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Just a Miner Threat? The Fourth Circuit Refuses to Review Temporary Reinstatement Orders Through the Collateral Order Doctrine

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I. Introduction

Finality. The concept manifests in many forms. In the practice of law, finality functions as the golden rule of appeal. Federal courts of appeal may only review lower courts' decisions if those decisions are final.[1] Given that courts of appeal "are courts of limited jurisdiction,"[2] the Constitution or a statute must expressly grant appellate jurisdiction.[3] If the statute granting jurisdiction only allows review of final decisions, the million dollar question becomes this: What is a final decision? At first blush, the answer appears obvious. The Supreme Court has defined a final decision as "one 'by which a district court disassociates itself from a case.'"[4] But this definition is incomplete. Based on a "practical rather than a technical construction [of 28 U.S.C. § 1291],"[5] the Court has broadened its definition of final to include a small class of collateral orders that do not end the litigation.[6] This concept—broadening the concept of finality to encompass a small class of collateral orders—is widely known as the collateral order doctrine.[7]

This Note explores the ability of appellate courts to review temporary reinstatement orders issued by the Federal Mine Safety & Health Review Commission (Commission) under the collateral order doctrine. These unique orders require mine operators to temporarily reinstate terminated miners pending the outcome of the miners' discrimination complaint filed with the Secretary of Labor (Secretary). The Supreme Court has never addressed whether temporary reinstatement orders are reviewable under the doctrine,[8] and as a result of the Fourth Circuit's 2014 decision *Cobra*

1. *See* 28 U.S.C. § 1291 (2012).

2. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

3. *Id.*

4. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (citing Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 42 (1995)).

5. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

6. *Id.*

7. *See, e.g.*, *Mohawk Indus., Inc.*, 558 U.S. at 106.

8. *See* Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 88 (4th Cir. 2014) (noting that the Eleventh and Seventh Circuit's consideration of the novel issue "are of limited persuasive effect").

Natural Resources, LLC, v. Federal Mine Safety & Health Review Commission, a circuit split now exists on the subject.[9] If the Supreme Court considers the split, it should hold that temporary reinstatements are reviewable under the collateral order doctrine.

Part II of this Note discusses the collateral order doctrine's origins, the evolution and purpose of the Federal Mine Safety and Health Act of 1977, and the Eleventh and Seventh Circuits' application of the doctrine to temporary reinstatement orders. Part III analyzes the facts, holding, and majority and dissenting opinions of the Fourth Circuit's decision. Part IV argues that the Fourth Circuit's decision is unjustified because it exaggerated the impact of a tolling affirmative defense, construed the doctrine's severability requirement too narrowly, and failed to consider the entire class of orders before rendering its decision.

II. Law Before Cobra*: The Collateral Order Doctrine, the Mine Act, and Temporary Reinstatement Orders*

A. The Collateral Order Doctrine: Origins and Development

The collateral order doctrine first emerged in the Supreme Court's 1949 opinion *Cohen v. Beneficial Industrial Loan Corporation*.[10] In *Cohen*, the Court encountered a novel jurisdictional question: Did it have the authority to review a district court's refusal to apply a New Jersey statute in a diversity suit?[11] Although the district court's decision was not final, the Court nonetheless held that it was reviewable because it fell within the "small class which finally determine[s] claims of right[s] separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[12]

The Supreme Court's analysis centered on the text of 28 U.S.C. § 1291, which governs appeals of final district court decisions.[13] The statute states that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all *final* decisions of the district courts . . . ."[14] Rather than construing this

9. *Id.* at 88 n.11, 92 (acknowledging that by holding temporary reinstatement orders unreviewable under the collateral order doctrine, the court's decision was contrary to both the Eleventh and Seventh Circuits decisions on the matter).

10. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

11. *Id.* at 543-45.

12. *Id.* at 546.

13. *Id.* at 545.

14. 28 U.S.C. § 1291 (2012) (emphasis added).

language strictly, the Court acknowledged that the statute receives a "practical rather than a technical construction."[15] Thus, the collateral order doctrine emerged as a broader interpretation of finality, not as an exception to the finality requirement.[16]

The Supreme Court articulated a three-part test for the collateral order doctrine in *Coopers & Lybrand v. Livesay*.[17] To fall within the scope of the doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."[18] The Court construes the test strictly, often emphasizing that "the '*narrow*' exception should . . . never be allowed to swallow the general rule . . . ."[19] When applying the doctrine, a court must not "engage in an 'individualized jurisdictional inquiry'"[20] but rather consider "the 'entire category [of orders] to which a claim belongs.'"[21] The doctrine's narrow construction prevents "piecemeal, prejudgment appeals . . . [that] encroach[] upon the prerogatives of district court judges."[22]

The most contentious aspect of the doctrine's analysis is determining whether a particular interest advanced by a category of orders is *sufficiently important* to qualify for review.[23] The Court has considered only a handful of interests sufficiently important, applying the collateral order doctrine to a criminal defendant's appeal of a double jeopardy claim in *Abney v. United States*,[24] a former president's appeal of an absolute immunity claim in *Nixon v. Fitzgerald*,[25] and a government official's appeal of a qualified immunity claim in *Mitchell v. Forsyth*.[26] These cases focus on the doctrine's third prong—effectively unreviewable on appeal. If an order

15. *Cohen*, 337 U.S. at 546.

16. *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994).

17. 437 U.S. 463, 468 (1978).

18. *Id.*

19. *Digital Equip. Corp.*, 511 U.S. at 868 (emphasis added).

20. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009) (quoting *Coopers & Lybrand*, 437 U.S. at 473).

21. *Id.* (citing *Digital Equip. Corp.*, 511 U.S. at 868).

22. *Id.* at 106.

23. *Digital Equip. Corp.*, 511 U.S. at 878-79 (noting that determining whether an interest satisfies the doctrine's third prong "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement").

24. 431 U.S. 651 (1977).

25. 457 U.S. 731 (1982).

26. 472 U.S. 511 (1985).

forcing a person with a valid double jeopardy, qualified immunity, or absolute immunity defense to stand trial is not immediately appealable, that person's claim would effectively be lost.[27] In each case, the interests protected outweighed any dangers associated with immediate review.[28]

B. The Collateral Order Doctrine and Administrative Decisions

Because the collateral order doctrine is a product of the construction given to 28 U.S.C. § 1291—the statute governing an appellate court's ability to review final district court decisions—the doctrine's applicability to administrative decisions is questionable.[29] The First Circuit, however, held in *Rhode Island v. EPA* that the collateral order doctrine can be used to review administrative procedures.[30]

The First Circuit proffered three reasons for its decision.[31] First, drawing on a trilogy of then-recent Supreme Court cases, the First Circuit concluded that the Supreme Court had illustrated its willingness to apply the doctrine to administrative proceedings.[32] Given what the First Circuit perceived to be a clear signpost erected by the Supreme Court, it stated that it would be "loath to strike off in a different direction."[33] Second, the First Circuit noted that the policy implications did not support the adoption of "a wholly different rule of finality to review . . . agency determinations."[34] Finally, the First Circuit reasoned that a contrary finding would create a split with the circuits that had applied the doctrine to review administrative decisions.[35]

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27. Will v. Hallock, 546 U.S. 345, 350-51 (2006).

28. *See Mitchell*, 472 U.S. at 526 (noting that a fundamental attribute of immunity is the "entitlement not to stand trial or face the other burdens of litigation"); *Nixon*, 457 U.S. at 751 (noting that allowing an immediate appeal of absolute immunity claims would insure that a president would not be distracted by the possibility of a costly private lawsuit); *Abney*, 431 U.S. at 660-61 (noting that the Constitution's Double Jeopardy Clause prevents a criminal defendant from being tried twice, not just sentenced twice, for the same crime).

29. Rhode Island v. EPA, 378 F.3d 19, 23 (1st Cir. 2004).

30. *Id.*

31. *Id.* at 23-25.

32. *Id.* (noting that Mathews v. Eldridge, 424 U.S. 319, 328 (1976), FTC v. Standard Oil, 449 U.S. 232, 246 (1980), and Bell v. New Jersey, 461 U.S. 773, 778-79 (1983) supported the application of the doctrine to administrative proceedings because the Court concluded that an administrative order could be considered final for review, applied the collateral order doctrine to review an administrative proceeding, and noted the possibility of applying the doctrine to review a non-final agency decision, respectively).

33. *Id.* at 24.

34. *Id.*

35. *Id.* at 25 (noting that the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have invoked the doctrine to review administrative decisions).

C. The Federal Mine Safety and Health Act of 1977

By passing the Federal Mine Safety and Health Act of 1977 (Mine Act), Congress sought to combat unsafe working conditions associated with mine operations.[36] Although Congress had previously enacted legislation to address the safety of miners, it found that the Department of Interior, the agency responsible for administering those statutes, was "seriously deficient . . . in its enforcement and administrative responsibilities under these statutes."[37] Based on these findings, Congress streamlined the enforcement of the new comprehensive statute. It transferred the administration of the Mine Act to the Secretary of Labor, establishing the Mining Enforcement and Safety Administration within the Department of Labor. It created the Mine Safety and Health Review Commission, the independent body charged with reviewing "orders, citations, and penalties,"[38] and it also established procedures that allow miners to file complaints with the Secretary if discrimination occurs because of a safety complaint.[39]

By prohibiting mine operators from discharging or discriminating against miners who file safety complaints with the Secretary, the Mine Act facilitates enforcement of its provisions.[40] When a miner files a discrimination complaint, two distinct processes occur.[41] The first is a determination of the merits underlying the miner's discrimination claim.[42] The second-and the primary subject of this Note-is the issuance of a temporary reinstatement order that restores the miner to his prior position.[43]

1. The Merits Determination

If a miner believes that a mine operator terminated or discriminated against him for engaging in a protected activity, such as reporting a health or safety violation, he may file a complaint with the Secretary within sixty days of the alleged violation.[44] If the Secretary finds that the mine operator violated the terms of the Mine Act, the Secretary will immediately file a

36. 30 U.S.C. § 801 (2012).
37. S. REP. NO. 95-181, at 8 (1977).
38. *Id.* at 11.
39. 30 U.S.C. § 815(c)(2).
40. *Id.* § 815(c)(1).
41. *See id.* § 815(c)(2).
42. *Id.*
43. *Id.*
44. *Id.*

complaint with the Commission.[45] After the Commission provides an opportunity for a formal adjudicative hearing in compliance with the Administrative Procedure Act,[46] it will issue an order "based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order . . . ."[47] Alternatively, if the Secretary finds that the mine operator did not violate the Mine Act, the miner may file a complaint directly with the Commission.[48] The Commission will still provide an opportunity for an adjudicative hearing pursuant to the Administrative Procedure Act and subsequently issue an order either dismissing or sustaining the miner's complaint.[49]

2. Temporary Reinstatement Orders

In addition to constructing a merits-determination procedure, the Mine Act establishes a procedure by which terminated miners may temporarily be reinstated to their previous positions.[50] After reviewing the miner's complaint, if the Secretary concludes that the claim "was not frivolously brought," the Commission will issue an order reinstating the miner pending the outcome of the miner's complaint.[51] Even if the Commission does not issue a temporary reinstatement order, the Secretary must still investigate the underlying discrimination claim.[52]

Although the Mine Act does not address adjudicative hearings on temporary reinstatement orders, the Commission has promulgated regulations that allow for such a hearing before an administrative law judge (ALJ) at the mine operator's request.[53] If a mine operator requests a hearing, the inquiry is limited to whether the miner's claim was frivolously brought.[54] It is neither the ALJ's nor the Commission's duty to resolve the merits of the discrimination claim *at the temporary reinstatement phase*.[55]

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45. *Id.*
46. 5 U.S.C. § 554 (2012).
47. 30 U.S.C. § 815(c)(2).
48. *Id.* § 815(c)(3).
49. *Id.*
50. *Id.* § 815(c)(2).
51. *Id.*
52. Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 84 (4th Cir. 2014).
53. Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738, 740 (11th Cir. 1990) (referencing 29 C.F.R. § 2700.44(b) (1990)).
54. Sec'y of Labor, Mine Safety & Health Admin. *ex rel.* Ratliff v. Cobra Nat. Res., LLC, 35 FMSHRC 394 (2013).
55. *Id.*

As the name suggests, temporary reinstatement orders do not permanently reinstate a miner and may be terminated or expire in three circumstances. First, if the Secretary fails to file a discrimination complaint with the Commission within ninety days of receiving a miner's complaint, an ALJ may dissolve the temporary reinstatement order.[56] Similarly, if after the investigation, the Secretary concludes that the mine operator did not violate the provisions of the Mine Act, an ALJ may dissolve the order.[57] Finally, certain economic circumstances, such as layoff or a reduction in workforce, may toll the mine operator's obligation to provide back pay to a terminated worker.[58] In these circumstances, the terminated miner would only collect back pay up until the time the mine operator would have terminated him absent the discriminatory treatment.[59] All ALJ decisions on temporary reinstatement orders are subject to the Commission's discretionary review.[60]

3. Judicial Review of Final Commission Orders

Section 816 of the Mine Act allows a party "adversely affected or aggrieved by an order of the Commission" to seek review of the order "in any United States court of appeals for the circuit in which the violation is alleged to have occurred. . . ."[61] Although the statute's text does not specifically limit appellate review to *final* Commission orders, the Supreme Court presumes that "judicial review will be available only when agency action becomes final."[62] Based on this presumption, several circuit courts have held that the Mine Act's language restricts appellate review to final Commission decisions.[63] That said, appellate courts wait until the

56. *Jim Walter Res., Inc.*, 920 F.2d at 741 (referencing 29 C.F.R. § 2700.44(f)).

57. *Id.*

58. Sec'y of Labor, Mine Safety & Health Admin. *ex rel.* Gatlin v. KenAmerican Res., 31 FMSHRC 1050, 1054 (2009).

59. *Id.*

60. Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 84 (4th Cir. 2014).

61. 30 U.S.C. § 816(a)(1) (2012).

62. Bell v. New Jersey, 461 U.S. 773, 778 (1983).

63. *See* Meredith v. Fed. Mine Safety & Health Review Comm'n, 177 F.3d 1042, 1048 (D.C. Cir. 1999) (noting that the Mine Act's legislative history illustrates Congress's intent to allow review of final Commission orders); Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738, 743 (11th Cir. 1990) ("Although the statute uses the term 'order' rather than 'final order,' this omission alone is insufficient to overcome the general presumption that judicial review of administrative actions is available only when such decisions have become final."); Monterey Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 635 F.2d 291, 292 (4th Cir. 1980) ("The statute, amplified by this

Commission issues an order that "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process."[64]

D. The Collateral Order Doctrine and Temporary Reinstatement Orders

Because temporary reinstatement orders technically are not final agency actions, the collateral order doctrine has emerged as a means to review the orders.[65] Before the Fourth Circuit's decision in *Cobra*, both the Eleventh and Seventh Circuits considered whether the doctrine allowed appellate courts to review temporary reinstatement orders in *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review Commission*[66] and *Vulcan Construction Materials v. Federal Mine Safety & Health Review Commission*,[67] respectively. Both concluded that it did.

1. Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review

In *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review Commission*, the Eleventh Circuit held that a temporary reinstatement order was appealable via the collateral order doctrine.[68] Jim Walter Resources, Inc. terminated two miners, both elected safety committeemen,[69] because

legislative history, demonstrates congressional intent that only final Commission orders should be reviewed.").

64. Transwestern Pipeline Co. v. FERC, 59 F.3d 222, 226 (D.C. Cir. 1995) (quoting Alaska v. FERC, 980 F.2d 761, 763 (D.C. Cir. 1992)).

65. *See Cobra Nat. Res., LLC*, 742 F.3d at 85-86 (referencing the collateral order doctrine to determine whether a temporary reinstatement order was considered final for judicial review); Vulcan Constr. Materials v. Fed. Mine Safety & Health Review Comm'n, 700 F.3d 297, 300 (7th Cir. 2012) (holding that although temporary reinstatement orders are not final agency actions, jurisdiction is still proper through the collateral order doctrine); *Jim Walter Res., Inc.*, 920 F.2d at 739 (reserving the question of whether temporary reinstatement orders are final agency actions because jurisdiction was proper under the collateral order doctrine).

66. 920 F.2d 738.

67. 700 F.3d 297.

68. 920 F.2d at 738-39.

69. "Safety committeemen are elected by the miners and have wide-ranging responsibilities for insuring mine safety, including inspection and notification duties under federal mine safety laws, handling of all safety grievances under the collective bargaining agreement, and the reporting of all mine hazards to management." *Id.* at 741.

they failed to comply with a mandatory drug screening.[70] Both miners had filed numerous safety complaints with management throughout their tenure as safety committeemen.[71] They believed their supervisor used the drug screening policy as a way to terminate the miners for their active enforcement of safety procedures.[72] After the miners filed a discrimination complaint with the Secretary, an ALJ determined that they did not frivolously bring the claims and ordered the mine operator to reinstate them.[73] Jim Walter Resources appealed the temporary reinstatement order to the Eleventh Circuit.[74]

Rather than deciding whether temporary reinstatement orders were technically final agency actions, the Eleventh Circuit instead found that jurisdiction was proper under the collateral order doctrine.[75] The court determined that a temporary reinstatement order satisfied the doctrine's first prong because it "is a 'fully consummated' decision, and there are literally 'no further steps' that JWR [Jim Walter Resources] can take in order to avoid the Commission's order at the agency level."[76] Regardless of the potential for factual overlap between the temporary reinstatement order decision and the discrimination decision, the court concluded the doctrine's second prong was satisfied because the two determinations are conceptually distinct.[77] Temporary reinstatement orders determine whether the miner's claim is frivolous, while the merits determination considers "whether there is sufficient evidence of discrimination to justify permanent reinstatement."[78] Finally, the court found that the doctrine's final prong was satisfied because a court reviewing an appeal from the final merits determination would not need to consider harms from the temporary reinstatement order.[79] Essentially, the aggrieved party would be without

70. *Id.* at 742.

71. *Id.* at 741.

72. *Id.* at 742. Both the miners were subject to harassment about the drug screening policy after one of them notified management that he was unable to provide a urine sample with others watching. *Id.* This harassment and ridicule kept both miners from producing a urine sample on the day of their scheduled drug screening. *Id.* The following day, both miners had a drug screening at a medical facility. *Id.* Neither miner tested positive for any illegal substance. *Id.* Jim Walter Resources refused to accept the test results. *Id.* at 741-42.

73. *Id.* at 742-43.

74. *Id.* at 743.

75. *Id.* at 744-45.

76. *Id.* at 744 (quoting Mitchell v. Forsyth, 472 U.S. 511, 527 (1985)).

77. *Id.*

78. *Id.*

79. *Id.* at 745.

"any opportunity for a judicial hearing of its claims [as to the temporary reinstatement order]."[80] After establishing jurisdiction through the doctrine, the Eleventh Circuit concluded that the miners' claims were not frivolous and affirmed the temporary reinstatement order.[81] Thus, the Eleventh Circuit's decision established precedent to support the collateral order doctrine's application to temporary reinstatement orders.

2. Vulcan Construction Materials v. Federal Mine Safety & Health Review Commission

In *Vulcan Construction Materials v. Federal Mine Safety & Health Review Commission*, the Seventh Circuit also held that a temporary reinstatement order was appealable through the collateral order doctrine, albeit in a much briefer analysis.[82] A miner filed a discrimination complaint with the Secretary alleging that Vulcan Construction Material, the mine operator, terminated him for engaging in a protected safety-related activity.[83] After determining that the miner did not frivolously bring the claim, the Secretary applied to the Commission for a temporary reinstatement order.[84] Upon further investigation, the Secretary concluded that no discrimination occurred.[85] Based on the Secretary's findings, Vulcan moved to dissolve the order, but the ALJ denied the request.[86] Vulcan then filed for Commission review of the ALJ's denial of the motion.[87] A divided Commission upheld the ALJ's decision to deny the motion.[88] Vulcan then appealed the Commission's decision to the Seventh Circuit.[89]

Echoing the analysis from the Eleventh Circuit's decision in *Jim Walter Resources*, the Seventh Circuit concluded that the collateral order doctrine's three prongs were satisfied.[90] First, the court noted that the Commission's decision regarding the motion to dissolve the order was conclusive.[91] Second, the court held that because the motion's dissolution depended on

80. *Id.*
81. *Id.* at 751.
82. 700 F.3d 297, 300 (7th Cir. 2012).
83. *Id.* at 299.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 300.
91. *Id.*

an interpretation of the Mine Act, it was separate from the underlying discrimination complaint.[92] Finally, the Seventh Circuit concluded that an appeal of the merits decision would not require a court to review the temporary reinstatement order, which would deprive the mine operator of the opportunity to dispute the order.[93] While the Seventh Circuit's discussion of the collateral order doctrine is concise, it ultimately strengthened the validity of the *Jim Walter Resources* holding.

III. Cobra Natural Resources, LLC v. Federal Mine Safety & Health Review Commission*: A Turning Point*

The Fourth Circuit deviated from its sister circuits in *Cobra* by refusing to review a temporary reinstatement order through the collateral order doctrine.[94]

A. Facts

Russell Ratliff, an underground equipment operator, began working at a Cobra-operated mine in Wharncliff, West Virginia, in June of 2008.[95] Following the Upper Big Branch mine disaster in April of 2010, which claimed the lives of twenty-nine miners in Montcoal, West Virginia,[96] Cobra instituted a policy requiring a mandatory safety meeting at the beginning of each shift.[97] During the October 9, 2012, daily safety meeting, Ratliff spoke out about the prominent ventilation problems in the mine.[98] Specifically, Ratliff stated that the cut cycle was unsafe because it required the miners to breathe dust particles, which causes significant health risks.[99] Over the next week, Ratliff submitted several anonymous "Running Right" cards, a system by which miners could notify the mine operator of any safety concerns.[100] Cobra terminated Ratliff on October 17, 2012, citing

92. *Id.*

93. *Id.* (citing Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738, 745 (11th Cir. 1990)).

94. Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 92 (4th Cir. 2014).

95. Sec'y of Labor, Mine Safety & Health Admin. *ex rel.* Ratliff v. Cobra Nat. Res., LLC, 35 FMSHRC 101, 105 (2013).

96. Clement Daly, *Four Years Since the Upper Big Branch Mine Disaster*, WORLD SOCIALIST WEB SITE (Apr. 5, 2014), http://www.wsws.org/en/articles/2014/04/05/ubba-a05.html.

97. *Ratliff*, 35 FMSHRC at 106.

98. *Id.*

99. *Id.*

100. *Id.*

poor attitude and work performance.[101] Ratliff contended that Cobra terminated him because of his numerous safety complaints.[102] He subsequently filed a discrimination complaint with the Secretary.[103]

After finding that Ratliff did not frivolously bring the discrimination claim, the Secretary applied to the Commission for a temporary reinstatement order.[104] Cobra requested a hearing, which was set for January 7, 2013. At the hearing Cobra alleged that Ratliff's claim was frivolous given his history of insubordination.[105] Additionally, Cobra contended that because it would have laid off Ratliff on January 15, 2013, three months after he was terminated, the reinstatement order should be tolled to that date.[106] But the ALJ rejected the tolling affirmative defense, found that the claim was not frivolously brought, and directed Cobra to reinstate Ratliff.[107] Cobra then requested review of the temporary reinstatement order by the Commission.[108] The Commission subsequently upheld the ALJ's decision in the temporary reinstatement hearing.[109] Cobra subsequently sought review by the Fourth Circuit, arguing that the collateral order doctrine gave the court jurisdiction.[110]

B. Procedural History, Issue, and Holding

Rather than deciding whether the Commission erred in rejecting Cobra's tolling argument, the Fourth Circuit focused on the threshold question of whether the collateral order doctrine allowed it to exercise jurisdiction over the case.[111] Although both parties conceded that the court had jurisdiction, the Fourth Circuit, in a 2–1 decision, held that an interlocutory review of the Commission's order was not proper because the order did not satisfy the three requirements of the collateral order doctrine.[112]

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101. *Id.* at 104.
102. Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 84 (4th Cir. 2014).
103. *Id.*
104. *Id.*
105. *Ratliff*, 35 FMSHRC at 104-05.
106. *Id.* at 117.
107. *Cobra Nat. Res., LLC*, 742 F.3d at 85.
108. *Id.*
109. Sec'y of Labor, Mine Safety & Health Admin. *ex rel.* Ratliff v. Cobra Nat. Res., 35 FMSHRC 394 (2013).
110. *Cobra Nat. Res., LLC*, 742 F.3d at 83.
111. *Id.* at 92.
112. *Id.* at 85.

C. The Majority's Decision

The Fourth Circuit began its analysis with an emphasis on the three most recent Supreme Court opinions discussing the doctrine: *Will v. Hallock*, *Digital Equipment Corporation v. Desktop Direct, Inc.*, and *Mohawk Industries, Inc. v. Carpenter*. The court used these cases to attack the persuasiveness of both the Eleventh and Seventh Circuits' decisions on the issue.[113] The court contended that because *Jim Walter Resources* was decided prior to the Supreme Court's decisions in *Will*, *Digital Equipment*, and *Mohawk Industries*, it was not consistent with the "narrow and limited scope of the collateral order doctrine" intended by the Supreme Court.[114] In a similar fashion, the Fourth Circuit quickly dismissed the Seventh Circuit's jurisdictional analysis in *Vulcan* as too brief to be convincing.[115]

Unencumbered by the weight of the Eleventh and Seventh Circuit opinions, the Fourth Circuit proceeded to analyze each of the collateral order doctrine's three prongs and ultimately concluded that none were satisfied.[116] For the Fourth Circuit, the doctrine's first prong—whether an order "conclusively determine[s] a disputed question"—was not met because an ALJ can review and modify a temporary reinstatement order if the mine operator raises a successful tolling defense.[117] The court reasoned that an ALJ's ability to revisit and modify the order prevented it from truly being conclusive.[118] The court also used the presence of a tolling defense to distinguish the facts in *Cobra* from those in *Jim Walter Resources*. In the former, the mine operator asserted a tolling defense; in the latter, the operator did not.[119] Therefore, the presence of a tolling defense in *Cobra* rendered the order "expressly held open for the possibility of reconsideration," which would fail the doctrine's first requirement.[120]

In a similar manner, the court found that the doctrine's second prong—whether an order "resolve[s] an important issue completely separate from the merits of the action,"—was also not satisfied.[121] While acknowledging

113. *Id.* at 88.
114. *Id.*
115. *Id.*
116. *Id.* at 88-92.
117. *Id.* at 88-89.
118. *Id.* at 89.
119. *Id.*
120. *Id.*
121. *Id.* (citing Will v. Hallock, 546 U.S. 345, 349 (2006)).

that the miner's burden of proof is significantly lower at the temporary-reinstatement-order stage, the court nonetheless held that review of the collateral order would overlap too significantly with the final merits determination to satisfy the doctrine's second requirement.[122] As the Fourth Circuit phrased it, "[A] temporary reinstatement analysis is simply a highly deferential look at the same basic facts and factors that ultimately control the outcome of the miner's claim."[123] Put simply, because "the considerations involved in the temporary reinstatement process are deeply enmeshed with the factual and legal issues comprising the miner's underlying discrimination claim," the order failed the severability requirement of the second prong.[124]

Finally, the Fourth Circuit's analysis of the doctrine's third prong—whether the order would be "effectively unreviewable on appeal from a final judgment"—mirrored that of the previous two prongs.[125] An unreviewable order "has significant and irreparable effects" or impacts "rights that would be irretrievably lost in the absence of an immediate appeal."[126] Relying on a handful of Supreme Court cases that invoked the doctrine, the Fourth Circuit determined that Cobra's economic injury did not fall within the scope of interest typically protected under the doctrine.[127] The interests common to collateral order doctrine analysis include presidential, sovereign, or qualified immunity claims or cases involving the rights of criminal defendants.[128] Ultimately, the court held that because "a coal operator's economic interest do[es] not begin to approach the importance of several interests . . . that the Supreme Court has deemed" reviewable under the doctrine," the temporary reinstatement order failed this third and final prong.[129] At bottom, because the majority held that the prongs of the collateral order doctrine were not met, the Fourth Circuit held it lacked power to review the case. One judge disagreed.

122. *Id.* at 90.
123. *Id.*
124. *Id.*
125. *Id.* (citing *Will*, 546 U.S. at 349).
126. *Id.* (quoting Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430-31 (1985)).
127. *Id.* at 91.
128. *Id.* at 91-92.
129. *Id.* at 92.

D. The Dissent

Judge Agee argued that temporary reinstatement orders are reviewable under § 816 of the Mine Act rather than through the collateral order doctrine.[130] From his perspective, denying review of the order would create unreviewable harm for the mine operator for three reasons.[131] First, Cobra's arguments against the temporary reinstatement order would be moot by the time the Commission decided the merits of Ratliff's discrimination claim.[132] Second, refusing review of these orders would preclude a mine operator from recovering the wages paid during the reinstatement period because no administrative procedure exists for this recovery.[133] Finally, allowing a disgruntled employee back into the work force could cause a major disruption in the working environment.[134] In sum, not allowing review of this order would deprive the mine operator of the ability "to correct a mistaken agency decision below."[135] But the mine operator is not the only one harmed.

In a similar vein, Judge Agee pointed to harm suffered by a miner if review is denied.[136] When a miner is denied a temporary reinstatement order, the unavailability of judicial review may "defeat the Mine Act's enforcement mechanisms and, in turn, the Congressional intent in adopting this legislation."[137]

Moving beyond his first argument, Judge Agee then considered whether the collateral order doctrine allowed for appellate review of temporary reinstatement orders.[138] Agee took issue with the majority's focus on the Commission's discretion to toll the reinstatement order.[139] He emphasized that "an order can be conclusive even if there is some possibility that the tribunal below will reconsider."[140] Judge Agee also noted that, in this case specifically, "The ALJ spoke in unequivocal terms and ordered Cobra to provide 'immediate reinstatement' to Ratliff."[141] He then pointed out that in

130. *Id.* at 93 (Agee, J., dissenting).
131. *Id.* at 95.
132. *Id.*
133. *Id.*
134. *Id.* at 96.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 97.
139. *Id.*
140. *Id.*
141. *Id.* at 98.

spite of the majority's argument to the contrary, the "Supreme Court accepts some 'factual overlap' in the collateral order context."[142] Additionally, he argued, because a temporary reinstatement order has no impact on the final resolution of the discrimination claim, the order would satisfy the severability requirement.[143]

Finally, rather than focusing on the specific economic impact faced by Cobra (as the majority had), the dissent framed the importance of the interest at stake in much broader terms.[144] Judge Agee stated that when a mine operator, like Cobra, appeals the Commission's decision to reinstate a worker, "it faces the prospect of paying unjustified money to a miner, reinstating a problematic worker, or facing legally unsustainable procedures below."[145] Conversely, when a miner appeals the Commission's denial of a reinstatement order, "he wishes to vindicate his right to much-needed contemporary payment and a fair process below."[146] These interests, he concluded, fall within the scope of the interests typically protected in the doctrine's third prong analysis.[147] Ultimately, Judge Agee came the correct conclusion: temporary reinstatement orders should be reviewable.

IV. Analysis

The Fourth Circuit's drastic departure from the Eleventh and Seventh Circuits' opinions is unwarranted. The majority places too much emphasis on the ability of a mine operator to assert a tolling defense, narrowly construes the severability requirement of the doctrine, and fails to consider the consequences of denying review of temporary reinstatement orders as a whole.

A. Tolling the Impact of the Tolling Affirmative Defense

The majority's attack on the conclusive characteristic of temporary reinstatement orders is two-fold.[148] First, an ALJ's ability to modify a temporary reinstatement order in light of a mine operator's tolling defense prevents the orders from being conclusive.[149] Second, because *Jim Walter Resources* was decided prior to the Commission's 2009 ruling in *Secretary*

142. *Id.*
143. *Id.*
144. *Id.* at 99.
145. *Id.*
146. *Id.*
147. *Id.* at 99-100.
148. *Id.* at 88-89.
149. *Id.* at 88.

of Labor, Mine Safety & Health Administration ex. rel *Gatlin v. KenAmerican Resources, Inc.*,[150] which discussed an ALJ's ability to modify a temporary reinstatement order in response to a tolling defense, *Jim Walter Resources* is no longer relevant law.[151]

The two cases cited by the Fourth Circuit in support of its first argument—*Swint v. Chambers County Commission*,[152] and *Jamison v. Wiley*,[153]—are factually distinguishable from *Cobra Natural Resources, LLC*.[154] In both cases, an appellate court refused to review a district court decision through the collateral order doctrine because the judge intended to review and modify his initial decision.[155] The key factual distinction is that in both cases, the district court judge unequivocally expressed an intention to return to the particular disputed issue.[156] But here, as Judge Agee noted in his dissent, the ALJ in *Cobra* never indicated any intent to return to the temporary reinstatement order.[157] Plainly, these cases shed no light on the availability of collateral order doctrine review when the presiding judge, be it an ALJ or a federal district judge, has the discretion to review a decision *but has not expressed an intention to do so*. At best, the Fourth Circuit's cited authority supports the idea that if an ALJ expresses an intention to review and modify a temporary reinstatement order, then the order cannot be conclusive. Regardless of the proposition's soundness, it is inapplicable to the facts of *Cobra*.

Additionally, the Fourth Circuit's argument that the Commission's *Gatlin* decision represents a turning point in the availability of the tolling defense is unfounded. Despite the crystal-clear precedent contained within the Commission's opinion, the Fourth Circuit mischaracterizes *Gatlin* as the first Commission opinion to discuss the tolling defense. This is startling because *Gatlin* cites previous Commission decisions where the tolling

150. 31 FMSHRC 1050 (2009).

151. *Cobra Nat. Res., LLC*, 742 F.3d at 89.

152. 514 U.S. 35 (1995).

153. 14 F.2d 222 (4th Cir. 1994).

154. *Cobra Nat. Res., LLC*, 742 F.3d at 97-98 (Agee, J., dissenting).

155. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 39 (1995) (noting that the district court denied a defendant's motion for reconsideration on a motion for summary judgment but expressed an intention to revisit the decision prior to the jury deliberations); Jamison v. Wiley, 14 F.3d 222, 230 (4th Cir. 1994) (noting that when the district court ruled on a substitution motion, it noted that the decision was only temporary).

156. *Swint*, 514 U.S. at 39; *Jamison*, 14 F.3d at 230.

157. *Cobra Nat. Res., LLC*, 742 F.3d at 98 (Agee, J., dissenting) ("The ALJ spoke in unequivocal terms and ordered Cobra to provide 'immediate reinstatement' to Ratliff.").

defense was both recognized and applied.[158] The idea that *Jim Walters Resources* is obsolete due to the "emergence" of the tolling defense is contradicted by *Gatlin* itself. The *Gatlin* decision cites the Commission's decision, affirmed by the Eleventh Circuit in *Jim Walter Resources*, as authority on the subject of temporary reinstatement orders.[159] In sum, *Gatlin* did not change the legal landscape for temporary reinstatement orders; rather, it affirmed a long-standing concept. The alternative interpretation of the decision advanced by the Fourth Circuit does not pass muster.

B. Six Degrees of Separation?

The *Cobra* majority employs an unnecessarily restricted interpretation of the doctrine's second requirement that is inconsistent with existing Supreme Court precedent. In the majority's view, temporary reinstatement orders do not meet the collateral order doctrine's second requirement because "a temporary reinstatement analysis is simply a highly deferential look at the same basic facts and factors that ultimately control the outcome of the miner's claim."[160] Citing its own precedent on the doctrine's second prong, the Fourth Circuit underplays the two very different burdens of proof between a temporary reinstatement order and a miner's claim by arguing that the "factual and legal issues" of each procedure are "deeply enmeshed."[161] The Fourth Circuit's analysis is problematic because it essentially ignores the Supreme Court's prior discussion of the "severability" principle of the doctrine, particularly in *Mitchell v. Forsyth*.[162] As the *Mitchell* dissent aptly noted, the Supreme Court has shown a willingness to allow factual overlap with the doctrine, especially when qualified or absolute immunity is involved.[163] In spite of this Supreme Court precedent, the Fourth Circuit relied on its own precedent which holds that the second prong is not satisfied when there is a "*threat* of substantial

158. Sec'y of Labor, Mine Safety & Health *ex rel* Gatlin v. KenAmerican Res., Inc., 31 FMSHRC 1050, 1054 (2009) (listing Commission decisions from 1940, 1984, 1985, and 1989 all advocating for the tolling of a terminated employee's back pay or reinstatement when a reduction in workforce was shown).

159. *See id.* (citing Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738 (11th Cir. 1990)) (describing the burden of proof and scope of temporary reinstatement orders).

160. *Cobra Nat. Res., LLC*, 742 F.3d at 90.

161. *Id.*

162. 472 U.S. 511 (1985).

163. *Id.* at 527-28; *Cobra Nat. Res., LLC*, 742 F.3d at 98.

duplication of judicial decision making . . . ."[164] Because this language requires a strict separation of the issues when one is not required by *Mitchell*, this narrow construction of the second prong is inconsistent with the Supreme Court's clear decision to allow overlap between the collateral order decision and the final merits determination.

The Fourth Circuit's analysis could be more persuasive with a different line of argument. Rather than downplaying the conceptual distinction between temporary reinstatement orders and the final merits determination, the Fourth Circuit should have decided that the Supreme Court's recent trilogy of cases addressing the doctrine—*Will*, *Mohawk Industries*, and *Digital Equipment*—essentially abrogated the Court's prior, more lenient interpretation of the second prong. The Supreme Court has not explicitly overturned *Mitchell*.[165] However, the Court's recent emphasis on a limited application of the doctrine could support the Fourth Circuit's more narrow interpretation of the doctrine. By focusing on the burden of proof in the two distinct procedures rather than the evolution of the doctrine,[166] the Fourth Circuit nearly sidesteps the issue. Without arguing that the doctrine has evolved in some manner, the Fourth Circuit's interpretation cannot be reconciled with the Supreme Court's allowance of decisional overlap in *Mitchell.*

C. The Interest at Stake: Looking at the Big Picture

The majority's argument regarding the doctrine's third prong addresses both components of the requirement: the unavailability of review and the importance of the interest at stake.[167] The majority essentially concedes that, as the coal operator appealing the temporary reinstatement orders, Cobra's interest would not be re-dressable absent an appeal.[168] The Fourth Circuit focused instead on the economic characteristics of the interests at stake.[169] Ultimately, the court refused to review the temporary reinstatement

164. *Cobra Nat. Res., LLC*, 742 F.3d at 89 (quoting Dickens v. Aetna Life Ins. Co., 677 F.2d 228, 233 (4th Cir. 2010)).

165. *See, e.g.*, *id.* at 91 (referencing the Court's analysis in *Mitchell*).

166. *Id.* at 90.

167. *Id.* at 90-92.

168. *Id.* at 92.

169. *Id.*

order because "a coal operator's financial interest in avoiding wage payments to a reinstated miner who returns to his job in the coal mines pales in comparison to those interests that have been deemed sufficiently important to give rise to collateral order jurisdiction."[170] This analysis is lacking. Because the Supreme Court requires a court to consider an entire class of orders when considering whether to allow a collateral order doctrine appeal,[171] the Fourth Circuit erred by only considering the mine operator's interests when deciding whether temporary reinstatement orders should be reviewable.

1. Unavailability of Review

Conceding that the mine operator's interests would be unreviewable on appeal does not relieve the court of its obligation to consider the impact of its decision on the miner's interests.[172] By only analyzing the situation from the perspective of a mine operator's appeal, the court fails to consider the equally probable scenario of a miner's appeal of the Commission's decision regarding a temporary reinstatement order. One way to illustrate the Fourth Circuit's incomplete analysis is to consider what impact the court's decision would have in all possible circumstances. Under the Mine Act, courts may only review *final* Commission orders.[173] If temporary reinstatement orders are not considered final orders either under the Mine Act or through the application of the collateral order doctrine, four possible scenarios emerge.

- *Scenario One:* A miner files a discrimination complaint with the Secretary. The Secretary finds that the miner's claims were not frivolously brought and applies to the Commission for a temporary reinstatement order. The Commission grants the order. After an investigation, the Secretary finds that the mine operator violated the terms of the Mine Act and files a complaint with the Commission. After a hearing, the Commission finds the mine operator guilty of discrimination. The mine operator appeals the Commission's final decision.

170. *Id.*
171. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994).
172. *Cobra Nat. Res., LLC*, 742 F.3d at 99 (Agee, J., dissenting).
173. Rhode Island v. EPA, 378 F.3d 19, 24 (1st Cir. 2004); Meredith v. Fed. Mine Safety & Health Review Comm'n, 177 F.3d 1042, 1048 (D.C. Cir. 1999).

- *Scenario Two:* A miner files a discrimination complaint with the Secretary. The Secretary initially finds that the miner's claims were frivolously brought and does not apply to the Commission for a temporary reinstatement order. After an investigation, however, the Secretary finds that the mine operator violated the terms of the Mine Act and files a complaint with the Commission. After a hearing, the Commission finds the mine operator guilty of discrimination. The mine operator appeals the Commission's final decision.

- *Scenario Three:* A miner files a discrimination complaint with the Secretary. The Secretary finds that the miner's claims were not frivolously brought and applies to the Commission for a temporary reinstatement order. The Commission grants the order. After an investigation, however, the Secretary finds that the mine operator did not violate the terms of the Mine Act. The miner then files a complaint with the Commission on his own behalf. After a hearing, the Commission finds the mine operator not guilty of discrimination. The miner appeals the Commission's final decision.

- *Scenario Four:* A miner files a discrimination complaint with the Secretary. The Secretary finds that the miner's claims were frivolously brought and does not apply to the Commission for a temporary reinstatement order. After an investigation, the Secretary finds that the mine operator did not violate the terms of the Mine Act. The miner then files a complaint with the Commission on his own behalf. After a hearing, the Commission finds the mine operator not guilty of discrimination. The miner appeals the Commission's final decision.[174]

174. Procedurally, scenarios Three and Four have two different avenues to the same outcome. Rather than the miner filing a complaint with the Commission his own behalf, the Secretary may find that there is enough evidence to warrant filing a complaint with the Commission. After the hearing, the Commission may vacate the Secretary's finding of discrimination. Under either avenue, the result is the same: the mine operator is not guilty of discrimination and the miner appeals the Commission's decision.

	Scenario 1	*Scenario 2*	*Scenario 3*	*Scenario 4*
Miner files discrimination complaint with Secretary. Secretary initially finds miner's claim…	*not frivolously brought* and applies to Commission for temporary reinstatement order. Commission grants the order.	*frivolously brought* and does not apply to the Commission for a temporary reinstatement order.	*not frivolously brought* and applies to the Commission for a temporary reinstatement order. The Commission grants the order.	*frivolously brought* and does not apply to the Commission for a temporary reinstatement order.
After an investigation, the Secretary finds that the mine operator…	*violated* the terms of the Mine Act and files a complaint with the Commission	*violated* the terms of the Mine Act and files a complaint with the Commission	*did not violate* the terms of the Mine Act. The miner then files a complaint with the Commission on his own behalf.	*did not violate* the terms of the Mine Act. The miner then files a complaint with the Commission on his own behalf.
After hearing, the Commission finds the mine operator…	*guilty of discrimination*. The *mine operator* appeals the Commission's final decision.	*guilty of discrimination.* The *mine operator* appeals the Commission's final decision.	*not guilty* of discrimination. The *miner* appeals the Commission's final decision	*not guilty* of discrimination. The *miner* appeals the Commission's final decision

A. Scenarios Two and Three

While temporary reinstatement orders do not merge with or impact the final discrimination decision, the ultimate discrimination decision does impact whether the party aggrieved by the temporary reinstatement order has the opportunity to present those arguments on appeal.[175] In Scenarios Two and Three, the party injured by the temporary reinstatement order—the miner in Scenario Two and the mine operator in Scenario Three—ultimately receives a favorable Commission order. In either situation, the appealing party would have little, if any, incentive to appeal the Commission's order only to address the grievances regarding the temporary

175. *Cobra Nat. Res., LLC*, 742 F.3d at 96 (Agee, J., dissenting) (highlighting that if temporary reinstatement orders are not considered final, "a miner's appeal from an adverse decision on temporary reinstatement will now be foreclosed because the mine operator and the miner share equal appeal rights").

reinstatement order. More likely, the losing party—the mine operator in Scenario Two and the miner in Scenario Three—would appeal the Commission's final order. In that situation, it is unlikely that the party aggrieved by the temporary reinstatement order but ultimately victorious on the discrimination claim would be able to present arguments against the Commission's temporary reinstatement decision on appeal. Ultimately, even if the parties overcame these procedural curiosities, they face the same hurdles as the parties appealing in Scenarios One and Four.

B. Scenarios One and Four

Scenarios One and Four are more favorable for the party aggrieved by the temporary reinstatement order because unlike Scenarios Two and Three, the party is at least afforded an opportunity to present arguments against the Commission's decision on appeal. In Scenario Two, during the appeal of the Commission's order finding discrimination, the mine operator may raise arguments regarding the initial temporary reinstatement order. Conversely, in Scenario Three, during the appeal of the Commission's order denying discrimination, the miner may raise arguments regarding the denial of the initial temporary reinstatement order. Having a forum to present the arguments, however, does not guarantee that the reviewing court will entertain the arguments or have the ability to grant relief.

In both scenarios, the appealing party faces the prospect that the reviewing court's jurisdiction is limited in some respect. For example, the court's jurisdiction may be limited to review of the final merits decision because temporary reinstatement orders are not final decisions reviewable under § 816 of the Mine Act. Alternatively, the reviewing court's jurisdiction may not be limited because the two procedures are sufficiently related to permit review of both. Ultimately, the court's interpretation of the procedures may impact whether the appealing party can raise their arguments regarding the temporary reinstatement order during the appeal of the Commission's final decision.

Assuming the circuit court allows the temporary reinstatement order arguments on appeal, neither the mine operator nor the miner's injury is fully re-dressable.[176] For the mine operator in Scenario One, even if a court finds that the miner was erroneously reinstated, no procedural mechanism exists that would allow the mine operator to recover the wages paid to the

176. *Id.* at 95.

miner while the miner was temporarily reinstated.[177] Conversely, for the miner in Scenario Four, even if the reviewing court finds that Commission improperly denied the temporary reinstatement order, any recovered wages do not redress the full extent of the miner's injury.[178] The purpose of the orders is two-fold: to provide temporary economic relief to miners bringing discrimination claims and to encourage miners to engage in protected activities without subjecting themselves to financial vulnerability.[179] If a miner is only able to recover lost wages, the true force of the orders is never realized.

1. More than Dollars and Cents

Even if the injury suffered by the mine operator as a result of a temporary reinstatement order is purely financial, for the miners, the interest protected by the temporary reinstatement order is more than dollars and cents. As the Mine Act's legislative history indicates, the purpose of temporary reinstatements orders is to incentivize enforcement of the Mine Act by providing economic protection to miners terminated for engaging in protected activities.[180] Much like qualified immunity exists to protect officials acting in a discretionary capacity from litigation,[181] temporary reinstatement orders exist to protect miners who are inherently vulnerable to discriminatory termination.[182] And in the same way qualified immunity incentivizes officials to use their discretion without the fear of suit, temporary reinstatement orders incentivize miners to hold their employers responsible for substandard working conditions without the fear of losing their jobs. Fearing that a temporary reinstatement order may not be granted and knowing that the decision is unreviewable, future miners may be deterred from complying with the Mine Act.[183] Ultimately, the Fourth Circuit's opinion deprives the Mine Act of its best enforcement mechanism.

177. *Id.* ("As counsel for the Secretary conceded, no procedure exists that allows an operator to recoup wages paid to a temporarily reinstated miner for all periods before a final merits decision.").

178. *Id.* at 96.

179. *See id.*

180. *Id.* (referencing S. REP. NO. 95–181, at 37 (1977)).

181. Pearson v. Callahan, 555 U.S. 223, 237 (2009).

182. *Cobra Nat. Res., LLC*, 742 F.3d at 96, 99 (Agee, J., dissenting).

183. *Id.*

V. Conclusion

In sum, the Fourth Circuit's decision should be rejected as an improper departure from its sister circuits. By holding that temporary reinstatement orders fail each prong of the collateral order doctrine, the Fourth Circuit misconstrues the reach of the tolling affirmative defense, narrowly construes the Supreme Court's discussion of the doctrine's severability requirement, and fails to consider the impact on all interests impacted by the decision. Even further, the Fourth Circuit thwarts Congress's specific intent of enforcing safe mining practices by undermining the Mine Act's primary enforcement mechanism. Based on this opinion, miners must now be cautious in their compliance with the Mine Act or else they risk losing their livelihood without a second thought by the Fourth Circuit Court of Appeals.

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