

On Appeal to the Commission  
Federal Mine Safety and Health  
Review Commission

Secretary of Labor,  
Mine Safety and Health Administration  
on behalf of Alvaro Saldivar,

Complainant,

v.

Grimes Rock, Inc.,

Respondent

Docket No. WEST 2021-0178-DM

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

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## Introduction

Under the Mine Act, a miner who brings a discrimination complaint that is not “frivolously brought” shall be “immediate[ly] reinst[ated].” 30 U.S.C. 815(c)(2). Alvaro Saldivar, a service technician and operator at Grimes Rock, complained to MSHA that Grimes Rock unlawfully discriminated against him for engaging in protected activity. Specifically, from October 2020 to January 2021, Saldivar reported to his direct supervisor and to the mine manager numerous safety issues, including balding tires on a water truck, defective brakes on a motor grader, missing roll-over protection system (ROPS) labels on two dozers, leaking diesel fuel on a service truck, and lack of proper training. Saldivar also testified that his supervisor responded to his safety complaints by mistreating him. He made his most recent safety complaint to management on January 14, 2021; Grimes Rock fired Saldivar the following day, January 15, 2021.

The Secretary sought Saldivar’s temporary reinstatement. Following a hearing, the ALJ determined that Saldivar’s complaint was not frivolously brought. She found that he engaged in protected activity when he lodged safety complaints with mine management and suffered an adverse action when Grimes Rock terminated him. The ALJ determined that the connection in time between the protected activity and adverse action, Grimes Rock’s knowledge of the protected activity, and its hostility towards Saldivar’s protected activity were evidence of a motivational nexus. As a result, the ALJ ordered Grimes Rock to temporarily reinstate Saldivar. On May 24, 2021, Grimes Rock petitioned for Commission review of the temporary reinstatement order.

The Secretary urges the Commission to affirm the ALJ’s order. Substantial evidence supports the ALJ’s finding that that management knew of Saldivar’s protected activity and that a

very close temporal proximity – just one day – existed between Saldivar’s protected activity and termination. The Commission long has held that these indicia of discrimination are sufficient to establish a non-frivolous claim of motivational nexus necessary to grant temporary reinstatement.

Grimes Rock makes two primary arguments as to why the Commission should overturn the ALJ’s decision, neither of which warrant disturbing the ALJ’s decision to temporarily reinstate Saldivar.

First, Grimes Rock claims that the ALJ erred by failing to give due consideration to a recent Ninth Circuit decision holding that claims brought under section 105(c) are evaluated under a but-for causation standard. But that case evaluated the standard necessary to prove a prima facie discrimination case, not the appropriate standard at the temporary reinstatement stage. The ALJ noted as much, and correctly concluded that “the outcome [would not] change here” even under a but-for causation standard because the causation evidence the Secretary adduced established the claim was “not frivolously brought.”

Second, Grimes Rock argues that the ALJ prevented it from presenting relevant evidence relating to Saldivar’s credibility. But the ALJ did not abuse her discretion in excluding this evidence because an ALJ cannot make credibility determinations in a temporary reinstatement proceeding. Even so, the ALJ gave Grimes Rock an opportunity to call witnesses to rebut Saldivar’s testimony, but Grimes Rock declined to call any witnesses.

### **Statement of the Issues**

1. Whether substantial evidence supports the ALJ’s decision to temporarily reinstate Saldivar.

2. Whether the but-for causation standard outlined in the Ninth Circuit’s recent decision in *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021) is relevant to whether Saldivar’s discrimination complaint was “not frivolously brought.”
3. Given that ALJs may not resolve credibility disputes in temporary reinstatement proceedings, whether the ALJ acted within her discretion in excluding evidence related to Saldivar’s credibility.

## **Statement of the Case**

### **I. Statutory Framework**

Under the Mine Act, miners who believes they have been discriminated against for exercising rights protected under the Act may file a complaint with the Secretary. 30 U.S.C. 815(c)(2). “[I]f 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.” *Ibid.*

The Commission has “repeatedly recognized that the ‘scope of a temporary reinstatement hearing is narrow, being limited to a determination by the [ALJ] as to whether a miner’s discrimination complaint is frivolously brought.’” *Sec’y of Labor on behalf of Cook v. Rockwell Mining, LLC*, 42 FMSHRC \_\_\_, slip op., No. WEVA 2021–0203 at p.5 (Apr. 23, 2021) (quoting *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)). “During a temporary reinstatement proceeding, the Secretary need not prove a prima facie case of discrimination but must simply prove a non-frivolous issue of discriminatory motive.” *Id.*

An ALJ may review the elements of a discrimination claim to assist in evaluating whether the Secretary’s evidence satisfies the non-frivolous test. *Id.* According to longstanding Commission precedent, a miner establishes a prima facie discrimination claim by showing (1) that the miner engaged in protected activity and (2) that the adverse action complained of was motivated in part by the protected activity. *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 (3rd Cir. 1981); *Sec'y of Labor of behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). And while the Ninth Circuit recently rejected the *Pasula–Robinette* framework in *Thomas v. CalPortland*, 993 F.3d at 1209, the Fourth, Sixth, and D.C. Circuits all have used the Commission's test. *E. Assoc. Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 813 F.2d 639, 642 (4th Cir. 1987); *Hopkins Cnty. Coal, LLC v. Acosta*, 875 F.3d 279, 288–289 (6th Cir. 2017); *Harrison Cnty. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 790 F. App'x 210, 213 (D.C. Cir. 2019).

Regardless, in a temporary reinstatement proceeding, the Secretary need prove only a non-frivolous issue of discriminatory motive. *Rockwell Mining*, WEVA 2021–0203 at p.12. The Secretary may establish the requisite motivational nexus between the protected activity and adverse action “simply through the operator's knowledge of protected activity and temporal proximity between the protected activity and the adverse action.” *Id.* at p.6; see also *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325–26 (Mar. 2000). “The 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).

During a temporary reinstatement proceeding, the ALJ “should not make credibility determinations,” “is not obligated to resolve testimonial conflicts,” and “should not weigh the operator's evidence against the Secretary's.” *Rockwell Mining*, WEVA 2021–0203 at p. 6.

## **II. Factual Background**

Alvaro Saldivar worked for Grimes Rock as a service technician and operator from October 2020 to January 2021. Hearing Transcript (Tr.). 15. His job duties included driving a water truck

to perform dust control activities, grading roads, driving a motor grader, and servicing heavy equipment. *Ibid.*

During his employment, Saldivar reported several safety issues to Rene Garcia, his direct supervisor, and Ernie Melendez, mine manager. *Id.* at 18. Specifically, he reported that a water truck had balding and cracked rear tires with missing threads and was leaking antifreeze. *Id.* at 17, 20. Melendez and Garcia did not repair these issues. *Id.* at 18, 20–21. Saldivar testified that, due to the defective tires, he was involved in an accident in December 2020 when the truck lost traction while driving uphill, causing it to roll backwards and crash into cinder block. *Id.* at 19. It was not until after the accident that the company replaced the rear tires. *Id.* at 20.

Saldivar reported other safety issues, including inoperable brakes on the motor grader and missing lights and ROPS tags on two dozers. *Id.* at 22, 24. Melendez and Garcia made no repairs, instructed Saldivar to continue using the equipment, and instructed him to put an “out of service” sign on the equipment when he was finished to deceive MSHA into believing that the equipment was not being used. *Id.* at 23, 25.

Saldivar also requested, but did not receive, training on how to properly operate the dozers, water truck, motor grader, and a service truck. *Id.* at 21, 26. Although he signed documents stating that he received new miner training, Saldivar did not believe he received necessary task training to operate large equipment. *Id.* at 21, 44.

Grimes Rock issued five disciplinary written warnings to Saldivar between October 2020 and January 2021, ostensibly for issues relating to Saldivar’s job performance. Saldivar signed these warnings. See Respondent Exhibit K. But Saldivar denied wrongdoing and testified that he signed the warnings only to avoid losing his job. *Id.* at 49, 54–56, 59, 64. He also disputed the contents of the warnings and testified that he believed other miners had been written up and

ultimately fired for reporting safety issues. *Id.* at 29, 49-50, 54-56, 62-63, 64, 75. Saldivar further testified that his supervisor treated him badly after he made safety complaints, and that the write-ups were a retaliatory response to his decision to report multiple safety hazards. Tr. 28, 59.

Saldivar most recently reported a safety issue to his supervisors on January 14, 2021. *Id.* at 30. Grimes Rock terminated him the next day. *Ibid.*

### **III. Procedural Background**

The day before the hearing, Grimes Rock identified documents related to Mr. Saldivar's criminal record as proposed exhibits. See Respondent's Exhibit List, p.2. The next morning, the ALJ's law clerk notified the parties that, consistent with her prior prehearing order, the ALJ would not allow such evidence.

On May 11, 2021, Judge Margaret Miller presided over the temporary reinstatement proceeding. During cross-examination of Saldivar, Grimes Rock's attorney attempted to elicit testimony related to Saldivar's criminal record, which the ALJ excluded. Tr. 38–39. Separately, during the hearing, Grimes Rock's attorney questioned Saldivar about receiving write-ups but conceded that the company did not terminate Saldivar “because he received the write-ups.” *Id.* at 51–52.

Judge Miller issued a decision on May 18, 2021, finding that Saldivar's claim was not frivolously brought and granting the application for temporary reinstatement. Dec. 5–6.

She found that Saldivar engaged in protected activity when he made several complaints to his immediate supervisor and the mine manager from October 2020 to January 2021. *Id.* at 5. Judge Miller further found that Saldivar suffered an adverse action when Grimes Rock fired him on January 15, 2021, the day after he made a safety complaint. *Ibid.* She found that the close temporal proximity between Saldivar's final safety complaint and termination, Grimes Rock's

knowledge of Saldivar's protected activity, and the suggestion of Grimes Rock's hostility towards the protected activity established a motivational nexus between the protected activity and adverse action. *Ibid.* Judge Miller noted, consistent with the directive in *Rockwell Mining* that operators be given an opportunity to participate in a "full hearing," Dec. 5, that although she gave Grimes Rock the opportunity to call witnesses to rebut Saldivar's testimony, Grimes Rock "did not introduce a witness to disprove Saldivar's claims." *Id.* at 4.

The ALJ noted that the Ninth Circuit recently opined that Mine Act discrimination is proved only if the operator would not have taken the adverse action but for the protected activity, even if the protected activity was one reason for the adverse action. But she concluded that decision does not affect the standard applicable to a temporary reinstatement proceeding. *Id.* at 3, n.1 (citing *CalPortland*, 993 F.3d 1204). She noted that the elements of a discrimination claim are merely guideposts under the temporary reinstatement's "not frivolously brought" standard and that discrimination under any test need not be proven. *Ibid.* Moreover, she noted that, given the evidence of protected activity and the close timing of Saldivar's firing, the outcome would not change even if she applied the but-for standard. *Ibid.*

In her decision, the ALJ rejected Grimes Rock's argument that it was denied a full hearing, noting that she specifically approved Grimes Rock's two proposed witnesses and repeatedly advised Grimes Rock during the hearing that it could call witnesses; Grimes Rock ultimately chose not to call any witnesses. *Id.* at 6. The ALJ further noted that she did not exclude any evidence that Grimes Rock presented at hearing. *Ibid.* Also, the ALJ explained her pre-hearing decision to reject evidence related to Saldivar's criminal record, because witness credibility is beyond the scope of a temporary reinstatement hearing and Grimes Rock conceded that it hired Saldivar with full knowledge of his criminal background. *Ibid.*

## Standard of Review

The Commission applies the substantial evidence standard of review to an ALJ's temporary reinstatement order. *Rockwell Mining*, WEVA 2021–0203 at p.5. It reviews an ALJ's evidentiary decisions for an abuse of discretion, *Prairie State Generating Co. v. Sec'y of Labor*, 35 FMSHRC 1985, 1996 (2013), and reviews "questions of law" *de novo*. *Sec'y of Labor v. Contractors Sand & Gravel, Inc.*, 20 FMSHRC 960, 967 (1998).

## Argument

### **I. Substantial evidence supports the ALJ's decision to temporarily reinstate Saldivar.**

Substantial evidence supports the ALJ's decision that Saldivar's discrimination complaint was not frivolously brought. Saldivar engaged in protected activity under section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), by making several safety complaints regarding numerous defects on multiple pieces of equipment and regarding his lack of necessary task-specific training. Dec. 4. Grimes Rock knew about the protected activity, because Saldivar reported issues directly to his immediate supervisor and to the mine manager. *Ibid*. Although Grimes Rock argues that there was "no documentary evidence" that Saldivar reported safety violations to MSHA, Pet. for Rev. 3, Commission rules specifically allow the Secretary to rely solely on the complaining miner's testimony at a temporary reinstatement hearing. See 29 C.F.R. 2700.45(d). And there was close temporal proximity between this protected activity and the adverse action; Grimes Rock fired Saldivar just one day after he reported safety issues on a truck he was instructed to drive. Dec. 2, 4. Additionally, Saldivar testified that his supervisors treated him badly after he lodged safety complaints, which the ALJ found suggested hostility toward the protected activity. *Id.* at 4. Grimes Rock did not call any witnesses to contradict that testimony and, in any event, at the temporary reinstatement stage, the ALJ was precluded from opining on the credibility of

Saldivar’s testimony or weighing Grimes Rock’s evidence against the Secretary’s. *Ibid.*;  
*Rockwell Mining*, WEVA 2021–0203 at pp. 8-9.

The recent *Rockwell Mining* case presented the Commission with strikingly similar evidence of discrimination – operator knowledge of protected activity and an adverse action in close temporal proximity. In that case, a Commission majority affirmed the ALJ’s decision granting temporary reinstatement, holding that it was “clear that knowledge and temporal proximity are sufficient to establish a non–frivolous claim of motivational nexus...” WEVA 2021–0203 at p.8. And although the Commission majority in *Rockwell Mining* held that an operator’s animus is not essential, the ALJ in this case found the evidence that Saldivar’s supervisors treated him badly after he made safety complaints also suggested “hostility towards the protected activity.” Dec. at 4. Although it was given the opportunity to call witnesses, Grimes Rock did not present any evidence undercutting either management’s knowledge of Saldivar’s protected activity or the close temporal proximity between Saldivar’s protected activity and his termination. And, in any event, the ALJ lacked the authority to resolve evidentiary conflicts implicated by any evidence Grimes Rock presented. *Rockwell Mining*, WEVA 2021–0203 at pp. 8-9.

The Secretary presented more evidence in this case than the *Rockwell Mining* majority deemed necessary to satisfy the non-frivolous standard, and the Commission should affirm the ALJ’s temporary reinstatement order.

## **II. The Ninth Circuit’s *CalPortland* decision provides no basis to overturn the ALJ’s decision in this case.**

The Ninth Circuit recently rejected the Commission’s *Pasula–Robinette* framework in *CalPortland*, holding that the appropriate test for causation in 105(c) discrimination claims is a but–for test, rather than the “motivated in any part by” test. 993 F.3d at 1209. Grimes Rock claims that the ALJ erred by failing to apply the Ninth Circuit’s holding. Pet. for Rev. 4–6. But

the ALJ correctly points out that the *CalPortland* decision has no bearing on the temporary reinstatement standard. Dec. 3, n.1.

First, the *CalPortland* court considered the appropriate standard to prove a prima facie case of discrimination, not the appropriate standard at a temporary reinstatement hearing. A temporary reinstatement proceeding has a lower evidentiary threshold than is required to prove a prima facie case of discrimination. At a temporary reinstatement hearing, the Secretary need establish only that the discrimination claim was not frivolously brought. *Rockwell Mining, WEVA 2021–0203* at p.5. While *CalPortland* imposes a but-for standard at a discrimination hearing on the merits, it does not impose that burden of proof at the temporary reinstatement stage. Instead, the Secretary’s burden at the temporary reinstatement stage remains the same: it must establish merely a “non-frivolous motivational nexus.” *Id.* at 6. As the ALJ noted, *570* did not alter the temporary reinstatement standard because the elements of a discrimination claim “are merely useful guideposts” to assess whether a claim is frivolously brought. Dec. 3 n.1.

Second, even applying the *CalPortland* but-for standard, the evidence the Secretary adduced shows a non-frivolous motivational nexus. Even under a but-for causation standard, adverse action in close temporal proximity to protected activity, by itself, is enough to establish a prima facie case. As the Ninth Circuit noted, no other circuit has evaluated the Commission’s *Pasula–Robinette* discrimination test in light of recent Supreme Court cases using a “but for” causation standard. 993 F.3d at 1210–11. But in other contexts, such as Title VII retaliation cases, various circuits have found that close temporal proximity between protected activity and alleged retaliation, standing alone, establishes causation under the “but for” standard. See *Porter v. Houma Terrebonne Housing Authority Bd. Of Comm’rs*, 810 F.3d 940, 948–49 (5th Cir. 2015) (finding a six–and–a–half week time between claimant’s protected activity and retaliation

sufficient to satisfy the prima facie case of causation); *see also Wilson v. AR Dep't of Human Servs.*, 850 F.3d 368 (8th Cir. 2017) (finding a six-week period between a plaintiff's EEOC charge and termination "plausibly alleges a but-for causal connection"). And the Ninth Circuit has found that close proximity between the protected activity and retaliatory action established a prima facie case of retaliation under Title IX based on its Title VII jurisprudence. *See Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 869 (9th Cir. 2014) ("The timing of these events is enough in context to show causation in this Title IX retaliation case."). It necessarily follows that at the temporary reinstatement stage, when a complainant does not need even to make out a prima facie case, very close temporal proximity coupled with management knowledge of protected activity surpasses the causation threshold even under a but-for causation test. The ALJ correctly concluded that even if *CalPortland* applied, "the outcome does not change here." Dec. 3 n.1.

Grimes Rock asserts that "at a minimum," Saldivar had to show "some knowledge of Respondent that safety violations existed, that Saldivar was aware of these safety violations and that Saldivar was communicating to management" to prevail under a but-for causation standard. Pet. for Rev. 4. But Saldivar did exactly that. *See* Dec. 4 ("Saldivar also testified that he had continuously made mine management aware of his safety complaints.").

Third, the Secretary respectfully disagrees with the *CalPortland* holding that a complainant must carry the evidentiary burden of showing that the adverse action would not have occurred but for the protected activity. Statutory "[t]ext may not be divorced from context." *Univ. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013). In *CalPortland*, the Ninth Circuit failed to give adequate consideration to the unique context of the Mine Act. Congress recognized that miners must play an "active part" in Mine Act enforcement in order for it to be



“truly effective.” *Sec’y of Labor obo Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920 (Aug. 2016) (quoting S. Rep. 95–181, 35 (May 16, 1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legis. History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)). Because miners advocating for safety could be inviting retaliation in a highly dangerous environment, “Congress concluded that “[w]henver protected activity is in any manner *a contributing factor* to the retaliatory conduct, a finding of discrimination should be made.” *Ibid.* (emphasis in original) (quoting S. Rep. 95–181 at 36). Ensuring that miners’ protected activities are not chilled to the detriment of their health is consistent with Congress’s mandate that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner.” 30 U.S.C. 801(a). To effectuate Congress’s intent, courts have “broadly interpreted” section 105(c). *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984); see also *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988) (“[S]ection 105(c)(1) must be broadly interpreted ... [consistent] with Congress’ remedial purpose.”). The Ninth Circuit did not mention this Mine Act context, which is inapplicable to Title VII, even though it recognized that if “context indicates otherwise,” its interpretation of the text would change. *CalPortland*, 993 F.3d at 1211.

The Ninth Circuit criticized the Commission’s decision in *Riordan* for overreliance on “legislative history.” *Id.* But the Supreme Court has held that “historical sources” can illuminate the meaning of statutory text “at the time of its adoption.” *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1750 (2020); see also *Lawson v. PPG Architectural Finishes, Inc.*, 982 F.3d 752, 757 (9th Cir. 2020) (“The legislative history, though not dispositive, reinforces this statutory history and the plain language.”). This is particularly true when “the legislative history” is “unequivocal[.]” *Simpson*, 842 F.2d at 462. Congress’s express statement that “[w]henver

protected activity is in any manner a *contributing factor* to the retaliatory conduct, a finding of discrimination should be made” leaves no doubt as to Congress’s intent. *Riordan*, 38 FMSHRC at 1920 (emphasis in original). The Ninth Circuit did not grapple with this specific Congressional statement.

Next, the *CalPortland* case involved a section 105(c)(3) discrimination complaint, 30 U.S.C. 815(c)(3), and the Secretary was not a party. The Ninth Circuit thus did not consider whether to give deference to both the Secretary’s and the Commission’s historical statutory interpretation as reflected in Commission caselaw. When the “Secretary and the Commission agree, there is no question but that we must accord deference to their joint view.” *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1025 (D.C. Cir. 2013).

Finally, *CalPortland* unnecessarily created a circuit split with the Fourth, Sixth, and D.C. Circuits, all of which have used the *Pasula-Robinette* framework in analyzing section 105(c) discrimination claims. See *supra* p. 4.

For these reasons, the Ninth Circuit’s decision in *CalPortland* does not impact the ALJ’s order granting temporary reinstatement.

### **III. The ALJ acted within her discretion in excluding evidence related to Saldivar’s credibility.**

As the Commission recently reaffirmed in *Rockwell Mining*, ALJs cannot resolve credibility disputes or weigh operator evidence at the temporary reinstatement stage. *Rockwell Mining*, WEVA 2021–0203 at pp. 8-9. The ALJ complied with this instruction, yet nonetheless gave Grimes Rock every opportunity to call witnesses. Dec. 6. Grimes Rock elected not to call any witnesses. So Grimes Rock’s claim that it was denied due process because the ALJ did not afford it a “robust evidentiary hearing” is incorrect and ignores the limited scope of temporary reinstatement proceedings. Pet. for Rev. 10.

Though conceding that the ALJ could not have “weigh[ed] credibility,” Pet. for Rev. 5, Grimes Rock seeks to expand inappropriately the scope of a temporary reinstatement hearing to include credibility determinations by objecting to the ALJ’s exclusion of Saldivar’s criminal history. Grimes Rock admits that it wanted to introduce this evidence because it “goes directly to [Saldivar’s] credibility.” *Id.* at 7. Moreover, the ALJ found that Grimes Rock hired Saldivar “with full knowledge of his criminal background,” so admitting evidence of Saldivar’s criminal background “would have been prejudicial” as it would not have offered any insight into Saldivar’s termination. Dec. 5 n.3. Grimes Rock does not address this reasoning.

Similarly, although Grimes Rock complains that the ALJ precluded cross-examination questioning about Saldivar’s training, its attorney admittedly wanted to use this evidence to attack Saldivar’s credibility. Tr. 36 (“He is just not credible across the board.”). The ALJ properly excluded such evidence because, as the *Rockwell Mining* majority recently reaffirmed, an ALJ cannot make credibility determinations during a temporary reinstatement hearing. WEVA 2021-0203 at p.8 (citing *Sec’y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089–90 (Oct. 2009)). Therefore, “it is unnecessary to further consider the operator’s due process argument.” *Id.* at p.11. Importantly, the ALJ repeatedly gave Grimes Rock “leeway” on cross-examination and precluded only its line of questioning relating to Saldivar’s credibility. Tr. 36, 38, 43. Her other limits on cross-examination also were reasonable when, for example, Grimes Rock sought to elicit testimony that would violate the government-informant privilege under the Mine Act. See Tr. 78.

The Grimes Rock petition also briefly claims that the “disciplinary form[s]” were “independent grounds” for Saldivar’s termination. Pet. for Rev. 9. But it said precisely the opposite before the ALJ, Dec. 5. Moreover, Saldivar disputed the contents of the write-ups and

Grimes Rock did not call any witnesses to testify as to the disciplinary forms' contents. The ALJ had no basis to disbelieve both Saldivar's and Grimes Rock's testimony that the warnings in the write-ups were not the reason Grimes Rock fired Saldivar. Additionally, any argument that the warnings were the real reason Grimes terminated Saldivar constitutes an affirmative defense, and is outside the scope of a temporary reinstatement hearing. See *CAM Mining, LLC*, 31 FMSHRC at 1090.

### **Conclusion**

For the reasons set forth above, the Secretary requests that the Commission affirm the ALJ's temporary reinstatement order.

Respectfully submitted,

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### **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 June 1, 2021 on the following:

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