FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 25, 2015

SHERWIN ALUMINA COMPANY, LLC, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 2015-0151-RM Citation No. 8778065; 11/13/2014
v.	:	
	:	Docket No. CENT 2015-0152-RM
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	Order No. 8778066; 11/13/2014 Mine: Sherwin Alumina, L.P. Mine ID No: 41-00906
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	**CIVIL PENALTY PROCEEDING** Docket No. CENT 2015-0185 A.C. No. 41-00906-371548
v.	:	
SHERWIN ALUMINA COMPANY, LLC, Respondent,	:	Mine: Sherwin Alumina, L.P. Mine ID: 41-00906
v.	:	
UNITED STEELWORKERS, LOCAL 235A Intervenor.	:	

DECISION AND ORDER

Appearances: Mary Kathryn Cobb, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, and Derek Baxter and Philip Mayor, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia (on brief) for the Secretary of Labor

Christopher V. Bacon, Esq., and Samantha D. Seaton, Esq., Vinson & Elkins LLP, Houston, Texas for Sherwin Alumina Company, LLC

Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado for United Steelworkers Local 235A

Before: Judge McCarthy

I. Statement of the Case

This matter is before me upon a Notice of Contest and related Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This is a case of first impression. The precise issue presented is whether Sherwin Alumina Company ("Sherwin") violated section 103(f) of the Mine Act by refusing to allow the properly designated representative authorized by miners to accompany MSHA during physical inspection of the mine after Sherwin locked out and temporarily replaced the miners during an ongoing, economic labor dispute. That refusal prevented the representative from aiding inspections and participating in pre-and post-inspection conferences since the lockout.

Twenty-two years ago, Chairman Holen and Commissioners Backley, Doyle and Nelson affirmed Administrative Law Judge Morris' conclusion that "striking employees ... were not miners because they were not working in the mine at the time of the inspection" and held that "striking employees ... were not entitled to have their previously designated walk-around representative accompany the MSHA inspector during his inspection of the mine." *Cyprus Empire Corp.*, 15 FMSHRC 10, 15 (Jan. 1993). Contestant/Respondent Sherwin Alumina argues that *Cyprus Empire* is controlling Commission precedent, and that under the doctrine of *stare decisis,* I must dismiss and vacate the citation and the concomitant failure-to-abate order at issue. Sherwin Br. 1, 21. Sherwin contends that the locked-out employees who designated their walkaround representative are no different than the striking employees in *Cyprus Empire*, because they are not actively working in a mine and therefore they are not miners under the plain language of section 3(g) of the Act. *Id.* at 8. In *Cyprus Empire*, the Commission concluded that the "safety purposes of section 103(f) were not diminished in this instance" because the striking miners were not working at the time and would be entitled to designate a walkaround representative once they returned to work. *Id.*, citing *Cyprus Empire,* 15 FMSHRC at 14. Similarly, Sherwin argues that once the locked-out employees return to work, they too will have the right to designate their own representative. In the meantime, Sherwin argues that the locked-out miners' safety is not being compromised, they continue to have access to safety information through MSHA's District Office, and MSHA's District Office has discretion to review and alter any training that they will receive prior to returning to work. *Id.*, citing Tr. 139, 140, 156-57; 30 C.F.R. part 48. Also, to the extent that section 103(f) serves the secondary purpose of providing information regarding ongoing health and safety conditions to the MSHA inspector, Sherwin argues that such purpose is better served by offering the inspector unlimited access to speak with replacement workers actually working in the mine. Sherwin Br. 8.

The Secretary argues that *Cyprus Empire* is not binding, and that the Secretary's current interpretation of sections 3(g) and 103(f) of the Mine Act must replace the Commission's prior interpretation in that case. Sec'y Br. 24, 26, *citing National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005) (*Brand X*) (permitting agencies to provide authoritative interpretations of ambiguous statutory language even after a contrary judicial interpretation). The Secretary emphasizes that only the United Mine Workers (as an intervenor), and not the Secretary of Labor, advanced the Secretary's interpretation beyond the trial level and

appealed the judge's adverse decision in *Cyprus Empire* to the Commission. Sec'y Br. 25. Hence, the Commission did not have the benefit of considering the Secretary's current interpretation that the statutory definition of the term "miner" in section 3(g) of the Act, defined to mean "any individual working in a coal or other mine," is ambiguous. Accordingly, under *Chevron,* the Secretary's argues that his interpretation of "miner" in the context of section 103(f) to include employees currently locked out or on strike, who have not been permanently replaced and reasonably expect to return to work at the end of the labor dispute, is permissible and entitled to deference. *See* Sec'y Br. 7; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Secretary contends that his current interpretation is consistent with the overall remedial purpose of the Act, the specific purposes of the walk-around provision, and Commission and judicial precedent giving a broad interpretation to the walk-around provision so that a locked-out miner representative can continue to protect the safety and health of miners who reasonably expect to return to the mine and resume active work. Sec'y Br. 16-24.

Intervenor, United Steelworkers Local 235A ("Steelworkers"), agrees with the Secretary that the Mine Act's definition of "miner" under section 3(g) is ambiguous, and should be interpreted in the context of section 103(f) to include workers who are on strike or locked out, but who reasonably expect to return to the mine at the end of a labor dispute. Intervenor Br. 8. The United Steelworkers further asserts that there is no evidence that the Secretary of Labor improperly issued the section 104(a) Citation and section 104(b) Order at issue in order to affect the balance of power in the labor negotiations between Sherwin and the Steelworkers. *Id.* at 12-16. Finally, the Steelworkers argue that including a locked-out miners' representative in the inspection party assists with ensuring, and does not compromise, safety at the mine. *Id.* at 20-23.

Early procedural background in this matter was set forth in my January 21, 2015 Order Consolidating Proceedings and Denying Motions. Thereafter, a hearing was held in Corpus Christi, Texas on February 17, 2015. During the hearing, the parties introduced testimony and documentary evidence. Witnesses were sequestered. The Secretary's Motion in Limine to exclude evidence of sabotage was denied. Tr. 16-19. After the hearing, the parties submitted briefs and reply briefs.

For the reasons set forth below, I find that *Cyprus Empire* does not govern disposition of this case because in that matter the Commission left open the prospect of remaining ambiguity in the statutory definition of the term "miner" and the Secretary proffered no position to which the Commission could accord weight. In this case, by contrast, the Secretary persuasively argues that in the context of Section 103(f), the statutory definition of "miner" in the phrase "representative authorized by his miners" is ambiguous and should include locked out miners, who have been temporarily replaced and reasonably expect to return to work at the end of the labor dispute. Such miners are still working in a mine, they have just been temporarily prevented from doing so during the lockout.

My decision is limited to the context of a lockout in which locked out miners cannot be permanently replaced and may be considered still working in the mine, albeit locked out. As such, they retain an ongoing interest in the primary purpose of the Mine Act, to protect the health and safety of the miners working in, and not permanently replaced from, the mine.

The Secretary obviously plays to a larger audience when he abandons his pre-hearing "lockout" versus "strike" basis for distinguishing *Cypress Empire* and instead argues that both locked out *and* striking miners who have not been permanently replaced are still working in the context of the walk-around provision because they can reasonably expect to resume active work in the foreseeable future, and help protect the safety of temporary replacements during the interim labor dispute. Sec'y Br. 30-31. I decline the Secretary's invitation to extend his current interpretation to striking miners, who have not been permanently replaced. In my view, that would bog the Commission down in resolving intricate and complex labor relations issues such as temporary versus permanent replacement and the nature of the underlying walk out, either an economic or unfair labor practice strike, which mandate different outcomes on the permanent replacement issue under the National Labor Relations Act.

An economic strike is one neither prohibited by law or collective-bargaining agreement nor caused or prolonged by an employer unfair labor practice and generally has an object of enforcing economic demands on the employer. *See e.g., NLRB v. Transport Co. of Texas.*, 438 F.2d 258, 262 n.6 (5th Cir. 1971). The strike in *Cyprus Empire* was clearly an economic strike over the terms of a new collective-bargaining agreement, in which the strikers could have been, but were not, permanently replaced. Rather, the operator resumed mining operations with salaried employees. *See Cyprus Empire Corp.*, 13 FMSHRC 1040, 1044 ¶ 13 (ALJ)("The hourly employees commenced the strike on or about May13, 1991, related to the negotiations over a new collective-bargaining agreement."). There was no mention of any underlying unfair labor practice.

The Commission has never addressed an unfair labor practice strike, where miners striking, at least in part over an unfair labor practice, cannot be permanently replaced and must be reinstated to existing positions upon their unconditional offer to return to work even if the employer has hired permanent replacements. *See, e.g., NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). The nature of an unfair labor practice strike, however, may turn on protracted litigation of the alleged underlying unfair labor practice. Further, a strike that is economic at its inception may be converted into an unfair labor practice strike by the employer's subsequent commission of an unfair labor practice. *See e.g., Citizens Publ'g & Printing Co., v. NLRB*, 263 F. 3d 224 (3d Cir. 2001) (false statement that economic strikers had been replaced converted strike to unfair labor practice strike). Such difficult legal determinations lie exclusively within the technical expertise of the National Labor Relations Board (NLRB).

Thus, rightly or wrongly, *Cypress Empire* controls in the context of an economic strike in which strikers walk off the job and can be permanently replaced, but are entitled to be placed on a preferential rehire list.[1] The Commission is certainly free to revisit *Cypress Empire,* but this judge

[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)(economic strikers may be permanently replaced and denied a request for reinstatement until vacancy arises); *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970)(economic strikers, who unconditionally apply for reinstatement when their jobs are filled by permanent replacements, remain employees, and are entitled to full reinstatement upon the departure of replacements, unless they have acquired regular and substantially equivalent employment or employer can establish that failure to offer full reinstatement was for legitimate and substantial business justifications).

cannot do so.[2] I can, however, differentiate between an offensive lockout, in which an operator withholds employment from his miners for the purpose of resisting their demands or gaining concessions, but may not permanently replace them, and an economic strike, in which miners voluntarily choose to withhold their services and may be permanently replaced. Such differentiation is particularly appropriate here in order to resolve whether a lockout renders the term "miner" ambiguous in the context of section 103(f)'s walkaround provision. I find that the statutory phrase "representative authorized by his miners" in section 103(f) is ambiguous in the context of a lockout, and that the Secretary's interpretation is reasonable, consistent with the underlying purpose of the Act and the purposes of the walk-around provision, and entitled to deference.

Accordingly, based on a careful review of the entire record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following:

II. Findings of Fact

Sherwin operates a large alumina refinery in Gregory, Texas, which encompasses 1200 acres. The facility utilizes hundreds of valves and tanks and miles of piping, and usually employs about 2,000 miners. Tr. 10, 96-97. Of the 2,000 miners operating the plant in 2014, 450 of the d

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[2] *Cypress Empire* may be criticized for a simplistic failure to reconcile the reasonable expectation of reinstatement rights under federal employment statutes such as the National Labor Relations Act (NLRA) with the entirely discrete yet compatible purpose of the Mine Act to protect the health and safety of miners. In any event, as explained herein, locked out miners, cannot be permanently replaced, are entitled to reinstatement at the conclusion of the labor dispute, and have specialized and experiential knowledge of health and safety concerns at the mine, which knowledge augments the protection of both replacement workers and miners entitled to return to work after resolution of a labor dispute. As the Supreme Court has recognized, "[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S.Ct. 2228, 2238 (2014) (citing *J.E.M. Ag. Supply, Inc. V. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001) ("[W]e can plainly regard each statute as effective because of its different requirements and protections"). *See also, Wyeth v. Levine,* 555 U.S. 563, 578-579 (2009). *Compare Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984) ("[c]ounterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA)" since enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA). For the reasons explained herein, given the ambiguity of the statutory term "miner" as one who works in a mine, one could perceive statutory warrant in the Mine Act for treating an operator's locked out employees as "miners," particularly in the context of section 103(f) dealing with a "representative authorized by his miners."

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

"hourly employees" were represented by the United Steelworkers Local 235A ("Steelworkers") under the terms of a collective bargaining agreement set to expire on October 1, 2014. About 500-600 other miners were contract workers. Tr. 97, 113; Jt. Stip. 10; Jt. Ex. 11, Exh. A.

In June of 2013, Joe Guzman was designated by miners working at Sherwin, as an authorized representative under Section 103(f) of the Mine Act. Jt. Ex. 19, Stip. No. 12; Jt. Ex 4. Guzman typically accompanied MSHA inspectors and provided information to inspectors about mine processes and gave them the names of other miners to be consulted. Tr. 28-29. Guzman also participated in post-inspection conferences and kept miners apprised of inspection results. Tr. 28-29, 31-32, 104-05. There is no evidence that Guzman ever engaged in misconduct or sabotage at the Sherwin Mine.

From September 2013 until the hearing, Sherwin received about 458 citations and about 119 of them were designated significant and substantial (S&S) violations by MSHA. Tr. 180. Around November 2013, in response to the large number of S&S citations, Sherwin submitted a corrective action plan (CAP) to MSHA. Tr. 143. About September 2014, MSHA gave Sherwin notice that it was a pattern-of-violations (POV) candidate under Section 104(e) of the Mine Act. Tr. 61, 141.

For several months prior to October 2014, Sherwin and the Steelworkers engaged in unsuccessful negotiations over a successor collective-bargaining agreement. Jt. Ex. 11, Declaration of Paul English, safety, health, and industrial-hygiene manager, at ¶ 3. During negotiations, verbal and written hazard complaints to MSHA increased, but only about a quarter of them were deemed to have any merit. Tr. 80-83, 129. MSHA, the Steelworkers, and Sherwin management and counsel, met in June 2014 to evaluate the CAP plan. Tr. 143. Sherwin's labor relations counsel at the time, Henry Chajet, from Patton Boggs (now merged with Jackson Lewis), raised several general allegations of sabotage with MSHA District Manager, Michael Davis. Tr. 143-44.

Indeed, during the summer of 2014, Sherwin documented several incidents of suspected sabotage at the facility. Tr. 81, 164, 175. Electrical substation panels and switch house cabinets were loosened or unscrewed, and machine guarding was missing or taken off and laid on the floor. Tr. 81, 164, 175. Air was turned off on a pneumatic overflow alarm in the rod mills. Sherwin purchased a lock to keep the valve open. Tr. 81. Weeks later, the lock was cut and the alarm turned off again. Tr. 81. To prevent any further tampering, Sherwin enclosed the valve with steel, and welded the enclosure shut. Tr. 81.

About mid-June 2014, after an anonymous complaint to MSHA, a pile of presumed asbestos-containing material (PACM) was dumped on the powerhouse floor, just one day after the same area had been examined by MSHA. Tr. 88-90. Also, someone broke into several supervisor offices. A safety relief valve was bent, and seemed to have been forced into a position that would not allow it to work properly. Tr. 167. A medical lancet was stuck into a suction unit in the plant ambulance, resulting in a finger injury to a miner. Tr. 165. Photographs of a 1999 explosion at the Kaiser Aluminum and Chemical Corporation Gramercy plant in Louisiana were left in the Sherwin administration building with a note stating words to

the effect that "This could happen to you." Tr. 165-66.[4]

Absent security cameras in the mine, which likely had to be negotiated with the Steelworkers as a change in working conditions under Section 8(a)(5) of the NLRA, Sherwin was unable to discover who committed the alleged sabotage. Tr. 176-177. Sherwin reported the incidents to government agencies, law enforcement, and several MSHA inspectors. Tr. 88, 167, 176-79, 185.

On Friday, October 10, 2014, the Steelworkers rejected Sherwin's final offer for a new collective-bargaining agreement. Tr. 183. On Saturday, October 11, 2014, Sherwin locked out approximately 450 miners represented by the Steelworkers in furtherance of its labor dispute with the Steelworkers. Jt. Stip. No. 11. Joe Guzman, and the two miners who designated him as their miner representative under section 103(f), were among those miners locked out by Sherwin. Tr. 55; Jt. Ex. 19, Stip. No. 13.

In anticipation of the lockout, Sherwin had trained management personnel as field supervisors and hired hourly, temporary replacement miners, who had done observational training in the plant during the month prior to the lockout, but performed no hands-on mining. Tr. 184. During the lockout and in response to picketing, Sherwin hired additional security, and bussed the temporary replacement workers into the plant. Tr. 42-43.

Two days after the lockout, Sherwin discovered that about 18 of its 30 hydraulic presses, essential equipment used in the clarification process, were damaged by water that had been introduced into the hydraulic systems. Tr. 178. On questioning from the undersigned, Stephen Hoey, Sherwin's director of environment, safety and health, acknowledged that either the pre-lockout miners represented by the Steelworkers or the post-lockout replacement workers could have committed the alleged sabotage of the presses. Tr. 185.

On October 14, 2014, MSHA inspector Francisco Velma arrived at the Sherwin Mine to

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[4] Sherwin opened the door to this tragic accident at trial. Tr. 165-66. I take judicial notice that this 1999 explosion injured 29 miners, blinded one, and occurred during a lockout of the United Steelworkers when the Kaiser Aluminum plant was being operated by temporary replacement workers. MSHA later produced a public report regarding this disaster. See MSHA, Report of Investigation, http://www.msha.gov/disasterhistory/gramercy/ report/reportdept.htm.

Under Commission precedent, judicial notice can be taken of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. *Union Oil*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). Also, the Commission has recognized that the existence and content of MSHA public documents are subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n. 4 (Aug. 2014) (Inspector General Report); *Black Diamond Constr. Inc.*, 21 FMSHRC 1188, 1202 n. 3 (Nov. 1999) (MSHA handbook); *Jim Walter Resources*, 7 FMSHRC 1348, 1355 n. 7 (Sept. 1985)(MSHA policy memorandum).

This disaster occurred about 6 years after *Cyprus Empire* was decided by the Commission. Perhaps that's why the Secretary of Labor now asks the Commission to re-examine *Cyprus Empire*.

continue a regular inspection. Jt. Stip. No. 14; Tr. 36. Velma asked Guzman to accompany him, but Sherwin (English) informed Velma that it would not permit Guzman to enter the mine and assist Velma because of the lockout. Jt. Stip. No. 15. Sherwin provided Velma with legal authority (presumably *Cyprus Empire*) supporting its position. Jt. Stip. No. 15. Velma conducted the inspection without Guzman and chose not to cite Sherwin at that time for preventing Guzman's participation, but Velma did not provide any future assurances that MSHA would not do so in the future. Jt. Ex. 19, Stip. No. 15.

On October 20, 2014, MSHA inspector Brett Barrick informed Sherwin that he wanted Guzman to accompany him on an MSHA inspection. Jt. Stip. No. 16. English again refused to allow Guzman to serve as the designated section 103(f) miners' walkaround representative. English told Barrick that Sherwin was tired of being asked that question and that if MSHA persisted, Sherwin would sue MSHA. Tr. 32-33. According to Barrick, English further told Barrick that Sherwin was excluding Guzman because he "was no longer an employee of the mine."[5] Tr. 33. English did not deny that he made this statement. I credit Barrick's testimony regarding the exchange, given English's rather vague and non-specific description of this discussion with Barrick, and Sherwin's failure to proffer Barrick's notes. Tr. 47, 84-85.

Barrick completed an inspection without Guzman and did not issue any 103(f) citation to Sherwin at that time. Jt. Ex. 19, Stip. No. 16. Barrick credibly testified that he believed that Sherwin had violated Section 103(f) on this occasion (October 20) by refusing to permit Guzman to accompany the inspection party, but Barrick did not express this view to Sherwin because he thought he needed permission from a supervisor to issue such a citation. Tr. 43-44, 47, 72. Barrick did not provide any assurances to Sherwin that its continued refusal to permit Guzman to accompany an MSHA inspector during the lockout would not result in a future citation. Jt. Ex. 19, Stip. No. 16.

Michael Davis, MSHA's South Central District Manager for Metal/Nonmetal Administration, became aware of Sherwin's refusal to accord Guzman section 103(f) miner representative status shortly after Velma's October 14, 2014 inspection. Tr. 123. Davis opined that Sherwin's conduct violated section 103(f) and that a citation should be issued. Tr. 123, 155, 160-61. Davis, however, did not direct Velma or Barrick to issue citations for the October 14 or 20 incidents because of adverse Commission precedent (*Cyprus Empire*) relied on by Sherwin. Tr. 124, 154-55. Rather, Davis spoke with superiors at MSHA headquarters to determine whether a miners' representative appointed by locked-out miners should be permitted to accompany an MSHA inspector during a lockout, and whether a citation should issue. Tr. 155-56, 160-61.

The Secretary's interpretation of Section 103(f) in this lockout context was formalized in a letter drafted at MSHA headquarters and provided to Davis. Tr. 132-34, 160-61; Jt. Ex. 2. Davis signed the letter and gave the letter and consonant citation to Barrick to issue to Sherwin should Sherwin continue to deny Guzman the right to accompany Barrick during his next

[5] English's statement was not accurate. Guzman remains an employee of Sherwin, but he had been locked out and was not actively engaged in mining because of the lockout.

inspection during the lockout. Tr. 132-34.

On November 13, 2014, Barrick returned to the Sherwin mine to perform another inspection. Jt. Ex. 19, Stip. No. 17; Tr. 34. Barrick met with English and requested that Guzman accompany Barrick as miners' representative during the inspection. Tr. 34. Barrick provided Sherwin with Davis' letter, which indicated that Sherwin's refusal to permit Guzman to accompany the inspection team contravened section 103(f). Tr. 34-35; Jt. Ex. 19, Stip. No. 18; Jt. Ex. 2. Barrick told English that Sherwin had 30 minutes to comply with his request or he would issue a 104(a) citation under section 103(f). Tr. 35. English consulted with counsel and informed Barrick that Sherwin still refused to permit Guzman to accompany the inspection team. Tr. 35.

Barrick then issued Citation No. 8778065. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3. That Citation states:

> On November 13, 2014 the mine operator refused to allow the miners' representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. This constitutes a violation of section 103(f) of the Mine Act. The condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard. The Secretary respectfully disagrees with the reasoning contained in the Federal Mine Safety and Health Review Commission decision in the Cyprus Empire Corporation, 15 FMSHRC10 (Jan. 1993), addressing section 103(f) of the Act. The Secretary has also determined that this case should not appropriately apply to the present situation. The interest that underlie the concept of miners' representatives remain important during a lockout, as miners' [sic] who have been locked out have a continued interest in the health and safety at the mine and miners' representatives play a crucial role in safeguarding this interest.

Jt. Ex. 3.

The violation was designated as non-S&S, with no likelihood of injury or illness, no lost workdays, and low negligence. Jt. Ex. 19, Stip. No. 7; Jt. Ex 3. The Secretary proposed a penalty of $112 for the alleged section 103(f) violation. Jt. Ex. 19, Stip. No. 8.

Thereafter, Barrick notified English that he would give Sherwin an additional 30 minutes to abate the Citation No. 8778065 by permitting Guzman to accompany Barrick on an inspection, otherwise Barrick would issue a section 104(b)(1) Order for failure to abate. Tr. 35. Thirty minutes later, when Sherwin continued to refuse to permit Guzman to accompany the inspection party, Barrick issued Order No. 8778066. Tr. 35; Jt. Ex. 19, Stip. No. 19; Jt. Ex. 3, pp. 3-4. That Order states:

> The mine operator continues to refuse the miner's [sic] representative to accompany the Secretary in inspection of this mine for the purpose of aiding such inspection. Mitigating circumstances have not been provided that would justify extension.

Jt. Ex. 3.

The failure to abate order listed no area affected, which is in accordance with an MSHA Interpretive Bulletin (IB) on the issue. Jt. Ex. 3; MSHA Interpretive Bulletin, Section 103(f) of the Federal Mine Safety and Health Act of 1977, 43 Fed. Reg. 17,546, (Apr. 25, 1978) ("However, actual withdrawal of miners will not *ordinarily* occur in cases arising under section 103(f), because section 104(b) also requires the inspector to determine the extent of the area the mine affected by the violation. In most cases, the area(s) of the mine affected by an operator's refusal to permit participation ... under section 103(f) would be a matter of conjecture and could not be determined [with] sufficient specificity.").

No failure-to-abate penalties were assessed by MSHA, although MSHA's Section 103(f) Interpretive Bulletin states:

> "...failure to abate [section 103(f)] violations subjects an operator to additional civil penalties for each day during which the failure to abate continues. (section 110(b).) Under circumstances where an operator refuse[s] to allow participation by a representative of miners, each day thereafter during which an inspector is carrying out activities covered by section 103(f) will be considered a day during which the failure to correct the violation continues, for purposes of proposing additional civil penalties."

43 Fed. Reg. 17547.

Guzman did not file a discrimination complaint with MSHA alleging that Sherwin's "interference" with his exercise of section 103(f) statutory participation rights violated section 105(c). *See id.* at 17,547.

On December 12, 2014, Sherwin filed a timely notice of contest concerning the Citation and Order. Jt. Ex. 5. On December 22, 2014, the Secretary filed a Motion for Expedited Proceedings. Jt. Ex. 7. On December 24, 2014, the Secretary filed a Motion for Summary Decision. Jt. Ex. 10. Sherwin filed Oppositions to both requests. Jt. Exs. 8 and 10. On January 21, 2015, the undersigned set a hearing date for February 17, 2015, ordered expedited discovery, and otherwise denied the Secretary's motion to expedite proceedings. My January 21, 2015 Order also denied the Secretary's Motion for Summary Decision.

On January 23, 2015, after the undersigned inquired during a conference call about whether the temporary replacement miners had designated a miners' representative, some temporary replacement miners designated Francisco S. Alvarez as their miners' representative. Tr. 53, 105, 130-31; Jt. Ex. 19, Stip. No. 20; Jt. Ex. 1. Alvarez is a management official for

CCC Group, a contractor that provides about 100 temporary replacement workers for Sherwin. Tr. 107-109, 113.

Alvarez reports to CCC lead manager, Steve Whitehouse, who reports to English. Tr. 106-107. English then provides third-hand feedback about MSHA inspections to the replacement and other non-locked-out miners. Tr. 99, 108, 111-12. At the time of the hearing, although Alvarez had accompanied inspection teams, he was "on a learning curve" and generally did not convey information about MSHA inspections directly to the miners as Guzman had done. Alvarez did not distribute or post MSHA citations and/or orders at control stations in the Mine, and did not point out hazards to MSHA inspectors. Tr. 98-99, 106-08, and 110. Barrick credibly testified and the Act provides that the representative of miners is supposed to assist MSHA in its inspection of the Mine to ensure that the miners have a voice in the health and safety of the Mine. Tr. 29-30.

Neither the locked out miners nor the temporary replacement miners had the benefit of any representative of miners from the time of the lockout on October 11, 2014 until Alvarez's designation on January 23, 2015. Jt. Ex. 19, Stip. 20; Jt. Ex 1; Tr. 75-76, 105-06. MSHA records still identify Guzman as a designated miners' representative. There has been no termination of his designation as representative of miners pursuant to 30 C.F.R. § 40.5(a) or (b). Tr. 56, 62, 144. Those regulations provide:

> **§ 40.5 Termination of designation as representative of miners.**
>
> (a) A representative of miners who becomes unable to comply with the requirements of this part shall file a statement with the appropriate District Manager terminating his or her designation.
>
> (b) Mine Safety and Health Administration shall terminate and remove from its files all designations of representatives of miners which have been terminated pursuant to paragraph (A) of this section or which are not in compliance with requirements of this part. The Mine Safety and Health Administration shall notify the operator of such termination.

III. The Applicable Statutory and Regulatory Framework

As noted, MSHA issued Citation No. 8778065 for an alleged violation of section 103(f) of the Mine Act and issued Order No. 8778066 for failure to abate that alleged violation. Jt. Ex. 3. Section 103(f) provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a *representative authorized by his miners shall be given an opportunity to accompany* the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to subsection (a), *for the purposes of aiding such inspection and to participate in pre- or post-inspection*

> *conferences held at the mine.* Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such 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 made under this subsection. *To the extent that that Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives.* However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 813(f) (emphasis added).

Section 103(f) grants miners and their representatives the opportunity to participate in physical inspections and conferences conducted by MSHA inspectors pursuant to section 103(a) for the purpose of observing or monitoring safety and health conditions as part of direct safety and health enforcement activity. In enacting section 103(f), Congress made clear that effective implementation of the Act depends upon active and orderly participation by miners and representatives of miners in the physical inspection process, including both pre and post-inspection conferences. Section 103(f)'s "walk-around provision" promotes this goal by ensuring that an MSHA inspector will benefit from the assistance and participation of a representative authorized by an operator's miners when conducting inspections and post-inspection conferences. *See* 29 U.S.C. 113(f); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1260 & n.4 (D.C. Cir. 1994); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 451-52, 455 (10th Cir. 1990); *see also* Tr. 29-30, 104-05 (describing how miners' representative Guzman assisted in inspections and post-inspection conferences, thus fulfilling this role).

The Senate Reports concerning the 1977 Act indicate that the Act's walk-around provisions are intended to enhance miner safety and awareness by assuring that miners are apprised of relevant inspection results by their representative. S. Rep. No. 95-181, at 26 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 3401, 3428, *reprinted in* Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 616 (Comm. Print 1978) ("Presence of a representative of miners at opening conference helps miners to know what the concerns and focus of the inspector will be, and attendance at closing conference will enable miners to be fully apprised of the results of the inspection. It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness.").

The status of walk-around rights provided by section 103(f) is discussed at length in MSHA's Interpretive Bulletin (IB) published on April 25, 1978, which notes:

> Section 103(f) provides an opportunity for the miners, through their representatives, to accompany inspectors during the physical inspection of the mine, for the purpose of aiding such inspection and to participate in pre-or post-inspection conferences held at the mine. As the Senate Committee on Human Resources stated, "If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 (1977)." Several important purposes are served by affording representatives of miners the opportunity to accompany Mine Safety and Health Administration (MSHA) inspectors. Participation by miners' representatives will enhance miner safety and health awareness and contribute to greater understanding by miners of the safety and health requirements of the Act. In addition, participation in the inspection process by representatives of miners will directly aid inspection itself by providing information through individuals familiar with day-to-day conditions at the mine site.

43 Fed. Reg. 17546.

The Mine Act, MSHA regulations, and MSHA's Interpretive Bulletin are all silent about whether a representative of striking or locked-out miners may serve as a representative of miners during an inspection that occurs amid a strike or lockout. Through regulation, the Secretary of Labor has defined a "representative of miners" as "(1) Any person or organization which represents two or more miners at a coal or other mine for purposes of the Act, and (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act." 30 C.F.R. § 40.1(b)(1) and (2). Part 40 of the Code of Federal Regulations contains regulations governing the Representative of Miners. The regulations contain requirements for the filing of specified identification data to be posted at each mine, the designation of persons to exercise the functions of a representative under provisions of the Mine Act, and the termination of such representatives. 30 C.F.R. §§ 40.2-5; *see also Utah Power*, 897 F.2d at 453.

The Preamble to the Part 40 regulations expressly rejected narrow interpretations of the terms "representative of miners" and broadly interpreted "representative of miners" to encourage miner participation in the health and safety of the mine because Congress deemed it vital to have miners freely participate in health and safety matters at the mines. 43 Fed. Reg. 29,508 (July 7, 1978). The Preamble expressly states:

> First, there is no clear statement in the legislative history of the Mine Act defining who is to be a representative of miners for a specific purpose, nevertheless, Congress believed it was vital to have miners freely participate in health and safety matters at the mines. Second, the frequent use of the term "representative" throughout the Mine Act in different contexts suggests that a broad definition would be

> preferable to a narrow one. Additionally, any attempt to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine and not in keeping with the spirit of miner participation. Finally, it would be very difficult to put forth a more detailed or restrictive rule which would be applied to all the varied situations at all mines--large and small, union, multi-union and nonunion, coal and metal/nonmetal, which would still be equitable in all situations.

43 Fed. Reg. 29508.

In rejecting the more narrow NLRB definition of "Representative" based on the "majority rule" concept inherent in the context of collective bargaining, "which contemplates only one union miner representative at each mine," MSHA emphasized the following:

> ...The purposes of the Mine Act are better served by allowing multiple representatives to be designated. This ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing the various functions of a representative of miners under the Act and within the framework of each provision.
>
> Finally, based on experience under the Federal Coal Mine Health and Safety Act of 1969 and Part 81, it is reasonable to expect that miners will choose representatives with a substantial amount of experience, and problems are not anticipated with this broad interpretation of the term representative of miners. If problems do arise MSHA will propose appropriate revisions.

43 Fed. Reg. 29508.

I conclude that section 103(f) of the Mine Act, as reinforced by the Preamble to the Part 40 regulations, authorizes a broad interpretation of the statutory phrase "*representative authorized by his miners*" as set forth in section 103(f) to achieve the statutory purpose of facilitating the miners' voice in health and safety matters at a mine.

To properly and broadly interpret the phrase "representative authorized by his miners" in section 103(f), it is necessary to examine the statutory definition of the term "miner" under section 3(g) the Act in the context of section 103(f) of the Act. Section 3(g) of the Act defines "miner" as "any individual *working* in a coal or other mine." 30 U.S.C. § 802(g) (emphasis added). Thus, a "representative authorized by his miners" under section 103(f) is any individual who is properly designated by two or more individuals "working" in a mine of an operator.

It is undisputed that Guzman was properly designated by two or more Sherwin miners who were working in the Sherwin mine at the time of the designation. Jt. Ex. 4. That designation was never terminated pursuant to MSHA regulation. 30 C.F.R. § 40.5. As further explained herein, it

(1984); *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F. 3d 234, 238 (D.C. Cir. 2011); *Simola, emp. by United Taconite, LLC,* 34 FMSHRC 539, 543-5 (Mar. 2012). Under that approach, if the statutory language is plain, the Commission must enforce such language according to its terms. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). On the other hand, if the statute is silent or ambiguous, the Commission asks whether MSHA's interpretation is reasonable and permissible. *Chevron*, 467 U.S. at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997). If the Secretary and the Commission have conflicting, reasonable interpretations of the Mine Act, the Secretary's interpretations rather than the Commission's interpretations are entitled to deference under *Chevron. See, e.g., Joy Technologies, supra,* 99 F.3d at 995; *see also Sec'y of Labor v. Excel Mining, LLC,* 334 F.3d 1, 6 (D.C. Cir. 2003); *Sec'y of Labor v. Mutual Mining, Inc.,* 80 F.3d 110, 113-15 (4th Cir. 1996).

Thus, if a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)(*Brand X*), citing *Chevron*, 467 U.S. at 843-44, and n. 11. Put differently, a reviewing court or tribunal, like the Commission, must "accept [the Secretary' s reasonable] construction of the [Mine Act], even if the [the Secretary's] reading differs from what the [Commission] believes is the best statutory interpretation." *Id.* at 980 (2005)(federal agencies can reverse judicial statutory interpretations of ambiguous statutory interpretations under certain circumstances); *cf., Martin v. OSHRC,* 499 U.S. 144, 152-53 (1991)(reviewing court should defer to Secretary's interpretation when the Secretary and the Commission furnish reasonable but conflicting interpretations of *ambiguous regulation* promulgated by the Secretary under the Occupational Safety and Health Act).

Similarly, a reviewing court's or tribunal's prior construction of a statute does not trump a new and permissible agency construction entitled to *Chevron* deference, absent clear and unequivocal terms of the statute leaving no room for ambiguity and agency discretion. *See Brand X*, 545 U.S. at 982; *see also NLRB v. Iron Workers Local 103 (Higdon Construction Co.)*, 434 U.S. 335, 351 (1978)(agency's pre-*Chevron* resolution of conflicting claims represented a defensible construction of the statute entitled to considerable deference even though courts may prefer a different application; moreover, "[a]n administrative agency is not disqualified from changing its mind, and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo*, and without regard to the administrative understanding of the statutes.").

In short, deference is given to the Secretary's interpretation of the Mine Act 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); *Twentymile Coal Co.,* 36 FMSHRC 2009, 2012 (Aug. 2014). *Chevron* deference is usually granted to reasonable statutory interpretations that the Secretary advances on behalf of MSHA during litigation before the Commission, even though such interpretations are not promulgated in formal rulemaking. *Martin v. OSHRC,* 499 U.S. 144, 156-7

(1991); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012); *Olson v. FMSHRC,* 381 F.3d 1007, 1011 (10th Cir. 2004; *Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *but see North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012) (only *Skidmore* deference is owed positions taken by the Secretary during enforcement actions). The fact that the Secretary has waited since 1993 to exercise his interpretive authority and considered judgment on the issues presented in anticipation of the instant litigation, does not lessen the deference owed. *See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

Finally, even where the Commission has previously interpreted an ambiguous statutory term or ambiguous statutory terms, the Secretary of Labor, on behalf of MSHA, "may, consistent with the [Commission's] holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) . . . ." *Brand X*, 545 U.S. at 983; *see, e.g., Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788 (D.C. Cir. 2009). When the Secretary does so, he does not say that the Commission's prior interpretation was necessarily wrong, he simply chooses a different permissible interpretation that is reasonable and consistent with the purposes of the Act. *See Brand X*, 545 U.S. at 983. As further explained below, I find that statutory language "representative authorized by his miners" in section 103(f) is ambiguous in the context of a lockout and I give deference to the Secretary's interpretation under *Chevron.*

In *Cyprus Empire*, the United Mine Workers of America (UMWA) argued that the erstwhile Commission must defer to the Secretary's interpretation of the statutory term "miner" in section 3(g) of the Act as applied to walk-around rights in section 103(f). *Cyprus Empire,* 15 FMSHRC at 15. In rejecting this argument, the 1993 Commissioners noted that the Secretary's analogous construction of the term "miner" was rejected as unreasonable by the D.C. Circuit in *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1151 (D.C. Cir. 1987)(*Peabody*).[7] Moreover, those

[7] In *Peabody*, the D.C. Circuit affirmed the Commission's holding that laid-off individuals were not miners for purposes of the training rights granted under section 115 of the Act because they were not working in a mine, exposed to the hazards of mining, *or employed* by a mine operator. *Peabody,* 822 F.2d at 1147-49 (emphasis added). The laid off miners in *Peabody* were contractually entitled under the collective-bargaining agreement to be placed on a panel for recall on the basis of "seniority," which was contractually defined as "length of service and the ability to step into and perform the work of the job at the time it was awarded." *Id.* at 1139. The operators passed over some miners at the top of the recall list because they lacked the necessary training or work experience to qualify as "experienced miners" and therefore could not begin working without first receiving "new miner training." *Id.* The court majority concluded that the laid-off individuals did not, in failing to obtain safety training, exercise any right granted a miner by section 115(a) of the Mine Act. Accordingly, the Secretary's position that the operators refused to employ them because of the exercise of a statutory right thereby engaging in prohibited discrimination, was not a reasonable interpretation of sections 105(c)(1) and 115(a) of the Act. *Id.* at 1151.

In her concurrence, then Judge Ruth Bader Ginsburg astutely observed that one need not exclude laid-off miners from the section 3(g) definition of "miner" for all statutory purposes, nor did she read the majority opinion to make so sweeping a disposition, and she rejected the Secretary's position solely on the language and structure of section 115 of the Act dealing with training rights. *Id.*, (Ginsburg concurring). Judge Ginsburg concluded that the word "miner" as

Commissioners emphasized that the Secretary did not appeal the judge's adverse decision or otherwise participate in the appeal; that "the wording of the statute sets forth Congress' intent as to the definition of miner; and that "[e]ven if there were remaining ambiguity, the Secretary has presented no position to which the Commission could accord weight." *Cyprus Empire,* 15 FMSHRC at 15. In this case, by contrast, the Secretary has clearly exercised his informed judgment, after consultation with his client MSHA, to argue before the Commission that the definition of "miner" under section 3(g) of the Act is ambiguous in the context of section 103(f), and the terms "representative authorized by his miners" in section 103(f) should include miners who have been locked out and reasonably expect to return to work at the end of the labor dispute.

When deciding whether the statutory language "representative authorized by his miners" in section 103(f) is plain or ambiguous, the Commission must examine the text of the language itself, the specific context in which the words or phrases are used in section 103(f), and the broader structure of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *King. v. Burwell*, 135 S. Ct. 2480, 2484 (2015). As Chief Justice Roberts recently noted in upholding the Affordable Care Act tax credits on federal exchanges:

> But often times the "meaning -- or ambiguity-- of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132. So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.*, at 133 (internal quotation marks omitted). Our duty, after all, is "to construe statutes, not isolated provisions." *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (internal quotation marks omitted).

135 S. Ct. at 2489.

The Supreme Court has also recognized that "... the same words, placed in different contexts, sometimes mean different things," and that identical language may convey varying content even when used in different provisions of the same statute. *Yates v. United States*, 135 S.Ct. 1074, 1082 (2015) (Ginsburg, J., plurality opinion). Furthermore, the Court has stated that once a statutory term has an established meaning in some sections of a statute but not in other sections, the term is ambiguous and each section must be examined to determine whether context provides further meaning that would resolve the dispute. *Robinson*, 519 U.S. at 343-44; *see also Brody Mining LLC*, 36 FMSHRC 2027, 2036 (Aug. 2014) *appeal docketed,* No. 14-1171 (D.C. Cir. Sept. 2014) (deference accorded Secretary's interpretation of ambiguous term "violation" where various statutory provisions could only refer to conditions alleged to be violations).

I agree with the Secretary that the present participle "working" as used in section 3(g)'s statutory definition of "miner" is ambiguous in the section 103(f) context because it connotes both

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employed in section 115 could not reasonably be read to encompass persons laid-off because the training provisions were directed to miners on the job and could not comprehensively be read to accommodate miners "who stand and wait." *Id.* at 1152.

ongoing activity in which the miner is actively engaged in the present, and interrupted activity from which the miner may temporarily be absent, but to which he has a reasonable expectation of returning. See Sec'y Br. 10-11, citing for comparison, *United States v. Hersom*, 657 F.3d 77, 79, n.2 (1st Cir. 2011) (adopting analogous reasoning with respect to the present participle "receiving"). For example, the undersigned might accurately say that I am working on Monday even though it is the Friday before, as I draft this example. Certainly, a miner who takes temporary leave is still working at the mine, although on leave status, and not engaged in work at the present moment. Similarly, the Fourth Circuit has recognized that miners who designated a union official as their representative while the mine was closed during investigation of an accident were "miners [who] currently work at the . . . [m]ine" for purposes of ruling on a preliminary injunction. *Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 287 (4th Cir. 2006).

In fact, as the Secretary enumerates, the Mine Act frequently uses the word "miner" to cover individuals who were working in the mine, but may not be actively working at the time that their statutory rights or obligations are triggered. Sec'y Br. 12-13, citing, *inter alia*, Sections 105(c)(2), 104(g)(1), 111, 115, 201, 203(c) and (d) of the Mine Act. The Commission in *Cyprus Empire* recognized that the statutorily-defined term "miner" must be interpreted in the context of the particular section in which it arises to effectuate the safety purposes of each section, but as noted, that Commission interpretation did not have the benefit of the Secretary's new and informed judgment in the context of a lockout. 15 FMSHRC at 15; *see also KenAmerican Resources, Inc.*, 35 FMSHRC 1969, 1973 (July 2013) (laid-off worker was "miner" for purposes of section 105(c)(2)'s anti-discrimination provision distinguishing cases like *Peabody* where laid-off workers were not "miners" under other statutory provisions); 35 FMSHRC at 1975 (definition of "miner" "cannot be applied literally" throughout the Act)(Chairman Jordan, concurring).

Thus, contrary to Sherwin's argument, several provisions of the Mine Act would make little sense if the term "working," as used to define "miner," was confined to times when actual mining work was presently being performed. Rather, I find that the term "miner" as used in section 3(g) of the Act is ambiguous, and encompasses times when workers are temporarily disengaged from the actual act of mining. Accordingly, I reject Sherwin argument that the plain meaning of the term "miner" in section 103(f) must mean an individual actually working in the mine at the time of the inspection, i.e., "[t]he term 'working' . . . refer[s] 'to action that is happening at the time of speaking or a time spoken of.'" Sherwin Br. 10. While such a strict construction, as adopted by the Commission in *Cyprus Empire,* may seem plain when viewed in isolation, the Secretary has determined that such a reading is untenable in light of the primary purpose of the Mine Act to most effectively promote miner safety and health. *Cf. Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994); *see also New York State Dept of Social Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973) (federal statutes cannot be interpreted to negate their stated purposes). Rather, as noted, "the fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view toward their place in the overall statutory scheme." *Utility Air Regulation Group v. EPA*, 134 S.Ct. 2427, 2441 (2014), *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Given that the text of the statutory phrase "representative authorized by his miners" in section 103(f) is ambiguous as discussed above, the Commission must look to the broader structure of the Act to determine whether the Secretary's current interpretation of the statutory walk-around

provision produces a substantive effect that is consistent with the overall purpose of the Mine Act. *Cf., United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Ambiguity should be resolved by looking to the context and purpose of the walk-around provision and eschewing a construction that would undermine the purpose of the provision or lead to absurd results. *See, e.g., Sec'y of Labor v. Twentymile Coal* Co., 411 F.3d 256, 261 (D.C. Cir. 2005); *Emery Mining Corp v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984); *Consolidation Coal*, 15 FMSHRC 1555, 1557 (Aug. 1993). I conclude that the context and structure of the statutory walk-around provision within the Mine Act fully supports the Secretary's interpretation that the designated representative of locked out miners shall be given an opportunity to participate in inspections during the lockout because this interpretation is reasonable, permissible, and advances the primary purpose of the Act to protect miner safety and health.

B. The Secretary's Interpretation is Consistent with the Overall Purpose of the Mine Act to Protect Miner Safety and Health and the Specific Purposes of Section 103(f) by Ensuring the Rights of Locked-Out Miners to Aid MSHA's Inspection and Participate in Pre-and Post-Inspection Conferences

The Mine Act's overall purpose is to protect the health and safety of the mining industry's most precious resource, the miner. *Peabody,* 822 F.2d at 1146, citing section 2(a) of the Act, 30 U.S.C. § 801(a). Thus, the Mine Act must be interpreted to achieve the overarching goal of protecting the safety and health of miners. *See United Mine Workers of Am. v. Dep't of Interior*, 562 F.2d 1260, 1265 (D.C. Cir. 1977) ("Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred.")

Section 103(f) plays a critical role in the overall enforcement scheme of the Act and the Commission will not restrict 103(f) rights, absent a clear indication in the statutory language or legislative history, or appropriate limitation imposed by regulation. *SCP Investments, LLC*, 31 FMSHRC 821, 827 (Aug. 2009) (opinion of Commissioners Young and Cohen); *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). As explained above, the definition of "miner," as set forth in the statutory phrase "representative authorized by his miners" in section 103(f), is ambiguous as applied to locked-out miners. The Secretary's interpretation that the phrase "representative authorized by his miners" should include a representative authorized by locked out miners is favored and entitled to deference. This is because that interpretation is fully protective of mine safety and health and best advances the overall purpose of the Act to protect miners, and the specific purposes of section 103(f) in furtherance of that overall statutory goal.

A fundamental purpose of the walk-around rights set forth in section 103(f) is to encourage miner awareness of health and safety concerns. *Kerr-McGee*, 40 F.3d at 1260, 1264 & n.13; *Consolidation Coal*, 3 FMSHRC 617, 618 (Mar. 1981); S. Rep. No. 95-181, at 28; MSHA Interpretive Bulletin, 43 Fed. Reg. 17,546, (Apr. 25, 1978). As inspector Barrick testified, this is the most important aspect of the miners' representative function. Tr. 29. This fundamental purpose of section 103(f) is advanced by permitting the authorized representative of locked-out miners to participate in physical inspections and pre- and post-inspection conferences under section 103(f). The reason is manifest. Participation by a miners' representative in physical inspections

and pre and post-inspection conferences permits dissemination of knowledge concerning safety and health hazards or conditions to other miners throughout the mine, particularly the locked-out miners, who have a reasonable expectation of returning. Locked-out miners have an actual and continuing interest in staying abreast of existing, continuing, developing, or abating safety and health issues at the mine where they reasonably expect to return and resume the inherently dangerous work of mining. *See Performance Coal Co.,* WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ) (miners who were employed at time of Upper Big Branch explosion and thereafter were involuntarily relocated to a sister mine have an ongoing interest in the safety of the mine where they were working and will return to work).[8]

Although lockouts may last for an extended period of time,[9] locked-out miners cannot be permanently replaced and have a reasonable expectation or returning to work after the conclusion of the lockout because the operator may only hire temporary replacement miners during a lockout, not permanent replacement workers that are permissible in the economic-strike context, such as *Cyprus Empire. See e.g., Ancor Concepts,* 323 NLRB 742, 744 (1997) (use of permanent replacements is inconsistent with a declared lawful lockout in support of bargaining position) *enforcement denied on other grounds*, 166 F.3d. 55 (2d Cir. 1999); *Harter Equipment, Inc.,* 280 NLRB 597 (1986)(absent specific proof of antiunion motivation, employer did not violate Section 8(a)(3) and (1) by hiring temporary replacements during offensive lockout), *aff'd sub nom. Operating Engineers Local 825 v. NLRB,* 829 F.2d 458 (3d Cir. 1987)(employer's hiring of

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[8] In *Performance Coal*, the judge found that "[t]he purpose of . . . section 103(f) is to allow miners the opportunity to be involved in the safety and health of the mine where they are employed," and it would "circumvent the purpose of the statute" to deny the miners a representative at the closed mine. *Performance Coal Co.,* WEVA 2010-1909, Unpublished Order at 11, (Dec. 17, 2010) (ALJ). The judge persuasively reasoned that the "miners who were employed at the Mine at the time of the accident have an ongoing interest in the safety of the mine where they were working and will potentially return to work. This safety interest is at the heart of the statute and regulations." *Id.* The judge further concluded that the operator's "narrow reading" of section 103(f) would permit mines "to unilaterally prevent" miners' involvement in safety oversight. *Id.*

Similarly here, Sherwin's interpretation of the phrase "representative authorized by his miners" to exclude a lawfully designated, but locked-out representative, unilaterally prevents miners' involvement in safety oversight. In fact, as noted herein, there was no miners' representative permitted to participate in inspections for three months after the lockout, until Alvarez was eventually designated after inquiry from the undersigned. By contrast, as in *Performance Coal*, the Secretary's interpretation of the phrase "representative authorized by his miners" fosters the overarching safety interest at the heart of the statute and regulations by ensuring that an operator cannot use a lockout to unilaterally preclude miners, through their designated representative, from participating in inspections and conferences to help ensure a safe mine environment where they reasonably expect to return to work.

[9] For example, a lockout lasted for two years (1991-92) at the Ravenswood Aluminum plant in West Virginia, chronicled by Kate Bronfenbrenner and Tom Juravich in *Ravenswood: The Steelworkers Victory and the Revival of American Labor* (1999), and a lockout lasted for two years at the Kaiser Aluminum refinery in Gramercy, Louisiana, during which a tragic explosion injured 29 miners on July 5, 1999. MSHA, Report of Investigation, http://www.msha.gov/disasterhistory/gramercy/ report/reportdept.htm.

temporary employees was not unfair labor practice, where employer intended to return regular employees to work at conclusion of dispute, employer was in financial straits, and employer did not have hostile motive); *cf., Harter Equipment, Inc.*, 293 NLRB 647 (1989) (only locked out "employees" in bargaining unit at time of lockout, and not temporary replacements, are eligible to vote in subsequent decertification election). Accordingly, the locked-out miners legally are still "working" at the Sherwin Mine, much like a miner on vacation or sick leave, albeit they will not return to work until the end of the lockout. Given the locked-out miners' reasonable expectation of returning to the Mine at the conclusion of the lockout, they retain an interest in the health and safety of the Mine and should be allowed to have a representative of miners participate in section 103(f) walk-around activities because such participation serves the statutory purposes set forth in section 103(f) of ensuring the rights of miners to assist MSHA in inspections and pre- and post-inspection conferences to maintain the health and safety of all miners working in the mine.

As noted, the Preamble to the Part 40 regulations authorizes a broad interpretation of the phrase "*representative authorized by his miners*" in section 103(f) to achieve the statutory purpose of facilitating the miners' voice in health and safety matters at a mine. 43 Fed. Reg. 29,508 (July 7, 1978). The Secretary's interpretation that section 103(f) covers a miners' representative designated by locked-out miners, who cannot be permanently replaced and reasonably expect to return to work, is reasonable because it furthers the specific and primary "purposes of aiding [MSHA's] inspection and to participate in pre- or post-inspection conferences held at the mine." *See* 30 U.S.C. § 813(f); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995); *Kerr-McGee*, 40 F.3d at 1263; 43 Fed. Reg. 17,546 (Apr. 25, 1978); *cf.*, *KenAmerican Resources,* 35 FMSHRC at 1973 (July 2013) (majority panel held that laid-off worker was "miner" for purposes of section 105(c)(2)'s anti-discrimination provision, distinguishing cases like *Peabody* where laid-off workers were not "miners" under other statutory provisions) (Chairman Jordan, concurring).

Another purpose of the walk-around provision is to assure miners that inspectors will uncover violations and hazards. 115 Cong. Rec. S27,287-88 (Sept. 26, 1969), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, 94th Cong., 1st Sess.. Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 393 (Comm. Print 1975) (statement of Sen. Metcalf introducing walk-around provision amendment in Coal Mine Health and Safety Act of 1969) ("[I]t might well happen that that miner working in that mine would help the inspector by calling attention to certain safety violations. He is familiar with the operation of the mine, and he would be able to represent his fellow union members or his fellow mine workers to reveal safety violations."). Participation in inspections and conferences by locked-out miners' representatives, who reasonably expect to return to work at the conclusion of the lockout, helps promote this purpose because such representatives, as demonstrated in this case, have site-specific knowledge and expertise to aid the Secretary in ensuring mine safety and health during a physical inspection. After all, "... it is reasonable to expect that miners will choose representatives with a substantial amount of experience ...." 43 Fed. Reg. 29,508. Such a representative will aid MSHA inspectors in their efforts to protect both the current safety of temporary replacement miners and the future safety of the locked-out miners when they return to work.

Based on the record evidence presented in this case, it is likely that inspection participation

by the representative of the locked-out miners will enhance mine safety and health more effectively than participation by a representative designated by temporary replacement miners, who will typically lack equivalent site-specific experience and technical knowledge, at least at the outset of the labor dispute. As explained below, the record in this case suggests that the representative designated by the temporary replacement workers at the outset of the lockout typically will be on a significant "learning curve," and therefore will be less qualified to identify hazards and assist the inspector by providing site-specific technical knowledge about the mine's production processes. It is significant that the temporary workers did not participate in mining or actively engage with the mine environment before the lockout began, and instead only observed the locked-out workers. Tr. 184.

On the other hand, the record establishes that since his designation, Guzman had significant mine-specific experience and familiarity with the hazardous processes of refining alumina under pressure using corrosive chemicals and caustic liquids. Tr. 28-29, 40, 104-05, 178. Specifically, inspector Barrick testified that the miners' representative, usually Guzman unless another representative was substituting, would travel with an inspector "to help us by providing information, typically on technical or process-type questions that we might have. Also, he could identify other miners in the area for us. And, of course, his most important job ... is to take that ... information back to his ... miners and let them know what ... he observed during an inspection." Tr. 29. In fact, Paul English, Respondent's safety, health and industrial hygiene manager, testified that Guzman would answer an inspector's questions about mine processes or how equipment worked, provide an opinion about possible allegations, and point out dangers or hazards to an inspector. Tr. 104-105. English confirmed that Guzman actively participated in post-inspection conferences by expressing agreement or disagreement with citations. Tr. 105. English also testified that Guzman would report inspection results back to the miners and that Guzman was a full-time miners' representative pursuant to the corrective action plan (CAP). Tr. 108.

When asked why he would consult a miners' representative like Guzman about processes or technical issues, inspector Barrick testified that "[a] lot of times that miner may have performed that work. He has ..., at times, a better understanding of the processes than sometimes operational folks will" because he has "a working knowledge of ... some of the processes. And if he doesn't, he knows those that do, and we can get those people. " Tr. 29. Inspector Barrick further testified, "[w]hen we're evaluating conditions, we want all the facts; we want as much information as we can possibly get about what we're dealing with at that time." Tr. 29-30. Barrick further explained, "... Sherwin is a very complex process; there's a lot there to learn; there's a lot there to understand. So again, the more people we could involve, you know, in that process of trying to garner the right information and make evaluations, and if, indeed we needed to, you know, issue citations, that we ... try to do that in a fair manner." Tr. 30. Barrick also credibly testified that the miners' representative plays a very useful role at closeout conferences, particularly through input regarding the appropriate level of abatement to get at the root cause[s] for cited conditions. Tr. 30-31.

Although English attempted to paint a picture that temporary replacement miners' representative, Francisco Alvarez, a management official with replacement contractor CCC Group, performed the same or comparable miners' representative role as Guzman at the time of the hearing, I discredit this effort. Tr. 106. Alvarez, the new, post-lockout miners' representative for

replacement miners, lacked the same or comparable site-specific technical and process knowledge as Guzman since English conceded that Alvarez was "on a learning curve." Tr. 106. In fact, for 105 days during numerous inspections after the commencement of the lockout, no miners' representative was given the opportunity to accompany MSHA inspectors until Alvarez was eventually designated on January 23, 2015, after inquiry from the undersigned. This factual scenario is antithetical to the encouragement of miner participation in the health and safety of the mine, which Congress deemed so vital to effective safety and health enforcement. See 43 Fed. Reg. 29508.

When CCC Group manager Alvarez was eventually designated as the replacement miners' representative, he did not report inspection results back directly to miners as Guzman had done. Tr. 29, 108. Rather, such information was filtered through English and other Sherwin and CCC management before reaching miners. Tr. 108. Nor did Alvarez point out hazards to an MSHA inspector, as Guzman had done. Tr. 105, 109-10. Further, when English was asked whether English had ever pointed out a hazard to an inspector, English evaded the question. Tr. 105. I find on this record that Alvarez's representative role was not comparable to Guzman's representative role, and because Sherwin excluded Guzman from participating in physical inspections and conferences during the lockout, the purposes of section 103(f) were flouted for more than 3 months.

I further find, consistent with the appropriate broad interpretation of the statutory phrase "representative authorized by his miners" in section 103(f), that "[t]he purposes of the Mine Act are better served by allowing multiple representatives to be designated" in the context of a lockout because "[t]his ensures that all miners have the opportunity to exercise their right to select the representative of their choice for the purpose of performing" section 103(f) representative-of-miner functions. See 43 Fed. Reg. 29508. Thus, Guzman must or "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection" of the Sherwin mine during the lockout, and Alvarez must or shall be given the same opportunity. In the words of section 103(f), "[t]o the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection...." 30 U.S.C. § 813(f). Sherwin's attempt to cabin MSHA's section 103(f) discretion and "to limit the manner in which representatives are selected would be intrusive into labor/management relations at the mine, and not in keeping with the spirit of miner participation." 43 Fed. Reg. 29508.

During a lockout, the designated miners' representative cannot effectively keep involuntarily locked-out miners apprised of the dynamic, ongoing, and constantly evolving safety and health conditions prevalent at the mine, absent participation in physical inspections and conferences. It may be too late to wait until the lockout concludes to bring the specialized knowledge or concerns of the locked-out miners' representative to bear on the physical conditions, hazards, or dangers prevailing at the mine during the lockout because decisions regarding such mine safety issues may be finalized by the time locked-out miners resume active work. For example, citations were written during post-lockout inspections from which Guzman was

excluded. Tr. 99. Therefore, Guzman could neither assist MSHA to understand the alleged violations and uncover additional hazards, nor keep the locked-out miners informed about such conditions to which they may be exposed when they return to work. Furthermore, Sherwin faced the prospect of being placed in POV status and challenging such notice and any subsequent section 104(e) withdrawal order during the lockout. Tr. 61, 141. The locked-out miners' representative should be allowed to participate in inspections and conferences related to such POV proceedings, if any, since the locked-out miners reasonably expect to resume work at the Mine.

Sherwin argues that inspectors can speak to other miners during the lockout. Sherwin Br. 4. Sherwin also argues that the locked out miners have not been precluded from staying abreast of safety issues and citations during the lockout because they can access MSHA's website and submit Freedom of Information Act (FOIA) requests. Further, Sherwin asserts that the locked-out miners are required to receive part 48 training prior to their return, including training on any new safety procedures and concerns that have arisen during the lockout. Sherwin Br. 4-5; Tr. 140; 30 C.F.R. part 48. All that may be true, but Sherwin is essentially substituting its own view of safety and health policy for the expert view of the Secretary of Labor (see Sec'y Reply Br. 5,) and Sherwin's reasonable-alternative-means argument is no substitute for Congress's decision that a properly designated miners' representative be granted the opportunity to invoke the statutory right to accompany inspectors during physical inspections and to participate in pre-and post-inspection conferences.

Nor, as the Secretary points out, is it sufficient to rely on the ability of the miners' representative to request a hazard inspection under section 103(g) when the lockout ends. Sec'y Br. 18-19; *but see Cyprus Empire*, 15 FMSHRC at 15 (economic strikers, subject to permanent replacement, were not entitled to a section 103(f) walk-around representative during the strike because they were not presently exposed to hazards and could request an inspection under section 103(g) *if* they returned to work). A section 103(g) hazard inspection focuses on an imminent danger or particular violation of a mandatory health or safety standard. 30 U.S.C. § 813(g)(1) ("a special inspection shall be made as soon as possible to determine if such violation or danger exists"). The special inspection may be needed during the lockout and the locked-out miners' representative should be there at MSHA's discretion for the limited purpose of assisting such inspection. If the locked-out miners' representative is unable to participate and assist in regular inspections and conferences during the lockout, he or she may be unaware upon return to work of subtle or dynamic changes in the mine environment likely to cause hazards, or unaware of particular conditions likely to create hazards. Indeed, hazards themselves may go unnoticed before they worsen and increase danger. Such danger is particularly acute at a large alumina refinery that encompasses 1200 acres, and utilizes hundreds of valves, tanks, and miles of piping (Tr. 96), and Sherwin's contrary interpretation of section 103(f) does not promote the safety and health purposes of the statute. The Gramercy explosion at the Kaiser alumina refinery referred to in the record by Sherwin, grounds this concern in reality. Tr. 165-66; *see supra*, n. 4.

Consequently, actual participation by the locked out miners' representative in inspections and conferences during the lockout is crucial to maximizing mine safety and health during the lockout. As the Secretary persuasively argues on brief:

> "... subsequent review by the [locked out] miners of a cold record of

> citations is no replacement for the robust, eye-witness experience the representative has when accompanying the inspection team and seeing for him or herself how conditions are evolving. Any suggestion that miners can simply get up to speed on how conditions at the mine have changed during their temporary absence by reviewing such records ignores the reality that most people learn and retain information better by witnessing live events than by reviewing notes. Furthermore, not every evolving condition that impacts miner health and safety will be something that leads to a citation. Only by accompanying the inspection team will the miners' representative stay apprised of conditions that may yet evolve into health or safety hazards.

Sec'y Br. 18.

The fact that replacement miners and returning locked-out miners must undergo training before commencing work, and that MSHA is able to speak to other miners during the lockout, is weak justification for excluding a locked-out miners' representative from participating in physical inspections and pre- and post-inspection conferences. As the Secretary again persuasively argues on brief, "[t]elling miners what has happened at a mine after the fact is no replacement for their having had a voice in the dialogue in the first place." Sec'y Reply Br. 5. Furthermore, as explained herein, MSHA need not choose from amongst sources of information or between designated representatives. Rather, MSHA has discretion to broadly gather information from as many sources as possible. Thus, an experienced locked-out miners' representative, such as Guzman, and an inexperienced temporary replacement miners' representative, such as Alvarez, should both be given the opportunity to participate in physical inspections and conferences during the lockout, at MSHA's discretion. Sherwin must give each representative the requisite training to fulfill their statutory responsibilities.[10]

The broad discretion conferred on the authorized MSHA inspector when determining the

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[10] Under 30 C.F.R. §48.3, operators must have an approved training plan that covers, *inter alia*, experienced miner training (30 C.F.R. §48.6) and annual refresher training (30 C.F.R. §48.8). Operators may receive citations for failure to properly conduct these trainings. See e.g., *Emery Mining Corp.*, 5 FMSHRC 1400 (Aug. 1983)(Commission held a civil penalty was appropriate when miners did not receive annual refresher training for 15 months in violation of 30 C.F.R. §48.8); *Sally Ann Coal Company, Inc.*, 37 FMSHRC 246 (Feb. 2015)(ALJ Harner)(citation under 30 C.F.R. §48.6 affirmed). As shown herein, unlike laid-off miners seeking to invoke training rights under section 115 of the Act, locked-out miners' representatives like Guzman remain "miners" for the purposes of the section 103(f) of the Act during the course of the lockout. Further, a miners' representative, who works at the mine and regularly assists an MSHA inspector during inspections, would be "regularly exposed to mine hazards," and therefore be a "miner" for training purposes under 30 C.F.R. §48.2. But for Respondent's unlawful exclusion of Guzman as the designated miners' representative under section 103(f) of the Act, Guzman presumably would not have experienced any lapse of training requirements after the lockout began. Accordingly, to the extent that any training of Guzman's has lapsed, Respondent is responsible for retraining him.

statutory participation right during the particular inspection at issue is aptly captured in the following passage from MSHA's Interpretive Bulletin concerning section 103(f) of the Mine Act.

> Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners. Where necessary in order to assure a proper inspection, the inspector may limit the number of representatives of the operator and miners participating in an inspection. The inspector can also require individuals asserting conflicting claims regarding their status as representatives of miners to reconcile their differences among themselves and to select a representative. If there is inordinate delay, or if the parties cannot resolve conflicting claims, the inspector is not required to resolve the conflict for the miners and may proceed with the inspection without the presence of a representative.

43 Fed. Reg. 17546. In this case, Sherwin unlawfully removed such discretion from inspector Barrick when it denied Guzman section 103(f) rights, as requested by Barrick on November 13, 2014.

Respondent's additional argument that the safety interests of the temporary replacement workers have been protected during the lockout, and that the interests of the locked-out employees will be protected when they eventually return to work is unconvincing and falls short of the requisite, broad interpretation of section 103(f) favoring a representative for each group of miners, whose interests may not always align. Sherwin's argument ignores the fact that no miners' representative participated in inspections after the lockout for over three months. Fortunately, no accident occurred during this period when the plant was operated with replacement workers, who were primarily newly trained miners, with no previous mining experience. Tr. 58-59; *compare* Tr. 165-66 and n. 9 (referring to Gramercy explosion).

Furthermore, it is arguable in a labor dispute context, such as a lockout, that *temporary* replacement workers may be less concerned about appointing an aggressive advocate to represent their safety interests and may be more easily intimidated because of their temporary status than a permanent, albeit locked-out, miners' representative. Even if the temporary replacement workers are concerned with advocating on safety issues, they likely lack the site-specific knowledge possessed by permanent workers, as discussed above. Furthermore, the Mine Act is concerned about the safety of all miners, both permanent and temporary alike, and temporary replacement miners are entitled to benefit from the knowledge possessed by locked-out miners and their representative, even if the interests of the two groups do not always align in the labor relations

context.

Finally, as noted above, only after inquiry from the undersigned during a pre-hearing conference call, did the temporary replacement workers eventually designate a member of the replacement contractor's management team to serve as a representative of miners and report through another manager to Sherwin's safety and health manager, who filtered the message back to the rank and file miners. Tr. 107 -08. In effect, two management representatives purported to "aid" the MSHA inspectors to uncover hazards during lockout inspections, although neither ever apparently pointed out a hazard, while management excluded Guzman, the miners' representative from the locked-out rank and file, who often pointed out hazards. Surely, section 103(f) was not designed to malfunction this way.

I discount Sherwin's attempt to claim that safety has improved because miners represented by the Steelworkers were locked out, and that the temporary replacement workers' commitment to safety has resulted in a noticeable improvement in Sherwin's safety record. Sherwin Br. 4. English testified that since the replacement workers began mining there has been an increased emphasis on safety, the overall health of the facility has improved, and he has received several compliments from various inspectors regarding the replacement workers. Tr. 86-87. In the absence of any concrete data provided by Sherwin, I must weigh English's testimony against inspector Barrick's testimony regarding the underlying impetus for any apparent improvement in safety.

Inspector Barrick testified that mine safety had been improving during the year prior to the lockout due to several factors. Barrick had seen improvement in 2014, after Sherwin developed a corrective action plan (CAP) in September 2013 and re-evaluated workplace examination requirements in conjunction with discussions with the MSHA district office. Tr. 38-39. As noted, the Mine had been informed that it was a POV candidate under section 104(e) because of its pattern of significant and substantial violations, primarily involving housekeeping matters such as guarding issues, electrical issues, and safe access issues. Tr. 40, 61, 141. After the lockout, MSHA changed its historical wall-to-wall inspection procedure to have an inspector present almost every day to intensify evaluation of small areas. Tr. 39. Sherwin was legally obligated to provide the temporary replacement miners with comprehensive training prior to their temporary employment, which it did. Tr. 140, 184; 30 C.F.R. part 48. Although Barrick acknowledged that the replacement workers had done a good job addressing housekeeping issues, most of the replacements were new miners with no previous mining experience. Tr. 58-60. In these circumstances, I reject any argument by Sherwin that mine safety improved because of the lockout and the exclusion of Guzman in contravention of section 103(f) of the Mine Act.

I also reject Sherwin's arguments that the Secretary's interpretation conflicts with federal labor policy under the NLRA. Sherwin Br. 19-20. Specifically, Sherwin argues that the Secretary's interpretation purportedly requires an operator to compensate a locked-out miners' representative in contravention of a non-precedential Advice memorandum from the NLRB's Office of General Counsel. Sherwin Br. 19-20, citing *Brighton Corp.*, 1984 WL 47445 (Feb. 29, 1984) (Advice Memorandum in Case 13-CA-23492). Sherwin further argues that the Secretary's interpretation forces Sherwin to allow a locked-out miners' representative to enter onto Sherwin's private property, and undermines Sherwin's ability to use an offensive lockout to exert lawful

economic pressure during a labor dispute. Sherwin Br. 19-20.

Sherwin's arguments lack merit. As the Secretary persuasively rejoins on reply brief, section 103(f) does not require that a miner's representative receive pay; rather, it only requires that the miners' representative "suffer no loss of pay during the period of his participation in the inspection." Sec'y Reply Br. 6, citing 30 U.S.C. § 813(f). Since a locked-out miner is not entitled to be paid wages and fringe benefits during the lockout, even under the NLRB "authority" relied on by Sherwin itself, Sherwin need not pay the locked-out miners' representative for performing section 103(f) functions during the lockout because such a miner will not suffer a *loss* of pay while locked out. *Cf.* Sec'y Reply Br. 6. Further, Sherwin need only pay the temporary replacement representative, not the locked out representative, even though both participate in the inspection, because section 103(f) explicitly provides that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection." 30 U.S.C. § 813(f).

Sherwin also argues, this time without citation to any NLRA authority, that the Secretary's interpretation forces Sherwin to allow locked-out employees to enter its mine, thereby effectively interfering with its lawful right to use the lockout as an economic weapon. Sherwin Br. 20. *See generally, American Ship Building*, 380 U.S. 300, 311 (1965)(employer does not violate section 8(a)(1) or 8(a)(3) of the NLRA after a bargaining impasse has been reached by temporarily laying off or locking out employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position); *Harter Equipment, supra,* 280 NLRB at 597, *aff'd sub nom. Operating Engineers Local 825 v. NLRB,* 829 F.2d 458 (3d Cir. 1987).

The Secretary counters:

> It is unclear how permitting a miners' representative to enter a mine for the exclusive purpose of joining a (supervised) inspection team noticeably diminishes an operator's ability to use "the tools that the NLRB has allowed employers and unions to use." *Id.* [citing Sherwin Br. 20] Even though the Secretary's interpretation has the effect of allowing a union member to enter a mine when he would not otherwise be able to, the same was true in *Utah Power & Light* and *Kerr McGee*, which permitted union representatives who are not "miners" to serve as miners' representatives. As those cases hold, the solution is not to invalidate the Secretary's interpretation, but to permit the operator to protest if the miners' representative engages in any (mis)conduct that goes beyond his or her role as an advocate for miners' safety.

Sec'y Reply Br. 6.

I once again find myself in full agreement with the Secretary of Labor. As the Steelworkers persuasively argue on brief, there is no evidence that the Secretary improperly issued the Citation and Order at issue to affect the balance of power in the ongoing labor dispute or negotiations between Sherwin and the Steelworkers. Steelworkers Br. 12-15. In fact, I permitted

Sherwin to pursue such inquiry at trial over objection from the Secretary and the Steelworkers. Tr. 15. Had there been proof that this was the Secretary's actual motivation and not advancement of miner safety and health, the Secretary would arguably have been acting *ultra vires*. Tr. 15-19; *Compare NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477 (1960)(economic weapons are "part and parcel" of peaceful resolution of collective-bargaining disputes and NLRB exceeded its power by attempting to regulate the choice of economic weapons to equalize disparity in bargaining power).

Furthermore, Sherwin's poorly articulated reliance on its private property rights under NLRA precedent to trump the statutory rights of an *employee* miners' representative to represent the interest of locked-out miners, and advance the purposes of mine safety and health under section 103(f) during a labor dispute, is not persuasive for several reasons. First and foremost, under the Mine Act, such property rights yield to a warrantless MSHA inspection. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). The miners' representative participates in an inspection party solely to aid that inspection. 30 U.S.C. § 813(f). In the pervasively regulated mining industry, the warrantless intrusion of an MSHA inspector and representative "aides" to ensure miner safety and health trumps private property rights. *Donovan v. Dewey*, 452 U.S. at 599-600; *compare Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990)(even nonemployee union representative entitled to exercise walkaround rights under section103(f)). Sherwin has advanced no compelling reason why this result should not hold true for an employee miners' representative like Guzman during a lockout.

As shown above, Respondent's arguments rely heavily on issues directly related to the National Labor Relations Act (NLRA). For the reasons discussed *supra*, there are adequate and independent logical and Mine Act bases for rejecting Respondent's labor law claims. However, even if I address Respondent's inchoate arguments under the NLRA, I see no reason why Guzman's walkaround rights should be limited. Rather, allowing Guzman to participate in the inspection party during a lockout is compatible with the NLRA.

By its plain terms, the NLRA confers statutory rights on employees, not unions or nonemployee organizers. *Lechmere, Inc. v. NLRB*, 502 U.S. 522, 532 (1992). There, the Supreme Court stated:

> Thus, while "[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves,* unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," [citing *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956)](emphasis added) *(citing Republic Aviation Corp.* v. *NLRB, 324* U. S. 793, 803 (1945)), "no such obligation is owed nonemployee organizers," 351 U. S. at 113.

Lechmere, 502 U.S. at 533. Thus, under the NLRA, as opposed to the Mine Act, an employer need not be compelled to allow *nonemployees* (usually union organizers) onto its property, except in the rare instance where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* at 537, *citing Babcock, 351* U.S. at 112 (1956). Significantly, in *Lechmere*, the Court reiterated *Babcock's* admonition that

accommodation between *employees'* statutory rights and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 534, *citing Babcock,* 351 U. S. at 112.

In the Mine Act section 103(f) context, the statutory right of a miners' representative to be given an opportunity to accompany the inspector to aid the inspection and to participate in pre- or post-inspection conferences held at the mine during a lockout can be maintained with little destruction of the employer's property interests, which already must yield to a warrantless inspection. In this case, Guzman, the miners' representative for the locked-out miners, is still an employee, who cannot be permanently replaced, and is exercising a statutory right at the discretion of the MSHA inspector under section 103(f) in furtherance of the overall purpose of the Mine Act to ensure miner safety and health.

Finally, Sherwin has failed to establish that the exclusion of Guzman as a miners' representative during a post-lockout inspection is necessary to maintain production or discipline. *Cf., NLRB v. Babcock & Wilcox Co.,* 351 U.S. at 113, *citing Republic Aviation Corp. v. NLRB,* 324 U. S. at 803. Although given a full opportunity to create a factual record, Sherwin failed to offer any evidence that Guzman, or any other miner represented by the Steelworkers, engaged in sabotage. Further, Sherwin has not cited a single instance where a miners' representative has engaged in sabotage, an act that is made less likely by the fact that miners' representatives usually join inspection teams that include an MSHA inspector and an operator's representative(s). As noted, the Secretary's implementing regulations and MSHA's Interpretive Bulletin concerning section 103(f) of the Mine Act give MSHA inspectors' broad discretion and control over proper inspection procedures in order to promote safety and avoid worksite disruptions. This is sufficient to counter Sherwin's unsubstantiated concern about abuse during inspections or conferences by locked-out miners' representatives. *Cf., In the Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 339-40 (7th Cir. 1995).[11]

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[11] Although interpreting a differently worded statute, it is instructive that the Seventh Circuit and the Occupational Safety and Health Review Commission (OHSRC) have rejected similar concerns with respect to strikers invoking the walk-around provision set forth in the Occupational Safety and Health Act. That provision, 29 U.S.C. § 657(e), states:

> "[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace."

Although the OSHA walk-around provision applies to "employees" without reference to whether they are "working," the Secretary has consistently determined that strikers are still employees who must be allowed to accompany OSHA inspectors to aid their inspections and ensure that inspection procedures are unaffected by labor disputes. *See In re: Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 338-39 (7th Cir. 1995); *Rockford Drop Forge Co. v.*

Furthermore, as the Secretary highlights on reply brief, "courts have held that '[w]hile . . . walk-around rights may be abused by nonemployee representatives, the potential for abuse does not require a construction of the Act that would exclude nonemployee representatives from exercising walk-around rights altogether. The solution is for the operator to take action against individual instances of abuse when it discovers them.'" Sec'y Reply Br. 4, *quoting Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 450 (10th Cir. 1990); *see also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1278 (10th Cir. 1995) (same); *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1264 & n.12 (similar); *see also Kerr-McGee Coal Corp. v. Sec'y of Labor*, 15 FMSHRC 352, 361 (Mar. 1993). Here, Sherwin failed to establish any pre-lockout misconduct by Guzman in his role as miners' representative, and Sherwin deprived itself of the opportunity to take post-lockout disciplinary action against Guzman for any misconduct because Sherwin unlawfully excluded Guzman from the inspection party.

Finally, the Secretary's statutory interpretation in this case, at least in the context of a lockout, is consistent with Commission and judicial precedent giving a broad interpretation to the walk-around provision to permit miners to designate non-miner, third parties as walk-around representatives in order to effectuate the safety purposes of the Mine Act. *See Thunder Basin*, 56 F.3d at 1280 (deferring to the Secretary's interpretation that the Act permits a nonemployee union agent to serve as a miners' representative); *Utah Power & Light*, 897 F.2d at 450 (concluding that section 103(f) "confers upon the miners the right to authorize a representative for walk-around purposes without any limitation on the employment status of the representative"); *Kerr-McGee*, 40 F.3d at 1263 (granting deference to Secretary's interpretation allowing non-elected labor organization to serve as miners' representative at non-unionized mine because "in view of Congress' clear concern about miners' safety, the Secretary's broad interpretation of the term is consistent with congressional objectives."). These cases demonstrate the validity and consistency of the policy concerns supporting the Secretary's current and reasonable interpretation of the Mine Act during a lockout.

In short, the Secretary's interpretation recognizes the "important role section 103(f) plays in the overall enforcement scheme," *Consolidation Coal*, 3 FMSHRC at 618, as well as the key position that both miners and miners' representatives serve in furthering the "general health and safety purposes of the Mine Act," *Thunder Basin*, 56 F.3d at 1278. As explained herein, the Secretary's interpretation in the context of a lockout is permissible and fully consistent with the Mine Act's overarching purpose to protect miner safety and health at all times, and with the specific purposes of the walk-around provision in furtherance of that primary statutory objective.

Donovan, 672 F.2d 626, 631-32 (7th Cir. 1982). In *Caterpillar*, the Seventh Circuit, recognized that "[t]he purpose of the [Occupational Safety and Health Act is to inspect for safety hazards and violations of OSHA regulations," and declined to "force employees to choose between exercising their National Labor Relations Act right to strike and their OSHA right to accompany inspections." *Caterpillar Inc.*, 55 F.3d at 340, (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307, 309 (1978)). Similarly, as the Seventh Circuit in *Rockford Drop* recognized, "[s]urely [striking] employees like these should not be disenfranchised from preserving the safety of the workplace where they hope to return." *Rockford Drop,* 672 F.2d at 632.

Accordingly, I affirm the 104(a) Citation and 104(b) Order, as written, and I affirm the proposed penalty of $112.

V. Civil Penalty

The Act requires that when evaluating a civil monetary penalty the Commission shall consider six statutory penalty criteria: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good faith compliance after notice of the violation. *Douglas R. Rushford Trucking,* 22 FMSHRC 598, 600 (May 2000). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for a substantial divergence from the proposed penalty under the criteria. *Spartan Mining Co.,* 30 FMSHRC 699. 723 (Aug. 2008).

Here, the Secretary provided a proposed assessment of $112. The Commission has frequently recognized that section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. See *Wade Sand & Gravel Company*, Docket No. SE 2013-120-M, slip op. (Sep. 16, 2015); and *Mining & Property Specialists*, 33 FMSHRC 2961, 2963 (Dec. 2011). Neither the Judge nor the Commission is bound by the proposed assessment. 29 C.F.R. § 2700.30(b); *Wade Sand & Gravel Company, supra*; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[Neither] the ALJ nor the Commission is bound by the Secretary's proposed penalties... we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission."). However, while the Secretary's proposed penalty is not binding, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Performance Coal Co.*, 2013 WL 4140438, *2 (Aug. 2, 2013); *Spartan Mining Co.,* 30 FMSHRC *supra*; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

In light of the Commission authority described above, I take pains to ensure that my penalty assessments are as transparent as possible. As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's assessment formula as a reference point. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). This formula is not binding, but operates as a lodestar, since factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Further, unique aggravating or mitigating circumstances may call for higher or lower penalties, and will be taken into account under my independent analysis of the criteria set forth in section 110(i) of the Mine Act and Commission precedent. Here, I find that the penalty proposed by the Secretary of $112 is consistent with the statutory criteria in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). Accordingly, I assess a $112 civil penalty against Respondent. If Sherwin continues to refuse to abate the violation, MSHA may assess daily failure-to-abate penalties. See 30 U.S.C. § 820 (b)(1), 30 U.S.C. § 813(f), and Interpretive Bulletin 43 Fed. Reg. 17,547, *supra.*

VI. ORDER

For the reasons set forth above, I **AFFIRM** Citation No. 8778065 and Order No. 8778066, as written. It is **ORDERED** that the operator provide Joe Guzman with any training that he needs

since the lockout to perform his miners' representative functions under section 103(f) of the Mine Act. It is further **ORDERED** that the operator pay a civil penalty of $112 within 30 days of this decision.[12]

Thomas P. McCarthy
Administrative Law Judge

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[12] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.