FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUN 24 2016

SECRETARY OF LABOR,	:	Docket No.	KENT 2009-820-R
MINE SAFETY AND HEALTH	:		KENT 2009-821-R
ADMINISTRATION (MSHA)	:		KENT 2009-822-R
	:		KENT 2009-1441
v.	:		
	:		
HOPKINS COUNTY COAL, LLC	:		

Before: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Hopkins County Coal, LLC ("HCC") appeals an Administrative Law Judge's decision upholding the validity of two citations and one failure to abate order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The violations were issued in response to HCC's refusal to release personnel records to inspectors as part of a MSHA discrimination investigation. The Secretary of Labor requires the records to determine whether there was a violation of the anti-discrimination provisions of the Act.

The issues before us are: (1) whether section 105(c) of the Mine Act authorizes the Secretary to investigate a miner's complaint of discrimination filed with MSHA if the complaint does not state a specific protected activity; (2) whether the Secretary has the authority under sections 103(a) and (h) of the Mine Act to demand access to personnel records in furtherance of a discrimination investigation; (3) whether the personnel records sought in the subject proceedings were "reasonably required" under section 103(h); (4) whether the "reasonable" standard of section 103(h) mandates notice of the protected activity as a prerequisite to the Secretary's power to demand records; (5) whether the Secretary's demand for personnel records violates the operator's Fourth Amendment rights; and (6) whether the section 104(b) order issued to HCC was valid.

For the reasons discussed below, we affirm the Judge. We hold that pursuant to the plain language of section 105(c) of the Mine Act, the Secretary did not exceed his authority by investigating allegations of discrimination and that HCC's compliance with the investigation was required in spite of the unidentified protected activity. We hold that section 103(h) of the Mine Act permits the Secretary to demand access to the disputed personnel records and conclude that the records were reasonably required to enable the Secretary to perform his function of determining HCC's compliance with the anti-discrimination provisions of the Act. We also find

that section 103(h)'s "reasonabl[e]" standard does not require notice of the protected activity to the operator as a prerequisite to the Secretary's investigation or an operator's compliance. Finally, we conclude that the Secretary's demand for records does not violate the Fourth Amendment rights of HCC and that the section 104(b) order was properly issued.

I.

Factual and Procedural Background

A. The Factual Background

Robert Gatlin was employed as a belt examiner at HCC's Elk Creek Mine in Madisonville, Kentucky. On January 8, 2009, Gatlin was fired by HCC after he refused to perform a pre-shift examination. With the assistance of a complaint processor,[1] Gatlin filed a discrimination complaint form with MSHA on January 20, 2009, and alleged that he was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c).[2] Specifically, the complaint stated:

> I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Gov. Ex. 1 at 1-2. The complaint did not set forth a protected activity as outlined in section 105(c)(2). Gatlin also requested temporary reinstatement. MSHA Supervisory Special Investigator Kirby Smith interviewed Gatlin the next day and determined that Gatlin may have

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[1] A complaint processor is an MSHA employee who assists miners with filling out the MSHA complaint form.

[2] 30 U.S.C. § 815(c)(1) states, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners . . . of an alleged danger or safety or health violation . . . .

engaged in protected activity and may have suffered adverse action.[3] 34 FMSHRC 789, 790 (Apr. 2012) (ALJ).

On January 26, 2009, the MSHA District Manager, Carl E. Boone, II, advised HCC by letter that MSHA wanted to interview five named miners in response to Gatlin's discrimination complaint "during the fact-finding segment of this investigation." Gov. Ex. 2. Boone requested that HCC contact MSHA Special Investigators Smith or Rodney Adamson by February 6 "with a convenient date and time to conduct these interviews." *Id.* In a letter dated February 6, counsel for HCC refused to arrange the requested interviews unless MSHA identified the protected activity alleged in the complainant's discrimination claim. Gov. Ex. 3.

On February 23, 2009, Boone sent HCC's counsel a letter requesting a number of documents, including Gatlin's personnel file and the "personnel files of all employees at the Elk Creek Mine who were disciplined, reprimanded or terminated during the period of January 1, 2004 – January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin." Gov. Ex. 4. This request would later be clarified. MSHA requested that the documents be provided to Smith by the close of business on March 2, 2009. After the exchange of several letters, HCC eventually agreed to provide the requested documents, except for the personnel files.

In letters discussing MSHA's document request, HCC made repeated requests for clarification of the protected activity alleged by Gatlin, and declared in its March 23 letter that if MSHA could not provide the protected activity, which HCC was entitled to know, "then the agency has no case to investigate, no jurisdiction, no entitlement and no basis upon which to make any request." Gov. Ex. 9. MSHA never responded.

On March 23, Investigators Smith and Adamson arrived at the mine. After reviewing the examination books, the investigators requested the personnel files, which the mine's general manager, William Adelman, refused to provide on the grounds that the request was vague and that privacy concerns prevented release of the files. Tr. 119-20. Smith then issued section 104(a) Citation No. 6694904 alleging that HCC violated sections 103(a) and (h) of the Act by failing to produce the requested records.[4]

Smith gave HCC until 9:00 a.m. (45 minutes) to abate the violation, but at 8:50 a.m. Adelman informed Smith that he had spoken to counsel and he did not intend to comply. Smith waited until 9:00 a.m. and then issued section 104(b) withdrawal Order No. 6694905, stating that: "The [operator's] agent . . . refused to comply with Citation No. 6694904 requiring the operator to produce/provide records requested by MSHA Special Investigators during the performance of their official duties in the investigation activities under [section] 105(c) of the

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[3] At the time of the trial, Smith had been a special investigator for approximately five years, routinely investigating section 105(c) discrimination complaints. He had investigated approximately 75 discrimination complaints while serving in this position. Tr. 32-33.

[4] Sections 103(a) and (h) of the Mine Act provide the Secretary with broad authority to inspect and investigate mines and to request records of mine operators. 30 U.S.C. § 813(a) and (h).

Mine Act." Gov. Ex. 11. The order was designated "No area affected," and no miners were withdrawn.

After another five minutes, the requested documents still were not produced and at 9:05 a.m., Smith issued another section 104(a) citation, No. 6694906, to HCC for continuing to work in the face of a section 104(b) withdrawal order. He set an abatement time of 10:00 a.m. When the citation was not abated, HCC became subject to the provisions of section 110(b)(1) of the Act, which imposes daily civil penalties of up to $5,000 a day. 30 U.S.C. § 820(b)(1).

Later that day, HCC filed notices of contest with the Commission and shortly thereafter, a motion requesting an expedited hearing, which the Secretary opposed. The following day, in a conference call with a Commission ALJ, HCC received clarification that MSHA sought the personnel records of similarly situated miners who had been disciplined for insubordination. Tr. 56, 91, 156-58, 161-62. On March 26, HCC produced Gatlin's personnel file and the redacted files of four other employees. In a March 27 conference call, the parties informed the Judge that abatement of the citations and order had occurred one day prior, thereby ending HCC's continuing liability under section 110(b)(1) and obviating the need for an expedited hearing. The Judge then issued an order denying HCC's motion to expedite. The parties then filed cross-motions for summary decision.

B. The Judge's Decision

In his April 2, 2012 decision, the Judge upheld the citations and order. 34 FMSHRC at 789. He rejected HCC's argument that section 103 of the Act does not authorize the Secretary to request personnel files during a discrimination investigation. He determined that because investigating discrimination claims is a function of the Secretary, information relevant to assessing the merits of those claims is "reasonably required." The Judge found the Secretary's interpretation of sections 103(a) and (h) reasonable and entitled to deference. 34 FMSHRC at 803. He determined that the requirement in section 103(h) that the information sought be "reasonably required" obligates the Secretary to have a reasonable understanding of the complainant's claim prior to making a document request. He found that Smith had credibly testified that he had a reasonable understanding of Gatlin's claim before making the request, and rejected HCC's claim that the request was a fishing expedition. *Id.* at n.15. [5]

The Judge rejected HCC's Fourth Amendment challenge on the grounds that under *Donovan v. Dewey*, 452 U.S. 594, 604 (1981), warrantless inspections under the Mine Act are

[5] Investigator Smith testified that by February 6, he had not yet established a protected activity, but based on allegations made by Gatlin in the interview, Smith began looking into the possibility of a protected activity related to determining and reporting safety hazards. Tr. 46-48. Specifically, Gatlin alleged that as a belt examiner he had been required to perform work beyond his regular job duties, which made his job so burdensome that he did not have enough time to correct the safety hazards he found. He alleged that as a result, he began citing more hazardous conditions in the pre-shift and on-shift exam books. Gatlin stated that he had been told that he did not necessarily have to record a hazard if it was corrected. Tr. 47-48.

permissible because the mining industry is pervasively regulated, and the certainty and regularity of the Act's inspection scheme provide an adequate substitute for a warrant. He further stated that the Secretary's interest in promoting miner safety outweighs HCC's general interest in its personnel records. 34 FMSHRC at 798-99.

The Judge disagreed with HCC's contention that section 104(b) orders cannot be issued for violations where there is no "area affected." He concluded that the provision's language as to whether an affected area must be identified and whether miners must be withdrawn is unclear. He accorded deference to the Secretary's interpretation that he may exercise his discretion in deciding to designate an order as "no area affected" and in declining to withdraw miners. *Id.* at 804-05.

II.

Disposition

A. Whether the Secretary had authority to investigate Gatlin's complaint of discrimination although it failed to identify a protected activity.

HCC argues that because Gatlin's MSHA complaint failed to allege a specific protected activity, the Secretary had no basis, and therefore no authority, to carry out an investigation on the miner's behalf.[6] The Secretary counters that the Mine Act authorizes MSHA to investigate every discrimination complaint filed by a miner, regardless of whether it alleges every element of a prima facie case of discrimination.[7]

We first turn our attention to the language of the statute. In considering the question of statutory construction, our first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue ("*Chevron I*" analysis). *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). If a statute is ambiguous or silent on a

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[6] The Secretary argued in his response brief that the Commission should decline to consider this argument because HCC raised it for the first time on appeal. However, based on our review of the record, we conclude that the argument was adequately raised below and that the Judge had an opportunity to pass on the question. Accordingly, we will consider the issue.

[7] In order to establish a prima facie case of discrimination under section 105(c), a complainant must present evidence demonstrating that (1) the individual engaged in protected activity, (2) that there was an adverse action, and (3) that the adverse action complained of was motivated in any part by that activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980); *UMWA o/b/o Franks & Hoy v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2093 (Aug. 2014).

point in question, deference is accorded to the interpretation of the agency charged with administering the provision in question, provided that the interpretation is reasonable *(Chevron II*' analysis). *See Chevron*, 467 U.S. at 843-44; *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

Section 105(c)(2) of the Mine Act authorizes the Secretary to investigate a complaint of discrimination upon the filing of a complaint. Specifically, the Act states that:

> *Any miner* or applicant for employment or representative of miners *who believes that he has been discharged, interfered with, or otherwise discriminated against . . . may . . . file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary* shall forward a copy of the complaint to the respondent and *shall cause such investigation to be made as he deems appropriate. . . .* If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . .

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

According to the statutory language, a miner's mere *belief* that he or she has been discriminated against and the filing of the MSHA complaint form expressing that belief are sufficient grounds to trigger an investigation of discrimination by the Secretary. The statute does not include a requirement that the miner state the protected activity that allegedly motivated the adverse action, nor that he proclaim any other element of a prima facie case of discrimination. In fact, beyond the miner alleging his belief of discrimination, the provision says nothing of form or content of the miner's charging complaint. *Compare* Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(b) (requiring through regulation that a charge contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3)).[8] The statutory provision here is silent on whether the miner's charging complaint must specifically identify a protected activity.

Although the legislative history is equally silent in this regard, it does provide a useful context for the proper consideration of protected activity, as well as how section 105(c) should be administered. Specifically, Congress was clear that "[t]he listing of protected rights contained in section 10[5](c) is intended to be illustrative and not exclusive, and that "the scope of the protected activities be broadly interpreted by the Secretary." S. Rep. No. 181, 95th Cong., 1st

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[8] *EEOC v. United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002), relied upon by our dissenting colleagues for the proposition that the Seventh Circuit will not enforce administrative subpoenas absent a cognizable claim of discrimination, is inapposite. Slip op. at 8. In that Title VII case, alleging discrimination on the basis of national origin and sex because of the airline's failure to make contributions to the French social security system, the threshold sufficiency of the charge was not at issue. 287 F.3d at 651 ("UAL does not point to any infirmities in the charge."). Rather, the Court rejected a records request that extended far beyond the inquiry into the airline's social security payments and that would have taken five full-time employees more than a year to satisfy. *Id.* at 648, 655. That is not the situation here. *See* Tr. 130.

Sess. 35-36 (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 623-24 (1978). It further stated that section 105(c) was to be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* at 36. It went on to say that "[i]t is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . . The bill requires the Secretary to rigorously enforce these rights with discrimination complaints receiving high priority." *Id.*; *Pasula*, 2 FMSHRC at 2789 ("[T]he 1977 Mine Act is remedial legislation, and is therefore to be liberally construed."). Therefore, even if the complainant does not assert a protected activity expressly protected under the Act, the activity may still be protected if it furthers the purpose of the legislation. *Pasula*, 2 FMSHRC at 2789.

The Act does not prohibit the commencement of the Secretary's investigation until a protected activity or actionable cause can be articulated. Instead, the Act *requires* that the Secretary investigate "upon receipt" of the complaint, "as he deems appropriate." 30 U.S.C. § 815(c)(2); *see also* S. Rep. No. 95-181 at 36-37 (1977) ("The Secretary's investigation of matters alleged in the complaint must commence within fifteen days of receipt of the complaint.").[9] The statutory language and the legislative history together make clear that an

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[9] Our dissenting colleagues' reliance on *Wilson v. Farris,* 38 FMSHRC 341 (Feb. 2016)(ALJ), is misplaced. Slip op. at 4-5. *Wilson* was a discrimination case, in which MSHA had determined, after investigation, that a violation of section 105(c) had not occurred. The complainant then filed an action under section 105(c)(3), and subsequently requested discovery from the respondents. As the dissent notes, the administrative law judge denied the discovery request and granted summary decision to the respondents because the complainant had not alleged a cognizable claim of discrimination. The clear difference between *Wilson* and the present case is that here the document request is being made by MSHA in carrying out its statutorily-mandated duty to investigate the complaint.

Likewise, our dissenting colleagues' reliance on *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991) is misplaced. In *Hatfield*, the Commission reviewed a judge's order denying a motion to strike a miner's amended 105(c)(3) complaint. The dissent cites *Hatfield* for the proposition that a miner's private complaint filed with the Commission pursuant to section 105(c)(3) is limited by the terms of the miner's initial complaint filed with MSHA. Slip op. at 4. We read *Hatfield* somewhat differently. The Commission remanded the case to the Judge to determine if the protected activities cited in the miner's amended section 105(c)(3) complaint "[were] investigated by the Secretary in connection with Hatfield's initial discrimination complaint to MSHA." 13 FMSHRC at 546. Although Hatfield's initial complaint was "general in nature" and "allege[d] no specific protected activities" the Commission reasoned that the statutory scheme of the Mine Act "provides to miners a full administrative investigation and evaluation of an allegation of discrimination" prior to the miner's private right of action. *Id.* Thus, the Commission held that it was not the terms of the initial complaint to MSHA that controlled whether the amended complaint could go forward, but the Secretary's investigation of the initial complaint. This holding acknowledges that the Secretary has the authority to investigate possible discriminatory acts, even if the miner's initial complaint is deficient.

investigation deemed appropriate by the Secretary should be afforded to every "miner . . . who believes that he has been discriminated against" and has "file[d] a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2).[10]

There may be instances where a protected activity cannot be set forth because the miner does not actually engage in protected activity, but may nonetheless experience adverse action as a result of the operator's erroneous suspicion that the miner has engaged in such activity. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd,* 770 F.2d 168 (6th Cir. 1985). In such situations, the miner is hardly the best person to draw the necessary legal distinction between a claim where he has exercised his rights and one in which he has not exercised them, but where his employer has sought to interfere with his ability to do so. He may not understand that such interference is still prohibited under the Mine Act.

Indeed, Supervisory Special Investigator Smith testified that "[a] lot of times in the fact finding segment [of the investigation], miners don't even know their miner's rights. They don't know what to tell you. They don't know the key phrases, and when we go and investigate and talk with them, we try to pull that." Tr. 52-53. He further testified that the majority of discrimination claims that cross his desk do not clearly set forth a protected activity. Tr. 37. Thus, in cases where a miner is uninformed or unclear about what constitutes a protected activity but believes that he or she has been wronged by an employer, the Secretary's investigation into this "belief" serves as a necessary safety mechanism that ensures the miner has the opportunity to fully develop his possible claim of discrimination.[11]

The dissent expresses concern that MSHA "was seeking to find a basis for a claim that had not been made by the miner." Slip op. at 2. However, Investigator Smith testified that based on allegations made by Gatlin in the interview, he began looking into the possibility of a protected activity related to determining and reporting safety hazards. Tr. 46-48. Specifically, Gatlin alleged that as a belt examiner he had been required to perform work beyond his regular job duties, which made his job so burdensome that he did not have enough time to correct the safety hazards he found. Gatlin alleged that as a result, he began citing more hazardous

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[10] Investigator Smith testified that MSHA formerly had a practice of assessing whether protected activity had occurred in section 105(c) complaints based solely on what the complainants initially reported. This resulted in some complainants being turned away without an investigation if protected activity was not apparent. After miners complained to Congress that they were being turned away without an investigation on the merits, MSHA changed the practice, and discovered that complainants did not know their rights as miners (for example, to complain to management about hazardous conditions), and thus sometimes did not articulate protected activity in their complaints although it had occurred. Tr. 110-11.

[11] MSHA's initial interview with the miner can provide the investigator with much needed clarity regarding the allegations, and can possibly lead to the discovery of other violative conduct the miner did not know to allege or had trouble articulating in his charging complaint. *See* Tr. 53, 80.

conditions in the pre-shift and on-shift exam books. Gatlin stated that he had been told that he did not necessarily have to record a hazard if it was corrected. Tr. 47-48. Thus, based on the interview, MSHA determined that it had a basis to investigate Gatlin's allegations as a possible violation of section 105(c), even though protected activity was not specifically alleged in Gatlin's written complaint. This is precisely what the Mine Act contemplates in section 105(c)(2) by creating a provision for MSHA to investigate a complaint made upon a miner's "belie[f]." The judge credited the investigator's testimony, finding that he had an understanding of the miner's claim and "did not . . . embark on a 'fishing expedition.'" 34 FMSHRC at 803 n.15. The dissent's contention that the inspector failed to describe Gatlin's possible protected activity or how it could have related to adverse action, slip op. at 6, n. 7, is incorrect.[12]

The Act requires that the Secretary's investigation "commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C.A. § 815(c)(2). In its discussion of the provision, Congress explained that "[u]pon determining that the complaint *appears to have merit*, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation." S. Rep. No. 95-181 at 36-37 (1977) (emphasis added). Thus, it is during this preliminary investigation that the Secretary must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was "not frivolously brought." *See Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), *citing* S. Rep. No. 95–181.[13]

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[12] Commissioner Cohen notes that our dissenting colleagues also state: "It is difficult to believe that the majority actually thinks MSHA has authority to investigate every adverse employment action in the mining industries through sweeping document demands about uninvolved employees without any alleged basis in section 105(c). Yet that is the inevitable outcome of its decision." Slip op. at 3-4. The short answer is that we don't believe that MSHA has authority to investigate "every adverse employment action in the mining industries through sweeping document demands," nor does MSHA. The document demands were made in this case only after Inspector Smith determined, based on his interview with Gatlin, that discrimination under the Act may have occurred. As noted above, the Judge found that MSHA's document request was not a "fishing expedition."

[13] In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214-16 (1946), the Supreme Court upheld an administrative subpoena issued by the Secretary of Labor seeking records during investigation to determine whether a company was violating the Fair Labor Standards Act. In relying on the statute which conferred subpoena power to aid the Department of Labor in enforcement and in investigations to determine compliance, the Court rejected the company's argument that without charge or complaint, Labor's subpoena amounted to a fishing expedition to secure information on which to base a charge. It stated that "[t]he very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Id.* at 201.

It appears that HCC confuses the minimal requirements that must be satisfied to trigger the Secretary's section 105(c) investigative power with the threshold requirements that must be met before the Commission in order to establish that a miner's case is not being frivolously brought. The "not frivolously brought standard" has been deemed the functional equivalent to the "reasonable cause to believe" standard. *Id.* at 748, n.10. As one Commission Judge has noted, in practice, in order to prevail on this very low burden of proof, the Secretary need only establish protected activity and one of the circumstantial indicatives of motive. *Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206, 211 n.9 (Feb. 2010) (ALJ). However, the threshold for initiating the Secretary's investigative power is even lower. It only requires the filing of a complaint with MSHA. It does not require that the Secretary establish protected activity before it may investigate, because whether or not a protected activity exists is determined during the preliminary investigation, not before.[14]

HCC's theory that the Secretary's investigative authority rests solely on the initial statements of the complaining miner is contrary to the statute's language, Congressional intent, and the purpose of the provision.[15]

B. Whether the Secretary's records demand was authorized under section 103 of the Act.

1. The Secretary has the right to obtain records an operator is not legally required to maintain.

HCC maintains that section 103(a) does not grant the Secretary the right to compel the production of documents, and that his authority under section 103(h) is limited to records that an operator must keep to allow the Secretary to conduct his functions under the Mine Act. We disagree.

In *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012-13 (May 2012), *aff'd*, 715 F.3d 631, 638 (7th Cir. 2013), we upheld the Secretary's right to inspect and copy records, (including personal medical information) not required by law to be maintained, in order for the Secretary to

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[14] *See United States v. Powell,* 379 U.S. 48, 58 (1964) (holding that agency need not meet any standard of probable cause to obtain enforcement of administrative summons); *In re Subpoena Duces Tecum*, 228 F.3d at 348, *citing Oklahoma Press*, 327 U.S. at 213 (finding that if the issuance of investigative subpoenas were based upon showings of probable cause, "the result would be the virtual end to any investigatory efforts by governmental agencies . . . .").

[15] The Commission has previously held that "the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint to [him], and not merely on the initiating complaint itself." *Sec'y o/b/o Callahan* v. *Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); s*ee Sec'y o/b/o Dixon v. Pontiki Coal Corp.,* 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint.

determine compliance with Part 50 accident reporting requirements. We emphasized that the Secretary has broad authority to conduct inspections and investigations under section 103(a). *See Big Ridge*, 34 FMSHRC at 1012; *Tracey & Partners*, 11 FMSHRC 1457, 1464 (1989). That provision states in relevant part that "the Secretary . . . shall make . . . investigations in . . . mines . . . for the purpose of . . . determining whether there is compliance with the mandatory health or safety standards . . . or other requirements of this chapter." 30 U.S.C. § 813(a). Thus, the language of section 103(a) generally authorizes the Secretary to verify, through investigation, operator compliance with the anti-discrimination requirements of section 105(c) of the Act.

Section 103(h) states that:

> In addition to such records as are specifically required by this chapter, *every operator of a . . . mine shall* establish and maintain such records . . . and *provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions* under this chapter.

30 U.S.C. § 813(h) (emphasis added). We held in *Big Ridge* that the plain language of section 103(h) provides a broad Congressional grant of authority to the Secretary to carry out his functions under the Act. 34 FMSHRC at 1012, *aff'd*,715 F.3d at 638; *see also Energy West Mining Co. v. FMSHRC*, 40 F.3d 457 (D.C. Cir. 1994) (recognizing broad scope of section 103(h)).

Section 103(h) does not restrict the Secretary's access to records that are specifically required to be maintained by the Act and regulations. *Big Ridge,* 34 FMSHRC at 1012, *aff'd* 715 F.3d at 641-42; *see also BHP Copper, Inc.*, 21 FMSHRC 758, 766 (July 1999). In fact, "Congress rejected earlier proposed versions of this section, which had limited the Secretary's access to operators' records to those specific records which the Secretary had 'prescribe[d] by regulation.' S. 717, 95th Cong., at 20, *reprinted in Leg. Hist.* at 129; H.R. 4287, 95th Cong., at 20, *reprinted in Leg. Hist.* at 207." *Big Ridge,* 34 FMSHRC at 1013.

In its decision in *Big Ridge*, the Seventh Circuit stated that section 103(h) provides that "MSHA may 'reasonably require' mines to produce non-required records when the additional information would enable MSHA 'to perform [its] functions' under the Act. This text permits MSHA to make information demands for a wide range of purposes—any reasonable requirement that would help MSHA fulfill the purposes of the Mine Safety Act." *Big Ridge*, 715 F.3d at 641; *see also* S. Rep. No. 95-461, at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1325 (1978) ("the House amendment . . . authorized the Secretary to require records, reports, and other information not otherwise specified by the Act.").

Accordingly, we conclude that section 103(h) broadly authorizes the Secretary to request access to records not required to be kept by operators, as long as the records are "reasonably require[d]" to enable him to perform his function under the Mine Act.

2. The personnel records were "reasonably required."

We now consider whether the Secretary's demand satisfies the requirements of section 103(h). We conclude that the personnel records requested by the Secretary are "reasonably require[d] . . . to enable him" to carry out his investigative "functions" under sections 105(c) and 103 of the Act. 30 U.S.C. § 813(h).[16]

The request for personnel records by the Secretary was reasonable because it met the standard set forth by the Seventh Circuit in *Big Ridge*, as it was "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 715 F.3d at 646 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). [17]

First, the records demand was sufficiently limited in scope, as it was tailored to capture only records of employees who had been disciplined, reprimanded, or terminated for engaging in the same or similar conduct as Mr. Gatlin. The scope was further limited by the time frame covered and the manner of inspection. Specifically, the time period was limited to records from the last five years. This is a reasonable window of time for capturing any relevant information given that the records sought would contain a discrete type of employee conduct. The manner was limited to MSHA's request to inspect and copy the records and did not include the agency rummaging through the files of HCC.

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[16] Contrary to the operator's assertion at oral argument (Oral Arg. Tr. 12-19), the "relevant and necessary" standard applied in *Big Ridge* is not applicable here. That standard was imposed by regulation and applies to the Secretary's power to demand records in the context of Part 50 audits. There is no applicable regulation here; thus, there are no regulatory requirements the Secretary's record demand must satisfy.

[17] The Seventh Circuit used this well-established standard for purposes of determining if the Secretary of Labor's demand for information from a mine operator was in accordance with the Fourth Amendment. *Big Ridge, Inc.*, 715 F.3d at 646 (citing *See v. City of Seattle*, 387 U.S. 541, 544 (1967). The Circuit adopted this standard because it recognized that the Secretary's request for information and records from an operator pursuant to section 103(h), for Fourth Amendment purposes, "amounts to an administrative subpoena in substance." *Id.* In order to create a test for determining whether a request by the Secretary under section 103(h) is "reasonably required . . . to enable him to carry out his investigative functions," it is appropriate for the Commission to apply the standard used to evaluate subpoenas under the Fourth Amendment.

In *Warrior Coal, LLC,* the Commission therefore applied this standard when determining that the Secretary's request was "reasonable" as required by section 103(h). *Warrior Coal, LLC*, 38 FMSHRC ___, slip op. at 5-8, KENT 2011-1259-R et al. (May 17, 2016), *appeal docketed*, No. 16-3646 (6th Cir. June 15, 2016). The limitations placed on the Secretary's information requests by the application of this standard appropriately balances the Secretary's authority against the burden of compliance placed on the mine operator and the possibility of government overreach.

Second, these specific directives also made compliance with the request manageable and not unreasonably burdensome, which is evidenced by Adelman's statement that it only took them "a few hours" to gather the requested files. Tr. 130; *see also infra* at 15.

Third, the personnel records were relevant to the purpose of a discrimination investigation. 34 FMSHRC at 803. They were critical aids in the Secretary's determination of disparate treatment, which is relevant to a finding of discrimination. Investigator Smith testified that Gatlin's personnel file would show his work history, including any disciplinary action taken against him, to find any information corroborating Gatlin's allegations and to determine his general credibility. Tr. 56, 68. The personnel files of other similarly situated employees were requested in order to determine whether there was evidence of disparate treatment. Tr. 56, 91; 34 FMSHRC at 792.

Further, the request enables the Secretary to carry out his investigative functions under sections 105(c) and 103(a). *See Big Ridge*, 34 FMSHRC at 1017. Verifying operator compliance with the Mine Act is one of the express purposes for which section 103(a) authorizes MSHA to inspect and investigate mines, see *Big Ridge*, 715 F.3d at 642, and verifying HCC's compliance with section 105(c) falls squarely within this function. This type of inquiry is particularly important because the Act protects miners against discrimination in order to encourage their active role in improving mine safety. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

Congress specifically stated that: "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. . . . [I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181 at 35, Leg. Hist. at 623. "The [discrimination] complaint procedure, therefore, serves an important function in accomplishing the legislation's broader goals of improving mine safety and protecting miners." *Vulcan Const. Materials, LP v. FMSHRC*, 700 F.3d 297, 302 (7th Cir. 2012). As the Judge stated, "[w]here the Secretary's function is the evaluation of a discrimination claim, information that is relevant to assessing the merits of that claim, including evidence of protected activity, adverse action or discriminatory intent may be 'reasonably required.'" 34 FMSHRC at 803.

Accordingly, we hold that records that tend to establish or disprove an element of a prima facie case of discrimination generally are, in our view, reasonably required to enable the Secretary to perform his investigative function under section 105(c) of the Mine Act.

3. HCC is not entitled to "notice" prior to MSHA commencing an investigation.

HCC also asserts that MSHA was required to provide it with a threshold level of "notice" of the protected activity so that HCC could determine whether a colorable claim was being alleged and whether its compliance was required. We disagree. The statute does not entitle HCC to "notice" of the protected activity, and therefore, "notice" is not a prerequisite to the Secretary's investigation or to an operator's compliance with the investigation.

We first begin by noting that HCC misconstrues its authority. The Mine Act does not permit the operator to determine the scope or dictate the direction of an MSHA compliance investigation. According to section 105(c), the Secretary "shall cause such investigation to be made *as he deems appropriate*." 30 U.S.C. § 815(c) (emphasis added). Thus, this duty is committed to the sole discretion of the Secretary. The Mine Act also does not allow the operator to determine if a colorable claim has been alleged. That initial determination is also made by the Secretary and only reached after he has investigated to an extent that he has deemed appropriate.

Section 105(c)(2) requires that once a miner who believes that he has suffered discrimination files a complaint with MSHA, "[u]pon receipt of such complaint, *the Secretary shall forward a copy of the complaint to the respondent* and shall cause such investigation to be made as he deems appropriate." 30 U.S.C. § 815(c)(2) (emphasis added). The language says nothing about providing "notice." Under a plain reading, the Secretary is only required to forward a copy of the complaint, as filed by the miner, to the operator. As previously noted, the provision contains no guidance on what a charging complaint must include. There is also no language that suggests the Secretary must provide to the operator anything more than a "copy" of what the miner has filed before he may commence his investigation into the complaint.[18] Congress did, however, intend for section 105(c) to be construed broadly to ensure that miners would not be hindered in any way in exercising their rights. Consequently, we have no basis to read conditions into the Act that might further complicate a miner's process for exercising his rights under this section.

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[18] In similar instances, Congress has chosen not to impose specific content requirements on a charging complaint or a service of notice requirement on the agency involved. *See, e.g.*, *United States v. Woerth*, 130 F. Supp. 930, 943 (N.D. Iowa 1955), *aff'd*, 231 F.2d 822 (8th Cir. 1956) ("There is no provision in the [Packers and Stockyards] Act or in any of the regulations promulgated thereunder that the contents of a complaint against a registrant be made known to him before an investigation may be made of his records in connection therewith."); *Solis v. Laborer's Int'l Union of N. Am.*, 775 F. Supp. 2d 1191, 1212 (D. Haw. 2010) (rejecting respondent's argument that prior to release of any records the Secretary of Labor must provide the nature of and identify specific allegations of the election challenge, and concluding that "[i]t is evident from reading the LMRDA that Congress intended that the Secretary exercise broad authority in investigating labor unions, such that '[t]he Secretary is not required to demonstrate probable cause exists to launch a LMRDA investigation.' *McLaughlin*, 880 F.2d at 174."); *EEOC v. Merrill Lynch, Pierce, Fenner & Smith*, 677 F. Supp. 918, 926 (N.D. Ill. 1987) (holding that the EEOC was not required to give employer Title VII notice of sex discrimination charge before commencing investigation or requesting disputed report from employer under Equal Pay Act and Fair Labor Standards Act).

In contrast, certain other statutes specifically impose a notice requirement. For instance, Title VII originally required that the EEOC simply provide a copy of a charge to the employer accused of discrimination. Pub.L. 88-352, § 706(a), 78 Stat. 259. However, in 1972, the provision was amended to require that the Commission "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on [the] employer . . . within ten days" of the charge being filed. 42 U.S.C. § 2000e-5(b); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 63 (1984).

HCC additionally asserts that notice is required here because it is analogous to the notice to service of process in a civil suit, which is to give the party notice of a claim or charge being filed against it. Oral Arg. Tr. 9. However, this is not the proper context in which to view the miner's complaint to MSHA or the Secretary's investigatory power. HCC erroneously seeks to apply the procedures associated with formal court proceedings to the Secretary's pre-proceeding investigation.

The miner's charging complaint here is not a pleading and does not initiate a formal section 105(c)(2) proceeding before the Commission. The miner's complaint only serves as the mechanism by which the Secretary's investigative function is activated. It is the predicate to, and not the result of, the Secretary's determination that the Mine Act has been violated. *See U.S. v. Morton Salt Co.*, 338 U.S. 632, 641-43 (1950) (drawing distinction between the judicial process and the administrator's function of investigating). In this regard, we find NLRB precedent helpful:

> A charge does not initiate a formal . . . proceeding against a party. [It] is filed by a private party and "serves merely to set in motion the investigatory machinery of the Board." *Texas Indus., Inc. v. NLRB,* 336 F.2d 128, 132 (5th Cir. 1964). . . . The charge "is not designed to give notice to the person complained of . . . Once . . . filed, the Board decides whether to issue a complaint, terminate the investigation as unfounded, or dispose of the matter through informal methods. Before [filing] a complaint, the action remains purely investigatory; no parties or judicial hearings exist.

NLRB v. H.P. Townsend Mfg. Co., 101 F.3d 292, 294-95 (2d Cir. 1996) (internal citations omitted); *see also Russell-Newman Mfg. Co. v. NLRB*, 407 F.2d 247, 249 (5th Cir. 1969).

Consistent with our holding in *Big Ridge*, we conclude that section 103(h) broadly authorizes the Secretary to request access to personnel records not specifically required to be kept by operators, as long as the records are "reasonably require[d]" to allow the Secretary to perform his function of investigating complaints of discrimination made pursuant to section 105(c) of the Mine Act.

C. Whether the Secretary's demand violates HCC's Fourth Amendment rights.

HCC argues that MSHA infringed upon its constitutional rights by seeking to conduct a warrantless search of operator records that are not required to be kept under the Mine Act and that are not reasonably required by MSHA to perform its functions under the Act. It also asserts that MSHA's demand was unreasonable because the records were not necessary to determine compliance, the records were irrelevant to the statutory scheme, and the request was overbroad and burdensome.

1. **The inspection was reasonable under *Donovan v. Dewey.***

Recognizing that mining is a pervasively regulated industry, the Supreme Court has upheld warrantless inspections under the Mine Act using a three-part test. *Donovan v. Dewey*, 452 U.S. 594, 599, 601-05 (1981). The Court held that an inspection is reasonable if it is: (1) authorized by law; (2) necessary for the furtherance of federal interests; and (3) the occurrence is not "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Id.* at 599; *see also Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

The instant case satisfies the *Donovan* test. First, the document request was authorized by sections 105(c) and 103 of the Mine Act. Second, as stated above, the document request furthered the anti-discrimination provisions of the Act, which serve as an integral component in the enforcement of the Act's health and safety regulations. Specifically, the Secretary has a substantial interest in protecting miners against discrimination and deterring operators from engaging in discriminatory conduct so that miners remain actively engaged in improving health and safety conditions at mines. Finally, the Act charges the Secretary with the function of investigating complaints of discrimination made against mine operators. These investigations are not uncommon, and presumably anticipated by operators upon being notified that a discrimination claim has been filed.

2. **The request satisfied the Fourth Amendment requirements for an administrative subpoena.**

Recently, in reviewing the Commission's decision in *Big Ridge*, the Seventh Circuit decided that, although "highly instructive," the *Donovan* analysis "does not fully answer the Fourth Amendment question," for *Donovan* concerned physical safety inspections of mines, not demands for production of medical and personnel files in mine custody. 715 F.3d at 645. The court further observed that the investigation at issue did not involve an intrusion in which government inspectors personally opened file cabinets and examined computer hard drives, but rather required mine operators to allow MSHA to review and keep copies of records. *Id*; *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

Focusing its Fourth Amendment analysis on the substance of MSHA's inspection request, the Seventh Circuit determined that MSHA's document review authority under section 103(a) and (h) amounts to an "administrative subpoena" in substance rather than a search or seizure. *Big Ridge*, 715 F.3d at 646. Such a subpoena implicates the Fourth Amendment to the extent that it requires the demand for information be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Id., citing See v. City of Seattle*, 387 U.S. at 544. Once an agency has satisfied the requirements for an administrative subpoena, the respondent carries the burden of showing that the request is overbroad, unduly burdensome, irrelevant, or otherwise an abuse of the court's process. *See United States v. Whispering Oaks Resid. Care Facility, LLC,* 673 F.3d 813, 817-19 (8th Cir. 2012) (citing *United States v. Powell*, 379 U.S. 48, 58 (1964)); *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1008-09 (9th Cir. 1996); *F.T.C. v. Invention Subm. Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

We conclude that the Secretary's request satisfies the "administrative subpoena" requirements of the Fourth Amendment. First, the parameters of the request are sufficiently limited in scope because its reach is restricted to the personnel records of employees who were "disciplined, reprimanded or terminated" within the last five years for engaging in the same conduct that led to Mr. Gatlin's termination.

Second, these records would corroborate or undermine Gatlin's allegations of disparate treatment. These records are relevant to the Secretary's overall purpose of identifying and abolishing the culture of intimidation and retaliation aimed at miners who may want to report safety hazards. Protecting miners from reprisals for their participation in the safety process plays a vital role in the improvement of safety conditions in mines.

Finally, the request was specific and clear enough that it was not unreasonably burdensome for HCC to produce the targeted records. Once HCC received clarification from MSHA on the exact reach of the records demand, the request, as already noted, was specific in scope in that it involved employee disciplinary records that were restricted to a particular type of employee conduct, time frame, and manner of inspection. Searching within such well-defined confines would not be burdensome. In fact, General Manager Adelman testified that after the clarification, HCC only needed to search through "just those terminated employees," and that it took him only five hours to locate the five relevant records that were ultimately produced. Tr. 130, 159.

Nonetheless, we recognize that MSHA's original request was hardly a model of clarity. We also acknowledge that given the irrelevant and private information contained therein, in the interest of time and fairness, the agency should have informed the operator at the outset that it would accept redacted copies of the files. However, as this is not HCC's first exposure to an MSHA discrimination investigation, there is no reason to believe that HCC was not already aware that redaction was an option.

Although the Secretary's request would have captured private information that was not relevant to the discrimination claim, we nonetheless conclude that this is not a legitimate basis upon which an operator can rest its refusal to cooperate with an authorized demand for records. *See Woerth v. United States*, 231 F.2d at 824 ("It may be that the records requested pertain to transactions not within the scope of the Act and which are irrelevant to the investigation in question. However, the fact that the respondent may have intermingled irrelevant information in the records in question cannot serve to defeat the right of the Secretary of Agriculture to examine those records as to transactions which had their origin in the activities of the respondent as a registered dealer."). At the very least, HCC could have released the relevant portions of the records.

We also hold that the burden was on HCC to raise its concerns regarding the reasonableness of the section 103(h) records request prior to issuance of any citation.[19] Had

[19] Beyond demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand. It failed to raise concerns about the vagueness or broadness of the language or seek a revision of the request until the March 24 conference call with the assigned Judge. This was one month after MSHA first requested the

HCC properly raised these concerns regarding the terms of the request, MSHA would have had a duty to discuss the concerns with HCC in good faith. Courts have held that before they will conclude that a subpoena is "arbitrarily excessive," they expect the person served "to have made reasonable efforts . . . to obtain reasonable conditions" from the government. *United States v. Morton Salt,* 338 U.S. 632, 653 (1950); *In re Subpoena Duces Tecum*, 228 F.3d 341, 349, 351 (4th Cir. 2000) ("as a condition to maintaining the argument that an investigative subpoena is overly broad and oppressive, [the subpoenaed party] would have to be able to point to reasonable efforts on his behalf to reach accommodation with the government").

Had HCC taken minimal steps early on to negotiate with MSHA, the imposition of daily penalties might have been avoided. After providing HCC with clarification, the Secretary accepted the records in redacted form with no objections and terminated the violations on March 26, 2009.

D. Whether the section 104(b) order was valid.

Finally, HCC argues that the section 104(b) order issued to it is invalid on its face because the Secretary failed to follow the statutory requirements that he determine an affected area and withdraw miners. We disagree.

1. <u>The Secretary's interpretation of section 104(b) was reasonable.</u>

Section 104(b) of the Act provides that, if on an inspection following the issuance of a section 104(a) citation, the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, *he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator . . . to immediately cause all persons . . . to be withdrawn* . . . until . . . the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b) (emphasis added).

The first clause of the provision plainly sets out two enumerated conditions the Secretary must establish before he can issue a withdrawal order: (1) that the underlying violation has not been totally abated within the set abatement time, and (2) the abatement time should not be

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documents, a week after being notified by MSHA that Investigator Smith would visit on March 23, and one day after the citations and order had been issued and the daily penalties began to accrue. *See* Gov. Exs. 4, 6. Mine Manager Adelman testified that he did not seek clarification of the request because he felt that the personnel files were "off limits anyway," but indicated that if it had been clarified he "may have been able to determine what part of a [] file might be needed" and they "could have worked that out." Tr. 119-20; *see also* ALJ Dec at 17-18.

extended. If those two conditions are satisfied, clause two, the center of our controversy, mandates that the Secretary must determine the extent of the area affected by the violation, and then issue an order which requires the withdrawal of all persons from that area. HCC's reading of the provision would have us treat clause two as an additional finding the Secretary must make before he is authorized to execute a section 104(b) order. We reject this interpretation.

When the Mine Act is silent on an issue, the Secretary's interpretation which reasonably effectuates the health and safety goals of the Act is controlling. *Sec'y of Labor ex rel. Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844).

We conclude that the Mine Act is silent on this issue, and that the Secretary's interpretation of the statute, which permits an MSHA inspector to issue a section 104(b) order upon a determination that there is no area affected and/or no miners to physically withdraw, is a reasonable interpretation of the provision. It is significant that nothing in the language of section 104(b) prohibits the Secretary from issuing a "no area affected" order. The language indicates that, if the two conditions above are met, the MSHA inspector "shall determine the extent of the area affected by the violation" and order the appropriate withdrawal of miners from "such area" until it is determined that the violation has been abated. Thus, if no specific area of the mine is affected by the violation, it is reasonable to read the statute as requiring the inspector to state that determination and issue a corresponding section 104(b) order.

The Secretary's authority to issue a section 104(b) failure to abate order is not predicated on proving that an affected area exists, but on showing that the underlying violation was not properly abated and that the time should not be extended. Indeed, Congress stated that "[s]ection 10[4](b) provides the Secretary with such authority upon a determination that the violation has not been totally abated within the original or subsequently extended abatement period, and that the abatement period should not be further extended." S. Conf. Rep. No. 95-181, at 30 (1977), *reprinted in Legis. Hist.* at 618. The language of section 104(b) also makes clear that if the pre-conditions are met, the Secretary is statutorily required to issue an order regardless of the extent of the area affected. *See* 30 U.S.C. § 814(b) ("*If*. . . the Secretary finds that a violation . . . has not been totally abated . . . and that the period . . . should not be further extended, *[then] he* shall determine the extent of the area affected . . . and *shall promptly issue an order*") (emphasis added).

The purpose of section 104(b) is to spur swift abatement of existing violations and compel operator compliance with the Act. A "no area affected" order provides an important deterrent to operators who fail to abate violations in a timely fashion. *See Thunder Basin Coal Co.*, 16 FMSHRC 671 (Apr. 1994) (acknowledging the Secretary's practice of issuing "no area affected" section 104(b) orders). The issuance of an order for a failure to abate promotes compliance by imposing a consequence on an operator that refuses to comply with the Mine Act. Moreover, penalizing an operator's refusal to comply with the Act in some instances, while allowing its refusal in others, falls short of fulfilling the Act's purpose. Thus, the Secretary's broad interpretation is consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an

operator incurs repeated violations and refuses to comply. *See* 30 U.S.C. § 814(d), (e); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012).

While an operator's continued refusal to turn over records may not present an immediate safety risk, it is nonetheless hazardous in that it hinders the Secretary's investigations, which are intended to ensure operator compliance with the Act's safety measures. Consequently, the rapid abatement of *all* violations, not only those that present immediate physical hazards, is essential for the protection of miners. Otherwise, absent our approval of the Secretary's interpretation, MSHA would have no remedy or leverage to force timely compliance should an operator refuse to comply with a reasonable request for information in furtherance of an investigation.

Accordingly, we conclude that the Secretary's interpretation of section 104(b) is reasonable and entitled to *Chevron II* deference. We hold that an operator's failure to abate any violation is a sufficient basis for the issuance of a section 104(b) order.

2. The Secretary has met his burden of proof regarding the section 104(b) order.

Lastly, having determined that MSHA's issuance of a section 104(b) order was proper under the circumstances, we now decide whether the Secretary has met his burden of proof regarding the validity of the withdrawal order issued to Hopkins due to its failure to abate.

In general, to establish a prima facie case that a section 104(b) order is valid, the Secretary must prove by a preponderance of the evidence that the underlying violation has not been abated within the time fixed or extended for abatement. *Martinka Coal Co.*, 15 FMSHRC 2452, 2455-56 (Dec. 1993), *citing Mid-Continent Res.*, 11 FMSHRC 505, 509 (Apr. 1989). The operator may also challenge the reasonableness of the time period set for abatement, or the Secretary's refusal to extend the time period. *Energy West Mining Co.*, 18 FMSHRC 565, 568 (Apr. 1996).

In the instant case, it is undisputed that HCC refused to turn over the personnel records within the 45-minute abatement time. Investigator Smith determined that the abatement time was reasonable and should not have been extended because there was no justification to do so. 34 FMSHRC at 793. Smith's refusal was not unreasonable considering that just prior to expiration of the abatement period, mine General Manager William Adelman indicated that he had no intention of complying. 34 FMSHRC at 793; Tr. 72. Adelman then continued to refuse after the section 104(b) order had been issued, which then led to issuance of a section 104(a) citation for continuing to work in the face of the section 104(b) order. HCC made it clear that regardless of the time set for abatement, it would not comply.[20]

[20] It has been HCC's position from the beginning that the Secretary is not entitled to the requested personnel records as part of its investigation. *See* Gov. Ex. 7 at 2 (refusing to release records on ground that "there has been no basis established for such request, given that no protected activity exists in this case"). HCC did not provide the parts of the record that were clearly relevant, while withholding the objectionable parts. In fact, HCC's counsel stated at the oral argument that the personnel records were not necessary because the Secretary could have obtained the disparate treatment information through other means, such as interviews. She stated

Accordingly, we conclude that the Judge did not err in finding that the section 104(b) Order No. 6694905 was validly issued.

IV.

Conclusion

For the reasons set forth herein, we conclude that the Judge did not err in finding that the citations and order were validly issued. Accordingly, Citation Nos. 6694904 and 6694906 and Order No. 6694905 are all affirmed.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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that even if a protected activity had been provided, it was HCC's position that the Secretary was not entitled to the requested personnel records because they were not "relevant and necessary" to his investigation. Oral Arg. Tr. 19. Therefore, a longer abatement time would not have changed the outcome.

Commissioners Young and Althen, dissenting:

In this case, neither the miner nor MSHA alleged or identified any basis for a claim of discrimination under section 105(c). The miner's complaint asserted insubordination as the reason for his discharge, and MSHA failed and refused to identify any basis for a claim of discrimination. Nonetheless, the majority upholds imposition of a civil penalty arising from MSHA's demand that the operator search and then produce five years of personnel records unrelated to any activity by the claimant miner. The Secretary utterly failed to carry his burden of proof of showing a reasonable basis for the document demand. We respectfully dissent.

Disposition[1]

Section 103(a) of the Mine Act authorizes the Secretary to make inspections and investigations for, *inter alia*, "determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." 30 U.S.C. § 813(a). Additionally, section 103(h) requires that operators "provide such information, as the Secretary or the Secretary of Health and Human Services may *reasonably require* from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h) (emphasis added). Here, the Secretary pursues a function under section 105(c) of the Mine Act. 30 U.S.C. § 815(c). The ultimate issue, therefore, is whether the Secretary reasonably required disclosure of five years of personnel records of uninvolved mine employees when the miner has not alleged discrimination based on protected activity and MSHA did not identify any alleged basis for a claim of discrimination.

Section 105(c) permits a miner who believes he has been discharged "in violation of this section" to file a "complaint" with MSHA. The miner initiates the investigation by filing a written complaint alleging that he/she suffered adverse employment action because of the exercise of a right protected by the Mine Act. There are three prerequisites to a Mine Act discrimination case: protected activity, adverse employment action, and a motivational connection (a link) between the protected activity and the adverse action. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). Therefore, a cognizable claim of discrimination exists when a miner or MSHA alleges that the miner engaged in protected activity and suffered adverse employment action that was at least partly motivated by the identified protected activity.

Here, MSHA did not base its demand for five years of personnel records upon any factual allegation made by the miner or MSHA to the operator that the miner might have suffered

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[1] Commissioner Young also disagrees with the majority's analysis of the request here as an "administrative subpoena" and incorporates in this opinion his dissent in *Warrior Coal, LLC*, 38 FMSHRC ___, slip op. at 15-21, KENT 2011-1259-R et al. (May 17, 2016), *appeal docketed*, No. 16-3646 (6th Cir. June 15, 2016). An MSHA request for documents under section 103(h) is not an administrative subpoena. Commissioner Althen continues to agree with observations in Commissioner Young's dissent in *Warrior Coal* regarding the nature of an administrative subpoena versus an MSHA document request as set forth in his separate opinion in *Warrior Coal*.

adverse employment action based upon protected activity. Neither the miner nor MSHA ever made any allegation of even possibly unlawful discrimination. The miner himself alleged his discharge resulted from his own insubordination and MSHA, without saying more, demanded five years of personnel records for employees not connected in any way to the complaining miner.

Robert Gatlin, filed a complaint (Gov't Ex. 1) and, as required by section 105(c), MSHA served that document upon the operator. The alleged complaint, however, is factually defective. It plainly did not assert a violation of section 105(c). The so-called complaint did not allege either protected activity or any adverse action motivated by unnamed protected activity. In its entirety, it alleged:

> I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged.
>
> I would like my job back, any negative comments deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Gov't Ex. 1-2.

Gatlin's claim was that he insisted upon doing work on weekends for extra pay. In short, he simply refused to do assigned work on a weekday. He does not admit insubordination; he proclaims it. In doing so, he does not allege either protected activity or any adverse action motivated by protected activity. Thus, he fails to allege even implicitly two out of the three elements of a violation of section 105(c). He actually alleges that the operator discharged him for a legitimate reason—insubordination. Our colleagues in the majority completely agree that Gatlin's claim did not assert discrimination because of protected activity. Indeed, they devote many pages to discussing a specific heading of whether MSHA could "investigate Gatlin's complaint of discrimination although it failed to identify a protected activity." Slip op. at 5. Thus, they concede that the miner's complaint did not state either protected activity or a nexus to adverse action.[2] They further concede, therefore, that from the very outset of MSHA's investigation, it was seeking to find a basis for a claim that had not been made by the miner.

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[2] Miners may initially fail to assert in precise legal terms the elements of a discrimination claim in their written complaint. When, as here, a miner's complaint is facially invalid, MSHA is entitled to ask questions and investigate whether any facts asserted by the miner at that point might support a discrimination claim—that is, can the miner allege the elements of protected activity and adverse action because of such activity. Here, MSHA conducted such a further inquiry of Gatlin's complaint even though Gatlin did not make a claim of protected activity or nexus to adverse action. The right to conduct such follow-up to a facially invalid complaint is not at issue at this point. Here, the miner, admittedly by the majority, did not at any point state a claim of protected activity. Thereafter, MSHA was not investigating a claim; it was hunting to see if it could find a claim. The question here is whether an MSHA demand for disclosure of

Nor does the majority contend that MSHA ever identified any potential claim of discrimination because of protected activity. When asked by the operator what the claim was – that is, what the protected activity was and what the nexus to discharge was, MSHA failed to reply. Plainly, neither the miner nor MSHA ever alleged or otherwise notified the operator of any cognizable claim of section 105(c) discrimination as a basis of the need for five years of personnel records of other miners.

Despite the absence of any basis for a discrimination claim, MSHA demanded six categories of records from the operator. Of course, the operator only knew that the miner complained that insubordination was the reason for his discharge. Through counsel, therefore, the operator responded reasonably to the facially unreasonable demand by requesting a statement of any alleged protected activity and discrimination asserted by the miner that would serve as a reasonable basis for the sweeping document demand. MSHA flat out failed and refused to provide any reason for the demand.[3]

Nowhere in the record do we find any allegation of the basic elements of a violation of section 105(c), by inference or otherwise, from the miner or from MSHA. The miner did not even testify at the post-citation hearing. Therefore, without a doubt, Gatlin never alleged a cognizable claim. He certainly provided no basis for a reasonable need for years of personnel records unrelated to the reason for his discharge. We must accept that this miner knew and honestly expressed his objection to his discharge. The miner's expression of discontent was only that the operator did not schedule the miner's work to permit extra pay on Saturday. Without a claim of protected activity or nexus to an adverse action, the miner's complaint is simply that the operator fired him for insubordination.

For its part, MSHA never supplemented the miner's complaint with any basis for a claim of discrimination or reason that, given the absence of a discrimination claim, it was reasonable to demand five years of personnel files. This is particularly important because the requested records did not even go to the complaining miner's conduct. It is difficult to believe the majority actually thinks MSHA has authority to investigate every adverse employment action in the mining industries through sweeping document demands about uninvolved employees without any alleged basis in section 105(c). Yet, that is the inevitable outcome of its decision.

In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the Commission recognized that the miner's complaint establishes the contours for subsequent action. When MSHA found no merit in Hatfield's initial complaint, he filed a pro se action. The operator moved to dismiss the complaint for failure to state a claim, and the Judge issued a Show Cause

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five years of confidential company records is reasonable when no one, neither the miner nor MSHA, has provided the respondent with any reasonable legal basis for the disclosure of the records.

[3] Eventually, notwithstanding MSHA's refusal to identify any basis for a claim of protected activity, the operator capitulated with respect to all the demanded documents except the five years of personnel records. Upon this refusal, MSHA issued the citation for violation of section 103(a).

Order. *Id.* In response, Hatfield filed an amended complaint. *Id.* at 545. The Judge denied the motion to dismiss, and the Commission granted a petition for interlocutory review. *Id.* at 544.

On review, the Commission described the structure of section 105(c). It found that Hatfield's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint. *Id.* at 546. The Commission held that the initial complaint formed the basis of MSHA's investigation. *Id.* After MSHA refused to act on that initial complaint, the miner could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. The Commission remanded the case to the Judge to determine if the activities alleged in the amended complaint were part of matters investigated by MSHA in connection with the initial complaint. Thus, the miner's subsequent pro se complaint was limited by the terms of his initial complaint.

The recent case of *Wilson v. Farris*, 38 FMSHRC 341 (Feb. 2016) (ALJ), *pet. for discretionary rev. denied*, Unpublished Notice, KENT 2015-672-D (Mar. 11, 2016), relies upon *Hatfield* to find correctly that, absent a cognizable discrimination claim, there is no reasonable basis for permitting sweeping discovery. There, a miner's representative filed a section 105(c) complaint against three rank-and-file miners asserting the miners asked a federal inspector how they could get rid of him as a miner's representative. *Id.* In a well-reasoned opinion, the administrative law judge denied the complainant's request for discovery and granted summary judgment for the respondents. *Id.* at 353. The miner's complaint did not state a cognizable claim of discrimination. Discovery was thus not warranted.

> In ruling upon Respondents' Motion for Summary Decision, the Court works from the proposition that each of Wilson's allegations in his complaint is taken to be true. Thus, the Court is left 'only with the question of whether, as a matter of law, Complainant has alleged a cognizable claim of discrimination under section 105(c) of the Mine Act.'

Id. at 350. In *Wilson*, the claimant did not allege the necessary element of adverse action in his complaint. The Judge did not allow depositions to be taken in the mere hope of finding some element of support for a cognizable claim of discrimination—a type of claim not made in his Complaint. More specifically, the Judge found, "[h]aving failed to establish any adverse action, it would be entirely inappropriate to saddle Respondents with the expense and time attendant to such discovery in Complainant's attempt to see if he can manufacture a claim, when the four corners of Wilson's complaint utterly fall short." *Id.* at 353. The Commission declined to hear Wilson's petition for discretionary review on March 11, 2016.

Throughout the proceedings in this case, MSHA never made any effort to expand upon or in any way provide the operator with any claim of an adverse action motivated in any part by protected activity that could support the reasonableness of its document demand.[4] It is similarly

[4] The majority relies upon irrelevant dicta in *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292 (2d Cir. 1996). Slip op. at 15. The majority fails to acknowledge that the National Labor Relations Act grants the NLRB the authority to issue administrative subpoenas enforced by court order. 29 U.S.C. § 161(1)-(2). Nor does the majority note that the genesis of the cited case was

inappropriate here to saddle Respondent with the expense and time attendant to responding to MSHA's fishing expedition in hopes it can manufacture a claim for a miner, when the miner's complaint failed to state one, and the agency after its investigation cannot and/or does not articulate any alleged basis for a discrimination claim.

The majority holds that "the burden was on HCC to raise its concerns regarding the reasonableness of the section 103(h) records request prior to issuance of any citation.[19] *Had HCC properly raised these concerns regarding the terms of the request, MSHA would have had a duty to discuss the concerns with HCC in good faith.*" Slip op. at 17-18 (emphasis added.) In footnote 19, the majority evinces a compelling sense of irony saying, "Beyond demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand."

The operator's concern with whether there existed a cognizable claim of protected activity – that is, whether there was any basis for a claim of discrimination – goes directly to the heart of the "reasonableness" of a document request. That is the critical "concern" raised by the operator.[5] In the absence of a cognizable claim, there simply was no reasonable basis for a

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a motion to quash a subpoena duces tecum. *H.P. Townsend*, 101 F.3d at 293-94. Further, the case did not even involve the review of an administrative subpoena but instead whether an individual could be bound to an order when the NLRB failed to serve an amended complaint naming him as a respondent. *Id.* at 293. The court distinguished between a charge and a complaint in the context of considering a necessary precursor to imposing an order upon a private citizen. *Id.* at 294. In this matter, MSHA seeks to impose a fine upon a private citizen without any notice of a cognizable claim to which the demanded documents could be relevant and in advance of any judicial determination of the propriety of the document demand.

[5] On February 6, 2009, the operator's attorney wrote MSHA "we fail to grasp, and would appreciate your identifying, what the alleged protected activity is under this Mine Act discrimination complaint." Gov't Ex. 3. On February 23, 2009, MSHA sent its document demand. Gov't Ex. 4. On March 16, 2009, MSHA sent a brief follow-up demand for the documents. Gov't Ex. 6. The operator quickly responded, as the majority would require. By letter dated March 18, 2009, the operator responded to the demand for five years of personnel files, stating, "Hopkins County Coal objects to this request on the basis that there has been no basis established for such request, given that no protected activity exists in this case, that the company does not release personnel files as requested absent consent from the individual employee, and that, otherwise, no employee other than Mr. Gatlin was disciplined, reprimanded or terminated for engaging in the conduct which led to his own termination." Gov't Ex. 7. This request did not result "in good faith discussion" by MSHA. Instead, in action directly contrary to the majority's holding, MSHA sent a one-page letter on March 20, 2009, without any information whatsoever regarding any basis for a discrimination claim that would make the request reasonable, but instead advising that inspectors would be at the mine on March 23 and a terse, "We expect that the personnel files will be provided to Investigators Smith and Adamson at this time." Gov't Ex. 8. The final two steps are a letter from the operator's counsel dated March 23, 2009 stating, "[L]et me again reiterate that the agency has repeatedly delayed and refused to answer a simple question to which my client *is entitled*: What is the protected activity in this case? If that question cannot be answered, then the agency has no case to investigate, no

demand of five years of personnel records. MSHA did not even offer to discuss the operator's legitimate concern.[6]

Having held that MSHA had a legal obligation to discuss the operator's concerns, the majority does not, and cannot, cite any evidence that MSHA was willing to engage in any such good faith discussions with the operator notwithstanding the operator's requests. MSHA never addressed in any way other than through citation the operator's legitimate concern that MSHA demanded confidential documents even though neither the miner nor MSHA claimed even any possible basis for finding adverse action because of protected activity. Clearly, that was an "operator concern." Yet, MSHA refused to discuss it. The majority's own holding completely undercuts its decision.

Unable to provide a colorable basis for its document request, MSHA simply stonewalled the operator's counsel's request for a charge of protected activity within the scope of section 105(c) or any nexus with adverse employment action. The only attempt made by MSHA to allege protected activity occurred at the hearing—that is, after the operator necessarily had to decide whether to capitulate or assert its rights and face a civil penalty. Even then, the hearing record fails to identify any allegation of any connection between any protected activity and an adverse employment action.[7]

The records demanded by MSHA do not go to the complainant's performance or any actions with respect to him. The majority states the "records would corroborate or undermine Gatlin's allegations of disparate treatment." Slip op. at 17. However, there is no evidence in this record that Gatlin ever made any allegation of disparate treatment. Further, there is no evidence anywhere in the record that MSHA had any reason to investigate disparate treatment or asserted to the operator that possible disparate treatment was a reason it wanted records. By manufacturing an unspoken reason for demanding the records, the majority essentially acknowledges that the demand was a fishing expedition by MSHA to see if it could find a basis for a claim that had not been made by the miner.

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jurisdiction, no entitlement and no basis upon which to make any request." Gov't Ex. 9. That same day MSHA issued the citation. Gov't Ex. 10. We search the record in vain for any evidence of a willingness of MSHA to engage, let alone actual engagement, in good faith discussions over the request. This failure is especially compelling because the requested documents do not even go to whether the miner engaged in any protected activity.

[6] Footnote 19 also begs the question: What could the operator do to "remedy the deficiencies in the MSHA's demand"? The deficiency was that MSHA did not provide any reasonable basis for it. Only MSHA could remedy that deficiency.

[7] In a footnote, the majority complains that other than "demanding identification of the protected activity, HCC did nothing to remedy the deficiencies it would later identify in MSHA's demand." Slip op. at 17 n.19. The operator's request to find out the basis for an assertion of a cognizable claim of discrimination was an effort to remedy a deficiency in the demand—namely, the demand did not relate to any cognizable claim. The majority fails to explain how the operator could "remedy" the principal deficiency that no cognizable claim of protected activity existed.

Remarkably, the miner did not testify at the hearing. Only one inspector testified for MSHA. He admitted that the demanded personnel records would *not* be helpful in determining whether the miner engaged in protected activity. Tr. 95. The inspector also admitted that 21 days after the filing of the complaint (the target date for filing a Request for Temporary Reinstatement), he had no idea of protected activity by Gatlin. Tr. 86, 89. The inspector further agreed that MSHA did not notify the operator of any protected activity. Tr. 88. Indeed, the inspector conceded that on the very day he issued the citation—March 23, which was 62 days after the miner filed the complaint—the inspector still did not know of any protected activity by the complaining miner other than insubordination. Tr. 101-02.[8] Therefore, prior to the citation and even the hearing, MSHA neither had nor had presented the operator with any claim of protected activity that might form the first predicate for a section 105(c) claim.[9]

MSHA's failure was fundamental; it refused to provide any reason-based claim of any alleged protected activity upon which the miner could base a complaint under section 105(c).[10]

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[8] The Inspector's testimony was,

> Q. Okay, now, as of March 23rd, had you determined what the protected activity was?
> A. No.
> Q. Okay. So you still don't know what conduct it is you're looking for?
> A. I do know what the conduct was, insubordination.

Tr. 101-02. The inspector testified only that Gatlin was a belt examiner and that he had unidentified "suspicions" of protected activity. He did not describe what those suspicions were or how those suspicions could have related to adverse action. Hundreds of miners are examiners. Every mining position entails duties that may result in the miner engaging in protected activity. Having a job in a mine does not constitute "protected activity" within the meaning of section 105(c).

[9] The majority emphasizes that when, as here, a miner requests temporary reinstatement, MSHA's preliminary investigation "must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was 'not frivolously brought.'" Slip op. at 9 (emphasis in original). MSHA did not seek temporary reinstatement for the miner within the 62 days between the filing of the demand for documents unrelated to protected activity of the claimant and the issuance of the citation. Therefore, according to our colleagues, MSHA had not even determined the miner's complaint was not frivolous. Yet, MSHA penalized the operator for refusing to provide documents unrelated to the claimant's conduct while MSHA also refused to explain the basis for the need for such documents despite the operator's repeated requests. MSHA never provided any evidence that it even had a colorable claim of discrimination and, certainly, never provided the operator with any reasonable basis for disclosure of years of personnel records.

[10] At most, the inspector stated that the complainant "alluded" to some things that "did not pan out." Tr. 112. Attempting to cover this defect, the Secretary's counsel implicitly suggested that the inspector should testify without identifying any claim of protected activity because MSHA prefers not to let the respondent know the nature of the claim against it. Tr. 48. Consequently,

Further, neither the miner nor MSHA ever stated any connection between any of the unidentified protected activity and any adverse employment action. MSHA simply insisted upon production of the documents without providing any legal basis for its request, beyond strong-arming the operator with demands and threats. This is not an issue of an operator having a right to know the full extent of a miner's contentions; it is an issue of MSHA failing to provide any reasoned basis for the mandatory production of records.

Without an assertion of protected activity and nexus to adverse action, there is no "complaint of discrimination" upon which to base a "reasonable" request for years of personnel records. It is only a complaint that "I got fired and I do not like it." The Secretary's position, stated most succinctly, is that there need not be an allegation of a section 105(c) violation in order to compel delivery of extensive files. The Secretary asserts, and the majority would wrongly grant MSHA, a *carte blanche* right to records under section 105(c) even when neither MSHA nor the complainant alleges that there is an actual claim of discrimination on the table. Our colleagues accept that position as reasonable. We vigorously disagree.

Under the majority's reasoning, the statutory requirement that the miner file a "complaint" that is served on the operator has no purpose. It is merely a notice that a miner has asked MSHA to investigate an adverse employment action without an actual claim of section 105(c) discrimination. Then, MSHA—without a claim of, or any basis for a claim of, any possible protected activity or any possible nexus to adverse action—may demand whatever it wishes including five years of personnel records that have nothing whatsoever to do with whether the subject miner engaged in protected activity. Effectively, under the majority's reasoning, MSHA may make a plenary demand for documents without demonstrating there has been an actual claim of discrimination.

To the majority, MSHA has absolute authority to investigate through extensive document demands the possibility of disparate treatment although neither the miner nor MSHA had articulated any claim of protected activity or a nexus between protected activity and an adverse action. That is nonsense.

Even when agencies are empowered with the right to issue administrative subpoenas, federal courts do not permit fishing expeditions in the absence of an actual claim. For example, the Seventh Circuit will not enforce an administrative subpoena for documents when that claimant has not made a cognizable claim of discrimination. *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 654-55 (7th Cir. 2002) ("Nothing in the charge suggests systemic discrimination on the basis of national origin or sex with respect to life, health, disability and leave benefits."). Similarly, nothing in this miner's charge or MSHA's conduct suggests discrimination based on protected activity.

MSHA seeks to impose a monetary penalty for a failure to produce records claiming that it need not even support its demand to the adjudicatory body evaluating whether to assess the demanded penalties. Apparently, even at the adjudication stage, the majority asks that we simply assume there might have been a basis for the inspector's unsupported "suspicions" of some unidentified protected activity.

The majority fails to come to grips with the fundamental problem in this case. Section 103 requires that document requests be "reasonable." This means that MSHA must provide a reasonable basis for the request for the demand. The majority focuses on irrelevancies such as specificity, quantity, and five-year period without ever dealing with the actual problem. MSHA never explained why, or identified any claim with respect to which, the records were reasonably necessary. Without an explained connection between an even possibly cognizable claim of discrimination and the requested documents, the demand is simply an unfettered investigation to see if MSHA can manufacture a claim when no claim has been made. Federal courts reviewing administrative subpoenas do not permit fishing expeditions such as MSHA undertook in this case.[11] *See, e.g.*, *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (company-wide information need not be produced in connection with investigation of allegation by specific individual); *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (court refused to enforce broad subpoena in charge filed by two complainants); *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001) (EEOC not entitled to subpoena information about gender of employees as part of investigation of employer on race discrimination charge under Title VII); *In re McVane*, 44 F.3d 1127 (2d Cir. 1995); *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir. 1982) ("[T]he subpoena cannot be so broadly stated as to constitute a 'fishing expedition.'").

In *EEOC v. Kronos Inc.*, 620 F.3d at 300-02, the Third Circuit refused to enforce a subpoena by the Equal Employment Opportunity Commission seeking files relative to possible race discrimination when the complaint before it was for discrimination on the basis of disability. As here, no facial claim of the type of discrimination the agency sought to investigate was pending before the agency. There, at least, there was a cognizable charge of another form of discrimination. Nonetheless, a demand for documents to support an investigation into a form of discrimination for which there was not a cognizable complaint was not reasonable. It was a fishing expedition. Fishing expeditions simply are not reasonable.

There simply is nothing in the allegations by Gatlin or MSHA's preliminary investigation that alleged protected activity or adverse action based on protected activity and nothing MSHA said changes that fatal fact. When there is not even a claim of protected activity or adverse action based on protected activity by the miner or MSHA, a request for five years of personnel records is a fishing expedition not authorized by the statute as a reasonable request.

The miner filed an honest statement that he refused to do work unless he could do it for more pay on weekends. He suffered the predictable consequences from a refusal to work—discharge. That claim, without any subsequent information or explanation by MSHA alleging protected activity or such activity as a motivating factor for adverse action, does not provide a reasonable basis for an invasive document request under section 105(c).

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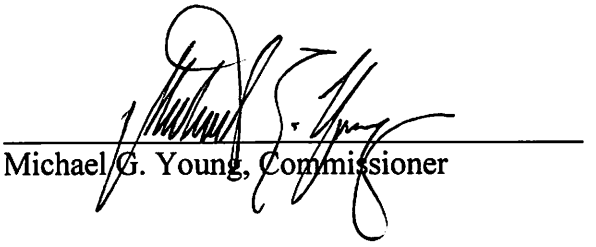
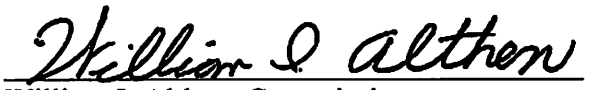
[11] This is especially important under the Mine Act because MSHA does not have the authority to issue administrative subpoenas. As a result, the Mine Act does not afford any pre-disclosure hearing rights to challenge a request in the first instance. MSHA's power to enforce document requests through issuance of penalty is a powerful coercive weapon. It is especially important, therefore, for the Commission to be scrupulous in requiring that MSHA provide a reasonable basis for document demands that an operator may refuse only at significant immediate peril.

We respectfully dissent.



Michael G. Young, Commissioner



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