FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 9, 20009

PETER J. PHILLIPS	:	
	:	
v.	:	Docket No. WEST 2008-1057-DM
	:	
A&S CONSTRUCTION COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). The case raises the question of whether an order of temporary reinstatement remains in effect after the Secretary of Labor has made a determination that facts revealed from an investigation by the Mine Safety and Health Administration ("MSHA") regarding a miner's discrimination complaint do not constitute a violation of section 105(c) of the Act.[1] Administrative Law Judge David Barbour concluded that

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[1] Section 105(c) provides in part:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act . . . .
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> (2) Any miner . . . 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 he 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

such an order does not remain in effect after MSHA's determination that no discrimination occurred. Accordingly, he dissolved his earlier order temporarily reinstating Peter J. Phillips, an employee of A&S Construction Company ("A&S"), and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ). Mr. Phillips filed a petition for discretionary review, challenging the judge's determination, which the Commission granted. For the reasons that follow, the judge's determination stands as if affirmed.

I.

Factual and Procedural Background

No factual record has been developed in this case. The procedural background of the case is set forth in the judge's decision and is briefly summarized here. Mr. Phillips was discharged by A&S on September 13, 2007. *Id.* at 1119. On February 11, 2008, Mr. Phillips filed a

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> 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, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. . . .
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> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. . . .

30 U.S.C. § 815(c).

complaint with MSHA alleging that his discharge was motivated by protected safety complaints in violation of section 105(c)(1) of the Mine Act. *Id.* MSHA conducted a preliminary special investigation of the complaint and determined that it was not frivolous. *Id.* The Secretary filed an application with the Commission seeking the temporary reinstatement of Mr. Phillips. *Id.* The parties agreed that a hearing on the Secretary's application was unnecessary and that Mr. Phillips should be economically reinstated.[2] *Id.* On June 6, 2008, the judge ordered Mr. Phillips' economic reinstatement. *Id.*

As part of the economic reinstatement, the judge ordered the Secretary to report on July 2, and August 1, 2008, regarding the status of her determination as to whether to bring a discrimination complaint on Mr. Phillips' behalf. Unpublished Order dated June 6, 2008. On each of those dates, counsel for the Secretary stated that the determination had not yet been made. 30 FMSHRC at 1120.

Approximately three months later, on November 10, 2008, the Commission received a notice that the Secretary did not intend to proceed under section 105(c)(2) of the Mine Act on Mr. Phillips' behalf. *Id.* Counsel for the Secretary stated that it was the Secretary's position that the order of temporary economic reinstatement must remain in effect until there is a final order of the Commission disposing of Mr. Phillips' case, including if Mr. Phillips decided to proceed on his own behalf under section 105(c)(3). *Id.* Attached to the Secretary's notice was a November 3, 2008, letter to Mr. Phillips from MSHA stating that MSHA had "determined that facts disclosed during the investigation do not constitute a violation of Section 105(c)" and that "[t]herefore, discrimination, within the confines of the Mine Act, did not occur." *Id.* (citations omitted).

On November 10, the Commission also received from A&S a motion to schedule a hearing to determine whether the order of temporary reinstatement should be rescinded in light of the Secretary's determination. *Id.* The judge scheduled the matter for oral argument.

Following oral argument, the judge determined that an order of temporary reinstatement is no longer viable after the Secretary has determined that the facts underlying a miner's complaint do not constitute a violation of section 105(c). *Id.* at 1121-23. The judge noted that the authority to issue an order of reinstatement arises under section 105(c)(2), which provides that such an order remains in effect "pending final order on the complaint." *Id.* at 1121. He explained that the complaint referred to is the miner's complaint that is investigated by the Secretary, and that a final order on the complaint is made when the Secretary determines that the facts alleged in the miner's complaint do not constitute a violation of section 105(c). *Id.* The judge reasoned that if a miner wishes to proceed under section 105(c)(3), the miner must file a new complaint, which is separate from the Secretary's application for temporary reinstatement.

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[2] The parties agreed that Mr. Phillips should receive the same pay and benefits he would have received prior to his discharge, as if he were still working. Unpublished Order dated June 6, 2008.

Id. at 1121-22. Accordingly, the judge dissolved the order of temporary reinstatement and dismissed the temporary reinstatement proceeding. *Id*. at 1123.

On December 15, 2008, Mr. Phillips filed a petition for discretionary review challenging the judge's order with the Commission. In addition, on that same date, Mr. Phillips filed an action on his own behalf under section 105(c)(3), which has been docketed as WEST 2009-286-DM, and assigned to Administrative Law Judge Richard Manning. On December 23, 2008, the Commission granted Mr. Phillips' petition and stayed the judge's order dissolving the order of temporary economic reinstatement, pending the Commission's decision. The Commission granted the Secretary leave to participate as amicus curiae.

_____A&S argues that the Commission should affirm the judge's order dissolving the temporary reinstatement order. A&S Br. at 5. It contends that the plain language of the Mine Act supports the judge's determination that "pending final order on the complaint" refers to the miner's complaint investigated by the Secretary, and that a final order on the complaint is made when the Secretary makes a determination of no discrimination. *Id.* at 9-10. Drawing an analogy to sections 105(a) and 105(b) of the Mine Act, A&S notes that a "final order" can arise from a notice issued by the Secretary under section 105 and need not be a final Commission order. A&S Resp. Br. at 3-5.

In her amicus brief, the Secretary contends that the judge erred in dissolving the temporary reinstatement order. S. Br. at 8-24. She contends that the plain meaning of section 105(c)(2) requires a temporary reinstatement order to remain in effect until there has been 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). *Id.* at 10-15, 24. The Secretary asserts that such a reading is also supported by the structure of the Mine Act, the legislative history, and the purpose of section 105(c)(2). *Id.* at 15-24. Finally, she states that 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 protection to miners contemplated by section 105(c)(2). *Id.* at 1, 23.

II.

Disposition

A. Analytical Framework

The question presented in this case is whether, under the provisions of section 105(c) of the Mine Act, a temporary reinstatement order remains in effect after the Secretary has determined that the allegations made by the miner in his or her discrimination complaint filed with MSHA do not constitute a violation of section 105(c)(1) of the Mine Act.

In considering this question of statutory construction, we are mindful that our first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

If a statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). Where the statute is silent or ambiguous, the agency's interpretation is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (citing *Chevron*, 467 U.S. at 843), *cert. denied*, 520 U.S. 1209 (1997); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Commissioners are evenly divided regarding whether the judge correctly determined that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. Commissioners Duffy and Young would affirm in result the judge's dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. Chairman Jordan and Commissioner Cohen would reverse the judge's order. The effect of a split decision is to allow the judge's order dissolving the temporary reinstatement order and dismissing the temporary reinstatement proceeding to stand, as if affirmed.[3] *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The separate opinions of the Commissioners follow.

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[3] Because the judge's order stands as if affirmed, we hereby lift the stay we issued on December 23, 2008. Accordingly, the order of temporary economic reinstatement is hereby dissolved and this temporary reinstatement proceeding is hereby dismissed.

B. Separate Opinions of the Commissioners

Commissioners Duffy and Young, in favor of affirming in result the judge's order:

1. Statutory Language

The authority to order temporary reinstatement is found in section 105(c)(2) of the Mine Act. Under the terms of section 105(c)(2), after the Secretary has filed an application stating that a miner's complaint of discrimination filed with MSHA was not frivolously brought, the Commission must order the "immediate reinstatement of the miner *pending final order on the complaint*." 30 U.S.C. § 815(c)(2) (emphasis added). In order to determine how long a temporary reinstatement order may permissibly remain in effect, we must consider what Congress meant by "final order" and "complaint." We first consider what is meant by "complaint."

Reading section 105(c)(2) in context, we conclude that the provision that a temporary reinstatement order remains in effect "pending final order on the complaint" clearly refers to the "complaints" filed under section 105(c)(2) and does not extend to the miner's "action" filed under section 105(c)(3). We base this conclusion on the usage of the term "complaint" in sections 105(c)(2) and 105(c)(3).

More specifically, section 105(c) refers to two complaints: the miner's complaint made to, and investigated by, the Secretary under section 105(c)(2); and the complaint filed by the Secretary with the Commission under section 105(c)(2) if, upon investigation, the Secretary determines that section 105(c)(1) has been violated.

The legitimacy of the miner's complaint is determined by the Secretary in a two-phased process. First, the Secretary determines whether the miner's complaint has been "frivolously brought" through an initial investigation. 30 U.S.C. § 815(c)(2). If the complaint is not frivolous, the Secretary files an application with the Commission to temporarily reinstate the miner. *Id.* The standard of the initial determination, which requires only that a miner's complaint must appear to have merit, is set low so that a miner may be reinstated while the Secretary conducts a more thorough investigation. *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000) ("The Mine Act's legislative history defines the 'not frivolously brought' standard as indicating that a miner's 'complaint appears to have merit.'") (citation omitted). Second, if, after further investigation, the Secretary determines that a violation of section 105(c) has occurred, the Secretary files a complaint with the Commission on the miner's behalf, which validates the initial finding of non-frivolousness and the miner's initial complaint of discrimination. In such circumstances, the Secretary is acting on the miner's complaint, which has merged with the Secretary's complaint. Temporary reinstatement continues until there is a final order on the miner's complaint as advanced by the Secretary in the section 105(c)(2) proceeding.

This contrasts with the terms of section 105(c)(3). Under that section, if the Secretary, upon investigation, determines that section 105(c)(1) has not been violated, the miner has the right to file a new, separate "action" charging discrimination with the Commission. Section 105(c)(3) also describes the time within which the Secretary must notify the miner of that negative determination as being within 90 days after the receipt "of a complaint filed under paragraph (2)." 30 U.S.C. § 815(c)(3). We conclude that Congress's reference to the documents filed under section 105(c)(2) as "complaints" and to the filing of an "action" under section 105(c)(3) was intentional.[1] *See Russello v. United States*, 464 U.S. 16, 23 (1983) (providing that where Congress uses a particular phrase in one section but omits it in another, the difference in language is presumed to be intentional). Therefore, based on the plain language of sections 105(c)(2) and (c)(3), a temporary reinstatement order remains in effect pending final order on the miner's complaint as advanced by the Secretary under section 105(c)(2), but does not extend to the pendency of an action under section 105(c)(3).

We next consider what is meant by the term "final order" in section 105(c)(2). The term "order" is used in section 105(c) to refer to action by the Commission in terms of issuing an order of temporary reinstatement; issuing an order affirming, modifying, or vacating the proposed order set forth in the Secretary's complaint; or issuing an order dismissing or sustaining a miner's charges under section 105(c)(3). In contrast, sections 105(c)(2) and 105(c)(3) consistently refer to the Secretary's conclusion regarding whether a violation of section 105(c)(1) had occurred as a "determination." Thus, the Secretary's conclusion regarding whether her investigation revealed discrimination is a "determination," not an order. In addition, although the Secretary may include a proposed order for the Commission's consideration in her complaint filed under section 105(c)(2), only the Commission may issue an "order" under section 105(c).[2]

Furthermore, we find it instructive that section 105(c) describes when a Commission order becomes "final." Sections 105(c)(2) and 105(c)(3) explicitly provide that the "order" issued by the Commission becomes "*final* 30 days after its issuance." 30 U.S.C. §§ 815(c)(2) & (c)(3) (emphasis added). Thus, it is clear from the language of the Act that "final order" in section 105(c)(2) refers to a final Commission order.

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[1] We note that section 105(c)(3) refers to a "complainant." We conclude that the term is used in section 105(c)(3) as a matter of convenience, in order to avoid repetition of the lengthy description of the filing party – that is, any "miner, representative of miners or applicant for employment" whose complaint to the Secretary may have resulted in an investigation under section 105(c)(2). 30 U.S.C. §§ 815(c)(1) & (c)(2).

[2] We reject the operator's analogy to sections 105(a) and 105(b) to support its argument that a "final order" may arise from a notice issued by the Secretary under section 105 and need not be a final Commission order. A&S Resp. Br. at 3-5. Sections 105(a) and 105(b) are not analogous because they explicitly provide that a notice "shall be deemed a final order of the Commission." 30 U.S.C. § 815(a) and (b). No such language is set forth in section 105(c).

Considering the language discussed above regarding what is meant by "complaint," with the language regarding what is meant by "final order," we conclude that a temporary reinstatement order remains effective pending the final order of the Commission on a complaint filed under section 105(c)(2). Therefore, if the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding.[3] If the Secretary determines that there has been discrimination and files a complaint on the miner's behalf, the temporary reinstatement order would remain in effect until the judge's decision disposing of the merits of the complaint, or the Commission's decision or court's decision, in the event of appeal, becomes final by the passage of 30 days.

Chairman Jordan argues that the terms of section 105(c)(2) mandate that temporary reinstatement remains in effect until there has been a final Commission order on the complaint the miner filed with the Secretary, and that such an order cannot issue in the temporary reinstatement proceeding. Slip op. at 17-18. We cannot agree with such reasoning as it proves too much. While the miner is, as Chairman Jordan states, "entitled" to file an action pursuant to section 105(c)(3) when the Secretary refuses to file a 105(c)(2) discrimination claim on his behalf, the miner is by no means required to do so, and may chose not to file such an action. Nevertheless, under Chairman Jordan's reading of the statute, if temporary reinstatement had been previously ordered, it could not be dissolved when a miner chooses not to proceed under section 105(c)(3) because there was and never will be a Commission "final order" on the miner's discrimination complaint filed with MSHA. We cannot agree that Congress intended such a result, and thus we reject that interpretation in favor of an one much more in keeping with how temporary reinstatement under section 105(c)(2) has worked in practice – it remains in place only as long as the Secretary is investigating and pursuing the miner's claim of discrimination.[4]

We are not troubled by concluding that a final order issued by the judge dissolving temporary reinstatement rests on a determination by the Secretary that there has been no violation of section 105(c), rather than on the judge's findings of fact developed from a record during a hearing. The Secretary was given authority by Congress to determine as an initial matter whether a violation of section 105(c)(1) has occurred, as is evident by statutory language that (1) requires the miner to file his or her complaint with the Secretary, and not with the Commission,

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[3] This was, in fact, Commission procedure for more than 27 years. *See* n.8, *infra*.

[4] We cannot ignore the significance under section 105(c)(2) of the Secretary's refusal to file her complaint with the Commission, as such a complaint is an absolute prerequisite to further Commission action, including of course the issuance of any "final order" in the proceeding, under that standard. Because the Secretary's refusal to go forward and file such a complaint prevents the Commission from acting on a discrimination complaint under section 105(c)(2), it only makes sense to view an order dissolving temporary reinstatement under section 105(c)(2) as the "final order" referenced in that provision.

(2) requires the Secretary to investigate that complaint "as [she] deems appropriate,"[5] and (3) requires the Secretary to file with the Commission a complaint on behalf of the complaining miner, applicant for employment or representative of miners alleging discrimination and proposing an order "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated." 30 U.S.C. § 815(c)(2). If, however, the Secretary determines that no violation has occurred after administrative investigation and evaluation, the miner is still entitled to seek a hearing in a section 105(c)(3) proceeding.

In fact, the language of section 105(c)(2) makes clear that the Commission is required to afford the opportunity for a hearing and issue an order based on findings of fact regarding the allegations of discrimination only in circumstances in which the Secretary has determined, upon further investigation, that a violation of section 105(c) has occurred. Under section 105(c)(2), the Commission must "afford an opportunity for a hearing . . . and thereafter . . . issue an order, based upon findings of fact, affirming, modifying, or vacating *the Secretary's proposed order*, or directing other appropriate relief." 30 U.S.C. § 815(c)(2) (emphasis added). The Secretary's proposed order is only before the Commission in circumstances in which the Secretary has filed a complaint after determining that her investigation reveals a violation of section 105(c).

Thus, it is apparent from the language of the statute that Congress intended a two-track system for discrimination complaints under the Mine Act. Under Section 105(c)(2), the complaint to the Secretary is merged into, and subsumed by, the Secretary's own complaint for redress of the alleged discrimination. A complainant is required to bring the issue to the Secretary and may not initiate an action with the Commission. In the event the Secretary finds that the Act may have been violated, it is her obligation to file a complaint with the Commission. There is clear continuity of action, and the "complaint" upon which the order for temporary reinstatement is based is the same "complaint" submitted by the Secretary.[6] The Secretary in that instance is the advocate for both the miner's private rights and the public interest.

Conversely, if the Secretary finds that the Act was not violated, she has made a determination with legal effect and consequences. As the Act makes clear, a person whose

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[5] The investigation by the Secretary is critical to vindicating public interest in whether the Mine Act has been violated. *See Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 545 (April 1991) ("[T]he statutory scheme provides to miners a full administrative investigation and evaluation of an allegation of discrimination.").

[6] We note that while the Commission is required to issue an order "affirming, modifying, or vacating the Secretary's proposed order" under section 105(c)(2), the Commission is required under section 105(c)(3) to issue "an order, based upon findings of fact, dismissing or sustaining the complainant's charges." 30 U.S.C. §§ 815(c)(2) & (c)(3). The separate grounds that must serve as the basis for the Commission's orders under sections 105(c)(2) and 105(c)(3) do not support the Secretary's contention that the miner's discrimination complaint filed with MSHA is the basis for the Commission's order under both sections. S. Br. at 12, 24.

complaint is investigated and found to be unsupported may proceed, but by "fil[ing] an action *in his own behalf* before the Commission." 30 U.S.C. § 815(c)(3) (emphasis added). This is necessary because once the Secretary has determined that a violation has not occurred, the original complaint – which was made to the Secretary, and not to the Commission – has no continuing legal status. A person wishing to bring the issues contained therein before the Commission must therefore initiate a new action.

In that context, it is notable that section 105(c)(2) expressly provides for temporary reinstatement, while section 105(c)(3) does not. We agree with the judge's determination that the inclusion of this remedy in one subsection and omission in the other is presumptively intentional. *See Russello v. United States*, 464 U.S. at 23. While temporary reinstatement may have been imposed on a finding that the complaint was not frivolously made, it is important to remember that this early determination is made before the Secretary has conducted the investigation commanded by the Mine Act. At the conclusion of the investigation, the Secretary must decide whether or not the Act has been violated. We rightly presume that the Secretary has faithfully performed her duty and, while that does not preclude the possibility that a violation of the Act may yet be found, it certainly stands in sharp contrast to the circumstances present when the initial complaint is filed, before there has been any exposition of the issue.

2. Legislative History and Statutory Structure

The rationale for temporary reinstatement is evident from changes made to the anti-discrimination provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act"). Under the Coal Act, a miner was responsible for pursuing his own discrimination case and filed the case at his own expense with his own counsel. *See* 30 U.S.C. § 820(b)(2) (1976) (amended 1977). Temporary reinstatement was not provided for under the Coal Act. Under section 105(c)(2) of the Mine Act, however, the Secretary has the exclusive duty to conduct the initial investigation, and retains effective legal control over the issues when she brings an action on a miner's behalf. Notwithstanding that the Secretary is directed in the Mine Act to complete her investigation within 90 days, Congress feared that a prolonged investigation under section 105(c)(2) of the Mine Act would impose an economic hardship on the miner since, unlike under the Coal Act, the miner was not in charge of his or her own case. To rectify the problem, Congress developed the remedy of temporary reinstatement in order to protect the miner from bureaucratic delay.

Such reasons justifying temporary reinstatement do not apply in a section 105(c)(3) proceeding under the Mine Act. In a section 105(c)(3) proceeding, the miner brings his own action at his own expense and is in charge of his case. Miners proceeding under section 105(c)(3) of the Mine Act are in much the same position they were in under the Coal Act. Under those circumstances, the need to account for harm caused by any bureaucratic delay does not exist.

This reading of the statutory language is supported by the Conference Report pertaining to section 105(c) of the Mine Act. The Conference Report provides in part:

> To protect miners from the adverse and chilling effect of loss of employment while such matters are being investigated, the Senate bill provided that if the Secretary determined that any such complaint was not frivolously brought, the Secretary seek temporary reinstatement of the complaining miner pending final outcome of the investigation and the Commission order such reinstatement, after expedited proceedings. The House amendment contained no such provision.
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> The Senate bill provided that upon completion of the investigation, if the Secretary found that there had been such discrimination, he immediately file a complaint with the Commission, with copies to the complaining party and the violator. The Commission, after affording the parties an opportunity for a hearing, could order appropriate relief . . . .
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> Under the Senate bill, a complaining party could, within 30 days of an adverse determination by the Secretary, file an action with the Commission on his own behalf. . . .
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> The conference substitute conforms to the Senate bill . . . .

S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977* ("*Legis. Hist.*"), at 1330-31 (emphases added). Thus, the Conference Report reveals that temporary reinstatement was a remedy fashioned to protect miners from the adverse effect of loss of employment during the Secretary's investigation. In addition, the Conference Report distinguishes between the initiating documents in section 105(c)(2) as "complaints," and the initiating document under section 105(c)(3) as an "action."

As the judge reasoned, the remedial provisions of sections 105(c)(2) and 105(c)(3) represent a balancing of interests by Congress. 30 FMSHRC at 1122. By providing temporary reinstatement under section 105(c)(2), Congress determined that operators should bear the greater economic burden during her investigation, and continuing once the Secretary has concluded that a miner's discrimination complaint has merit. However, if the Secretary determines that the miner's discrimination complaint does not have merit, i.e., that a violation of the Act has not

occurred, the balance would tip in favor of the operator's interest in controlling its workforce.[7] As noted by the judge, the Eleventh Circuit stated that deprivation of an employer's right to control the makeup of its workforce is only a "*temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor." *Jim Walter Res. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990) (emphasis in original).

Our reading of the Mine Act is also consistent with the Commission's historic reading of the statute, as embodied in its former procedural rule pertaining to temporary reinstatement. Rule 45(g) formerly provided that, "If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement." 29 C.F.R. § 2700.45(g) (2005). The sentence requiring the judge to dissolve the order of reinstatement was in place from the inception of the Commission's rule implementing the temporary reinstatement provisions of the Mine Act in 1979 and remained unchanged until the Commission's rulemaking in 2006.[8] In the absence of any compelling contrary argument, we are reluctant to overturn an interpretation which existed without challenge for almost 30 years.

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[7] We note that section 105(c)(3) proceedings can be lengthy in duration. *See, e.g., Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (Aug. 1990) (passage of approximately four-and-a-half years between the filing of an action by miner under section 105(c)(3) and issuance of the Commission decision). The duration can be increased by procedural delays if the miner is proceeding without benefit of counsel. *See, e.g., Jaxun v. Asarco, LLC*, 29 FMSHRC 616, 617-21 (Aug. 2007); 31 FMSHRC 631 (May 2009) (ALJ) (passage of approximately three years between the filing of a 105(c)(3) action by an unrepresented miner and the issuance of the Commission decision disposing of merits). As a practical matter, if a miner remains temporarily reinstated during a section 105(c)(3) proceeding, there is little incentive for the miner to advance the proceeding expeditiously.

[8] On June 29, 1979, the Commission adopted final procedural rules that included Rule 44(b), entitled, "Dissolution of order," which provided in part, "If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement." 44 Fed. Reg. 38226, 38231 (June 29, 1979). The provisions of Rule 44(b) were later set forth in Rule 45(g), 29 C.F.R. § 2700.45(g). In August 2006, the Commission revised Rule 45(g) to delete the requirement that the judge dissolve the order of temporary reinstatement after the Secretary has made a determination of no discrimination. 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). In the preamble, the Commission explained that the deletion "leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3)." *Id.* at 44199.

3. Conclusion

In sum, we conclude that the language of sections 105(c)(2) and 105(c)(3) and relevant legislative history demonstrate that Congress directly spoke to the issue in this case: a temporary reinstatement order may not remain in effect after the Secretary has made a determination that no discrimination has occurred, and a temporary reinstatement order may not remain in effect during a section 105(c)(3) proceeding.

Even if the Act were silent or ambiguous on the question at issue, however, we would reach the same conclusion. The Secretary (S. Br. at 23), along with Commissioner Cohen, would have us defer to the Secretary's interpretation of the Mine Act, but we fail to see how the Secretary is owed deference on the question of whether temporary reinstatement should continue after the Secretary has made a determination of no discrimination. Deference under *Chevron II* is owed to an agency's interpretation when the statutory provision being interpreted is one the agency is "charged with administering." *Energy West*, 40 F.3d at 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The Secretary, by declining to pursue a miner's claim of discrimination, essentially removes herself from the case.

Once that occurs in future cases,[9] it will certainly not be the Secretary that is "administering" the Mine Act. The question of whether the miner was discriminated against can then only take place in a section 105(c)(3) proceeding, a proceeding that is essentially a private right of action. If any agency will be said to be "administering" the Mine Act at that point, it would be this Commission, which, among other things, will be charged with interpreting the discrimination provisions of section 105(c) to determine whether discrimination occurred, the Secretary's determination notwithstanding. Consequently, we look not to the Secretary's interpretation of section 105(c) to see whether the temporary reinstatement protections in section 105(c)(2) carry forward into section 105(c)(3) proceedings, but rather our own.[10]

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[9] In this case the Secretary has chosen to appear as an amicus to give her views on the legal question this case presents. Once the issue is resolved, we highly doubt the Secretary will be making appearances as an amicus in other section 105(c)(3) proceedings, given that such proceedings take place only after the Secretary has determined that there was no discrimination.

[10] Commissioner Cohen would nevertheless have the Commission defer to the Secretary's interpretation of section 105(c), because the Secretary administers the overall Mine Act statutory scheme. Slip op. at 28. We cannot agree, because according such deference would run counter to the plain meaning of section 105(c). First, under the terms of that section, the Secretary discharges her responsibility when she determines that no discrimination occurred. Second, while the Secretary is free to interpret section 105(c)(1) to conclude under section 105(c)(2) that an operator's action did not constitute discrimination, the very fact that Congress provided in section 105(c)(3) that the Commission could come to the opposite conclusion, and that the operator would be then subject to penalties for engaging in discrimination, suggests that,

Commissioner Cohen asserts that we have mischaracterized the Secretary's role in this case. However, his description of the procedure under section 105(c), slip op. at 29-30, misstates the process by which the Secretary relinquishes her involvement in the case and simplifies the problem before us by assuming away the issue. Commissioner Cohen says that "[t]he fact that the Secretary has determined that *a miner has not demonstrated discrimination* in a particular case does not change the Secretary's interest in ensuring that miners who file section 105(c)(3) actions are entitled, as a class, to continue temporary reinstatement until a final order of the Commission." *Id.* at 29 (emphasis added). First of all, it is not the miner's responsibility to "demonstrate discrimination." Rather, it is the *Secretary's* duty to initiate an appropriate investigation to determine whether discrimination has occurred. 30 U.S.C. § 815(c)(2). Second, when the Secretary has made a determination that there has been no discrimination, there is no basis for her interest in continuing temporary reinstatement. The presumption of discrimination that underlies temporary reinstatement cannot exist in a section 105(c)(3) proceeding because the fact of violation is the ultimate issue we are called upon to decide. Third, Commissioner Cohen's assumption runs counter to the procedural posture of every section 105(c)(3) case brought before us. In that regard, we note that the end result of the investigation required by section 105(c)(2) is a finding by the Secretary either that (1) a violation of the law has occurred, in which case the procedure and her duty are outlined in the subsection, or (2) a violation has not occurred, in which case the Secretary, through her own actions and determination, is no longer a party in the case. Thus, the Secretary *must* initiate an investigation and *must* pursue the miner's complaint if she believes the anti-discrimination provisions of the Act have been violated and may only elect, in her sole discretion as the "enforcer of the Act," not to pursue the Miner's complaint when she has determined that the provisions of the Act have not been violated.

In sum, the mere fact that the Secretary appears before us as an amicus does not determine the weight we afford her view; rather, it is the fact that she attained that status through what we must presume to be a scrupulous and diligent exercise of her authority, leading to a finding that the operator did not discriminate against the complainant and that it would therefore be inappropriate to continue with a public prosecution of the complaint. The cases cited by Commissioner Cohen, slip op. at 30 n.4, conferring deference or weight to an agency's interpretation, even as a nonparty, do not involve the agency's deliberate, negative determination on the question at issue and are therefore distinguishable.

Finally, even if we were to consider deferring to the Secretary's interpretation of sections 105(c)(2) and 105(c)(3), we would conclude that her interpretation is unreasonable because it is inconsistent with the statutory language, relevant legislative history, and the Commission's own experience with section 105(c)(3) cases, as discussed above. *See Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 393 (3d Cir. 1992) ("[W]e cannot conclude that the Secretary's interpretation is reasonable in this case insofar as it conflicts with the language of the statute."); *cf. Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 920 (D.C. Cir. 1997) (finding Secretary's

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in the area of discrimination proceedings, the Commission is not obligated to defer to the Secretary.

interpretation reasonable where it was consistent with the statutory language, legislative history and legislative purpose).

For the reasons discussed above, we would affirm in result the judge's dissolution of the order of temporary economic reinstatement and his dismissal of the temporary reinstatement proceeding.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

Chairman Jordan, in favor of reversing the Judge's order:

Under the Mine Act, a miner's temporary reinstatement remains in effect "pending final order on the complaint." 30 U.S.C. § 815(c)(2). Because the plain language of the statute mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, I would reverse the judge's order dissolving the miner's temporary reinstatement in this case.

A miner who alleges an illegal discharge may obtain temporary reinstatement in accordance with section 105(c), which provides in relevant part:

> [a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall . . . cause such investigation to be made as he 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*.

30 U.S.C. § 815(c)(2) (emphasis added).

Upon completion of her investigation, the Secretary makes a determination as to whether discrimination occurred. If the Secretary determines that the Act was violated, she must "immediately file a complaint with the Commission." *Id.* If the Secretary concludes that no violation occurred, she must notify the miner of that fact and the miner, pursuant to section 105(c)(3), has the right to "file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3). The issue in this case is whether the temporary reinstatement remains in effect while the miner proceeds on his own behalf to litigate his or her discrimination claim before the Commission.

As in other cases involving statutory interpretation, we must determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, *Inc*., 467 U.S. 837, 842 (1984). The Supreme Court emphasized in *Chevron* that, "[i]f the intent of Congress is clear, 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." *Id*. at 842-43. As demonstrated below, Congress intended the temporary reinstatement of a miner to continue until there is a final Commission order on the merits of the miner's claim that he or she was discriminated against because of safety activity.

Section 105(c)(2) provides for temporary reinstatement "pending final order on the complaint." The Secretary's decision not to go forward on the miner's discrimination case is not a final order on the complaint. On this point I agree with my affirming colleagues, who state that "only the Commission may issue an 'order' under section 105(c)." Slip op. at 7. Pursuant to the split enforcement scheme envisioned by Congress, it is the Secretary who investigates miners' complaints of discrimination and issues proposed orders, but it is only the adjudicatory body – the Commission – that issues final orders pertaining to the litigation. *See* 30 U.S.C. § 815(c)(2) and (c)(3). The word "order" appears in section 105(c) nine times, always referring to a Commission order (either an order granting temporary reinstatement, an order disposing of a complaint filed by the Secretary on behalf of a miner under section 105(c)(2), or an order disposing of an action filed by a miner under section 105(c)(3)). As my colleagues correctly point out, "the Secretary's conclusion regarding whether her investigation revealed discrimination is a 'determination,' not an order." Slip op. at 7.

The Mine Act sets forth the method by which the Commission issues a final order in a discrimination proceeding. If, after conducting her investigation, the Secretary decides that the Act has been violated, pursuant to section 105(c)(2) she is required to file a complaint with the Commission and to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Commission, after affording an opportunity for a hearing, is required to "issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief." *Id*. The Commission's order "become[s] final 30 days after its issuance." *Id*.

If the Secretary notifies the miner of her determination that no violation of section 105(c)(1) occurred, "the complainant," pursuant to section 105(c)(3), is entitled to "file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3). The Commission is required to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate. . . ." *Id.* This Commission order "become[s] final 30 days after its issuance." *Id*.

Thus, in accordance with the plain meaning of the statute, there is no "final order on the complaint" until the Commission issues an order which either affirms, modifies, or vacates the Secretary's proposed order in accordance with section 105(c)(2), or dismisses or sustains the complainant's charges in accordance with section 105(c)(3). It is clear that a final order in either case must be based on the Commission's findings of fact and the Commission's determination of whether discriminatory conduct in violation of section 105(c)(1) occurred.[1]

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[1] My affirming colleagues contend that if the miner does not choose to go forward under section 105(c)(3), under my view of the statutory language there would never be a Commission final order on the discrimination complaint. Slip op. at 8. Since temporary reinstatement remains in effect "pending a final order on the complaint," the temporary reinstatement could never be dissolved. My colleagues claim this is not what Congress intended. I agree. A

A miner who has been granted temporary reinstatement is entitled to remain in that status "pending final order on the complaint." 30 U.S.C. § 815(c)(2). There has been no final Commission order on Mr. Phillips' complaint, and, therefore, the statutory prerequisite that would justify dissolution of Mr. Phillips' temporary reinstatement order is lacking. Although my affirming colleagues appear to treat it as such, the judge's November 26, 2008 order dissolving Mr. Phillips' temporary reinstatement cannot constitute the prerequisite "final order on the complaint." To consider it in this manner would amount to a ruling that the final order on the complaint, necessary to dissolve the temporary reinstatement, is the order dissolving the temporary reinstatement.

The judge did not dissolve Mr. Phillips' temporary reinstatement because of a final Commission order. The judge never considered the merits of Mr. Phillips' claim. The sole basis of the judge's decision was the Secretary's determination that a violation of section 105(c) had not occurred, and her notification that she would not be filing a complaint on Mr. Phillips' behalf. According to the judge: "A final order on the miner's complaint is reached when the Secretary advises the miner, as she has done in this proceeding, that '[y]our complaint of discrimination under Section 105(c) has been investigated . . . [and] MSHA has determined that facts disclosed during the investigation . . . do not constitute a violation of section 105(c).'" 30 FMSHRC 1119, 1121 (Nov. 2008) (ALJ).

Having agreed that the Secretary's determination regarding the results of her investigation does not constitute a final order under section 105(c), ("the Secretary's conclusion . . . is a 'determination' not an order," slip op. at 7), my affirming colleagues nevertheless proceed to make the duration of the temporary reinstatement contingent on just this determination. Ignoring the statute's plain language, they conclude: "[I]f the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding." Slip op. at 8. The statute requires a final order from the Commission, not a determination from the Secretary, in order to dissolve a grant of temporary reinstatement. My colleagues fail to realize that the judge lacked the necessary statutory prerequisite for dissolving the temporary reinstatement because no final order had been issued on Mr. Phillips' complaint.

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reinstatement that can never be dissolved can hardly be considered temporary. The requirement that temporary reinstatement remain in effect "pending final order on the complaint" necessarily implies that there is a possibility of obtaining a Commission final order on the discrimination complaint under section 105(c)(2) or 105(c)(3). In the event the miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable.

My colleagues have been led astray by their narrow focus on section 105(c)(3)'s reference to the complainant's right to file an "action" in his own behalf before the Commission.[2] They consider the reference to filing an "action" under section 105(c)(3) as an indication that there no longer exists a complaint that can be the subject of a Commission order. Since temporary reinstatement stays in effect pending the Commission's "final order on the complaint," initiating an "action" under section 105(c)(3) must, in their view, extinguish the miner's temporary reinstatement. My colleagues' position is untenable in light of the pertinent statutory language and the Commission case law.

Much as my colleagues would like to erect an impenetrable analytical barrier between the miner's initial filing of a discrimination complaint to the Secretary and the miner's subsequent action before the Commission, neither the statutory language nor the Commission case law permit them to do so. Although section 105(c)(3) refers to an "action" before the Commission, the person who files this action is referred to as the "*complainant.*" 30 U.S.C. § 815(c)(3) (emphasis added). Thereafter, the Commission is instructed to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining "the *complainant's*" charges." *Id.* (emphasis added). The reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the "complainant."

Commission rulings have made that fact clear. In *Hatfield v. Colquest Energy, Inc.,* 13 FMSHRC 544 (Apr. 1991), the operator argued that the complainant's amended filing pursuant to section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else "the statutory prerequisites for a *complaint* pursuant to § 105(c)(3) have not been met." *Id.* at 546 (emphasis added). *Accord Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp*., 19 FMSHRC 1009 (June 1997). The Commission's reference to the section 105(c)(3) proceeding as a "complaint" in *Hatfield* was not an isolated occurrence. In *Roland v. Sec'y of Labor*, 7 FMSHRC 630 (May 1985), the Commission pointed out that "[s]hould the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3) . . . may file a discrimination *complaint* on his own behalf before the Commission." 7 FMSHRC at 635 (emphasis added).

Resort to the legislative history of the Mine Act merely underscores the strained nature of my colleagues' reading of the statute. Citing the Conference Report language that "[u]nder the Senate bill, a complaining party could, within 30 days of an adverse determination by the

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[2] Section 105(c)(3) states that "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

Secretary file *an action* with the Commission on his own behalf," slip op. at 11 (emphasis added), my colleagues omit the sentence that follows, which states that:

> The Commission must afford an opportunity for a hearing, and thereafter, issue an order, based upon findings of fact, dismissing or sustaining *the complaint*, and granting such relief as may be appropriate. If the *complainant* prevailed in an action which he brought himself after the Secretary's determination, the Commission order would require that the violator pay all expenses reasonably incurred by the *complainant* in bringing the action.

S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1330 (1978) ("*Legis. Hist.*") (emphases added).

The Commission's Procedural Rules also demonstrate that the significance my colleagues place on the use of the word "action" in section 105(c)(3) (as opposed to the word "complaint" in section 105(c)(2)) is misplaced. Our rule clearly contemplates that a miner filing a claim under section 105(c)(3) does so by filing a "complaint." Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), states:

> A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

Additional language in the Mine Act refutes the contention that Congress considered claims brought under section 105(c)(2) and (c)(3) to be such entirely separate proceedings, that they deemed it appropriate to provide temporary reinstatement pursuant to only one of them. Section 105(c)(3) states that "[p]roceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. § 815(c)(3). This mandate, however, undeniably applies to section 105(c)(2) actions as well (otherwise the reference to the Secretary makes no sense). Indeed, the Commission has interpreted it in this manner. *See Sec'y of Labor on behalf of Noe v. J & C Mining, LLC*, 22 FMSHRC 705, 706 (June 2000) (stating, in a section 105(c)(2) case, that "the Commission will be expediting these proceedings as it is statutorily required to do"). Likewise, section 105(c)(3) refers to Commission orders issued "under this paragraph" being "subject to judicial review in accordance with section 106." 30 U.S.C. § 815(c)(3). Clearly, however, a Commission order issued under section 105(c)(2) is also subject to judicial review.

My affirming colleagues contend that temporary reinstatement is designed to protect miners "from the adverse effect of loss of employment during the Secretary's investigation."

Slip op. at 11. Not only is this position contrary to the statutory language (which provides for temporary reinstatement pending final order on the complaint, not pending the resolution of the Secretary's investigation), the literal application of this principle would result in the dissolution of the temporary reinstatement order upon conclusion of the Secretary's investigation, even if the Secretary determines that section 105(c)(1) was violated. That the temporary reinstatement provision was hardly viewed in the cramped fashion suggested by my colleagues is evidenced by the Senate Report, wherein the drafters explained that:

> The Committee feels that this 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 or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 37, *Legis. Hist*. at 625.

Because, under section 105(c)(3), a miner "brings his own action at his own expense and is in charge of his case," slip op. at 10, my affirming colleagues have concluded that the need to account for harm due to "bureaucratic delay" does not exist. *Id.* Underlying this statement is the unsubstantiated notion that somehow a miner in a section 105(c)(3) proceeding will be able to control how quickly his or her case is resolved. Their own reference to a section 105(c)(3) case that took four-and-a-half years to decide belies this contention. Slip op. at 11-12 n.7 (citing *Price v. Monterey Coal Co.,* 12 FMSHRC 1505 (Aug. 1990)). My affirming colleagues are concerned that, "if a miner remains temporarily reinstated during a section 105(c)(3) proceeding there is little incentive for the miner to advance the proceeding expeditiously." Slip op. at 12 n.7. Of course, the corollary to this concern is that when the complainant miner is not temporarily reinstated, there is every incentive for the respondent mine operator to delay the section 105(c)(3) proceeding. While both scenarios are problematic, the appropriate question for us to consider is, which one caused Congress greater concern?

By making temporary reinstatement dependent on a determination that the miner's discrimination claim is "not frivolously brought," 30 U.S.C. § 815(c)(2), 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 Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990).[3] While the employer's loss of its ability to control its

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[3] My colleagues invoke the Court's observation that "deprivation of an employer's right to control the makeup of its workforce is only a "*temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or by a decision on the merits in the employer's favor." Slip op. at 12 (citing *Jim Walter*, 920 F.2d at 748 n.11 (emphasis in original)). However, it appears the Court's comment was prompted by prior Commission Rule 44(f), 29 C.F.R. § 2700.44(f) (subsequently re-numbered as Commission Rule 45(g), 29 C.F.R. § 2700.45(g)), *id.* at 741, rather than by an independent interpretation of the statute.

workforce is not to be taken lightly, the legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to 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, at 36, *Legis. Hist*. at 624. Recognizing the important role that individual miners play in ensuring a safe and healthy working environment, Congress was also acutely aware that "mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity." S. Rep. No. 95-181, at 35, *Legis. Hist*. at 623. The temporary reinstatement provision was viewed as "an essential protection" for miners who might not be able "to suffer even a short period of unemployment." S. Rep. No. 95-181, at 37, *Legis. Hist*. at 625. This Congressional balancing of equities applies equally to a section 105(c)(2) case brought by the Secretary, and to a section 105(c)(3) claim, brought by the miner on his own behalf after the Secretary declines to go forward.

Temporary reinstatement is imposed pursuant to a Commission order that the miner's discrimination claim was not frivolously made. The Secretary's decision not to proceed with the discrimination complaint does not transform that complaint into a frivolous action. To hold otherwise would require us to conclude that Congress implemented a statutory provision (section 105(c)(3) of the Mine Act) devoted to the litigation of frivolous claims. To the contrary, not only does the Secretary's negative determination not reduce the complaint to a frivolous claim, the Commission has explicitly acknowledged that it "may find discrimination where the Secretary has not" and that "the Secretary's determination not to prosecute [a] discrimination case . . . is not probative of whether [the operator] discriminated against the miners." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1117 (July 1995). Indeed, there have been numerous cases in which the Secretary declined to file a complaint and the miner successfully proceeded on his own behalf. *See, e.g.*, *Ross v. Shamrock Coal Co.,* 15 FMSHRC 972, 974-76 (June 1993); *Meek v. Essroc Corp*., 15 FMSHRC 606, 612-13 (Apr. 1993)); *Womack v. Graymont Western US, Inc.*, 25 FMSHRC 235, 261-63 (May 2003) (ALJ); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (Feb. 1999) (ALJ); *Paul v. Newmont Gold Co.*, 18 FMSHRC 181, 191 (Feb. 1996) (ALJ).

Consequently, since the Secretary's decision not to go forward on Mr. Phillips' behalf does not vitiate the previous non-frivolous finding regarding his complaint, the temporary reinstatement, which is based on that nonfrivolous finding, must remain in effect "pending final order on the complaint."[4] Balancing the equities does not require the opposite conclusion. Requiring the temporary reinstatement to remain in effect pending the miner's litigation under section 105(c)(3) is no more inequitable than the Commission's determination that a temporary reinstatement order remains in effect pending appeal to the Commission, notwithstanding the fact that a Commission judge concluded, subsequent to a hearing on the merits, that no discrimination

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[4] In *Jim Walter,* the Eleventh Circuit explained that the basis for a temporary reinstatement order and the underlying merits of a miner's claim are "conceptually different," and it ruled that the temporary reinstatement order was a collateral order completely separate from the merits of the action. 920 F.2d at 744.

occurred. *See Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999). In *Bernardyn*, the Commission recognized that the statutory language, providing for temporary reinstatement "pending final determination on the merits of the complaint," required this result. 21 FMSHRC at 950.[5]

In conclusion, in passing the Mine Act, Congress created two different mechanisms for bringing discrimination complaints, under which either the Secretary or the claimant may prosecute the case. Under either procedure, the same underlying complaint (filed initially with MSHA) is at issue. The statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on this complaint. Here, there has been no such final order on the miner's complaint. Accordingly, I would reverse the judge's decision.

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Mary Lu Jordan, Chairman

[5] I recognize that in *Bernardyn*, the Commission refers to prior Procedural Rule 45(g), 29 C.F.R. § 2700.45(g) (1999), which provided for dissolution of a temporary reinstatement order if the Secretary determined that discrimination did not occur, as a "gap filling provision designed to deal with a situation not addressed by the statute – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)." 21 FMSHRC at 950. I believe this comment, which is dictum, to be incorrect since I have concluded that the referenced situation is addressed by the statutory language "pending final order on the complaint" and requires the maintenance of temporary reinstatement until there is a final determination by the Commission on the merits of the miner's claim of discrimination.

Commissioner Cohen, in favor of reversing the Judge's order:

This case presents the question of whether a temporary reinstatement order remains in effect after the Secretary determines that the anti-discrimination provisions of the Mine Act, 30 U.S.C. § 815(c), have not been violated. The relevant Mine Act language states that, after a determination that a discrimination complaint was not "frivolously brought," the Commission "shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The resolution of this issue involves identifying the proper interpretation of "final order" and "complaint" in this section of the statute. Although I agree with my colleague, Chairman Jordan, that a temporary reinstatement order stays in effect pending resolution of a discrimination complaint filed with the Mine Safety and Health Administration ("MSHA"), I reach this conclusion by way of a different analysis, and therefore write separately, as I find that the statutory language at issue is ambiguous.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).[1] If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Under *Chevron II*, deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The operator contends that the plain meaning of the Mine Act requires that the temporary reinstatement order be dissolved if the Secretary does not file a complaint on behalf of the miner. A & S Br. at 7. My colleagues Commissioners Duffy and Young agree with the operator. On the other hand, the Secretary asserts that the plain meaning of the statute mandates that a temporary reinstatement order remain in effect until the Commission issues a final order on the merits of the miner's underlying discrimination complaint. S. Br. at 10. My colleague Chairman Jordan agrees with the Secretary. The parties' insistence that the statutory language is clear, coupled

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[1] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

with their equally emphatic contentions proposing contradictory interpretations of that language, suggests that the Mine Act is actually ambiguous on this question.[2]

In order to determine whether Congress' intention as to the question at issue can be gleaned from the "plain meaning" of the statutory language, we employ the "traditional tools of statutory construction." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). These include examination of the statute's text, legislative history, and structure, as well as its purpose. *See Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). As the D.C. Circuit recognized in *Bell Atlantic*, a court utilizes the text, history, and purpose of a statute to determine whether they convey a plain meaning that *requires* a certain interpretation. *Id*. at 1049 (emphasis in original).

Statutory language is considered ambiguous if reasonable minds may differ as to its meaning, and when, as in this case, it is open to two or more constructions. 73 Am. Jur. 2d Statutes § 114. Consequently, we must determine "whether the language of [the] statute is susceptible to more than one natural meaning." *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir.

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[2] As one federal court judge declared, when wrestling with the meaning of a term in environmental law:

> Despite the fact that both parties argue that the meaning of "toxicity" is clear, they come to different conclusions as to whether [a particular chemical] meets the definition. . . . What emerges clearly from this dialogue between the parties is not the meaning of "toxicity," but that its meaning is both ambiguous and ill-defined.

The Fertilizer Institute v. Browner, No. CIV. A. 98-1067 (GK) 1999 WL 33521297, at *3 (D.D.C. Apr. 15, 1999); *see also Pugliese v. Pukka Dev., Inc.,* 550 F.3d 1299, 1304 (11th Cir. 2008) (ruling that although both parties agreed that statutory language was plain and unambiguous, and argued that plain meaning supported their different interpretations, this indicated ambiguity); *Toomer v. City Cab*, 443 F.3d 1191, 1194-95 (10th Cir. 2006) (holding that when both parties argued that a statutory term was unambiguous and urge different meanings that are clear from the statute's plain language, the statute was ambiguous with respect to that term); *Harris v. Sims Registry*, No. 00 C 3028, 2001 WL 78448, at *3 (N.D. Ill. Jan. 29, 2001) (finding that when both parties asserted that a statutory text was not ambiguous but their interpretations differed, the term created ambiguity). *But see* Symposium, "*Pernicious Ambiguity in Contracts and Statutes*," 79 Chicago-Kent L. Rev. 859, 867 (2004) (citing Justice Thomas' view that "[a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong" (citation omitted)); *John v. United States,* 247 F.3d 1032, 1041 (9th Cir. 2001) (stating that "statutory ambiguity cannot be determined by referring to the parties' interpretations of the statute. Of course their interpretations differ. That is why they are in court.").

2009) (citation omitted). Here, the parties differ strenuously as to the "plain meaning" of the statute's text, its structure, its legislative history, and its purpose.

As to the text, the parties disagree about the plain meaning of the words "final order" and "complaint" in the phrase "immediate reinstatement of the miner pending final order on the complaint" in section 105(c)(2), and offer several competing interpretations. The Secretary argues that the words refer to the Commission's final order on the miner's underlying complaint of discrimination. S. Br. at 10-15. A&S, echoing the judge, 30 FMSHRC at 1121, contends that the "final order" occurs when the Secretary's involvement ends, after the investigatory findings do not show a violation of section 105(c)(1). In its reply brief, A&S argues that a "final order" of the Commission can arise out of the Secretary's investigatory determination, just as a final order can arise out of an operator's failure to timely contest a proposed assessment by the Secretary under sections 105(a) and (b). A&S R. Br. at 3-5. A&S also states that the judge's order dismissing the case when the Secretary chose not to proceed constitutes a final order of the Commission. *Id.* at 4.

Likewise, my colleagues disagree as to the "plain meaning" of the text. Commissioners Duffy and Young assert that the textual language means that the temporary reinstatement order remains effective pending the Commission's final order on the miner's discrimination complaint to the Secretary under section 105(c)(2), and that this final order occurs when the judge, upon notification by the Secretary of a determination of no discrimination under section 105(c)(1), issues an order dissolving temporary reinstatement and dismissing the temporary reinstatement proceeding. Slip. op. at 8. On the other hand, Chairman Jordan agrees with the Secretary that the textual language refers to the Commission's final order disposing of the miner's complaint of discrimination to MSHA. Chairman Jordan disputes Commissioners Duffy and Young, arguing that the final order on which the dissolution of temporary reinstatement is predicated cannot be the order which itself dissolves temporary reinstatement. Slip op. at 18.

This brief summary of the different "plain meanings" which have been advanced in this case for the statutory text "reinstatement of the miner pending final order on the complaint" – most of which have at least some justification – illustrates that the text actually does not have a plain meaning.

Differences also emerge when the parties and my colleagues examine the structure of the statute. The Secretary argues that a finding that the complaint was not frivolously brought, which triggers temporary reinstatement under section 105(c)(2), is different from a determination that the substantive discrimination provisions of section 105(c)(1) were not violated. The determination that a substantive violation has not occurred must be made by the Commission, not the Secretary, and case law establishes that a violation may have occurred even though the Secretary declined to file a complaint. The Secretary further asserts that 105(c)(2) and 105(c)(3) actions before the Commission have the same relationship to the miner's underlying discrimination complaint. S. Br. at 15-21. However, following the reasoning of the judge, 30 FMSHRC at 1121-22, A&S argues that section 105(c)(2) and section 105(c)(3) embody different

kinds of complaints and procedures. Temporary reinstatement only occurs in the context of section 105(c)(2). Moreover, a miner does not face lengthy delays in a complaint under section 105(c)(3), which the statute requires to be "expedited." A&S Br. at 7-11. Similarly, Commissioners Duffy and Young describe a two-track system where the miner's "complaint" in section 105(c)(2) is distinctly different from the miner's "action" in section 105(c)(3). Temporary reinstatement applies in section 105(c)(2) but not in section 105(c)(3). Their opinion concludes that if the Secretary makes a determination of no discrimination, the miner's original complaint has no legal status, and the miner must initiate a new "action," distinct from his original "complaint." Slip op. at 6-7. However, Chairman Jordan contends that the section 105(c)(3) "action" is not inherently different from the section 105(c)(2) "complaint," because the statute describes the party bringing the section 105(c)(3) "action" as the "complainant,"which refers back to the miner's complaint under section 105(c)(2). She points out that the Commission's Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), refers to the "action" filed by a miner under section 105(c)(3) as a "discrimination complaint." Chairman Jordan also cites case law in which the Commission has held that the requirement in section 105(c)(3) that the proceedings be "expedited" also applies to cases before the Commission under section 105(c)(2). Slip op. at 20.

The parties and my colleagues also have different interpretations of the legislative history of the temporary reinstatement provision. The Secretary cites the Senate Report, which states that Congress intended 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, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 ("*Legis. Hist*."). The Secretary quotes the same report to the effect that upon determining that the complaint was not frivolously brought, she shall seek "an order of the Commission temporarily reinstating the complaining miner pending *final outcome* of the investigation *and complaint* . . . [as] an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Br. at 21-23 (citing S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis in Secretary's brief)). In contrast, Commissioners Duffy and Young cite the Conference Report, which states that the Conference Committee adopts the Senate version of the provision, which, according to the Conference Committee, provides that if the complaint was not frivolously brought, the Secretary shall "seek temporary reinstatement of the complaining miner pending the *final outcome of the investigation*." Slip op. at 11 (citing S. Conf. Rep. No. 95-461, at 52-53 (1977), reprinted in *Legis. Hist*. at 1330-31 (emphasis added)). Thus, the Conference Report referred to temporary reinstatement until completion of the investigation (if the Secretary did not find discrimination), while the Senate Report spoke of temporary reinstatement until the resolution of the entire complaint. The legislative history can be interpreted quite differently depending on which report is quoted.

The parties and my colleagues also interpret the purpose of the temporary reinstatement provision differently. The Secretary, S. Br. at 21-23, and Chairman Jordan, slip op. at 21-22,

emphasize the need to fully protect the miner who is unemployed because of alleged discrimination, and conclude that a viable allegation of discrimination continues past an adverse finding by the Secretary and until the conclusion of proceedings by the Commission. However, A&S, Br. at 8-9, and Commissioners Duffy and Young, slip op. at 11-12, echoing the decision of the judge, 30 FMSHRC at 1122-23, emphasize a balancing of the interests of the miner and the operator, which is best accomplished by limiting temporary reinstatement to the period of the Secretary's investigation if the investigation does not result in a finding of discrimination.

In view of these different and contrary interpretations of the statute's text, its structure, its legislative history, and its purpose, all set forth as having a "plain meaning" and all containing at least some plausibility, I have to conclude that in terms of the *Chevron I* analysis, the statute is ambiguous.

I also note that former Commission Procedural Rule 45(g), 29 C.F.R. § 2700.45(g) (1999), permitted the dissolution of a temporary reinstatement order upon the Secretary's decision not to proceed on the complaint. The Commission has described this as "a 'gap filling' provision designed to deal with a situation *not addressed by the statute* – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949-50 (Sept. 1999) (emphasis added). I fail to see how the statutory language can be considered plain when we have acknowledged that it pertained to a situation that Congress did not address.

Since the relevant statutory language is ambiguous, it is necessary under *Chevron II* to determine whether the Secretary's interpretation is reasonable and should be accorded deference. As demonstrated by the analysis of Chairman Jordan, I find that the Secretary's interpretation – that a temporary reinstatement order must remain in effect until there is a final Commission order on the miner's underlying discrimination complaint (whether it is litigated by the Secretary pursuant to section 105(c)(2) or by the miner under section 105(c)(3)) – is reasonable, and therefore it is entitled to deference. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

My other colleagues claim that deference to the Secretary's policy position is not appropriate in this case. They base this assertion on their view that the Secretary is not "charged with administering" section 105(c) after she makes a determination of no discrimination. Slip op. at 13. According to them, once the Secretary has made such a determination, "there is no basis for her interest in continuing temporary reinstatement." *Id*. at 14. This is due to the "presumption of discrimination that underlies temporary reinstatement [that] cannot exist in a section 105(c)(3) proceeding." *Id*. This position misapprehends the role of temporary reinstatement under the Mine Act, and the Secretary's interest in implementing it.

Commissioners Duffy and Young state that *Chevron* deference is owed to an agency interpretation "when the statutory *provision* being interpreted is one the agency is charged with

administering," slip op. at 13 (citing *Energy West*, 40 F.3d at 460) (emphasis added), which in turn cited to *Chevron*, 467 U.S. at 844. However, both the D.C. Circuit in *Energy West* and the Supreme Court in *Chevron*, did not parse an agency's statutory authority provision by provision when articulating the general principles underlying the deference doctrine, but instead spoke of "an agency's interpretation of the *statute* it is charged with administering," *Energy West,* 40 F.3d at 460 (emphasis added), and "an agency's construction of the *statute* which it administers," and the weight to be accorded to "an executive department's construction of a *statutory scheme*, *Chevron*, 467 U.S. 842, 844 (emphases added).

Moreover, my colleagues' are incorrect in stating that temporary reinstatement is predicated on a "presumption of discrimination." The statutory language does not, in any way, describe a "presumption of discrimination" as the basis for temporary reinstatement. Rather, temporary reinstatement is based on a finding by the Secretary that the discrimination claim was not "frivolously brought." The fact that the Secretary may later find that discrimination did not occur does not alter or diminish her finding that the complaint was not "frivolously brought." Since the Secretary was the entity who made the determination that the complaint was not frivolously brought, which triggers temporary reinstatement in the first place, it makes no sense to say that the Secretary is not "charged with administering" the temporary reinstatement provision of the Act.

Additionally, my colleagues' basis for refusing to accord deference to the Secretary is an unnecessarily restrictive view of the Secretary's role under the Mine Act. The fact that the Secretary has determined that a miner has not demonstrated discrimination in a particular case does not change the Secretary's interest in ensuring that miners who file section 105(c)(3) actions are entitled, as a class, to continued temporary reinstatement until a final order of the Commission. Because "enforcement of the [Mine] Act is the sole responsibility of the Secretary," *Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151, 161 (D.C. Cir. 2006), she has an interest in ensuring that section 105(c) is interpreted in an expansive manner, as vigorous protection for miners who make safety complaints (such as the complaint in this case, regarding miners operating equipment while under the influence of alcohol, S. Br. at 3). As the Secretary noted herein, "Congress . . . recognized the important role that individual miners play under the Mine Act in ensuring a safe and healthy working environment." S. Br. at 21 (quoting S. Rep. No. 95-181, at 35, *Legis. Hist*. at 623). The unfettered right of miners to complain about safety issues without fear of economic penalty strengthens the Secretary's ability to effectively enforce the Act.

The Secretary has recognized Congress' concern 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. Br. at 22 (quoting S. Rep. No. 95-181, at 37, *Legis. Hist*. at 625). Anything that could potentially diminish some miners' willingness to do

so – including the prospect of being fired in retaliation and not having the right to temporary reinstatement – thwarts the Secretary's overarching mission to make our nation's mines safer.[3] Thus, the fact that the Secretary has determined that there has been no violation of section 105(c)(1) in a particular case does not decrease her interest in guaranteeing that miners may make health or safety complaints free of economic coercion. Consequently, the Secretary has real interest in ensuring that her view of the Mine Act's temporary reinstatement provision prevails.[4]

Finally, by invoking the Secretary's "negative determination on the question at issue" to deny her deference, my colleagues confuse the issue at hand. Although the Secretary indeed declined to continue to represent Phillips in his discrimination claim, the "question at issue" here is whether temporary reinstatement should be continued notwithstanding that determination – a question to which the Secretary has responded with a resounding "yes."

Accordingly, I would reverse the order of the judge.

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Robert F. Cohen, Jr., Commissioner

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[3] As the Eleventh Circuit pointed out in *Smith v. Bellsouth Telecommunications, Inc.*, 273 F.3d 1303 (11th Cir. 2001), a case involving the private right of action created for employees under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. ("FMLA"), "[i]f former employees like Smith knew they would have no remedy if their former employers retaliated against them for their past use of FMLA leave, it would tend to chill employees' willingness to exercise their protected leave rights and would work against the purpose of the FMLA." 273 F.3d at 1313.

[4] My colleagues also err in their assertion that Secretary should not be accorded deference because she is not a party to the section 105(c)(3) case and has chosen to participate as amicus. Slip op. at 13. *See Community Bank of Arizona v. G.V.M. Trust,* 366 F.3d 982, 987 (9th Cir. 2004) (recognizing that interpretations of the Office of the Comptroller of Currency ("OCC") of the National Bank Consolidation and Merger Act contained in amicus briefs were entitled to "great weight" if those interpretations were reasonable); *see also Bank of America v. City & County of San Francisco*, 309 F.3d 551, 563 (9th Cir. 2002) (stating that "that the OCC's construction of the National Bank Act comes to us in the form of an *amicus* brief does not make it 'unworthy of deference.'" (citation omitted)).

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