No. 13-1406

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COBRA NATURAL RESOURCES, LLC,

Petitioner,

v.

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION on behalf of RUSSELL RATLIFF,

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over proceedings for review of a decision of the Federal Mine Safety and Health Review Commission ("the Commission") under section 106(a)(1) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 816(a)(1). The Commission had jurisdiction over the matter under sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d).

Cobra Natural Resources, LLC ("Cobra") seeks review of the Commission's February 28, 2013, temporary reinstatement order; Cobra timely filed its petition for review on March 27, 2013. *See* 30 U.S.C. § 816(a)(1).

Although the Commission's temporary reinstatement order from which Cobra appeals is not a final order because it does not "'end[ ] the litigation on the merits,'" the Court has jurisdiction over this matter because Cobra's appeal of the order falls within the collateral order exception to finality principles. *See Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990) (per curiam) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)) (finding jurisdiction over a Mine Act temporary reinstatement decision under the collateral order doctrine); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d 297, 300 (7th Cir. 2012) (same).

The collateral order doctrine permits review of an order that: 1) conclusively determined the disputed question, 2) resolved an important issue completely

separate from the merits of the underlying action, and 3) would be effectively unreviewable on appeal from a final judgment. *See United States v. Juvenile Male*, 554 F.3d 456, 462 (4th Cir. 2009) (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468–69 (1978)). All three requirements are met here.

First, the Commission's order conclusively determined that Cobra must temporarily reinstate Russell Ratliff pending further proceedings on the merits. *See Jim Walter Res.*, 920 F.2d at 744. Second, the issue of whether a miner must be temporarily reinstated when the Secretary of Labor makes a non-frivolous showing that a layoff was discriminatorily motivated raises an issue of fundamental importance to the enforcement of the Mine Act's anti-discrimination provision, 30 U.S.C. § 815(c), that is separate from the merits of the miner's discrimination complaint. *See id.* (explaining that the issues raised in a temporary reinstatement proceeding are "conceptually different" from those implicated by the ultimate adjudication on the merits). Finally, the Commission's order will be effectively unreviewable on review of a final order on the merits of Mr. Ratliff's discrimination complaint because Cobra's asserted injury in having to temporarily reinstate Mr. Ratliff pending a decision on the discrimination complaint will evaporate once there is a decision on the merits of that complaint. *See id*. at 745.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the Commission's application of the statutory "not frivolously brought" standard in a temporary reinstatement proceeding was proper and consistent with Commission precedent.

II. Whether substantial evidence supports the Commission's findings that Mr. Ratliff's discrimination complaint was not frivolously brought.

STATEMENT OF THE CASE

This case involves a challenge to an order of temporary reinstatement under the anti-discrimination provision of the Mine Act, 30 U.S.C. § 815(c). As discussed in greater detail below, under the Mine Act, if a miner files a complaint of discrimination with the Secretary of Labor ("the Secretary") and the Secretary finds that the complaint was "not frivolously brought," the Commission must order the miner's immediate reinstatement. 30 U.S.C. § 815(c)(2). This reinstatement is temporary, pending a final decision on the merits of the complaint. *Id*.

Russell Ratliff was employed at Cobra's Mountaineer Mine from June of 2008 until his discharge on October 17, 2012. Joint Appendix ("JA") 39, 43. On October 31, 2012, Mr. Ratliff filed a complaint with the Secretary alleging that he had been discharged in retaliation for raising safety concerns to mine management. JA 156-57.

The Secretary found that Mr. Ratliff's complaint was not frivolously brought and filed an application for temporary reinstatement with the Commission on December 12, 2012. JA 4-12. On December 20, 2012, Cobra requested a hearing on the Secretary's application for temporary reinstatement. JA 18. In its request, Cobra indicated that the hearing should address the issue of whether any award of temporary reinstatement "should be tolled no later than January 15, 2013, when Mr. Ratliff's employment would have terminated by Cobra via a reduction in force." *Id.*

A hearing was held on January 7, 2013 before Commission Administrative Law Judge ("ALJ") William S. Steele. JA 32. On January 14, 2013, ALJ Steele issued a decision finding that Mr. Ratliff's complaint was not frivolously brought and that temporary reinstatement should not be tolled due to Cobra's recent reduction in force because work was still available at the mine which Mr. Ratliff could perform. JA 188-94. The ALJ therefore ordered Mr. Ratliff's temporary reinstatement. JA 194. The parties subsequently entered into an agreement to temporary economic reinstatement, under which Mr. Ratliff will be paid his salary but not physically reinstated to the mine pending an order on the merits of his complaint. JA 228-31.

On January 22, 2013, Cobra filed a petition for discretionary review with the Commission challenging the ALJ's finding that the temporary reinstatement should

not be tolled due to the reduction in force. JA 195-209. On February 28, 2013, the Commission affirmed the ALJ's order of temporary reinstatement on the grounds that the claim that Mr. Ratliff's inclusion in the reduction in force was related to his safety complaints was not frivolous. JA 237-42. Cobra filed a petition for review of the Commission's decision with this Court on March 27, 2013.

STATEMENT OF FACTS

I. Statutory Background

In response to the "notorious history of serious accidents and unhealthful working conditions" in the mining industry, Congress enacted the Mine Act in 1977 to establish a comprehensive and pervasive regulatory scheme governing mine safety and health. *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). "Recognizing 'an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines,' Congress passed the [Mine Act] to strengthen the government's ability to ensure mine safety." *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 634 (7th Cir. 2013) (citing 30 U.S.C. § 801(c)).

The whistleblower provision at section 105(c) of the Act was a critical part of the health and safety enforcement program. *See Vulcan*, 700 F.3d at 302. Congress recognized that "[i]f our national mine safety and health program is to be

truly effective, miners will have to play an active part in enforcement of the Act." [1] S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977), at 35, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3435. Accordingly, Congress promulgated section 105(c) to encourage miners to be active in voicing concerns about mine safety by protecting them against "any possible discrimination which they might suffer as a result of their participation." *Id.* The temporary reinstatement provision at issue in this case was "essential" to this goal of encouraging miner participation, given that complaining miners "may not be in the financial position to suffer even a short period of unemployment or reduced income pending resolution of the discrimination complaint." *See id.* at 37, *reprinted in* 1977 U.S.C.C.A.N. at 3437.

Section 105(c) prohibits mine operators from discriminating against miners for making any complaint "under or related to" the Act, including a complaint notifying the operator of "an alleged danger or safety or health violation" at the mine. 30 U.S.C. § 815(c)(1). A miner who believes that he has been discriminated against may file a complaint with the Secretary. 30 U.S.C. § 815(c)(2).

[1] The importance of miner participation in the Act's health and safety enforcement program is reflected throughout the statute. In addition to section 105(c), 30 U.S.C. § 815(c), which protects miners who make safety complaints to mine management or to the miners' representative, the statute also provides for the participation of miners' representatives in safety inspections by the Secretary, 30 U.S.C. § 813(f), the right to obtain a special inspection if a miner believes a violation has occurred or an imminent danger exists, 30 U.S.C. § 813(g)(1), the right to notify the Secretary of an alleged violation or other danger, 30 U.S.C. § 813(g)(2), and the posting of orders in a place easily visible to miners, 30 U.S.C. § 819(a).

The Mine Act requires expeditious treatment of miners' discrimination complaints. The Secretary is required to begin an investigation of a complaint within fifteen days. 30 U.S.C. § 815(c)(2). If the Secretary finds that the miner's complaint was "not frivolously brought," the Secretary must apply to the Commission for an order temporarily reinstating the miner, and the Commission, on an expedited basis, must order the miner temporarily reinstated "pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission's Procedural Rules afford the mine operator the opportunity for a hearing on the Secretary's application for temporary reinstatement, but the timeline is expedited in light of the importance of quick resolution: the operator has ten days to request a hearing, the hearing must be held within ten days of the request, and the ALJ must issue an order within seven days of the hearing. 29 C.F.R. § 2700.45(c), (e). Either party may seek review of the judge's order, but the timeframe is similarly abbreviated: the party seeking review must file a petition with the Commission within five days of the judge's order, a response is due within five days of the petition, and the Commission must issue a decision within ten days of receiving the response. 29 C.F.R. § 2700.45(f).

The Secretary must complete the investigation and make a determination of whether a violation has occurred within ninety days of the complaint being filed. 30 U.S.C. § 815(c)(2)-(3). If the Secretary determines that a violation has

occurred, the Secretary must file a complaint with the Commission, and the Commission must thereafter provide an opportunity for hearing and issue an order. *Id.* § 815(c)(2). If the Secretary determines that a violation has not occurred, the miner may pursue an action on his own behalf, but the temporary reinstatement ends. *Id.* § 815(c)(3); *Vulcan*, 700 F.3d at 317; *N. Fork Coal Co. v. FMSHRC*, 691 F.3d 735, 744 (6th Cir. 2012).

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204 (1994); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). Under the split-enforcement scheme of the Mine Act, Commission judges hear discrimination cases brought by the Secretary under section 105(c). *See Sec'y of Labor ex rel. Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114 (4th Cir. 1996).

By filing a petition for discretionary review, a party may seek review of an adverse judge's decision before the Commission. 30 U.S.C. § 823(d)(2); *see also* 29 C.F.R. 2700.45(f) (procedures for review of order granting or denying an application for temporary reinstatement). An adversely affected party may obtain review of a Commission decision in an appropriate Court of Appeals. 30 U.S.C. § 816(a), (b).

II. Mr. Ratliff's Employment and Discharge [2]

Mr. Ratliff began working in underground coal mines at the age of nineteen and has roughly thirty years of experience as a miner at various mines in Kentucky and West Virginia. JA 41-42, 244. Mr. Ratliff spent much of his mining career as an equipment operator and has operated numerous pieces of underground mining equipment, including the continuous miner machine, the scoop, the shuttle car, and the bridge. JA 40-42. Mr. Ratliff is also certified to work as a mine supervisor and has worked in various supervisory positions, including approximately ten years as a mine superintendant at a mine in Kentucky. JA 41-42.

Mr. Ratliff began working at Cobra's Mountaineer Mine in June of 2008. JA 39, 244. The Mountaineer Mine is an underground coal mine located in Wharncliffe, West Virginia. JA 34, 39-40. Cobra is an affiliate of Alpha Natural Resources, Inc. ("Alpha"). JA 105-106; Pet'r Disclosure of Corporate Affiliations. Mr. Ratliff worked at Cobra as an equipment operator, operating the continuous miner machine, the scoop, and the shuttle car. JA 40.

Mr. Ratliff was active and outspoken on matters of safety at the mine. JA 87-88, 101, 103. Following an agreement stemming from the 2010 Upper Big

[2] The facts described here are based on the testimony and other evidence presented at the temporary reinstatement hearing. *See* JA 32-174. Because, as discussed below, the temporary reinstatement hearing occurs before the parties have conducted discovery and is limited to assessing whether the Secretary's claim is "not frivolous," the evidentiary record at this stage is limited and the hearing judge has not made any determination as to the weight to be given to particular evidence.

Branch disaster, in which an explosion at an underground coal mine subsequently purchased by Alpha claimed the lives of twenty-nine miners,[3] all of Alpha's mines instituted mandatory daily safety meetings beginning around January of 2012. JA 45. Mr. Ratliff frequently spoke up at these meetings to voice safety concerns; few, if any, other miners spoke up as frequently as Mr. Ratliff. JA 87-88, 101. Mr. Ratliff also frequently submitted safety concerns to management in writing by completing the "Running Right" safety incident reporting cards provided by the mine. JA 96. Mr. Ratliff also served for a period as part of the Employee Involvement Group, which reviewed the cards submitted. JA 97. Mr. Ratliff testified that his insistence on safety matters earned him a reputation for being "hot headed" and "particular" over safety issues. JA 101, 103.

Testimony at the hearing focused on Mr. Ratliff's participation in the October 9, 2012, safety meeting because Mr. Ratliff believed that his participation in the October 9 meeting was a cause of his October 17 discharge. At the October 9 meeting, Mr. Ratliff and another miner, Jon "Tubby" Lewis, raised complaints about a lack of air ventilation in the mine. JA 47. Mr. Ratliff expressed his concern that in recent weeks Cobra had not been following its mining plans and

[3] *See Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 236 (D.C. Cir. 2011) (discussing the Upper Big Branch disaster); *Big Ridge*, 715 F.3d at 647 ("The importance of miner safety remains strong today. Unfortunately, we need only look to the twenty-nine miners who died in the 2010 disaster at the Upper Big Branch mine—the 'deadliest coal mine disaster this nation has experienced in forty years.'" (citation omitted)).

that as a result, miners were exposed to increased amounts of dust. JA 49. The mining plans are submitted to MSHA and state regulators and are posted at the mine and discussed at the safety meetings. JA 78-79. Mr. Ratliff was concerned that miners would develop black lung disease or silicosis as a result of inhaling the dust. JA 50-51. Kevin Hutchinson, who was running the meeting on behalf of Cobra management, responded to Mr. Ratliff's and Mr. Lewis's concerns by yelling at them. JA 48, 46.

Following the October 9 safety meeting, Mr. Ratliff testified that the mine did not make any changes with regards to following the plans or reducing dust levels. JA 51. Over the next several days, Mr. Ratliff completed approximately ten Running Right cards, which he submitted on October 15. JA 51-52, 64. On the cards, Mr. Ratliff repeatedly complained that the mine was not conducting regular rock dusting as required by the mining plans. JA 54, 58, 59, 61, 62. Rock dusting is a process in which rock dust is applied to mine surfaces to control coal dust. JA 58-59. Mr. Ratliff explained that he was concerned about the failure to conduct rock dusting because it would lead to accumulations of coal dust, which created a risk of explosions as well as health problems for miners forced to inhale the dust. JA 59, 60. Mr. Ratliff also raised several other safety issues in his cards, including concerns related to the type of ventilation problem that he and Mr. Lewis raised at the October 9 meeting and failure to adequately clear an area of loose

material before mining. JA 64-65. In addition to the ten cards submitted on October 15, Mr. Ratliff submitted three more cards prior to the start of his shift on October 17. JA 63-64.

On October 15, Mr. Ratliff was involved in an argument with a supervisor. JA 11, 44. The incident occurred in the mine bathhouse approximately twenty minutes after the end of Mr. Ratliff's shift. JA 69. The bathhouse is an area where hourly miners shower and change their clothing after the end of a shift. JA 70. Management employees rarely enter the bathhouse because they have their own separate changing facilities. *Id.*

After his shift ended on October 15, Mr. Ratliff went to the bathhouse and took a shower. JA 69. After he showered but before he dressed, Foreman Otto Bryant entered the bathhouse and approached Mr. Ratliff. JA 69. A number of other employees were also present in the bathhouse at the time. JA 69-71. Mr. Bryant asked Mr. Ratliff why he had not helped his coworkers perform work on the mantrip (the shuttle cars that transport miners into and out of the mine) during the previous shift. JA 69. Mr. Ratliff did not answer initially because he knew that no work had been performed on the mantrip during that shift. *Id.* Mr. Bryant then became very angry and asked Mr. Ratliff again why he had not helped with the work on the mantrip. *Id.* Mr. Ratliff, still naked in a room full of his coworkers, became frustrated that Mr. Bryant was accusing him of not helping with the

mantrip when Mr. Ratliff knew that no such work had been required on the mantrip that day. JA 69-70. Mr. Ratliff acknowledged that he subsequently told Mr. Bryant to "shut the fuck up" and "get the fuck out" of the employee bathhouse. JA 99-100.

Witnesses at the hearing testified regarding the use of profanity at the mine. Mr. Ratliff testified that he knew of at least one other hourly miner, K.J. Phillips, who had told his boss to "shut the fuck up." JA 102-103. Mr. Phillips subsequently became a Section Boss. JA 102. Keith Cook, a Manager of Human Resources for Alpha and a witness at the hearing, acknowledged that an underground coal mine is "not a delicate work environment" and testified that he had never heard of an employee being discharged for using curse words in a mine. JA 132.

On October 17, at the start of his shift, Mr. Ratliff was called into a meeting with management and informed by Human Resources Manager Wayne Cooper that he was being discharged as a result of the October 15 altercation with Mr. Bryant in the bathhouse. JA 44.

III. The Evaluation and Layoff

In its request for hearing on the Secretary's application for temporary reinstatement, Cobra asserted that any award of temporary reinstatement should be tolled no later than January 15, 2013, because Mr. Ratliff's employment would

have been terminated on that date due to a reduction in force. JA 18. At the hearing, Cobra introduced testimony and exhibits regarding the reduction in force and the manner in which it would have affected Mr. Ratliff had he not been terminated in October. JA 105-131, 162-174, 244.

In November of 2012, Alpha announced that Cobra would be reducing the size of its operations. JA 119-120. Cobra determined that the reduction required the elimination of a total of thirty positions at the Mountaineer Mine, including sixteen contract miners and fourteen permanent employee positions. JA 127, 163. Of the fourteen miners whose positions were eliminated, nine were reassigned to other Alpha mines and five were laid off. *Id*. The five employees who were laid off in November were paid through January 15, 2013. JA 124-25.

The nine employees identified for layoff or transfer were identified based on the results of employee evaluations conducted in March of 2012. JA 122. The evaluations were performed by a team of three managers: Alpha HR Manager Keith Cook, Cobra HR Manager Wayne Cooper, and Cobra General Manager Boon Miller. JA 111-12. Employees were not aware that the evaluations were being conducted or informed of the criteria used. *See* JA 100.

The evaluation team rated each employee in each of three categories and fifteen subcategories. JA 162. For each of the fifteen subcategories, an employee was given a score from 1 to 5. JA 110-11, 162. In addition to these scores, an

employee was awarded one additional point if he possessed any special certifications or skills or was able to operate at least three pieces of equipment. JA 111, 162. Therefore, each employee could receive a total of up to seventy-six points. The employees' scores were totaled and those five employees with the lowest total scores were laid off. JA 127-129, 174. Those five employees received total scores ranging from 29 to 34. JA 174.

Cobra's records of the evaluation process do not indicate the basis for the numerical scores given to any particular employee. *See* JA 244. Instead, the records only show each employee's total score in each of the three primary categories, as well as whether the employee was awarded the additional point for special certifications and skills. *Id*. Thus, for example, while Cobra's records may show that a particular employee received a score of 25 in the "Running Right" category, there is no way of knowing whether this score reflected the employee's performance in the area of safety, adherence to policy, or any of the four other subcategories. *Id.* Nor do the records show which particular behaviors or practices exhibited by the employee formed the basis for the numerical evaluation. For example, if an employee received a low score in the "Job Efficiency" category, there is no way of knowing whether this score was based on the employee's timeliness in completing a recent task or his failure to meet management's expectation on a particular assignment, or indeed whether such factors were

considered at all. For some employees, the records show comments provided by the evaluators in the "areas for improvement" and "other comments" portions of the evaluation form,[4] but those comments do not explain the basis for any particular numerical score. JA 244, 162.

Similarly, the evaluation team did not have any criteria for determining how or whether a particular positive behavior or performance trait would be reflected in an employee's numerical evaluation. JA 134-141. Instead, the numbers assigned to an employee in a given subcategory were based on the team's "collective" determination of the employee's "overall collective behavior." JA 135, 134. Mr. Cook did not work at Cobra and had never observed any of the employees personally, so he relied on input from the other two team members in reaching his conclusions. JA 135-36.

Mr. Ratliff received an overall score of 30: 12 points in the "Running Right" category, 10 points in the "Job Efficiency" category, and 8 points in the "Initiative" category. JA 244. As discussed above, however, Cobra's records do not provide any information as to which particular aspects of Mr. Ratliff's job performance were or were not considered in reaching these numbers. *See id.* Nor do the

[4] The evaluation form itself provides space for the evaluator to provide written answers to two questions: "What does the employee need to improve?" and "Other comments…". JA 162 (ellipsis in original). The evaluators' answers were entered into the spreadsheet under columns entitled "Areas for Improvement" and "Other Comments." JA 244.

records indicate how Mr. Ratliff was scored in any of the fifteen individual subcategories. *Id.* Indeed, the only qualitative information in the evaluation records regarding Mr. Ratliff's performance is in the "areas for improvement" portion, where the evaluators indicated that Mr. Ratliff needed to improve in the area of "attitude." *Id*. Mr. Ratliff was not awarded the extra point for special skills or certifications, even though he testified that he had experience operating three different pieces of equipment at Cobra (the continuous miner, the scoop, and the shuttle car), JA 40, and Cobra indicated that the extra point would be awarded to a miner who could operate at least three pieces of equipment. *Id.*; JA 162, 111.

Mr. Lewis, the other miner who spoke up at the October 9 safety meeting, also received an overall score of 30, placing him among the five miners who were permanently laid off. JA 244. In "areas for improvement" in Mr. Lewis's evaluation, the evaluators wrote "very bad attitude toward company and coworkers." *Id*.

IV. The Decisions Below

The ALJ found that that Mr. Ratliff's complaint was not frivolously brought and that temporary reinstatement should not be tolled on the basis of the reduction in force. JA 194. On the issue of whether Mr. Ratliff's complaint was frivolous, the ALJ first found that Mr. Ratliff engaged in protected activity when he spoke out at the October 9 safety meeting and when he submitted the Running Right

cards. JA 188-89. The ALJ then determined that there was evidence of a nexus between that protected activity and Mr. Ratliff's discharge on October 17. JA 189-192. The ALJ found that Cobra had demonstrated hostility or animus towards Mr. Ratliff's protected activity based on Mr. Ratliff's testimony that he had a reputation for being difficult. JA 190. The ALJ inferred that Mr. Ratliff's reputation was caused by his insistence on safety matters, and that this demonstrated Cobra's hostility towards Mr. Ratliff's protected safety complaints. *Id.* The ALJ found further circumstantial evidence of a nexus between Mr. Ratliff's protected activity and his discharge based on Cobra's knowledge of Mr. Ratliff's protected activity, the coincidence in time between the most recent activity and his October 17 discharge, and disparate treatment of Mr. Ratliff as compared to other miners who used profanity. JA 190-92. On the issue of tolling, the ALJ determined that the temporary reinstatement order should not be tolled because work was still available at the mine that Mr. Ratliff could perform if reinstated. JA 192-93.

The Commission affirmed the ALJ's order of temporary reinstatement, but on different grounds. The Commission first noted that under its decision in *Secretary of Labor ex rel. Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050 (2009), an ALJ may consider evidence that an award of temporary reinstatement should be tolled based on a subsequent layoff. JA 240. Applying

Gatlin to this case, the Commission noted that while "[a]n operator generally must prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence," that standard was not applicable given the procedural posture of this case. *Id.* Rather, the Commission explained, because the issue of the reduction in force was raised during the temporary reinstatement phase itself, i.e. before any decision had been issued on temporary reinstatement and before the parties had any opportunity to complete discovery, the reduction in force should be evaluated under the statutory "not frivolously brought" standard applicable to temporary reinstatement decisions. JA 240, 241 n.3. Applying this standard, the layoff itself is evaluated as the adverse action that resulted in the miner's loss of employment and temporary reinstatement should be granted if the Secretary can show that the miner's complaint of discrimination, i.e. that the layoff was a result of protected activity, was not frivolously brought. JA 240-242.

In reaching this conclusion about the proper standard to be applied, the Commission stressed that its holding was limited to the initial stage of the proceedings when the parties have not conducted discovery. JA 241 n.3. Thus, the Commission acknowledged the possibility that an ALJ might provide a mine operator with an opportunity, prior to the hearing on the merits, to prove by a preponderance of the evidence that temporary reinstatement should be tolled, but

that this would not be appropriate until the parties had an opportunity for discovery. *Id.*

The Commission then applied the "not frivolously brought" standard to Mr. Ratliff's case and found "conflicting evidence in the record" on the question of whether Mr. Ratliff's inclusion in the layoff was entirely unrelated to his protected activity. JA 241. In support of a finding that Mr. Ratliff's poor score in the March 2012 evaluation was related to his protected activity, the Commission noted that the ALJ had found that Mr. Ratliff frequently spoke up at safety meetings and that Cobra management had expressed hostility towards him due to his insistence on safety matters. *Id.* The Commission also noted that the March 2012 evaluation of Mr. Ratliff was not based solely on objective factors that could not be affected by this animus, but was based in part on subjective factors such as management's view that Mr. Ratliff had an unsatisfactory "attitude." *Id.* Thus, although the Commission found that the ALJ had not applied the correct legal framework in evaluating the layoff issue, the Commission nonetheless affirmed the ALJ's order because the facts in the record supported a finding that temporary reinstatement should be granted under the correct standard. JA 242 (citing *Am. Mine Svcs., Inc.*, 15 FMSHRC 1830, 1834 (1993) for the principle that "remand [is] not necessary when record supports no other conclusion").

SUMMARY OF ARGUMENT

The anti-discrimination provision of the Mine Act requires swift reinstatement of a complaining miner upon a finding by the Secretary that the complaint was "not frivolously brought." Consistent with the statutory mandate, the Commission has consistently held that the scope of a hearing on temporary reinstatement is limited to the question of whether the miner's complaint was frivolous. Under this framework, if the Secretary makes a non-frivolous showing that the miner's discharge was motivated in any part by protected safety complaints, the miner is granted temporary reinstatement pending completion of the Secretary's investigation and full hearing on the merits. This framework has been challenged in federal court and upheld, and is essential to the Mine Act's goal of encouraging miner participation in safety and health enforcement.

The Commission's decision in this case is entirely consistent with the statute and its own precedent. In light of the above principles, the Commission properly held that the "not frivolously brought" standard is the only appropriate analytical framework to apply at the temporary reinstatement phase of the litigation. The Commission's decision in this case is not inconsistent with its opinion in *Gatlin* because *Gatlin* was decided under a different procedural posture.

Applying the "not frivolous" standard to the argument that temporary reinstatement should be tolled due to layoff, the Commission properly explained

that if the Secretary raises a non-frivolous issue that the miner's layoff was in some way related to protected activity, temporary reinstatement should be granted. To hold otherwise would be contrary to the intent of the temporary reinstatement provision – to provide immediate reinstatement when a miner's discrimination complaint appears to have merit and ensure that the mine operator, not the miner, bears the larger share of the burden of uncertainty pending full resolution on the merits.

Finally, the Commission's finding that the Secretary made a non-frivolous showing that Mr. Ratliff's inclusion in the layoff was motivated at least in part by his protected activity is supported by substantial evidence in the record. The evidence presented at the hearing supports the Commission's finding that Mr. Ratliff was one of the mine's most vocal safety advocates and that his inclusion in the layoff may have been related to management's hostility towards his frequent safety complaints. Accordingly, the evidence provides reasonable cause to believe that Mr. Ratliff's inclusion in the layoff was related to his protected safety activity, and the Commission's order of temporary reinstatement should be affirmed.

ARGUMENT

I. Standard of Review

The Commission's factual findings are reviewed for substantial evidence. 30 U.S.C. § 816(a)(1); *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 368

(4th Cir. 1986). Under the substantial evidence standard, an agency's findings are upheld so long as the record contains "such relevant evidence as a reasonable mind might accept as adequate to support" the agency's conclusion. *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008) (citation omitted).

This Court has explained that the scope of substantial evidence review is limited and "our task is not to reweigh the evidence and determine which of the competing views is more compelling." *Gonahasa v. U.S. I.N.S.*, 181 F.3d 538, 542 (4th Cir. 1999); *see also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 452 (4th Cir. 2003) ("the [agency's] findings may not be disregarded on the basis that other inferences might have been more reasonable." (citation and quotation omitted)). This is true "even though [the Court] might reach a different result after hearing the evidence in the first instance." *Evergreen*, 531 F.3d at 326. Rather, the agency's findings are conclusive unless the evidence was such that "any reasonable adjudicator would be compelled to conclude to the contrary." *Djadjou v. Holder*, 662 F.3d 265, 273 (4th Cir. 2011) (citation and quotation omitted), *cert. denied*, 133 S. Ct. 788 (2012).

The Court reviews questions of law *de novo*. *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011) (citation omitted), *cert. denied*, 132 S. Ct. 1000 (2012).

II. The Commission's Application of the Statutory "Not Frivolously Brought" Standard Was a Proper Application of the Statute and Consistent with its Own Precedent

A. Background Legal Principles

As discussed above, the Mine Act's anti-discrimination provision requires swift reinstatement of a complaining miner upon a finding that the miner's complaint was not frivolously brought. The statutory language provides a clear mandate: the Secretary must commence an investigation within fifteen days of receiving 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." 30 U.S.C. § 815(c)(2).

Congress enacted the temporary reinstatement provision "[t]o protect miners from the adverse and chilling effect of loss of employment while [the complaint is] being investigated." H.R. Rep. No. 95-655, 95th Cong. 1st Sess. (1977), at 52, *reprinted in* 1977 U.S.C.C.A.N. 3485, 3500. Congress deemed this protection "essential" to the Mine Act's goal of encouraging miner participation in health and safety enforcement because complaining miners "may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 95-181, at 37, *reprinted in* 1977 U.S.C.C.A.N. at 3437. Congress also explained that "mining

often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity." *Id.* at 35, *reprinted in* 1997 U.S.C.C.A.N. at 3435. More generally, Congress intended the Mine Act's anti-discrimination provision "to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* at 36; *reprinted in* 1997 U.S.C.C.A.N. at 3436.

Consistent with the statutory language and Congressional intent, "[t]he Commission has repeatedly recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.'" *Sec'y of Labor ex rel. Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (2009) (quoting *Sec'y of Labor ex rel. Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990); *see also* 29 C.F.R. § 2700.45(d) (Commission Procedural Rule explaining that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought").

The limited scope of a temporary reinstatement proceeding is essential in light of statutory language and purpose. The Mine Act and legislative history make clear that Congress intended temporary reinstatement to be effectuated as

soon as possible after the Secretary determined the miner's complaint was not frivolous, and before the Secretary's investigation was completed. *See* 30 U.S.C. § 815(c)(2); H.R. Rep. No. 95-655, at 52 (purpose of temporary reinstatement was "[t]o protect miners from the adverse and chilling effect of loss of employment *while [the complaint] is being investigated*" (emphasis added)). As noted, Congress was concerned that "even a short period of unemployment" would risk undermining the safety goals of the Mine Act's anti-discrimination provision. S. Rep. No. 95-181, at 37. In requiring immediate temporary reinstatement prior to the completion of the investigation, Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision" prior to full hearing on the merits. *Jim Walter Res.*, 920 F.2d at 748 n.11.

In determining whether a miner's complaint was "not frivolously brought," the Commission and the one federal court to have addressed the issue have described the "not frivolously brought" standard as being akin to a "reasonable cause to believe" standard applied in other statutes. *See Sec'y of Labor ex rel. Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (2000) (citations omitted); *Jim Walter Res.*, 920 F.2d at 747 (noting that Congress equated the "not frivolously brought" standard with a finding that the "complaint appears to have merit" and noting the similarities between this and a "reasonable cause" or "not insubstantial" standard). Accordingly, the Commission has explained that

temporary reinstatement should be granted if the Secretary can show "that a non-frivolous issue exists as to whether [the miner's] discharge was motivated in part by his protected activity." *CAM Mining*, 31 FMSHRC at 1091. In light of the limited nature of the inquiry and the preliminary stage of the proceedings, the Commission has explained that the judge in a temporary reinstatement hearing is not called upon to resolve conflicting testimony or weigh the operator's rebuttal evidence against the Secretary's evidence of a prima facie case. *Id.* at 1088, 1091; *see also Sec'y of Labor ex rel. Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (2012) (resolving conflicts in testimony not appropriate at temporary reinstatement hearing because parties have not yet completed discovery).

Importantly, the determination at the temporary reinstatement stage as to whether the miner's complaint was "not frivolously brought" is a different and independent inquiry from the ultimate determination as to whether discrimination has occurred. *See Jim Walter Res.*, 920 F.2d at 744 ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.").

The Commission's application of the temporary reinstatement provision has been challenged on Constitutional procedural due process grounds, and was upheld. *Jim Walter Res.*, 920 F.2d at 748.

B. *The Commission's Decision is Consistent with the Fundamental, Unchallenged Legal Principles Underlying Temporary Reinstatement, and with Commission Precedent, and Should Be Upheld*

The basic legal principles outlined above – that a temporary reinstatement hearing is limited to the narrow issue of whether the complaint was frivolously brought, that this determination is made before the Secretary has completed his investigation or conducted discovery, and that it requires only a "non-frivolous" showing that the discharge was motivated in any part by protected safety complaints – are not challenged by Cobra here. Rather, Cobra challenges the Commission's application of these principles to its claim that Mr. Ratliff's employment would have been terminated due to a reduction in force. As explained below, the Commission's application of the "not frivolously brought" standard in this case should be upheld because it is consistent with these unchallenged principles and with Commission precedent on the issue of tolling temporary reinstatement.

1. The *Gatlin* decision

A discussion of the basis for the Commission's decision in this case must begin with *Secretary of Labor ex rel. Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050 (2009). In *Gatlin*, a miner was discharged for refusing to work under conditions which he believed to be unsafe. 31 FMSHRC at 1051. The miner filed a complaint with the Secretary, the Secretary filed for temporary

reinstatement, and the ALJ, after a hearing, determined that the miner's complaint was not frivolously brought and ordered temporary reinstatement. *Id.* Approximately two weeks after the order of temporary reinstatement, a layoff occurred at the mine. *Id.* KenAmerican subsequently refused to reinstate the miner on the grounds that he would have been included in the layoff had he not been discharged. *Id.* at 1051-52. The ALJ rejected KenAmerican's argument and found that temporary reinstatement could not be tolled for any reason, including changed circumstances at the mine. *Id.* at 1052.

KenAmerican petitioned the Commission for review and the Commission reversed the ALJ. *Id.* at 1054. The Commission held that "a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding." *Id.* Consistent with that holding, the Commission remanded the case for further proceedings. *Id.* at 1055. Specifically, the Commission explained that "[o]n remand, the Judge, upon request, shall expeditiously take further evidence and provide an opportunity for discovery, if appropriate, to determine whether the duration of temporary reinstatement set forth in the [temporary reinstatement] Order should be modified." *Id.* The Commission went on to explain that "in order to justify termination of [temporary] economic reinstatement, KenAmerican must prove by a preponderance of the evidence that

Mr. Gatlin's inclusion in the layoff was entirely unrelated to his protected activities." *Id.*

2. The Commission's decision in this case

In the present case, the Commission was faced with the question of how to apply the rule articulated in *Gatlin* during the temporary reinstatement phase itself. *See* JA 238. In *Gatlin*, the operator raised the tolling argument after the temporary reinstatement hearing was held and after the ALJ had ordered temporary reinstatement based on a finding that the miner's complaint was not frivolously brought. 31 FMSHRC at 1051. By contrast, in this case, Cobra raised the argument that temporary reinstatement should be limited on account of the layoff at the temporary reinstatement hearing itself. JA 238. Consistent with long-standing Commission precedent that the scope of a temporary reinstatement hearing is limited to the question of whether the miner's complaint was frivolously brought, the Commission determined that the operator's tolling argument, when raised at the temporary reinstatement phase of the litigation, must be evaluated under the statutory "not frivolously brought" standard. JA 240.

The Commission made clear that its holding was limited to cases, such as this one, where the tolling argument was raised during the temporary reinstatement phase of the litigation, "during which the parties may not have completed discovery." JA 241 n.3. Thus, the Commission acknowledged that an operator

might request, and an ALJ may afford, an opportunity for further hearing on tolling of temporary reinstatement due to changed circumstances prior to the hearing on the merits. *Id.* This is precisely the type of intermediate hearing that the Commission ordered in *Gatlin*, which the Commission explained may be held after "opportunity for discovery." 31 FMSHRC at 1055. The Commission made clear, however, that prior an opportunity for discovery, the complaint must be evaluated under the "not frivolously brought" standard. JA 241 n.3.

The Commission's decision also explains how the tolling argument should be assessed under the "not frivolously brought" standard: the layoff itself is evaluated as a potentially discriminatory action to determine whether was related in any way to protected activity. JA 240. Temporary reinstatement should be granted if the Secretary can establish a non-frivolous claim that the miner's inclusion in the layoff resulted at least in part from protected activity. JA 240-42.

3. The Commission's decision is consistent with statute and precedent

Cobra argues that the Commission's decision is inconsistent with the burdens of proof established by the Mine Act, Commission rules, and prior Commission precedent. Pet'r Br. 19. To the contrary, the Commission's holding that the statutory "not frivolously brought" standard should apply because the case is still at the temporary reinstatement phase is not only consistent with, but required under, the authorities cited by Cobra. *See* Pet'r Br. 19-20 (citing statute,

rules, and Commission precedent for the proposition that the temporary reinstatement hearing is limited to determination of whether the complaint was frivolously brought). As the Commission explained, while the layoff issue may be analyzed during the temporary reinstatement phase itself, the analysis must be limited to determining whether the Secretary has made a non-frivolous showing that the layoff was in some way related to protected activity. JA 240.

Not only is the Commission's holding required by statute and Commission precedent regarding the narrow scope of a temporary reinstatement proceeding, but a contrary holding would be inconsistent with the purpose of the temporary reinstatement provision. As discussed above, temporary reinstatement is an interim measure that must be implemented before the Secretary's investigation is complete. At this stage in the proceedings, prior to discovery, detailed information regarding the nature of a layoff is almost entirely in the hands of the operator, and it would be unfair, and inconsistent with statutory intent, to require the Secretary and the complainant to rebut an operator's arguments regarding the way the layoff was conducted and the basis for the miner's inclusion therein. *Cf. CAM Mining*, 31 FMSHRC at 1091 (given Secretary's limited burden at the temporary reinstatement phase, weighing of operator's rebuttal evidence was inappropriate); *Argus Energy*, 34 FMSHRC at 1879 ("[r]equring the judge to resolve conflicts in testimony…, when the parties have not yet completed discovery, would improperly transform

the temporary reinstatement hearing into a hearing on the merits."). Rather, in light of the interim nature of the proceeding and the importance of swift reinstatement pending further investigation, it is appropriate for the Commission to order temporary reinstatement upon a non-frivolous showing by the Secretary that the miner's inclusion in the layoff was in some way related to his protected activity. *See CAM Mining*, 31 FMSHRC at 1091 (Secretary only required to prove that non-frivolous issue exists as to whether discharge was motivated in part by miner's protected activity).

Cobra argues that the standard applied by the Commission is contrary to the "make whole" remedial aims of the Mine Act's anti-discrimination provision because it "gifted" Mr. Ratliff "with a favored position of legally mandated employment" and had the effect of "catapulting a complainant into a better position than he would have enjoyed absent the discrimination." Pet'r Br. 9, 13, 14, 30. This argument fundamentally misunderstands the nature of the temporary reinstatement provision and the Commission's analysis in this case.

Contrary to Cobra's assertions that the Commission ordered Ratliff's "indefinite reinstatement" based on its initial finding here that the layoff may have been related to protected activity, Pet'r Br. 13, the Commission's order of reinstatement in this case is, by definition, temporary. Moreover, the decision on the merits as to whether Mr. Ratliff's inclusion in the layoff was discriminatory

will be made in a wholly separate proceeding under different evidentiary standards. *See Jim Walter Res.*, 920 F.2d at 744 ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.").

Cobra is also incorrect to suggest that the Commission's decision ordered Mr. Ratliff's temporary reinstatement without any consideration of whether his loss of employment was related to protected activity. Pet'r Br. 14, 30 (suggesting the Commission's decision has the "unlawful effect of catapulting [Mr. Ratliff] into a better position than he would have enjoyed absent the alleged discrimination"). To the contrary, the Commission's decision was based on its finding that the Secretary had established a non-frivolous claim that Mr. Ratliff's inclusion in the layoff was related in part to his ongoing voicing of safety concerns, and that absent his safety complaints he would not have been included in the November layoff. JA 241-42.

In sum, the Commission has provided Cobra with two opportunities, not mutually exclusive, to present its claim that Mr. Ratliff would have been laid off in the absence of protected activity: 1) at the temporary reinstatement phase itself, subject to the "not frivolously brought" standard and accompanying evidentiary burdens – which the Commission has consistently held is the only analysis

permitted at the temporary reinstatement phase; or 2) at an intermediate hearing, following discovery but before the full merits hearing, where Cobra would have the opportunity to prove its claim by a preponderance of the evidence, *see* JA 241 n.3; *Gatlin*, 31 FMSHRC at 1055.[5] Cobra is dissatisfied with the Commission's decision because it believes it is entitled to both of these opportunities at once: immediate resolution of the layoff claim under the evidentiary burdens established for later stages in the proceeding. As explained above, however, this would contravene the intent of the temporary reinstatement provision. Rather, the Mine Act requires Mr. Ratliff's temporary reinstatement based on the evidence presented to date that the layoff may have been related to his protected activity. Any risk of an erroneous decision at this preliminary stage is one that Congress intended the mine operator to bear. *Jim Walter Res.*, 920 F.2d at 748 n.11.

4. The Commission's decision does not constitute an unexplained departure from precedent

Finally, Cobra argues that the Commission's decision should be reversed because it represents an impermissible departure from Commission precedent. Pet'r Br. 20-22. This argument should be rejected because the Commission's

[5] Cobra has not requested an intermediate hearing to demonstrate that Mr. Ratliff's temporary reinstatement should be tolled due to changed circumstances. *Cf.* JA 241 n.3. A hearing on the merits of Mr. Ratliff's complaint is currently scheduled for September of 2013.

decision is consistent with *Gatlin* and the different standard applied here is adequately explained by the different procedural posture of this case.

Although it is generally true that an agency may not diverge from its prior precedent without explanation, where "the circumstances of the prior cases were sufficiently different than those of the case before [the Court],…[the agency] is justified in declining to follow them" and the Court may accept "even a laconic explanation as an ample articulation of its reasoning." *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989) (citation and quotation omitted). "Thus, where a particular agency action does not appear to be inconsistent with prior decisions, the agency's explanation need not be elaborate." *Id.*

Applying this rule, courts have found that where the reviewing court itself can ascertain that past decisions involve different circumstances, the agency's explanation need not be thorough. *See Envtl. Action v. FERC*, 996 F.2d 401, 412 (D.C. Cir. 1993) (the agency "may distinguish precedent simply by emphasizing the importance of considerations not previously contemplated, and [] in doing so it need not refer to the cases being distinguished by name"); *Chao v. Roy's Constr., Inc.*, 517 F.3d 180, 195 (3d Cir. 2008) (because context of previous decisions was "different enough" and "those differences are generally understood," "a thorough explanation from the Commission is unnecessary.").

In this case, the Commission cited *Gatlin* as relevant precedent and then explained why the circumstances of this case require a variation on the standard articulated in *Gatlin*. *See* JA 240. Specifically, the Commission first noted that under *Gatlin*, "an operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Id.* The Commission went on to say, "*However*, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the 'not frivolously brought' standard contained in section 105(c)(2) of the Mine Act." *Id.* (emphasis added). Thus, the Commission both identified the relevant precedent and provided reasons for applying a different standard here.

The Commission further explained that the temporary reinstatement phase is distinguished from subsequent stages of the litigation because "the parties may not have completed discovery." JA 241 n.3. In contrast, the Commission in *Gatlin* remanded for consideration under the "preponderance of the evidence" but explicitly noted that on remand the judge "shall…provide an opportunity for discovery." 31 FMSHRC at 1055. And in *Gatlin*, the Commission considered the case after temporary reinstatement had been granted under the "not frivolously brought standard, 31 FMSHRC at 1051, whereas in this case the Commission considered the operator's tolling argument in the context of the initial temporary

reinstatement hearing itself, JA 240. Consistent with *Gatlin*, the Commission in this case noted that, at a subsequent stage in the litigation after discovery has been allowed, a hearing on tolling under the traditional standard may be provided. JA 241 n.3.

Because the circumstances of this case are "sufficiently different" from those in *Gatlin*, *Hall*, 864 F.2d at 873, and because the Commission identified relevant precedent and noted that it was departing from it in light of those different circumstances, the Commission was fully justified in applying a different standard in this case and its explanation was adequate. *Roy's Constr.*, 517 F.3d at 195 ("a thorough explanation from the Commission is unnecessary"); *Hall*, 864 F.2d at 873 (the Court may accept "even a laconic explanation as an ample articulation of [the agency's] reasoning"). Therefore, any differences between the Commission's holding in *Gatlin* and this case are not a basis for overturning the decision.

III. Substantial Evidence Supports the Commission's Finding that Mr. Ratliff's Discrimination Complaint was Not Frivolously Brought

After establishing the relevant legal standard, the Commission affirmed the ALJ's order of temporary reinstatement because it found that the record evidence demonstrated that Mr. Gatlin's inclusion in the layoff may have been related to his protected activities. JA 241. Specifically, the Commission found "conflicting evidence in the record concerning whether the March 2012 evaluations were

entirely unrelated to miners' protected activities," and found that, under the standard applicable in temporary reinstatement proceedings, that fact compelled the conclusion that the claim that Mr. Ratliff's inclusion in the layoff was related, at least in part, to his protected activity was not frivolous. JA 241-42. The Commission's findings should be upheld because they are supported by substantial evidence.

As discussed above, consistent with the limited scope of the temporary reinstatement proceeding, the Commission has found that temporary reinstatement should be granted if the Secretary can show "that a non-frivolous issue exists as to whether [the miner's] discharge was motivated in part by his protected activity." *CAM Mining*, 31 FMSHRC at 1091.

Unlike a hearing on the merits, in a temporary reinstatement proceeding the Secretary is not required to establish a *prima facie* case of discrimination by showing that the adverse employment action was actually motivated in some part by the miner's protected activity. *CAM Mining*, 31 FMSHRC at 1091. Instead, the judge at a temporary reinstatement proceeding reviews evidence of protected activity and motivation to determine whether the miner's complaint "appears to have merit." *Id.* at 1089. The Commission has found that a complaint is "not frivolously brought" when the Secretary presents evidence of "protected activity,

adverse action, and a nexus between the two." *Sec'y of Labor ex rel. Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 326 (2000).

In this case, substantial evidence supports the Commission's conclusion that the Secretary put forth sufficient evidence to show that Mr. Ratliff's inclusion in the layoff may have been related to his protected activity. Accordingly, this Court should affirm the Commission's finding that the complaint was not frivolously brought.

A. Protected Activity

The Commission correctly found that Mr. Ratliff engaged in protected activity. The record demonstrates that Mr. Ratliff was active and outspoken on safety issues at the mine. JA 87-88, 101, 103. After daily safety meetings were instituted in January of 2012, Mr. Ratliff frequently raised safety concerns at those meetings. JA 87-88, 101. By contrast, few other miners regularly spoke up at the safety meetings. JA 101. Mr. Ratliff also frequently submitted written safety concerns to management through the "Running Right" card program. JA 96. He also participated in a committee which reviewed the safety cards. JA 97. All of these activities are protected under section 105(c) of the Mine Act, which explicitly protects a miner from retaliation for "notifying the operator…of an alleged danger or health or safety violation." 30 U.S.C. § 815(c)(1).

Cobra argues that substantial evidence does not support a finding that Mr. Ratliff engaged in any protected activity prior to the March 2012 evaluations. To the contrary, Mr. Ratliff testified at the hearing that he "frequently" participated in discussions at the safety meetings and that he had done so "many times before" the October 9 meeting. JA 87-88. Mr. Ratliff also testified that he "frequently" participated in the Running Right card program, although he could not estimate how many cards he had filled out in the years that the program had been in place. JA 95-96.

Mr. Ratliff's testimony regarding his frequent and ongoing participation in safety meetings and the Running Right card program constitutes evidence that "a reasonable mind might accept as adequate to support" the conclusion that Mr. Ratliff was engaging in these activities prior to March of 2012. *Evergreen Am. Corp.*, 531 F.3d at 326. In applying the substantial evidence standard, this Court has explained that an agency "may draw reasonable inferences from the evidence," *id.*, and that the agency's findings "may not be disregarded on the basis that other inferences might have been more reasonable." *Newport News Shipbuilding*, 326 F.3d at 452. In this case, it was reasonable for the Commission to infer that a miner who testified that he "frequently" participated in meetings and that he had done so "many times before" the October 9 meeting was engaged in that activity a mere six months earlier, at the time of the March evaluations.

The ALJ's finding that Mr. Ratliff had a reputation for being difficult on safety matters further supports the Commission's conclusion that Mr. Ratliff's participation in the meetings, as well as his general outspokenness on matters of safety, began prior to the March evaluations. *See* JA 190 (findings of the ALJ). Indeed, it is unlikely that Mr. Ratliff had developed this reputation based solely on the small number of safety complaints made during a single week in October that were the focus of the hearing. Because the Commission's finding is supported by substantial evidence and reasonable inferences, there is no basis for this Court to disturb it. *See Djadjou*, 662 F.3d at 273 (agency's finding should be upheld unless "any reasonable adjudicator would be compelled to conclude to the contrary").

B. Nexus Between Mr. Ratliff's Protected Activity and His Inclusion in the Layoff

Recognizing that "[d]irect evidence of motivation is rarely encountered," the Commission has identified four primary circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) coincidence in time between the protected activity and the adverse action; (3) hostility or animus toward the protected activity; and 4) disparate treatment of the complainant. *Sec'y of Labor ex rel. Chacon v. Phelps Dodge, Inc.*, 3 FMSHRC 2508, 2510 (1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). In determining whether the Secretary has established a nexus between protected activity and the adverse action in a

temporary reinstatement proceeding, the Commission has looked for the existence of one or more of these indicia, although the Commission has never required the presence of any one or combination of these indicia in order to establish a nexus sufficient to meet the "not frivolously brought" standard. *See Sec'y of Labor ex rel. Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 718 (1999) (Secretary not required to show operator knowledge of protected activity to meet "not frivolously brought" standard); *A&K Earth Movers*, 22 FMSHRC at 325 n.2 (animus is not required but "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 (finding the complaint was not frivolous because the Secretary presented evidence of the operator's knowledge of the complaints and timing of the discharge).

In this case, there is adequate evidence in the record to support the Commission's finding that Mr. Ratliff's ranking in the March 2012 evaluations was related, in part, to his protected activity.

The Commission's decision focused on the ALJ's finding of animus towards Mr. Ratliff's protected activity. JA 241. The ALJ correctly noted that a miner's reputation for being difficult may represent animus towards his safety concerns. JA 190 (citing *Sec'y of Labor ex re. Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059 (finding that an employee's reputation for being "difficult" may represent animus toward protected activity). The ALJ concluded that "to a certain

degree, Ratliff's reputation for being difficult was caused by his insistence on safety matters." JA 190. This conclusion is supported by Mr. Ratliff's testimony that he had a reputation for being "hot headed" or "particular" over safety matters. JA 101, 103.

In its opening brief, Cobra does not contest the Commission's conclusion that Mr. Ratliff had a reputation for being difficult due to his participation in safety meetings. Pet'r Br. 26. Instead, Cobra argues that there is no evidence that Mr. Ratliff gained this reputation prior to March of 2012. *Id.* However, as discussed above, the Commission drew a permissible inference that Mr. Ratliff's "reputation" did not develop suddenly after the October 9 meeting but rather was long-standing, a result of Mr. Ratliff's frequent, ongoing safety-related activities at the mine.

In addition to the evidence regarding Mr. Ratliff's reputation, the record contains evidence of strong hostility towards Mr. Ratliff's protected activity in October of 2012. In analyzing whether Mr. Ratliff's complaint that his October 17 discharge was not frivolously brought, the ALJ found that the Secretary's evidence was sufficient to show a nexus between the protected activity and the discharge. JA 192. Cobra argues that there is no evidence of animus towards Ratliff's protected activity in or before March of 2012, Pet'r Br. 26, but Cobra's argument misunderstands the nature of animus. Manifestations of animus need not be

contemporaneous with the employer's adverse action in order to constitute relevant circumstantial evidence that the adverse action was discriminatorily motivated. *See SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004) (NLRB properly considered employer's post-discharge conduct, and the inference of anti-union animus drawn therefrom, in determining the employer's motivation at the time of discharge).[6] Similarly, in deciding cases under other anti-discrimination statutes, courts have regularly found that an employer's *history* of animus or violations is relevant circumstantial evidence of animus in the current case. *See Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285, 289 (8th Cir. 1988) (finding of retaliation was supported by employer's "long history of anti-union animus"); *Young v. Shore Health Sys., Inc.*, 305 F. Supp. 2d 551, 561 (D. Md. 2003) ("history of arguably age-based animus," along with other factors, could support a finding of discrimination under ADEA); *NLRB v. Grand Rapids Press of Booth Newspapers, Inc.*, 215 F.3d 1327, at *3 (6th Cir. 2000) (unpublished table decision) (ALJ was entitled to consider findings of another ALJ in a prior case that the employer had violated NLRA to support an inference of anti-union animus in this case). Likewise, the ALJ's finding, which is not

[6] In light of the similarities between section 105(c) and certain provisions of the National Labor Relations Act ("NLRA"), the Commission has noted that "settled cases decided under the NLRA – upon which much of the Mine Act's anti-retaliation provisions are modeled – provide guidance on resolution of discrimination issues under the Mine Act". *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2543 (1990).

challenged by Cobra here, that Mr. Ratliff's October 17 discharge may have been motivated in part by his protected activity constitutes additional relevant circumstantial evidence that Mr. Ratliff's inclusion in the layoff may also have been motivated by his protected activity.

Cobra also argues that there is no evidence in the record that the employer had knowledge of Mr. Ratliff's protected activity prior to the March 2012 evaluation or that there was any coincidence in time between the protected activity and the evaluations. Pet'r Br. 26-27. On the issue of knowledge, the Commission has explained that the Secretary is not required to show the operator had knowledge of the miner's protected safety activity to show that the complaint was not frivolously brought. *Chicopee Coal*, 21 FMSHRC at 718. Nonetheless, the fact that Mr. Ratliff had a "reputation" for being outspoken on safety strongly suggests that the Cobra managers who performed the evaluation were aware that he frequently spoke out on safety matters. On the issue of timing, Cobra argues that this factor cannot support a finding of discriminatory motivation because there was no temporal relationship between the October 9 safety meeting and the March 2012 evaluations. Pet'r Br. 27-28. However, given that the Commission based its finding of a relationship between protected activity and the March evaluations on Mr. Ratliff's ongoing, frequent participation in safety meetings and the Running

Right card program rather than on the October 9 meeting, Cobra's argument is unavailing.

Finally, in addition to the indicia of discriminatory intent discussed above, the Commission considered the March 2012 evaluation process itself in determining whether there was reasonable cause to believe that Mr. Ratliff's inclusion in the layoff was related to his protected activity. JA 241. Specifically, the Commission noted that Cobra's March 2012 ranking of Mr. Ratliff was based in part on the subjective factor of his "attitude." *Id.* While analysis of the operator's purported justification for the termination of employment (in this case, the layoff) is not required as part of the analysis as to whether the miner's complaint was frivolously brought, *CAM Mining*, 31 FMSHRC at 1091, it is relevant in this case because it lends support to the Secretary's claim that the evaluation of Mr. Ratliff may have been related to his protected activity. It is well-established that discharges purportedly based on valid business justifications, such as layoffs, may in fact be discriminatorily motivated. *See Mutual Mining*, 80 F.3d at 112 (nature of economic layoffs raised inference that they were motivated by an unlawful reason); *Jim Walter Res.*, 920 F.2d at 750 (application of drug testing policy to particular miners may have been motivated by desire to retaliate against them for their safety-related activities).

In order to prevail at the temporary reinstatement stage, Cobra must show that the Secretary's claim was frivolous. JA 240. This, in turn, would require a showing that Mr. Ratliff's inclusion in the layoff was "entirely unrelated to his protected activities." *See Gatlin*, 31 FMSHRC at 1055. Cobra could potentially make that showing if it could prove that the criteria used to evaluate Mr. Ratliff in March were entirely unrelated to his ongoing safety complaints and any animus that management may have against Mr. Ratliff based on those complaints. *See* JA 241.

The evidence presented by Cobra at the hearing, however, does not establish that the evaluations were "entirely unrelated to protected activity." As discussed above, while Cobra described in detail the criteria that the evaluation team used to rate the miners, there is no evidence in the record of the basis for the scores given to Mr. Ratliff. JA 244. The evaluation records provided by Cobra do not show how Mr. Ratliff scored in any of the individual subcategories of evaluation. *Id.* Nor is there any narrative accompanying the evaluation that would indicate which aspects of Mr. Ratliff's performance were or were not considered in computing his numerical score. *Id.* Indeed, the only specific aspect of Mr. Ratliff's job performance that was considered, according to the records provided by Cobra, was his "attitude," which the evaluation team deemed to need improvement. *Id.* Far from being wholly unrelated to protected activity, courts have recognized that

management comments regarding an employee's attitude may reflect animus against protected activity or status. *See SCA Tissue*, 371 F.3d at 990 (it was reasonable for NLRB to conclude that employer's comment about employee's "attitude" reflected anti-union animus); *FedEx Freight E., Inc. v. NLRB*, 431 F.3d 1019, 1030 (7th Cir. 2005) (same); *White v. Dep't of Correctional Svcs.*, 814 F. Supp. 2d 374, 390 (S.D.N.Y. 2011) ("[c]omplaints by an employer about a plaintiff's 'attitude' or 'demeanor' have been considered to be one indicator of retaliatory animus") (citing cases). In light of the ALJ's finding that Mr. Ratliff had a reputation at the mine for being difficult due to his insistence on safety issues, the evidence presented by Cobra regarding the basis for Mr. Ratliff's poor score in the March evaluations fails to show that his score, and subsequent inclusion in the layoff, was entirely unrelated to protected activity.

In sum, substantial evidence supports the Commission's finding the Secretary's claim that Mr. Ratliff's poor score in the March evaluations resulted at least in part from his protected activity is not frivolous. Specifically, there is evidence in the record to support the Commission's findings: 1) that Mr. Ratliff actively participated on an ongoing basis in the daily safety meetings and Running Right card program, and that such participation began prior to the March 2012 evaluations; 2) that, as a result of those safety activities, Mr. Ratliff developed a reputation for being difficult and that that reputation resulted, at least in part, from

Cobra management's hostility towards Mr. Ratliff's regular voicing of safety concerns; and 3) that the criteria used by Cobra to evaluate Mr. Ratliff were not so objective that they could not have been influenced by management's hostility towards Mr. Ratliff based on his safety-related protected activity, and that his poor score in the evaluation may in fact have been motivated, at least in part, by such hostility.

Under the substantial evidence standard, this Court should affirm the Commission's order unless it determines that "any reasonable decisionmaker would be compelled to conclude" that the Secretary's claim is frivolous. *Djadjou*, 662 F.3d at 273. Because there is evidence in the record to support the finding that the March evaluation of Mr. Ratliff may have been related in some way to his protected activity, the Court should affirm the Commission's order of temporary reinstatement and it should continue pending further proceedings in this case.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court deny Cobra's petition for review and affirm the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B) because it contains, 11,696 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing brief is presented in proportionally-spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

/s/ Nancy E. Steffan
Nancy E. Steffan

Dated: July 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I filed and served the foregoing Response Brief for the Secretary of Labor with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that I will cause eight paper copies to be delivered to the Clerk of Court. I also hereby certify that the following participants in the case will be served via the CM/ECF system:

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