FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710

FEB 08 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of KEVIN SHAFFER	:	
v.	:	Docket No. WEVA 2018-117-D
THE MARION COUNTY COAL COMPANY	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

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) (2012) ("Mine Act").[1] On January 22, 2018, the Commission received from the Marion County Coal Company ("Marion County Coal") a petition for review of an Administrative Law Judge's January 16, 2018 order temporarily reinstating Kevin Shaffer. The operator has also requested a stay of the temporary reinstatement order. On January 29, 2018, the Commission received the Secretary of Labor's

[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 [s]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.

opposition to the petition and motion to stay.[2] For the reasons that follow, we grant the petition for review, deny the operator's motion for a stay, and affirm the Judge's order requiring the temporary reinstatement of Mr. Shaffer.

While all Commissioners reach this result, Commissioners have stated differing rationales for the result in two separate opinions. The separate opinions of the Commissioners follow.

Factual and Procedural Background

Mr. Shaffer's employment with Marion County Coal began in June 2010. His assigned duties included working as a mobile equipment operator at the Marion County Mine to haul refuse from a refuse bin to the refuse disposal area.

On October 18, 2017, Shaffer made safety complaints regarding the condition of mobile equipment he was operating, referred to as the No. 4 truck, and requested alternative work. Shaffer alleges that he complained to his supervisor, Adam Bond, that the transmission of the truck was not working, and that the truck had twice jumped out of neutral into reverse. Supervisor Bond instructed Shaffer to use a different truck. A mechanic, Paul Dixon, was called to the mine to repair the No. 4 truck. 40 FMSHRC ___, slip op. at 3, No. WEVA 2018-117-D (Jan. 16, 2018) (ALJ) ("slip op.").

Later that shift, Bond informed Shaffer that the mechanic, Dixon, had seen Shaffer driving without his headlights turned on. According to Shaffer, he responded by denying Dixon's claim, and Supervisor Bond, in turn, responded, "I'm tired of this f___ing sh__ on this equipment." *Id.* According to Bond, when Bond confronted Shaffer about the mechanic's claim, Shaffer responded by stating repeatedly, "f__ you," and told Bond, "I'm going to whip your ass; I'm going to take you to the gate." *Id.*

The next day, Supervisor Bond recounted the confrontation to the human resources office at Marion County Coal. *Id.* Later that day, Marion County Coal suspended Shaffer pending an investigation and, on October 23, suspended him with intent to discharge. *Id.* The United Mine Workers of America instituted a grievance process on behalf of Shaffer.

Shaffer filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discharged in violation of section 105(c) of the Mine Act. MSHA Special Investigator Clarence Moore concluded that Shaffer's complaint, alleging that he had been discharged for engaging in protected activity, was not frivolously brought. The Secretary of Labor filed an Application for Temporary Reinstatement.

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[2] On January 29, 2018, the Secretary electronically filed a motion for leave to file a corrected response to the operator's petition and the corrected response. The corrected response was timely and not substantially different from the initial response filed earlier that date. *See* 29 C.F.R. § 2700.8(d) ("For filing by electronic means . . . the due date ends at midnight Washington, D.C. local time."). We hereby grant the motion and accept the corrected response for filing.

The operator elected to brief the issue in lieu of a hearing on the application, and attached to its brief various exhibits including an arbitration transcript and associated arbitration decision resulting from the grievance process. Marion County Coal contended before the Judge that it terminated Shaffer because he threatened Bond in violation of its insubordination policy, and because he had similar discipline in his personnel record.

The Judge ordered Marion County Coal to temporarily reinstate Shaffer. She concluded that it was undisputed that Shaffer had engaged in protected activity by complaining about the No. 4 truck on October 18. Slip op. at 4. The Judge further stated that the Secretary had alleged adverse action close in proximity to the protected activity, and that it was undisputed that Bond had knowledge of Shaffer's protected activity. She noted that, at best, the operator has shown its intent to defend its actions on the basis of legitimate, business-related, non-discriminatory reasons. The Judge concluded that because the allegations of discrimination set forth in the Secretary's Application had not been shown to be clearly lacking in merit, the Secretary had sufficiently established that Shaffer's discrimination complaint was non-frivolous. *Id.* at 4-5.

Marion County Coal filed a petition for review of the Judge's temporary reinstatement order pursuant to Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). It argues that the Secretary failed to establish any non-frivolous nexus between Shaffer's termination and his safety complaint through evidence that Shaffer had suffered disparate treatment or that the operator demonstrated hostility toward Shaffer's protected activity. It asserts that the evidence demonstrates that the only reason for Shaffer's termination was his improper and physically threatening behavior, which violated company policies. Finally, it requests that the Commission stay Shaffer's reinstatement until a ruling has been issued on the merits because it contends that Shaffer's "reentry into the workforce would create a potentially unsafe work environment for other miners and members of management." Mot. to Stay at 3.

The Secretary opposed the petition and motion to stay.

Separate Opinion of Commissioner Jordan and Commissioner Cohen:

A. Petition for Review of Temporary Reinstatement

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the [J]udge 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). 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., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

Courts and the Commission have likened the "not frivolously brought" standard set forth in section 105(c)(2) with the "reasonable cause to believe" standard applied in other statutes. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) ("there is virtually no

rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012) (other citations omitted). The Commission has noted that in the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing "reasonable cause to believe" that a violation of the statute has occurred is a "relatively insubstantial" burden. *Argus Energy*, 34 FMSHRC at 1878 (citing *Schaub v. W. MI Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). The Commission stated that in *Schaub*, "the Court explained that the proponent 'need not prove a violation of the NLRA nor even convince the district court of the validity of the Board's theory of liability; instead he need only show that the Board's legal theory is substantial and not frivolous.'" *Id.* (citations omitted). It noted that the Court cautioned:

> An important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting evidence between the parties. *See Fleischut [v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988)] (stating that the appellant's appeal did not seriously challenge whether reasonable cause exists; instead it simply showed that a conflict in the evidence exists); *Gottfried [v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987)] (same). Rather, so long as facts exist which could support the Board's theory of liability, the district court's findings cannot be clearly erroneous. *Fleischut*, 859 F.2d at 29; *Gottfried*, 818 F.2d at 494.

Id. (citations omitted).

Similarly, 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 744. As the Commission has recognized, "[i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The Commission applies the substantial evidence standard in reviewing the Judge's determination.[3] *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

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. *CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of

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[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 19080), *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). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *CAM Mining*, 31 FMSHRC at 1089 (other citations omitted).

We conclude that substantial evidence supports the Judge's determination that Shaffer's application for temporary reinstatement was not frivolously brought. As stated by the Judge, it is undisputed that Shaffer engaged in protected activity when he made safety complaints to his supervisor about the No. 4 truck on October 18, 2017. Slip op. at 3; Opp'n to PTR at 6. In addition, there is no dispute that Shaffer's termination from employment was an adverse action. *Id.* Rather, the issue on review is whether there is substantial evidence to support the Judge's determination that there is a sufficient nexus between the protected activity and adverse action to support temporary reinstatement.

As the Judge found, Marion County Coal has explicitly acknowledged that Shaffer engaged in protected activity and that Bond had knowledge of it. Slip op. at 4. Moreover, there is proximity in time between Shaffer's protected activity and adverse action in that Shaffer made safety complaints to Bond about the No. 4 truck on October 18, Shaffer was suspended pending an investigation the next day, and Shaffer's employment was terminated on October 23. Slip op. at 3.

There is disputed evidence in the record regarding the operator's hostility or animus toward the protected activity. Shaffer alleges that Bond told Shaffer, "I'm tired of this f___ing sh__ on this equipment." Slip op. at 3. The operator alleges that the record does not contain substantial evidence of hostility, and that when Shaffer made the complaints to Bond, Bond told Shaffer to stop using the equipment and called a mechanic to repair the truck. PTR at 3, 6. It maintains that the only reason Shaffer was terminated was because of his improper and threatening behavior, which violated company policies.

Evidence that Shaffer was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. The Judge will need to resolve the conflicting evidence in the context of the full discrimination proceeding. *See Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). At the temporary reinstatement stage, however, the Judge does not resolve conflicts in the evidence.[4]

[4] In support of its position Marion County Coal asserts that "violating an established company policy has consistently been found to undermine a viable claim under Section 105(c) of the Act, even in the context of a temporary reinstatement proceeding." PTR at 7. In support of this argument, the operator cites a number of decisions that are not relevant to temporary reinstatement proceedings, do not involve disputed facts, are non-precedential ALJ decisions, or a combination of the above. Three cases the operator relies upon – (1) *Sec'y of Labor on behalf of McKinsey v. Pretty Good Sand Co.*, 36 FMSHRC 2843, 2869-70 (Nov. 2014) (ALJ), (2) *Sec'y*

"'[R]esolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case' are simply not appropriate" in a temporary reinstatement proceeding. *Id.* (citations omitted). The Commission has recognized that "[r]equiring the Judge to resolve conflicts in testimony between [the alleged discriminatee] and the operator's witnesses, when the parties have not yet completed discovery, would improperly transform the temporary reinstatement hearing into a hearing on the merits."[5] *Argus Energy*, 34 FMSHRC at 1879.

The Judge did not consider whether Shaffer suffered disparate treatment. However, given the evidence discussed above, we conclude that substantial evidence exists in the record to support the Judge's conclusion that Shaffer's application for temporary reinstatement was not frivolous. *Cf. Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000) (affirming temporary reinstatement based upon a nexus shown by knowledge and proximity in time between the protected activity and adverse action).

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of Labor on behalf of Pack v. Maynard Branch Dredging Co., 11 FMSHRC 168, 172 (Feb. 1989), *aff'd*, 896 F.2d 599 (D.C. Cir. 1990), and (3) *Pollock v. Kennecott Barney's Canyon Mining Co.*, 22 FMSHRC 419 (Mar. 2000) (ALJ) – involve decisions on the merits of discrimination proceedings, not temporary reinstatements. In the fourth case – *Sec'y on behalf of Fletcher v. Frontier-Kemper Constructors, Inc.*, 34 FMSHRC 2189 (Aug. 2012) (ALJ) – the Judge determined that, unlike this case, the relevant facts establishing the non-existence of hostility toward protected activity were not in dispute.

[5] Our colleagues have recognized that Shaffer and Bond gave conflicting testimony as to who said what to whom and when during the critical conversation. This conflicting evidence goes to the heart of whether Shaffer's discharge was in violation of section 105(c) of the Mine Act. Our colleagues further recognize that substantial evidence supports the Judge's finding that the complaint was non-frivolous. We decline to discuss, as our colleagues do, the nature and quantum of evidence which may be sufficient to weigh against a claimant's evidence. Commission precedent rejects the weighing of evidence in temporary reinstatement proceedings.

We are mindful that a temporary reinstatement hearing occurs in the preliminary stages of a proceeding, often before discovery has been completed, in recognition that "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 resolution of the discrimination complaint." S. Rep. No. 95-181, at 37, *reprinted in* Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978). At this preliminary stage of the proceedings, we do not have before us the full record that will be developed in any proceeding on the merits.

B. Motion to Stay

Commission Procedural Rule 45(f) provides that, with respect to an order granting temporary reinstatement, "[t]he filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances." 29 C.F.R. § 2700.45(f). When a party requests that the Commission stay a temporary reinstatement order, the Commission applies the test set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1312 (Aug. 1987); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Co.*, 35 FMSHRC 811, 812 (Apr. 2013). The burden is on the movant to provide sufficient substantiation of the requirements for the stay. *North Fork Coal Corp.*, 33 FMSHRC 589, 596 (Mar. 2011); *JWR*, 9 FMSHRC at 1312.

The operator argues that a stay is appropriate because having Shaffer re-enter the work force would create a potentially unsafe work environment for other miners and management given his past conduct. Mot. at 3. The operator does not cite or apply the factors in *Virginia Petroleum Jobbers.* Nor does the operator state why its concerns regarding Shaffer could not be addressed through economic reinstatement. Accordingly, the operator has failed to meet its burden of showing the "extraordinary circumstances" warranting a stay.

Conclusion

For the reasons discussed above, we join our colleagues in granting the petition for review, denying the operator's motion for a stay, and affirming the Judge's order requiring the temporary reinstatement of Shaffer. We intimate no view as to the ultimate merits of this case.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Separate Opinion of Acting Chairman Althen and Commissioner Young:

We join in granting the petition for review of the Judge's order temporarily reinstating Kevin Shaffer, affirming the Judge's order, and denying the operator's motion for a stay.

There is no presumptive right to temporary reinstatement. Rather, the complainant's entitlement must be established by substantial evidence, as in any other proceeding. Only the standard that the evidence must meet is diminished. Thus, in a discrimination case, the complainant bears the burden of proving discrimination by a preponderance of the evidence. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, at this early stage of the proceedings, the Secretary has the burden of proving by a preponderance of the evidence only that the claim is not frivolous.[1] *Sec'y of Labor on behalf of Pappas*, 38 FMSHRC 137, 154 (Feb. 2016), *rev'd on other grounds*, *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016).

Preponderance of the evidence means the greater weight of the evidence, such that the Secretary has demonstrated that it is more probable than not that the claim is not frivolous. The burden of proof in a temporary reinstatement case, therefore, contains two legal standards: "preponderance of the evidence" and "non-frivolous."

As with all disputed claims, the outcome depends upon the evidence presented. If the operator requests a hearing, the hearing is a full judicial proceeding.[2] In *Secretary of Labor on*

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[1] The legislative history of the Mine Act states that, under the not frivolously brought standard, the complaint must "appear to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3436. The Eleventh Circuit equated the Mine Act's "not frivolously brought" standard to the "reasonable cause to believe standard" applied in another statute's temporary reinstatement proceedings. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990).

The Commission has repeatedly approved this standard. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1326 (June 2016); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012); *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 158 (Feb. 2000); *Sec'y of Labor on behalf of Markovich v. Minn. Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350 (Aug. 1996) ("The judge cited the correct legal test in reviewing the Secretary's application. He cited the decision of the Eleventh Circuit Court of Appeals, in which that court concluded the standard for review of an application for reinstatement was a 'reasonable cause to believe standard.'" (citations omitted)); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987).

[2] Respondent, Marion County Coal, agreed to forgo a hearing. The parties relied instead upon attachments to their briefs in support of their respective positions. The Secretary attached the declaration of Special Investigator Clarence Moore to his brief. Marion County Coal attached a transcript of an arbitration proceeding resulting from a grievance filed by the United

behalf of Gray v. North Fork Coal Corp., 33 FMSHRC 27 (Jan. 2011), the Commission quoted with approval the decision of the Eleventh Circuit regarding the nature of a temporary reinstatement hearing:

> At [the temporary reinstatement hearing], the employer has the opportunity to 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. . . . [T]he statute grants [the employer] the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal.

Id. at 42 (quoting *Jim Walter Res.*, 920 F.2d at 747-748).

We glean two points. First, a temporary reinstatement hearing or proceeding is a full evidentiary process, albeit a greatly expedited one. The opportunity for such a hearing satisfies the operator's due process rights.

Second, the opportunity to test credibility identified by the Commission in *Gray* would be meaningless without a genuine exposition of the evidence presented. If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.[3]

Thus, 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. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve. It is the Judge's duty to determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.

In this case, the two principal witnesses, Shaffer and Bond, gave conflicting testimony as to who said what to whom and when during the critical conversation. Finding that she could not determine that the allegations in the application for reinstatement clearly lacked merit, the Judge reinstated Shaffer.

Mine Worker of America on Shaffer's behalf and other affidavits. The Judge necessarily drew the background information from those sources; she gave no weight to the arbitration decision.

[3] We do not read our colleagues' opinion as suggesting a Judge must credit testimony if the other party demonstrates that such testimony is false or erroneous, or that a Judge must grant reinstatement if the claim does not have a legitimate chance of succeeding because its basis is shown to be false or erroneous.

We may define a "non-frivolous" case as one that is "viable." At the conclusion of a temporary reinstatement proceeding, the Secretary must have shown by a preponderance of the evidence the existence a claim of discrimination or interference that is capable of succeeding — that is, a case which is not foreclosed by the evidence available and one for which there is a reasonable cause to believe the complainant may prevail.

In this case, a witness, without rebuttal, testified at the arbitration hearing about Shaffer's abusive conduct during a company trip. He said that when water was not working at a mine rescue team's motel during a company trip in which Shaffer participated, Shaffer "called the hotel manager – he was of Hispanic origin. He called him Jose and also called him the Sand N____r and also was creating a ruckus out in the parking lot when there were other guests out in the parking lot at the time." Arb. Tr. 174. Shaffer did not disclaim this conduct in the arbitration hearing or in the pleadings before the Judge. There was further testimony that Shaffer "was abusive to the team captain and to fellow members" and that "when the team vacated his [Shaffer's] particular room had additional damage that was investigated after they had left and moved to another hotel." *Id.* at 170, 174.

The operator removed Shaffer from the mine rescue team and suspended him for five days for his actions. *Id.* at 170-71. There is no evidence Shaffer or the UMWA filed any complaint or grievance for such discipline. Vile, racist language is reprehensible in itself; destructive rage carries misconduct to an even higher level. These are important contextual details that an employer would be expected to take into account in determining whether or not to retain an employee.

Testimony also established without dispute that two months before the conflict leading to his discharge occurred, Shaffer said "f___ you" to his supervisor Adam Bond when Bond simply told Shaffer that he would need to work overtime. Arb. Tr. 79-81. Bond testified that Shaffer repeated it and then said, "I am going to f___ your eyeballs out." *Id.* at 81. Shaffer admitted that he used "f___" toward Bond on that day. *Id.* at 263.

The critical confrontation for this case was also between Shaffer and Bond. Shaffer testified that Bond cursed at him for raising problems with the equipment. Bond testified that Shaffer swore at him for reprimanding Shaffer for driving with his lights out, and that Shaffer threatened to take him to the gate — that is, from the mine site — and beat him.[4] Paul Dixon, a mechanic for a subcontractor testified he could hear some of the conversation, although some equipment moving nearby partially affected his hearing. He testified that he heard Shaffer "hollering at [Bond], 'F___ you' repeatedly." *Id.* at 139. Clarifying, Dixon stated, "I mean he was literally screaming 'F___ you' and he was right up – I mean he was right up against him." *Id.* at 141. Dixon heard Shaffer "holler[] out, 'The gate,' and pointed down towards the main gate." *Id.* at 139. During the exchange, Dixon could tell that Bond seemed calm, but he "could

[4] There also was an earlier conversation. Shaffer asserted that at that separate time he asserted safety rights and requested a safety representative. Bond said Shaffer only said the truck was defective and that he (Bond) directed him to park the truck and use a different one. There were no witnesses.

definitely hear [Shaffer] screaming." *Id.* at 140. Dixon did not count how many times Shaffer said "f___ you" to Bond, but he said he was sure it was 10 to 15 times. *Id.* at 142.

This evidence is relevant, and the Bond testimony, confirmed to some extent by Dixon, supports a rebuttal and/or affirmative defense. But at this stage, there has been no discovery. The Secretary had no opportunity to cross-examine Dixon about his perception or motivations. And there is little evidence about the context surrounding the confrontation between Shaffer and Bond. But we note that at some point, a claimant's testimony may be rendered inherently incredible by the weight of evidence against it.

At that point, the Judge would not be making a "credibility determination," but a finding that evidence offered by the claimant is so unreliable that a reasonable person could not choose to believe it. Had Dixon's account been more clear and corroborated by other disinterested witnesses or a recording of the conversation, the Judge might well have concluded substantial evidence established that Shaffer profanely and repeatedly threatened to take Bond to the gate and beat him and that such conduct was intolerable regardless of the context.

In the absence of a disparate-impact component or, perhaps, severe provocation,[5] there can be no doubt that vulgar threats to a supervisor to take him off-site and beat him, especially in light of prior unrebutted bad conduct, would constitute a separate and sufficient reason for discharge[6] because there would not be reasonable cause to believe the claimant could prevail on his claim. In short, if testimony or evidence for a claimant is conclusively disproved by other evidence (video or audio tapes, evidence of a criminal conviction for the underlying misconduct, etc.), it is not necessary to accept such refuted testimony or evidence in deciding whether there is a reasonable cause to believe a claim may succeed, because the miner's testimony, alone, would not rise to the level of substantial evidence necessary to support a viable claim.

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[5] Due to the outcome in this proceeding and the fact that Shaffer has denied making the statement rather than claiming provocation, we need not consider the dubious proposition that wrongfully reprimanding an employee for complaining about the safety of equipment would be sufficiently provocative to justify a miner with a history of misconduct threatening to beat his supervisor.

[6] At MSHA's 2016 Annual Training Resources Applied to Mining Conference, Charlie Moore of Catamount Consulting LLC cited a survey by Business Wire Magazine that found that "[w]orkplace [v]iolence is considered the most significant threat to American Business." Charlie Moore, Workplace Violence – Who is At Risk and How to Reduce It, 2016 TRAM Conference, https://arlweb.msha.gov/Training/materials/tram/2016/WorkplaceViolence&Prevention.pdf (emphasis in original). The presentation identified 14 signs of impending violence. Among them were (1) "persons who make veiled or clear threats," (2) "persons who attempt to intimidate or instill fear in others," (3) "persons who cannot calmly accept criticism," (4) "persons who hold grudges, silently or with ongoing talk," and (5) "[persons who are] easily agitated and take longer to 'wind down' each time." Separately, it is regrettable that MSHA has missed the ninety-day statutory deadline for completing its investigation in this case. The ninety-day requirement is not jurisdictional but MSHA should not treat it as a mere suggestion, especially in cases dealing with alleged threats of physical violence.

Here, it is Shaffer's version against Bond's version, except to the extent Dixon supports Bond. Determining that there was a genuine conflict between the version of events presented by Shaffer and that offered by Bond, and corroborated to some extent by Dixon, was within the Judge's discretion. Substantial evidence supports the Judge's finding, and we concur in affirming reinstatement.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Distribution

Jennifer Betts, Esq.
Michael D. Glass, Esq.
Thomas A. Smock, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One PPG Place, Ste. 1900
Pittsburgh, PA 15222
Thomas.smock@ogletreedeakins.com
Michael.glass@ogletreedeakins.com
Jenn.betts@ogletreedeakins.com

Laura P. Karr, Esq.
United Mine Workers of America
18354 Quantico Gateway Dr., Suite 200
Triangle, VA 22172
lkarr@umwa.org

Cheryl C. Blair-Kijewski
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450
Blair-kijewski.cheryl@dol.gov

Ali A. Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge Jacqueline Bulluck
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710