time had not yet passed for the Commission to review the judge's decision on the merits . . . . Accordingly, the judge's decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review."); *Sec'y of Labor on behalf of Noe v. J & C Mining, LLC, and Manalapan Mining Co*., 22 FMSHRC 705, 706 (June 2000).

In the instant matter, the Judge erred by terminating the temporary reinstatement before this Commission could direct review of her merits decision. Furthermore, temporary reinstatement ends only after the merits case has become final.[15] Neither scenario had occurred here when the Judge issued her order of termination.

Accordingly, the Judge erred when she ended the order of temporary reinstatement concurrently with her merits decision. This issue is remanded to the Chief Administrative Law Judge for recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final.[16]

C. Grimes Rock's petition challenging the Judge's order granting the Secretary's motion to enforce

Grimes Rock argues that the Judge abused her discretion by retroactively modifying the economic reinstatement agreement and ordering the operator to pay the full reinstatement amount after Saldivar lost his other employment. It notes that Grimes Rock only agreed to pay the difference between Saldivar's earnings at the job he secured after being terminated by Grimes Rock and what he would have been earning at Grimes Rock. G.R. PDR 2 at 14; G.R. Reply Br. at 3-5. The operator asserts that the Judge improperly interpreted the agreement to include implied terms that should only have been considered upon the Secretary's proper filing of a motion to modify the existing order. G.R. Br. at 27-31.

We conclude that the Judge did not err in granting the Secretary's motion to enforce and in finding that Grimes Rock was obligated to pay Saldivar all wages required to make the miner whole under the original order of temporary reinstatement.

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[15] Our dissenting colleague discusses, at length, concerns regarding prolonged periods of temporary reinstatement during the appeals process after a hearing on the merits in which an operator prevails. Slip op. at 19-25. In the instant case, Grimes Rock prevailed on the merits case and that decision was not appealed. 44 FMSHRC 473 (June 2022) (ALJ). Saldivar's temporary reinstatement has now ended. As a result, we do not believe that our colleague's concerns regarding lengthy appeals are implicated here.

[16] Whether the final termination date of temporary reinstatement is properly determined by the 30-day language in section 105(c)(2), 30 U.S.C. § 815(c)(2), or by the 40-day language in section 113(d)(1), 30 U.S.C. § 823(d)(1), is currently under consideration before the Commission in *Jason Hargis v. Vulcan Construction Materials Incorporated*, SE-2021-0163.

Under section 105(c)(2) of the Mine Act, if it is found that a miner's complaint of discrimination is 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). While temporary "reinstatement" means to place the miner back to work at the mine during the pendency of the discrimination case, the Commission has deemed economic reinstatement an acceptable alternative. Economic reinstatement is negotiated by joint agreement, which may be accepted by the Judge in lieu of actual reinstatement. A Judge may not order economic reinstatement on his or her own initiative. *Sec'y on behalf of McGoughran v. Lehigh Cement Co., LLC*, 42 FMSHRC 467, 469 (July 2020); *Sec'y of Labor on behalf of Gray v. North Fork Coal Corp*., 33 FMSHRC 589, 593 (Mar. 2011), *rev'd on other grounds*, 691 F.3d 735 (6th Cir. 2012). In addition, parties may renegotiate, or Judges may modify economic reinstatement agreements to allow for the offsetting of the temporary reinstatement award by the amount of wages earned by the miner from other employment during the reinstatement period. *North Fork Coal Corp*., 33 FMSHRC at 595-96.

Congress stated that: "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 (emphasis added). Congress also stated 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; *Sec'y on behalf of Bussanich v. Centralia Mining Co*., 22 FMSHRC 153, 161–62 (Feb. 2000).

Consistent with the legislative history, the Commission has held that "the purpose of the temporary reinstatement provisions is to put the miner, during the time he [or she] pursues [a] discrimination claim, *in no worse a position than he [or she] was while working for the operator.*" *See North Fork*, 33 FMSHRC at 597-98 (emphasis added). We have noted that a "Judge may defer ruling on a temporary reinstatement application or implementing a temporary reinstatement order in light of an economic reinstatement agreement between the parties *that is consistent with the purposes of section 105(c)*." *Lehigh Cement*, 42 FMSHRC at 469 (emphasis added).

A miner is not "reinstated" if the miner is receiving less pay than what he or she would have received if the termination had not occurred. Under an order of temporary reinstatement, it is the operator's responsibility to ensure that the miner is no worse off than when employed by the operator prior to the discrimination complaint. This status quo requirement remains even when the miner no longer has any alternative employment to offset the operator's payment. Here, when the Judge first awarded Saldivar temporary reinstatement, her decision specifically reinstated "Mr. Saldivar to his former position at the mine . . . at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." *Grimes Rock*, 43 FMSHRC 287, 292 (May 2021). The decision was subsequently affirmed by the Commission. *Grimes Rock*, 43 FMSHRC 299 (June 2021). The parties then agreed to economic reinstatement and because Saldivar had secured other employment at that time, Grimes Rock's payments were set at the difference

between Saldivar's earnings at his new job and what he would have been making at Grimes Rock.

Although the agreement was silent on what would happen if Saldivar no longer had other employment to offset Grimes Rock's payments, interpreting that silence to mean that Grimes Rock is responsible for something less than what is required to "reinstate" Saldivar would not be "consistent with the purposes of section 105(c)." It is also difficult to believe that the Secretary and miner would agree to any compensation that was less than what the Judge had already awarded or to any terms that would "put [Saldivar] . . . *in [a] worse [] position than he was while working for the operator*." *See North Fork*, 33 FMSHRC at 597-98. There is no indication in the record that Saldivar intended to waive any portion of the full wages to which he was statutorily entitled.[17] Likewise, we see no sign in the Judge's decision approving settlement that she intended to approve any agreement that would run afoul of the Mine Act by placing the miner in a situation that would make him less than whole.

In fact, in the Judge's Order granting the Secretary's motion to enforce, she stated that: "The Economic Reinstatement Order was issued in the shadow of the initial Reinstatement Order, which mandated full and total reinstatement for Saldivar at this previous rate of pay. I approved the parties' settlement agreement insofar as it adequately made Saldivar whole while his discrimination case was pending." ALJ Ord. Gr. Sec'y Mot. to Enforce at 2 (June 17, 2022). She further noted that her initial order was issued to accomplish the goal of the temporary reinstatement provision and the order approving economic reinstatement simply "'described how the parties proposed to implement relief ordered by the Judge pursuant to the Mine Act.'" *Id*., *quoting North Fork*, 33 FMSHRC at 592.

We conclude that any economic reinstatement agreement and any order issued by a Judge must be consistent with the purpose of the temporary reinstatement provision of the Mine Act, which is to make the miner whole. See *North Fork*, 33 FMSHRC at 593; *Lehigh Cement*, 42 FMSHRC at 469.

Grimes Rock argues that California statutory rules of contract interpretation govern the temporary reinstatement agreement, therefore any ambiguity in the agreement as to the operator's payment obligations in the event of Saldivar's loss of alternative employment must be construed against the Secretary. G.R. PDR 2 at 18-23. We reject this argument. The parameters of any temporary reinstatement agreement are first dictated by the statute, and any ambiguity shall be interpreted to further the purposes of the Mine Act.[18] A private agreement simply cannot trump a valid order of temporary reinstatement issued pursuant to section 105(c). In light

[17] This is not to suggest a miner could waive a statutory entitlement through an economic temporary reinstatement agreement.

[18] The Commission has previously rejected the argument "that the issue raised . . . should be decided solely by reference to contract law." *North Fork*, 33 FMSHRC at 592. We reasoned that we cannot ignore the Mine Act in determining the construction, application, and effect of an economic reinstatement agreement. *Id*.; s*ee also R. Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citations omitted) (reasoning that "we do not decide cases in a manner which permits parties' private agreements to overcome . . . miners' protected rights").

of this, it would have been reasonable for all involved to assume that in the event Saldivar no longer had other employment, Grimes Rock's payments would automatically revert to the full amount under the Judge's original order, which was still in place.

Conversely, Grimes Rock goes on to assert that it was implied in the agreement that "Mr. Saldivar would act in good faith and exercise reasonable efforts at maintaining an employable status," which he failed to do. G.R. PDR 2 at 11. We reject this notion as the Mine Act does not require a miner to mitigate an operator's temporary reinstatement obligation, which includes agreeing to offset an operator's payments due to other employment. A miner's only obligation to mitigate in a section 105(c) proceeding is limited to the consideration of backpay in the merits case. However, we have already distinguished backpay awards from wages owed under temporary reinstatement. *North Fork*, 33 FMSHRC at 592.

We also find unpersuasive Grimes Rock's argument that it would not have agreed to full economic reinstatement. G.R. PDR 2 at 21. Given the mandates of the Mine Act and the Judge's original reinstatement order, the operator's agreement was not necessary. If Grimes Rock had not opted for economic reinstatement, it would have had to physically reinstate Saldivar at his full pay. In any event, Saldivar was entitled to receive his full wages. "Economic reinstatement" allows the miner the benefit of receiving his or her normal pay, while permitting the operator to avoid bringing the miner back into the workplace. See *Lehigh Cement*, 42 FMSHRC at 469.

We conclude that an economic reinstatement agreement must work in tandem with any existing order of temporary reinstatement and cannot deprive a miner of the full wages owed under and intended by the Mine Act's temporary reinstatement provision.[19]

Finally, Grimes Rock maintains that it was deprived of its due process right to a hearing, which it contends it was entitled to if the Judge was going to impose an increased payment amount. We disagree. A temporary reinstatement hearing was held and an order issued temporarily reinstating Saldivar "at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination." *Grimes Rock*, 43 FMSHRC at 292. As we have stated, the settlement agreement could not divest Mr. Saldivar of any pay owed to him under the original order and

[19] Our dissenting colleague would hold that the parties' agreement to economically reinstate a miner would supersede the requirements of the Mine Act. Slip op. at 28-31. In short, the dissent would allow the economic reinstatement agreement to set the terms of the parties' relationship during the temporary reinstatement. For the reasons outlined in this section, we disagree. However, we would also note that given this conclusion, the dissent is not internally consistent. Specifically, the parties' temporary economic reinstatement agreement did not contain any provision that allowed Grimes to terminate or discipline Saldivar. Further, it does not expressly create an employment relationship; it creates an obligation for Grimes to pay Saldivar regardless of work. If the parties' agreement alone sets the terms for the parties' relationship, it is unclear how our dissenting colleague reached his other conclusions in this case: that is, that Saldivar was an employee of Grimes and Grimes was entitled to discharge him for alleged misconduct.

served only to describe his manner of reinstatement. Finally, contrary to Grimes Rock's assertion, the Judge did not increase the amount Grimes Rock owed to Saldivar. The operator simply lost the benefit of Saldivar's other employment offsetting its payments. The operator was due no additional hearing.

Accordingly, we reject the notion that the Judge retroactively modified the parties' settlement agreement and conclude that the Judge did not err in granting the Secretary's motion to enforce.

D. Secretary's motion for interest and consequential damages

The Commission grants the Secretary's motion for interest. Specifically, Grimes is obligated to pay interest, pursuant to section 105(c)(2) of the Mine Act, on any yet unpaid temporary reinstatement payments owed to Saldivar. In addition, Grimes is obligated to pay interest on any temporary reinstatement payments that were paid late to Saldivar. On remand, the Judge should determine the amounts of any remaining temporary reinstatement payments owed as well as interest owed.

Additionally, on remand, the Judge should determine whether consequential damages as a result of Grimes' failure to timely comply with the Judge's orders are appropriate. *See e.g., Amos Hicks v. Cobra Mining*, 14 FMSHRC 50 (Jan. 1992).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's order denying the operator's motion to toll temporary reinstatement. We vacate the Judge's order dissolving the temporary reinstatement as of the date of her order and decision, and remand it for assignment to a Judge for recalculation of the temporary reinstatement amount owed between the date the Judge issued the order of enforcement and the date her merits decision became final. We affirm the Judge's order enforcing temporary reinstatement. Finally, we grant the Secretary's motion for interest and consequential damages and remand this matter for a determination of any remaining temporary reinstatement payments and interest owed as well as a determination on whether consequential damages are appropriate.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Althen, dissenting:

I respectfully dissent.

I.

FACTUAL BACKGROUND

On October 6, 2020, Saldivar submitted an employment application to Grimes. The application signed by Saldivar asked: "Have you ever been convicted of, plead guilty/no contest to a crime?" Saldivar responded, "possession of a loaded firearm." G.R. PDR 1, Decl. of Pachowicz, Ex 6. Saldivar certified that the answers were true and acknowledged that falsification would be grounds for dismissal. Despite his certification and acknowledgment, it is now indisputable that Saldivar lied on the application.

In 2021, the Secretary requested temporary reinstatement on behalf of Saldivar. An Administrative Law Judge ("ALJ") temporarily reinstated Saldivar on May 18, 2021. Afterward, the parties entered into an economic reinstatement agreement explicitly prescribing the terms of his reinstatement – namely, the monies Saldivar would receive from Grimes. This prescribed amount was the difference between the salary Grimes had paid Saldivar and the amount Saldivar earned at a new job.[1] The ALJ accepted the parties' agreement and entered an Order containing the terms of the agreement.

[1] The parties' agreement explicitly provided,

> Respondent agrees to pay Mr. Saldivar the difference in earnings at his present place of employment Wayne J. Sand and Gravel Inc. and Grimes Rock Inc. . . . Based on these calculations, Grimes Rock Inc. will pay Mr. Saldivar $2,136.78 on a bi-weekly basis.

Sett. Agreement and J. Mot. for Temp. Econ. Reinst. at 3 (May 27, 2021).

An ALJ does not have authority to order temporary economic reinstatement. *Sec'y on behalf of James McGoughran, v. Lehigh Cement Co.*, LLC, 42 FMSHRC 467, 469 (July 2020). ("A Judge may not order economic reinstatement on his or her own initiative."). Because an ALJ may not order economic reinstatement on his or her own initiative, the terms of the parties' settlement govern the terms for economic reinstatement. It is useful to repeat, therefore, that based upon mutual agreement of the parties, the ALJ ordered Grimes to pay the specific amount of $2,134.78 per pay period. If Saldivar had found work paying more than his other employer at the time of the agreement, the Commission would not hear an argument by Grimes for an "implicit" offset to keep Saldivar's compensation the same as he was making at Grimes. *See Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 594 (Mar. 2011).

After Saldivar's discrimination complaint, Grimes acquired evidence that contrary to Saldivar's certified statement the prior year, Saldivar previously was convicted of, among other things:

a. Willfully causing or permitting a child to be placed in a situation where his or her person or health is endangered,
b. Being under the influence of cocaine, cocaine base, heroin, methamphetamine, or phencyclidine while in the immediate personal possession of a loaded, operable firearm,
c. Commission of a felony after release on bail of own recognizance,
d. Possessing an assault weapon.
e. Possession of a controlled substance while armed with a loaded, operable firearm,
f. Possessing a sawed-off shotgun or rifle, and
g. Carrying a loaded firearm in a vehicle [2]

People v. Saldivar, Case No. 2016002309, Superior Court of California, County of Ventura, available at https://secured.countyofventura.org/courtservices/Information/CaseInformationSearch.aspx (last visited Aug. 28, 2023).[3]

While on temporary reinstatement, on September 16, 2021, Saldivar pled guilty to a theft charge. He subsequently spent 75 days in the Ventura County, California jail. The Secretary recognized that Saldivar committed the crime and agreed that Grimes need not make temporary reinstatement payments to Saldivar during his incarceration.

On November 29, 2021, Grimes filed a motion to toll temporary reinstatement. Grimes made several arguments, including (1) after-acquired evidence that Saldivar failed to disclose prior severe crimes on his certified employment application despite notice that a failure to report fully could cause discharge and (2) Saldivar's criminal misconduct after his reinstatement. On January 7, 2022, the ALJ denied Grimes's motion to toll without a hearing. The ALJ failed even to consider Saldivar's post-reinstatement criminality. Indeed, the ALJ neither considered nor ruled on the impact of Saldivar's criminality upon reinstatement.

As a result, this case does not present the Commission with the normal process of reviewing factual findings for substantial evidence. The ALJ made no factual findings related

[2] My colleagues say, "Grimes Rock knew at the time that it hired Saldivar that he had some criminal history" (Slip op. at 8 n.10), thereby wholly ignoring the gross disparity between the minimal statement on the application and Saldivar's later demonstrated criminal record. "Some criminal history" understates and minimizes Saldivar's crimes set forth above. More importantly, under their line of reasoning, no crimes by Saldivar before or after reinstatement would suffice to permit discharge through tolling.

[3] See also CAL PENAL § 273a(a) (child endangerment); CA HLTH & S § 11550(e)(1) (under the influence with firearm); CAL PENAL § 12022.1(b) (commission of felony on bail); CAL PENAL § 30605(a) (assault weapon); CA HLTH & S § 11370.1 (possession of controlled substances with a firearm); CAL PENAL § 33215 (sawed-off shotgun or rifle); CAL PENAL § 25850(a) (loaded firearm in vehicle).

to Saldivar's criminality to review. However, the commission of the crimes is undisputed. Further, the ALJ's denial of the motion to toll did not discuss the legal effect of post-reinstatement criminality. Therefore, the ALJ decision made no legal findings relevant to the Commission's review.

On January 17, 2022, the Commission granted a Petition for Discretionary Review challenging the ALJ's denial of tolling. In early 2022, Saldivar again went to jail – this time, for failure to appear. Grimes again filed a motion to toll. Saldivar spent sixty-five days in jail. The ALJ granted tolling only for the period Saldivar was in jail. Again, Grimes filed a Petition for Discretionary Review of the ALJ's refusal to toll, and the Commission granted review. The Commission issues its decision on tolling today, long after the ALJ absolved Grimes from the discrimination claim and long after Grimes paid Saldivar tens of thousands of dollars.

On June 17, 2022, five months after a remote hearing, the ALJ found Grimes had not discriminated against Saldivar and dissolved the Temporary Reinstatement Order. That same day, six months after Saldivar's release from jail, the ALJ granted the Motion to Enforce filed by the Secretary in May. The ALJ's Enforcement Order explicitly required Grimes to pay Saldivar $12,533.94. The Secretary expressly requested this amount, subject to minor adjustments after the filing. The Secretary did not seek any consequential damages, and the ALJ never considered a claim for consequential damages. See Sec'y Motion to Enforce (May 27, 2022).

On July 13, 2022, the Secretary filed a Petition for Review challenging the ALJ's dissolution of temporary reinstatement on June 17, arguing the Mine Act entitled Saldivar to continue temporary reinstatement until the expiration of any period of appeal or thirty days after the ALJ's decision if neither the Secretary nor Saldivar filed an appeal. On July 13, 2022, Grimes filed a Petition for Review challenging the ALJ's grant of the Secretary's motion to enforce. The Commission granted both petitions.

On August 25, 2022, approximately 69 days after the ALJ found no discrimination and 39 days after the period for filing a Petition for Review, the Secretary filed a Motion for Consequential Damages directly with the Commission.

II.

TOLLING REINSTATEMENT

A. The commission of crimes during temporary reinstatement and after-acquired evidence of dischargeable misconduct warranting termination may limit compensation

The Supreme Court has recognized that after-acquired evidence warranting termination may limit compensation to the period before a defendant obtains such evidence. Further, dischargeable misconduct during regular employment, permanent reinstatement, or temporary reinstatement warrants termination of employment.

In *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995), the Supreme Court considered new facts supporting termination, which the employer only learned about after discharging the employee. The Court held that compensation would cease when the employer learned of the employee's actions justifying termination. It stated that:

> The proper boundaries of remedial relief in the general class of cases where, after termination, it is discovered that the employee has engaged in wrongdoing, must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case. We do conclude that here, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. ***It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.***
> . . .
> ***Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information***, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.

Id. at 361-62 (emphasis added).[4]

The majority's position on Grimes's presentation of new crimes and after-acquired evidence flouts this Supreme Court precedent. The Court has cogently and directly held that after-acquired evidence makes it inequitable and pointless to continue the reinstatement of someone the employer would have terminated, and will terminate, in any event, upon lawful grounds. Necessarily, this principle applies equally to new misconduct,

The majority "stresses" that the factual allegations raised by the operator "were relevant to, and were considered by the Judge in, the case on the merits, where the operator prevailed." Slip op. at 6 n.7. In so doing, the majority recognizes that the factual allegations of new misconduct and after-acquired evidence may point to denial of reinstatement. However, despite the Supreme Court's instruction, they are satisfied to allow such new events to linger unreviewed until a hearing on the merits. Here, the delay was for eight months.

Moreover, the ALJ did <u>not</u> consider the after-acquired evidence and new misconduct in her decision issued in June 2022. The majority's misstatement that the ALJ considered such evidence and the ALJ's failure to consider the evidence demonstrates the wrongfulness of the

[4] The Court considered the possibility of an employer doing discovery into a discharged employee's background to obtain after-acquired evidence. However, such consideration did not alter its decision. *McKennon*, 513 U.S. at 363.

majority's willingness to accept a delay of many months to assess post-reinstatement events and evidence disqualifying Saldivar from permanent reinstatement. Having recognized that the new evidence and events are relevant to continued employment, the majority endorses the "inequitable and pointless" process of not permitting a hearing regarding a complainant whom the operator could terminate based on after-acquired evidence or post-reinstatement misconduct.

B. The Commission Errs by Refusing to Consider Evidence of Misconduct After Reinstatement and After-Acquired Evidence

1. Criminal activity by a reinstated person after reinstatement justifies discharge.

The Mine Act provides crucial safety and health protection for miners. Section 105(c) of the Act supports those protections. There, the Act prohibits discrimination against a miner because of the exercise of any of the protections of the Act. Section 105(c) further seeks to assure that miners will not suffer a temporary loss of employment because of exercising a protected right. It provides for the temporary reinstatement of a miner if the Secretary presents a "non-frivolous" claim of discrimination.[5] These are essential rights.

The Mine Act, however, does not exempt miners from the obligation of all workers to observe the legally required norms of society at work and away from work. In this case, undisputed evidence demonstrated that Saldivar engaged in criminal misconduct for which he served two jail sentences totaling several months and lied on his employment application.

This case presents a significant issue of first impression for the Commission: Does temporary reinstatement protect a reinstated complainant from discipline if the complainant engages in criminal wrongdoing, resulting in incarceration after reinstatement? The specific criminal wrongdoing in the case is theft, followed by failure to appear. However, as a case of first impression, the case also presents the broader question of the effect of criminal misconduct by or incarceration of a reinstated complainant after reinstatement.

After temporary reinstatement, Saldivar committed crimes of theft and failure to appear. There is no dispute over his guilt or his jail terms. The Secretary does not dispute that such crimes occurred and agrees that Saldivar was not entitled to pay while in jail.[6]

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[5] The Commission has not defined "non-frivolous." The United States Court of Appeals for the Eleventh Circuit analogized the "non-frivolous" standard to a reasonable cause to believe standard. It held "there is virtually no rational basis for distinguishing between the stringency of this standard [non-frivolous] and the 'reasonable cause to believe' standard that was implicitly upheld in *Roadway Express." Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990).

[6] This does not mean that the Secretary was not entitled to a hearing to address the issues. Indeed, the Commission very recently unanimously recognized the reason for and right to a hearing in a tolling case. *Sec'y of Labor on behalf of Torres v. W.G. Yates & Sons Constr. Co.*, 2023 WL 5170092 **(**July 2023).

The Mine Act does not differ from general employment law for discipline motivated by a reason other than protected activity. Unless employees have a contract, employers may discharge employees for any reason that is not unlawful. *Engquist v. Oregon Dept. of Agr*., 553 U.S. 591, 606 (June 2008) ("The basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all." (citing *Andrews v. Louisville & Nashville R. Co*., 406 U.S. 320, 324 (May 1972))). Employment at-will is the law in California. *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 335 (Oct. 2000); *Cittadino v. BrandSafway Services, LLC*, 2023 WL 3440407 (E.D. Cal May 2023) ("Under California law, there is a strong statutory presumption of 'at will' employment."). There is no doubt that absent a claim of discrimination or other legal impediments, the employer could refuse to re-employ the worker.

In this case, the issue is whether a reinstated worker has a right to return to reinstatement if the attempt to return is after a jail term for theft. Does a reinstated worker have more rights than a regular employee? Does the Secretary's presentation months earlier of a non-frivolous claim protect a complainant from the ordinary prospect of discipline for post-reinstatement misconduct warranting discharge or after-acquired evidence of misconduct warranting discipline? Is a reinstated complainant legally entitled to engage in crimes or other unsafe or dangerous actions and retain or regain reinstatement with no questions asked by his employer?

A diligent review does not disclose any dispensation in the Mine Act for crimes committed by reinstated employees. Reinstated employees should and must follow the lawful requirements imposed upon all workers. One does not suppose that even the majority would support continued reinstated employment if the reinstated complainant stopped coming to work or committed safety violations in the workplace. It would not matter whether such conduct is a "change of circumstances" or simply "misconduct."[7] The availability of discipline would be the same.

Unfortunately, the majority decision fails to fulfill the most fundamental requirements of appellate adjudication—a fair representation of the appellant's argument and presentation of a principled legal basis for the appellate decision.

The majority bases its decision regarding tolling upon a misrepresentation of Grimes's position and the issue in the case. The majority says Grimes seeks to extend tolling to "a situation where the operator no longer wishes to offer employment to a miner. Specifically, Grimes Rock argues that tolling is justified because it no longer desires to employ Saldivar due to his periods of incarceration and the criminal allegations against him." Slip op. at 5.

The assertion that Grimes argues that it simply no longer wished to employ Saldivar is wrong – a makeweight for an erroneous decision. Grimes bases its argument upon Commission case law that a "change of circumstances" may warrant tolling. Indeed, elsewhere, in its opinion, the majority expressly notes that a "change of circumstances" is a reason for tolling. Slip op. at 4.

[7] Nonetheless, it is entirely accurate to refer to the commission of crimes, safety violations, repeated absences, etc. as a "change of circumstances." When a worker deviates from the normal and routine duties, it is a change of circumstance.

Grimes argues that criminal misconduct by a complainant after temporary reinstatement is a "changed circumstance" that warrants tolling the employment of the miscreant complainant. This argument claims that reinstatement does not make a complainant immune from the consequences of criminal misconduct after reinstatement. Grimes does not assert that temporary reinstatement may be tolled based upon a "wish" but rather on the confessed criminal misconduct of the complainant after reinstatement.

Grimes correctly contends that just as an employer may terminate the position of a regular employee or a permanently reinstated employee for criminal misconduct, temporary reinstatement does not create a haven from the results of criminal mischief that occurs after the temporary reinstatement. Discipline may occur when a reinstated employee engages in post-reinstatement misconduct warranting discipline.

This same logic applies to Saldivar's time in jail when he would not have been able to work. An employee would not expect to maintain employment after being absent due to a jail sentence. Moreover, neither the majority nor the Secretary dares go as far as to assert that Saldivar should have received temporary reinstatement while in jail. They both say that the Mine Act demands an operator rehire an individual after a stint of unavailability to work due to the individual's intentional misconduct.

The majority doubles down on its misinterpretation of Grimes's argument by finding that Grimes's claim that an operator may discipline a temporarily reinstated complainant who engages in post-reinstatement criminal misconduct would mean that in every instance, an operator could discharge any temporarily reinstated worker, regardless of the occurrence of misconduct. Slip op. at 5. That finding drawn from its misstatement of Grimes's argument is facially incorrect—another makeweight for error.

The fundamental issue is whether misconduct by a temporarily reinstated complainant may constitute a circumstance permitting discipline. The specific misconduct in this case is theft and failure to appear. Here, a temporarily reinstated complainant committed crimes after reinstatement for which an operator normally could, and almost certainly would, discipline a permanently reinstated worker or regular employee. It is senseless to find that the operator must wait for perhaps many months for a decision on the merits of the discrimination claim before acting on the new misconduct.[8] In this case, the gap between misconduct and a final decision was eight months. In another currently pending case, the gap between reinstatement and a finding on the merits was 17 months, and the case has been pending upon review for nearly a year. *Sec'y on behalf of Hargis v. Vulcan Constr. Materials, LLC*, SE 2021-0163, 2022-001, 2022-013.

[8] The majority triples down on its misstatement of Grimes argument by asserting that this dissent's mention of "at-will" principles means the dissent would construe the Mine Act as providing "no protection" because reinstatement could be tolled "for no reason at all." Slip op. at 5 n.6. The issue before the Commission is whether post-reinstatement misconduct may permit tolling of reinstatement. It is a serious issue. The majority should such eschew obvious and trivial misrepresentations based upon the unremarkable observation that an employer ordinarily may discharge an employee who seeks to return to work after several months in jail for theft.

As stressed above, Grimes' argument and the undisputed facts of Saldivar's crimes present a case of first impression regarding the consequences of post-reinstatement misconduct. Saldivar's specific acts of post-reinstatement misconduct were theft and failure to appear, both of which resulted in many weeks of incarceration. The case raises an important legal question of the effect of post-reinstatement misconduct.[9]

Nonetheless, the majority states it is not ruling on this seminal question and issues no principled guidance regarding tolling for post-reinstatement misconduct. The majority proclaims its lack of principled reasoning: "We take no position on whether our narrow tolling doctrine could be extended to other fact patterns not raised by this case." Slip op. at 6 n.7.

The majority does not explain why a reinstated complainant may commit crimes or other acts warranting discipline without any disciplinary consequence. The majority does not base its decision on any legal principle or reasoning. By doing so, in derogating proper appellate adjudication, the majority fails to provide any principled legal basis for its decision or guidance to ALJs. It simply says, "no discipline" in this case.

By not taking any position on the possibility of discipline for misconduct, the majority decision is simply an arbitrary and unreasoned refusal to permit any adverse consequences to flow from Saldivar's criminal conduct.[10] Because this decision is limited to Saldivar and Saldivar alone, readers and ALJs may draw no legal principle from the majority decision. It is a decision without any underlying principle.

Moreover, the opinion does not appear to be a "majority" decision. In footnote 5, the opinion states that Commissioner Rajkovich, perhaps writing only for himself, would find it reasonable to consider changes in a miner's circumstances on a case-by-case basis. Apparently or possibly, unlike the Chair and Commissioner Baker, he recognizes a right to impose discipline for misconduct.

The decision states that Commissioner Rajkovich fully joins the entire opinion. However, it does not state whether Chair Jordan and Commissioner Baker agree with Commissioner Rajkovich's opinion. It appears Chair Jordan and Commissioner Baker neither deny nor affirm that post-reinstatement misconduct can warrant tolling. They "take no position on it." Slip op. at 6 n.7. However, Commissioner Rajkovich finds that the tolling doctrine extends to discipline for misconduct. Do Chair Jordan and Commissioner Baker join

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[9] It bears repeating that the Supreme Court has cogently established a point regarding after-acquired evidence that is equally applicable to post-reinstatement misconduct—namely, that "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *McKennon*, 513 U.S. at 361.

[10] The majority incorrectly asserts that the Administrative Law Judge considered Saldivar's criminality in making a final decision on the underlying discrimination claim. The ALJ did not even take Saldivar's criminality into account in considering the motion to toll let alone the final decision on the merits.

Commissioner Rajkovich?[11] The Commission leaves the public and ALJs with a unanimous decision but without a majority decision on whether an employer may terminate a reinstated employee for crimes of theft and failure to appear. The majority opinion is a refusal to explain its joint decision and an "add-on" opinion by Commissioner Rajkovich about which Chair Jordan and Commissioner Baker express no opinion.

The result is a tottering legal standard that cannot stand on its own weight. Worse yet, these flaws are by design. The majority appears to want to craft an amorphous standard for tolling that allows for ad hoc review whereby the result can be bent to suit the desires of the Commission without regard for any underpinning legal rule. How can the regulated community, the Secretary, or Commission ALJs know whether temporary reinstatement can be tolled in a particular situation? One can only guess. Without a principled finding, they will find no help in the majority's decision.

Finally, as discussed further below, the majority's finding that Grimes was not entitled to a hearing is contrary to due process and recent Commission precedent. In *Secretary of Labor on behalf of Torres v. W.G. Yates & Sons Construction Company***,** the Commission unanimously found that the Secretary was entitled to a hearing on tolling at which she could present evidence concerning the tolling of reinstatement. 2023 WL 5170092 **(**July 2023). The Commission required an appropriate hearing to provide "the parties with the opportunity to present evidence on tolling outside of the initial temporary reinstatement hearing." *Id*. at 4 n.4.[12] Obviously, it is wrong for the Commission to accord the Secretary greater rights to defend against tolling than operators have in asserting tolling. Such inconsistent decisions may raise questions regarding the impartiality of Commission decisions.

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[11] Having recognized the possible right of an employer to toll reinstatement for post-reinstatement misconduct, Commissioner Rajkovich writes that Grimes did not positively "prove" in its motion that it would discharge a worker for theft. Thus, he asserts the novel proposition that the proponent of a motion must prove its claim to a level of summary disposition on the face of the motion. Undisputed evidence proved Saldivar's lies and crimes—suitable reasons for discharge. The Secretary had a right to challenge Grimes's claim. Moreover, Commissioner Rajkovich errs in saying Grimes's "offered no indication of a company policy." Slip op. at 5 n.5. Grimes introduced its employment application warning applicants that they could be fired for lying on the application. That is the proof, however unnecessary at this stage, of Grimes's policies. It should suffice. Moreover, Commissioner Rajkovich suggestion would require an employer to have a "one-size-fits-all" discipline program. That is not correct. An employer may and should mete out discipline according to the offense and the employee's record. To illustrate, unless unlawful discrimination is the basis for differing treatment, an employer may discharge one employee for misconduct and retain a different employee who engages in the same misconduct. Job performance, history with the employer, circumstances of the event, and many other factors may result in different consequences for the two employees. Finally, one may rightly suggest that not many handbooks explicitly say: "We will discharge you for going to jail for theft."

[12] This puts to rest the fallacious argument by the majority that all issues regarding reinstatement must be resolved in the initial hearing.

By reflexively neutering the right of an operator in a position such as Grimes to discipline a temporarily reinstated worker for misconduct after initial reinstatement, the majority effectively opts for the immunization of reinstated workers from redress for misconduct. Such a decision is not acceptable.

2. Indisputable Evidence Demonstrates That Saldivar Told Material Lies in Applying for Employment with Grimes.

Documentary evidence submitted by Grimes demonstrates that Saldivar's employment application asked if he had been convicted of or pled guilty to a crime. Saldivar replied that he had been convicted of "possession of a loaded firearm." Grimes hired Saldivar despite such a confessed conviction. Court records found and submitted after reinstatement disclosed that Saldivar lied on the application. He had been convicted of several felonious crimes far more severe than possessing a firearm. Saldivar's lie on his application meets an expressly written condition for discharge.

Saldivar had pled guilty or admitted to multiple felonies: (1) carrying a loaded firearm in a vehicle, (2) child endangerment (two counts), (3) possession of an assault weapon, (4) committing a crime while on bail, (5) the offer for sale/transfer/possession of a short-barreled rifle or shotgun, and (6) possession of a controlled substance while in possession of a firearm. *People v. Saldivar*, Case No. 2016002309 Superior Court of California, County of Ventura.

The Commission permits post-temporary reinstatement hearings on whether changed circumstances warrant tolling. *Sec'y on behalf of Ratliff v. Cobra Nat. Res., LLC*, 35 FMSHRC 394 (Feb. 2013). It is insensible to read the Mine Act to permit tolling on changed circumstances through the closure of a mine or layoffs but not to permit such hearings when the operator discovers dispositive evidence after the initial hearing of new and different gross misconduct by the complainant.

An operator may not attempt to relitigate the temporary reinstatement hearing by asserting new evidence to show the miner did not engage in the protected activity claimed at the initial hearing or that the operator's original reason for terminating the miner was not motivated by protected activity.[13] However, in this case, the after-acquired evidence does not relate to an alleged protected activity or the motivation for the initial discipline. It is free-standing, newly acquired evidence for which Grimes may disqualify Saldivar from resumed employment.[14]

[13] Delays within the Commission means that an operator may have to maintain a properly discharged individual in its workforce or pay significant amounts to an undeserving complainant for extended periods. Correctly expedited decisions by the Commission would get miners back to deserved status or save operators the problem of maintaining a discharged worker at its worksite or making tens of thousands of dollars in unrecoverable payments to an undeserving individual.

[14] It is undisputed that Saldivar committed post-reinstatement crimes. If an operator would lawfully fire the charged miner for those actions, the discrimination claim cannot be won and is, therefore, frivolous. *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018).

Courts have recognized the application of after-acquired evidence to a variety of statutes. *Russell v. Microdyne Corp.,* 65 F.3d 1229, 1240 (4th Cir. 1995); *Mardell v. Harleysville Life Ins.* Co., 65 F.3d 1072, 1073-74 (3rd Cir. 1995); *Wallace v. Dunn Constr. Co.*, 62 F.3d 375, 378 (11th Cir. 1995); *Wehr v. Ryan's Family Steak Houses, Inc*., 49 F.3d 1150, 1153 (6th Cir. 1995); *Manard v. Fort Howard Corp*., 47 F.3d 1067, 1067 (10th Cir. 1995). *See also LA Film School, LLC & Its Branch, La Recording Sch., LLC & California Fed'n of Teachers & Brandii Grace*, 358 NLRB 130, 141-42 (Mar. 2012), *John Cuneo*, 298 NLRB 856 (June 1990); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (Jan. 1993), *aff'd in relevant part*, 39 F.3d 1312 (5th Cir. 1994) (NLRA); *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1021 (11th Cir. 2001) (Title VII); *Miller v. AT&T Corp.*, 250 F.3d 820, 837 (4th Cir. 2001) (Family and Medical Leave Act); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 378 (11th Cir. 1995) (Title VII and the Equal Pay Act).

ALJ Lewis applied the after-acquired evidence principle in *Sec'y of Labor on behalf of McKinsey v. Pretty Good Sand Co., Inc*, 36 FMSHRC 2843, 2870 (Nov. 2014). Although the operator failed to mount an effective affirmative defense, the ALJ found that an independent ground existed for dismissal. Prior threats made by the miner were of such a nature as to render the complainant unfit for employment. Therefore, the ALJ limited backpay to the date the operator learned of the threats.[15] *Id*. The critical point is that the complainant did not have any right to damages or, in this case, to reinstatement for a period after new evidence demonstrated that the operator would have discharged him legitimately for proscribed conduct. As the Supreme Court said in *McKennon*, waiting months for an inevitable termination of an undeserved benefit is inequitable and unfair. That is especially true when, as here, the operator may not recapture the undeserved payments.[16]

[15] The majority asserts that *Pretty Good Sand* is not relevant because it was decided after a hearing. Slip op. at 8 n.11. Of course, that is a convincing argument for why the ALJ should have held a hearing in this case. The decision shows a complainant is not entitled to continued pay or backpay past the point of acquisition of the new evidence of misconduct. If "after-acquired" evidence cannot be used before a final hearing, the principle becomes meaningless because at that point the operator will have paid the complainant undeserved monies but will not have any opportunity for recapture. The *raison d'etre* of after-acquired evidence is that the complainant is not entitled to compensation after acquisition of evidence justifying the termination.

[16] For some reason, my colleagues stray into an erroneous irrelevancy by writing that temporary reinstatement is not a remedy for violation of the Mine Act. The Mine Act prohibits discrimination, and discrimination is a violation of the Mine Act. Temporary reinstatement is a remedy for a nonfrivolous assertion of a violation of the Mine Act rather than a proven violation. Separately, my colleagues show sympathy to Saldivar by deliberately downplaying the blatant lying on his employment application. They write "Saldivar might have been less than forthcoming on his employment application about the full extent of his criminal history." Slip op. at 7 n.9.

III.

GRIMES WAS ENTITLED TO BE HEARD ON ITS MOTIONS TO TOLL.

Due process requires a hearing at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319 (1976). Most often, litigants think of a hearing as an appearance before a tribunal during which witnesses testify and introduce evidence. However, at its most fundamental level, *Mathews* means a right to be "heard" – a right for an impartial tribunal to listen to a party's arguments and reach a reasoned and impartial decision.

In this case, the ALJ did not merely fail to hold an evidentiary hearing; the ALJ struck the entire "fact" section of Grimes' argument from the record and further struck from the record Grimes' argument based on those facts. She ordered:

> It is **ORDERED** that Section III [the facts section] of Respondent's Motion to Toll, as well as any other portion of the motion or other document filed that recites or relies upon those "facts," be **STRIKEN** from the record.

Order at 4 (Jan. 7, 2022). Thus, the ALJ did not even consider Grimes' argument that forms of post-reinstatement misconduct, such as theft, may warrant tolling. The ALJ found that only a lack of work for the reinstated individual warrants tolling. She did not listen to – that is, hear Grimes' position.

If Chair Jordan and Commissioner Baker mean to imply that only the absence of available work can cause tolling so that crimes, unsafe acts, threats of violence, refusal to perform work, and other such actions do not permit tolling, then the ALJ did not need to hear Grimes' argument because no crimes or safety violations could warrant tolling. As seen above, however, such a ruling would be repugnant to the purposes of the Mine Act and employment law generally in the face of after-acquired evidence of misconduct and post-reinstatement misconduct.

Crimes by an employee constitute a legitimate reason for discharge unless a claimant proves discrimination. Moreover, even if, as Commissioner Rajkovich would require, a pre-existing "policy" was necessary to discharge an employee for criminality, how could Grimes have "proved" that fact without an adversarial, evidentiary hearing? It did "prove" its policy to discharge lying job applicants. Indeed, as seen above, the Commission has held that the Secretary is entitled to a hearing. *Cobra Natural Res.,* 35 FMSHRC at 397. Not only was Grimes not given a chance to provide such proof, but as set forth above, the ALJ refused even to hear the argument or permit the attachment of evidence to its motion. It is impossible to discern how Grimes failed to "prove" its position when the ALJ neither listened to Grimes' position nor permitted the admission of any evidence regarding its position to the record.

Finally, we need only point to *W.G. Yates & Sons, supra*, to show that the Commission has unanimously recognized entitlement to a hearing in tolling cases. 2023 WL 5170092 at 4 n.4. If the Secretary must have a legal right to challenge tolling based upon undisputed facts, the operator must have a right to present facts, even though undisputed, warranting tolling.

The majority does not have principled grounds for finding Grimes was not entitled to even the possibility of tolling Saldivar's reinstatement. They cannot explain why. They do not permit any disruption in the reinstatement of a confessed criminal.

In *Secretary on behalf of Robert Gatlin v. KenAmerican Resources, Inc.* 31 FMSHRC 1050, 1054 (Oct. 2009), the Commission found that "the Judge abused her discretion when she determined that a temporary reinstatement order requires a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order." The Commission violates its own well-stated principle without hearing Grimes' argument.

IV.

THE MOTION TO ENFORCE WAS IMPROPERLY GRANTED.

A. Facts Related to the Motion to Enforce

On May 18, 2021, the ALJ issued an Order requiring Grimes to reinstate Saldivar temporarily. After that, the parties negotiated a "settlement agreement" providing economic reinstatement for Saldivar instead of actual temporary reinstatement. On May 27, 2021, the Secretary and Grimes filed a "Settlement Agreement and Joint Motion for Temporary Economic Reinstatement."[17] In the attached proposed Decision Approving Settlement, the parties mutually agreed upon a settlement that stated:

> Respondent shall economically reinstate Mr. Saldivar to his position as a miner starting May 19, 2021, effective as of the entry of this Decision and Order. Respondent shall pay the difference between Mr. Saldivar's earnings at his present place of employment Wayne J. Sand and Gravel and Grimes Rock Inc. based on the average amount of hours worked at each place of employment at his regular rate of pay for the first forty hours and at the overtime rate for any hours over forty. Based on these calculations, Respondent shall pay $2,136.78 per pay period (bi-weekly, every 2 weeks) subject to normal deductions. Mr. Saldivar will not report for duty with Grimes Rock Inc. during the temporary economic reinstatement period.

On May 28, 2021, the ALJ entered an "Order Approving Settlement Order of Temporary Economic Reinstatement." The Order stated,

> I accept the representations and modifications of the Secretary as set forth in the motion. I have considered the documentation

[17] As the representative of Saldivar, the Secretary negotiated the settlement agreement with Grimes.

> submitted, find that the terms are reasonable, and conclude that the proposed settlement is appropriate under the Mine Act. The joint motion for temporary economic reinstatement is hereby **GRANTED**. The Respondent is **ORDERED** to pay Mr. Saldivar $2,134.78 per pay period (every two weeks), subject to normal deductions, and to otherwise comply with the terms of the settlement agreement.

Order at 2 (May 2021).

The Secretary and Grimes submitted a proposed economic reinstatement Order to the ALJ under which payments would cease if Saldivar obtained employment at an equal or higher pay rate. However, the settlement agreement between the parties did not contain such a provision. The ALJ's Order accepted the terms of the settlement agreement and did not take any note of or provide for that condition in the parties' Proposed Decision. Thus, the ALJ's Order followed the terms of the settlement agreement rather than the proposed order.

After Saldivar's release from prison in November 2021, understandably, Saldivar lost his then-current employment. Grimes continued to obey the settlement agreement and Order to make payments of 2,134.78 per pay period to Saldivar. The Secretary did not seek to amend the Economic Temporary Reinstatement Order entered at Grimes' and the Secretary's mutual request. Instead, *months* after Saldivar lost his active employment, the Secretary filed a "motion to enforce" in which the Secretary argued that, although Grimes had been paying the amount explicitly required by the ALJ's Order, that Order "implicitly" required additional payments from Grimes.[18]

The ALJ found no discrimination; she granted the motion to enforce on the same day. Subsequently, Grimes filed a Petition for Discretionary Review with the Commission, challenging the ALJ's decision on the motion to enforce. The Commission granted the Petition. However, the Secretary did not wait for the Commission to act on Grimes' Petition.

On August 15, 2022, the Secretary issued a section 104(a) citation to Grimes for failing to make the required payments, violating the Judge's Order to enforce. 30 U.S.C. § 814(a). The suddenly aroused Secretary waited only two days. On August 17, 2022, MSHA issued another 104(a) citation against Grimes. Subsequently, on August 22, 2022, MSHA issued a 104(b) Order. At that time, MSHA informed Grimes that it faced penalties of $10,000 a day and/or closure of the mine. MSHA, having applied the heavy hand of government coercion from which

[18] The Secretary bases much of her argument on allegations related to California contract law and particularly on a complicated and irrelevant California family court decision between quarreling divorcees. Grimes continued to obey the ALJ's Order and parties' mutual agreement. The Secretary failed for months to take the appropriate action by filing a motion to modify the original Order. Any economic injuries suffered by Saldivar between November and June are attributable to the Secretary's lassitude rather than to Grimes adherence to the ALJ's Order.

there could be no redress, Grimes capitulated and paid the sum required by the decision on enforcement.[19]

B. Discussion

The majority decision does not cite any case for accepting the Secretary's argument that a clear, precise, and explicit settlement agreement between the parties implemented by an ALJ Order contains implicit or unwritten obligations. Moreover, Commission precedent demonstrates that any such implicit agreement would only flow one way. *Sec'y of Labor v. North Fork Coal Corp*., 33 FMSHRC 589, 594 (Mar. 2011). There, the Commission enforced the wording of the settlement agreement and did not find any implicit agreement that the settlement should be enforced only to make the complainant whole. "Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties." *Id*. at 593.

The Commission refused an additional offset for the employer. *Id*. at 595. In this case, the Commission finds it would not enforce the negotiated agreement and subsequent order embodying the agreement.[20]

Here, the Commission holds that bitter medicine for the operator is a sweet relief for the complainant. It accords no weight to the fact that an explicit settlement with potential benefits for both sides was negotiated between the parties and then embodied in an "Order" by the Judge. The agreement of the parties and the complementary Order by the ALJ are irrelevant to the majority's decision. Again, the Opinion does not cite any authority for changing an explicit agreement of the parties based upon a finding of what the parties must have implicitly decided. The Opinion finds that the Order did not need to be modified to require a change of terms. Under the Opinion's reasoning, a complainant could negotiate an agreement with an offset to

[19] On August 17, 2022, Grimes filed a motion to stay the ALJ's enforcement decision. The Commission meaninglessly denied the stay on August 30, 2022, days after Grimes had fallen to government might.

[20] In economic reinstatement, the discharged employee agrees to forego actual reinstatement provided the employee receives satisfactory economic reinstatement. Such agreements vary because they are negotiated agreements in which each party seeks to obtain benefits from avoiding actual reinstatement. We easily understand the benefits each party seeks. The discharged employee gets money without any obligation to work. The employer avoids bringing a discharged employee back into the workforce. The parties may contemplate that the employee may get another job thereby doubling his income or, conversely the employee may lose existing alternative employment reducing total income. The strength of the of the parties' desires for a return to employment determines the content of an economic reinstatement agreement. The Commission decision today turns this good faith negotiation in which each party may make concessions into a secret "heads I win, tails you lose" negotiation for the discharged employee.

avoid returning to the job. Then, immediately after obtaining the Judge's Order, the employee could quit the offsetting job and be entitled to full pay from the operator.

The Mine Act neither recognizes nor endorses economic reinstatement instead of actual reinstatement. Economic reinstatement is a non-statutory procedure through which the Commission permits the parties to substitute a private agreement for the prescribed statutory right to actual reinstatement. Both had competent counsel. However, that private, negotiated agreement becomes an enforceable Order by dint of the ALJ's Order. Thus, a complainant does not need to go to state court to enforce the agreement between the parties.

Because such agreements are non-statutory, the ALJ does not help negotiate a mutually acceptable agreement. The Mine Act does not authorize Commission Judges to substitute economic reinstatement for actual reinstatement. For that reason, such agreements, as in this case, are often styled as a "settlement" of an Order to Temporarily Reinstate.

The Commission has held:

> The obligation to comply with the terms of that order as written, with no offset, will continue unless and until the parties negotiate a new agreement and it is entered as a superceding [sic] order by the judge, or either party invokes the judge's continuing jurisdiction and the judge modifies or rescinds the existing order. In the event a motion is submitted to modify or rescind the previously entered consent order, the judge is required to examine all the relevant circumstances, in accordance with section 105(c) of the Mine Act, and not just whether the miner or operator still consents to it.

North Fork, 33 FMSHRC at 595.

In short, the Commission endorses the loss of Grimes's position on two critical matters without a hearing or any motion before the Commission to modify an explicit Order based upon mutual agreement of the parties. This decision is a profound setback for due process before the Commission.

V.

THE SECRETARY'S MOTION FOR CONSEQUENTIAL DAMAGES IS UNTIMELY AND BEYOND THE COMMISSION'S JURISDICTION.

A. Relevant Facts

The Mine Act grants the Commission specific jurisdiction. The Commission does not have jurisdiction over a motion filed directly with it over unlitigated claims. Further, the Secretary's attempt to obtain consequential damages from the Commission is untimely. Finally, the Secretary has not even attempted to show good cause or any justification for seeking extraordinary relief through a motion to file a new claim directly before the Commission. The Opinion does not even consider the issues.

Upon filing the complaint on behalf of Saldivar, the Secretary became his legal representative. Immediately, the Secretary negotiated and submitted a written settlement agreement on Saldivar's behalf calling for Grimes to pay Saldivar a specific dollar amount. The ALJ subsequently entered an Order confirming the requirement for Grimes to pay Saldivar $2,134.78 per pay period. As discussed above, the Secretary asserts Grimes should have known the agreement and subsequent ALJ Order did not mean what they said because the law imposed an obligation upon Grimes to pay more if Saldivar lost his job regardless of a binding Order agreed upon by the parties with the assistance of counsel.

When Saldivar left jail in November 2021, Grimes continued to comply with its mutually agreed upon settlement and ALJ's Order's explicit terms—a position logical to all but the Secretary and Commission. Moreover, despite being Saldivar's representative, the Secretary took no action.

The Secretary waited five months and then filed a motion to change the settlement agreement and the Order by claiming an implied obligation. Given that the Secretary's Solicitor served as counsel for Saldivar, if the Secretary thought Saldivar was entitled to larger payments, she immediately should have filed a motion to amend the ALJ's Order. Instead, the Solicitor sat on her hands, allowing his damages to accrue. Only now, after completing the case before the ALJ, claims Grimes should pay monetary damages.

The Secretary now asserts any harm is Grimes' fault because it should have known the Order did not mean what it said but carried an implicit obligation to increase payments. In fact, of course, if Saldivar suffered consequential harm due to the Secretary's inaction, it is due to the Secretary's failure as his representative.[21]

B. The Commission does not have jurisdiction to hear the Secretary's Untimely Motion.

The Mine Act grants the Commission specific jurisdiction. Section 113(d)(2)(A)(i) states:

> Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

[21] The Secretary fails to note that Saldivar spent at least 140 days in jail and, consequently, missed at least ten pay periods of $2,136.78—that is, a total of $21,367.80. Plus, he missed at least six pay periods from the other employer during the initial incarceration at approximately $1,000 a pay period. Therefore, Saldivar's own criminal conduct caused him to lose three times as much income as the amount "lost" by Grimes' adherence to the ALJ's Order.

30 U.S.C. § 823(d)(2)(A)(i).

Section 113(d)(2)(A)(ii) provides:

> Petitions for discretionary review shall be filed only upon one or more of the following grounds:
>
> > (I) A finding or conclusion of material fact is not supported by substantial evidence.
> > (II) A necessary legal conclusion is erroneous.
> > (III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.
> > (IV) A substantial question of law, policy or discretion is involved.
> > (V) A prejudicial error of procedure was committed.

30 U.S.C. § 823(d)(2)(A)(ii).

The Commission is an institution of appellate review. Ignoring the jurisdictional prerequisite for Commission jurisdiction, the Secretary does not seek to obtain a review of an ALJ decision but instead asserts a new claim not raised before the ALJ. Indeed, the Secretary does not cite any of the jurisdictional prerequisites of the Mine Act for Commission jurisdiction. The Secretary did not file a timely Petition for Discretionary Review because the ALJ had given Saldivar everything the Secretary sought in granting the Motion to Enforce. The Secretary does not press an assignment of error by the ALJ. She filed a new claim against Grimes directly with the Commission.

Having failed to seek a modification of the Judge's temporary reinstatement order and waiting six months to take any enforcement action, the Secretary failed to make any claim for consequential damages. There is no decision of fact or law by the ALJ for the Commission to review.

Finally, the Secretary does not attempt to provide any excuse, let alone good cause, for the failure to present any issue of other damages to the ALJ. Saldivar forfeited any claim for damages not pressed before the ALJ.

In summary, the Secretary failed to file a Petition for Discretionary Review as required by the Mine Act, failed to identify any of the jurisdictional grounds in section 113(d)(2)(A)(ii), failed to identify any assignment of error, failed to present the issue to the ALJ, and failed to provide any reasonable cause for such failures. Sometimes, parties must live with the action or inaction of their counsel. This case is one of those times.

VI.

CONCLUSION

In summary, the majority misrepresents the issues presented. It presents a willful and unexplained refusal to accept that Saldivar's crimes may have consequences. It does not establish any principled guidance for ALJs to apply in future cases. No legal principle may be gleaned from the majority's decision, especially considering Commissioner Rajkovich's separate comment. The majority does not rule whether post-reinstatement crimes or theft may warrant discipline or tolling. It finds only, and without explanation, that Saldivar's crimes could not toll temporary reinstatement in this case.

I respectfully dissent.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. Warrior Met Coal Mining LLC, Respondent.	INTERFERENCE PROCEEDINGS Docket No. SE 2023-0146 Mine: No. 4 Mine Mine ID No. 01-01247 Docket No. SE 2023-0147 Mine: No. 7 Mine Mine ID No. 01-01401

ORDER DENYING THE ACTING SECRETARY'S MOTION FOR SUMMARY DECISION, DENYING THE ACTING SECRETARY'S MOTION TO STRIKE WARRIOR MET'S AMENDED ANSWER, AND GRANTING WARRIOR MET'S MOTION FOR LEAVE TO FILE AMENDED ANSWER

Before: Judge Thomas P. McCarthy

These dockets are before the undersigned upon the Secretary of Labor's interference complaint filed against Respondent Warrior Met Coal Mining, LLC, for alleged violations of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1).

I. Procedural History

Dockets SE 2023-0146 and SE 2023-0147 were assigned to the undersigned on April 12, 2023. Prior thereto, the undersigned disposed of numerous other dockets that pre-dated the assignment of the instant dockets and that arose during an economic strike. In the interest of providing a comprehensive record, a truncated recitation of the procedural history for the prior dockets is included below.

a. Prior Dockets

In the prior dockets, the Secretary issued five 104(a) citations and thirteen penalty assessments to Warrior Met Coal Mining LLC ("Respondent"), each alleging a violation under section 103(f) of the Mine Act. The collective citations alleged that Respondent violated the Mine Act on multiple occasions by denying "miners' representatives" access to the No. 4 and No. 7 Mines. Respondent denied these allegations and asserted that the individuals claiming to be miners' representatives were not properly designated by an individual or individuals actively working in a coal or other mine. *See* 30 U.S.C. § 802(g); *see also Cyprus Empire Corp.*, 15 FMSHRC 10 (Jan. 25, 1993).

On November 8, 2022, Respondent timely filed two documents titled "Notice of Contest and Unopposed Request for Expedited Hearing." The first of these filings concerned Docket Nos. SE 2023-0028 and -0029, which both involved alleged violations at the No. 7 Mine. The second filing concerned Docket Nos. SE 2023-0030, -0031, and -0032, which related to alleged violations at the No. 4 Mine. On December 2, 2022, the Secretary of Labor filed Answers to each Notice of Contest.[1]

Following these initial submissions, the parties engaged in protracted parleys involving complex discovery that was at times directly overseen by this administrative tribunal. Both parties engaged in written discovery and Respondent conducted depositions of an MSHA district manager, assistant district manager, and coal field office supervisor. On January 11, 2023, the Acting Secretary submitted a Motion in Limine to Exclude Irrelevant Evidence and Testimony. On January 27, 2023, Respondent filed a Motion for Temporary Relief requesting that the undersigned

> consolidate all Petitions for Civil Assessment of Civil Penalties against [Respondent] [Dockets Nos. SE 2023-0041, SE 2023-0042, SE 2023-0051, SE 2023-0053, SE 2023-0056, and SE 2023-0057] and prohibit any future Petitions for Civil Assessment of Civil Penalties against [Respondent] related to the Enforcement Actions or any similar circumstances pending the resolution of this matter.

Resp't App. for Temp. Relief at 3. Respondent then filed a Motion to Compel on January 31, 2023, seeking to require the Acting Secretary to "fully respond to [Respondent's] Interrogatories and Requests for Production of Documents, and to provide further testimony." Resp't Mot. to Compel at 1.

On February 2, 2023, my office received 1) Respondent's Opposition to the Secretary's Motion in Limine, 2) Respondent's Motion to Postpone and Reschedule Hearing and Related Prehearing Deadlines, and 3) the Secretary's Opposition to Respondent's Application for

[1] The Secretary and, after March 11, 2023, the Acting Secretary, submitted Civil Penalty Petitions on the following dates:

- January 6, 2023, for SE 2023-0041 and -0042;
- January 17, 2023, for SE 2023-0056 and -0057;
- January 19, 2023, for SE 2023-0051 and -0053;
- February 21, 2023, for SE 2023-0067 and -0068;
- March 2, 2023, for SE 2023-0089;
- March 21, 2023, for SE 2023-0098, -0099, and -0101; and
- April 3, 2023, for SE 2023-0118.

Respondent submitted Answers to eight of the thirteen Civil Penalty Petitions, which were received on:

- February 6, 2023, for SE 2023-0041 and -0042;
- February 15, 2023, for SE 2023-0051, -0053, -0056, and -0057; and
- March 23, 2023, for SE 2023-0067 and -0068.

Temporary Relief. On February 7, 2023, the undersigned held a conference call with the parties to discuss outstanding motions, including Respondent's Motion to Compel and the Acting Secretary's Motion in Limine. During the conference call, the parties were encouraged to narrow and work toward resolution of outstanding discovery issues. In addition, the Secretary was ordered to provide a privilege log consistent with Fed. R. Civ. Proc. 26(b)(5)(A)(ii). Further, the undersigned agreed to review disputed documents *in camera* if the parties were unable to resolve redaction or privilege issues through a privilege log or protective order.

On February 13, 2023, the undersigned issued an Order Denying Respondent's Application for Temporary Relief.[2] On February 15, 2023, the Secretary submitted a Response to Respondent's Motion to Compel. On February 21, 2023, following receipt of the Secretary's Response, the undersigned held a follow-up conference call to further discuss all discovery issues that were outstanding, including the discoverability of certain topics, the production of documents by MSHA to Respondent, the submission of other documents for *in camera* review, and further depositions of MSHA and United Mine Workers of America ("UMWA") representatives.[3] At the conclusion of this conference call, Respondent was given until March 3, 2023 to file a Reply to the then Acting Secretary's Opposition, and the Acting Secretary was given until March 10, 2023 to file a Sur-

[2] In its Application for Temporary Relief, Respondent argued that the miners' representatives at issue in this case were not properly designated by striking employees, who do not meet the Commission's definition of "miners" under *Cyprus Empire Corp*., 15 FMSHRC 10 (Jan. 1993). Respondent averred that the Secretary issued a new civil penalty each time Respondent declined entry to the person designated as a miners' representative by the striking employees. For relief, Respondent requested that the undersigned consolidate all Petitions for Assessment of Civil Penalties against Respondent. At the time the Application for Temporary Relief was filed, the applicable Dockets Nos. were SE 2023-0041, SE 2023-0042, SE 2023-0051, SE 2023-0053, SE 2023-0056, and SE 2023-0057. Respondent also requested that the undersigned prohibit any future Civil Penalty Assessments against Respondent relating to these underlying matters. *See* Resp't App. for Temp. Relief at 3.

The undersigned denied Warrior Met's application for temporary relief from the issuance of further 104(a) citations, for three reasons. First, the Mine Act only allows temporary relief to be granted from "order[s]," not from citations. *See* 30 U.S.C. § 815(b)(2). Second, the relevant provision of the Mine Act explicitly precludes the Commission from granting temporary relief from "a citation issued under subsection (a) . . . of section 104." *Id.*; *see also* 29 C.F.R. § 2700.46(a). Finally, the Commission does not have the authority to stop the Secretary from proposing penalties. *See generally, Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 724 (D.C. Cir. 2019).

[3] With regard to Respondent's discovery requests seeking the identity of striking miners who designated the UWMA representatives, the undersigned found that MSHA was not obligated to disclose the names of the designating miners. *Wolf Run Mining*, 446 F. Supp. 651, 655-56 (N.N. W. Va. 2006). Accordingly, with regard to that issue, the undersigned granted the Secretary's Motion in Limine and denied Warrior Met's Motion to Compel. Given the parties' representation that they were working towards a settlement of the above matters, the undersigned found it unnecessary to definitively rule on other outstanding discovery or evidentiary issues at that time.

Reply. Respondent timely filed a Reply on March 10, 2023, and the Acting Secretary submitted a Sur-Reply on March 12, 2023.

On March 26, 2023, the Acting Secretary filed a Motion to Dismiss all of the five Contest Proceedings and five of the thirteen Civil Penalty Proceedings in the exercise of her prosecutorial discretion. *See RBK Construction, Inc.*, 15 FMSHRC 2099, (October 1993). My office received a first amended version of this Motion to Dismiss on April 2, 2023, which was updated to include all thirteen of the pertinent Civil Penalty Dockets. On April 10, 2023, my office received a second amended version of the Acting Secretary's Motion to Dismiss ("Amended Motion to Dismiss"). That same day, the Acting Secretary filed a section 105(c)(1) interference complaint with two counts. Count One alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4 and No. 7 mines by refusing to allow properly designated miners' representatives to accompany MSHA on inspections, thereby discouraging miners and their representatives from exercising their rights under section 103(f) and chilling their participation in MSHA inspections. Count Two alleged that Respondent interfered with the exercise of statutory rights by miners and miners' representatives at the No. 4 and No. 7 mines by filing a motion to hold the UMWA and individual picketers in contempt of Alabama Circuit Court for alleged violations of the Court's latest injunction, including their attempts to exercise section 103(f) rights, thereby chilling miner and miners' representatives exercise of those rights.

Also on April 10, 2023, Respondent filed a Motion to Consolidate the collective Contest and Civil Penalty Proceedings with the above-captioned Interference Complaints.

On April 18, 2023, the undersigned held a conference call with the parties to ascertain their respective positions on the pending motion to consolidate. During that call, the undersigned represented that he was inclined to grant the Acting Secretary's Motion to Dismiss, but reserved decision on this matter until Respondent had an opportunity to file a written response to this motion. On April 20, 2023, the Acting Secretary filed an Opposition to Respondent's Motion to Consolidate, and Respondent filed a Response to the Acting Secretary's Amended Motion to Dismiss.

On April 28, 2023, the undersigned issued a written order granting the Acting Secretary's Amended Motion to Dismiss and Denying Warrior Met's Motion to Consolidate the collective Contest and Civil Penalty Proceedings with these interference dockets.

b. Active Interference Dockets

The Acting Secretary filed an initial Interference Complaint on April 10, 2023, and, as previously stated, this matter was assigned to the undersigned on April 12, 2023. On April 14, 2023, the Acting Secretary filed an Amended Interference Complaint in Docket Nos. SE 2023-0146 and -0147, alleging that Respondent chilled miner and miners' representatives' exercise of section 103(f) rights when it filed a Motion for Contempt in Alabama Circuit Court in response to alleged continued violations of the Circuit Court's injunction. In this Amended Complaint, the Acting Secretary alleges that Respondent refused to allow designated miners' representatives to accompany MSHA on inspections on November 4, 2022; November 8–9, 2022; November 14–17, 2022; November 22–23, 2022; November 29, 2022; December 1–2, 2022; December 5–6, 2022;

December 8, 2022; December 15, 2022; January 11–13, 2023; January 20, 2023; January 26–27, 2023; January 30, 2023; February 22–23, 2023; March 10, 2023; and March 13, 2023. *See* Sec'y Am. Compl., ¶¶ 9–44. The Acting Secretary dropped Count One of the original interference complaint and alleged that in January 2023, the UMWA, Floyd Conley, Eddie Pinegar, and Keri Bester filed section 105(c) complaints with MSHA alleging interference with statutory rights. The sole remaining count remained the same as Count Two of the original complaint alleging section 105(c)(1) interference by pursuit of state court contempt charges for the exercise of statutory rights under the Mine Act, including section 103(f) walkaround rights.

On May 15, 2023, Respondent filed an Answer to the Amended Interference Complaint. On May 24, 2023, the Secretary filed a Motion for Default Judgement, which was withdrawn on May 25, 2023.

Thereafter, on August 31, 2023, the Secretary filed a Motion for Summary Decision. On September 5, 2023, Respondent filed an Amended Answer to the Amended Interference Complaint. On September 6, 2023, the undersigned conducted a conference call with the parties and discussed the arguments set forth in the Secretary's Motion for Summary Decision and in Respondent's Amended Answer.[4] Near the conclusion of the call, the undersigned denied the Secretary's motion for summary decision, as follows:

> [At appx. 3:53 to 4:23] "With regard to the motion for summary decision, I am denying that motion. Under Section [105(c)(1)], the language of the Act says that 'because of the exercise of any statutory right.' And, I find a genuine issue of law as to whether, in fact, there is any protected activity in this case. So, that motion is denied."[5]

Following the September 6, 2023 conference call, the undersigned received the Secretary's Motion to Strike Respondent's Amended Answer and Respondent's Initial Opposition to the Secretary's Motion for Summary Decision. On September 8, 2023, Respondent filed a Motion for Leave to File Amended Answer, which pertains to its answer previously filed on September 5, 2023. On September 10, 2023, the Secretary filed its Opposition to Respondent's Motion to Amend its Answer.

The undersigned is in receipt of a number of other filings from the parties, including 1) Respondent's Motion to Compel, filed September 20, 2023, and the Secretary's Response thereto, filed September 28, 2023; and 2) Respondent's Motion for Phone Status and Hearing on Motions, filed October 4, 2023, and the Secretary's Response in Opposition, filed October 17, 2023. Further, the undersigned is in receipt of two October 16, 2023 filings from the United Mine Workers of America ("UMWA"), including 1) a Motion to Revoke Third Party Witness Subpoenas and Notice

[4] In addition to the previously referenced calls on April 18 and September 6, 2023, the undersigned also conducted a conference call on July 31, 2023 to ascertain the procedural status of the two interference dockets as of that date.

[5] In denying the Secretary's Motion for Summary Decision, the undersigned inadvertently cited Section 105(c)(3) rather than 105(c)(1).

of Deposition, and 2) a Motion to Revoke Third Party Subpoena Duces Tecum. The undersigned will hold a conference call with parties and the UMWA on Tuesday, November 21, 2023, to discuss their respective positions as to the aforementioned filings. A hearing is currently scheduled to commence on December 18, 2023.

II. The Acting Secretary's Motion for Summary Decision

The Secretary argues that the initial pleadings in these matters are sufficient to establish, as a matter of law, that Respondent's actions were violative of the Mine Act's interference provision. *See* 30 U.S.C. § 815(c)(1). More specifically, the Secretary submits, in part:

> The undisputed material facts establish that Warrior interfered with walkaround rights. The principal issue in this case is whether Warrior interfered with miners' rights when it included in its contempt motion explicit reference to section 103(f) rights, which were not a subject of the injunctions that Warrior bases the motion on. Warrior has a right to pursue its state court claims; it has no right to leverage the power and prestige of the courts to condemn—unnecessarily and extraneously—section 103(f) rights. Warrior's actions—filing a motion seeking to hold persons in contempt for attempts to accompany MSHA during inspections—would be viewed by reasonable miners or miners' representatives, under the totality of the circumstances, as tending to interfere with the exercise of walkaround rights.

Sec'y Mot. for Summary Decision at 8.

The Secretary's motion essentially restates its position initially set forth before dismissal of the prior dockets when the Secretary opined, as follows:

> The question in the interference case is not whether striking miners are "miners." It is whether, from the perspective of a reasonable miner, [Respondent's] actions tended to interfere with miners' or miners' representatives' exercise of protected rights, and whether those actions were justified by a legitimate and substantial business interest. *See* 30 U.S.C. 815(c)(1); *Marshall Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 923 F.3d 192, 201-204 (D.C. Cir. 2019). That analysis focuses on any reasonable miner or miners' representative, not on any particular one. *Wilson v. Fed. Mine Safety & Health Rev. Comm'n*, 863 F.3d 876, 882 (D.C. Cir. 2017).

Sec'y Opp'n to Resp't Mot. to Consolidate at 2.

In support of its request for summary decision, the Secretary identifies the following set of "undisputed facts" that are purportedly sufficient to satisfy the Secretary's burden of proof:

1. Warrior and the United Mine Workers of America were engaged in a labor dispute arising from the bargained contract between the parties from April 2021 through March 2023.

2. During the dispute, Warrior filed in the Circuit Court of Tuscaloosa County, Alabama five injunctions seeking to bar the UMWA and other individuals from various actions (including property damage and business interference).
3. During the labor dispute, beginning in October 2022, several UMWA members attempted to exercise section 103(f) rights to accompany MSHA on inspections.
4. Warrior refused to allow those UMWA members to accompany MSHA.
5. These attempts continued through the time Warrior filed a motion for contempt.
6. On December 9, 2022, Warrior filed a motion in the Circuit Court of Tuscaloosa County, Alabama to hold the UMWA and individual picketers in contempt of court for violations of the fifth injunction.
7. The contempt motion asserts various reasons for holding individuals in contempt, including trespass and damage to equipment, placing jack rocks in the road, holding a demonstration, and intimidation of other workers.
8. None of these are the basis for the Secretary's interference complaint.
9. The motion then concludes with a final rationale for contempt:
   Since October 26, 2022 and on numerous occasions continuing to the present at both No. 4 Mine and No. 7 Mine, UMWA agents and employees, usually two at a time, have arrived at various entrance gates and informed Warrior managers that they are there to conduct an inspection of the Warrior mine. They claim to be exercising their rights as miners' representatives under Section 103(f) of the Mine Act, which says a representative designated by two or more miners shall be given an opportunity to accompany the [Mine Safety and Health Administration] inspector during a physical inspection of the mine. These UMWA agents claim to have been designated by Warrior miners, but will not provide the names or contact information of the alleged designators (i.e., the Warrior miners who chose them). Warrior has responded professionally and consistently that they may not enter the mine property. The Federal Mine Safety and Health Review Commission (and its ALJ[s]) is the administrative judicial body charged with the interpretation of the Mine Act and it has previously ruled that striking miners are not "miners[]" under the Mine Act and therefore striking miners cannot designate representatives to accompany MSHA inspectors during MSHA's inspections of the mine. Therefore, the UMWA agents are not at the mine lawfully in these circumstances and are in direct violation of the Fifth Injunction when they park at the mine entrance gate and get out of […] their cars to confront with mine management with these unlawful demands.
10. The contempt motion is a public filing.
11. The day after it was filed, screenshots were shared on Twitter.
12. The state court has yet to rule on that motion as of the date of this filing.
13. The UMWA and two individuals subsequently filed section 105(c) discrimination complaints with MSHA alleging that Warrior violated section 105(c) when it refused to allow them to accompany MSHA on inspections.
14. Based on the complaint[s], MSHA conducted an investigation and gathered publicly available information regarding the parties' relationship, activities,

court filings and social media posts in order to determine if any section 105(c) rights were affected.

15. MSHA determined that the specific clause in the contempt motion referring to section 103(f) rights constituted interference under section 105(c).
16. MSHA determined that the public nature of the contempt motion filing and the fact that it was shared on social media created an atmosphere that suggested miners could be punished in state court for attempting to exercise their rights.
17. Warrior has a history of violations of the Mine Act over the 15 months preceding the alleged section 105(c) violation at issue in this case.
18. Warrior is a large operator; in 2022, it produced 6.3 million tons of coal.

Sec'y Mot. for Summary Decision at 3-5.

The Secretary argues that the factual assertions delineated above establish that Respondent's actions "reasonably tended to discourage miners from engaging in protected activities," and tended to interfere with the exercise of statutory rights. *See Sec'y of Lab. ex rel. Poddey v. Tanglewood Energy, Inc*., 18 FMSHRC 1315, 1321 (Aug. 1996); *see also Marshall Cnty. Coal Co.*, 923 F.3d at 202 (D.C. Cir. 2019) (quoting *Moses v. Whitley Dev. Corp*., 4 FMSHRC 1475, 1479 n.8 (1982), aff'd, 770 F.2d 168 (6th Cir. 1985)(holding that "[w]hether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.").

In its Opposition to the Secretary's Motion for Summary Decision, Respondent argues as follows:

> The Secretary relies almost exclusively on her own unverified allegations found in the Secretary's Amended Complaint – many of which were specifically denied by Warrior in its Answer and subsequent Amended Answer. For example, in paragraph 3 of the Secretary's MSD, she states: "During the labor dispute, beginning in October 2022, several UMWA members attempted to exercise section 103(f) rights to accompany MSHA on inspections." Of course, contrary to the Secretary's unsupported representation to the Court, this paragraph is not "undisputed." Indeed, a central question in this case is whether the UMWA members—who undisputedly were not lawfully designated as miners' representatives by "miners" as defined in the Mine Act—were in fact "exercis[ing] section 103(f) rights to accompany MSHA on inspections." The Commission's controlling case law clearly answers that question in the negative. *See Cyprus Empire Corp*., 15 FMSHRC 10 (Jan. 1993) ("The Mine Act's definition of 'miner' is not grounded in the rights of employees under the [National Labor Relations Act] or under private collective bargaining agreements. We perceive no statutory warrant in the Mine Act for treating an operator's striking employees as 'miners.'"); *see also Sherwin Alumina*, 37 FMSHRC 2153 (Sept. 2015) (ALJ McCarthy) ("*Cypress Empire* controls in the context of an economic strike."). Moreover, the Secretary fails to adequately explain why the United States Supreme Court decision in *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983) does not prevent the ALJ from deciding the issues presented in this case while Warrior's Fourth Motion for

> Contempt remains pending before the Circuit Court for Tuscaloosa County, Alabama.

Warrior Opp. to Mot. for Summary Decision at 3-4. Respondent further contends that:

> It is well-established that Rule 56(c)(1)(A) does not permit a party to rely on the pleadings to establish a fact. *Middlegate Dev., LLP v. Beede*, Case NO. 10-0565-WS-C, 2011 U.S. Dist. LEXIS 88327 *43-44 (S.D. Ala. Aug. 9, 2011) ("[H]owever, the Beedes' only citation for the fact is to "Beede Answer and Counterclaim." That is not sufficient to satisfy the Beedes' threshold burden under Rule 56 of the Federal Rules of Civil Procedure. As summary judgment movants, the Beedes must support their assertions of undisputed fact by reference not to pleadings, but to specific materials in the record."); *Keever v. First Am. Title Ins. Co.*, Case No. 4:13-cv-00246-HLM, 2014 U.S. Dist. LEXIS 186782, *6-7 (N.D. Ga. May 21, 2014), *aff'd*, 605 App'x 953 (11th Cir. 2015) (holding that plaintiff could not cite only unsubstantiated allegations in the complaint in support of a summary judgment motion). The Secretary's failure to provide actual evidence in support of a Motion for Summary Decision is alone grounds for denial of that Motion.

Warrior Opp. to Mot. for Summary Decision at 3, n. 2.

The legal standards governing disposition of a motion for summary decision within Commission proceedings are relatively straightforward. Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, and affidavits, shows: 1) that there is no genuine issue as to any material fact; and 2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) ("[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law."). The Commission has long held that:

> Summary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard. Under our rules, a party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law.

Missouri Gravel Co., 3 FMSHRC 2470, 2471 (Nov. 1981) (footnote omitted). It "is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).[6]

[6] Summary judgment is proper only if there is no reasonably contestable issues of fact that are potentially outcome determinative. *See e.g., Wallace v. SMC Pneumatics, Inc*., 103 F.3d (continued…)

A motion shall be accompanied by a memorandum of points and authorities and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue, and be supported by reference to accompanying affidavits or other verified documents. 29 C.F.R. § 2700.67(c). An opposition shall include a memorandum of points and authorities and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact supported by reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered for the moving party. 29 C.F.R. § 2700.67(d).

When considering a motion for summary decision, the judge must draw all "justifiable inferences" from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision "upon proper showings of the lack of a genuine, triable issue of material fact." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); see also *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987-88 (Dec. 2011) (reiterating the Commission's summary decision rules). In reviewing a record on summary decision, a judge must evaluate the evidence in the light most favorable to the party opposing the motion. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); see also *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Here, the Secretary attempts to dictate a set of "undisputed facts" alleged to support her request for summary decision. 'Undisputed Fact 3' avers that "During the labor dispute, beginning in October 2022, several UMWA members attempted to exercise section 103(f) rights to accompany MSHA on inspections." Sec'y Mot. for Summary Decision at 3. During disposition of the prior dockets, and throughout the course of these subsequent interference proceedings, Respondent has opposed the contention that UMWA members' repeated efforts to accompany MSHA on routine inspections constituted protected attempts to exercise section 103(f) walkaround rights. *See* Sec'y Mot. for Summary Decision at 3. Indeed, Respondent contends that "a central question in this case is whether the UMWA members—who undisputedly were not lawfully designated as miners' representatives by 'miners' as defined in the Mine Act—were in fact 'exercis[ing] section 103(f) rights to accompany MSHA on inspections.'" Warrior Opp. to Mot. for Summary Decision at 3-4. Whether the UMWA members were properly designated and thus empowered to exercise section 103(f) rights thus presents a genuine issue of material fact that

[6] (…continued)
1394, 1396 (7th Cir. 1997). This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). Under that standard, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986), citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480 (1943) and *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

might affect the Secretary's ability to carry her ultimate burden to establish that Respondent interfered with the exercise of the statutory rights of any miner or miners' representative because of the exercise by such miner or representative of miners, on behalf of himself or others, of any statutory right afforded by the Act. As noted, at the summary decision stage, an inference must be drawn in Respondent's favor that the UMWA members at issue here *were not* properly designated as miners' representatives. *See, generally, MClass Mining, LLC*, 41 FMSHRC at 582; *see also* 30 U.S.C. § 813(f). As the Secretary has thus not met her burden to establish the lack of a genuine, triable issue of material fact, taking the extraordinary step of granting summary decision in her favor would be inappropriate. *See generally, Energy W. Mining Co.*, 16 FMSHRC at 1419.

Furthermore, the Secretary's case, in her own words, turns on a determination of "how a reasonable miner or miners' representative—regardless of whether any particular person was on strike—would be affected by Respondent's actions." Sec'y Opp'n to Resp't Mot. to Consolidate at 2. The Secretary alleges that "Warrior's specific identification of the attempted exercise of Mine Act rights as part of the contemptible behavior is interference." Sec'y Mot. for Summary Decision at 8, n. 2; see also alleged "Undisputed Fact 15" above ("MSHA determined that the specific clause in the contempt motion referring to section 103(f) rights constituted interference under section 105(c)." In the clause MSHA relies on, Respondent states: "They [i.e., UMWA agents and employees] claim to be exercising their rights as miners' representatives under Section 103(f) of the Mine Act …." Sec'y Mot. for Summary Decision at 4. At Undisputed Fact 16, MSHA also determined that the public nature of the contempt motion filing and the fact that it was shared on social media created an atmosphere that suggested miners could be punished in state court for attempting to exercise their rights. Sec'y Mot. for Summary Decision at 5.

Despite MSHA's arguments, I find summary judgment inappropriate. The language of section 105(c)(1) speaks to interference with the exercise of the statutory rights of any miner or miner representative because of the exercise by such miner or representative of miners, on behalf of himself or others, of any statutory right afforded by the Act. If there is no exercise of a statutory right and only the attempted exercise of purported walkaround rights that have not been recognized as protected activity by the Commission, there is a genuine issue of law as to whether there can be any interference because of the exercise of any statutory right under the Act.

In sum, I find the Secretary's motion insufficient to establish the absence of any genuine issue of material fact, or to mollify this tribunal's concerns as to the existence of the requisite protected activity to support a finding of interference. Accordingly, the Secretary's Motion for Summary Decision is **DENIED.**

III. Respondent's Motion to Amend its Answer

On September 5, 2023, the undersigned received Respondent's Amended Answer to the Amended Interference Complaint. Respondent did not request formal leave to file its amended answer, but rather filed a motion on September 8, 2023, seeking retrospective leave to file its amended answer. On September 6, 2023, the undersigned received the Secretary's Motion to Strike Respondent's Amended Answer. On September 10, 2023, the undersigned received the Secretary's Opposition to Respondent's Motion to Amend its Answer.

The Commission has no specific rule regarding amendment of pleadings. Commission Rule 29 C.F.R § 2700.1(b), however, states that "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedures Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." Federal Rule of Civil Procedure 15 allows a party to amend a pleading once as a matter of course within 21 days after serving it (or 21 days after service of a responsive pleading, or Rule 12(b), (e) or (f) motion). Fed. R. Civ. P. 15(a)(1)(A),(B); *see also* 29 C.F.R. 2700.1(b) (the Commission incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act). In all other cases, a party may amend pleadings only with the opposing party's consent or leave of the court; the court should freely give leave where justice so requires. Fed. R. Civ. P. 15(a)(2). The Commission has required a liberal application of Rule 15(a), explaining that "amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *See Wyoming Fuel*, 14 FMSHRC 1282, 1290 (Aug. 1992), citing *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990).

Respondent's motion to amend its answer presents several new defenses. First, Respondent submits that, under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Commission cannot enjoin or interfere with state court proceedings, or any arguments advanced in those proceedings. *See* Warrior Amended Ans. at 6-7. Second, Respondent submits that, under the U.S. Supreme Court's decision in *Bill Johnson's*, the substance of the state law claims are reserved for the state court to adjudicate. *Id.* Third, Respondent submits that that the Secretary's amended complaint must be dismissed for failure to state a claim on which relief can be granted. *Id.* Fourth, Respondent asserts that the Secretary's proposed remedy violates the First Amendment by seeking to enjoin speech made truthfully within a state court proceeding. *Id*.

As an initial matter, the undersigned admonishes Respondent for its failure to request leave *before* filing its amended answer. As the Secretary has accurately observed, Respondent's motion to amend its answer was filed approximately four months following the filing of its initial answer, and five months after the Secretary filed its amended interference complaint. *See* Sec'y Mot. to Strike at 2. Therefore, the 21-day period in which Respondent was entitled to amend its answer as a matter of course has long since passed, and the proper course of action would have been for Respondent to request either consent to amend its answer from the Secretary or leave from this tribunal in advance of filing its amended answer, rather than seeking forgiveness after the fact for its failure to abide by the appropriate procedural standards. *See* Fed. R. Civ. P. 15(a)(1)(A),(B); *see also* 29 C.F.R. 2700.1(b).

The undersigned disagrees, however, with the Secretary's assertion that allowing Respondent to amend its answer through the exercise of leave of this tribunal would somehow run afoul of party presentation principles. *See* Sec'y Mot. to Strike at 2-3. In her Motion to Strike, the Secretary states:

> Warrior offers these defenses ex post facto, after having the benefit of listening to the judge discuss Bill Johnson's, following an unrecorded status conference call during which the judge raised the case and questioned the Secretary as to its applicability. This raises party presentation issues; courts "rely on parties to frame

> the issues for decision and assign to [themselves] the role of neutral arbiter of matters the parties present." *Hopedale Mining, LLC*, 42 FMSHRC 589, 593 (Aug. 2020) (quoting *U.S. v. Sineneng-Smith*, 590 U.S. ___, 140 S.Ct. 1575, 1579 (2020)). Warrior must frame its own issues rather than poaching a framing from the Court; likewise, the role of the Court is to evaluate the facts and law presented, not to sua sponte furnish a party with defenses or frame the issues prior to the parties' presenting arguments.

The import of a U.S. Supreme Court decision represents mandatory legal authority, where and when applicable. I reject the Secretary's suggestion that this tribunal has somehow overstepped its adjudicatory responsibilities by asking the parties to address the possible limitations imposed by a U.S. Supreme Court case that *the Secretary herself* has identified in her Motion for Summary Decision (*see* Sec'y Mot. for Summary Decision at 8, n. 2.). I conclude that it is a judge's unique responsibility to review potentially controlling legal authority and inquire whether it applies to the facts at hand in a particular case. Requesting the parties' respective positions as to potentially controlling Supreme Court case law is not 'furnishing' a legal defense; rather, it is one of the core responsibilities of this tribunal.

The undersigned agrees with the Secretary's observation that Respondent could have identified its position concerning the *Bill Johnson's* holdings in its Opposition to the Secretary's Motion for Summary Decision. *See* Sec'y Mot. to Strike at 2. The fact that Respondent chose not to do so, however, does not establish that it would be contrary to the interests of justice to allow Respondent to raise these issues now by amending its answer, especially in the absence of evidence that Respondent has been guilty of bad faith or acted for the purpose of delay. *See Wyoming Fuel*, 14 FMSHRC at 1290, citing *Cyprus Empire Corp*., 12 FMSHRC at 916. Moreover, Respondent correctly notes that granting its request for leave to file its amended answer would not alter any deadlines or otherwise impact the scope of discovery in this proceeding, nor would the Secretary suffer any identifiable prejudice as a result of Respondent being afforded leave to amend its Answer. *See* Warrior Mot. for Leave to Amend at 2. Therefore, the undersigned interprets Rule 15(a) liberally, and will **GRANT** Respondent's request to amend its Answer to the Amended Interference Complaint.

ORDER

For the reasons discussed above, the Acting Secretary's Motion for Summary Decision is **DENIED;**

Further, the Acting Secretary's Motion to Strike Respondent's Amended Answer is **DENIED**;

Finally, Respondent's Motion for Leave to File Amended Answer is **GRANTED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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