On Appeal to the Commission

# Federal Mine Safety and Health Review Commission

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| Secretary of Labor,<br>Mine Safety and Health Administration,<br><br>Applicant,<br><br>v.<br><br>Rockwell Mining, LLC,<br><br>Respondent. | Docket No. WEVA 2021-0203 |

**Secretary of Labor's Response to Petition for Review of Temporary Reinstatement Order**


ELENA S. GOLDSTEIN
Deputy Solicitor

APRIL E. NELSON
Associate Solicitor

ARCHITH RAMKUMAR
Counsel for Appellate Litigation

SUSANNAH M. MALTZ
Attorney

Department of Labor
Office of the Solicitor
Mine Safety & Health Division
201 12th Street South, Ste. 401
Arlington, VA
(202) 693-9333
maltz.susannah.m@dol.gov

Attorneys for the Secretary of Labor

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## Introduction

The Mine Act provides that if a miner brings a discrimination complaint that is not "frivolously brought," that miner shall be "immediate[ly] reinst[ated]." 30 U.S.C. 815(c)(2). In this case, miner Roger Cook, a fireboss at Rockwell Mining's Eagle #3 Mine, filed a complaint of unlawful discrimination for engaging in protected safety-related activity, under section 105(c)(1), 30 U.S.C. 815(c)(1). Specifically, in late January 2021, Cook came across a cable that had been "jumpered" to allow current to flow through a short circuit, creating a shock hazard. He locked and tagged out the cable's cathead plug to prevent anyone from using it, and spoke with an MSHA inspector about what he had discovered. Mine management witnessed Cook's discussion with the MSHA inspector. The next day, he was suspended, and four days later, he was terminated.

The Secretary sought Cook's temporary reinstatement. Following a hearing, the administrative law judge concluded that Cook's discrimination complaint was not frivolously brought, because there was sufficient evidence of protected activity (Cook's safety complaints and his discussion with MSHA about the jumpered cable). The judge found that the protected activity motivated, at least in part, his termination, based on Rockwell's knowledge of the activity and the nexus in time between his ultimate protected activity and the adverse consequences Cook suffered (mere days). The judge ordered Rockwell to temporarily reinstate Cook. On April 7, 2021, Rockwell filed a petition for review of the judge's order of temporary reinstatement.

The Secretary urges the Commission to affirm the judge's order. First, the Commission should reject Rockwell's various requests to heighten the temporary reinstatement standard, as those requests have no basis in statutory text, Commission precedent, or the Congressional

intent underlying the temporary reinstatement provision. Second, the judge properly rejected Rockwell's request to introduce evidence that Cook was suspended and terminated for a non-discriminatory reason. Such evidence is an affirmative defense that is outside the scope of a temporary reinstatement proceeding. Finally, Rockwell's cursory claim that the temporary reinstatement hearing violated the Due Process Clause is meritless, because temporary reinstatement proceedings contain a panoply of procedural protections that do not deprive operators of due process.

## Statement of the Issues

1. Whether the administrative law judge was within her discretion in temporarily reinstating Cook.
2. Whether the administrative law judge was within her discretion in excluding evidence of Rockwell's affirmative defense to the underlying merits discrimination claim.

## Statement of the Case

### I. Statutory framework

The Mine Act prohibits discrimination against miners for exercising rights protected under the Act. 30 U.S.C. 815(c). Congress intended miners to "play an active part in the enforcement of the Act," and recognized 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 (1978).

Miners who believe they were discriminated against for the exercise of a protected right can file a complaint with MSHA. 30 U.S.C. 815(c)(2). Under section 105(c)(2), "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 of the complaint." 30 U.S.C. 815(c)(2); 29 C.F.R. 2700.45(d).

Unlike a hearing on the merits, 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." *Sec'y of Labor* v. *Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (1987), aff'd, *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). During a temporary reinstatement hearing, the judge does not make determinations as to the actual merits of the prima facie discrimination claim or an affirmative defense. *Jim Walter Res.*, 9 FMSHRC at 1306; *Sec'y of Labor* v. *CAM Mining, LLC*, 31 FMSHRC 1085, 1090 (2009). In such a hearing, it is "not the judge's duty, nor is it the Commission's, to resolve [a] conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor* v. *Chicopee Coal Co.*, 21 FMSHRC 717, 719 (1999). Instead, these issues are properly addressed at the subsequent hearing on the merits of the discrimination claim, after the parties have engaged in discovery and developed their precise legal theories with clarity. *Jim Walter Res.*, 9 FMSHRC at 1306; *Sec'y of Labor* v. *Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (2012).

A miner establishes a prima facie discrimination claim by demonstrating that: (1) the miner engaged in some protected activity under the act, and (2) the adverse action identified in the complaint was motivated at least in part by the protected activity. *Sec'y of Labor* v. *Durango Gravel*, 21 FMSHRC 953, 957 (1999). Importantly, however, "an applicant for temporary reinstatement need not prove a prima facie case of discrimination." *CAM Mining, LLC*, 31 FMSHRC at 1088. Instead, a miner need only prove that the complaint was "not frivolously

brought;" judges have used the prima facie elements as a guide, and determined frivolity based on whether there is a non-frivolous issue as to each element. *Id.*at 1090.

## II. The facts

The relevant facts are undisputed. Roger Cook has worked in the mining industry for 30 years. Hearing Transcript (Tr.) 17-19. He has been employed by Rockwell for approximately 5 years. *Id.* at 17-18. During the time relevant to this case, he was working as fireboss at Rockwell's Eagle #3 Mine. *Ibid.* In this role, Cook was responsible for, among other things, identifying and recording safety hazards. *Id.* at 19.

Before he was terminated in January 2021, Cook brought several safety-related issues to management's attention. In February 2020, a foreman instructed Cook to use a gunite spray machine to apply gunite to stoppings. Tr. 25-27. While using the spray machine, Cook was exposed to dust. *Ibid.* He complained to a foreman, who made some adjustments to the machine, which had no effect. *Id.* at 26. Cook continued to breathe in dust while finishing the job. *Ibid.* Cook suffered from respiratory issues throughout 2020, and in August 2020 asked that Rockwell make an accident report to MSHA. *Id.* at 27. Travis Hartsog, the mine superintendent, told him he should have been wearing a mask. *Id.* at 30. Also in December 2020, Cook voiced concerns about demolishing and rebuilding stoppings in a return in an attempt to reroute air around a roof fall without hanging curtains or taking other measures to properly direct the airflow in the interim, while the new stoppings were being installed. Tr. 31. In January 2021, Cook complained to the Safety Manager and Mine Foreman about five miners crowded into a two-person mantrip. *Id.* at 30. A few days later, he also reported to Hartsog that a flat car loaded with oxygen acetylene

tanks was being pushed down the track without a mantrip in front of it to prevent it from running unimpeded down the track. *Id.* at 33, 45.

On January 20, 2021, Cook was involved in a final safety-related incident. In the course of performing his duties as fireboss, he checked on a pump used to pump water from a travelway. Tr. 19. Someone had "jumpered" the pump cable, creating a short circuit. Tr. 20. This posed a shock hazard. *Ibid.* Cook removed the cathead from the power center and locked and tagged out the cathead, so that no one could use it. *Ibid.* He left a note on the cathead reading: "No monitor, had wire under cathead. Dusty Cook 1-20-21 11:04am. Shame shame." Tr. 20; Sec'y Hearing Ex. 2.

Later that day, during the course of a routine investigation, an MSHA inspector discovered the locked and tagged out cathead and the note. Tr. 23. The inspector asked to speak with Cook, so mine superintendent Hartsog and foreman Brad Bunch went to find him and brought him back to the area to speak with the inspector. *Ibid.* In front of Hartsog, Bunch, and several other miners, Cook explained to the MSHA inspector why he had left the note. *Id.* at 23-24. The inspector then issued a section 104(d)(2) order for improper use of the pump cable. Tr. 76; Sec'y Hearing Ex. 3.

The following day, on January 21, 2021, Cook was suspended. Tr. 32. Prior to this, he had never been the subject of any disciplinary action at Rockwell. *Ibid*. Four days later, on January 25, 2021, he was terminated. *Ibid.*

## III. The proceedings

### a. The pre-hearing motions and hearing

Prior to the temporary reinstatement hearing, Rockwell furnished the judge and the Secretary with proposed exhibits and testimony concerning its affirmative defense to Cook's discrimination claim. Rockwell intended to argue that Cook was not terminated as a result of discrimination, but instead was terminated because on January 16, 2021, he was aware of a defective panic bar on a scoop, but did not inform management and allowed the scoop to remain in use. See Sec'y's Mot. in Limine, *Rockwell Mining, LLC*, No. WEVA 2021-0203, 2021 WL ______ (FMSHRC Apr. 2, 2021).

In response, Cook asserted that he was not aware of the defective panic bar. Tr. 57. This issue is part of the Secretary's merits investigation, which is ongoing. Sec'y's Mot. in Limine at 8.

The Secretary moved to exclude the proposed evidence concerning the alleged scoop issue because the proposed evidence concerned an affirmative defense, raised credibility issues, and would require the judge to consider and resolve conflicting testimony. As such, it was outside of the narrow scope of a temporary reinstatement hearing. Sec'y's Mot. in Limine at 4-7. The judge agreed, and issued an order granting the motion and objections on March 26, 2021. Rockwell filed a Motion to Reconsider, which the judge denied. Rockwell Mot. to Reconsider, *Rockwell Mining, LLC*, No. WEVA 2021-0203, 2021 WL ______ (FMSHRC Apr. 2, 2021).

On March 29, 2021, a hearing was held before Judge Priscilla M. Rae. At the hearing, Rockwell attempted to proffer evidence on the scoop issue, despite the fact that the judge's March 26, 2021 order excluded it. The Secretary objected, and the judge sustained the

objections. *Rockwell Mining, LLC*, No. WEVA 2021-0203, 2021 WL ______ (FMSHRC Apr. 2, 2021) ("Dec.") 3 n.2.

**b. The judge's decision**

Following the hearing, Judge Rae issued a decision on April 2, 2021, finding that Cook's complaint was not frivolously brought and that he was entitled to immediate temporary reinstatement pending a hearing on the merits of the discrimination claim. Dec. 5.

The judge found that there was sufficient evidence under the "not frivolously brought" standard to establish that Cook engaged in protected activity and that his termination was motivated at least in part by the protected activity. Dec. 4-5. The judge found that Cook's having witnessed or complained about several safety-related incidents between August 2020 and January 2021, including the final incident, when he locked and tagged out the cathead and cooperated with an MSHA inspection into the situation, constituted protected activity. *Ibid*.

The judge next found that Rockwell management was aware of Cook's protected activity, because Cook spoke with the MSHA inspector about the jumpered pump and cathead in front of the Mine Superintendent and a foreman. Dec. 4. The judge found, further, that the short time period elapsing between the final safety-related incident and Cook's suspension and termination established a temporal nexus between the protected activity and the adverse action. Dec. 4-5.

Together, the judge determined that management's knowledge of Cook's protected activity and the temporal nexus were sufficient evidence that Cook's protected activity motivated, at least in part, the adverse actions identified in the complaint. Dec. 4-5. She thus concluded that the complaint was not frivolously brought, and ordered Rockwell to temporarily reinstate Cook. Dec. 5.

## Argument

### I. Standard of review

The Commission reviews a judge's temporary reinstatement order for abuse of discretion. *Sec'y of Labor* v. *Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (1997). The Commission reviews a judge's evidentiary decisions for an abuse of discretion, *Prairie State Generating Co.* v. *Sec'y of Labor*, 35 FMSHRC 1985, 1996 (2013), and her factual findings for substantial evidence, *Sec'y of Labor* v. *Signal Peak Energy, LLC*, 40 FMSHRC 1059, 1067 (2018).

### II. General principles

It is well-established 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." *Jim Walter Res.*, 9 FMSHRC at 1306. The "not frivolously brought" standard is virtually indistinguishable from the standard requiring there be a "reasonable cause to believe" that a violation has occurred. *Jim Walter Res., Inc.* v. *FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990). This burden is "relatively insubstantial," *Sec'y of Labor* v. *Argus Energy*, 34 FMSHRC at 1879, and designed to assign more risk to the operator than to the miner. *Sec'y of Labor* v. *Marion County Coal Co.*, 40 FMSHRC 39, 41 (2018) ("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."). In a temporary reinstatement hearing, the Secretary need not prove a violation, only complaint non-frivolity. *CAM Mining*, 31 FMSHRC at 1090; *Jim Walter Res.*, 9 FMSHRC at 1306 (The judge's duty is to consider "whether the evidence mustered by the miner… established that [the] complaint [is] nonfrivolous, not whether there is sufficient evidence to justify permanent reinstatement.").

The phrase "not frivolously brought" is not defined in the Mine Act, but the Eleventh Circuit has recognized that a complaint that is not frivolously brought is one that "appears to have merit." *Jim Walter Res.*, 920 F.2d at 747.Whether a complaint has merit can be determined by whether it "lacks an arguable basis either in law or in fact." *Neitke* v. *Williams*, 490 U.S. 319, 325 (1989) (discussing the meaning of "frivolous" in the *in forma pauperis* statute, 28 U.S.C. 1915(d)). A complaint is frivolous when it is based only in an "undisputedly meritless theory." *Id.* at 327.

Though the Secretary need not prove a prima facie case of discrimination at the temporary reinstatement phase, judges use the elements of a discrimination claim to guide their determination of whether a complaint was frivolously brought. *Marion County Coal Co.*, 40 FMSHRC at 42; *CAM Mining,* 31 FMSHRC at 1088. Those elements are whether the miner engaged in some protected activity under the act, and whether the adverse action identified in the complaint was motivated at least in part by the protected activity. *Durango Gravel*, 21 FMSHRC at 957.

"The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect." *CAM Mining, LLC*, 31 FMSHRC at 1089. Thus, whether the adverse action was at least partially motivated by the protected activity can be established by "circumstantial indicia," *Durango Gravel*, 21 FMSHRC at 958, where a mine operator had knowledge of the protected activity or exhibited hostility or animus toward the protected activity, or a coincidence in time exists between the protected activity and adverse action. *Sec'y of Labor* v. *A&K Earth Movers, Inc.,* 22 FMSHRC 323, 326 (2000). The Secretary not need prove these indicia, only that there is a non-frivolous issue as to their existence. See

*CAM Mining*, 31 FMSHRC at 1090 ("The Secretary need not prove that the operator has knowledge of the complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.").

Additionally, hostility or animus is not required to show that an operator acted with an improper motive. The Commission "ha[s] found improper motivation where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge." *Durango Gravel*, 21 FMSHRC at 958 (citing *Sec'y of Labor* v. *Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (1997)).

Affirmative defense evidence is not properly included in a temporary reinstatement hearing. *CAM Mining*, 31 FMSHRC at 1090. As the Secretary has not, at the temporary reinstatement stage, had the opportunity to conduct discovery, he is not able to develop fully the evidence in support of his theories with regard to the merits. *Jim Walter Res*., 9 FMSHRC at 1306 (the Commission cannot make a "determination at this point as to the ultimate merits of a case of discrimination on this evidence," because "the complainants' precise theories of discrimination have not been presented with the utmost clarity.").

Moreover, it is "not the judge's duty, nor is it the Commission's, to resolve [a] conflict in testimony at this preliminary stage of the proceedings." *Chicopee Coal Co.*, 21 FMSHRC at 719. A judge's attempt to resolve conflicting testimony prior to discovery "would improperly transform the temporary reinstatement hearing into a hearing on the merits." *Argus Energy*, 34 FMSHRC at 1879.

Instead, evidentiary and credibility determinations regarding the merits discrimination case are appropriate at the merits hearing, where a mine operator has a chance to offer an affirmative defense only after the Secretary has proved the prima facie discrimination case. *CAM Mining*, 31 FMSHRC at 1088, 1090. This is a well-settled principle of Commission law and federal discrimination law. *Sec'y of Labor* v. *United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (1981); *Sec'y of Labor* v. *Stafford Construction Co.*, 732 F.2d 954, 959-960 (D.C. Cir. 1984) ("[T]he Secretary of Labor bears initial burden of demonstrating that a discharge was partially motivated by the complainant's protected activity. Upon such a showing, a prima facie case is established and the burden shifts to the employer to demonstrate by a preponderance of the evidence that the complainant would not have been discharged even if he had not engaged in the protected activity.")

## III. The judge did not abuse her discretion in finding the complaint was not frivolously brought.

The judge did not abuse her discretion in deciding to temporarily reinstate Cook.

First, the judge found that the evidence supported the finding that Cook's safety-related complaints, and his conversation with the MSHA inspector about the jumpered pump cable, constituted protected activity. Rockwell apparently does not dispute that these incidents constituted protected activity. Petition for Review ("Pet.") 8. The judge noted that such conduct, in particular cooperating with an MSHA inspection, is protected activity under the Mine Act. Dec. 4 (citing *Thomas* v. *CalPortland Co.*, 42 FMSHRC 43, 51 (2020); *Sec'y of Labor* v. *Tanglewood Energy, Inc.* 19 FMSHRC 833, 837 (1997). Thus, the judge reasonably concluded that Cook engaged in protected activity.

Next, the judge also found that the evidence supported the finding that Rockwell's decision to suspend and then terminate Cook was motivated, at least in part, by Cook's protected activity.

The judge reasonably found that the mine operator knew of the protected activity, because Cook had made his various safety complaints to management, and, with respect to his cooperation with MSHA about the shock hazard, in front of the Mine Superintendent and a foreman. Dec. 4. Rockwell does not dispute that management was aware of these incidents. Pet. 3, 4-5. The judge noted that there was "at least a non-frivolous issue that management was aware of the incident." Though"[t]he Secretary need not prove that the operator has knowledge of the complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge," *CAM Mining*, 31 FMSHRC at 1090, here management's knowledge was undisputed. Dec. 4.

The Commission has held that "[t]he operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Sec'y of Labor* v. *Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (1981). In light of the importance of the operator's knowledge, the judge properly accorded that indicium significant weight. Dec. 4-5.

Rockwell does not dispute that Cook was suspended one day after speaking with MSHA and terminated four days after that. Pet. 5-6. The judge reasonably found that the fact that Cook was suspended and terminated only days after speaking with the MSHA inspector demonstrated a "clear temporal nexus." There is no bright line rule establishing when coincidence in time may infer an improper motive, *Hicks* v. *Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (1991), but by all measures, the one- and five-day periods were extremely short and suggest improper motive. The Commission has found "complaints ranging from four days to one and one-half months before

the adverse action were deemed sufficiently coincidental in time to establish illegal motive." *Durango Gravel*, 21 FMSHRC at 958 (discussing *Phelps Dodge Corp.*, 3 FMSHRC at 2511, and finding that a two-week duration was sufficient to establish temporal nexus). The D.C. Circuit has found that a period of two weeks was determinative, holding that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." *Stafford Construction Co.*, 732 F.2d at 960. If close temporal proximity is enough to establish a prima facie discrimination case, see *id.*, the same proximity suffices for the Secretary to meet the more forgiving temporary reinstatement standard.

Additionally, in analogous federal discrimination law, much longer periods than the one- to five-day period here are sufficient to establish a temporal nexus. *Hamilton* v. *Geithner*, 666 F.3d 1344, 1357-1358 (D.C. Cir. 2012) (discussing various intervals and concluding that a three-month period was sufficient to establish a temporal nexus for the purposes of a Title VII discrimination claim). In some cases, a temporal nexus may itself alone be sufficient to satisfy causation. *Id.* at 1357 ("[A] close temporal relationship may alone establish the required causal connection."). So the judge reasonably concluded that the Secretary demonstrated a temporal nexus between Cook's protected activity and his subsequent suspension and termination.

Instead of asserting that the ALJ misapplied the temporary reinstatement standard, Rockwell asks the Commission to jettison settled precedent and make the temporary reinstatement inquiry more searching. Pet. 9. The Commission should reject that request.

First, Rockwell suggests that the judge should have evaluated whether there was animus; that is not correct and Commission precedent forecloses that suggestion. In *Secretary of Labor* v. *A&K Earth Movers, Inc.*, a mine operator petitioned for review of a temporary reinstatement order,

arguing that the judge had erred in determining it was not frivolously brought because the Secretary did not present evidence of animus. 22 FMSHRC at 324. The Commission affirmed the judge's order, finding that there was some evidence that the operator was aware of the miner's protected activity, and that only eight days had elapsed between the protected activity and the miner's termination, sufficiently close a time to establish a temporal nexus. *Id.* at 325-326. Importantly, the Commission was unequivocal in clarifying that "we have never held that hostility is a prerequisite to a finding that a complaint is not frivolous. Rather, such evidence is but one of *several circumstantial indicia* of discriminatory intent that may be offered to show that a complaint is not frivolous." *Id.* at 325 n.2 (emphasis added).

Rockwell admits that, under existing law, animus is not necessary to establish that a complaint was not frivolously brought. Pet. 9. But Rockwell suggests a new legal test making a showing of hostility or animus a prerequisite, despite longstanding Commission precedent to the contrary and despite the fact that at the temporary reinstatement phase, the elements of a discrimination claim serve only as a guide in determining how to analyze whether a claim was non-frivolously brought. *CAM Mining,* 31 FMSHRC at 1088. Rockwell's proposal, if adopted, not only would reconfigure and expand the narrow temporary reinstatement standard, it would ratchet upwards the prima facie merits test for discrimination, requiring proof of animus there as well. The test the Commission currently uses is applied not only in the 105(c) context, but is similar to the antidiscrimination provisions of myriad laws. See, *e.g.*, *Aka* v. *Washington Hosp. Center*, 156 F.3d 1284 (D.C. Cir. 1998) (employing a similar test in the ADA and ADEA context). To require consideration of animus in evaluating whether a complainant's protected activity motivated an operator's adverse action would bring the Mine Act wildly out of step with general

antidiscrimination doctrine. And, in addition to moving the goalposts at the temporary reinstatement stage, it would add a needless burden to miners seeking to prevail on their merits claims under 105(c).

Rockwell also asks for an additional requirement: that the judge conclusively determine that that the Complainant did not "engage[] in misconduct which negates motivation based on an improper purpose-protected activity." Pet. 9; *id.* n.2 ("Frankly, the nexus factors outlined in [*Phelps Dodge Corp.*] should be expanded to include a fifth factor: the existence of 'misconduct' by the Complainant."). But such alleged misconduct has nothing to do with whether Cook's claim was frivolously brought. Instead, "[e]vidence that [the miner] 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." *Marion County Coal Co.*, 40 FMSHRC at 44; *CAM Mining*, 31 FMSHRC at 1091 ("Furthermore, we note that evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. In essence, the judge weighed the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case. In doing so, the judge erred by assigning a greater burden of proof than is required.").

The facts here demonstrate why Rockwell's proposal is untenable. *Ibid*. Cook disputes that he was aware the scoop was defective. Tr. 57. So not only would Rockwell's request necessitate the evaluation of an operator's affirmative defense at the temporary reinstatement stage, but judges also would have to resolve credibility disputes at that preliminary stage in contravention of decades of Commission law on this issue. If the Commission allows disputed evidence related to merits defenses and credibility at the temporary reinstatement stage, there will be nothing left to

resolve at trial, and no distinction will exist between a temporary reinstatement proceeding and a full-blown merits trial..

Here, the judge determined that Rockwell's undisputed knowledge of Cook's cooperation with MSHA, coupled with the mere days elapsing between his protected activity and his suspension and discharge created a non-frivolous issue as to causation. This is fully consistent with Commission precedent. See *Marion County Coal Co.*, 40 FMSHRC at 45 (noting that it is proper to "affirm[] temporary reinstatement based upon a nexus shown by knowledge and proximity in time between the protected activity and the adverse action").

## IV. The judge did not abuse her discretion in excluding the affirmative defense evidence.

The judge did not abuse her discretion in excluding the evidence Rockwell attempted to introduce as beyond the limited scope of the temporary reinstatement hearing. The evidence raised an affirmative defense and required a credibility determination.

It is a well-settled principle of antidiscrimination law that, in a merits case, a complainant has the burden to make out a prima facie case. Once the complainant has proven the elements of discrimination, the employer has an opportunity to articulate a legitimate, non-discriminatory reason for the adverse employment action. *United Castle Coal Co.*, 3 FMSHRC at 818 n.20; *Stafford Construction Co.*, 732 F.2d at 959-960. This type of affirmative defense is exactly what Rockwell has attempted to include at the temporary reinstatement stage. Rockwell refers to this evidence as "the real reason for the termination of Mr. Cook." Pet. 12. The trier of fact is then tasked with determining whether, based on the submitted defense, the reason for the adverse action was discrimination.

The judge correctly excluded this evidence for two reasons. First, as discussed above, judge may not consider an operator's affirmative defense at the temporary reinstatement stage. As noted, the Commission has held that where a judge "weigh[s] the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case… the judge err[s] by assigning a greater burden of proof than is required." *CAM Mining,* 31 FMSHRC at 1091. That is precisely what Rockwell urged the judge to do here, and she was within her discretion to reject that suggestion.

Second, in a temporary reinstatement hearing, as discussed above, a judge may not make credibility determinations or weigh conflicting evidence relevant to the prima facie merits case. The Commission has made clear that "[i]t [is] not the judge's duty, nor is it the Commission's, to resolve [a] conflict in testimony at this preliminary stage of the proceedings," *Chicopee Coal Co.*, 21 FMSRHC at 719. In *CAM Mining*, the Commission was clear that where a judge "resolved conflicts in testimony, and made credibility determinations in evaluating the Secretary's prima facie case," this was in error and he "clearly should not have done [so] at this stage in the proceeding." 31 FMSHRC at 1089.

This principle applies logically to any evidentiary conflict in a temporary reinstatement proceeding. Here, the judge declined to hear the two differing accounts regarding the scoop. While Rockwell claimed that Cook had knowingly allowed others to use a defective scoop, Cook claimed that he did not know the scoop was defective. Introduction of evidence about the scoop would have required the judge to hear two conflicting accounts and make credibility determinations in order to reconcile the differing testimony. The Commission has held repeatedly that ALJs lack the authority to do that.

The merits case is the subject of an ongoing investigation, and, should the Secretary allege that Rockwell discriminated against Cook in violation of 105(c)(1), Rockwell will have an opportunity to raise its affirmative defense. At that point in the proceedings, the Secretary will have had a chance to conduct discovery if needed, and both parties will be able to offer testimony on issues outside of the narrow inquiry as to whether a complaint was frivolously brought. 30 U.S.C. 815(c)(2).

Rockwell relies on *Secretary of Labor* v. *Frontier-Kemper Constructors, Inc.* to suggest that evidence of an affirmative defense based on a complainant's misconduct is appropriate in a temporary reinstatement hearing. 34 FMSHRC 2189 (2012) (ALJ). But *Frontier-Kemper*, a nonbinding ALJ decision, differs from the present case in two important ways: first, the evidence of misconduct in *Frontier-Kemper* was inseparable from evidence of the protected activity (the complainant had committed a safety violation, and then told an MSHA inspector about it). 34 FMSHRC at 2192. Second, the misconduct in that case was uncontested. There was no need for credibility determinations nor for reconciliation of conflicting testimony because both the complainant and operator agreed that the complainant had engaged in misconduct. 34 FMSHRC at 2190. Here, by contrast, there are two conflicting accounts. Tr. 57; Pet. 2. In *Frontier-Kemper,* the evidence was not solely rebuttal evidence. Here, by contrast, the scoop incident is totally separate from Cook's protected activity.

Rockwell appears to suggest that had evidence of the scoop issue been allowed in, it would have proven an absence of animus, compelling the conclusion that the complaint was frivolously brought. Pet. 10-11. But even if the evidence had been allowed, in light of the undisputed facts concerning the operator's knowledge and the temporal nexus, as well as the undisputed

protected activity and adverse action, the complaint could not be considered frivolous and based on an "undisputedly meritless theory." See *Neitke*, 490 U.S. at 327. And because Cook disputes Rockwell's assertion, the judge very well could have credited Cook's account over Rockwell's.

Finally, throughout its petition, Rockwell asserts that because it was not permitted to enter evidence of an affirmative defense and because the judge lacked the authority to resolve credibility disputes, it has been denied a fair hearing and due process. See, *e.g.*, Pet. 9 ("A fair evaluation of whether the complaint is frivolous cannot occur unless the Court evaluates whether the operator showed any animus… Without such a full and fair analysis, the Court perpetuates a legal fiction rather than a fair hearing."); see also Pet. 13-14 (arguing that where "courts refuse to consider credibility issues at any stage" due process rights are violated). The courts and the Commission have rejected this argument and should continue to do so. See *Jim Walter Res.*, 920 F.2d at 747-48 ("[T]he employer [is offered] the opportunity for a… hearing *prior* to a temporary reinstatement …. Most importantly, section 105(c)(2) requires that an *independent* decisionmaker determines whether a miner's complaint in a particular dispute meets the 'not frivolously brought' standard…. We therefore conclude that the scheme of procedural protections, including the statutory standard of proof, provided by section 105(c)(2) to an employer in temporary reinstatement proceedings far exceed the minimum requirements of due process.") (emphasis in original).

If Rockwell believes that without an explicit, mandatory animus analysis supported by evidence of an affirmative defense and credibility assessments, the "not frivolously brought" standard is not fair, its gripe is with Congress, not with the Commission. The statute does not impose such a requirement, the case law does not impose such a requirement, and the judge

likewise did not impose such a requirement. The Commission should affirm the judge's ruling below,as it properly applied the temporary reinstatement standard.

## Conclusion

For the reasons set forth above, the Secretary requests that the Commission deny Rockwell Mining's petition for review of the judge's temporary reinstatement order.

Respectfully submitted,


ELENA S. GOLDSTEIN
Deputy Solicitor

APRIL E. NELSON
Associate Solicitor

ARCHITH RAMKUMAR
Counsel for Appellate Litigation

SUSANNAH M. MALTZ
Attorney

Department of Labor
Office of the Solicitor
Mine Safety & Health Division
201 12th Street South, Ste. 401
Arlington, VA
(202) 693-9333
maltz.susannah.m@dol.gov

Attorneys for the Secretary of Labor

## Certificate of Service

I certify the a copy of the Secretary of Labor's Response to Petition for Review of Temporary Reinstatement Order was served by electronic mail on April 13, 2021 on the following:

Christopher D. Pence
Hardy Pence PLLC
10 Hale St., 4th Fl.
P.O. Box 2548
Charleston, WV 25329
cpence@hardypence.com

s/ Susannah M. Maltz

Department of Labor
Office of the Solicitor
Mine Safety & Health Division
201 12th Street South, Ste. 401
Arlington, VA
(202) 693-9333
maltz.susannah.m@dol.gov