June 2021

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Review was Granted in the Following Case During the Month of June 2021

Secretary of Labor obo Alvaro Saldivar v. Grimes Rock, Inc., Docket No. WEST 2021-0178 (Judge Miller, May 18, 2021)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 11, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ALVARO SALDIVAR	Docket No. WEST 2021-0178-DM
v.	Mine ID: 0405432
GRIMES ROCK, INC.	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Althen and Rajkovich, Commissioners

This temporary reinstatement proceeding 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] On May 25, 2021, the Commission received from Grimes Rock, Incorporated ("Grimes Rock") a petition for review of an Administrative Law Judge's May 18, 2021 order temporarily reinstating miner Alvaro Saldivar. On June 1, 2021, the Commission received the Secretary of Labor's opposition to the petition. For the reasons that follow, we grant the petition for review and affirm the Judge's order requiring the temporary reinstatement of Mr. Saldivar.

[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 testified that he was a miner at Grimes Rock, Incorporated on two separate occasions. He was first employed as a welder from May 2019 through July 2019, and then employed again from October 5, 2020, to January 15, 2021, as a service technician. Tr. 16. Saldivar testified that while employed at Grimes Rock, he reported approximately eight or so safety issues to his direct supervisor Rene Garcia and general manager Ernie Melendez on multiple occasions. Saldivar stated that the complaints went unaddressed by mine management. Tr. 17-27. Most of his complaints involved the water truck he operated. All the alleged protected activity occurred during Saldivar's second period of employment with Grimes Rock. Tr. 35-36.

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

Grimes Rock issued five disciplinary warnings to Saldivar during his second period of employment at the mine, which Saldivar signed. Resp. Ex. K. Saldivar testified that he did not commit the infractions as written on the disciplinary forms, and that he signed the forms only to avoid losing his job. Tr. 49-50, 54-56, 59, 62-63, 64, 74-75. He also testified as to his belief that his supervisors were acting in a "malicious" manner towards him and that the discipline was being issued in retaliation for his frequent complaints about jobsite safety hazards. Tr. 28, 59. Saldivar was terminated on January 15, 2021, one day after he made his last safety complaint. Tr. 30.

On February 21, 2021, Saldivar filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") over his termination. The Secretary of Labor subsequently filed an application for temporary reinstatement on behalf of Saldivar on April 12, 2021. A hearing was held on the matter on May 11, 2021. On May 18, the Judge issued a decision granting the Secretary's application for temporary reinstatement and issued an order directing temporary reinstatement of the miner. *Sec'y of Labor on behalf of Alvaro Saldivar v. Grimes Rock, Inc.*, Unpublished Decision and Order at 1-6 (May 18, 2021). On May 25, 2021, the Commission received the operator's petition for review of the Judge's temporary reinstatement decision and order.[2] The Secretary responded to the operator's petition on June 1, 2021.

[2] On May 27, 2021, the Commission received a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement from the parties. The Judge approved the motion for temporary economic reinstatement on May 28, 2021.

II.

Applicable Law

A. Temporary Reinstatement

The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the Judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990) ("*JWR*"); *Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc*., 37 FMSHRC 2519, 2522 (Nov. 2015). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *JWR*, 920 F.2d at 748, n.11.

At a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d at 744. As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Upon adopting the "*Marion approach*" in *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC* in which the scope of a temporary reinstatement hearing was at issue, the Commission held that a temporary reinstatement hearing must be a full evidentiary process. 43 FMSHRC ___, slip op. at 9, No. WEVA 2021-0203 (Apr. 23, 2021), citing *Sec'y of Labor on behalf of Kevin Shaffer v. Marion County Coal Co.*, 40 FMSHRC 39, 47 (Feb. 2018) (separate opinion of Acting Chair Althen and Commissioner Young). During the proceeding, a Judge must consider any evidence which is relevant to the adverse action. *Id*. In other words, "all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim." *Id*.

The *Marion approach* gives operators an opportunity to provide evidence that the complaint *was* frivolously brought. 43 FMSHRC ___, slip op. at 9 (emphasis added). It is permissible, therefore, for a Judge to consider evidence regarding allegations of a miner's unprotected misconduct to determine if the miner has a viable case. However, such evidence may not serve as a basis for denial of reinstatement if it requires resolution of a credibility determination. *Id*. at 10. In a temporary reinstatement hearing, the Judge may not resolve credibility disputes or make rulings on credibility.

B. Standards of Review

The Commission applies the substantial evidence standard when reviewing a Judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Sec'y of Labor on behalf of Bussanich v.*

Centralia Mining Co., 22 FMSHRC 153, 157 (Feb. 2000). "Substantial evidence" means 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion."' *Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)); *Sec'y of Labor on behalf of Norman Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2392 (Sep. 2012).

When reviewing a Judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp*., 22 FMSHRC 1361, 1366 (Dec. 2000). "Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial." *Marfork Coal Co*., 29 FMSHRC 626, 634 (Aug. 2007) (citation omitted). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero*, 22 FMSHRC at 1366 (citations omitted).

III.

Disposition

In its Petition, the operator essentially sets forth two alleged errors by the Judge. First, it claims the Judge erred in applying the *Pasula-Robinette* standard instead of the new "but-for" causation standard articulated by the Ninth Circuit Court of Appeals in *Thomas v. CalPortland Co*., 993 F.3d 1204 (9th Cir. 2021). PTR at 2-3, 4-5, 10. Second, it argues that the Judge's pretrial rulings and preclusion of evidence at the hearing improperly narrowed the scope of the proceeding and deprived the operator of a robust evidentiary hearing in violation of its right to due process. PTR at 2-3, 10. It cites to at least five examples of evidentiary error.

We conclude that the Judge did not abuse her discretion and that substantial evidence supports her finding that the miner's claim was not frivolously brought.

A. Grimes Rock argues that the Judge erred in applying the *Pasula-Robinette* standard instead of the new "but-for" causation standard mandated by the Ninth Circuit in *Thomas v. CalPortland*.

The "but-for" causation standard established by the Ninth Circuit Court of Appeals in *Thomas v. CalPortland* now governs section 105(c) discrimination cases brought within the Ninth Circuit. The Judge initially looked to the Commission's longstanding *Pasula-Robinette* standard in reaching her decision. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803 (Apr. 1981). However, contrary to Grimes Rock's assertion that she "failed to consider" the *CalPortland* holding, the Judge specifically looked to the Ninth Circuit test, acknowledging that the instant case arises in the Ninth Circuit.

The Judge concluded that the same outcome would have been reached under the "but-for" causation standard for discrimination proceedings within the Ninth Circuit. *Grimes Rock,*

Inc., Unpublished Decision and Order at 1-6; PTR at 10. The Judge correctly pointed out that the requirements for a full discrimination proceeding do not affect the "not frivolously brought" standard in a temporary reinstatement case such as this.

Grimes has not shown that the Judge erred in concluding that, under either standard, the complainant met the "not frivolously brought" test applicable to temporary reinstatement proceedings. Accordingly, it is neither necessary nor useful to identify the full scope of the "but-for" causation standard in this temporary reinstatement proceeding.[3]

B. Grimes Rock argues that the Judge's pretrial rulings and preclusion of evidence at the hearing improperly narrowed the scope of the proceeding and deprived the operator of a robust evidentiary hearing in violation of its right to due process.

Specifically, Grimes Rock contends that the Judge erred in the following discovery and evidentiary rulings when considering the relevance of the available evidence.

1. <u>The Judge denied the operator's Application for Discovery.</u>

The Mine Act envisions an "expedited basis" for a temporary reinstatement proceeding that does not permit full discovery or complete resolution of conflicting testimony. 30 U.S.C. § 815(c)(2); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012). Furthermore, in reviewing claims that a Judge erred in a discovery dispute, the Commission cannot merely substitute its judgment for that of the Judge. *Asarco, Inc*., 12 FMSHRC 2548, 2555 (Dec. 1990) ("*Asarco I*"). A Commission Judge is granted wide discretion in discovery matters. *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1005 (June 1992) ("*Dust Sample Cases*"); *Gray v. North Fork Coal Corp*., 35 FMSHRC 2349, 2359-60 (Aug. 2013).

We conclude that the Judge did not err in denying the broad discovery request. Grimes Rock's discovery request was extraordinarily broad, consisting of a demand for the production of sixty documents, many of which were likely in the possession of Grimes Rock. Additionally, the application for discovery was filed only 7 days before hearing. As stated by the Judge, the request was overbroad, many of the requested documents were not relevant to a temporary reinstatement proceeding, and admission of much of the requested information would have required the Judge to make credibility determinations. Ord. Denying Resp. App. for Disc. at 2 (May 10, 2021). Resolving credibility issues is beyond the scope of a temporary reinstatement proceeding. *See Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009).

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[3] To date, the Commission has not yet issued a decision applying the Ninth Circuit's holding in a section 105(c) discrimination proceeding.

2. The Judge rejected Grimes Rock's request to admit evidence of Saldivar's criminal history.

The operator's counsel argued that Saldivar's criminal past should be admitted as evidence relevant to Saldivar's credibility as a witness. PTR at 7.

The Judge did not abuse her discretion in denying admission of evidence regarding Saldivar's criminal history. Due to the limited nature of a temporary reinstatement proceeding, a "Judge can only consider evidence which does not require any credibility . . . determinations." *Rockwell Mining*, 43 FMSHRC ___, slip op. at 9, No. WEVA 2021-0203 (April 23, 2021). Thus, evidence regarding Saldivar's credibility is not relevant at this stage of the proceedings.

In any event, a prior criminal conviction does not definitively prove that a person is untruthful in every situation and cannot be used to reject an applicant's statements unless the conviction shows factually that a statement relative to the specific proceeding is untrue. Thus, a criminal conviction in no way contradicts Saldivar's assertion that he made safety complaints, nor does it support Grimes Rock's alleged legitimate business reason for terminating him. Additionally, there is no evidence that Saldivar withheld knowledge of his conviction from Grimes Rock. In fact, by its own admission, the operator was fully aware of Saldivar's past and still chose to rehire him in October 2020. Resp. Opp. To Sec'y Mot. in Limine to Exclude Resp. Evidence at 1.

3. Grimes Rock argues that the Judge refused to allow questioning about Saldivar's new miner training.

During the hearing, the Judge eventually asked Counsel for the operator to move on from his line of questioning concerning the new miner training that Saldivar had received. Tr. 42-45.

The Judge did not abuse her discretion in making this evidentiary ruling. Commission Procedural Rule 55(e) provides that Commission Judges have the power to "[r]egulate the course of the hearing," while Commission Procedural Rule 55(c) provides that Commission Judges have the power to "[r]ule on offers of proof and receive *relevant* evidence." 29 C.F.R. §§ 2700.55(c), (e) (emphasis added). Commission Procedural Rule 63(a) states that "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). The Administrative Procedure Act, in turn, states that "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). *See Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012).

Grimes Rock's allegation that the Judge did not allow cross-examination on Saldivar's training is not accurate. During cross-examination, the operator's counsel focused heavily on trying to prove that Saldivar was provided training during his first period of employment with the operator. Tr. 34-36. However, Saldivar's safety complaints, including his requests for training, occurred during his second period of employment with Grimes Rock, not during his first. Tr. 21. Additionally, Saldivar alleged that he requested task training on the specific equipment he was asked to operate during his second period of employment. Tr. 21-22. However, operator's counsel repeatedly questioned Saldivar about new miner training during his

first period of employment. The Judge allowed Counsel to explore this line of questioning sufficiently before she asked him to move on.

The operator's line of questioning regarding new miner training during Saldivar's first period of employment was not relevant to the miner's claim, involving in part his failure to receive task training. The Judge was well within her authority to limit the time spent on questioning that does not support or disprove a material fact. Counsel also sought to use the line of questioning to show that Saldivar was not credible, which again, is not proper in a temporary reinstatement proceeding. Tr. 37.

4. The Judge declined to order the disclosure of the names of other miners who Saldivar alleged expressed similar safety concerns.

The Secretary asserted the informer's privilege at the hearing. Tr. 77-78. The informer's privilege is codified in Commission Procedural Rules 61 and 62. Commission Procedural Rule 61 states that "[a] Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 C.F.R. § 2700.61. Commission Procedural Rule 62 states that "[a] Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness." 29 C.F.R. § 2700.62.

The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *see generally* Thomas J. Oliver, Annotation, *Application, in Federal Civil Action, of Governmental Privilege of Nondisclosure of Identify of Informer*, 8 ALR Fed. 6 (1971). The purpose of the privilege is to protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation. *Sec'y of Labor on behalf of Logan v. Bright Coal Co*., 6 FMSHRC 2520, 2523 (Nov. 1984); cf. *Hodgson v. Charles Martin Inspectors of Petroleum, Inc*., 459 F.2d 303, 305 (5th Cir.1972); *Warrior Coal, LLC*, 38 FMSHRC 913, 920 (May 2016).

Saldivar testified that other miners had made similar safety complaints. During the hearing, the operator repeatedly sought to learn the identity of the unnamed miners, to which the Judge refused to permit testimony. Tr. 47, 60-61, 73, 77-79.

We conclude that the Judge did not abuse her discretion in her ruling. Forcing the Secretary or Complainant to reveal a miner's identity who might have made safety complaints against the company and who might later become a witness in a subsequent discrimination proceeding could potentially lead to a miner who is still employed becoming a victim of retaliation. Revealing a miner's identity prematurely could also be particularly devastating for a miner who ultimately is not called as a witness.

5. Grimes Rock contends that the Judge precluded questioning about disciplinary warnings received by Saldivar, which was evidence relevant to its rebuttal and affirmative defense.

Grimes Rock is incorrect in its assertion that the Judge precluded questioning about disciplinary warnings received by Saldivar. The Judge, in full compliance with *Rockwell Mining*, 43 FMSHRC ___, slip op. at 16-18, allowed Counsel to question Saldivar about the disciplinary warnings and also admitted the documentation into the record. Tr. 49-54, 67. However, Counsel for Grimes Rock made a tactical decision not to offer witnesses regarding activities that the operator claimed would have shown the applicant could not meet the not frivolously brought standard under the "but-for" causation standard.

C. Substantial evidence supports the Judge's decision to temporarily reinstate Saldivar.

Substantial evidence supports the Judge's finding that the Secretary sufficiently demonstrated that the miner's complaint was not frivolously brought and that the Order of Temporary Reinstatement should be affirmed.

The hearing consisted of testimony from one witness, the Petitioner Alvaro Saldivar. Saldivar testified that he made roughly eight safety complaints, including requests for task training on specific equipment, to his direct supervisor Rene Garcia and the Mine Manager Ernie Melendez. Tr. 17-27. He also indicated that he wrote down some of the issues on the preoperational sheets that he filled out daily.[4] Tr. 73.

In contrast, Grimes Rock's case consisted of cross-examining Saldivar and entering three exhibits (Resp. Exs. C, K, and M) into the record, which were meant to serve as proof of training and of numerous disciplinary warnings to Saldivar. Tr. 67. The evidence relates only to the operator's rebuttal and affirmative defense. It does not speak to Saldivar's claim that he engaged in protected activity. Grimes Rock declined to introduce any witnesses of its own, including the two supervisors who had direct knowledge of Saldivar's alleged complaints. Tr. 81. This refusal by the operator essentially left undisputed Saldivar's claims of safety complaints and that mine management had knowledge of those complaints. It also left Grimes Rock's exhibits uncorroborated. Furthermore, even though Saldivar signed the disciplinary warnings, he disclaimed the content of them and claimed that he only signed them to keep his job.

Saldivar's disagreement with the content of the warnings creates an evidentiary dispute requiring credibility determinations, which cannot be resolved in a temporary reinstatement proceeding.

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[4] These forms were not introduced into evidence. However, this is likely because such documentation is the property of Grimes Rock. Thus, the Secretary could request them through discovery, which does not usually occur until the discrimination proceeding has commenced.

Thus, considering all the evidence adduced at this preliminary stage of the proceeding, it is undisputed that Saldivar engaged in protected activity when he made safety complaints to the operator. Saldivar suffered an adverse action when he was terminated. It is undisputed that there was a close temporal proximity between Saldivar's final safety complaint and his termination one day later. It is undisputed that Grimes Rock management was aware of the safety complaints, and Saldivar's allegation that his supervisor was being malicious to him suggests hostility towards Saldivar's safety complaints. Therefore, substantial evidence supports the Judge's determination that the available evidence established a sufficient link between the protected activity and adverse action, even considering "but-for" causation.

IV.

Conclusion

For the foregoing reasons, we conclude that the Judge did not abuse her discretion in making evidentiary rulings, and that substantial evidence supports the Judge's determination that Saldivar's complaint alleging discrimination was not frivolously brought.

Accordingly, the Judge's decision is affirmed.

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

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

Chair Traynor, concurring in result only:

I concur in result only. My position and views on certain legal issues addressed in this majority opinion are adequately expressed in my dissenting opinion in *Sec'y of Labor on behalf of Cook v. Rockwell Mining*, 43 FMSHRC ___, slip op. at 16-18, No. WEVA 2021-0203 (Apr. 23, 2021) (Traynor, concurring in result only and addressing the scope of temporary reinstatement proceedings), and my most recent concurring opinion in the Order of Remand, *Thomas v. CalPortland Co.*, 43 FMSHRC ___, slip op. at 3, No. WEST 2018-402-DM (June 11, 2021) (Traynor, concurring in result only and addressing the Ninth Circuit's opinion in *Thomas v. CalPortland Co*., 993 F. 3d 1204 (9th Cir. 2021).

I conclude that the Judge did not abuse her discretion in making evidentiary rulings, and that substantial evidence supports the Judge's determination that Saldivar's complaint alleging discrimination was not frivolously brought.

Accordingly, I would affirm the Judge.

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

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2021

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. NASELLE ROCK AND ASPHALT COMPANY	Docket No. WEST 2020-0341-M A.C. No. 45-01129-511209 Docket No. WEST 2020-0342-M A.C. No. 45-00063-511208

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 6, 2020, the Commission received from Naselle Rock and Asphalt Company ("Naselle") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). [1]

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

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

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[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2020-0341-M and WEST 2020-0342-M involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on March 23, 2020, and became final orders of the Commission on April 22, 2020. Naselle asserts that the proposed assessments were not timely contested as a result of safety precautions taken in response to the Covid-19 pandemic. Offices were shut down on March 30, 2020, and personnel did not return to work until the week of April 20. The notices of contest were mailed on April 23, 2020, one day after the proposed assessments became final orders. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Naselle's request and the Secretary's response, we find that the one-day delay in contesting the proposed assessments was excusable in light of the unusual pandemic related circumstances. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

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

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

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June 11, 2021

ROBERT THOMAS v. CALPORTLAND COMPANY	Docket No. WEST 2018-402-DM Mine ID: 4503687

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

ORDER OF REMAND

BY: Althen and Rajkovich, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that Thomas had established a prima facie case of discrimination, reversed the Judge's decision, and dismissed the case.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that the Commission had erred in its determination and asserted, along with Respondent CalPort, that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, as it misconstrues the word "because" in the statute.[1] *See Sec'y of Labor on behalf of Pasula v.*

[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or ***because*** such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . .

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

Consolidation Coal Co., 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). Citing several Supreme Court decisions,[2] the parties argued that the *Pasula-Robinette* standard conflicts with Supreme Court instruction that the ordinary meaning of "because" required application of the simple and traditional standard of "but-for causation."[3] *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208-09 (9th Cir. 2021).

Applying step one of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–44 (1984), the Circuit Court ultimately found the statute clear and rejected the *Pasula-Robinette* standard of review concluding that the Supreme Court has instructed "that the word 'because' in a statutory cause of action requires a but-for causation analysis unless the text or context indicates otherwise." 993 F.3d at 1211. It remanded the case to the Commission with instructions to apply the "but-for" causation analysis to Thomas' claim of discrimination. *Id*.

On June 7, 2021, the court issued its mandate in this matter, thereby returning the case to the Commission's jurisdiction. Accordingly, we remand this matter to the Judge for reconsideration of Mr. Thomas' claim of discrimination under the "but-for" causation standard consistent with the Ninth Circuit's decision.

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

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

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[2] *Burrage v. United States*, 571 U.S. 204, 212-17 (2014); *Univ. of Sw. Tex. Med. Ctr. v. Nassar*, 570 U.S. 338, 346-60 (2013); *Gross v. FBL Fin. Servs*., 557 U.S. 167, 174-80 (2009).

[3] At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021).

Chair Traynor, concurring in result only:

This case is already over.

It began with a complaint filed by miner Robert Thomas alleging that CalPort discriminated against him for his exercise of protected rights in violation of the Mine Act. After a Commission Administrative Law Judge found that CalPort unlawfully discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

On review, the Commission determined that the Judge erred in concluding that miner Thomas had established a prima facie case of discrimination. None of the five Commissioners found that protected activity in any way motivated Thomas's suspension and termination. Thus, the Commission unanimously reversed the judge's decision for lack of *any* evidence of unlawful motivation.[41] The Commission was unanimous in concluding that under *any* causation standard, the case must be dismissed.

Thomas subsequently filed a petition for review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit on the grounds that the Commission had erred in its determination. Initially, Thomas joined Respondent CalPort's assertion that the Commission's long-standing precedent under *Pasula-Robinette* should no longer apply to section 105(c) cases, claiming various Supreme Court holdings require application of some version of a "but-for" test when analyzing whether an adverse action is motivated by protected activity. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1209 (9th Cir. 2021). At oral argument, however, Thomas changed his position and argued that the Court should apply the *Pasula-Robinette* standard instead. *Id*. It is of great significance that the Secretary of Labor—the indispensable party charged with interpretation of the Mine Act—was not a party to this case and did not participate at any of the stages of this proceeding, including at argument before the Ninth Circuit.

The Commission had unanimously ruled that there was no evidence whatsoever that CalPort's termination of Thomas was motivated at all by protected activity. Thus, it is immaterial to the resolution of this case whether in future cases the Commission and Courts should require the Secretary to offer an interpretation of section 105 that replaces the *Pasula-Robinette* test with a more stringent "but-or" test of causation. We know with certainty that the miner in this case failed to introduce evidence that would satisfy any test of causation—from the *Pasula-Robinette* test's requirement of "some motivation" to the most stringent conceivable application of a "but-for" causation standard. The Commission found and the Ninth Circuit did not disagree that there is simply no evidence of causation in this case. Yet rather than affirm the Commission, the Court purported to "reverse" the Commission (even though it did not disagree with our review of the

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[1] The two concurring Commissioners explained that they had "considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination" to conclude that "[a]long with the majority, we find *no proof* that they did." 42 FMSHRC 43, 58 (Jan. 2020) (Jordan and Traynor, concurring) (emphasis added).

evidence in the case or our decision to dismiss it) in an opinion directing the Commission to revise its interpretation of section 105(c) as applied in discrimination cases and first announced in *Pasula-Robinette*. Unfortunately, that direction results from some confusion as to the role of the Secretary and Commission under the Mine Act's somewhat unique split-enforcement scheme.

The Ninth Circuit panel wrote that under the well-known *Chevron* doctrine it "need not consider the Commission's interpretation because the statutory text is unambiguous." 993 F.3d at 1211. Of course, the Commission is not responsible for interpreting section 105(c) of the Mine Act, its role is to review the Secretary of Labor's interpretation. "Since the Secretary of Labor is charged with responsibility for implementing this Act . . . the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 95-181, at 49 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). Because the Secretary has not yet proffered an interpretation of section 105(c) in light of case law purportedly requiring a 'but-for' standard of causation, the Ninth Circuit in this case did not (and could not have) correctly applied the *Chevron* doctrine in this case.[2] This confusion manifested itself again in the Court's final direction to the Commission on remand in which they state that it "is for the Commission to apply the but-for standard to this case in the first instance on remand." 993 F.3d at 1211. Of course, it is not for the Commission but for the Secretary of Labor to interpret section 105(c) in the first instance. The Commission and Courts are to provide deferential review.[3]

The Secretary of Labor is not a party to this case, and this is therefore not an appropriate case to litigate or announce a revised interpretation of section 105(c), especially since this case can (and has been) resolved without engaging in such reinterpretation. The Commission has already unanimously held that this case should be dismissed for lack of evidence of unlawful motivation under *any* standard of causation—whether *Pasula-Robinette*, or some yet to be articulated version of the "but-for" test. The Ninth Circuit did not disagree.

On remand, the Judge must be cautious not to usurp the Secretary's role interpreting section 105(c). The Judge need not stray far from the Commission's prior decision, undisturbed

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[2] The Court addressed the precise question of whether the existing legal standard for making a prima facie case under section 105(c)—the *Pasula-Robinette* standard—was incompatible with recent caselaw addressing the text of the Mine Act and answered in the affirmative. What the Court did not do (and could not have done) is apply *Chevron* review to the Secretary's new interpretation of section 105(c) accommodating a but-for causation element.

[3] We cannot in this litigation know how the Secretary might choose to interpret section 105(c) in a future case in which he must demonstrate "but-for" causation to make out a prima facie case of discrimination.

by the Ninth Circuit's review,[5] to demonstrate that Thomas' complaint fails for lack of *any* evidence of unlawful motivation under any conceivable formulation of the "but-for" causation requirement. But interpreting section 105(c) in the first instance to arrive at a new test for discrimination that includes a "but-for" causation requirement is the role of the Secretary, not the Judge, Commission or Courts.

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

[5] The Court did not find any error with the Commission's unanimous conclusion that the record in this case is devoid of any evidence that protected activity motivated the miner's termination.

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ADMINISTRATIVE LAW JUDGE DECISIONS

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June 7, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2020-0087-M A.C. No. 01-03143-504754
v.	
VULCAN CONSTRUCTION MATERIALS, LLC, Respondent	South Russellville Quarry

DECISION

Appearances: Winfield Ward Murray, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia for Petitioner;
Chris Sorrows, Vulcan Construction Materials LLC, Birmingham, Alabama, for Respondent.

Before: Judge Manning

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Vulcan Construction Materials LLC ("Vulcan") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a video conference hearing and filed post-hearing briefs. A single 104(a) citation with a total proposed penalty of $121.00 was adjudicated at the hearing. For reasons set forth below, I vacate the single citation at issue.

Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments. Further, my findings are restricted to the particular facts of this case and carry no precedential value beyond the evidence presented.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Vulcan operates the South Russellville Quarry (the "mine"), a surface limestone quarry in Franklin County, Alabama. On September 18, 2019, MSHA Inspector Tommy R. Wright conducted a routine inspection of the mine.[1] Tr. 18. At the time of the inspection mine personnel were engaged in the process of stripping back material in order to have more rock to mine. Tr. 19. Trucks and other mobile equipment were being used during the stripping process.

At some point during the day Wright inspected the air brake system on a Mack water truck (the "truck" or the "water truck").[2] Tr. 20. Wright began the inspection by first having the driver move the truck onto a ramp, stop the truck with the service brake, and then set the parking brake to show that the brake would hold. Tr. 32. Both the service brake and parking brake held the truck on the ramp. Tr. 32, 68.

Wright then had the driver move the truck to flat ground in order to test the brake system for air leaks. Tr. 32. After the wheels were scotched and the truck turned off, Wright instructed the driver to place his foot on the brake pedal. Tr. 32, 54-55. Wright then walked around the truck listening for air leaks. Tr. 33. After hearing the sound of air escaping from somewhere under the truck, Wright got down on his hands and knees, crawled toward the sound, and eventually used his finger to feel air coming out of a small hole on the brake chamber for the wheel on the right side of the rear most axle of the truck. [3] Tr. 33-34, 53-57, 63. According to

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[1] Inspector Wright has been with MSHA for over ten years. Tr. 11. Although Wright is currently employed as an electrical specialist, in September of 2019 he was a general mine inspector and routinely inspected pits, highwalls, mobile equipment, and plants, among other things. Tr. 11. Wright trained as a journeymen inspector at the Mine Safety Academy. Tr. 13. While at the Academy he received both classroom and hands-on training regarding how to examine brakes, including air brakes, for violations of the Secretary's regulations. Tr. 14. Although Wright could not recall what model vehicle he was trained on, it was similar to the truck at issue in this proceeding. Tr. 44. Prior to working for MSHA, Wright spent 25 years in the coal mining industry and held jobs that required him to conduct maintenance, break down and rebuild mining equipment, troubleshoot and repair equipment components, and conduct pre-shift examinations when needed. Tr. 12-16.

[2] The truck was being used to water the roads at the mine. Tr. 44. Wright testified that the truck is considered a self-propelled vehicle under MSHA regulations. Tr. 69.

[3] Respondent's cross-examination of Wright included questions about the inspector's training and qualifications to inspect air brakes. Wright explained that he is trained to listen for audible air leaks when inspecting commercial motor vehicle air brake systems. Tr. 37-39. Although he could not say whether his Mine Academy training included instruction specific to Mack trucks like the one at issue, Wright confirmed that he was trained to examine, and conducted practice examinations of, similar trucks. Tr. 38-44; Ex. R-7. In response to questions about whether he made an air loss calculation, or completed a pressure threshold test, Wright explained that he is not required to do so. Tr. 61-62, 65-66.

Wright, the air being expelled from the hole was "continuous" and persisted the entire time the driver "pushed the brake pedal down and had it engaged." Tr. 34-35, 54, 61. Wright agreed that the alleged leak did not start and stop as if the brakes were being pumped and "would go away" when the driver took his foot off the service brake pedal. Tr. 26, 34, 68. According to Wright, the chamber never sealed as it should have when the pedal was engaged. Tr. 66, 68-69.

On cross-examination Wright conceded that, although he instructed the driver to put constant and consistent pressure on the brake pedal, he could not see the driver engaging the pedal during the test. Tr. 54-55.

Wright testified that occasionally dirt accumulates around the diaphragm in air brake chambers. Tr. 35. As a result, he generally gives drivers an opportunity to pump the service brake pedal two to three times to expel any contaminates that may be in the chamber. Tr. 34-35. Although Wright testified that he gave the driver an opportunity to pump the brakes of the water truck, it is unclear whether the driver did so in this instance. Tr. 34-35. Nevertheless, according to Wright the alleged leak persisted, and the chamber did not seal. Tr. 35. In his experience, leaks only get worse over time. Tr. 34-35.

At hearing, when shown a photograph of the subject brake chamber, Wright initially could not identify the hole from which air was escaping. Tr. 56, 58; Ex. P-2. However, Wright ultimately identified the "weep hole" on the brake chamber as the location from which air was being expelled but could not explain the purpose of the hole. Tr. 60, 66. Wright explained that "usually in a situation like that, [i.e., when air is coming out of a weep hole] it's the diaphragm that's busted or damaged." Tr. 60-61.

Based on what he saw and heard, Wright issued Citation No. 9428135 to Vulcan for an alleged violation of section 56.14101(a)(3), which requires that "[a]ll braking systems installed on the equipment shall be maintained in functional condition." 30 C.F.R. § 56.14101(a)(3). Wright testified that the brake system was not being maintained in a functional condition because "the whole time that [the driver] had the foot brake pushed down, there was an audible air leak at this brake chamber."[4] Tr. 20-23,26, 36. Wright testified that he relied on MSHA's Program Policy Manual regarding section 56.14101(a)(3) when issuing the citation. Tr. 25; Ex. R-16.

The Secretary's Expert Witness

The Secretary called Jonathan Hall as an expert witness. Hall is a mechanical engineer in MSHA's Approval and Certification Center, which is part of the agency's Technical Support Division.[5] Tr. 71. In addition to providing technical support to MSHA field personnel, Hall conducts accident investigations. Tr. 72. He has conducted approximately a dozen accident

[4] Wright explained that he did not cite respondent under 56.14101(a)(1) or (a)(2) because the service brake and parking brake both held the truck on the ramp. Tr. 35-36.

[5] Hall has a Bachelor of Science degree in mechanical engineering and is a registered professional engineer in the State of West Virginia. Tr. 73. Prior to working for MSHA, Hall was an engineer responsible for testing military equipment. Tr. 72-73.

investigations involving trucks with air brake systems. [6] Tr. 75. Hall testified that he is familiar with air brake systems like the one on the cited truck and has received on the job training for examining air brake systems and identifying defects.[7] Tr. 75, 92.

Hall, both in his expert report and at hearing, provided an explanation of air brake system components and how they work.[8] Tr. 76; Ex. P-9. According to Hall each wheel has an air chamber or chambers, push rod, slack adjuster, S-Cam, brake pads, and brake drum. Tr. 78. Air chambers are canisters made up of two pieces of metal clamped together with an elastomeric rubberlike diaphragm inside. Tr. 78. In a dual air chamber system, like the one at issue in this case, the canister includes two chambers, one of which controls the parking brake while the other controls the service brake. Each chamber has its own diaphragm. Tr. 79. Air put into the parking brake chamber moves the diaphragm from one side of the chamber to the other in order to release the parking brake. Tr. 79-80. Air put into the service brake chamber similarly moves the service brake diaphragm from one side of the chamber to the other, which in turn causes the push rod to move. Tr. 78. The push rod rotates the slack adjuster and S-Cam and presses the brake pads against the inside of the brake drum. Tr. 78, 85. The brake pads pushing against the drum create friction and slow the rotating wheel. Tr. 78, 85.

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[6] Hall explained that an accident investigation is significantly more in-depth than a regular inspection because the vehicle has already been shown to have a fault or defect since it was involved in a serious or fatal accident. Tr. 101. Accident investigations, as opposed to regular inspections, often take days and involve multiple personnel, a check of both the "air side" and "mechanical side" of the brake system, the use of heavy equipment, and a review of manufacturer's information and equipment operator manuals. Tr. 100-102, 112. Hall explained that, if a truck is still able to run following an accident, the investigation of the air brake system begins by conducting a pressure-holding test. Tr. 93. The pressure-holding test involves releasing the parking brake, allowing air to build up in the system until the compressor shuts off, and then holding down the service brake pedal to determine how much the pressure drops over a period of time. Tr. 106. The rate at which pressure is lost is then compared against the equipment manufacturer's allowable air pressure loss rate to determine whether the system is losing pressure too fast and requires necessary repair. Tr. 93-94, 106, 107. Hall explained that, while the test verifies whether the air system can hold the necessary pressure, it does not determine whether the "wheel end" portion of the system is properly adjusted and can apply needed pressure to the wheel itself, nor does it necessarily show whether there is an air leak. Tr. 95, 107. To illustrate, Hall explained that you can have a small air leak that does not show up during the pressure-holding test and may not require the truck to be taken out of service immediately, but nevertheless still creates a problem. Tr. 95-96.

[7] Hall's on the job training included assembly, disassembly, testing and measuring of equipment components of trucks that were involved in accidents. Tr. 92-93.

[8] Prior to hearing Hall prepared an expert report that explained, generally, what truck air brakes are, how they work, the components of an air chamber, and problems that can be caused by air leaks in air brake systems. Tr. 76; Ex. P-9.

Hall explained that there are three possible sources for air leaks in an air chamber like the one at issue in this case. Tr. 80. First, air can leak from where the metal pieces of the chamber are clamped together. Tr. 80. Second, air can leak from the hoses that provide pressurized air to the chamber. Tr. 81-82. Third, air can leak through a damaged diaphragm. Tr. 82. On cross-examination Hall explained that, generally, one determines if there is a leak by listening for it. Tr. 96. While other tests can be used to find smaller leaks, the "rule of thumb" is that if you can hear a leak then there is some sort of problem within the braking system. Tr. 96, 113.

Hall was not present at the time the citation was issued and did not examine the equipment. However, he reviewed the citation and was present during Wright's testimony. Based on the data provided, Hall believed the most likely source of the alleged leak was a damaged diaphragm. Tr. 81-82, 86. Hall explained that diaphragms move every time the brake is applied and released. Tr. 82. Diaphragms wear out over time and eventually start to develop tears. Tr. 82, 89. In addition, dirt that gets into the chamber through the weep hole can cause an abrasion and, over time, create a hole or tear in the diaphragm. Tr. 82.

Hall explained that the weep hole allows air to exit the chamber when the diaphragm moves from one side to the other.[9] Tr. 83. Each time the brakes are applied or released the diaphragm moves from one side of the chamber to the other and there should be a brief, momentary movement of air through the weep hole. Tr. 82, 109, 111. When the brake is applied the chamber becomes pressurized, the diaphragm moves from one side to the other and air is expelled from the weep hole. Tr. 83, 109. When the brake is released air travels the other way through the weep hole. Tr. 83, 109-110. On cross-examination Hall agreed that any fluctuation in the treadle actuated by the brake pedal, will cause the system to exhaust air. Tr. 112, 114.

According to Hall, air brake systems are designed and intended to be airtight and there should never be a continuous release of air from an air brake chamber or air brake system. Tr. 83, 88, 107. Air brake systems are "designed to work with a certain given air pressure at a certain amount of energy." Tr. 80, 83, 88. An air leak removes energy from the system and prevents it from working the way it was designed and intended to work. Tr. 80, 83, 88-89. Here, according to Hall, the continuous air leak was a defect, or shortcoming of the air brake system. Tr. 86. Continuous air leaks do not go away and, in Hall's opinion, only get worse over time. Tr. 87, 89-90.

Vulcan's Expert Witness

Marty Rolfe was Vulcan's sole witness and testified as an expert. Rolfe has a degree in occupational safety and health from Columbia Southern University, currently works in Vulcan's safety and health department, and serves as the DOT representative for the company's southeast division.[10] Tr. 118-119; Ex. R-24 p. 312. His responsibilities include, among other things,

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[9] In this instance the brake chamber is mounted vertically on the truck, so the diaphragm moves up and down, but the operation of the chamber is the same. Tr. 141.

[10] Prior to working for Vulcan, Rolfe held several positions in which he was responsible for addressing issues related to regulatory compliance of commercial motor vehicles. Tr. 120-122; Ex. R-23.

maintaining Vulcan's commercial motor vehicle ("CMV") inspection schedule and regulatory qualification files for all company personnel who conduct air brake inspections and conducting risk investigations on vehicles that travel between mine sites. Tr. 119. Rolfe has 19 years of experience as a certified CMV air brake inspector[11] and specializes in the application and enforcement of regulations under Title 49 C.F.R. Parts 40 and 300-399.[12]

Rolfe testified that a threshold pressure test is the first step of any air brake inspection. Tr. 126, 134. The threshold pressure test is an industry standard test which enables an air brake inspector to calculate an air loss rate for the brake system.[13] Tr. 126, 135. The air loss rate is then compared to an allowable air loss rate to determine if the air system is functioning or the vehicle needs to be taken out of service.[14] Tr. 126-127, 134, 136. According to Rolfe, the threshold pressure test determines if there is a leak you need to find and correct. Tr. 126-127.

While Rolfe agreed that there should not be a continuous air leak from a brake chamber while the brake pedal is engaged, he explained that what sounds like an air leak may be the normal operation of the air brake system rather than the result of a defective leak. Tr. 130, 154-155. Air systems are not completely airtight and have multiple exhaust ports and ways to vent air in order to protect the system and ensure proper operation. Tr. 130, 138-139. According to Rolfe, if a leak is audible then the system will fail the threshold pressure test. Tr. 135. Moreover, the threshold pressure test will tell you if a leak exists or if the system is still settling and exhausting by design. Tr. 144.

Although Rolfe was not present at the time Wright inspected the truck and did not witness the alleged leak, he did have an opportunity to inspect the truck at issue.[15] Tr. 136, 153-154. Rolfe agreed that the alleged defect was at the weep hole. Tr. 133-134. He explained that a

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[11] Rolfe is certified to inspect CMVs through both North American Standard and the FMCSA. Tr. 116; Ex. R-24. He testified that additional knowledge, training and experience requirements must be met to qualify as a CMV air brake inspector. Tr. 117.

[12] Rolfe testified that 49 C.F.R. contains the "only governmental regulations that exist" when inspecting a CMV. Tr. 131. These are regulations issued by the Department of Transportation.

[13] The threshold pressure test is conducted from the seat of the truck. Tr. 135. The person conducting the test watches the air brake system gauge to determine the drop in system pressure, calculated in PSI, over the course of one minute. Tr. 136. I note that this test, as described by Rolfe, seems to be the same as the "pressure-holding test" described by Hall and utilized during MSHA accident investigations.

[14] The allowable air loss rate is set by the manufacturer. Tr. 126. Most manufacturers follow an industry standard. Tr. 126.

[15] At hearing, when presented with a picture of the chamber at issue, Rolfe easily identified it as a "Clamp Type 30 brake chamber in the vertical position" with a "standard type stroke chamber," and provided a detailed explanation of the various parts of the chamber. Tr. 141-143; Ex. R-1 p. 6.

weep hole allows air to escape from a brake chamber when the diaphragm moves forward, thereby preventing pressure buildup that would prevent necessary movement of the diaphragm. Tr. 138-140, 142. While Rolfe generally agreed with Hall's testimony regarding how air brake systems and air brake chambers work,[16] he took issue with Hall's explanation of how long air may vent from a weep hole. Tr. 134. Specifically, he stated that "because you can't see the diaphragm - it's an internal piece of a component … - you can't determine how much air or how long it's going to vent. … You have to allow for the settling of all those components because you don't know how fast those diaphragms are going to move forward." Tr. 134. Further, he explained that any fluctuation in the treadle valve will release air from the weep hole. Tr. 140.

Rolfe opined that, had the diaphragm been "busted" as Wright alleged, there would have been no question about it and, given that there was 100 to 120 PSI on the pressurized side of the diaphragm, there would have been a "trumpet" sound coming from the chamber, which there was not. Tr. 143-144; Ex. R-5. p. 23.

Citation No. 9428135

Citation No. 9428135, issued under section 104(a) of the Mine Act on September 18, 2019, alleges a violation of Section 56.14101(a)(3) of the Secretary's safety standards. The Condition or Practice section of the citation states as follows:

> The braking system on the in use Mack water truck, Co. 66039, located at water tank fill up, is not being maintained in a functional condition. When tested the right rear tandem brake chamber has an audible air leak present when the brake paddle is engaged. The truck is used multiple times throughout the day to water mines roads. Employees working in and around this equipment were exposed to the possibility of injury, if the brakes were to fail. The truck passed a brake test, making the chance of an accident unlikely.

Inspector Tommy Wright determined that an injury was unlikely to be sustained, but that if an injury were sustained it could reasonably be expected to result in lost workdays or restricted duty. Wright further determined that the cited condition was not S&S, affected one person, and was the result of Respondent's low negligence. The Secretary proposed a penalty of $121.00 for this alleged violation. Vulcan replaced the brake chamber to abate the citation.

Fact of Violation

Brief Summary of the Parties' Arguments

The Secretary argues that Vulcan violated the cited standard because an audible air leak from the brake chamber indicated that the air brake system was not being maintained in a functional condition. Sec'y Br. 9. The Secretary cites the Commission's decision in *Daanen v. Janssen*, 20 FMSHRC 189 (Mar. 1998) and argues that a violation of 56.14103(a)(3) exists when

[16] Rolfe explained that the service brake chamber is where pneumatic energy is turned in to mechanical energy. Tr. 142.

a component of a braking system is not maintained in the functional condition. Sec'y Br. 12-14. The brake chamber was a component of the braking system. According to the Secretary the continuous air leak from the chamber indicated a defect in the chamber and that the brake system was not being maintained in a functional condition. *Id*. at 9-10.

Vulcan asserts that the citation should be vacated because the issuing inspector lacked the knowledge, training and education necessary to conduct a proper air brake inspection and failed to conduct a proper inspection in this instance.[17] Vulcan Br. 1-8. Moreover, Respondent argues that air brake systems are designed to exhaust air from the location where the alleged leak was observed and that the test, as administered by the inspector, did not establish that there was a defect in the system. Vulcan Br. 9-10.

Discussion

Section 56.14101(a)(3) requires that "[a]ll braking systems installed on the equipment shall be maintained in functional condition." 30 C.F.R. § 56.14101(a)(3). The Commission's decision in *Daanen & Janssen*, 20 FMSHRC 189 (Mar. 1998) is controlling in cases involving citations issued for alleged violations of section 56.14101(a)(3).

In *Daanen* the Commission concluded that section 56.14103(a)(3) was ambiguous because it supported "at least two plausible and divergent interpretations."[18] *Id*. at 192. There the Secretary submitted an interpretation of the standard that "mandates a finding of violation when a component of the braking system is not maintained in functional condition, regardless whether the braking system is capable of stopping and holding the vehicle." *Id*. In finding that the

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[17] Respondent primarily argues that the water truck was a commercial motor vehicle subject to DOT regulations, and that the inspector failed to have the "minimal qualifications" necessary to conduct a proper air brake inspection under those regulations. Vulcan Br. 1-6. However, Respondent cites no authority for the proposition that MSHA has either incorporated DOT standards in its enforcement scheme, or that DOT regulations in any way preempt MSHA's mandatory safety standards. Absent specific authority on these issues, I reject Respondent's arguments regarding the applicability of DOT regulations to the case at hand. *See Williams Natural Gas Company*, 19 FMSHRC 1863, 1869 (Dec. 1997) (Discussing lack of specific authority regarding DOT preemption of regulations promulgated under the Mine Act). Moreover, although Wright may have lacked the knowledge, training and education to be a DOT certified air brake inspector, I find that nothing in the record suggests that he was not an authorized representative of the Secretary qualified to conduct inspections and issue enforcement actions for violations of mine safety and health standards including section 56.14101(a).

[18] The Secretary, in his brief, mistakenly states that the "Commission found that the language of . . . [the subject standard] *was not ambiguous* because the Secretary's interpretation was reasonable as it is consistent with the language of the regulation." Sec'y Br .13 (emphasis added). In fact, the Commission in *Daanen* found that the language subject standard *was ambiguous* before turning to the question of whether the Secretary's interpretation was reasonable and entitled to deference. 20 FMSHRC at 192-193.

Secretary's interpretation was reasonable and entitled to deference the Commission cited four specific reasons.

First, the Commission found that the Secretary's interpretation was consistent with the language of the standard. The standard's use of the term "system" contemplated an "interrelationship of component parts." *Id*. at 193. As a result, the Commission determined that for a braking system "to be considered functional, each of its component parts must be functional." *Id*.

Second, the Secretary's interpretation was consistent with the Mine Act's goal of promoting miner safety. *Id*. The Commission reasoned that "[b]y allowing a citation to issue before the entire braking system fails, the Secretary's interpretation is preventive and seeks to cure equipment defects before serious accident occur." *Id*.

Third, the Commission found that the Secretary had consistently applied the proffered interpretation. *Id*. at 194. The Secretary's Program Policy Manual explicitly states that a citation should be issued under the standard "if a component or portion of any braking system on the equipment is not maintained in functional condition even though the braking system is in compliance with" subsections (1) and (2) of 56.14101(a). *Id*.

Finally, the Commission stated that the Secretary's "interpretation gives independent meaning to each part: subsection (1) is a [service brake] performance standard, while subsection (3) is a maintenance standard." *Id*. The Commission noted that if a citation could only be issued under subsection (3) when the braking system failed to stop and hold equipment, then there would be no difference between the two subsections. *Id*.

Consistent with the Commission's holding in *Daanen*, I find that in order to establish a violation of section 56.14101(a)(3) the Secretary must prove that a component of the air brake system on the water truck was not maintained in a functional condition, regardless whether the braking system was capable of stopping and holding the vehicle.[19,20]

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[19] Respondent contends that *Daanen* is inapplicable to the case at hand. Vulcan Br. 5. I disagree. Respondent's argument rests entirely on factual differences between the two cases. *Id*. While the facts of the two cases are not identical, the Commission in *Daanen* made clear that the Secretary's interpretation of the standard was reasonable, and that a violation will be proven if the Secretary can establish that a component of a braking system is not maintained in a functional condition.

[20] Much of Respondent's evidence was presented as if the Secretary were charging Respondent with a violation of section 56.14101(a)(1) or (a)(2), i.e., for failing to pass the parking brake or service brake performance tests. However, Wright testified that the truck passed both performance tests and, as a result, issued the citation for an alleged violation of 56.14101(a)(3) pursuant to the guidance in MSHA's Program Policy Manual. In *Daanen* the Commission endorsed this approach by citing the Program Policy Manual as support for the Secretary's consistent application of the standard. 20 FMSHRC at 194.

For reasons set forth below I find that while the air brake chamber on the water truck is a component of the braking system, the Secretary failed to prove by a preponderance of the evidence[21] that the chamber and, in turn, the brake system, was not being maintained in a functional condition.

I find that the air brake chamber is a critical component of the braking system on the water truck, which is clearly self-propelled mobile equipment. This fact was not disputed by the parties. Consequently, the air brake chamber must be maintained in functional condition for the truck's braking system to be considered functional. *See Daanen* at 193.

I find that the Secretary failed to establish that the air brake chamber was not being maintained in a functional condition. I credit Wright's testimony that he heard and felt air being expelled from the weep hole. However, I find that the Secretary failed to prove by a preponderance of the evidence that the air brake chamber and, in turn, the air brake system, was not being maintained in a functional conduction. In reaching this conclusion I have relied on four critical pieces of evidence.

First, both expert witnesses agreed that a weep hole's purpose is to exhaust air from the air brake chamber during normal operation. Accordingly, observing air being expelled from a weep hole does not by itself establish that a chamber is not being maintained in a functional condition.[22] In order to prove a violation in this instance the Secretary also must establish that a defect, or shortcoming, in the chamber was the source of the air Wright observed being expelled from the weep hole.

Second, neither of the Secretary's witnesses could identify the source of the air being expelled from the weep hole with any level of the certainty. While both Wright and Hall posited that a damaged diaphragm was the likely source of the alleged leak, their testimony on this point was almost entirely speculative. Neither Wright nor Hall viewed the diaphragm or saw any

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[21] The Secretary bears the burden of proving a violation by a "preponderance of the evidence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). In order to satisfy this burden, the Secretary must convince the court that the existence of a fact is more probable than not. *Id*. Under certain circumstances the Secretary may establish a violation by inference, but only when the inference is inherently reasonable and there is a rational connection between the evidentiary facts and the conclusion inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (May 1984). "If the Secretary fails to meet this burden then there is no violation, irrespective of any counterarguments." *Sims Crane*, 41 FMSHRC 393, 396 (July 2019).

[22] The Secretary, in his brief, cites *Grace Pacific Corp*., 35 FMSHRC 3722 (Dec. 2013) (ALJ) and seemingly argues that an audible air leak by itself evidences an equipment defect. Sec'y Br. 15. However, the inspector in *Grace Pacific* both heard an audible air leak and calculated an air loss rate. *Id*. at 3273. Moreover, there the ALJ relied at least in part on the air loss rate calculation in finding that a violation existed. *Id*. at 3274 ("Given that the psi was lower than the acceptable level, leaving the brakes ineffective, I find that the brakes were not maintained in functional condition and a violation has been shown.").

damage to the diaphragm.[23] Rather, in reaching their conclusion that the diaphragm was likely damaged, they relied almost exclusively on Wright's observation that there was a "continuous" release of air from the weep hole, which, according to them, indicated a leak. However, Wright offered very little context as to what he meant by stating that the release was "continuous."[24] While Wright and Hall testified that air should exhaust from the weep hole for only a brief moment when the brake is depressed before the diaphragm seals, Rolfe offered testimony disputing that fact. According to Rolfe, who unlike Secretary's expert had an opportunity to examine the truck after the citation issued, it is impossible to determine how long air will vent from a weep hole. He explained that air brake chamber diaphragms are internal components that cannot be seen. As a result, it is impossible to tell how fast a diaphragm is moving or how long air will vent from a weep hole. I find Rolfe's testimony on this issue to be both compelling and credible. While his testimony does not conclusively establish that the air brake chamber was being maintained in a functional condition, it does provide a credible alternative explanation for why the chamber did not seal as fast as Wright may have expected.

Third, both experts agreed that any fluctuation in the brake pedal could release air from the system.[25] Therefore it is critical that there be no fluctuation of the brake pedal during a test which seeks to discover whether there are leaks in the air brake system. Otherwise air being properly expelled from the system could be mistaken for a leak. For reasons that follow, I find that the Secretary failed to establish that during the test administered by Wright there was no fluctuation in the brake pedal that controls the treadle valve.

Fourth, it is unclear how the truck driver depressed the service brake pedal during the test. While I credit Wright's testimony that he instructed the driver to maintain constant and consistent pressure on the brake pedal during the test, it is unclear whether the brake was applied in such a way. Wright agreed that he was unable to observe the driver during the test. Moreover, the record is devoid of evidence that after he heard air being expelled from the weep hole Wright asked the driver whether he continuously depressed the pedal as instructed. [26] Given that any

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[23] Hall, who offered the more substantive testimony on this topic, was not present at the time of the inspection, did not hear the alleged air leak, and never examined the subject brake chamber.

[24] Outside of statements that air was expelled from the chamber the entire time the brake pedal was depressed, Wright offered little context as to what he meant by saying that the alleged leak was "continuous" or "constant." Notably, he did not testify to the duration of time that the brake pedal was depressed.

[25] Although neither party offered a detailed explanation of the treadle valve, the court understands that the treadle valve is connected to the service brake foot pedal and controls the amount of air pressure delivered to the brake chamber. As a result, fluctuations in pressure to the brake pedal necessarily means that air is moving through the treadle valve to the brake chamber.

[26] Indeed, Wright left open the possibility that the brake pedal was not fully depressed during the entire test. When Wright was asked on cross whether he knew for a fact that the driver applied consistent pressure to the brake pedal, he responded by saying that "if he didn't [apply
(continued…)

fluctuation in the brake pedal would send air through the treadle valve to the brake chamber, it was critical that the test administered by Wright be carried out in a very specific way in order to ensure that air being correctly expelled from the system would not be mistaken for a leak. Here, I find that the Secretary's evidence is lacking with respect to how the brake pedal was depressed during the test and the evidence suggests that another plausible alternative explanation exists for why air was being expelled from the weep hole.

Given the above analysis, I find that the Secretary failed to establish by a preponderance of the evidence that the air expelled from the weep hole indicated that the brake chamber and, in turn, the brake system, was not being maintained in a functional condition. Rolfe's testimony regarding the inability to determine how long it may take for a properly functioning chamber to exhaust air from weep hole, the lack of more conclusive evidence regarding the source of the leak, and the failure to ensure that the test was properly administered by Wright all prevent me from making the inferential jump the Secretary's evidence requires to uphold the citation.

It is important that the parties recognize that that I am not finding that Respondent was in compliance with the cited standard. Rather, I find only that the Secretary failed to meet his burden of establishing the violation by a preponderance of the evidence. In reaching this conclusion I have not based my decision on the inspector's alleged lack of training to conduct DOT inspections of commercial motor vehicles or his alleged failure to conduct the brake tests suggested by Vulcan. Consequently, the citation is vacated.

III. ORDER

For reasons set forth above, Citation No. 9428135 is **VACATED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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[26] (…continued)
consistent pressure], that would be [Vulcan's] people not doing as they was (sic) asked." Tr. 55. However, it is the Secretary's burden at hearing to prove every element of the violation by a preponderance of the evidence. While it is unclear what happened in this instance, an inspector's testimony that he gave someone an instruction does not conclusively establish that the instruction was followed. Similarly, failure to follow the instruction of an inspector does not prevent an operator from challenging whether the Secretary has met his burden.

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RYAN S. LEMLEY, Complainant, v. MONONGALIA COUNTY COAL RESOURCES, INC., Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. PENN 2021-0087 MSHA Case No.: MORG-CD-2021-05 Mine: Monongalia County Mine Mine ID: 46-01968

ORDER GRANTING TEMPORARY REINSTATEMENT OF RYAN S. LEMLEY

Before: Judge Lewis

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor ("Secretary") on June 8, 2021, filed an Application for Temporary Reinstatement of miner Ryan S. Lemley ("Complainant") to his former position with Monongalia County Coal Resources Inc. ("Respondent") at Respondent's mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Secretary's certificate of service states that the Application for Temporary Reinstatement of Complainant was served on Respondent by electronic mail on June 8, 2021. The Respondent has not filed a timely Request for Hearing. The parties submitted on June 23, 2021, a Joint Motion to Approve Settlement, which I approve herein.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c)(2) of the Act, the temporary reinstatement of Ryan S. Lemley is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that "if the Secretary finds that the complaint was not frivolously brought, the

Commission, on an expedited basis upon application by 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).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought,[1] shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the Complaint filed by Complainant (Exhibit "A" to the Application) and the Declaration of Special Investigator Clarence Moore indicating that this was done (Exhibit "B.")

Mr. Moore's Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought, including:

1. At all relevant times, Monongalia County Coal Resources Inc. was a Corporation and is a "person" as defined in section 3(f) of the Mine Act.

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[1] The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *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, 747 & n.9 (11th Cir. 1990).

[2] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

2. Complainant was employed as a belt cleaner at MCCR's Monongalia County Mine (46-01968), and therefore, was a "miner" within the meaning of section 3(g) of the Mine Act.
3. Complainant was employed at the Mine for approximately seven years, from 2014 until MCCR discharged him from employment on April 19, 2021.
4. On April 21, 2021, Complainant filed a discrimination complaint alleging that MCCR discharged him on April 19, 2021 in response to Complainant engaging in protected activity.
5. Complainant served on the Mine safety committee from June of 2016 through June of 2018, and or four months, Complainant held a belt examiner certification. During these and other times, and while conducting belt examinations, he discovered and reported safety issues. On several occasions, he filled out an entire page in an examination book with safety concerns and hazards. In several instances, he filed complaints with MSHA under section 103(g) of the Mine Act.
6. During his employment at the Mine, Complainant frequently accompanied federal and state mine inspectors as a Miners' Representative during their inspections. During one such examination by a state inspector, Complainant pointed out an area of inadequate roof support for which the inspector issued the Mine a citation. On another occasion, Complainant advised an MSHA inspector that an emergency sled was not in the required location with the required equipment, and the MSHA inspector issued a citation to the Mine.
7. Complainant observed a "hot trolley hanger" in the Mine to which someone had run a hose to spray water to keep it cool. If the water was turned off for more than 30 seconds, the hanger would start smoking and the plates in the top would turn red. Complainant noted that the Mine did not take any other steps to abate this obvious condition during the day shift and afternoon shift, and so he called the dispatcher to contact the UMWA and let them know of the situation. Following this report, the UMWA and MCCR worked out a suitable solution to address the hot hanger.
8. Complainant reported that MCCR engaged in a years-long pattern of harassing him due to his safety reporting and cooperation with government inspectors.
9. In an August 14, 2018 letter from the late Bob Murray to UMWA President, Murray identified Complainant as one of several out of control individuals at Murray Energy owned mines who used "constant safety allegations and 103(g) complaints" to "harass [the] company and its management."
10. Complainant was generally known by MCCR as a miner that would cooperate with government inspectors. Following a number of anonymous 103(g) complaints called in to MSHA, management began referring to Lemley as "'G' Lemley."
11. MCCR raised false allegations against Complainant for allegedly destroying a contractor's belt equipment while working underground at the mine. Complainant was subsequently written up for poor work performance and suspended on the grounds that he allegedly failed to report an area of unsupported roof for which the Mine was cited by a state inspector. Complainant maintains that he, in fact, reported

the unsupported roof to the inspector. The suspension eventually proceeded to arbitration, and Complainant was restored to his position with back pay.

12. During a belt move in which Complainant reported several safety issues, a foreman encouraged Complainant to ignore the safety concerns. Complainant's work was impeded and slowed due to the safety concerns, but he was able to complete the belt move. The following day, a foreman told Complainant that the Assistant Superintendent wanted to write Complainant up for poor work performance, impeding production, and not following safety protocols. However, the foreman purportedly refused to do so because Complainant's safety concerns were accurate.

13. After Complainant's report of the mis-located emergency sled to an MSHA inspector, a MCCR safety representative told him he would no longer be able to serve as a Miners' Representative on inspections with him if Complainant was going to continue to point out safety concerns to inspectors.

14. Following an anonymous 103(g) complaint about non-compliant hardhat liners that MSHA substantiated and MCCR believed Complainant called in, a member of the Safety Department approached him daily for the next two weeks to ensure he had the proper hard hat liner.

15. Complainant also reported that MCCR assigned him to an especially hostile foreman who repeatedly threatened him and attempted to write Complainant up for taking equipment out of service, purposefully making mistakes, and creating a hostile workplace. Complainant also complains of being assigned to several less desirable positions during that time.

16. On March 20, 2021, Complainant reported five 103(g) safety complaints to MSHA which MSHA investigated on March 22 and issued citations substantiating all five complaints. While underground, Complainant asked a foreman, "What's new?" to which the foreman responded, "Other than you calling in all these complaints?" The foreman informed Complainant that MCCR was not happy, and he showed Complainant the list of violations. Complainant stated that the complaints must have been legitimate because of the citations issued.

17. The Mine's attendance policy distinguishes between personal and sick days, and provides for multiple levels of discipline for violations.

18. On April 2, 2021, the UMWA and MCCR reached a local agreement to use the miners' second week of vacation this year as personal days, due to the mine ceasing operations and permanently closing late in 2021.

19. On April 9 and 10, 2021, Complainant missed work, apparently without management consent and without proving an illness with a doctor's note.

20. On April 16, 2021, Complainant suffered an adverse action when MCCR suspended him with the intent to discharge him under the attendance policy. Complainant received no warning before his suspension and discharge, and he was not afforded an opportunity to use personal days or a combination of a personal day and a sick day for his two absences.

21. On April 19, 2021, Complainant suffered an adverse action when MCCR discharged him from his employment at the Mine.
22. MCCR treated Complainant more harshly than another similarly situated miner who has never called in a 103(g) complaint and has never been accused of doing so. In March 2021, that miner missed work, and attempted to use a personal day, but he did not have any personal days left to use. The miner had previously received a warning for missing work. As this was an additional unexcused absence within a 180 day time frame, MCCR issued a letter suspending the miner for two days. Subsequently, the miner was again absent from work without an excuse. Yet, although MCCR initially moved to discharge him, it did not do so. Instead, MCCR issued him a second suspension and allowed him miner to use a personal day for his March absence. In addition, the miner had previously violated the attendance policies more than once.
23. Based on my investigation to this date, I have concluded that there is reasonable cause to believe that MCCR discharged Ryan S. Lemley because he engaged in protected activities. MCCR had knowledge of Complainant's protected activities, it demonstrated animus towards Complainant regarding his protected activities, it disparately treated Complainant, and there was a short time between the latest protected activity and the adverse action. Thus, there is reason to believe that MCCR's decision to discharge Complainant was based, at least in part, upon his protected activity, and I have concluded that the complaint filed by Ryan S. Lemley is not frivolous.

Dec. of Clarence W. Moore, June 8, 2021 (Ex. "B" to App. For Temp. Reinst.)

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant Ryan S. Lemley is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Ryan S. Lemley** be **immediately** **TEMPORARILY REINSTATED** according to the terms submitted by the parties in their Joint Motion to Approve Settlement.

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

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint as soon as possible.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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