

U.S. Department of Labor

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Division of Mine Safety & Health  
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ON APPEAL TO THE COMMISSION

February 4, 2010

Lisa M. Boyd  
Executive Director  
Federal Mine Safety and Health  
Review Commission  
601 New Jersey Avenue, NW  
Suite 9500  
Washington, D.C. 20001

Re: Secretary of Labor on behalf of Mark Gray v. North  
Fork Coal Corporation, Docket No. KENT-2009-1429-D

Dear Ms. Boyd,

Enclosed for filing, please find the original and six  
copies of the Secretary's opening brief in this case.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Robin Rosenbluth".

Robin Rosenbluth  
Attorney

(202) 693-9333

Cc: Counsel of record

FEDERAL MINE SAFETY AND HEALTH  
REVIEW COMMISSION

SECRETARY OF LABOR, )  
MINE SAFETY AND HEALTH )  
ADMINISTRATION (MSHA), )  
on behalf of MARK GRAY, )

Petitioner, )

v. )

Docket No. KENT 2009-1429-D

NORTH FORK COAL CORPORATION, )

Respondent. )

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## STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge erred in failing to read Section 105(c)(2) of the Mine Act as requiring temporary reinstatement orders to remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Mine Act or by the miner under Section 105(c)(3) of the Mine Act.

2. Whether the Secretary has standing to seek review of the judge's order by the Commission.

## STATEMENT OF THE CASE

### A. Procedural Background

On June 15, 2009, miner Mark Gray filed a discrimination complaint with the Secretary under Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). The complaint alleged that Mr. Gray was unlawfully discharged by North Fork Coal Corporation because he refused to perform work he considered dangerous and because he complained about safety hazards at North Fork's Mine No. 4. Secretary's Application For Temporary Reinstatement, Ex. B.

After a preliminary special investigation, the Secretary found that Mr. Gray's complaint was not frivolously brought, and on August 13, 2009, the Secretary

filed an application for temporary reinstatement of Mr. Gray. See Secretary's Application For Temporary Reinstatement. North Fork requested a hearing on the Secretary's application for temporary reinstatement, and a hearing was held on September 2, 2009. On September 8, 2009, the judge issued an order finding that the complaint was not frivolously brought and requiring North Fork to temporarily reinstate Mr. Gray. 2009 WL 2971144 (Sept. 8, 2009). The Secretary, North Fork, and Mr. Gray subsequently agreed that the temporary reinstatement would be economic reinstatement. The judge approved the economic reinstatement agreement on September 17, 2009. 2009 WL 3332838 (Sept. 17, 2009).

After conducting a full investigation of Mr. Gray's complaint, the Secretary decided in late November 2009 not to file a Section 105(c)(2) complaint on Mr. Gray's behalf. On November 20, 2009, the Secretary sent written notification of her decision to Mr. Gray. On December 30, 2009, Mr. Gray filed an action on his own behalf under Section 105(c)(3) of the Act.

B. The Judge's Order

On December 2, 2009, the judge, on the motion of North Fork, issued an order dissolving the order of temporary economic reinstatement and dismissing the temporary

reinstatement proceeding. In so doing, the judge cited Secretary of Labor on behalf of Peter J. Phillips v. A&S Construction Co., 30 FMSHRC 1119 (2008), aff'd, Peter S. Phillips v. A&S Construction Co., 2009 WL 2971140 (Sept. 9, 2009) ("A&S Construction"). See Dec. 2, 2009, Order.

#### ARGUMENT

THE JUDGE ERRED IN FAILING TO READ SECTION 105(c)(2) OF THE MINE ACT AS REQUIRING TEMPORARY REINSTATEMENT ORDERS TO REMAIN IN EFFECT UNTIL THERE IS A FINAL COMMISSION ORDER ON THE MERITS OF THE MINER'S UNDERLYING DISCRIMINATION COMPLAINT, REGARDLESS OF WHETHER THE COMPLAINT IS LITIGATED BY THE SECRETARY UNDER SECTION 105(c)(2) OF THE MINE ACT OR BY THE MINER UNDER SECTION 105(c)(3) OF THE MINE ACT

#### A. Introduction

This case presents an issue of fundamental importance to the enforcement of the Mine's Act's anti-discrimination provisions: whether a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Mine Act or by the miner under Section 105(c)(3) of the Mine Act. The Secretary reads Section 105(c)(2) of the Act as plainly meaning that in both scenarios, a temporary reinstatement order must remain in effect until there is a final Commission order on the miner's underlying complaint. Even

if Section 105(c)(2) does not have a plain meaning, the Commission should accept the Secretary's interpretation because it is reasonable and furthers the critically important protection to miners contemplated by Section 105(c)(2).

B. Standard of Review

Determination of whether a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act, requires the Commission to review the Secretary's interpretation of Section 105(c)(2) of the Act. "If the statute is clear and unambiguous, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Coal Employment Project v. Dole, 889 F.2d 1129, 1131 (D.C. Cir. 1989) (internal citations and quotation marks omitted). Courts use the traditional tools of statutory construction in determining whether the meaning of a statutory provision is plain. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000). The traditional tools include the statutory text, the overall

structure and design of the statute, the legislative history of the statute, and the purpose of the statute.

Id. See also Consolidation Coal Co., 15 FMSHRC 1555, 1557 (1993) (applying traditional tools to ascertain a standard's plain meaning).

If a provision does not have a plain meaning, the Secretary's interpretation is owed deference and is entitled to affirmance as long as it is reasonable. Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). See also Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-16 (4th Cir. 1996) (deferring to the Secretary's interpretation of Section 105(c)(2)'s remedial provisions). "In the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard, and is therefore deserving of deference." Excel Mining, 334 F.3d at 6 (internal quotation marks and citations omitted).

In A&S Construction, Commissioners Duffy and Young concluded that if the meaning of Section 105(c)(2) were not

plain, the Secretary's interpretation of the phrase "pending final order on the complaint" in Section 105(c)(2) would not be entitled to deference because once the Secretary declines to pursue a miner's claim of discrimination, she is no longer "administering" the Mine Act. A&S Construction, 2009 WL 2971140, at \*9-10. They misunderstand deference.

Commissioners Duffy and Young's attempt to deny the Secretary's interpretation of Section 105(c)(2) deference by whittling the Secretary's authority under the Mine Act into separate slivers is unsupported by, and inconsistent with, the case law on Chevron deference. See National R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the [statutory] language, a court must look to the structure and language of the statute as a whole"); Mutual Mining, 80 F.3d at 113-14 (granting Chevron deference to the Secretary's interpretation, even though it pertained to relief fashioned by the Commission under Section 105(c) of the Act, because only the Secretary has the ability "to render authoritative interpretations of the Act") (emphasis added); Stowell v. Secretary of HHS, 3 F.3d 539, 544 (1st Cir. 1993) (recognizing that Chevron deference is

appropriate when the statute contains complicated and interrelated provisions and the agency, through its administration of the statute, has an understanding of "the relationship of a given provision to the statute as a whole") (citation and internal quotation marks omitted); A&S Construction, 2009 WL 2971140 at \*22-23 (Commissioner Cohen's opinion).

Contrary to Commissioners Duffy and Young's approach, the Secretary, through her administration of the Act, has the "historical familiarity and expertise" (Mutual Mining, 80 F.3d at 113) to determine how Section 105(c)(2) should be interpreted to best effectuate Congress' purpose of encouraging miners to participate in health and safety matters without retaliation. The Commission, as a "neutral arbiter" with "nonpolicy making adjudicative powers," does not. Id.<sup>1</sup>

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<sup>1</sup> Of the two entities established by the Act, "[o]nly one . . . can retain the ability to render authoritative interpretations of the Act." Mutual Mining, 80 F.3d at 113. Under Commissioner Duffy and Young's approach, however, both of those entities would have the ability to render interpretations of Section 105(c)(2) -- a situation under which, depending on the nature of the proceeding, the very same provision could be given different interpretations in different cases. The scenario of two entities rendering conflicting interpretations of the same provision is a scenario Congress cannot have intended.

- B. The Plain Meaning of Section 105(c)(2) Is That a Temporary Reinstatement Order Must Remain In Effect Until There Is A Final Commission Order on the Merits of the Miner's Underlying Discrimination Complaint, Regardless of Whether the Complaint Is Litigated By the Secretary Under Section 105(c)(2) or By the Miner Under Section 105(c)(3)
1. The Language and Structure of Section 105(c)(2) Plainly Mean That a Temporary Reinstatement Order Must Remain In Effect Pending A Final Commission Order On the Miner's Underlying Complaint

Section 105(c)(2) states in relevant part:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [she] deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission . . . .

30 U.S.C. 815(c)(2). In A&S Construction, the Commission evenly split on the meaning of the phrase "pending final order on the complaint" in Section 105(c)(2). See 2009

WL 2971140 at \*3. Although all four Commissioners concluded, in agreement with the Secretary, that the term "final order" in the operative phrase refers to a Commission final order (id. at \*5, 12, 23), the Commissioners evenly divided over the proper reading of the term "the complaint" in the operative phrase.

Chairman Jordan and Commissioner Cohen, in agreement with the Secretary, concluded that the term "the complaint" refers to the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) or by the miner under Section 105(c)(3). 2009 WL 2971140 at \*11, 22-23. Commissioners Duffy and Young read the term "the complaint" to refer to "complaints" filed under Section 105(c)(2) and not to refer to miners' actions filed under Section 105(c)(3). Id. at \*5-6.

Contrary to Commissioners Duffy and Young's reading, it is "a rule of law well established that the definite article 'the' particularizes the subject which it precedes." American Bus. Association v. Slater, 231 F.3d 1, 4 (D.C. Cir. 2000) (internal quotation marks and citation omitted). The only "complaint" referred to in Section 105(c)(2) preceding the phrase "pending final order on the complaint" is the miner's underlying complaint.

Indeed, Section 105(c)(2) refers to the miner's underlying complaint five times prior to the phrase "pending final order on the complaint." Thus, the term "the complaint" in the phrase "pending final order on the complaint" plainly refers to the miner's underlying complaint.

Also contrary to Commissioners Duffy and Young's reading (2009 WL 2971140 at \*9), the miner's underlying complaint does not somehow merge into and become the same "complaint" as a complaint the Secretary may file under Section 105(c)(2). Immediately following the language in Section 105(c)(2) stating that a temporary reinstatement order remains in effect "pending final order on the complaint," Section 105(c)(2) states that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission" (emphasis added). If Congress had intended the Secretary's complaint to be viewed as the same complaint as the miner's underlying complaint, Congress would have again used the definite article "the." See American Bus. Association, 231 F.3d at 4. It did not do so. Instead, Congress used the indefinite article "a" -- a fact that indicates that Congress intended the Secretary's complaint to be viewed as something different than the miner's underlying complaint.

See American Forest & Paper Ass'n v. FERC, 550 F.3d 1179, 1181 (D.C. Cir. 2008) (when Congress uses different words, it is presumed to have intended different meanings -- especially when the different words occur "in neighboring sentences") (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

In addition, Commissioners Duffy and Young's reading is refuted by two other aspects of Section 105(c). First, it is refuted by the fact that Section 105(c)(3) continues to speak in terms of "the complainant" -- a fact that indicates that, when a miner proceeds under Section 105(c)(3), he continues to advance the underlying complaint he filed under Section 105(c)(2). See A&S Construction, 2009 WL 2971140 at \*13-14 (Chairman Jordan's opinion). Second, it is refuted by the fact that Section 105(c)(3) speaks in terms of the miner filing an "action" rather than in terms of the miner filing a "complaint" -- a fact that indicates that, when a miner proceeds under Section 105(c)(3), he is merely taking an administrative action to carry his underlying complaint forward, not filing a new complaint that takes the place of a previously filed complaint that has somehow ceased to exist. See Adams v. Slonim, 924 F.2d 256, 258 (D.C. Cir. 1991) (application of the Russello principle is especially

appropriate when the different words occur in "two subsections [that] are closely related").

Finally, Commissioners Duffy and Young's interpretation is fatally flawed because it fails to address the question this case presents: what becomes of the miner's underlying complaint when the Secretary declines to file a complaint under Section 105(c)(2)? Even if the miner's underlying complaint somehow merges with the Secretary's complaint when the Secretary files a complaint, it cannot merge with the Secretary's complaint when the Secretary does not file a complaint. Commissioners Duffy and Young's interpretation simply sidesteps the fundamental question in this case.

The only thing Commissioners Duffy and Young's interpretation accomplishes is to underscore the correctness of the Secretary's interpretation. When the Secretary files a complaint, the miner's underlying complaint is carried forward through the Secretary's complaint (in the Commissioners' formulation, is "merged" with the Secretary's complaint), and the "final order on the complaint" is the Commission's final order on the miner's complaint as it is "merged" with the Secretary's complaint. When the Secretary declines to file a complaint, the miner's underlying complaint continues to

exist in its original form and is carried forward by the miner's action, and the "final order on the complaint" is the Commission's final order on the miner's complaint in its "unmerged" form. See Secretary on behalf of Charles Dixon v. Pontiki Coal Corp., 19 FMSHRC 1009, 1017 (1997) (holding that a Section 105(c)(2) complaint filed by the Secretary has the same relationship to the miner's underlying complaint as does a Section 105(c)(3) action filed by the miner); A&S Construction, 2009 WL 2971140 at \*14-15 (Chairman Jordan's opinion).<sup>2</sup>

The Secretary's reading of Section 105(c)(2), unlike Commissioners Duffy and Young's reading of Section 105(c)(2), is consistent with Section 105(c)(2)'s requirement that temporary reinstatement be ordered when there is a finding that the miner's underlying discrimination complaint "was not frivolously brought." The question whether a miner's underlying complaint was

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<sup>2</sup> Commissioners Duffy and Young assert that if neither the Secretary nor the miner goes forward with the miner's underlying complaint, there will never be a final Commission order on the complaint and the temporary reinstatement order will remain in effect forever. 2009 WL 2971140 at \*6. That assertion is a red herring. If the Secretary decides not to go forward, the miner has 30 days to go forward on his own. 30 U.S.C. § 105(c)(3). If the miner fails to go forward within 30 days, the operator may request, and the Commission may issue, a final order dismissing the underlying complaint and an order dissolving the temporary reinstatement order.

"frivolously brought" and the question whether Section 105(c)(1) has "not been violated" are very different questions. Reading Section 105(c)(2) to require that orders of temporary reinstatement be dissolved when the Secretary determines that Section 105(c)(1) has "not been violated" incorrectly conflates the two questions.

Recognizing the fundamental distinction between the two questions, the Commission has held that, because there has been a "not frivolously brought" finding, temporary reinstatement orders remain in effect pending appeal to the Commission of a judge's decision in a Section 105(c)(2) action even when the same judge who affirmed the "not frivolously brought" finding finds, after a full hearing on the merits, that Section 105(c)(1) has not been violated. Secretary of Labor on behalf of Bernardyn v. Reading Anthracite Co., 21 FMSHRC 947, 949 (1999). If Congress intended a temporary reinstatement order to remain in effect pending appeal even when a neutral judge has found after a full hearing on the merits that no discrimination occurred, there is no reason to believe that Congress did not intend a temporary reinstatement order to remain in effect pending a final Commission order on the miner's Section 105(c)(3) action when the Secretary has determined, based on her investigation of the miner's complaint, that

Section 105(c)(1) has "not been violated." This is particularly true because in making such a determination, the Secretary, unlike a judge, does not have the benefit of discovery or a full hearing on the merits.

This is also true because, although the Act speaks in terms of the Secretary determining that Section 105(c)(1) has "not been violated," the Secretary's determination in reality is not a determination that a violation has not occurred -- let alone a determination that the miner's complaint was "frivolously brought." The determination that a violation has not occurred can only be made by an adjudicator -- and, under the Mine Act, the adjudicator is the administrative law judge and/or the Commission, not the Secretary. The Secretary is merely the prosecutor, and the Secretary's determination is merely a discretionary prosecutorial determination that, in all of the circumstances, the Secretary cannot prove that a violation occurred. See Roland v. Secretary of Labor, 7 FMSHRC 630, 635 (1985) (recognizing that the Secretary has "wide discretion" in determining whether the facts underlying a miner's discrimination complaint require her to file a Section 105(c)(2) complaint with the Commission). Cf. Speed Mining Inc. v. FMSHRC, 528 F.3d 310, 318-19 (4th Cir. 2008) (recognizing that a "complicated balancing of a

number of factors" affects the Secretary's discretionary decision whether to prosecute a violation).

Moreover, reading Section 105(c)(2) to require that a temporary reinstatement order remain in effect pending a final Commission order on the miner's underlying complaint is consistent with Congress' decision to give miners "an independent avenue of adjudication" under Section 105(c)(3) if the Secretary decides not to proceed under Section 105(c)(2). Roland, 7 FMSHRC at 635-36. Inherent in Congress' decision was a recognition that even if the Secretary decides not to proceed under Section 105(c)(2), there is still a realistic possibility that discrimination occurred -- a recognition borne out by the significant number of cases over the years in which the Secretary declined to file a complaint, the miner filed an action on his own, and the judge and/or the Commission ultimately found that the miner's complaint should be sustained on the merits. See, e.g., Womack v. Graymount Western US, Inc., 25 FMSHRC 235, 261-63 (2003); Adkins v. Ronnie Long Trucking, 21 FMSHRC 171, 176-77 (1999); Paul v. Newmont Gold Co., 18 FMSHRC 181, 191 (1996); Ross and Gilbert v. Shamrock Coal Co., Inc., 15 FMSHRC 972, 974-76 (1993); Meek v. Essroc Corp., 15 FMSHRC 606, 612-13 (1993).

Furthermore, "in enacting the 'not frivolously brought' standard, [Congress] clearly intended that employers should bear a disproportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." Jim Walter Resources v. FMSHRC, 920 F.2d 738, 748 n.11 (11th Cir. 1990). As the Jim Walter Court recognized, "[a]ny material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits." Id.<sup>3</sup>

2. The Legislative History and Purpose of Section 105(c)(2) Support the Secretary's Plain Meaning Reading

In enacting the Mine Act, Congress made clear its intent that Section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, 95th Cong. 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human

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<sup>3</sup> Commissioners Duffy and Young protest that proceedings under Section 105(c)(3) "can be lengthy in duration." 2009 WL 2971140 at \*8 n.10 (citing a case involving a time span of four-and-a-half years). That protest is misplaced. If Section 105(c)(3) proceedings take too long, the appropriate solution is for the Commission to speed up its processing of the proceedings before it -- not for the Commission to misinterpret Congress' intent in enacting the temporary reinstatement provision. Indeed, Section 105(c)(3) explicitly requires the Commission to expedite Section 105(c)(3) proceedings.

Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 ("Leg. Hist.") at 624. Congress also recognized the important role that individual miners play under the Act in ensuring a safe and healthful working environment. 95th Cong. 1st Sess. 35, Leg. Hist. at 623.

Recognizing that "mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity," Congress stressed that "temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment . . . ." S. Rep. No. 95-181 at 35 and 37, Leg. Hist. at 623 and 625. Interpreting Section 105(c)(2) to require that, once a "not frivolously brought" finding is made and affirmed, a temporary reinstatement order remains in effect pending a final Commission order on the merits of the miner's underlying complaint is consistent with Section 105(c)'s purpose of encouraging miner participation in safety and health matters.

Moreover, in discussing the need for temporary reinstatement, Congress stated that "temporary reinstatement is an essential protection . . . pending the resolution of the discrimination complaint." S. Rep. No.

95-181 at 37, Leg. Hist. at 625 (emphasis added). There is no "resolution" of the miner's underlying discrimination complaint until there is a final Commission order on the complaint. Similarly, in explaining the process for obtaining temporary reinstatement, Congress stated that "the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation and complaint." Id. (emphases added). Although there may be a final outcome of the investigation if the Secretary determines that Section 105(c)(1) "has not been violated," there is not a "final outcome" on the miner's underlying complaint until there is a final Commission order on the complaint.

For all of the foregoing reasons, the plain meaning of Section 105(c)(2) is that a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) of the Act or by the miner under Section 105(c)(3) of the Act. Excel Mining, 334 F.3d at 6 (discussing the first step of the Chevron analysis). Even if the meaning of Section 105(c)(2) is not plain, the Secretary's interpretation of Section 105(c)(2) is

reasonable and entitled to acceptance. See id. (discussing the second step of the Chevron analysis).<sup>4</sup>

II.

THE SECRETARY HAS STANDING TO  
SEEK REVIEW OF THE JUDGE'S  
ORDER BY THE COMMISSION

Under Section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), "[a]ny person adversely affected or aggrieved" by a judge's decision may file a petition for discretionary review by the Commission. The Secretary is a "person adversely affected or aggrieved" by the judge's order in this case, just as she is a "person adversely

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<sup>4</sup> Commissioners Duffy and Young attempt to shore up their interpretation of Section 105(c)(2) by claiming that, prior to 2006, the Commission's procedural rules reflected such an interpretation. 2009 WL 2971140 at \*9. That attempt is unpersuasive for two reasons. First, the Commission's decision in 2006 to "leave[] open for litigation" the question whether the miner's underlying complaint remains in effect after the Secretary decides not to go forward -- a decision the Commission made in response to the Secretary's assertion that it does -- implicitly recognized that the Secretary's interpretation was a reasonable interpretation to assert in litigation. See 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006) (discussing 71 Fed. Reg. 560 (Jan. 5, 2006)). Indeed, in explaining its 2006 decision, the Commission explicitly stated that it "ha[d] not decided" the question. Id. Second, even if the Commission had clearly adopted an interpretation different than the interpretation the Secretary asserted in 2006, that fact would not alter the principle that the Commission must give deference to the Secretary's interpretation. See National Cable & Telecommunications Ass'n v. Brand X Internet, 545 U.S. 967, 982-83 (2006) (explaining that "[w]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur").

affected or aggrieved" in any case in which a Commission judge dismisses her enforcement action over her objection.

Section 105(c)(2) vests in the Secretary the exclusive authority to apply for orders of temporary reinstatement from the Commission. Moreover, under Section 105(c)(2), the Secretary's finding that a miner's discrimination complaint was not frivolously brought is, if affirmed by the judge, the exclusive basis for ordering temporary reinstatement. Id. The Secretary is thus "the designated champion of [miners]" in the Mine Act's temporary reinstatement scheme. Cf. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 132-33 (1995) (holding that the Director of the Office of Workers' Compensation Programs was not "adversely affected and aggrieved" because the Director is merely an arbiter and a broker in private disputes between employers and employees, not an enforcer and "the designated champion of employees within [the] statutory scheme").

As the sole enforcer of the Act's temporary reinstatement provision, the Secretary in this case is "adversely affected or aggrieved" by the judge's order dissolving the order of temporary reinstatement, just as she would be "adversely affected or aggrieved" in a case in

which the judge issued an order denying her application for temporary reinstatement in the first place.

The fact that the Secretary in this case has decided not to proceed under Section 105(c)(2) does not negate the adverse affect of the dissolution of the temporary reinstatement order on the Secretary. A conclusion that it does rests on two erroneous assumptions.

First, such a conclusion erroneously assumes that the Secretary's decision that Section 105(c)(1) has "not been violated" and the Secretary's finding that the miner's underlying discrimination complaint was "not frivolously brought" are equivalent findings. As discussed above, the question whether a miner's underlying complaint was "frivolously brought" and the question whether Section 105(c)(1) has "not been violated" are very different questions. Although the Secretary in this case has determined that Section 105(c)(1) has "not been violated," she has also determined that Mr. Gray's underlying complaint was "not frivolously brought" -- a determination the judge in this case affirmed. The judge's order dissolving the temporary reinstatement order despite the Secretary's extant "not frivolously brought" determination adversely affects and aggrieves the Secretary.

Second, a conclusion that the Secretary is not adversely affected or aggrieved by the judge's dissolution order erroneously assumes that the Secretary's only objective in applying for temporary reinstatement is to obtain temporary relief for the discharged miner pending resolution of that miner's discrimination claim. As set forth above, in enacting the Mine Act, Congress recognized the important role all miners play in ensuring a safe and healthful working environment. See 95th Cong. 1st Sess. 35, Leg. Hist. at 623 ("If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act."). Toward that end, Congress enacted the anti-discrimination provisions in Section 105(c)(2) to ensure that miners would not be inhibited in any way from exercising their statutory rights. See 95th Cong. 2d Sess. 36, Leg. Hist. at 624. Accordingly, while obtaining temporary relief for discharged miners is one of the Secretary's objectives in applying for temporary reinstatement, a broader objective is, as the legislative history makes clear, to quell the potential chilling effects of one miner's loss of employment during the pendency of that miner's discrimination claim on all miners' willingness to make safety and health complaints and otherwise exercise their

statutory rights under the Act. See Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc., 18 FMSHRC 552, 558 (1996) (recognizing that the discharge of one miner may have a chilling effect on other miners). Cf. General Telephone. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980) (the EEOC may seek class-wide relief because, through its enforcement actions, the EEOC vindicates the public interest as well as private rights in eliminating discrimination); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc) (the Secretary was not bound by the results of private litigation because the Secretary's interest in bringing enforcement actions under the Employee Retirement Income Security Act is based not only on the duty of protecting individual beneficiaries or specific pension programs, but also on the duty of protecting the ERISA program itself); Donovan v. University of Texas at El Paso, 643 F.2d 1201, 1208 (5th Cir. 1981) ("the purpose of the Secretary's obtaining an injunction under [the Fair Labor Standards Act] is not to collect a debt but rather to redress a wrong being done to the public good (internal citation and quotation marks omitted)").

That Congress intended to give the Secretary standing to appeal the judge's dissolution order to the Commission

is evident from the structure of the Mine Act's anti-discrimination scheme. The miner is not a named party in a temporary reinstatement proceeding, and the miner typically does not participate in such a proceeding (other than as a witness for the Secretary). Thus, if this case were a typical temporary reinstatement case, and if the Secretary did not have standing to appeal the order dissolving temporary reinstatement, there would be no party or participant before the judge with the ability to appeal the dissolution order to the Commission. Congress cannot have intended a result so antithetical to miners' statutory rights and so at odds with established legal principles. See Kukana v. Holder, \_\_ S.Ct. \_\_, 2010 WL 173368, \*11 (January 20, 2010) ("Because the presumption favoring interpretations of statutes to allow judicial review of administrative action is well-settled, the Court assumes that Congress legislates with knowledge of the presumption. It therefore takes clear and convincing evidence to dislodge the presumption (internal citation and quotation marks omitted)").

Significantly, in the one sort of Mine Act discrimination proceeding in which Congress plainly intended miners to litigate on their own, i.e., in Section 105(c)(3) proceedings, Congress specifically provided for

attorney fee awards to prevailing miners. See 30 U.S.C. § 815(c)(3). No such awards are available in temporary reinstatement proceedings provisions under Section 105(c)(2). Cf. Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 643-44 (4th Cir. 1987) (holding that a miner is not entitled to recover attorney fees in Section 105(c)(2) cases in which the miner has hired private counsel because the language of Section 105(c) does not provide for the recovery of attorney fees in Section 105(c)(2) cases). Congress' failure to provide for attorney fee awards to miners in temporary reinstatement proceeding appeals to the Commission indicates that Congress did not intend to require miners to represent themselves in such appeals.

The judicial review provisions of the Mine Act similarly indicate Congress' intent to give the Secretary statutory standing to appeal the judge's dissolution order to the Commission. Section 106(b) of the Mine Act, 30 U.S.C. § 816(b), provides that the Secretary may obtain review or enforcement of "any final order of the Commission" in a Court of Appeals (emphasis added). It is illogical to conclude that Congress authorized the Secretary to appeal any adverse order the Commission may issue in this case to a Court of Appeals, but did not

authorize the Secretary to first appeal the judge's adverse order in this case to the Commission.

If Mr. Gray had not filed his own petition for discretionary review, and if the Secretary did not have standing under Section 113(d)(2)(A)(i) to seek review of the judge's order by the Commission and the Commission therefore denied the Secretary's petition for discretionary review, the judge's order would in all likelihood have become a final Commission order under Section 113(d)(1) of the Act. 30 U.S.C. § 823(d)(1) ("The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless reviewed by the Commission . . . .").<sup>5</sup> Section 106(b) would then have authorized the Secretary to "obtain review . . . of [the] final order of the Commission" in a Court of Appeals. 30 U.S.C. § 816(b). It is illogical to conclude that Congress intended what essentially would be direct review of the judge's decision by a Court of Appeals in this case, but not in any other enforcement action under the Mine Act. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (the Mine Act establishes "a detailed

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<sup>5</sup> Although Section 113(d)(2)(B) of the Act authorizes the Commission to direct review sua sponte, it authorizes the Commission to do so only in very limited circumstances, and the Commission does so in very few cases.

structure" for reviewing enforcement actions including review by an administrative law judge, the Commission, and a Court of Appeals). Such an anomalous result, which would deny the Secretary the ability to appeal the case to the Commission and deny the Commission the ability to review the case before the Secretary appeals it to a Court of Appeals, would be at odds both with the Mine Act's detailed review structure and with general principles of judicial review. See Section 106(a) of the Act, which applies to proceedings under Section 106(b) (specifying that, absent extraordinary circumstances, any objection considered by the Court must first have been urged before the Commission); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

#### CONCLUSION

For the reasons discussed above, the Secretary requests that the Commission vacate the judge's order dissolving the order of temporary economic reinstatement

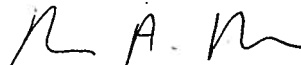
and dismissing the temporary reinstatement proceeding and hold that Section 105(c)(2) requires that a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under Section 105(c)(2) or by the miner under Section 105(c)(3).

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of  
the Secretary's Brief was served on this 4 day of  
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