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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CLAYTON NANTZ	:	
v.	:	Docket No. KENT 92-259-D
NALLY & HAMILTON ENTERPRISES, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), Administrative Law Judge George A. Koutras concluded that Nally & Hamilton Enterprises, Inc. ("NHE") constructively discharged Clayton Nantz in violation of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), and awarded Nantz backpay plus interest. 14 FMSHRC 1858 (November 1992)(ALJ) (liability); 15 FMSHRC 237 (February 1993) (ALJ)(damages). The Commission granted NHE's petition for discretionary review, which challenged the judge's determination of discriminatory discharge and his backpay award. The Commission also directed review, sua sponte, of the judge's deduction

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1. All Commissioners agree on the disposition of issues except for the deduction of unemployment compensation from the backpay award. Commissioners Doyle and Holen have voted to affirm the judge's decision to deduct unemployment compensation; Chairman Jordan and Commissioner Marks would reverse the judge on this issue. The effect of the tie vote is to let stand the judge's ruling that unemployment compensation is deducted from the backpay award. Pennsylvania Elec. Co., 12 FMSHRC 1562, 1563-65 (August 1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992).

of unemployment compensation from Nantz's backpay award. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Nantz operated an enclosed-cab bulldozer at NHE's Gray's Ridge Job Mine, a surface coal mine in Harlan, Kentucky, on the night shift. On or about April 3, 1991, a truck struck the bulldozer Nantz customarily used, knocking out its back window. 14 FMSHRC at 1860, 1889. As a result of the broken window, Nantz began experiencing problems with dust exposure. Id. at 1860. On a number of occasions, he complained to Foreman Henderson Farley and then to his replacement, Foreman Wayne Fisher, that dust was choking him and causing health problems. Id. at 1885. Both foremen assured Nantz that the window would be replaced. Id. at 1860-61.

Upon reporting to work on April 16, Nantz asked Fisher whether the window had been replaced. 14 FMSHRC at 1861. When Fisher replied that it had not, Nantz asked if he could perform other work to avoid the dust problem. Id. The foreman advised Nantz that he could operate a loader for an hour or so but that he would then have to return to work on the bulldozer. Id. Nantz told Fisher that he did not want to operate the equipment without the window, gave him his phone number, and asked him to call when the window was replaced. Id. Nantz returned a day or two later to pick up his paycheck. Id. He again asked Fisher if the window had been installed. When Fisher replied that it had not, Nantz said he was leaving and told Fisher to call him when the window was replaced. Id.

Nantz filed a discrimination complaint with the Secretary of Labor on May 29, 1991. On January 31, 1992, the Secretary filed a complaint on Nantz's behalf, pursuant to section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), alleging that Nantz had been discriminatorily discharged. Before the judge, NHE moved to dismiss the complaint and the Secretary's proposed penalty on the grounds that the Secretary had unduly delayed in filing. The judge denied the motion, ruling that NHE had failed to establish that it had been prejudiced by the Secretary's delay. 14 FMSHRC at 1882.

The judge concluded that NHE had constructively discharged Nantz in violation of section 105(c)(1). 14 FMSHRC at 1899. He found that Nantz's refusal to operate the bulldozer on April 16 and April 17, and his refusal to operate a loader for a short period of time on April 16 (termed by the judge an "alternate work refusal"), were activities protected under the Mine Act. Id. at 1893, 1897. He concluded that Nantz was exposed to intolerable, hazardous dust conditions that made it difficult for him to see the trucks in the fill area and caused choking and breathing problems. Id. at 1898. The judge determined that NHE's failure to repair the broken window and its insistence that Nantz operate the bulldozer amounted to constructive discharge. Id. at 1899. The judge assessed a civil penalty of $1,000 against the operator. Id. at 1901.

In awarding backpay, the judge deducted two weeks' pay because, after leaving NHE, Nantz delayed two weeks before seeking other work. 15 FMSHRC at 248-49. He also deducted from Nantz's backpay an amount equal to the unemployment compensation he had received. Id. at 249. The judge rejected NHE's contention that the backpay award should be reduced because of the Secretary's delay in filing the complaint. Id. at 250. He also rejected NHE's assertion that an offset should be made against backpay because of an alleged job offer extended to Nantz, finding that the offer was not bona fide. Id. The judge ordered Nantz's reinstatement and awarded him $17,385 in backpay for the period from April 16, 1991, through December 31, 1992, plus interest. Id. at 250-51.

II.

Disposition of Issues

A. Discriminatory Discharge

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Id.; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

1. Constructive Discharge

A constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. See, e.g., Simpson v. FMSHRC, 842 F.2d 453, 461- 63 (D.C. Cir. 1988). In essence, "[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly." Id. at 461.

NHE argues that the judge erred in concluding that Nantz was constructively discharged, contending that Nantz's work refusal was not protected and that Nantz was not faced with intolerable work conditions. The Secretary responds that the judge properly found Nantz's refusal to work to be activity protected under the Mine Act and that he properly concluded that Nantz had been discriminatorily discharged.

In analyzing whether Nantz was constructively discharged, we address whether Nantz's refusal to operate the bulldozer constituted protected activity under the Act and whether the dust exposure was an intolerable condition, which, left unaddressed, compelled his resignation. These issues are analyzed under the framework the Commission has applied when a miner alleges a discriminatory discharge under section 105(c) of the Mine Act. See, e.g., Pasula, 2 FMSHRC at 2797-800; Robinette, 3 FMSHRC at 817-18.

a. Protected Activity

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd, 780 F.2d 1022 (6th Cir. 1985); Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990)(citations omitted). A miner refusing work is not required to prove that a hazard actually existed. See Robinette, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Id.; see also Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." Robinette, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." Id.

NHE asserts that Nantz's refusal to operate the bulldozer was not protected because he lacked a good faith, reasonable belief that a hazardous condition existed. Contrary to NHE's contentions, substantial evidence supports the judge's determination that Nantz's work refusal was made in good faith and was reasonable because the dust conditions caused by the broken window were, in fact, hazardous. 14 FMSHRC at 1892-93. Nantz, whom the judge deemed a credible witness, testified that, as a result of the dust in the cab, he choked, suffered from headaches, and had difficulty seeing. Id. at 1888, 1898; Tr. 17. A "judge's credibility findings ... should not be overturned lightly." Quinland Coals, Inc., 9 FMSHRC 1614, 1618 (September 1987). Nantz's co-workers corroborated his testimony that he was exposed to extreme dust levels. Tr. 116, 135; see also Tr. 155-56. They also testified that they heard Nantz complain

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2. The Secretary argues that NHE actually discharged Nantz for his work refusals. S. Br. at 6. The evidence may also support a finding that Nantz was discharged. See, e.g., Tr. 124. (Co-worker Harold Farley testified that Foreman Fisher had said he hated to let Nantz go because he was a good worker.)

several times to management that the dust was getting to him "bad" (Tr. 97, 101, 117-18, 131) and one co-worker reported to Foreman Fisher that Nantz was suffering from dust exposure. Tr. 133.

NHE contends that an "objective" test should be applied to determine whether a good faith, reasonable belief in a hazard exists. It asserts that Liggett Indus., Inc. v. FMSHRC, 923 F.2d 150 (10th Cir. 1991), supports its contention that a miner's belief must be objectively reasonable. In Liggett, the court held that, although a miner need not prove the actual existence of a hazard, the lack of a hazard would bear on the reasonableness of a miner's belief that his health was in danger. Id. at 152 (citation omitted). Liggett is consistent with Commission law requiring a miner to show that his perception of a hazard was based on a good faith belief and was reasonable under the circumstances. See Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Secretary on behalf of Hogan v. Emerald Mines Corp., 8 FMSHRC 1066, 1072 (July 1986).

In support of its position that Nally's belief was not reasonable, NHE points to evidence that others did not regard the dust exposure as hazardous. PDR at 3, 13, citing Tr. 198-99, 201-02, 244-45, 294. NHE also argues that Nantz's failure to request a dust mask and his refusal to use a clear plastic cover over the window show the unreasonableness and lack of good faith of his work refusal. It asserts that a reasonable miner in Nantz's place would have taken advantage of these and other self-help remedies if the dust level had been truly severe.

The judge found that NHE did not require its personnel to use masks. 14 FMSHRC at 1891. Nantz testified that he was not aware that dust masks were available and that, in any event, the dust exposure was too intense for a mask to be of assistance. Tr. 73-74. The judge's factual determinations are amply supported in the record.

We also agree with the judge that NHE's evidence on the makeshift plastic covering deserves little weight. 14 FMSHRC at 1890. The judge found that the plastic cover, which Nantz testified would impair his vision (Tr. 70-71), was not routinely used as a preventive measure against dust exposure. 14 FMSHRC at 1891. Foreman Fisher stated that a plastic cover "would help," but conceded that it would not have prevented dust in the bulldozer. Tr. 265. Superintendent Louis Hamilton stated only that, in the past, plastic had been placed on back windows of lifts for protection and that he did not believe it decreased night visibility. 14 FMSHRC at 1891; Tr. 207. NHE's witnesses acknowledged that plastic covering was intended

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3. The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

to help maintain warmth in the cab in winter. 14 FMSHRC at 1891. We perceive no reason to overturn the judge's factual determinations on this issue.

An operator has an obligation to address a danger perceived by a miner who makes a safety complaint. Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). Once it is determined that a miner has expressed a good faith, reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled." Gilbert, 866 F.2d at 1441; see also Bush, 5 FMSHRC at 997-99. The record does not support NHE's assertions that, even if Nantz had a good faith, reasonable belief that the dust condition was hazardous, it acted reasonably to quell his fears, thus rendering his continuing work refusal unreasonable. NHE asserts that the fill area was watered to control dust and that the window was repaired within a reasonable period of time. The record, however, supports the judge's finding that the operator's water trucks did not adequately control the dust. 14 FMSHRC at 1891-92; Tr. 22-23, 70, 135-36. Moreover, the judge found that approximately 13 or 14 days elapsed from the time the window was broken until Nantz's work refusal, during which time NHE "failed to take timely actions to repair the dozer or to take it out of service so that it could be repaired promptly." 14 FMSHRC at 1889, 1898. The record shows that the window was eventually repaired in only three hours during a normal shift. Id. at 1889; Tr. 147-48. We agree with the judge that NHE did not adequately address Nantz's safety concerns.

We conclude, therefore, that Nantz reasonably and in good faith refused to operate the bulldozer and that, in accordance with Commission precedent, his refusal qualified as protected activity under the Act.

b. Intolerable Conditions

NHE argues that the dust conditions did not reach an intolerable level. The judge found that the dust conditions were severe, causing vision difficulties, "and more significantly, ... choking and breathing problems." 14 FMSHRC at 1898. This determination is supported by Nantz's testimony and corroborated by his co-workers. We conclude that substantial evidence supports the judge's finding that the dust, which caused breathing and visibility problems, reached an intolerable level.

Accordingly, we affirm the judge's conclusion that NHE constructively discharged Nantz by refusing to remedy the intolerable dust conditions to which he was subjected.

2. Affirmative Defense

In affirmatively defending against Nantz's claim, NHE asserts that Nantz's refusal to operate the loader was not protected activity and independently justified his termination. NHE Br. at 9.

On April 16, when he was told that the window had not been repaired, Nantz offered to do any work other than operate the bulldozer. Tr. 24-25, 101, 133-34, 138. Fisher offered Nantz work on a loader for a short time but informed him that he would later have to return to the bulldozer. Tr. 25, 138, 267. (The usual loader operator testified that he expected to relieve Nantz after two hours. Tr. 138-40.) The judge found that this offer of work on the loader was not an "adequate and reasonable response" to Nantz's complaint and that Nantz reasonably believed that he would shortly be exposed once again to the severe dust conditions. 14 FMSHRC at 1896. The record supports the judge's finding. Tr. 25, 138-40. We agree with the judge that Nantz's refusal to operate the loader for a brief period of time was inextricably connected to his refusal to operate the bulldozer and also qualified as protected activity.

Accordingly, we affirm the judge's determination that NHE failed to affirmatively defend against Nantz's claim.

3. Conclusion

For the foregoing reasons, we hold that Nantz was discriminatorily discharged in violation of section 105(c)(1) of the Mine Act.

B. Backpay Award

1. Filing Delay by Secretary

NHE asserts that the Secretary's four-month delay in filing Nantz's complaint should result in a corresponding reduction in the backpay award. The judge rejected this contention on the ground that the operator had failed to show legally recognizable prejudice resulting from the delay. 15 FMSHRC at 250.

The Mine Act permits a miner who believes that he has been discriminated against to file a complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. 815(c)(2). After receipt of the complaint, the Secretary has 90 days to notify the miner, in writing, of his determination as to whether a violation occurred. 30 U.S.C. 815(c)(3). Section 105(c)(2) provides that, once the Secretary determines that a violation has occurred, "he shall immediately file a complaint with the Commission." Commission Procedural Rule 41(a) implements the latter provision by requiring the Secretary to file a discrimination complaint with the Commission within 30 days after such written determination. 29 C.F.R. 2700.41(a) (1993).

Nantz filed his discrimination complaint on May 29, 1991, within the 60-day period. The Secretary was required to notify Nantz of his determination of violation by August 27, and file a complaint with the Commission by September 26. The complaint was filed on January 31, 1992, more than four months late. The record discloses no reason for the delay.

The Commission has determined that the time limits in sections 105(c)(2) and (3) "are not jurisdictional" and that the failure to meet them should not result in dismissal, absent a showing of "material legal prejudice." See, e.g., Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). As the judge found, the delay was not extreme and did not prejudice NHE's presentation of its case. 15 FMSHRC at 250; 14 FMSHRC at 1882-83. Therefore, we decline to reduce Nantz's backpay on account of it. However, as the Commission stated in Hale, "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary." 8 FMSHRC at 908. We remind the Secretary to adhere to the time limits set forth in section 105(c) of the Act and to explain to the Commission reasons for delay.

2. Purported Job Offer

NHE argues that, in July 1991, it offered Nantz a job at its Leatherwood facility and, because Nantz rejected this offer, his backpay award should be reduced. The judge determined that NHE's "suggestion that it made an 'offer' of reemployment to Mr. Nantz is unsupported," and he found "no evidence that this was the case." 14 FMSHRC at 1903; see also 15 FMSHRC at 250. After filing his discrimination complaint with the Secretary, Nantz visited the Leatherwood site and asked his former foreman, Henderson Farley, if there were anything for him to do. Tr. 242. Farley replied: "[N]o, not right at the time, but if I got something, you know, I would put him back to work." Id. Farley testified that he never contacted Nantz and that Nantz never contacted him again. Tr. 243. Nantz confirmed that Farley stated only that he would see what he could do and had not conveyed a firm job offer. Tr. 76-77. Accordingly, we affirm the judge's refusal to reduce the backpay award based on NHE's claim of a job offer.

3. Nantz's Delay in Seeking Work

NHE argues that, in calculating the backpay award, the judge failed to make a deduction for the two-to-three-week period following his termination during which Nantz did not seek other work. In fact, the judge deducted two weeks pay from the award on account of Nantz's delay in seeking other employment. 15 FMSHRC at 249.

4. Deduction for Unemployment Compensation

In Meek v. Essroc Corp., 15 FMSHRC 606 (April 1993), the Commission addressed for the first time the question of whether unemployment compensation benefits are appropriately deducted from backpay awards. Concluding that the issue is a matter of agency discretion, the Commission determined that a policy of deducting unemployment benefits comports with the Mine Act's goal of making miners whole. Id. at 617-18. It adopted this policy to be followed by its judges. Id. at 618.

Because the Mine Act is silent on the issue of unemployment compensation, the Commission looked for guidance to case law interpreting similar remedial provisions of the National Labor Relations Act, 29 U.S.C. 160 ("NLRA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g) ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. 626(b) ("ADEA"). 15 FMSHRC at 616. The Mine Act's remedial provisions, as well as those of Title VII and the ADEA, are modeled on section 10(c) of the NLRA, as amended, 29 U.S.C. 160(c). See, e.g., Secretary on behalf of Dunmire v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1982).

The Commission relied, in part, on NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), in which the Supreme Court was presented with the issue of whether the National Labor Relations Board ("NLRB") abused its discretion in refusing to deduct unemployment compensation from a backpay award while allowing deduction of other earnings. In concluding that the NLRB had not abused its discretion, the Court stated: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion...." Id. at 363.

Consistent with the Supreme Court's decision in Gullet Gin, certain reviewing courts have held that similar discretion exists under other labor statutes with remedial provisions patterned on the NLRA. Thus, the United States Courts of Appeals for the Second, Seventh, Ninth and Tenth Circuits determined that, under Title VII and the ADEA, the deduction of unemployment compensation from backpay awards is a matter within the discretion of the trial judge. See, e.g., EEOC v. Enterprises Ass'n Steamfitters, 542 F.2d 579, 591-92 (2d Cir. 1976)(Title VII); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1428 (7th Cir. 1986)(Title VII); Naton v. Bank of Cal., 649 F.2d 691, 699-700 (9th Cir. 1981)(ADEA); EEOC v. Sandia Corp., 639 F.2d 600, 624-26 (10th Cir. 1980)(ADEA); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988)(ADEA). The Commission noted in Meek that other circuits (the Third and Eleventh), also relying on Gullett Gin, have established a policy of

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4. The Secretary was not a party to Meek. While that case was pending, the Commission, sua sponte, directed review in this case of the issue of deductibility of unemployment compensation benefits because the administrative law judge here had made a determination on the issue in direct contrast to that made by the judge in Meek.

non-deductibility to be followed by trial courts within the circuit. 15 FMSHRC at 618, citing Craig v. Y&Y Snacks, Inc., 721 F.2d 77, 81-85 (3d Cir. 1983); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983). In accordance with this case law, the Commission, in Meek, concluded that this Commission has discretion to adopt an appropriate policy concerning the deduction of unemployment compensation from backpay awarded under the Mine Act. 15 FMSHRC at 616-17, citing Gullet Gin, 340 U.S. at 363. See also S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

Thus, interpreting Gullett Gin to the effect that the Commission's policy is a matter within its discretion, a three-member majority adopted as agency policy the deduction of unemployment compensation from backpay awards. 15 FMSHRC at 618. Commissioner Backley, interpreting Gullett Gin to the effect that unemployment compensation may not be deducted, dissented in Meek. Id. at 621-22. The Commission reaffirmed its holding in Ross v. Shamrock Coal Co., 15 FMSHRC 972, 976-77 (June 1993).

In this case, which was decided by the judge prior to the Commission's decision in Meek, both the Secretary and NHE argued to the judge that the deduction of unemployment compensation from backpay awards was within the discretion of the judge. 14 FMSHRC at 1902; 15 FMSHRC at 249. In exercising his discretion, the judge deducted an amount equal to the unemployment compensation received by Nantz from his backpay award. 15 FMSHRC at 249.

In contrast to his argument to the judge, the Secretary now urges the Commission to reverse the judge's deduction of unemployment compensation benefits and to determine as a matter of agency policy that such benefits should not be deducted from backpay awards. S. Br. at 19. In support of his position, the Secretary argues that the benefits are "collateral" and that state law in 47 states requires that the benefits be repaid to the state unemployment agency. Id. at 20-22. The Secretary suggests that, at the time of each backpay award, the Commission may want to notify the appropriate state agency to facilitate agency proceedings to recoup from the

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5. Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1114 (8th Cir. 1994), decided by the Eight Circuit after Meek was issued, similarly established a circuit-wide policy of non-deductibility under the ADEA. The dissent apparently misreads the Commission's recitation of this case law. Slip op. at 21. Under our analysis, Gullett Gin does not preclude a policy of deductibility, non-deductibility, or trial judge discretion.

6. Under the Social Security Act, 42 U.S.C. 503(g), and the Internal Revenue Code, 26 U.S.C. 3304(a)(4), states may require restitution of unemployment compensation when, as a result of an award of backpay, the worker is rendered not unemployed for the period of the award and the benefits received become overpayments.

miner the unemployment compensation he had received earlier. Id. at 20. As to the other three states, the Secretary argues that the discriminatee is "the logical choice" to retain the benefits. Id. at 22 (citation omitted).

The issue of recoupment was not argued in Meek. The Commission followed its precedent, which recognized that, in determining backpay awards, it "endeavors to make miners whole and to return them to their status before illegal discrimination occurred." 15 FMSHRC at 617; see Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463, 3464 (December 1980); Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." 15 FMSHRC at 617, quoting Dunmire, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Further, the Commission sought "to fashion relief that is just and does not overcompensate the discriminatee." Meek, 15 FMSHRC at 617, citing Dunmire, 4 FMSHRC at 142-43.

In deciding that unemployment compensation should be deducted from a backpay award under the Mine Act, the Commission noted that such a policy does not result in less than full compensation to the miner for his lost wages. 15 FMSHRC at 617. It noted the similarity in effect between deducting unemployment compensation and deducting other earnings, in that both leave the discriminatee in the same position he was in before the illegal discrimination. Id. Under settled Commission law, a miner's earnings are deducted from his backpay award. See, e.g., Dunmire, 4 FMSHRC at 144.

The Commission also recognized that deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct because an employer must still place the victim of unlawful discrimination in the position he would have been in but for the unlawful discrimination, by providing backpay with interest, reinstatement with full seniority rights and attorneys' fees. 15 FMSHRC at 617. Further, the Mine Act, unlike the NLRA, Title VII, and the ADEA, mandates a separate civil penalty against an operator who unlawfully discriminates against a miner. 30 U.S.C. 815(c), 820(a). The Commission's recently issued Procedural Rules require the Secretary to propose a separate civil penalty for a violation of section 105(c). 29 C.F.R. 2700.44 (1993).

In disavowing Commission precedent, the dissent mischaracterizes the rationale of Meek as the theory that "the failure to deduct unemployment compensation results in a windfall to the miner...." Slip op. at 15. The term "windfall" appears in Meek only in the dissent and that concept was not the basis for the Commission's decision. Rather, Meek rests on the

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7. We reject the dissent's assertion that "adoption of a deduction policy conflicts with the Mine Act's goal of deterring illegal conduct." Slip. op. at 21.

Commission's determination that the goal of the Mine Act's discrimination provisions is to make miners whole. The Commission determined that this goal was best met by deduction of unemployment compensation. The Commission's alleged failure "to explain why the recoupment of benefits ... does not adequately address any concerns over a windfall to miners" (slip op. at 16) stems from the fact that, contrary to the dissents' assertions, both here and in Meek, such concerns were not the basis for the Commission's decision in either case.

The dissent's reliance on Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988), is misplaced. The Commission has not, as asserted, employed a standard for analyzing this issue different from that set forth in Gullett Gin. Slip op. at 17-18. Rather, the Commission has followed the Supreme Court's analysis (that the issue of deductibility is within the agency's discretion) "to render a decision that differs from the Supreme Court's." Levine, 864 F.2d at 460 (emphasis in original). Under our colleagues' analysis, a split between the United States Courts of Appeals could not have occurred. In their opinion, those circuits permitting the deduction of unemployment compensation from Title VII and ADEA cases would have erred in "bottom[ing their] discretionary policy choice on standards or reasons which have been rejected by the Supreme Court." Slip op. at 18 ; See, e.g., Naton, 649 F.2d at 700 ("[The district court] retained the discretion under the ADEA to deduct the [unemployment] compensation from the backpay award."); Enterprise Ass'n Steamfitters, 542 F. 2d at 592 (In a Title VII action, it is "not an abuse of discretion to deduct sums received from collateral sources such as unemployment compensation.") We do not believe that those United States Courts of Appeals so erred.

The Secretary's arguments have been carefully considered, including his acknowledgment on review that the deduction of unemployment compensation is a matter of Commission

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8. Our colleagues, disagreeing with the policy established in the exercise of the Commission's discretion, have attempted to discredit that policy by misrepresenting its rationale. They have also attributed improper motives to the majorities here and in Meek. See, e.g., slip op. at 20 ("their zeal to ensure that no possibility exists for illegally discharged miners to receive overlapping compensation"). They have also speculated as to how we would vote on the issue of consequential damages, which is not before us, and concluded that we have "bolstered" the case against that vote. Slip op. at 18.

9. Although our colleagues support recoupment as a method for addressing the Commission's alleged "concerns" about a "windfall" (slip op. at 16), they do not propose recoupment as agency policy nor do they adopt the Secretary's suggestion that the Commission facilitate recoupment. They propose only that a backpay award "should not be reduced by the amount of unemployment compensation received...." Slip op. at 14.

10. The dissent takes issue with the Commission's current policy and also with its earlier practice, supported by the Secretary at hearing, which left discretion to the trial judge to determine this issue.

discretion. S. Br. at 19. We reaffirm the reasoning and conclusion set forth in Meek and reaffirmed in Ross v. Shamrock, 15 FMSHRC 972, and affirm the judge's deduction of unemployment compensation from Nantz's backpay award.

III.

Conclusion

For the foregoing reasons, the Commission affirms the judge's conclusion that NHE constructively discharged Nantz in violation of section 105(c)(1) of the Mine Act and affirms the judge's backpay award.

Joyce A. Doyle, Commissioner
Arlene Holen, Commissioner

Jordan, Chairman and Marks, Commissioner, concurring in part and dissenting in part:

We concur with Commissioners Doyle and Holen on the disposition of all issues except the requirement that unemployment compensation be deducted from backpay. On that point, we would reverse the administrative law judge and hold that a backpay award to a miner injured by a mine operator's violation of the Mine Act should not be reduced by the amount of unemployment compensation received by the injured employee.

The question concerning the propriety of a setoff for unemployment compensation was first decided by the Commission in Meek v. Essroc Corp., 15 FMSHRC 606 (April 1993). Meek involved a claim of discrimination filed and prosecuted by the affected employee, without the participation of the Secretary, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3). In Meek, the Commission majority reversed the administrative law judge in part and ruled that a backpay award on behalf of a discriminatee under the Mine Act must be reduced by the amount of unemployment compensation received by the miner victimized by the operator's violation of the Act. Commissioner Backley dissented on the unemployment compensation issue. 15 FMSHRC at 621-26. Meek did not appeal the Commission's decision to the Court of Appeals.

In his brief before the Commission, the Secretary, citing to Meek, urged the Commission "to adopt Commissioner Backley's position." S. Br. at 19 n.4. We have considered the Meek decision in light of the arguments of the parties, and we have concluded that Commissioner Backley's Meek dissent continues to set forth the proper disposition of the unemployment compensation issue. Because of the importance of this question to the effective enforcement of the Act's protection of miners from employer discrimination on the basis of protected health and safety activity, we reiterate here, with some amplification, the analysis first set forth in Commissioner Backley's dissent in Meek.

I.

It is beyond dispute that the Commission has the discretion to fashion backpay remedies which effectuate the purposes of the Mine Act. But the Commission's discretion in this area is not unlimited; as with any court or agency, the Commission must base its exercise of discretion upon reasoned, rational principles that are not in conflict with the facts of the case or binding precedent. Failure to do so amounts to an abuse of that discretion. In this case, examination of

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11. Commissioner Backley participated in considering this case and voted to reverse the judge's unemployment compensation holding, but his term of office expired before the decision was ready for issuance. See, e.g., Penn Allegh Coal Co., 3 FMSHRC 2767 n.1 (December 1981).

12. See, e.g., NLRB v. Blake Constr. Co., Inc., 663 F.2d 272, 285 (D.C. Cir. 1981).

the bases upon which our affirming colleagues conclude that unemployment compensation received should be deducted from backpay awards constrains us to conclude that they have abused their discretion.

In deciding this case, our colleagues reaffirm the rationale and decision of the Commission in Meek. Slip op. at 10. Distilled to its core, the Meek majority's two-pronged rationale was that the failure to deduct unemployment compensation results in a windfall to the miner that is in conflict with the policy to require deductions of earnings from backpay, and that such failure to deduct constitutes an additional expense to the employer. Both of these propositions have already been rejected by the Supreme Court.

A.

The "employee windfall" theory has long since been considered and rejected by the Supreme Court. The leading case in this area is NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). While the Meek majority pays lip service to Gullett Gin, its decision flies in the face of the Supreme Court's holding. In rejecting the employee windfall rationale, the Gullet Gin Court held that state unemployment compensation benefits represent entirely collateral benefits having nothing whatever to do with the remedial purpose of the statute. Id. at 364. In determining that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from backpay under the National Labor Relations Act, the Supreme Court clearly differentiated unemployment compensation from earnings. The Court flatly rejected the argument that unemployment compensation was to be treated as earnings, stating:

> In Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, ... this Court held that the benefits received by employees under a state unemployment compensation act were plainly not earnings which, under the Board's order in that case, could be deducted from the backpay awarded.

340 U.S. at 363.

The Gullett Gin Court also rejected the argument that the unemployment compensation payments were to be considered as direct payments from the employer and therefore properly set off against the backpay award. The Court stated:

> Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

Id. at 364 (citations omitted).

In addition to the collateral benefits rationale, the Supreme Court in Gullett Gin identified a second basis for its holding that declining to deduct unemployment compensation does not result in a windfall to the injured employee. The Court observed that "some states permit recoupment of benefits paid." 340 U.S. at 364 n.1. This effective and sensible approach has been widely followed. In adopting a rule of non-deductibility of unemployment benefits and rejecting the windfall argument, the Third Circuit reasoned:

> [A]lthough it appears to provide double recovery, in fact that is not the inevitable result. Often insurers have subrogation rights, and in some circumstances state benefits are recoupable. For example, a recently enacted Pennsylvania statute provides for recoupment of unemployment benefits when backpay has been awarded.

Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83-84 (3d Cir. 1983) (citation omitted); see also Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988), where the court rejected the setoff because Colorado law requires an employee who receives a backpay award to "repay . . . all unemployment benefit payments received...."

In affirming a lower court ruling on this question, the Ninth Circuit referred approvingly to the rationale that:

> if Congress did not intend for an employee to receive unemployment benefits in addition to backpay the logical solution is a recoupment of the unemployment benefits by the state employment agency.

Kauffman v. Sidereal Corp., 695 F.2d 343, 347 (9th Cir. 1982).

Indeed, even in the Seventh Circuit, where the court registered a preference that an employee not receive unemployment compensation and overlapping backpay, the court reasoned that the solution was not to allow the employer to "get a deduction for unemployment insurance benefits but that [the employee] should have to repay them...." Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1429 (7th Cir. 1986). The court went on to observe that if that were not possible "the choice seems to be between conferring a windfall on Allis-Chalmers and a windfall on Hunter. As the victim of Allis- Chalmers' wrongdoing, Hunter is the logical choice." Id.

In its brief to the Commission, Nally and Hamilton makes no reference to the Commission's Meek decision, but rather urges us to affirm the judge's proper use of discretion to require a backpay setoff. Our affirming colleagues decline to explain why the recoupment of benefits, endorsed by the Supreme Court and courts of appeals, does not adequately address any concerns over a windfall to miners. As demonstrated in this case, the employer/operator, the

party-in-interest in the litigation, will almost always be more than eager to notify the appropriate state authority to recoup unemployment compensation. Indeed, Nally and Hamilton has even argued for the intervention of the state agency into this proceeding.

B.

By reaffirming Meek, our colleagues apparently continue to maintain that the failure to deduct unemployment compensation would effectively require the operator "to additionally compensate the miner with backpay for funds already received, if the miner . . . received unemployment compensation." Meek, 15 FMSHRC at 617-618 (emphasis supplied). The majority opinion went on to note that "[w]hen an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating." Id. at 618 n.11. Although our colleagues' point is not fully explicated, we take these comments together as a suggestion that when a discriminatee receives both unemployment compensation and backpay, the offending employer is made to pay twice for the same wrong.

The short answer to this concern is that the employer's experience rating may well remain unaffected in view of the high probability that unemployment compensation will be recouped by the state fund, as detailed above. But in any event, the Supreme Court has already found wanting the "extra payment" proposition advanced by the Meek majority. In Gullett Gin, the Court explained:

> We doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws [citations omitted]. However, even if the Louisiana law has the consequence stated by respondent, which we assume arguendo, this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself [citation omitted].

340 U.S. at 365. As the Court made clear, the employer's responsibility to contribute to an unemployment compensation fund is for the purpose of "carry[ing] out a policy of social betterment for the benefit of the entire state" (Id. at 364) and has nothing to do with remedying or deterring violations of federal anti-discrimination laws. Accord EEOC v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd on other grounds, 458 U.S. 219 (1982).

Although the Commission has the discretion under the Mine Act to establish a policy on this issue, even one that differs from the result reached by the Supreme Court, the Commission

does not have the authority to bottom its discretionary policy choice on standards or reasons which have been rejected by the Supreme Court. As one Court of Appeals has stated:

> A lower court, when faced with a factually distinguishable but legally relevant Supreme Court decision, may employ the Supreme Court's method of analysis to render a decision that differs from the Supreme Court's. A lower court, however, may not employ a different standard in analyzing the different facts.

Levine v. Heffernan, 864 F.2d 457, 460 (7th Cir. 1988) (emphasis in original and supplied).

The Commission is required to follow not only Supreme Court decisions but also the clear implications of those decisions. Hendricks County Rural Elec. Membership Corp. v. NLRB, 627 F.2d 766, 769 (7th Cir. 1980), rev'd on other grounds, 454 U.S. 170 (1981), on remand, 688 F.2d 841 (7th Cir. 1982). Unless and until the Supreme Court chooses to depart from its ruling and rationale we must be so guided. Kovacs v. United States, 355 F.2d 349, 351 (9th Cir. 1966).

Our colleagues protest that, because they have not used the word "windfall," their opinion has been unfairly criticized for relying on the discredited windfall theory. Slip op. at 11-12. But the affirming Commissioners' concern in Meek that failure to deduct unemployment benefits would overcompensate the discriminatee and result in "double recovery" (15 FMSHRC at 617, quoting EEOC v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 592 (2d Cir. 1976)) is nothing more or less than the windfall theory under different names. The affirming Commissioners have repeated their erroneous reliance on the windfall theory here. Slip op. at 11, 13 (citing "overcompensat[ion]" and "reaffirm[ing] the reasoning and conclusion set forth in Meek ..."). Our colleagues' attempt to camouflage the basis of their decision, while understandable in light of judicial rejection of the windfall theory, is unpersuasive.

By flouting the collateral benefits doctrine, the affirming Commissioners have bolstered the legal basis for injured miners to seek relief, based on the employer's violation of the anti-discrimination provisions of the Act, for collateral losses, e.g., a repossessed car, a cancelled insurance policy, or medical treatment for depression.
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13. Contrary to our colleagues' assertion, our criticism is based on their faulty rationale, not on any "improper motives" (slip op. at 12 n.8).

14. Such relief would be consistent with section 105(c)(2) of the Mine Act, which grants the Commission authority to provide relief from unlawful discrimination "including, but not limited to, . . . reinstatement . . . with backpay and interest." 30 U.S.C. 815(c)(2) (emphasis supplied). In this connection, the Senate Committee on Human Resources stated its:

> [i]ntention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full

> seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978) ("Legis. Hist.") (emphasis supplied).

II.

Beyond the foregoing legal basis for our disagreement with the affirming Commissioners, we are eager to dissociate ourselves from a policy choice which fails to fairly balance the interests of the parties. After reading our colleagues' opinion on this issue, it would seem necessary to remind the reader that in this case the miner prevailed, i.e., he was the victim of an illegal discharge. This caution is necessary because the affirming Commissioners' rationale focuses unduly on avoiding the risk of visiting a windfall recovery upon the miner. Never mind that our colleagues' approach betrays no concern that a reciprocal windfall may inure to employers whose backpay liability will be partially discharged from a public fund not intended for such use. As the Tenth Circuit has observed:

> The deduction or offsetting of unemployment benefits may well result in a windfall to the employer. He finds himself in a position where he is not responsible for the payment of the illegally withheld backpay and then offsetting it with unemployment benefits by the government, which is unjust enrichment except to the extent that employers make contributions to the fund.

EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980).

The Seventh Circuit's reasoning in Hunter, 797 F.2d at 1429, serves to pinpoint the basic unfairness of our colleagues' policy choice. The Meek majority conceded that state recoupment of unemployment compensation occurs "in many instances." 15 FMSHRC at 617 n.10. This suggests that the risk of a windfall recovery to the miner is limited. Indeed, the Secretary advises that only Georgia, Rhode Island and Louisiana do not have recoupment provisions. S. Br. at 21-22. On the other hand, the Meek majority also conceded that the risk of any increased employer expense, due to higher unemployment insurance taxes, is variable and unknown. 15 FMSHRC at 618, n.11.

Thus, our affirming colleagues' twin concerns -- miner windfall recovery, and increased employer payment -- are bottomed on nothing more than vague speculation regarding the effects of wide state-by-state legal variations. Nevertheless, in their zeal to ensure that no possibility exists for illegally discharged miners to receive overlapping compensation, our colleagues have adopted a national policy which will at times provide an employer with a windfall setoff from his backpay obligation. We, as did the court in Hunter, find this choice to be illogical and unfair. Moreover, our colleagues' policy is directly in conflict with the Gullett Gin Court's express rationale detailing the basis for its rejection of the employer's argument that under the experience-rating record formula it will be prejudiced.

One of the most glaring infirmities of our colleagues' decision is that it undermines one of the fundamental purposes of backpay awards under the Mine Act and other anti- discrimination provisions -- the deterrence of unlawful conduct in the future. Subsequent to the issuance of the Meek decision, the Eighth Circuit had occasion to address this issue in an Age Discrimination in Employment Act case. In reversing the district court's deduction of unemployment compensation from the backpay award the Court stated:

> Backpay awards in discrimination cases serve two functions: they make victimized employees whole for the injuries suffered as a result of the past discrimination, and they deter future discrimination. . . . Reducing a backpay award by unemployment benefits paid to the employee, not by the employer, but by a state agency , . . . makes it less costly for the employer to wrongfully terminate a protected employee and thus dilutes the prophylactic purposes of a backpay award. . . . Indeed, it leads to a windfall to the employer who committed the illegal discrimination. . . .
>
> Based on these considerations, no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases. Circuits have split, however, over whether deducting unemployment benefits should be prohibited or should be left to the discretion of the trial court. The majority [of courts] have held that, as a matter of law, unemployment benefits should not be deducted from backpay awards. See Craig, 721 F.2d at 85 [3rd Cir.]; Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 627-28 (6th Cir. 1983), cert. denied, 466 U.S. 950 . . . (1984); Kauffman v. Sidereal Corp., 695 F.2d 343, 346-47 (9th Cir. 1982) (per curiam); E.E.O.C. v. Ford Motor Co., 645 F.2d 183, 196 (4th Cir. 1981), rev'd & remanded on other grounds, 458 U.S. 219 . . . (1982), . . . on remand, 688 F.2d 951, 952 (4th Cir. 1982) (per curiam); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983) (en banc) (per curiam). Three circuits have adopted a minority position that deducting unemployment benefits lies within the discretion of the trial court. See Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988); Hunter, 797 F.2d at 1429 (Posner, J., acknowledging discretion as Seventh Circuit rule but stating that it "may be unduly favorable to

> defendants"); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). The Second Circuit has in the past affirmed a deduction of unemployment benefits as discretionary, see E.E.O.C. v. Enterprise Assoc. Steamfitters Local 638 of U.A., 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 430 U.S. 911 . . . (1977), but more recently indicated that the circuit's rule remains unsettled, see Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 258 (2d Cir. 1991), cert. denied, . . . 112 S.Ct. 939 . . . (1992).

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1113-14 (8th Cir. 1994) (emphasis supplied). The Eighth Circuit found the view of the majority of the Courts of Appeals, that deduction of unemployment benefits is inconsistent with the deterrent purpose of backpay awards in discrimination cases and awards a windfall to employers that discriminate, to be the "more sound position" and adopted it. Id. at 1114. We do not agree with our colleagues that the Courts of Appeals for the Third, Fourth, Eighth, Ninth and Eleventh Circuits erred in reaching this conclusion.

Gaworski and like cases fatally undermine our colleagues' conclusion that "deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct." 15 FMSHRC at 617; slip op. at 11. This repeated leap of logic is too vast to be ignored. In fact, it is correct to state the opposite -- that adoption of a deduction policy conflicts with the Mine Act's goal of deterring illegal conduct. There certainly is no deterrent value in establishing a policy whereby a violating operator may be relieved of his obligation to furnish illegally withheld pay from a discharged worker by offsetting his obligation through the use of state funds. In adopting a circuit-wide rule of non-deductibility of unemployment benefits, the Third Circuit concluded that "the legislative history and Gullett Gin are persuasive, that the primary prophylactic of Title VII would thereby be better served." Craig, 721 F.2d at 85. Recognizing that backpay awards have a prophylactic or deterring effect on future discrimination, the court also concluded: "To the extent that a backpay award is reduced by unemployment benefits, this purpose is diluted." Id. at 84.

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15. We share our colleagues' view that case law relating to Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and the Age Discrimination in Employment Act is applicable to this issue.

16. The affirming Commissioners state that in Gaworski, the Eighth Circuit "established a circuit-wide policy of non-deductibility under the ADEA." Slip op. at 10 n.5. Our colleagues fail to mention the holding of Gaworski that a uniform deduction requirement is inconsistent with the very purpose of backpay awards in discrimination cases. 17 F.3d at 1113.

17. Our colleagues, misapprehending the basis of the dissent, mistakenly assert that in our view,"those circuits permitting the deduction of unemployment compensation . . . erred . . . ." Slip op. at 12. Gullet Gin makes clear that an agency has discretion in this area. But that discretion must be exercised in a manner consistent with Supreme Court holdings. Levine v. Heffernan, supra. Unlike our colleagues' opinion here, the Courts of Appeals permitting trial court

discretion to deduct unemployment benefits do not base their holdings on the rejected employee windfall theory. Indeed, in Cooper, Hunter and Sandia Corp., the Courts of Appeals approved the trial courts' refusal to deduct unemployment benefits. In Naton, the Ninth Circuit case cited by our colleagues, the court expressly declined to reach the question presented here; the later Kaufmann decision places that circuit among the majority that disallows deductions. Finally, as noted by the Gaworski court, in Promisel, the Second Circuit recently backed away from its earlier embrace of the employee windfall theory in EEOC v. Enterprises Ass'n Steamfitters.

Curiously, our colleagues continue to attempt to support their policy choice by noting that the Mine Act imposes a civil penalty upon offending operators. 15 FMSHRC at 618; slip op. at 11. We see no relevance of this fact to the issue of what constitutes an appropriate, fair backpay award to a miner who has been illegally discharged. In commenting on the wide breadth of relief that the Commission should require under the Mine Act, the Senate Committee on Human Resources expressly stated "the relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Legis. Hist. at 623 (emphasis supplied).

For the foregoing reasons we would follow the reasoning of the Supreme Court, and the rule followed by the majority of courts, that unemployment compensation not be deducted from backpay awards. We would therefore reverse the decision of the administrative law judge on the issue of deducting unemployment compensation benefits from backpay, and order that no such deduction occur.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner