FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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December 18, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MICHAEL COOK, Complainant, v. PANTHER CREEK MINING, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEVA 2023-0337-D MSHA No. HOPE-CD-2023-02 Mine: American Eagle Mine/Speed Mine Mine ID: 46-05437

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Rebecca W. Mullins, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, and Samuel B. Petsonk, Esq., Petsonk PLLC, Beckley, WV, for Complainant;
Jonathan Ellis, Esq., Steptoe & Johnson PLLC, Charleston, WV, for Respondent.

Before: Judge Paez

This discrimination case is before me pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). On May 19, 2023, the Secretary of Labor ("Secretary"), on behalf of Michael Cook, filed a complaint of discrimination against Panther Creek Mining, LLC ("Panther Creek") related to Cook's Black Lung Disease or coal workers' pneumoconiosis ("CWP"), an occupational lung disease caused by inhalation of respirable coal mine dust. The complaint references the "Part 90 Miner" program, 30 C.F.R. part 90 (Coal Miners Who Have Evidence of the Development of Pneumoconiosis), designed to prevent progression of CWP by establishing a right to transfer to a less dusty job in the mine.

I. STATEMENT OF THE CASE

In her complaint, the Secretary of Labor alleges that Panther Creek discriminated against Cook in violation of section 105(c) of the Mine Act, which protects miners from retaliation for, or interference with, the exercise of their rights under the Mine Act. (Compl. at 4.) The Secretary alleges Panther Creek discriminated against Cook for asserting his Part 90 rights by reducing Cook's regular rate of pay. (*Id.*) Under the Part 90 regulations, Cook is entitled to transfer to a different area of the mine where respirable dust is maintained at or below the applicable standard. *See* 30 C.F.R. § 90.1. In addition, Part 90 requires mine operators to ensure that miners who exercise this transfer option—also called "exercising their Part 90 rights"—retain their regular rate of pay. *Id.* The issue in this case hinges on the interpretation of Mine Act language considering recent Supreme Court rulings on deference to agency interpretations.

On November 3, 2023, with the agreement of the parties, I issued an order canceling the hearing and ordering the parties to file briefs for disposition on stipulated facts. After filing their Joint Statement of Stipulated Facts on November 9, 2023, the parties filed their cross-motions for summary decision on stipulated facts on December 12, 2023, and filed their responses in opposition to the cross-motions for summary decision on January 13, 2024.

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an "extraordinary procedure" and has analogized it to Federal Rule of Civil Procedure 56 on summary judgment. *Lakeview Rock Prods.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

After reviewing the parties' cross-motions for summary decision, I determine there is no issue as to any material fact, making this matter ripe for determining which moving party is entitled to summary decision as a matter of law under Commission Procedural Rule 67(b). The parties have submitted stipulations and agreed facts, which I discuss below.

II. STIPULATIONS AND FACTUAL STATEMENTS

On November 9, 2023, the parties submitted the following eighteen joint stipulations, verbatim, which are of both a legal and factual nature:

1. The Federal Mine Safety and Health Review Commission and its administrative law judges have jurisdiction over this proceeding under sections 105(c)(2) and 113 of the Mine Act. 30 U.S.C. 815(c)(2) and 823.
2. Panther Creek Mining, LLC, is a coal company that, at the relevant time period in question, operated American Eagle Mine (Mine ID 46-05437).
3. On or around February 20, 2023, Respondent changed the mine's name to Speed Mine.
4. Panther Creek Mining, LLC, is a limited liability company with a principal business address of 250 West Main Street, Suite 2000, Lexington, KY 40507. It is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. 802(d).
5. American Eagle Mine is an underground coal mine near Cabin Creek, West Virginia. It is a "coal or other mine" as defined in section 3(h) of the Mine Act, 30 U.S.C. 802(h).
6. The proposed penalty in this docket will not affect Panther Creek's ability to continue in business.
7. The Complainant, Michael Cook, was, at all relevant times, employed by Respondent at the mine and was a "miner" under section 3(g) of the Mine Act, 30 U.S.C. 802(g).
8. Cook began working at American Eagle Mine in July 2022.

9. On January 19, 2023, MSHA notified Panther Creek that a medical examination indicated that Cook was eligible for rights afforded under Title 30, Code of Federal Regulations, Part 90 ("Part 90 Miner").
10. On February 7, 2023, Cook received a letter from MSHA granting him rights as a Part 90 miner.
11. On February 7, 2023, Cook was working at American Eagle Mine as a continuous miner operator.
12. From the date of hire until February 2023, Cook rotated between a five-day and six-day work week, working ten-hour shifts.
13. On February 8, 2023, Cook discussed his Part 90 miner status with General Manager Jamie Wiant, who informed Cook if he intended to exercise his Part 90 rights, that Panther Creek would offer Cook an outby mine examiner position. The outby mine examiner position is regularly scheduled for 8-hour shifts.
14. On February 10, 2023, Cook exercised his Part 90 transfer rights and transferred to the mine examiner position. In this position, Cook worked 8-hour shifts on February 15, 16, 17, 20, 21, and 22.
15. On February 14, 2023, Cook filed a complaint with MSHA under section 105(c) of the Mine Act.
16. Personal dust monitoring conducted on Cook while he worked in the mine examiner position indicated overexposure.
17. On February 23, 2023, Cook again exercised his Part 90 transfer rights and transferred to an outside utility man position where, effective beginning on February 24, 2023, he resumed ten-hour shifts. On February 23, 2023, Cook worked a 9-hour shift.
18. Between February 10–23, 2023, Cook worked 13 fewer hours than he would have in the continuous miner operator position. Those 13 hours would have equated to $761.67.

III. ARGUMENTS AND ISSUES

The Secretary's complaint alleges, and Respondent does not dispute, that on February 7, 2023, Cook received a letter from MSHA granting him rights as a Part 90 miner. (Compl. at 3.) At that time, Cook worked ten hours per shift as a "continuous miner operator" and rotated between five-day and six-day workweeks. (*Id.*)

On February 10, 2023, Cook exercised his Part 90 rights and accepted a transfer to the "mine examiner" position. (*Id.*) Cook's shifts were reduced from ten to eight hours, resulting in a loss of two hours of overtime pay for each mine examiner shift he worked. (*Id.*) Personal dust monitoring conducted on Cook while he worked in the mine examiner position indicated an overexposure of respirable dust. (Compl. at 4.) Thereafter, on February 23, 2023, Cook again exercised his Part 90 rights and transferred to an "outside utility man" position where he resumed ten-hour shifts. (*Id.*)

The parties—the Secretary, Complainant Cook, and Respondent—filed their cross-motions for summary decision, as well as their oppositions, which I summarize below.

A. Secretary's Arguments

The Secretary asserts Panther Creek Mining discriminated against Cook because Panther Creek Mining paid Cook less after he exercised his Part 90 rights. (Sec'y Mot. at 1–3.) The Secretary argues that Part 90 is ambiguous on the issue of whether "regular rate of pay" means: (1) the same number of dollars per hour or (2) *the same dollar amount received immediately prior to transfer*. (Sec'y Mot. at 3.) The Secretary argues for the latter—that "Cook was entitled to receive 'the same dollar amount that he received immediately prior to his transfer' such that he would suffer 'no loss of pay upon transfer.'" (Sec'y Mot. at 1 (quoting *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 430 (4th Cir. 1981)).) The Secretary argues that I should adopt her interpretation of "regular rate of pay" because (1) it is the fairest reading of the regulation, and (2) regardless of the fairest reading, the law at the time of the Secretary's filing required me to defer to the Secretary's reasonable interpretation of "regular rate of pay." (Sec'y Mot. at 3–4.)

As noted, the Secretary argues I should follow her interpretation of "regular rate of pay" without determining whether it is entitled to deference because her interpretation is the fairest reading of the regulation. (Sec'y Mot. at 3–4.) The Secretary cites *Tilden Mining Company* to support her argument that "'we need not rely on *Auer* deference where an agency's interpretation is the fairest reading of a regulation.'" (*Id*. at 4 (quoting *Tilden Mining Co. v. Sec'y of Labor*, 832 F.3d 317, 322 (D.C. Cir. 2016)).) The Secretary asserts that her interpretation is the only reading that ensures eligible miners will not suffer a loss in pay. (Sec'y Mot. at 4.) Thus, the Secretary contends that her "interpretation of the text 'mirrors its purpose,' *Tilden Mining*, 832 F.3d at 323, by encouraging participation in medical examination programs." (*Id.*)

Alternatively, the Secretary argues that I should defer to her interpretation because the interpretation is reasonable and "reflects the agency's 'fair and considered judgment.'" (Sec'y Mot. at 4–5 (quoting *GMS Mine Repair v. Sec'y of Labor*, 72 F.4th 1314, 1320 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1095 (2024) (citation omitted)).) The Secretary argues that her interpretation of "regular rate of pay" is supported by the text, structure, history, and purpose of Part 90 and the Mine Act as well as previous cases. (Sec'y Mot. at 5–8.) The Secretary contends that her interpretation warrants deference because it is consistent with her prior litigating position and implicates her substantive expertise. (Sec'y Mot. at 10–11.)

Accordingly, the Secretary argues Part 90's "regular rate of pay" requirement means miners must receive the "same dollar amount received immediately prior to transfer." (Sec'y Mot. at 3.) Here, Cook transferred and immediately lost two hours per shift and therefore earned $761.67 less than if he had not transferred. (Sec'y Mot. at 1, 3.) The Secretary asks me to grant her Motion for Summary Decision by finding that under section 105(c)(1) of the Mine Act, Respondent discriminated against Cook for engaging in protected activity by paying him less. (*Id.* at 11.) The Secretary requests that she be awarded a civil penalty of $17,500 against Panther Creek Mining and that Cook receive back wages, interest, and any other fees. (*Id*. at 12.)

B. Cook's Arguments

Complainant Cook, represented by his own counsel, joins with the Secretary on the issue of whether Respondent violated Part 90. (Compl't Mot. at 1.) Additionally, Cook argues that

Respondent violated section 105(c) of the Mine Act because Respondent's conduct interfered with his Part 90 rights by intentionally transferring him to a job with substantially lower wages and significant dust exposure, even though there were other positions that would not have financially damaged him or exposed him to coal-mine dust levels that exceeded Part 90 limits. (Compl't Mot. at 1–2.) Cook requests that the Court order the Respondent to refrain from any further interference with Cook's rights under Part 90 and pay the reasonable attorney fees and expenses incurred in pursuing this matter. (Compl't Mot. at 2.)

C. Respondent's Arguments

Respondent Panther Creek Mining asks me to grant its Motion for Summary Decision and dismiss the case with prejudice. (Resp't Mot. at 19.) It argues that the term "regular rate of pay" means simply *the money earned per hour* because (1) the phrase is not ambiguous; (2) this is the plain meaning of the phrase; and (3) even if the phrase is ambiguous, the Secretary's interpretation is inconsistent with MSHA's previous use of the term, the Commission's case law on Part 90, the text and structure of the Mine Act, and the interpretation of "rate of pay" in other legal contexts. (Resp't Mot. at 9–17.)

Respondent argues that the text, structure, history, and purpose of Part 90 and the Mine Act do not support the Secretary's interpretation of "regular rate of pay." (Resp't Resp. at 8–12.) Respondent also asserts that the Secretary's interpretation of "regular rate of pay" does not warrant *Auer* deference because her interpretation does not implicate her substantive expertise. (*Id.* at 15.)

Respondent argues that the Secretary cannot prove Cook suffered adverse employment action as a result of exercising his Part 90 rights, because it did not violate the regular rate of pay guarantee of Part 90. (Resp't Mot. at 5–6.) Respondent also alleges that the Secretary cannot prove wrongful motivation on its part, which it argues is necessary for establishing a discrimination claim under section 105(c)(1) of the Mine Act. (*Id.* at 18.)

Consequently, the parties disagree on whether Panther Creek Mining discriminated against Cook for asserting his Part 90 rights because they disagree on the meaning of "regular rate of pay" as referenced in Part 90.

IV. DISCUSSION AND ANALYSIS

Given that the parties have stipulated to the material facts of this case, and because I have determined that no genuine issue as to any material fact exists pursuant to Commission Procedural Rule 67(b)(1), I must therefore examine whether either party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b)(2). This determination hinges on the interpretation of the phrase "regular rate of pay" contained in section 203(b)(3) of the Mine Act, 30 U.S.C. § 843(b)(3),[1] and the standard at section 90.103, 30 C.F.R. § 90.103.

[1] The statutory language of section 203(b) has an unusual history. *See* discussion *infra* IV.A.

A. Deference is Not Owed to the Secretary's Interpretation of "Regular Rate of Pay"

Both the Secretary and Respondent cite *GMS Mine Repair v. Secretary of Labor*, 72 F.4th 1314 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1095 (2024), in their Motions for Summary Decision. (Sec'y Mot. at 4, 10, 11; Resp't Mot. at 7.) In *GMS Mine Repair* the D.C. Circuit applied the framework from *Kisor v. Wilkie*, 588 U.S. 558 (2019), "which provided clear instructions about how courts are to evaluate agency interpretation of regulations" to a dispute about the meaning of a MSHA standard.[2] *GMS*, 72 F.4th at 1320. However, in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), the Supreme Court held that when a regulation "parrots" language from a statute and does not provide additional instructions on how to interpret that language, *Kisor* deference does not apply as courts must interpret the statute, not the regulation. The Court in *Gonzales* concluded that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation it has elected merely to paraphrase the statutory language." *Gonzales*, 546 U.S. at 257.

The Federal Coal Mine Health and Safety Act of 1969 ("1969 Coal Act") set nationwide health and safety standards for the coal mining industry. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91–173, 83 Stat. 742. The 1969 Coal Act also established interim mandatory health and safety standards to prevent miners from developing "pneumoconiosis or any other occupation-related disease." Pub. L. No. 91–173, § 201(b), 83 Stat. 742, 760 (1969).

One of the interim mandatory standards of the 1969 Coal Act was section 203(b) of the statute which established the right of miners employed at underground coal mines who have evidence of the development of pneumoconiosis to be "afforded the option of transferring" to a position in the mine which would expose the miner to low concentrations of respirable dust. Pub. L. No. 91–173, § 203(b), 83 Stat. 742, 763–64 (1969). Section 203(b)(3) of the 1969 Coal Act also provided that transferred miners must receive compensation "at not less than the *regular rate of pay* received" immediately prior to transfer. Pub. L. No. 91–173, § 203(b)(3), 83 Stat. 742, 764 (1969) (emphasis added).

[2] While both parties cite *GMS Mine Repair*, neither the Secretary nor Respondent provide the full analysis required by *Kisor* in their respective motions. Under *Kisor*, courts must first determine whether the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools' of construction." *Kisor*, 588 U.S. at 575 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984) (*overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024))). The traditional tools of statutory construction include carefully considering the "text, structure, history, and purpose of [the] regulation." *Kisor*, 588 U.S. at 575. Second, even if courts find that a regulation is genuinely ambiguous, the agency's interpretation "must fall 'within the bounds of reasonable interpretation.'" *Kisor*, 588 U.S. at 576 (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). Finally, courts must inquire into "whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 588 U.S. at 576. Namely, deference is warranted when an interpretation reflects an "agency's authoritative, expertise-based, 'fair[, or] considered judgment.'" *Kisor*, 588 U.S. at 573 (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

Section 101 of the 1969 Coal Act directed the *Secretary of the Interior* to promulgate improved mandatory health or safety standards to supersede the interim mandatory standards. Pub. L. No. 91–173, § 101, 83 Stat. 742, 745–47 (1969). In 1971, the Secretary of the Interior followed the directive of section 101 and promulgated Part 90 as an improved standard of section 203. *See* Procedures for Transfer of Miners with Evidence of Pneumoconiosis, 36 Fed. Reg. 20,600 (Oct. 27, 1971) (to be codified at 30 C.F.R. pt. 90). However, section 90.34 of the improved standard maintained the same language as the interim standard regarding compensation after a miner transfers. *Compare* 36 Fed. Reg. 20,600, 20,602 (Oct. 27, 1971) ("[a]ny miner transferred in accordance with the provisions of this Part 90 shall receive compensation for his work at not less than the *regular rate of pay* received by him immediately prior to his transfer" (emphasis added)) *with* Pub. L. No. 91–173, § 203(b)(3), 83 Stat. 742, 764 (1969) ("[a]ny miner so transferred shall receive compensation for such work at not less than the *regular rate of pay* received by him immediately prior to his transfer" (emphasis added)).

In 1977, Congress amended the 1969 Coal Act with passage of the Mine Act, "but did not alter the interim mandatory health standards in section 203." Coal Miners Who have Evidence of the Development of Pneumoconiosis, 45 Fed. Reg. 80,760 (Dec. 5, 1980). As an interim mandatory health standard, section 203(b) of the Mine Act superseded the 1971 Part 90 (30 C.F.R. pt. 90) regulations promulgated by the Secretary of the Interior. Section 101 of the 1969 Coal Act was amended by the Mine Act so the *Secretary of Labor*, rather than the Secretary of the Interior, was charged with promulgating improved mandatory health or safety standards. *See* 30 U.S.C. § 811(a). Thereafter, in 1980, the Secretary of Labor, acting under the authority of section 101 of the Mine Act, promulgated Part 90 (30 C.F.R. pt. 90) as "an improved mandatory health standard" to supersede "the interim standards established by section 203(b)" of the 1977 Mine Act. 45 Fed. Reg. 80,760 (Dec. 5, 1980).

The Secretary of Labor improved the section 203(b) interim standard of the Mine Act by providing "eligible miners with significant additional protections against fears about job security, adverse economic consequences, undesirable working hours, wages and work assignments." 45 Fed. Reg. 80,760, 80,763 (Dec. 5, 1980). However, like the Secretary of Interior, the Secretary of Labor incorporated without modification the "regular rate of pay" language from section 203(b)(3) of the Act into the Part 90 standard. *Compare* 30 C.F.R. § 90.103(b) ("[w]henever a part 90 miner is transferred, the operator shall compensate the miner at not less than the *regular rate of pay* received by that miner immediately before the transfer" (emphasis added)); *with* 30 U.S.C. § 843(b)(3) ("[a]ny miner so transferred shall receive compensation for such work at not less than the *regular rate of pay* received by him immediately prior to his transfer" (emphasis added)).

Because "regular rate of pay" is "parroted" from section 203(b)(3) of the Mine Act, *Kisor* deference does not apply to the Secretary's interpretation of "regular rate of pay" in Part 90. *See Gonzales*, 546 U.S. at 257 (concluding that "the existence of a parroting regulation does not change the fact that the question . . . is not the meaning of the regulation but the meaning of the statute."). Instead, I must determine the meaning of "regular rate of pay" as it is used in section 203(b)(3) of the Mine Act. *See Gonzales*, 546 U.S. at 257.

Under *Chevron*, courts were to defer to "permissible" agency interpretations of ambiguous statutes. *Chevron U. S. A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. __, 144 S. Ct. 2244 (2024)). However, as of June 28, 2024, "*Chevron* is overruled." *Loper*, 144 S. Ct. at 2273. Going forward, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper*, 144 S. Ct. at 2273.

1. Whether "Regular Rate of Pay" is Ambiguous

The parties disagree on whether the meaning of the phrase "regular rate of pay" in 30 C.F.R. § 90.103 is ambiguous. The Secretary argues Part 90 is ambiguous on the issue of whether "regular rate of pay" means the same number of dollars per hour, or the same dollar amount received immediately prior to transfer. (Sec'y Mot. at 3.) Conversely, Respondent argues that the phrase "regular rate of pay" is not ambiguous because it can "*only* mean dollars of pay earned *per* regular (*i.e.*, straight) hour[s] worked" excluding overtime. (Resp't Resp. at 6.) Following the *Loper* decision, courts no longer need to conduct step one of *Chevron*, which is determining whether the statute is ambiguous with respect to the precise question at issue. *Loper*, 144 S. Ct. 2244; *Chevron*, 467 U.S. at 842 (1984). Rather, courts are directed to apply "the traditional tools of statutory construction" to determine the "best reading of the statute." *Loper*, 144 S. Ct. at 2266, 2268.

The Fourth and D.C. Circuits have held that the meaning of "regular rate of pay" is unambiguous. In *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 429 (4th Cir. 1981),[3] the

[3] In the preamble to the 1980 Part 90 standard promulgated by the Secretary of Labor under the authority of the 1977 Mine Act, the Secretary notes that MSHA received a substantial number of comments regarding whether a transferred Part 90 miner should "receive wage increases commensurate with increases received in the old work classification." 45 Fed. Reg. 80,766–67 (Dec. 5, 1980). Commentators in support of this position cited *Matala v. Marshall*, 483 F. Supp. 1332, 1333 (N.D.W. Va. 1980), *rev'd sub nom. Matala v. Consolidation Coal Co.*, 647 F.2d 427 (4th Cir. 1981) (concluding that Congress intended "regular rate of pay" in section 203(b)(3) of the 1969 Coal Act to mean "classification rate," and the Part 90 miner was therefore entitled to receive the increased wage rate of his pre-transfer classification), while commentators opposed to this position cited *Higgins v. Marshall*, 584 F. 2d 1035, 1037, 1039 (D.C. Cir. 1978) (holding that the pay protection of section 203(b)(3) of the 1969 Coal Act "is not linked forever" to the Part 90 miner's "pre-transfer job classification," and thus the Part 90 miner was not owed "the future pay increments he would have received had he remained in his previous position"). 45 Fed. Reg. 80,767 (Dec. 5, 1980). The Secretary rejected both these arguments, noting: "This new rule is an improved mandatory health program promulgated under section 101 of the [1977 Mine] Act and as such, supercedes [sic] provisions contained in section 203(b). Neither the *Higgins* nor *Matala* holdings are applicable to the pay provisions specified under this new Part 90 as the issue in both of these cases involves the statutory interpretation of section 203(b) of the [1969 Coal] Act." 45 Fed. Reg. 80,767 (Dec. 5, 1980).

Here, the Secretary is addressing the Northern District of West Virginia's *Matala* decision, which was subsequently reversed by the Fourth Circuit. *See Matala v. Consolidation*

Fourth Circuit had to decide "whether section 203(b)(3) of the [1969 Coal] Act[4] guarantees the transferred miner only the amount that he received immediately prior to his transfer or whether it requires the employer to continue to pay a transferred employee at his pre-transfer classification rate." The Fourth Circuit held that "[t]he meaning of section 203(b)(3) is clear on its face . . . the ordinary meaning of 'rate' is *dollar amount*." *Matala*, 647 F.2d at 429 (emphasis added).

In support of its holding, the Fourth Circuit explained that—

> "regular rate of pay" must not be read alone but must be construed with the rest of section 203(b)(3). *See United States v. Snider*, 502 F.2d 645,652 (4th Cir. 1974). In the statutory context of section 203(b)(3), the plain meaning of "rate" is confirmed by the modifying phrase "received by him immediately prior to his transfer." If "rate" were construed as referring to classification rate, then "received by him" would have no meaning, thereby violating a basic canon of statutory construction that all words in a statute are to be given effect. *Id.*

Matala, 647 F.2d at 429. The Fourth Circuit further noted that its interpretation of section 203(b)(3) aligns with Congress's intent, for under its interpretation "a miner who exercises his statutory right of transfer would receive the *same dollar amount* that he received immediately prior to his transfer, thus suffering *no loss of pay* upon transfer." *Matala*, 647 F.2d at 430 (emphasis added).

In *Higgins v. Marshall*, 584 F.2d 1035, 1037 (D.C. Cir. 1978), the D.C. Circuit similarly had to decide whether "regular rate of pay" in section 203(b)(3) of the 1969 Coal Act "means that in addition to not suffering an immediate pay cut, the transferring miner also may not be denied the future pay increments he would have received had he remained in his previous position." The D.C. Circuit rejected this interpretation and instead held that the meaning of regular rate of pay "is simple and straight-forward: a transferring miner is *not to receive less compensation* than he would have received had he not transferred, that is *not less than the monetary amount* he was receiving 'immediately prior to transfer.'" *Id.* (emphasis added). The D.C. Circuit found that the legislative history of section 203(b)(3) "indicates congressional concern for protecting the transferring miner from *loss in compensation*." *Higgins*, 584 F.2d at 1037–38 (emphasis added). Thus, the D.C. Circuit concluded that its interpretation of section 203(b)(3) "is consistent with the basic purpose of the [1969 Coal] Act; *by not having to take a*

Coal Co., 647 F.2d 427, 430 (4th Cir. 1981) (reversing the judgment of the district court). The Secretary's assertion that *Higgins* and *Matala* are irrelevant in determining the new language of the Part 90 standard is inapposite to the significance of the cases' interpretation of "regular rate of pay" in section 203(b)(3) of the 1969 Mine Act. As I explained, *see* discussion *supra* IV.A, the language of section 203(b)(3) of the 1969 Coal Act was incorporated without modification in section 203(b)(3) of the 1977 Mine Act. Therefore, the D.C. and Fourth Circuits holdings interpreting the meaning of "regular rate of pay" in *Higgins* and *Matala*, respectively, remain good law.

[4] *See* discussion *supra* IV.A for the history of the statutory language of section 203(b)(3).

pay cut upon transfer to a position which would ordinarily pay less, the miner is more likely to transfer to protect his health than he would be otherwise." *Id.* at 1038 (emphasis added).

In *Mullins v. Andrus*, 664 F.2d 297, 305 (D.C. Cir. 1980), the D.C. Circuit had to decide whether a Part 90 miner's "post-transfer wage rate was to be pegged at the level accorded his job classification, or rather at some higher level dictated by the amount he actually earned." Citing *Higgins*, the D.C. Circuit held "the phrase 'regular rate of pay' in . . . section [203(b)(3) of the 1969 Coal Act] means the rate at which the transferring miner was *actually and regularly compensated* when the transfer occurred," irrespective of the miner's pre-transfer job classification. *Mullins*, 664 F.2d at 310 (emphasis added). In support of its holding, the D.C. Circuit explained that "[t]he incentive to transfer would be dampened if indeed not seriously depressed, were miners with actual earnings above their classification rates required to drop back to their classification levels." *Mullins*, 664 F.2d at 308. The D.C. Circuit concluded that the text of section 203(b)(3),

> as well as its legislative history, make crystal clear the will of Congress that a miner not be forced to endure a reduction in his accustomed rate of renumeration upon exercising his statutory right to transfer. We have encountered nothing indicative of a purpose to roll a transferring miner back to his classification rate when his pre-transfer dollar rate is more.

Mullins, 664 F.2d at 308.

Thus, the Fourth and D.C. Circuits have concluded that "regular rate of pay" unambiguously means the regular and actual compensation/dollar/monetary amount the Part 90 miner received immediately prior to transfer. Although the Fourth and D.C. Circuits did not face the precise issue before me, their construction of section 203(b)(3) binds me to a holding that a transferring Part 90 miner takes with them the total monetary amount they received before transferring. Thus, if a Part 90 miner's actual compensation before their transfer regularly included overtime pay, then that total amount—including overtime pay—is the floor and the Part 90 miner's post-transfer pay can be no less.

Though I could end my analysis here, given the recent Supreme Court directive I feel compelled to apply the traditional tools of statutory construction in my analysis.

B. Interpreting "Regular Rate of Pay" in Section 203(b)(3) of the Mine Act

Following the directive of *Loper*, I will also exhaust the "traditional tools of statutory construction" to determine the "best reading of the statute." *Loper*, 144 S. Ct. at 2266, 2268. The traditional tools of statutory construction include carefully considering the text, structure, history, and purpose of the statute. *Kisor v. Wilkie*, 588 U.S. 558, 559 (2019). *See, e.g.*, *United States Sugar Corp. v. E.P.A.*, 113 F.4th 984, 991–97 (D.C. Cir. 2024) (applying traditional tools of construction to interpret statute, specifically text and structure of the statute); *Pac. Gas & Elec. Co. v. FERC*, 113 F.4th 943, 947–49 (D.C. Cir. 2024) (applying traditional tools of construction to interpret statute, specifically text and structure of the statute).

1. The Mine Act's Text and Structure

Accordingly, I examine the phrase "regular rate of pay" myself to determine its meaning. First, I must look at the plain text of the statute. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"). One reading could find that "rate" means "a proportional or relative value." *RATE*, BLACK'S LAW DICTIONARY (12th ed. 2024). "Rate of pay," therefore, would be the proportion of pay to some quantity of time like an hourly rate. *Id.* Alternatively, another reading of "rate" is the total monetary amount. *RATE*, BLACK'S LAW DICTIONARY (12th ed. 2024) (rate is "an amount paid. . . for a . . . service.") "Rate of pay," therefore, would be the total monetary amount paid for a service. *Id.* Thus, the ordinary meanings of "rate" do not answer the interpretive question at issue in the present case.

Given the context of section 203(b)(3), "regular" likely means something "done . . . on a habitual basis; usual; customary." The New Oxford American Dictionary 1,427 (Erin McKean ed., 2d ed. 2005). Under such a definition, a Part 90 miner's rate of pay would include overtime pay if they usually received overtime pay. Thus, this ordinary meaning of "regular" supports the Secretary's interpretation that "regular rate of pay" means the same dollar amount received immediately prior to transfer.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 203(b)(3) of the Mine Act requires operators to compensate miners at "*not less than* the regular rate of pay." 30 U.S.C. § 843(b)(3) (emphasis added). The inclusion of "not less than" indicates that the protection for compensation is the floor, not the ceiling. Both parties accept this interpretation. (*See* Sec'y Mot. at 5; Resp't Resp. at 8.) Courts have also accepted the floor not ceiling understanding. For example, the Fourth Circuit considered the miner's hourly cost-of-living add-on as part of the miner's "regular rate of pay" for purposes of calculating the pay a Part 90 miner was entitled to receive after transfer. *Matala*, 647 F.2d at 430. This buttresses the Secretary's argument that "regular rate of pay" is not limited exclusively to the miner's straight hourly rate prior to transfer. (Sec'y Resp. at 7.) Moreover, as the Fourth Circuit highlighted in *Matala*, "'regular rate of pay' must not be read alone but must be construed with the rest of section 203(b)(3). *Matala*, 647 F.2d at 429 (citation omitted). After reviewing the full statutory context of section 203(b)(3), the Fourth Circuit concluded that the modifying language "received by him immediately prior to his transfer" confirms that "regular rate of pay" refers to the regular and actual dollar amount the Part 90 miner was paid before transfer. *Id.*

I note that Respondent misconstrues the Secretary's interpretation of "regular rate of pay" to mean that, when a Part 90 miner works more hours after their transfer than they did before, they will still be paid the same amount that they were paid before their transfer. (Resp't Mot. at 17–18.) That is an oversimplification of the Secretary's argument, because such an interpretation would mean an operator could always pay the transferred miner the same amount and not run afoul of Part 90, even when a transferred miner would be entitled to a higher wage in the post-transfer job. Respondent's confusion stems from its belief that the Secretary's

interpretation prohibits operators from using a miner's hourly rate to determine the miner's "regular rate of pay." Instead, the Secretary's position is that "*all* hourly rates—straight time hours, routine overtime hours, routine Saturday pay, etc.—combine to equal a miner's regular rate of pay." (Sec'y Resp. at 7.) Moreover, as the D.C. Circuit noted in *Mullins*, regardless of any challenges in calculating a miner's "regular rate of pay," I "must reject a statutory interpretation—and surely one merely serving administrative convenience—when it flouts a legislative edict." *Mullins*, 664 F.2d at 309.

Additionally, Respondent argues "regular rate of pay" cannot mean "no loss of pay" because "no loss of pay" is used in section 103(f) of the Mine Act; and "'[w]here a statute or regulation uses specific language in one [provision] but different language in another, the Court presumes different meanings were intended.'" (Resp't Mot. at 15–17 (quoting *Weichsel v. JP Morgan Chase Bank, N.A.*, 65 F.4th 105, 113 (3d Cir. 2023) (citations omitted)).) Once again, Respondent oversimplifies and misconstrues the Secretary's argument. The Secretary does not argue that Part 90 or section 203(b)(3) means that transferred miners shall suffer no loss of pay. Rather, the Secretary argues that under Part 90 "Cook was entitled to receive 'the *same dollar amount* that he received immediately prior to his transfer' *such that* he would suffer 'no loss of pay upon transfer.'" (Sec'y Mot. at 1 (quoting *Matala*, 647 F.2d at 430 (emphasis added)).) Thus, section 203(b)(3) and Part 90 establish an affirmative obligation to pay the transferred miner at least the "same dollar amount" they received prior to their transfer, and as a result of this obligation the Part 90 miner does not suffer a loss of pay upon transfer. *Matala*, 647 F.2d at 430.

In contrast, section 103(f) of the Mine Act provides that a representative of miners has the right to accompany the Secretary or her authorized representative during the physical inspection of any coal or other mine for the purpose of aiding such inspection and to participate in pre– or post–inspection conferences held at the time. 30 U.S.C. § 813. Because the miner representative cannot perform their typical work while attending the inspection, section 103(f) also confirms that "[s]uch representative of miners who is also an employee of the operator shall *suffer no loss of pay* during the period of his participation in the inspection." 30 U.S.C. § 813 (emphasis added). Thus, after examining the full context of section 103(f) it is clear that the "no loss of pay" language serves to prevent mine operators from not paying miner representatives for the time they spend attending the inspection, which would greatly dissuade miner representatives from taking part in the inspections. This protection against complete non-payment differs from section 203(b)(3)'s affirmative guarantee that a transferred miner is to receive at least the same "regular rate of pay" of their pre-transfer position.

The text and structure of the Mine Act suggests that Congress aimed to address miners' fear of invoking their Part 90 transfer option by protecting miners from the potential loss of pay. Interpreting "regular rate of pay" to include overtime pay protects against those fears by effectively maintaining the same compensation before and after exercising the transfer option. Thus, the Mine Act's text and structure supports the Secretary's interpretation.

2. The Legislative History of the 1969 Coal Act and Mine Act of 1977

The legislative history of a statute is often "the most fruitful source of instruction as to its proper interpretation. *Flora v. United States*, 362 U.S. 145, 151 (1960). Thus, I will examine the legislative history of section 203(b)(3) "in order to ascertain the intent of Congress." *United States v. Wise*, 370 U.S. 405, 414 (1962). The legislative history of section 203(b)(3) of the 1969 Coal Act illustrates "Congress' firm resolve that miners contracting black lung disease were not to be discouraged from health-saving transfers by fear of an ensuing reduction in pay." *Mullins v. Andrus*, 664 F.2d 297, 302, n.49 (D.C. Cir. 1980) (citing S. REP. NO. 91–411, at 50 (1969); H.R. REP. NO. 563, at 40–41 (1969)). The intent of section 203(b)(3) was summarized by a Senate Report as follows: "[i]n order to insure [sic] that miners who are afflicted with pneumoconiosis *suffer no loss in compensation*, the committee has included a provision entitling a miner who is transferred to another job pursuant to this subsection to receive his old or new rate of pay, whichever is greater." S. REP. NO. 91–411, at 49 (1969) (emphasis added).

Congress amended the 1969 Coal Act in 1977 by enacting the Mine Act, thus recognizing "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines . . . in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). The Mine Act amended the 1969 Coal Act by modifying and extending coverage under Titles I and V to all types of mining and transferring enforcement to the Secretary of Labor.

Specifically, Congress amended section 101, directing the Secretary of Labor to promulgate an improved mandatory health or safety standard for the transfer of coal and non-coal miners due to exposure of toxic substances. 30 U.S.C. § 811(a)(7). When drafting this provision in section 101(a)(7), the House and Senate versions of the bill addressed the issue of wage increases for transferred miners based on their previous or new work classification differently. *Higgins*, 584 F.2d at 1038. The House version of the bill included no compensation protection provision for miners transferred under section 101(a)(7). *Id.* The Senate version of the bill included a compensation protection provision for miners transferred under section 101 as follows: "[a]ny miner transferred as a result of such exposure shall continue to receive compensation for such work at *not less than the regular rate of pay for miners in the classification such miner held* immediately prior to his transfer." S. 717, 95th Cong. § 101 (1977) (emphasis added).

The compensation protection provision of section 101(a)(7) of the Mine Act, as finally enacted by both Houses, includes the following language:

> [a]ny miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the *regular rate of pay* for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the *new work classification*.

30 U.S.C. § 811 (a)(7) (emphasis added).[5]

The Mine Act was accompanied by a Conference Committee Report that explains the differences between the House and Senate versions of the bill regarding the compensation provision of section 101(a)(7). The relevant portion of the Conference Report reads:

> The conference substitute conforms to the Senate bill, except that it *limits* the scope of the provision which guarantees that a miner who is reassigned to a different job classification will suffer no reduction in compensation if such reassignment is the result of a medical examination indicating that such miner may suffer material impairment of health or functional capacity by further exposure to a toxic substance or harmful physical agent. After reassignment . . . such miner will be entitled only to the *same dollar rate* increases applicable to his new job classification. The conferees intend this provision to encourage miner participation in medical examination programs by [e]nsuring that miners who do participate in such programs shall suffer *no immediate financial disadvantage* if a medical examination results in a job reassignment.

H.R. REP. NO. 95-655, at 42 (1977) (emphasis added).

Both parties argue the legislative history of section 101 of the Mine Act supports their interpretations of "regular rate of pay." The Secretary points to the language in the Conference Report describing Congress' intent that Part 90 miners shall suffer "*no immediate financial disadvantage* if a medical examination results in a job reassignment." (Sec'y Mot. at 6 (quoting H.R. REP. NO. 95-665, at 42 (1977) (emphasis added)).) Respondent, in turn, points to the section that refers to a post-transfer miner's raises as entitling miners "to the *same dollar rate* increases applicable to his new job classification." (Resp't Resp. at 10 (quoting H.R. REP. NO. 95-665, at 42 (1977) (emphasis added)).) Respondent argues that in context, the language, "suffer no immediate financial disadvantage," does not relate to the Part 90 miner's total paycheck but the "dollar rate." (*Id.*)

Respondent's argument assumes "dollar rate" is the hourly wage rather than total amount. The distinction between the two is the crux of the issue. The D.C. Circuit in *Higgins* analyzed the same Conference Report and concluded, "[i]t is clear that . . . miners transferred under section 811(a)(7) of the 1977 Act because of exposure to toxic substances are *not to suffer an immediate decrease in pay*, but it is also manifest that the pay protection is not linked forever to their pre-transfer job classification." *Higgins*, 584 F.2d at 1039 (emphasis added). Thus, the

[5] In the preamble to the 1980 Part 90 standard, the Secretary of Labor also notes that the wage protection in 30 C.F.R. § 90.103(e) ("[i]n addition to the compensation required to be paid under paragraphs (a), (b), and (d) of this section, the operator shall pay each part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned") is consistent with section 101(a)(7) of the Act. 45 Fed. Reg. 80,760, 80,767 (Dec. 5, 1980)

language "suffer no immediate financial disadvantage" confirms that Congress intended that a miner transferring as a result of a medical examination should "receive the same dollar amount that he received immediately prior his transfer," that is the same total amount. *Matala*, 647 F.2d at 430. Moreover, the language "same dollar rate increases" is referring to the subsequent raises a transferred miner should receive, not the base compensation they should receive after being transferred. Thus, the language "same dollar rate increases" is not relevant to the precise issue here.

The legislative history suggests that to encourage participation in medical examination programs, Congress intended that Part 90 miners not suffer any loss in pay after transferring, except that raises to their pre-transfer job positions were not available to them. Consequently, the Secretary's interpretation of "regular rate of pay" ensures "no immediate financial disadvantage" to Part 90 miners exercising their transfer option because they will receive the total amount of pay received prior to the transfer.

3. The Legislative Purpose of the 1969 Coal Act and the 1977 Mine Act

Finally, I must interpret the language of section 203(b)(3) "in light of the purposes Congress sought to serve." *Chapman v. Hous. Welfare Rts. Org.*, 441 U.S. 600, 608 (1979). In enacting section 203(b) of the 1969 Coal Act,

> Congress recognized that human suffering, including individual and societal costs, result from the continued exposure of miners with pneumoconiosis to high levels of respirable dust. To protect miners who have evidence of pneumoconiosis but who may desire or find it necessary to remain working at coal mines, Congress sought to minimize the risk that further health impairment would occur.

45 Fed. Reg. 80,760, 80,763 (Dec. 5, 1980). Thus, Congress established the right of miners with evidence of pneumoconiosis to work in an area of the mine with a lower concentration of respirable dust in the atmosphere. 45 Fed. Reg. 80,760, 80,763 (Dec. 5, 1980).

Congress also recognized that "miners may be forced to choose between continued exposure to hazardous substances or significant wage reduction if work in cleaner environments is sought." 45 Fed. Reg. 80,760, 80,767 (Dec. 5, 1980). To remedy this dilemma, Congress created section 203(b)(3) which explicitly states that a transferred miner must retain at least "the regular rate of pay received by him immediately prior to his transfer." 30 U.S.C. § 843(b)(3). *See also Higgins*, 584 F.2d at 1037–38 (finding that the basic purpose of section 203(b)(3) of the 1969 Coal Act was to ensure that a miner does not have to take a pay cut upon transfer to a position which would ordinarily pay less, so that "the miner is more likely to transfer to protect his health than he would be otherwise"); *Matala*, 647 F.2d at 430 (finding that Congress's intent in creating section 203(b)(3) of the 1969 Coal Act was to ensure that a miner transferring because of Black Lung Disease does "not lose money because of the transfer"); *Mullins*, 664 F.2d at 309 (finding that the pay-maintenance section of the 1969 Coal Act "was designed to promote health-conserving transfers by eliminating fear of adverse economic consequence").

If I were to adopt Respondent's interpretation of "regular rate of pay" as meaning the same number of dollars per hour, then an operator could significantly reduce the pay of a Part 90 miner. An operator could simply reduce the number of hours the Part 90 miner works at the less dusty job while maintaining the same hourly rate of pay as the prior dusty job. Such an outcome would result in Part 90 miners being immediately financially disadvantaged for exercising their Part 90 option. Allowing such an outcome would result in a chilling effect whereby miners will be disincentivized and discouraged from exercising their Part 90 rights. This outcome would fundamentally frustrate the purpose of section 203(b)(3) of the Mine Act.

After reviewing the text, structure, history, and purpose of the Mine Act as well as relevant case law, I determine that the Secretary's interpretation of "regular rate of pay" is the most reasonable and in line with what Congress intended. Any other interpretation would allow an operator to significantly reduce a Part 90 miner's hours and thus compensation, as long as the operator compensated the Part 90 miner the same dollar amount per hour. Thus, I conclude that "regular rate of pay" in section 203(b)(3) means the same total dollar amount the Part 90 miner received immediately prior to transfer.

C. Whether Respondent Discriminated and/or Interfered with Cook's Part 90 Rights in Violation of Section 105(c)(1) of the Mine Act

1. Whether Respondent Discriminated against Cook

Section 105(c)(1) of the Mine Act provides that no person shall "discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . is the subject of medical evaluation and potential transfer under a standard published pursuant to section 811 of this title." 30 U.S.C. § 815(c)(1). The legislative history of section 105(c) has led the Commission to conclude that the section is to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act.]" S. REP. NO. 95–181, at 36 (1977) (quoted in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1490 (Aug. 1982)).

The Commission has formulated a test to establish a claim of discrimination under section 105(c) called the *Pasula-Robinette* test.[6] Under the *Pasula-Robinette* test, a miner establishes a prima facie case of discrimination by showing (1) that they engaged in protected activity, and (2) that they thereafter suffered adverse employment action that was motivated in any part by that protected activity. *E. Associated Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 813 F.2d 639, 642 (4th Cir. 1987).

The Secretary claims that discriminatory motivation need not be shown in the present case. (Sec'y Mot. at 11.) The Secretary argues that the very fact Cook was paid less than his "regular rate of pay" after he exercised his Part 90 rights is sufficient to find discrimination under section 105(c)(1). (Sec'y Mot. at 11.) The Secretary substantiates this argument by pointing to

[6] *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

an analogous case in which the Commission held that an operator violated section 105(c)(1) when it paid a miner less than she would have otherwise earned after exercising her statutory walkaround rights under section 103(f) of the Mine Act. *See Otten v. Continental Cement Co.,* 45 FMSHRC 258 (May 2023), *appeal docketed*, No. 23-2213 (8th Cir. May 16, 2023). The Commission concluded in *Otten* "that a showing of animus is not required to establish a violation of section 103(f), and that *Pasula-Robinette* is not the appropriate test for evaluating a miners' representative's claim of an unlawful loss of pay in that regard." *Otten*, 45 FMSHRC at 6. *See also Stillion v. Quarto Mining Co.*, 12 FMSHRC 932 (May 1990) (concluding that a violation of section 103(f) demonstrates the operator discriminated against the miners' representative without considering whether the operator was motivated by discriminatory animus); *Sec'y of Labor ex rel. Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293, 1299 (Sept. 1986) (finding the operator interfered with the miners' representative's section 103(f) rights in violation of section 105(c)(1) without considering whether the operator was motivated by discriminatory animus).

Respondent argues that the statutory language "no loss of pay" in section 103(f) is not found in § 90.103 and therefore *Otten* does not apply. (Resp't Resp. at 20–23.) While the statutory language is not the same, both statutory rights operate similarly to prevent "a loss expressly prohibited by the Act because of [the] exercise of an expressly protected right." *Otten*, 45 FMSHRC at 262 n.8. Indeed, the conditions of *Otten*—as well as the Commission's decisions in *Stillion v. Quarto Mining Company* and *Secretary ex rel. Truex v. Consolidation Coal Company*—are sufficiently similar to Cook's case, as both miners were paid at a lower rate than their statutory right. Like Otten, Cook "suffered an adverse action" because he exercised his rights. *Otten*, 45 FMSHRC at 262. Namely, Cook was paid less than the regular rate of pay he received immediately before his transfer, which is "expressly prohibited" by § 90.103, "regardless of intent." *Otten*, 45 FMSHRC at 262. Based on my analysis of the Commission's case law, I conclude that Respondent discriminated against Cook in violation of section 105(c)(1) of the Mine Act.

2. Whether Respondent Interfered with Cook's Part 90 Rights

Cook, separate from the Secretary, argues that even if Respondent's conduct did violate part 90, Respondent nevertheless violated Section 105(c)(1) of the Mine Act by interfering with his Part 90 rights. (Compl't Mot. at 1.) Specifically, Cook alleges "that the Respondent interfered with [his] Part 90 rights by intentionally transferring him to a job with substantially lower wages and significant dust exposure, while yet having other available job positions that would not have financially damaged [Cook] or subjected him to coal-mine dust levels that violated Part 90." (Compl't Mot. at 2.) Cook asserts that Respondent's conduct "reasonably appeared to a miner like him to penalize him for exercising his Part 90 rights." (Compl't Mot. at 4.)

Because I determine that Respondent violated Part 90, any question of whether Respondent interfered with Cook's Part 90 rights without violating Part 90 is not at issue and inapposite.

D. Penalty

In addition to the $761.67 in backpay wages plus interest, the Secretary proposed a civil penalty of $17,500.00. (Sec'y Mot. at 1, 12.) The Commission is not bound by the Secretary's proposal and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). I must consider the factors under section 110(i) of the Mine Act in assessing a civil penalty. *See* 30 U.S.C. § 820(i); *Otten*, 45 FMSHRC at 265 (confirming that the Commission allows ALJs to assess discrimination civil penalties under the criteria of section 110(i) of the Mine Act).

Here, the Secretary's proposed penalty of $17,500.00 appears excessive given that even the Secretary herself argues that the meaning of "regular rate of pay" in Part 90 is ambiguous. (Sec'y Mot. at 3.) Because the Secretary considers the standard ambiguous, Respondent's ignorance regarding the applicability of the standard would appear less negligent. The dearth of cases dealing with Part 90 that could elucidate the meaning of "regular rate of pay" also suggests Respondent's negligence to be low. Moreover, the Secretary does not point to any published guidance in her handbooks for the regulated community on Part 90 violations, which would also mitigate Respondent's level of negligence.

Respondent's failure to immediately transfer Cook to an outside job with lower dust exposure when one was available may be construed as discriminatory intent. (Compl't Mot. at 2.) However, Cook's relatively quick transfer from underground to outside work after additional dust monitoring indicated continued overexposure, coupled with the ambiguous meaning of "regular rate of pay" in Part 90, are mitigating factors that work to reduce the proposed penalty. (Joint Stipulations at 3.)

Upon considering the criteria set forth in section 110(i) of the Mine Act, as well as the purpose of section 105(c) and all the relevant facts and circumstances, I hereby assess a civil penalty of $4,500.00.

V. ORDER

Respondent Panther Creek Mining's Motion for Summary Decision is hereby **DENIED**, Cook's Cross-Motion for Summary Decision is **GRANTED**, in part, and **DENIED**, in part, and the Secretary of Labor's Motion for Summary Decision is **GRANTED**.

Cook's request for attorney's fees and expenses is hereby **DENIED**. A miner who retains private counsel to intervene in a section 105(c)(2) discrimination proceeding brought by the Secretary is not entitled to recover their private attorney's fees. *E. Associated Coal Corp. v. F.M.S.H.R.C.*, 813 F.2d 639, 644 (4th Cir. 1987).

Respondent is **ORDERED** to pay backpay to Cook in the amount of $761.67 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. *See Sec'y of Labor ex rel. Bailey v. Ark.–Carbona Co.*, 5 FMSHRC 2042, 2051–52 (Dec. 1983). Such payment shall be made within 40 days of the date of this decision.

Respondent is **ORDERED** to pay the Secretary of Labor the sum of $4,500.00 within 40 days.

Alan G. Paez
Administrative Law Judge

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