FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JOHN COLLINS	:	Docket No. SE 2023-0235
v.	:	
CRIMSON OAK GROVE RESOURCES, LLC	:	

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

DECISION

BY: Jordan, Chair; Rajkovich and Baker, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). The Secretary of Labor filed an Application for Temporary Reinstatement on behalf of John Collins against Crimson Oak Grove Resources, LLC, ("Crimson") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). On September 18, 2023, the Administrative Law Judge issued a Decision and Order Reinstating John Collins. 45 FMSHRC __, Docket No. SE 2023-0235 (Sept. 18, 2023) (ALJ). On September 22, 2023, Crimson filed a Petition for Review of Temporary Reinstatement Order in which it argued that the Judge erred in finding the miner's complaint was not frivolously brought. It further argued that the Mine Act's and Commission's procedures governing temporary reinstatement have deprived it of due process of law. On September 29, 2023, the Secretary filed a response. For the reasons which follow, we hereby affirm the Judge's decision.

I.

Factual and Procedural Background

A. Factual Background

Crimson operates the Oak Grove Mine, an underground coal mine near Adger Alabama, which mines coal through room-and-pillar-mining and longwall mining. At the time of his discharge John Collins worked as a mobile equipment operator at the surface yard. Collins had worked at this mine for 19 years, and as a mobile equipment operator since February 2023.

On July 27, 2023, Collins filed a discrimination complaint with MSHA alleging that he was unlawfully discharged from employment with the mine after complaining that it was not safe

to operate a Komatsu 250 front-end loader for the task which he was assigned, and then allegedly failing to safely operate the equipment.

The relevant incident occurred on June 14, 2023. Crimson supervisor Paul "Jeff" Jamison assigned Collins to load pan line[1] onto a haul truck using a Komatsu front-end loader. Collins testified that he was concerned that the loads were too heavy for the Komatsu; the Cat loader, a larger loader, is normally used for this task. Tr. 28-29.

Collins informed Jamison that he was uncomfortable using the Komatsu loader to lift such a heavy load.[2] Jamison responded that the Komatsu is regularly used for this task. Collins responded, "I understand that, Jeff, but I'm not comfortable using it." Tr. 26. Jamison responded that the larger loader was not available. Collins then stated, "I'm going to tell you again, I don't feel comfortable doing it, but I will go ahead and do it." Tr. 26, 30. Collins testified that he reluctantly complied with his supervisor's directive despite his concerns because he was worried about losing his job.[3]

Collins successfully placed the first load onto the haul truck using the Komatsu. He testified the heavy pan line caused the loader to rock which was "kind of scary." Tr. 28, 30-31. Collins transported the second pan line across the yard. As Collins attempted to raise the load onto the truck, the back end of the Komatsu lifted from the ground. Tr. 31-32. The rear tires lifted more than five feet from the ground, as the front of the machine dipped lower. The load slid off and the rear of the Komatsu crashed back to earth. Collins injured his back. Tr. 36. Another miner finished loading the haul truck using the heavier Cat loader. Collins testified that about five minutes after the incident he told Jamison that he "knew it was going to happen." Tr. 35.

On June 23, Collins was called into a meeting with mine manager Jesse Avery, a representative from human resources, and an union representative. Together they jointly watched a security video of Collins attempting to load the haul truck on June 14, 2023. Jamison testified that the video depicted Collins using proper technique during his initial lift, but using improper technique on his second loading attempt. Specifically, Jamison believed that the video demonstrated that he failed to tip the forks back and that the load was not safely secured against the mast. Tr. 64. Collins was suspended after the meeting, pending an investigation into the June 14th incident.

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[1] The pan line appears to refer to a pan conveyor, which is "[a] conveyor comprising one or more endless chains or other linkage to which usually overlapping or interlocking pans are attached to form a series of shallow, open-topped containers." *See* Pan Conveyor, *Dictionary of Mining, Mineral, and Related Terms* (2d Ed. 1996).

[2] Collins testified that while he regularly operated the Komatsu 250, he had never before used it to load pan lines onto a haul truck. Tr. 21-22. He had previously loaded pan lines onto a haul truck approximately five or six times, each time using a heavier Cat loader. Tr. 22. Conversely, Jamison testified that the operator used the Komatsu 250 to load pan lines ever since Jamison started with them, and he had personally used it to load pan lines. Tr. 68.

[3] Collins had recently been suspended from employment for damaging the loader.

Avery testified that he learned from his investigation that after Collins' recent suspension he routinely told Jamison that he was uncomfortable with his assigned tasks. Tr. 92. Avery testified that Jamison believed that the loader could be safely used. Tr. 92.

Crimson General Manager Eric Koontz testified that Collins recently had two other incidents in which he damaged parts and equipment while operating mobile equipment. Koontz testified that he had offered Collins alternative work after becoming concerned that he was operating equipment carelessly. Tr. 93. In one instance, on March 23, 2023, Collins damaged a pump while unloading a truck. Tr. 61. In the other instance, on April 13, 2023, Collins damaged the Komatsu loader while operating it. Tr. 62.

Koontz determined that Collins operated the Komatsu loader dangerously on June 14, 2023. Koontz testified that the Komatsu loader was capable of lifting the assigned loads. Specifically, as configured, the Komatsu loader was capable of lifting 15,000 pounds. A scale ticket from August 9, 2023 demonstrated that a pan line weighed approximately 11,500 pounds. Tr. 68, 98; R. Exs. E, G. Koontz testified that he made the decision to discharge Collins based on these three incidents. Tr. 93.

On July 21, 2023, an arbitrator found that Crimson did not violate the collective bargaining agreement when it fired Collins. On July 27, 2023, Collins filed the subject discrimination complaint with MSHA. An inspector for the Secretary began his investigation and, thereafter, filed an application for Collins to be temporarily reinstated to his former position pending a decision on the merits of his complaint.

B. The Judge's Decision

On September 18, 2023, a Commission Administrative Law Judge concluded that Collins' repeated declarations that he was uncomfortable with his assigned task constituted protected activities sufficient to meet the Secretary's burden of proof in a temporary reinstatement proceeding.

In his written decision and order reinstating John Collins, the Judge noted that Crimson submitted evidence in an attempt to demonstrate that the pan lines were within a Komatsu loader's safe lifting capacity. The Judge found that without expert testimony he was unable to interpret the technical evidence relating to the machine's capabilities. Regardless, even if evidence demonstrated that the pan lines could be safely loaded with a Komatsu 250, so long as the miner has a good faith belief that there is a safety hazard, they are protected in bringing their concern to the operator. Slip op. at 14 (*citing Sec'y on behalf of Robinette*, 3 FMSHRC 803 (Apr. 1981); *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989)). The Judge further concluded that his discharge was an adverse employment action and that there was reasonable cause to believe that the operator was aware of Collins' protected activity, showed animus, and that there was a close connection in time between the protected exercise and the miner's discharge. For these reasons, the Judge granted the Secretary's application for the temporary reinstatement of Collins.

II.

Disposition

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The purpose of this protection is to encourage miners "to play an active part in the enforcement of the Act," in recognition of the fact that "if miners are to be encouraged to be active in matters of safety and health they must be protected against . . . discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, 95th Cong. 1st Sess. 35 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623. Temporary reinstatement is "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id*. at 624-25 (1978).

An operator may request a hearing following receipt of the Secretary's application for temporary reinstatement pursuant to Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45(c). Rule 45(d), 29 C.F.R. § 2700.45(d), provides that in such hearing "the Secretary may limit his presentation to the testimony of the complainant. The respondent [operator] shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought."

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 obo Price v. Jim Walter Res., Inc*., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990); *Sec'y obo 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." *Jim Walter Res.*, 920 F.2d at 748, n.11.

Notably, at the 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." *Id.* 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 obo Albu v. Chicopee Coal C*o., 21 FMSHRC 717, 719 (July 1999).

The Commission then reviews a Judge's temporary reinstatement order to determine whether it is supported by substantial evidence. *See e.g.*, *Sec'y obo Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). "While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity." *Id*. at 1088 (citations omitted).

A. Substantial Evidence Supports the Judge's Determination that the Secretary Demonstrated a Non-Frivolous Case that Collins Engaged in Protected Activity.

On review, Crimson argues that the Judge erred by finding that Collins actions were protected by the Mine Act. The operator maintains that its undisputed evidence refutes Collins' belief that it was hazardous to load pan line with the Komatsu 250 loader.[4]

We disagree. Substantial evidence supports the Judge's finding that the Secretary demonstrated a non-frivolous case that Collins engaged in activity protected by the Mine Act. Additionally, there is evidence that the complaint was made in good faith. *See Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988) (the Mine Act protects the right to refuse work under conditions that a miner reasonably and in good faith believes to be hazardous).

Collins testified that while he regularly operated the Komatsu front-end loader, he had never before used it to load pan lines. Tr. 21-22. Collins believed that the pan line was too heavy to be safely lifted with the Komatsu, which is why the heavier Cat loader was regularly used to perform this task at the mine. Tr. 22, 28-29, 31. Collins testified that he told Jamison three times that he was not comfortable using the Komatsu loader for this assignment before eventually acquiescing. While Collins was attempting to load the second pan line onto the truck, the weight of the lifted load caused the back end of his machine to rise approximately five feet off of the ground and the pan line to slide from the loader's forks. Collins told Jamison that he "knew it was going to happen" directly thereafter. Tr. 35. Collins testified that he injured his back in the fall. Tr. 36.

Crimson argues that the Judge erred; it contends that it submitted evidence that demonstrates that the Komatsu can be safely used to lift pan lines. It further argues that its evidence demonstrates that Collins operated the equipment improperly.

A review of the record demonstrates that Crimson's evidence was in fact disputed. In particular, there was a conflict as to whether the Komatsu could be safely used. Collins testified that it was not possible to safely use the Komatsu to load pan line. When he performed the task the loader became unbalanced. In contrast, Crimson introduced evidence suggesting that a pan line was within a Komatsu 250's safe loading capacity. Specifically, it introduced evidence that the loader had the capacity to lift approximately 15,000 pounds, Tr. 98; R. Ex. G (Komatsu 250 specification sheet) and evidence that a pan line weighed 11,560 pounds.[5] R. Ex. E (August 9, 2023 scale ticket).

Additionally, there was a conflict as to whether Collins used proper procedures when attempting to load the haul truck. Collins testified that he used the same lifting procedure during

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[4] Crimson also contends that Collins failed to make a safety complaint. Collins stated that he was uncomfortable using the Komatsu 250 to complete the assigned task. Tr. 28. Substantial evidence supports the Judge's finding of a safety complaint. The fact that the loader became unbalanced during an attempted lift demonstrates the plausible reasonableness of his stated concerns.

[5] We note that a scale ticket from August 9, 2023, is not dispositive proof of the weight of the load on June 14, 2023.

the first successful lift and the second unsuccessful attempt. Tr. 40-41. In contrast, Crimson argues that the video and testimony established that Collins used improper technique on his second loading attempt. Jamison testified that the video demonstrated that Collins failed to take adequate measures to straighten his load or to tip the load backwards to prevent it from sliding off of the forks.[6] Tr. 64-68.

The Judge is simply not permitted to resolve these conflicts in the testimony and evidence in a temporary reinstatement decision. *Sec'y of Labor obo Albu*, 21 FMSHRC at 719 ("[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."). At the hearing on the merits of the complaint, the operator will be provided with the opportunity to attempt to demonstrate the equipment could be safely used for the task and to attempt to demonstrate that Collins failed to follow correct procedures. The hearing will be conducted after the parties have had the opportunity to engage in appropriate discovery regarding these technical issues. Despite Crimson's arguments, the Judge was not permitted to weigh the evidence submitted by the parties. On review, the only inquiry is whether the Judge's conclusion is supported by substantial evidence. It is.[7]

B. The Commission's Procedures Provided Crimson with Due Process.

Crimson contends that the Commission's temporary reinstatement proceedings are constitutionally defective. It maintains that principles of due process require that an operator be permitted to challenge the complainant's credibility and for the fact-finder to be able to weigh the evidence before him.

Crimson's arguments have been addressed and refuted by the Supreme Court in *Brock v. Roadway Exp.*, 481 U.S. 252 (1987) and by the Court of Appeals for the Eleventh Circuit in *Jim Walter Res*., 920 F.2d 738 (11th Cir. 1990).

Due process requires fair notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Roadway Exp., Inc*., 481 U.S. at 261 (1987) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) [8]). In *Jim Walter Res*., the Eleventh Circuit found that the

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[6] Even if the video undisputedly demonstrated improper technique (which it does not), it would not resolve whether the Komatsu became unbalanced solely because of operator error or because of the weight of the load. Any error on the part of Collins does not mean his safety concerns were not genuine.

[7] Commissioner Althen dissents, concluding that the Secretary failed to provide any evidence of a non-frivolous motivational nexus between the protected activity and the adverse action. That is incorrect. The Commission has held that the Secretary may establish a non-frivolous motivational nexus simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action. *Sec'y obo Roger Cook v. Rockwell Mining, LLC,* 43 FMSHRC 157, 162 (Apr. 2021) (*citing Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc*., 22 FMSHRC 323, 325-26 (Mar. 2000)). Collins was suspended and then discharged less than two weeks after the occurrence of the event.

[8] In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court articulated a three-part test to determine what due process requires:

Mine Act and the Commission's Procedural Rules governing temporary reinstatement proceedings "far exceeded" the minimum constitutional requirements. The Eleventh Circuit also specifically rejected the operator's argument that the Commission's "not frivolously brought" standard in temporary reinstatement hearings was so easily met by a complaining miner that the operator was deprived of due process of law.

In so ruling the Eleventh Circuit relied upon *Roadway Express*, in which the Supreme Court determined that a similar temporary reinstatement provision in the Surface Transportation Assistance Act of 1982 provided the employer with due process of law. The Supreme Court held that the absence of a pre-deprivation hearing was not constitutionally defective, and that the statute's procedural protections met minimum standards of due process because the employer, prior to temporary reinstatement, was provided the following:

> Notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witness. The presentation of the employer's need not be formal, and cross-examination of employee's witnesses need not be afforded [prior to temporary reinstatement].

Id. at 264.

In *Jim Walters Res*., the Eleventh Circuit extrapolated the same principles and applied them to the temporary reinstatement procedures under the Mine Act, noting that the cases were "virtually indistinguishable." The Eleventh Circuit stated:

> Faced with virtually the same balance of competing government and private interests as in this case, the Supreme Court in *Roadway Express* held that due process does not require that an employer, who is challenging a temporary reinstatement of an employee, be provided with a pre-deprivation hearing. Due process is satisfied "[s]o long as the prereinstatement procedures establish a reliable 'initial check against mistaken decisions' and complete and expeditious review is available." *Id*. (citation omitted).

920 F.2d at 746-747.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures use, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

The Court concluded that the protections afforded by section 105(c)(2) of the Mine Act and the Commission's Procedural Rules "far exceeded" the minimum required. *Jim Walter Res*., 920 F.2d at 748. Notably, under the procedures upheld in *Roadway Express,* the Secretary had sole authority to determine whether the standard had been met and to issue the reinstatement order. The employer was provided with a post-deprivation hearing on the merits of the complaint.

Although in the case at hand Crimson argues that the limited nature of the Commission's due process hearings are constitutionally defective, it is clear that the Supreme Court in *Roadway Express* found that a pre-deprivation hearing was not even required in a temporary reinstatement case.

Crimson also claims that the Commission recently further narrowed the scope of temporary reinstatement hearings by removing a Judge's ability to make credibility determinations. R. Br. at 11 (citing *Sec'y obo Cook v. Rockwell Mining*, 43 FMSHRC 157, 165 (Apr. 2021). This is not true. The Commission has long held that under the "not frivolously brought test," a Judge is prohibited from making credibility determinations and weighing evidence. *See e.g., Sec'y obo Williamson*, 31 FMSHRC at 1089 (Oct. 2009) (finding that the Judge erred as he "resolved conflicts in the testimony, and made credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at this stage in the proceeding.").[9]

Crimson also argues that it lacks fair notice of the burden of proof. We disagree. In its majority decisions, the Commission has consistently continued to require that the Secretary's burden of proof is to demonstrate that the complaint has not been frivolously brought. *See Sec'y obo Roger Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157, 161 (Apr. 2021) (*citing Williamson*, 31 FMSHRC at 1089). It is well established that 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." *Jim Walter Res.*, 920 F.2d at 744.

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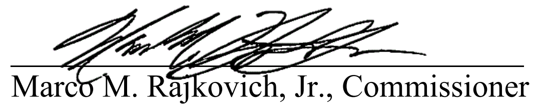
[9] As the Secretary identified in her brief, "[p]er *Roadway Express*, parties are not constitutionally entitled to "test the credibility of opposing witnesses" during an initial investigation because this added procedural protection "would not increase the reliability of the preliminary decision sufficiently to justify the additional delay." S. Br. at 12 (*citing* 481 U.S. at 266).

III.

Conclusion

In summary, substantial evidence supports the Judge's finding that the Secretary made a non-frivolous demonstration that the miner engaged in activities protected by the Mine Act. The operator's arguments that the Mine Act and the Commission's Procedural Rules governing temporary reinstatement are constitutionally defective are unavailing. Similar arguments have previously been addressed and dismissed by federal appellate courts including the Supreme Court. For these reasons, we affirm the Judge's order temporarily reinstating miner John Collins.

Mary Lu Jordan, Chair



Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

Commissioner Althen dissenting,

The standard of proof for temporary reinstatement is very low—a nonfrivolous complaint. However, "low" does not mean nonexistent.[1] I respectfully dissent.

I. SUPPLEMENTAL FACTS

It is helpful to supplement and clarify the majority's statement of facts. Undisputed evidence demonstrates that Collins's employment was shaky before he failed to load the pan lines in June 2023. On March 23, 2023, Collins knocked a pump off a truck, damaging it. Tr. 61. On April 13, 2023, he severely damaged a loader. Tr. 62-63.

After the second incident, the operator considered discharging Collins. However, pursuant to negotiations with UMWA representatives, the operator and Collins agreed upon a 35-day suspension. Tr. 53, 86. Additionally, contrary to showing animus, the operator offered Collins other surface jobs at the mine, but he refused them even at that time. Tr. 85. Collins did a test for one surface job but failed the test. *Id*.

The third incident within three months occurred on June 14, 2023, when Collins dropped a pan line from the loader while attempting to load the pan line on the truck. After this third instance of damaging equipment, the operator discharged Collins. Collins' UMWA representative grieved the discharge, and it went to arbitration. Collins' basis for his claim in arbitration was that the operator fired him for filing an accident report. Operator's Exhibit F. (The Secretary does not pursue that theory here.) The Arbitrator upheld the discharge. *Id.* In doing so, the Arbitrator's decision finds that Union witness Eddie Pinegar, Safety Committeeman, "testified that he loaded three (3) pieces of pan line on a different truck that day without incident." Exhibit F, p. 11.[2] The Arbitrator further found as Collins agreed in this case, that the operator properly task-trained Collins for loading equipment using the Komatsu 250 front-end loader.

There is no actual dispute about whether the Komatsu loader could safely load the pan lines. We cannot shrug off official documents showing the Komatsu's capability as if they were a lay opinion unless a party presents a live "expert" witness at the hearing. Moreover,

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[1] Or, maybe to the Commission, it does. A review of Commission records for fiscal years 2018 through 2022 shows 56 motions for temporary reinstatement: forty-six were granted seven were withdrawn, two settled, none were denied. Indeed, Administrative Law Judges wonder why they must go through hearings to reach a foregone conclusion as the Administrative Law Judge in this case demonstrates in a wonderfully ingenuous exclamation, "Well, that's why -- jeez, I've been here a long time. I've had very few temporary instatement hearings because the threshold was so low that the Secretary had to meet." Tr. 116.

[2] The Arbitrator does not expressly write that Pinegar used a Komatsu. However, there would be no relevance if he were not using a Komatsu. Moreover, Collins testified that on the day of the incident, Jamison reiterated that Crimson used Komatsu's for this purpose "all the time." Tr. 26. His response was, "I understand that, Jeff." *Id*. No one disputes the fact that Crimson regularly used the Komatsu to load pan liners.

miners had safely used the Komatsu to load pan lines. To assert Collins's statement that he was uncomfortable created a genuine dispute regarding the capabilities of the Komatsu is analogous to asserting that a nervous flier's fear creates a dispute about whether airplanes can fly. Regardless of an individual's subjective beliefs, objective evidence proves airplanes can fly and that the Komatsu can load pan lines.[3]

In response to Collins' statement that he was uncomfortable, Jamison, who had tasked trained Collins, first told him, "[W]e do it all the time," and Collins replied that he knew that. Tr. 26. So, Collins acknowledged that miners were using the Komatsu safely to load pan lines. Collins affirmed that he had bid for the loader operator job and was qualified. Tr. 47.

Nonetheless, Collins pressed his lack of comfort to which Jamison replied, "Well, everybody loads it with it; just -- you'll be all right; just be careful, watch what you do; take your time." Tr. 63. Thus, rather than showing animus towards Collins' statement, a busy supervisor who knew the capabilities and regular use of the Komatsu, including currently loading pan lines, instructed him to be careful and take his time.

After the failed load effort, Jamison asked Collins if he wished to file an accident report. At first, Collins declined but later changed his mind.

In summary, the evidence shows that the operator task-trained Collins on the use of the Komatsu loader. The Komatsu can objectively load pan lines on trucks. Another union miner that very day used the Komatsu to load pan lines. Collins agreed that the Komatsu was used to load pan lines. Rather than flaring at Collins' regular statements of uncomfortableness, Jamison offered him advice and reassurance. Collins failed to load the pan lines but dropped them short of the truck. After that failure, Jamison asked Collins if he wished to file an accident report.

Here, there is ***no evidence***—none—that the discharge was motivated in any part by Collins's expression of uncomfortableness. The majority incorrectly focuses upon purportedly disputed evidence regarding whether the Komatsu was strong enough to load the pan lines and whether Collins used proper procedures. Undisputed evidence and testimony demonstrated that the Komatsu could load pan lines. Even Collins agreed that the operator had used the Komatsu for that task "all the time." Tr. 26, 47.

However, more importantly, the claim of discrimination does not turn on the capabilities of a Komatsu loader or whether Collins used it correctly on the day he failed to load the pan line. The Secretary's complaint alleged that the operator discharged Collins for "reporting safety concerns."[4] Application for Temporary Reinstatement, p. 2. In other words, the issue is not the

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[3] The ALJ found that authoritative documents showing the strength of the Komatsu and prior uses of the Komatsu for that purpose were insufficient to prove it could handle pan lines. He needed an expert witness. Obviously, that is an error.

[4] In fact, Collins testified that his concern was that he was "uncomfortable" using the Komatsu to load pan lines. Of course, a lack of comfort could arise from safety concerns even though Collins knew the Komatsu had loaded pan lines. It might also have been an expression that he would be uncomfortable using it because he doubted his ability to use it properly. At the

Komatsu or Collins's operation of the Komatsu but rather whether the operator fired him after Collins's third mishap for his statements about uncomfortableness and not for his repetitive damaging negligence. The majority does not point to any evidence on that fundamental issue.

The Secretary must prove a nonfrivolous case that Collins's expression of uncomfortableness caused the operator to discharge him. Moreover, under *Pasula/Robinette*, if the operator was justified for discharged him for his third damage of equipment, the claim cannot stand. No evidence links Collins's expression of uncomfortableness to the discharge, and it is uncontested that he damaged equipment for a third time. The evidence shows only that Collins had a common human reaction when punished for a mistake—self-forgiveness and blame-shifting. We all may experience such feelings when called to task for a failing.

II. ANALYSIS

In the context of this proceeding, the Mine Act provides,

> No person shall discharge . . . any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because . . . of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter

30 U.S.C. § 815(c)(1). In turn, section 105(c)(2) provides for the temporary reinstatement of a complainant if the Secretary determines the miner's complaint was "not frivolously brought."

In *Jim Walter Res*., 920 F.2d 738 (11th Cir. 1990), cited approvingly by the majority, the Eleventh Circuit upheld the constitutionality of the nonfrivolous standard. It is analogous to the Supreme Court decision in *Brock v. Roadway Exp.*, 481 U.S. 252 (1987). In doing so, the circuit court synchronized the temporary reinstatement standard to the standard considered in *Brock*. Specifically, the circuit court found,

> We find that the "not frivolously brought" standard is not so low and easily met by a miner seeking temporary reinstatement as to violate due process. Indeed, there is virtually no rational basis for distinguishing between the stringency of this standard and the "reasonable cause to believe" standard that was implicitly upheld in *Roadway Express*.

920 F.2d at 747.

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hearing, he naturally testified that he meant safety concerns. However, in recounting the events of the day, he testified that he said he was "uncomfortable" three times. However, even if he had a subjective fear the Komatsu could not do the job with him at the controls, that subjective feeling does not create protected activity.

The circuit court's finding puts at least a scrap of meat on the bones of "nonfrivolous." In a temporary reinstatement hearing, the question is whether the Secretary has presented sufficient evidence so that there is reasonable cause to believe the operator discriminated against the complainant.

Traditionally, the Commission applies the *Pasula-Robinette* test. *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).[5] That test contains three elements. A miner or the Secretary must prove discrimination by showing that: (1) the miner engaged in protected activity, (2) was subject to an adverse action, and (3) that such adverse action was at least partially motivated by that protected activity. Operators may defend affirmatively by proving that the adverse action was also motivated by the miner's unprotected activity and that it would have taken the action for the unprotected activity alone. *Sec'y of Labor o/b/o Smitherman v. Warrior Met Coal Mining, LLC*, 45 FMSHRC ___, (June 20, 2023).

Here, Collins's discharge constitutes adverse action. However, insuperable problems arise for the Secretary's case on the issue of protected activity and from the absence of any evidence whatsoever that Collins' discharge after his severe third failure in four months was motivated in any way by an expression of discomfort especially when Jamison reassured Collins rather than rebuked him. Finally, in this unusual fact pattern, the operator undoubtedly would prevail with an affirmative defense. There is no reason to reinstate Collins briefly before the Secretary drops the action for Collins. If Collins wishes to pursue a hopeless case, he may do so on his own.

1. **Protected Activity**

Unquestionably, the Mine Act gives miners essential rights to protect their safety. A miner may refuse to work if he has a good faith belief that a hazard exists and communicates his belief to the operator. In *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia Circuit considered the issue of constructive discharge of a miner who refuses to work in intolerably dangerous conditions. The circuit adopted an objective test of whether "the conditions [were] so intolerable that a reasonable miner would have felt compelled to resign." *Id*. at 461. The circuit court cited *Clark v. Marsh,* 665 F.2d 1168 (D.C. Cir. 1981), in which the court characterized the standard test in discrimination cases as an "objective test."

National Cement Co. v. FMSHRC, 27 F.3d 526 (11th Cir. 1994) supports this objective test. In *National Cement*, the circuit court stated, "If the work refusal is not objectively

[5] In *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), the Ninth Circuit rejected the *Pasula-Robinette* standard and held the plain meaning of section 105(c) requires a "but-for" causation standard for discrimination determinations under the Mine Act. Thus far, no other circuit has followed the ninth circuit's approach and the operator in this case did not challenge the standard. Therefore, although we may anticipate future successful challenges to *Pasula-Robinette*, no challenge exists here.

reasonable, there is no protected activity. [T]he [work] stoppage must be reasonable, as well as motivated by a genuine belief that it is necessary to protect safety or health." 27 F.3d at 533, (citing *Miller v. FMSHRC*, 687 F.2d 194, 195 (7th Cir.1982)). A good faith belief, standing alone, does not create protected activity. The stoppage must be "reasonable." This means the work stoppage must be a rational "reason" rather than a fear unsupported by any reasonable basis.

In this case, Collins cannot support a claim that feeling "uncomfortable" with using a Komatsu loader constituted an objectively reasonable belief that the Komatsu was unsafe. An unexplained and unfounded assertion of fright (even assuming that was the actual cause of any uncomfortableness) does not rise to the realm of protected action, especially considering other miners' regular safe use of the equipment and Collins also regularly used the Komatsu. Tr. 21-22. Indeed, Collins himself safely loaded a pan line with it, and, as the Arbitrator found, at least one other miner also performed such pan line loading work the same day Collins only said that he was "uncomfortable." Collins did not testify to any knowledge of the Komatsu that objectively would create fear; he did not testify to any experience with the Komatsu that would objectively create fear.

Collins expressly acknowledged that he knew miners used the Komatsu to load pan lines "all the time." Tr. 26. Regarding the reasonableness of his position, Collins never expressed to Jamison any reason for a lack of comfort. Indeed, in the face of vigorous cross-examination, Jamison testified that he did not interpret Collins's statements as exercising a right to express safety concerns. Tr. 73. Instead, Jamison testified that Collins' expression of being uncomfortable was a pattern of conduct that Collins used regularly. *Id*. The most Collins's supervisor understood was that Collins was again saying without explanation that he did not feel comfortable doing a job that other miners, with Collins's knowledge, performed "all the time" with the same equipment.

The absolute most that can be said is that, although Collins was an experienced machine operator who had used the Komatsu many times before, he personally and without any basis said he was "uncomfortable" about using it to perform a task that the Komatsu clearly could perform and had performed. He expressed only "uncomfortableness" and was reassured that he would be fine—just going ahead and taking his time.

In this case, we consider an unexplained assertion of uncomfortableness in performing an ordinary mining task. Collins was trained in using the Komatsu and loaded other equipment. An unexplained declaration of lack of comfort in using equipment on which the miner has been trained, has used to load other equipment, and was being used to perform the same task the same day by other miners is not a protected activity.

2. **Motivation**

In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission identified several indicia of discriminatory intent, including (1) disparate treatment of the complainant (2)

hostility or animus towards protected activity; (3) knowledge of the protected activity; and (4) coincidence in time between the protected activity and the adverse action. 3 FMSHRC at 2510.

Even were we to find that Collins's unreasoned and unexplained claim of uncomfortableness was protected activity, the Secretary presented no evidence that the operator greeted Collins's expression of such discomfort with hostility, animus, or other action indicative of discrimination. There is no evidence whatsoever that Collins's discharge occurred "because" of statements about being uncomfortable before destroying company property. Indeed, when an employer discharges an employee after three incidents of the negligent destruction of company property in four months, it is laughable to suggest the motivation was an unexplained expression of being uncomfortable with using a machine to perform an ordinary work task.

a. Disparate Treatment

There is no evidence of disparate treatment. There was no evidence that any other miner ever expressed discomfort in loading pan lines with the Komatsu. Contrary to disparate treatment, other classified employees used the Komatsu to load pan lines. Similarly, there was no evidence that the operator would not have discharged other miners who committed multiple performance errors, resulting in damage to company property.

b. Hostility/Animus

There is no evidence of hostility or animus. To the contrary, Jamison informed Collins that other miners were doing the work, which Collins acknowledged. Jamison reassured him to go slow and take his time. The record does not indicate disparagement, critical remarks, or hostility to Collins' comments. The response was simply a business-like reply that he would be okay performing the work.

c. Knowledge of Protected Activity.

As explained above, Collins did not engage in protected activity. He did not have a reasonable basis to think the Komatsu could not perform the task safely. Collins acknowledged that he routinely used the Komatsu and that the operator used it regularly to load pan lines. He did not express a safety concern but said he was "uncomfortable" doing the work.

While Collins expressed that he was not comfortable using the Komatsu to perform the task, it was not sufficiently clear—in the context of the facts of this case—for the operator to reasonably infer that his complaint was related to safety. Collins did not claim he lacked training or assert any problem with the Komatsu that would have contributed to a diminution of his safety or the safety of other miners on the site. Moreover, Jamison had little reason to think that the vague statement was safety-related when, according to Jamison, it was a pattern of conduct that Collins used regularly when assigned tasks. It is uncontested that, at the time, Jamison did not interpret Collins' statements as exercising a right to express a safety concern. *See Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 426–28 (6th Cir. 2010) (finding that the motivation inquiry turns "on what the operator actually believed at the

time, not what the Commission later reasons the operator could have relied upon in making its disciplinary decision").

d. Timing of the Adverse Action

The operator discharged Collins soon after he committed a third error, destroying the operator's property. The discharge arose from a third and final act of destruction of property by mishandling operator equipment. When else would an employer discharge an employee for destroying property than soon after the destruction? It would be more suspicious if an operator took months to discharge an employee for repeated destruction of property; anyone, including the employee, would expect immediate action. Thus, from a timing perspective, the discipline makes complete sense for a third act of incompetently destroying company property rather than retribution for a statement about the miner's comfort.

The evidence at the hearing does not support any disparate treatment, the occurrence of protected activity, hostility toward Collins, a discriminatorily hasty discharge, or a reasonable belief of protected activity.[6]

3. Affirmative Defense

Suppose a complainant establishes a prima facie case of discrimination. In that case, the operator will nonetheless prevail if it demonstrates that it would have discharged the miner for unprotected activity without regard to the protected activity. *Pasula-Robinette*, *supra*.

In *Jim Walter Res*., *supra* at 747, the Eleventh Circuit stated that the employer has:

> The opportunity for a full evidentiary hearing *prior* to a temporary reinstatement. 29 C.F.R. § 2700.44(b). At this hearing, the employer can test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement.

The right for an operator to have a full hearing at which it may present its evidence contesting temporary reinstatement must encompass a right to prove to a level of summary decision that it would have discharged the employee for unprotected actions. Such an occurrence at a temporary reinstatement hearing must be extremely rare because it ordinarily must be based upon undisputed evidence and must not require a meaningful credibility determination. However, suppose an operator conclusively establishes at a temporary reinstatement hearing that it will be entitled to summary judgment based upon an affirmative

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[6] In affirming the temporary reinstatement, the majority relies almost wholly on the timing of the discharge. If discharging an employee quickly for damaging company when that employee is coming off a 35-days suspension for damaging company property is proof of discrimination meriting temporary reinstatement, there really is no standard for temporary reinstatement.

defense. In that case, the complainant's case is hopeless—frivolous. This unique case warrants such an outcome.

In this case, the Secretary claims the operator discharged Collins due to protected activity – namely, that the operator discharged Collins for his declaration of unexplained uncomfortableness in using a Komatsu. For this section of the dissent only, we assume that there is some way that an ALJ could find Collins's speculation could warrant a finding that his uncomfortableness was a reason for his discharge. However, we cannot neglect the operator's claim that it discharged Collins due to repetitive damaging negligence. If the operator establishes that claim to a level of summary decision, it negates any claim of entitlement to reinstatement.

The operator's affirmative defense would build upon the indisputable facts of Collins's repetitious negligence. Thus, the operator claims that it discharged Collins for severe repetitive negligence. Of course, discharge for repetitive asset-damaging negligence does not imply protected rights or activity. Therefore, given the burden-shifting under *Pasula-Robinette*, if the operator shows unprotected actions were a reason for the discharge, the Secretary must prove that the asserted reason for discharge was pretextual. In the *Pasula-Robinette* context, damaging negligence does not have to be "the" reason for discharge. It only needs to be "a" reason for discharge.

Rarely could summary judgment standards be met at a temporary reinstatement hearing. However, they are met in this case. The Secretary does not dispute the acts of negligence. The Secretary does not/cannot assert that damaging negligence is a protected activity. Thus, to prevail against the affirmative defense at a hearing, the Secretary must prove that the discharge for three undisputed acts of damaging negligence was pretextual. In other words, the Secretary must show the operator did not discharge Collins even partially for such damaging negligence but only for the complaint of uncomfortableness.

We suppose the Secretary could make the argument, although not with a straight face, that the operator's discharge of Collins for repetitive acts of negligence (upheld by an arbitrator) was a pretext for assertedly the operator's only genuine problem with Collins—a comfort complaint that preceded the last act of negligence. The Secretary must contend that the operator was not partially motivated by the repetitive negligent destruction of its property for which it had previously imposed a 35-day suspension—that is, that the discharge for the third negligent act damaging company property was pretextual. Presumably, to the Secretary, this third failure was not even part of the reason for the discharge; the discharge was solely because the operator could not abide a comfort complaint. Based on the evidence, such an argument is complete nonsense. The Commission does not have to, and should not, act upon nonsense.

It is undisputed that Collins twice negligently destroyed the operator's property before the third negligent act. It is undisputed that the operator attempted to discharge Collins for such negligence after the second instance and imposed a 35-day suspension. It is undisputed that Collins was again negligent and destroyed the operator's property only a few days after the suspension ended. It is undisputed that Collins knew the Komatsu had performed such loading work. An arbitrator upheld the discharge against a charge that the discharge occurred. Collins

filed an accident report with the operator's assistance—a claim not even made in this case. For Collins to prevail, an ALJ would have to reject these facts and find the motivating reason for discharge was an expression of uncomfortableness.[7] Neither the Mine Act nor our case law require us to reduce legal positions to absurdity.

Let us make it simple. The operator proves, and Collins agrees, that Collins committed three destructive acts of negligence in four months. It attempted to discharge Collins after the second act. The Secretary implicitly but not explicitly argues, "Collins's third act of destructive negligence was not any reason for the discharge; the only reason was his statement that he was uncomfortable. We do not have any evidence to support that claim, but because he was uncomfortable, he must get his job back." Stunningly, the majority agrees with the Secretary.

The majority requires the operator to restore a former employee to a position where he has repeatedly demonstrated that he will negligently destroy property and present a danger to himself and others. It does so because it says it cannot believe, at this stage, that the operator discharged Collins, at least in part for multiple acts of demonstrated destructive negligence after suspending him for such failures. Reduction of the Mine Act to an absurd credibility ruling trivializes the dignity and importance of the essential anti-discrimination provision of the Act.[8]

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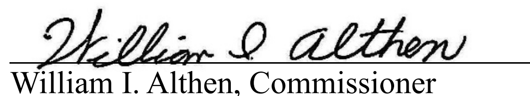
[7] I note again that the operator did not react badly to Collins expression of uncomfortableness. Jamison assured Collins that the Komatsu had performed the work. Collins agreed with this assurance. Jamison then told Collins to be careful and take his time. Collins claim of animus, therefore, is not supported by any expression of animus to his uncomfortableness but by reassurances. Collins does not have any "evidence" to support his claim. His claim is purely an unsupported "I think" claim. Finally, it is absurd to assert the timing of a discharge immediately after an employee destroys property displays that the real and only reason for discharge was Collins's expression of uncomfortableness. Such a clam is a fanciful makeweight to support an unsupportable proposition—an irrational, willful decision rather than an objective adjudication.

[8] It is not entirely clear what the Commission has meant by not permitting "credibility" determinations. Surely, it must not mean the Commission must accept proven lies or that it must accept allegations not supported by evidence but only the imagination and desires of a witness. Does it mean that anything a claimant says must be believed but testimony of other witnesses must be disbelieved or neither believed nor disbelieved? If it is crucial to a claim whether a mine car broke loose and rolled downward and ten witnesses say it did not while one witness says it did, must the ALJ not make a finding on such critical factor? Does it depend upon who the one witness is—claimant or company representative? Does it mean that in a case such as this where there were uncontested acts of gross and harmful negligence by the complainant, we must not accept that such negligence was a reason for the discharge because complainant suggests an unexplained and unsupported suspicion without evidence that his negligence was not a reason for discharge? Surely, not.

III. CONCLUSION

The evidence demonstrates that Collins only said he was "uncomfortable" performing work with a Komatsu loader. The evidence also demonstrates conclusively that the Komatsu loader could perform the work. Indeed, on the same day, another worker was using that type of loader for the very tasks asked of Collins. At the time of Collins's "uncomfortable" statement, the operator exhibited no hostility. Indeed, after Collins's prior costly failures, the operator attempted to find him another position. In discharging Collins, the operator dealt immediately with a severe third act of destruction of equipment by Collins in four months. The majority concedes there was not any disparate treatment.

There must be some minimal requirements for temporary reinstatement. This case does not meet those requirements. I respectfully dissent.



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