FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ERIC GREATHOUSE and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION	:	
v.	:	Docket No. WEVA 2015-904-D
MONONGALIA COUNTY COAL COMPANY, CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION[1]	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

In these proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Administrative Law Judge found that the operators of six mines owned and operated by Murray Energy Corporation ("the Operators") violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), by interfering with miners' protected rights. 38 FMSHRC 941 (May 2016) (ALJ). Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant

[1] Additional captions in these cases are listed in Appendix A to this order.

> for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

The cases arise from the Operators' implementation of bonus plans at their respective mines. The Operators and the United Mine Workers of America ("UMWA" or "the Union") filed cross petitions for review of the Judge's decision, which the Commission granted. We briefly respond to the Union's petition and then turn to the Operators' claim.

The UMWA's Request for a Make-Whole Remedy

UMWA seeks a make-whole remedy for miners who did not receive bonuses under the plans' provisions. We deny that request. The Union did not present evidence regarding miners who suffered lost bonuses. As the Secretary's brief in response to UMWA's opening brief pointed out, proof of such relief would require a remand and re-opening the record to present additional evidence of each instance of denied bonus and proof of the lost payment amount, beyond the scope of issues raised in the initial hearing before the Judge. The Union had the opportunity to submit this issue for consideration by the Judge, but it did not. Accordingly, we find that the Union waived this argument, and the Commission declines to consider it on appeal.

The Operators' Challenge to the Decision of the Judge Below

Regarding the Operators' claim, the parties stake their positions on clear and sharply contrasting views of section 105(c). The Secretary and the UMWA contend that an action interferes with the exercise of protected rights if the action tends to interfere with the exercise of protected rights and is not justified by a legitimate and substantial reason whose importance outweighs harm caused to the exercise of protected rights. They assert motivation or causation is not an element of such a violation. The Operators, on the other hand, contend that the Judge erred in the application of section 105(c). They contend that section 105(c) contains a necessary element of motive or causation. Thus, they argue that the complaining party must demonstrate that an operator's action arose because of the exercise of protected activity. The Judge adopted the position asserted by the Secretary and the UMWA.

The Commissioners are divided evenly regarding the correct analytical framework to apply and whether the Operators violated section 105(c).

Commissioners Jordan and Cohen would find that the language of section 105(c) is ambiguous and would defer to the Secretary's reasonable interpretation. They would apply the *Franks* test, *infra* slip op. at 8, and conclude that substantial evidence supports the Judge's determination that the Operators violated section 105(c) by implementing bonus plans which interfered with miners' protected rights under the Mine Act.

Acting Chairman Althen and Commissioner Young would find that the language of section 105(c) is plain and requires proof of motivation related to protected activity to establish a claim of interference and would conclude that the Secretary has failed to prove motivation in this case. Thus, they would reverse the Judge's finding of interference in violation of section 105(c).

The effect of the split decision is to allow the Judge's conclusions on the violations and penalty assessments to stand as if affirmed. *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992).

I.

Background and Proceedings Below

A. Background

In 2014, the Operators decided to implement bonus plans at each of the six mines. The bonus plans provided that miners would earn additional pay if they met specified production goals. In October or November 2014, the Operators held a meeting at each of the mines with the UMWA representatives to present the bonus plans. During these meetings, the UMWA representatives argued that the bonus plans would have a negative effect on mine safety and miners' willingness to exercise their rights. Tr. 33-34, 146-47, 149, 208-09, 282, 288.

The Operators made minor changes to their initial proposals that somewhat narrowed plan provisions that disqualify entire crews from earning bonuses if an injury occurred during a shift. However, miners continued to raise safety concerns during subsequent meetings with management. Jt. Ex. 1A, Stip. 28; Jt. Ex. 14-19; Tr. 36-37, 151. At three mines, miners voted on whether to approve the bonus plans, and two of the three rejected the plans. Jt. Ex. 1A, Stips. 35, 47; Tr. 37, 210-11. The Operators nonetheless implemented the bonus plans at all six mines between January 15 and 19, 2015.

Arbitration decisions under the collective bargaining agreement between the Operators and the UMWA have since led to the discontinuation of the bonus plans at the Marion County Mine in July 2015, at the Powhatan No. 6 Mine in September 2015, and at the Harrison County Mine in December 2015. 38 FMSHRC at 946. The plans remained in effect at the other three mines until the Judge's decision in this case in May 2016. *Id.*

The plans at the six mines were generally identical. Miners in a production crew qualified for bonuses that increased by steps according to how far the working face advanced during a shift. To qualify for the bonus, miners had to be "physically present the entire shift." 38 FMSHRC at 943; Jt. Exs. 20-25. Miners working outby the face were eligible to receive 10% of the bonuses achieved by production crews. Miners from production crews who accompanied MSHA inspectors during inspections were only eligible for the 10% outby bonus.

Certain events would disqualify section crews for a shift, a day, or even a week. All production crews on a section would lose their bonus eligibility for a full day if an MSHA

inspector issued a significant and substantial ("S&S")[2] citation for a condition inby the tailpiece. Similarly, all the miners on a section could be deemed ineligible to receive a bonus for a full week if the section received a withdrawal order under sections 104(b) or 104(d) of the Mine Act. The entire crew would be ineligible for one shift if any crew member suffered a lost-time accident during that shift. And at five mines, any "major deviation" from "[s]ection production and safety standards" would disqualify a production crew.[3] 38 FMSHRC 943; Jt. Exs. 20-25.

As set forth above, the parties assert starkly contrasting views of the proper interpretation of section 105(c). As one would expect, each side presented evidence supporting its legal position.

The Secretary and Union presented six Union officials and/or local safety committeemen. Each testified in detail about the terms of the bonus plans, explaining how certain activity by miners would render them ineligible for a bonus. They also testified to the chilling effects of the plans upon the exercise of protected rights, describing numerous instances in which miners were deterred from engaging in safety related activity in order to avoid negatively impacting a bonus. The testimony of interference ranged from miners raising fewer safety issues and neglecting non-production safety tasks, such as rock dusting, to fewer reports of injuries and antipathy towards miners' representatives' assertion of safety rights. The witnesses also explained why the legitimate business purposes intended to be served by the bonus plan did not offset the interference.

At oral argument, the Secretary stated that his case did not depend upon a showing of retaliatory motivation. Accordingly, the Secretary did not present evidence going to a causal connection between the implementation of the bonus plan and prior protected activity.

The Operators, on the other hand, staked their case on their view of the law. They presented just one witness – John Forrelli, Senior Vice President of Murray Energy Corporation. He testified that the purpose of the bonus plans was to improve both production and safety and that the Operators did not implement the plans because of any protected activity. Thus, they claimed protected activity did not motivate adoption of the plans. Under their view of section 105(c), an absence of evidence showing that the plans were implemented because of the exercise of protected rights defeats a section 105(c) claim.

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] The discontinued plan at the Harrison County Mine did not include the "major deviation" provision. Jt. Ex. 24.

B. The Judge's Decision

On May 2, 2016, the Judge issued a decision and order finding that the Operators had interfered with miners' rights at each of the mines. The Judge began her analysis by concluding that the proper test for analyzing section 105(c)(l) interference claims is the two-step framework adopted by two Commissioners in *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (sep. op. of Chairman Jordan and Comm'r Nakamura) (hereinafter cited as "*Franks*"). 38 FMSHRC at 946-48. The Judge rejected the Operators' reliance on *Sec'y of Labor on behalf of Feagins v. Decker Coal Co.*, 23 FMSHRC 47 (Jan. 2001) (ALJ), a 15-year-old ALJ decision, concluding that it was out of line with the Commission's current case law on interference. *Id.* at 948-49.

The Judge then turned to the first step of the *Franks* test, which asks whether a reasonable miner would view the operator's actions as tending to interfere with miners' protected rights. The Judge found that (1) "[t]estimony at hearing indicated that the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety," and that this effect was compounded by peer pressure, *id.* at 950; (2) miners were "reluctant to report safety issues to management or MSHA under the bonus plans because making the report and undergoing an inspection take away from production time," *id.* at 950-51; (3) "[t]here is no question that some miners are discouraged from serving as walk-around representatives because they would miss out on the chance to get a larger bonus," *id.* at 952; and (4) the injury disqualification "impermissibl[y] burden[s]" miners' right to report injuries because an injured miner "must choose between exercising his right to report the injury and getting a bonus," *id.*

Having adopted the *Franks* test, the Judge then turned to the second step of this test, which requires identifying and weighing any legitimate and substantial business justification proffered by the operator for actions it takes that interfere with protected rights. The Judge recognized that the Operators purported to have promulgated the bonus plans to increase safety and production. The Judge stated that an operator "certainly has a right to implement programs to assure that miners are producing at the best rate possible," but found that the Operators had not shown that the bonus plans promoted safety or increased production. *Id.* at 954. "In contrast, the harm to miners' rights is evident." *Id.* at 955. Thus, the Judge found that "[t]he uncertain benefits that [the Operators] put forth do not outweigh these harms." *Id.*

The Judge therefore ordered that the bonus plans be rescinded at the three mines where they remained in place, required the posting of a remedial notice, and assessed a civil penalty of $25,000 per mine – $5,000 more per mine than the Secretary's proposal. *Id.* at 955-56.

The Operators filed a timely petition for review. The UMWA also filed a timely petition for review, arguing that the Judge should have ordered additional remedies. The Commission granted both petitions.

II.

Disposition

The Operators contend that the Judge erred by applying the wrong test for analyzing a claim of interference. They argue that the *Franks* test fails to adhere to the plain language of section 105(c), which requires a finding of motive or intent. They set forth the following three-part test as an alternative framework for analyzing interference claims: (1) the exercise of statutory rights by a miner; (2) any adverse action taken must be directed against the miner who engaged in the exercise of statutory rights; and (3) the operator must take some affirmative adverse action against a miner in response to the exercise of statutory rights. PDR at 12. The Operators point to the Judge's decision in *Secretary of Labor on behalf of Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435 (June 2016) (ALJ) (hereinafter cited as "*Pepin*"), as support for its interpretation of section 105(c) and the application of its interference test in lieu of the Secretary's *Franks* test.[4]

The Secretary asserts that the Judge correctly applied the *Franks* test as supported by the Mine Act's text, its legislative history, and Commission precedent. Both the UMWA, an intervenor in these proceedings, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union ("USW"), which filed an amicus brief on appeal, support the Secretary's position that the Judge correctly applied the *Franks* test in concluding that the Operators' bonus plans violate section 105(c) by interfering with miners' protected rights.

A majority of Commissioners has not endorsed the *Franks* test, under which evidence of motivation or causation is relevant only to proof of a legitimate business justification defense. Commissioners Jordan and Cohen agree that the applicable test is *Franks* and conclude that substantial evidence supports the Judge's finding of a violation. Acting Chairman Althen and Commissioner Young conclude that the plain language of the Mine Act requires proof that the action was taken "because of" the exercise of protected rights. They would find, therefore, that the Judge failed to apply the proper test. The effect of the split vote is to affirm the Judge's decision below. The separate opinions of the Commissioners follow.

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[4] The Secretary claims that the Operators have waived this argument because they did not present it to the Judge below. We disagree. This argument is intrinsically intertwined with the Operators' challenge of the claim of interference. Although the Operators challenged the application of *Franks* below, they did not present their alternative test for the Judge to consider. Op. Post-Hrg. Br. at 7-9 & n.4. However, they did cite Commission precedent concerning the issue. Since their test essentially mirrors the Commission's *Pasula-Robinette* test applicable to discrimination claims, their argument on appeal is sufficiently related. *See Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984) (finding that operator's broad statements addressing the issue of the interpretation of the regulation at issue "afforded the administrative law judge an opportunity to pass" upon the question). Moreover, *Pepin* was not issued until after the Judge issued her decision in this case. Thus, we may appropriately consider the Operators' arguments.

III.

Separate Opinions of the Commissioners

Commissioners Jordan and Cohen, in favor of affirming the Judge:

As more fully explained in our decision, we reject the interpretation of the Operators and our colleagues that section 105(c) has a plain meaning, because both interpretations would lead to absurd results. Hence, we find the language ambiguous and would defer to the Secretary's reasonable interpretation. We thus would apply the *Franks* test and would conclude that substantial evidence supports the Judge's determination that the Operators violated section 105(c) by implementing bonus plans which interfered with miners' protected rights under the Mine Act. We also conclude that the Judge did not abuse her discretion in making her evidentiary rulings below.

I. Proof of Retaliatory Motive is Not Required in an Interference Claim Under the Mine Act.

This case concerns the scope of section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"). That particular statutory provision prohibits persons from discharging, or in any manner discriminating against, or otherwise interfering with the statutory rights of any miner "because of the exercise by such miner . . . of any statutory right afforded by this Act."[1] 30 U.S.C. § 815(c)(1). The case before us presents the issue of whether, in order to

[1] Section 105(c)(1), 30 U.S.C. § 815(c)(1), states:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment 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 at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

constitute a violation of section 105(c), it is sufficient to demonstrate that an operator's policy interferes with the exercise of miners' rights, and that such interference is unjustified, or whether one must also prove that the challenged policy was implemented with a retaliatory motive, in other words directly "because of" a miner's exercise of a statutory right.

As described below, we believe that the correct test is the test previously articulated by two Commissioners in *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op. of Chairman Jordan and Comm'r Nakamura), and proposed by the Secretary herein (S. Resp. Br. at 13-15), providing that a section 105(c) violation of interference occurs if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

In attempting to answer the question of the correct test for interference, we turn to the language of the statute, and 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). *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 an interpretation of statutory language which apparently is clear and unambiguous leads to absurd results, then the language should be found to be ambiguous. *American Water Works Assoc. v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994); *see also United States v. Ryan*, 284 U.S. 167, 175 (1931) ("A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."). If a statute is ambiguous or silent on a 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) mandates that persons not take certain actions "because of" a miner's[2] exercise of statutory rights. Included in the list of prohibited actions is the directive not to

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[2] Section 105(c) speaks of the protected class as including "miner[s], representative[s] of miners, or applicant[s] for employment in any coal or other mine subject to this Act." 30 U.S.C. § 815(c)(1). For simplicity of expression, in this opinion we shall simply use the word "miner," understanding that it refers to the entire protected class.

"otherwise interfere with the exercise of [miners'] statutory rights." 30 U.S.C. § 815(c)(1). In general, a claim that a person has interfered with another's ability to do something would cause us to consider whether, or how, that person's actions made it more difficult for another person to carry out the activity in question. The focus of the inquiry is on the effect of the challenged action, not necessarily on the motive behind the action.

The respondent operators, Murray Energy Corporation, et al. ("the Operators") and our colleagues assert that the plain language of section 105(c) requires any employer action challenged as violating that provision be shown to have been taken "because of" the exercise of protected rights. They focus on the meaning of the term "because" to derive an alleged plain meaning in section 105(c). However, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *The American Coal Co.*, 796 F.3d 18, 25 (D.C. Cir. 2015) (affirming the Commission, the Court held that the term "fire" in section 3(k) of the Mine Act is ambiguous and the Secretary's interpretation of the term to include smoldering, smoking combustion without visible flames was reasonable) (citing *Yates v. United States*, 135 S.Ct 1074, 1081 (2015)).[3]

Here too, we must interpret the terms used in section 105(c) in context with both the Mine Act's goals and the actual experiences of miners. Congress recognized that interference with miners' rights can be subtle and will take uncommon forms. *See* S. Rep. No. 95-181 at 36, discussed *infra.* To permit subtle interference through a narrow construction of the term "because of" in section 105(c) would be inconsistent with this Congressional recognition.

Specifically, the Operators argue that the statutory test requires three elements to establish a claim of interference: (1) the actual exercise of statutory rights by a miner *prior to* the alleged act of interference by the employer, (2) that the alleged act of interference be directed against the miner who previously exercised statutory rights, and (3) that the employer be shown to have committed the alleged act of interference *in response to* the miner's exercise of statutory rights. PDR at 12. Thus, in the operators' view, a literal reading of the statutory language requires that prior conduct of a miner be the catalyst for the employer action under review, and to do otherwise would read the "because of" language out of the Act.[4]

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[3] In *American Coal Company*, the Commission had considered the legislative history and context in which the Mine Act was written as part of its analysis. 35 FMSHRC 380, 383-84 (Feb. 2013). The Commission determined that because the legislative history of the Mine Act contained reference to "smoldering" fires that resulted in mass suffocation fatalities, Congress could not have plainly used the term "fire" to mean or exclusively require the presence of a flame.

[4] Our colleagues take a somewhat different view. *See infra* slip op. at 18-20.

A. The Language of Section 105(c) has No Plain Meaning Because a Literal Reading Would Lead to Absurd Results.

We conclude that the language of section 105(c), insofar as it pertains to interference claims, does not have a plain meaning. The relevant language states: "No person shall . . . otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). As the Operators contend, a literal reading of the words "because of the exercise by such miner . . . of any statutory right afforded by this Act" necessarily refers to an exercise of a statutory right which has already taken place. But such a reading leads to absurd results.

Imagine a situation where a mine is newly opened with a new workforce and the mine owner creates a bonus plan which provides that if a miner contacts MSHA to complain about an unsafe condition, an action protected under section 103(g) of the Act,[5] the miner will lose his bonus. Clearly, this is interference within the meaning of section 105(c). But it does not involve any prior act by any miner, and so, under the Operators' literal reading, it would not be an illegal act under section 105(c).[6]

Because a literal reading of the statute leads to absurd results, the interference provision of section 105(c) must be seen as lacking a plain meaning. A case in point is *American Water Works Assoc. v. EPA*, *supra*. This case involved a challenge by the Natural Resources Defense Council ("NRDC") to the EPA's interpretation of the language "not economically or technologically feasible" in the Safe Drinking Water Act, 42 U.S.C. § 300f(1)(C)(ii). The dispute centered on an EPA regulation for the control of lead in public water systems, specifically whether EPA was required to set a numeric maximum contaminant level ("MCL"), which was required by the statute unless it was "not economically or technologically feasible," or whether it could establish a treatment technique to control lead. In support of its position that the EPA was required to set a specific MCL for lead, the NRDC argued that the plain meaning of the word "feasible" was "physically capable of being done at reasonable cost." In response, the EPA did not dispute that it was "feasible" to monitor lead under the definition proposed by the NRDC, but contended that use of an MCL standard could lead to requiring public water systems to undertake aggressive corrosion control techniques which would increase the levels of other

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[5] Section 103(g) provides: "Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . of such violation or danger." 30 U.S.C. § 813(g).

[6] This hypothetical was posed to counsel for the Operators during the oral argument in this case. The initial response of the Operators' counsel was that the plan would constitute interference with statutory rights under section 105(c). Oral Arg. Tr. 11-13. But on further reflection, after being reminded that the test he proposed required prior protected activity by a miner, counsel agreed that the bonus plan would not constitute illegal interference because of the absence of a predicate act by a miner. Oral Arg. Tr. 14-17.

contaminants. Hence, EPA interpreted "feasible" broadly to mean "capable of being accomplished in a manner consistent with the Act." 40 F.3d at 1270-71.

In siding with the EPA, the Court stated:

> We agree with the EPA that the meaning of 'feasible' is not as plain as the NRDC suggests. Although we generally assume that the Congress intends the words it uses to have their ordinary meaning, . . . case law is replete with examples of statutes the ordinary meaning of which is not necessarily what the Congress intended. . . . Indeed, where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning . . . and is the proper subject of construction by the [agency] and the courts.' . . . If the meaning of 'feasible' suggested by the NRDC is indeed its plain meaning, then this is such a case; for it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act.

Id. at 1271 (citations omitted). The Court then went on to defer to the agency's interpretation of the statute, finding, pursuant to the *Chevron* doctrine, that it was a reasonable one.

Likewise, we conclude that the literal reading of the interference provision of section 105(c) asserted by the Operators leads to absurd results. As illustrated by the example of a new mine with a bonus plan which discourages complaints to MSHA described above, it leads "to a result squarely at odds with the purpose" of the Mine Act.

The Commission has adhered to the principle that when interpreting the Mine Act and safety standards, constructions that lead to absurd results must be avoided. *See, e.g.*, *Central Sand and Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001). Notably, the Commission has been guided by this precept in considering the scope of protection afforded by section 105(c). For example, the statute prohibits the "discharge . . . of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act." 30 U.S.C. § 815(c)(1). The literal application of the provision advocated by the Operators would cover only retaliatory actions taken against the particular person who made a safety complaint. This is because the statute prohibits the discharge of a miner "because *such* miner . . . has . . . made a complaint under or related to this Act . . . or because of the exercise by *such* miner . . . of any statutory right afforded by this Act." *Id.* (emphasis added). If an employer fired a miner believing that the miner filed a safety complaint, but a different miner had made the complaint, would the fired miner have a claim under section 105(c)? A literal approach, seeking to give effect to every word, would require the Commission to answer in the negative.

In *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission confronted this very question. Moses was fired, and the Judge below found that the discharge occurred "because the operator thought the complainant had engaged in protected activity, even though he had not." 4 FMSHRC at 1480. We acknowledged that "a literal interpretation . . . might require the actual or attempted exercise of a right before

the protection of section 105 comes into play," but we nevertheless found a violation. Emphasizing the *effect* of the employer's action on the willingness of miners to exercise their rights, we pointed out that:

> Miners would be less likely to exercise their rights if no remedy existed for discriminatory action based on an operator's mistaken belief that a miner had exercised a protected right . . . . [E]mployees could reasonably fear that they might be treated adversely on the basis of suspicion alone, and thus would seek to avoid even the appearance of asserting their rights.

Id.

More recently, in *Sec'y obo Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), a case involving an alleged threat against a miner, we stated:

> [I]nterference . . . does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights . . . .

Id. at 9 (quoting *Am. Freightways Co.*, 124 NLRB 146, 147 (1959)).

The case involved conversations between an assistant mine superintendent, Jim Brummett, and Mark Gray, who had been called to testify before a grand jury about smoking, ventilation and roof support violations at the mine (although ultimately he was not called as a witness). *Id.* at 2. When Gray told Brummett that he did not want hard feelings between them, Brummett replied, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you," and then laughed. *Id.* at 3. The next day, Brummett sought assurances from Gray that a second miner had not testified against him. *Id.* Brummett told Gray that "if anyone had laid the screws to him that he would whip their ass." *Id.* The Judge dismissed Gray's discrimination complaint, finding that Brummett's statement to Gray was just an "exaggerated expression, commonly used between friends" and that his statement to Gray on the following day was directed at the second miner, and not at Gray. *Id.* at 5.

The Commission found that the Judge had erred in denying Gray's interference claim based on the absence of intent or motive. The Commission said, "We conclude that the judge examined Brummett's statements too narrowly by considering largely, if not exclusively, Brummett's intent or motive in making the statements. . . . rather than considering only Brummett's intent, the judge should have analyzed the totality of circumstances surrounding Brummett's statements to determine whether they were coercive and violative of section 105(c) of the Mine Act." *Id.* at 10.[7]

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[7] Our colleagues would require proof of motivation in a claim of interference. They contend that their approach is consistent with *Gray* because the threats in *Gray* "were clearly

The Commission's approach in *Moses* and *Gray* is consistent with cases that considered the scope of the analogous anti-discrimination provision in the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the current statute. In *Phillips v. IBMA*, 500 F.2d 772 (D.C. Cir. 1974), the D.C. Circuit considered whether a miner came under the protection of section 110(b) of that Act when he complained to his foreman, and then subsequently refused to work because of the dusty conditions in the mine.[8] The dissenting judge applied the literal language of the Coal Act, which afforded protection to miners who notified the Secretary or his authorized representative of an unsafe condition, and concluded that "the phrase 'the Secretary or his authorized representative' on its face plainly does not mean a foreman or the mine employees serving on a safety committee." *Id.* at 785. The *Phillips* majority, however, after considering the procedures in place at the mine and the practical effect of applying the literal language of the provision, concluded that such an interpretation "would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines." *Id.* at

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motivated by protected activity. . . . The issue of whether motivation was required for interference was not before the Commission." Slip op. at 47-48. However, our colleagues ignore the fact that in *Gray* the Commission vacated an ALJ decision where the Judge had specifically found that Brummett's statements to Gray "'amounted to no more than an exaggerated expression, commonly used between friends who expect loyalty from one another,'" and that "'no threat occurred.'" 27 FMSHRC at 5, quoting 25 FMSHRC at 215, 217. Thus, our colleagues' contention that Brummett issued "threats" which were "motivated by protected activity" is inconsistent with the Judge's findings based on credibility determinations after a hearing. In reversing the Judge, the Commission did not challenge her findings regarding the motivation behind Brummett's statements to Gray. Rather, the Commission found the motivation relied on by the Judge to be irrelevant. It was the nature of Brummett's statements, and their potentially coercive effect on Gray, which was essential to the Commission's decision. 27 FMSHRC at 10. Hence, our colleagues are incorrect in stating that the issue of motivation in an interference claim was not before the Commission in *Gray*. Their interpretation of the interference provision in section 105(c) is inconsistent with *Gray*.

[8] Section 110(b)(1) of the Coal Act stated:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

30 U.S.C. § 820(b)(1) (1976).

781(footnote omitted).[9] The *Phillips* Court analogized section 110(b)'s protection to the protection afforded under the corresponding anti-discrimination provision of the National Labor Relations Act which, the *Phillips* Court noted, had been construed broadly so as to apply to the discharge of an employee for giving a sworn written statement to a NLRB field examiner who was investigating an unfair labor charge. Such protection was necessary, the Supreme Court had determined, in order "to prevent the Board's *channels of information from being dried up* by employer intimidation of prospective complainants and witnesses." *Id.* at 782 (emphasis added) (citing *NLRB v. Scrivener dba AA Electric Co.*, 405 U.S. 117, 122 (1972)).[10]

The concern that safety-related channels of information were being dried up prompted the Secretary's filing in this case. Here, however, the reluctance of the miners to assert their rights is attributed not so much to employer intimidation as it is to the inducements contained in the employer's bonus plan. As set forth in more detail, *infra* slip op. at 22-24, certain aspects of the plan can cause a miner who chooses to exercise his or her right to accompany an inspector to risk losing a portion of a bonus payment. Likewise, under the plan, a miner who points out a condition that is hazardous, or which violates a safety standard, can be, at least indirectly, the cause of a forfeiture of all or part of the bonus. Reporting an injury can result in the entire crew losing their bonus. Miners who insist that certain time-consuming but necessary safety-related chores (like rock dusting) be carried out incur the ire of fellow employees, who fear that the activity will lessen the likelihood of a bonus. Putting aside for a moment the issue of whether the Secretary has adequately proven these potentially deterrent effects of the bonus plan, the question remains whether the Secretary must also show that the plan was implemented "because of" the miners' exercise of protected activity.

In interpreting other, similarly-worded, statutes, the Supreme Court has found the phrase "because of" not to have the alleged plain meaning of motivation advocated by the Operators or our colleagues. The Court has recognized that statutes prohibiting discrimination "because of" congressionally designated criteria need not include a motive element. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015), the Court considered whether a method of distributing low income housing tax credits violated the Fair Housing Act. That statute made it unlawful *inter alia* to "refuse to sell or rent

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[9] The holding of the *Phillips* Court, that the coverage of the anti-discrimination provisions of the Coal Act begins when a miner notifies mine officials or the safety committee of possible safety violations, and that no formal complaint to the Secretary of Labor is required, was reaffirmed in *Munsey v. Morton*, 507 F.2d 1202, 1208-9 (D.C. Cir. 1974).

[10] Four years later, in *Baker v. IBMA*, 595 F.2d 746 (D.C. Cir. 1978), the Court rejected the view that section 110(b)'s protection from discrimination was only afforded to miners who had the intent to contact federal officials at the time they made safety complaints to a mine foreman. The Court noted the comment by the sponsoring Senator, Edward Kennedy, that "(T)he rationale for this amendment is clear. For safety's sake we want to encourage the reporting of suspected violations of health and safety regulations." 595 F.2d at 749-50 (citation omitted). Thus, the Court focused on the safety-enhancing purpose of the statute's anti-discrimination language rather than on the express language of the statute.

after the making of a bona fide offer . . . *or otherwise make unavailable or deny,* a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin." *Id.* at 2518 (quoting 42 U.S.C. § 3604(a)) (emphasis added). Although a purpose underlying the Fair Housing Act was to reduce racially segregated housing, the housing tax credit program under review actually wound up reinforcing it, albeit without evidence of a discriminatory intent. The Housing Department denied liability, claiming that "[a]n action is not taken 'because of race' unless race is a reason for the action." 135 S. Ct. at 2519.

The Court rejected the argument that "because of" must include a motivational argument. Focusing on the phrase "or otherwise make unavailable," it noted the similar language in both Title VII and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, and concluded:

> In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases *looking to consequences, not intent.* And all three statutes use the word 'otherwise' to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions. Webster's Third New International Dictionary 1598 (1971).

135 S. Ct. at 2519 (emphasis added). Thus, the Court held that the inclusion of the phrase "because of" in an anti- discrimination statute does not imply the need to show discriminatory motive.[11]

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[11] Our colleagues argue that *Inclusive Communities* is irrelevant to the issues here because it involved a claim of disparate impact, an area of law they suggest is unique unto itself. But the Court's reasoning and conclusions were not so narrowly drawn. The above-quoted passage shows that the language and structure of the anti-discrimination provisions reviewed by the Court were critical to its conclusion that the effects or consequences of employer conduct may support a claim of discrimination without regard to the employer's intent. Similar language and structure support the same reading and conclusion for section 105(c) of the Mine Act.

Moreover a focus on the effects of employer conduct is not limited to cases involving disparate impact claims and, in fact, is consistent with Commission precedent interpreting section 105(c), as reflected in *Moses* and *Gray*. The importance the Commission has placed on the effects of operator conduct is also reflected in its use of section 8(a)(1) of the National Labor Relations Act as an aid in interpreting section 105(c). *See Gray*, 27 FMSHC at 9-10. Section 8(a)(1) focuses on the effects of employer misconduct and does not contain a motivational requirement.

B. The Mine Act's Legislative History Demonstrates that Interference Could Occur Without a Showing of Motive on the Part of the Operator.

The directive that no person shall "otherwise interfere with the exercise of the statutory rights of any miner" was included when the 1969 Coal Act was amended to become the Federal Mine Safety and Health Act of 1977. The Senate drafters explained that the wording of section 106(c)(1) (the section which became section 105(c) in the final bill) was "broader than the counterpoint language in section 110 of the Coal Act" and the listing of protected rights was "intended to be illustrative and not exclusive." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Healthy Act of 1977*, at 624 (1978). The Committee specified that this section should "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation" and indicated its intention "to insure the continuing vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions. *See, e.g.*, *Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202." S. Rep. No. 95-181, at 36, *reprinted in Legis. Hist.* at 624.

The legislative history of the discrimination provision in the 1977 Mine Act establishes that Congress had contemplated the type of operator conduct present in this case, and that Congress intended to prohibit it without a showing of operator motive. The Senate Report demonstrates that Congress' intent was to protect miners from "not only the common forms of discrimination, such as discharge, suspension, demotion . . . but *also against the more subtle forms of interference, such as promises of benefit* or threats of reprisal." S. Rep. No. 95-181, at 36 (emphasis added). This language directly addresses the Operators' bonus plans at issue here. "Promises of benefit" inherently affects *future* protected activity rather than being made *in reaction* to prior protected activity. Thus the Operators' argument that section 105(c) only

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Given the Supreme Court's reasoning in *Inclusive Communities*, our colleagues' reliance on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) ("*Gross*") and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) ("*Nassar*"), to argue that the phrase "because of" has a plain meaning which requires proof of motive in all case, is misplaced.

Gross involved a claim of disparate treatment under the ADEA which requires proof of wrongful motivation. Nothing in *Gross* suggests that the Court was rejecting prior interpretations of the ADEA, as described in *Inclusive Communities*, allowing claims challenging the discriminatory effect or impact of employer conduct without proof of discriminatory motive.

Similarly, *Nassar* involved a claim under Title VII's anti-retaliation provision set forth at 42 U.S.C. § 2000e-3(a). That provision does not contain language similar to "otherwise adversely affects" in the anti-discrimination provisions of Title VII (42 U.S.C. § 2000e-2(a)(2)) and the ADEA (29 U.S.C. § 623(a)(2)), "otherwise make unavailable or deny" in the FHA (42 U.S.C. § 3604(a)), or "otherwise interferes" in section 105(c) of the Mine Act (30 U.S.C. § 815(c)(1)). It is limited to claims of retaliatory treatment of employees, which require proof of motive.

forbids adverse action or interference "because . . . such miner" previously participated in protected activity directly contravenes the legislative history of the Mine Act.[12]

In light of this legislative history, we conclude it inappropriate to limit the scope of section 105(c)'s protection from interference in the manner proposed by the Operators. We decline to adopt their narrow construction, based on the literal terminology of the statute and focused on an employer's motivation when implementing the policy, rather than on the effects of the policy on miners' willingness to exercise their rights. The decisions endorsed by the Senate drafters rejected such an interpretation. Those decisions declined to elevate the statutory text at the expense of the underlying remedial purpose of the law, and we find it difficult to believe the drafters would consider motivation to be such a necessary element that its absence would be the basis for an interpretation of 105(c) that undermines its very purpose: to encourage the reporting of suspected violations of health and safety regulations.

Indeed, the test proposed by the Operators leads to absurd results because the Congressional intent to include "the more subtle forms of interference" is essentially precluded.[13]

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[12] Our colleagues' assertion, slip op. at 37-38, that the legislative history of section 105(c) supports their position rings hollow. They rely heavily on the drafters' statement that their goal was the protection of miners from interference with their rights in the form of "threats of reprisal," and then argue that "[f]or there to be a threat of reprisal there must be an action that triggers the threat – that is, there must be a *cause* for the reprisal." *Id.* at 37. Our colleagues ignore the fact that in the same sentence of the legislative history containing the phrase "threats of reprisal," the drafters expressed their concern about interference in the form of "promises of benefit." S. Rep. No. 95-181, at 36. A promise of benefit which has the *effect* of interference with the exercise of protected rights need not have been *motivated* by the exercise of those rights.

Our colleagues also claim textual significance in the fact that in converting the 1969 Coal Act's section 110(b) into the 1977 Mine Act's section 105(c), Congress changed the language "by reason of the fact" to "because" and re-structured the section so that instead of phrases beginning "(A)," "(B)," and "(C)," each subject to the "by reason of the fact" language, the section now contains separate clauses prefaced by "or" and including the "because" or "because of" language. We fail to discern an effectual difference between "by reason of the fact" and "because." What is much more significant in the evolution of this section is that in 1977 Congress added the language "or otherwise interfere with the exercise of . . . statutory rights," a provision which did not exist in the 1969 Coal Act. In explanation of the new interference language, the legislative history spoke of going beyond "the common forms of discrimination" so as to include "the more subtle forms of interference, such as promises of benefit . . . ." S. Rep. No. 95-181, at 36.

[13] *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018), relied on by our colleagues, does not refute this. In that case, the Supreme Court ruled that a private sector employee who did not report any securities-law violations to the Securities and Exchange Commission was not a "whistleblower," even though he had reported his concerns to senior management. The Court's adherence to the plain language of the statutory definition of "whistleblower," which states that a

Congress intended to include "threats of reprisal" within the ambit of illegal interference, but such threats cannot be reached under the Operators' test unless there has been a predicate act of miners exercising protected rights which gave rise to the threat of reprisal. Moreover, the "promises of benefit" contemplated by Congress virtually cannot be reached at all.[14] The test proposed by the Operators' is essentially backward-looking. It requires that there be a pre-existing exercise of statutory rights by a miner which triggers the alleged act of interference by the operator. However, the Mine Act's prohibition of unlawful interference, as described in the legislative history, is forward-looking. The interference which Congress sought to prevent is the promise of *future* benefit or the threat of reprisal for a *future* assertion of statutory rights by a miner.

C. Demanding Proof of an Operator's Motivation Would Permit Some Policies Intruding Upon the Mine Act's Protections Against Interference to Go Uncorrected.

The test proposed by the Operators would have the effect of reading the "interference" language of section 105(c) out of the Mine Act. The statutory language provides, "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, ..." Thus, "interference" is distinct from "discrimination." In *Sec'y on behalf of Pendley v. Highland Mining Co.*, the Commission held that "discrimination" includes all retaliatory "adverse actions" that are "harmful to the point that they could well dissuade a

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"whistleblower" is a person who provides information relating to a violation of securities laws to the Secretary, was driven in large part by its view that the purpose of the statute was to encourage prompt reporting of violations to the SEC (which the plaintiff had not done). By contrast, a literal reading of section 105 of the Mine Act (resulting in the institution of a motivation requirement in interference cases) does nothing to further the objectives of the anti-discrimination provisions in the Act. To the contrary, it makes it more difficult for miners to prevail in interference lawsuits.

Although, in *Digital Realty Trust,* the Court applied a plain meaning analysis to the language of a discrimination statute, its rationale was based specifically on the statute's purpose and on alternative mechanisms that could protect employees. The Court opinion is not the first – nor the last – to base an interpretation on the plain meaning of statutory text. Importantly, however, in rejecting the specific "absurd results" analysis of the lower court and the parties, the Supreme Court relied on case-specific rationales, and did not call into question the use of the absurd results doctrine in other cases.

[14] The Operators' express concern is that under the *Franks* test (as embodied in the Judge's Decision), "any bonus plan that provides an element of production is *per se* unlawful." Oral Arg. Tr. 30. We reject this suggestion. But what is clear is that under the Operators' proposed test, the "promises of benefit" provided in a bonus plan based on production can never be found unlawful under section 105(c) without smoking gun evidence that the plan's intent was to subvert statutory rights.

reasonable worker" from engaging in protected activity. 34 FMSHRC 1919, 1932 (Aug. 2012) (quoting *Burlington N. & Santa Fe Railway v. White*, 548 U.S. 53, 57 (2006)). Given that the dissuading of workers from engaging in protected activity is the essence of "interference," *Pendley* establishes that "interference" which is in retaliation for protected activity – i.e., the test proposed by the Operators – is covered by section 105(c)'s provision against "discrimination." As noted above, Congress added the "interference" language to the 1969 Coal Act in creating the Mine Act in 1977 and intended the interference provision to broaden the coverage of the anti-discrimination provision. However, if the test proposed by the Operators is adopted by the Commission, it would render the "interference" language a nullity.

Our colleagues' approach is somewhat different from that of the Operators. They reject the literal interpretation of section 105(c) advanced by the Operators and argue that they can divine a plain meaning of the section separate from its literal meaning, slip op. at 34 n.6, 35, 46, 49-50, although, as the Operators point out, the literal meaning of the statutory language is clear.[15] Like the Operators, our colleagues assert that there must be a causal nexus between alleged acts of interference and protected activity in order to come within the ambit of the statutory prohibition. However, unlike the Operators, they assert that the required protected activity can include activity that is yet to occur.[16]

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[15] Our colleagues rely on *Meredith v. FMSHRC*, 177 F.3d 1042, 1054 (D.C. Cir. 1999), where the Court held that MSHA employees are not "persons" who can be named as respondents in discrimination claims under section 105(c) of the Mine Act. Interestingly, the Court found a textual analysis of the word "person" to be insufficient to determine a plain meaning of the statute. Rather, the Court looked to the statutory scheme as a whole. *Id.* at 1054-56. Our colleagues, however, rely primarily on a textual analysis. Our colleagues also rely on the Commission decision in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759 (Aug. 2011), where the Commission interpreted the word "maintain" as used in 30 C.F.R. § 77.410(c). In finding a plain meaning for the word, the Commission did not reject the literal meaning of the word as inconsistent with the plain meaning, but rather, rejected the operator's attempt to inject nuances and requirements into the plain meaning which simply were not present. *Id.* at 1763.

[16] Our colleagues submit that interference claims are analytically indistinguishable from discrimination claims characterized by firing, suspension, adverse change in job duties or other such direct adverse action, and so should be analyzed under the traditional formula created in *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) and *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981), and widely known as the *Pasula-Robinette* test. Slip op. at 46, 50. However, in *Gray,* the Commission noted that "[t]he Commission's approach to the analysis of operator statements [of alleged coercive interrogation or harassment constituting interference with protected rights] stands in contrast to its analysis of discrimination against miners who have exercised their rights under the Mine Act. . . . This latter analysis is generally referred to as the *Pasula-Robinette* test." 27 FMSHRC at 8-9 n.6. Thus, the Commission has indeed recognized a difference between interference claims and the more typical discrimination claims arising under section 105(c).

We can envision situations where actions by mine operators may constitute actionable interference under section 105(c) absent motivation to inhibit miners' protected activity. An obvious example is the fact pattern described in *Gray,* where the Commission found interference although the Judge accepted Brummett's testimony that he was only joking with Gray and that no threat occurred. 27 FMSHRC at 5.

At least one Commission Judge has described how demanding proof of motivation as a requirement in interference cases would permit operators to interfere with statutory rights for reasons that would not be actionable. Commission Judge John Kent Lewis noted, "[a]ccording to the *Pepin* test,[17] an agent of the operator would be legally permitted to interfere with a miner's statutory rights because he doesn't like the miner, because there was a lack of resources, because he was ignorant of the miner's statutory rights, or a host of other reasons that are not motivated by the exercise of statutory rights." *Wilson v. Armstrong Coal Co.,* 39 FMSHRC 1072, 1092 (May 2017) (ALJ), *review granted* June 15, 2017. Thus, the interpretation of section 105(c) advanced by our colleagues, like the interpretation by the Operators, would lead to absurd results: in some circumstances, policies intruding upon the Mine Act's broad protections would escape corrective action under section 105(c).

Moreover, we note that both the Operators and our colleagues assert that their respective interpretations of section 105(c) represent the "plain meaning" of the statutory language. The obvious conflict between these allegedly "plain" meanings suggest that section 105(c) actually is ambiguous, and not subject to resolution under *Chevron I* analysis. *See American Coal Co.*, 796 F.3d at 24-25.

D. Deference to the Secretary's Interpretation is Warranted.

Given our conclusion that the alleged "plain meaning" interpretations by the Operators and our colleagues lead to absurd results, and thus that section 105(c) is ambiguous as to whether proof of motivation is required in an interference claim, we next consider whether it is appropriate to defer to the Secretary's interpretation of the statutory language pursuant to *Chevron II* analysis.

As noted above, the Secretary submits that an action constitutes interference in violation of section 105(c)(1) if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and

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[17] Judge Lewis was discussing Judge David Barbour's decision in *Secretary obo Pepin v. Empire Iron Mining Partnership*, 38 FMSHRC 1435, 1453-54 (June 2016) (ALJ), a decision whose thesis that in a claim of unlawful interference under section 105(c) the Secretary has the threshold burden of proving the operator's unlawful motivation is echoed by our colleagues' opinion in this case.

> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

S. Br. at 13-17 (quoting *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op of Chairman Jordan and Comm'r Nakamura). The Secretary thus interprets the Mine Act so as to allow a miner to prevail on an interference claim, without requiring proof of the operator's motivation to interfere with the miners' statutory rights. This two-part test was articulated and adopted by two Commissioners in *Franks & Hoy*, 36 FMSHRC at 2108 (sep. op of Chairman Jordan and Comm'r Nakamura). This analytic framework has been dubbed "the *Franks* test."

Commissioners recently concluded that it was not error for a Judge to apply the *Franks* test. *Sec'y of Labor on behalf of McGary v. Marshall Cty. Coal Co.*, 38 FMSHRC 2006 (Aug. 2016). In that case, the operator instituted a policy, announced at company-wide meetings, requiring miners to report safety hazards to management first, thereby circumventing miners' rights to report hazards under section 103(g) of the Act.[18] 38 FMSHRC at 2012 n.11, 2028 n.22.[19] All five commissioners concluded that the *Franks* test was consonant with *Moses* and *Gray* and thus it was not incorrect for the Judge to use it in the *McGary* case. *Id.* at 2012.

In a recent interference case under the Mine Act, the D.C. Circuit also employed the *Franks* test, noting that the administrative law judge had applied it and that neither party challenged its use. *Wilson v. FMSHRC*, 863 F.3d 876 (D.C. Cir. 2017). In ruling on the miner's interference claim, the Court emphasized that the *Franks* test calls for an objective evaluation of how a reasonable miners' representative would view the alleged discriminator's conduct, and not whether the individual accused of interference had a subjective intention to interfere with the statutory rights of the miners' representative. *Id.* at 881-82. Specifically, the Court stated, "as the Commission has instructed, whether 'interference' occurred does not turn 'on the [respondent's] motive . . . .'" *Id.* at 881 (citing *Gray*, 27 FMSHRC at 9).

In sum, we reject the literal interpretation of section 105(c) that would unduly restrict the reach of the Mine Act's protection from interference. We would have the Commission adopt the *Franks* test, deferring to the Secretary's reasonable interpretation of the statutory language, an interpretation that is consistent with Commission precedent, federal case law, and the legislative

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[18] As previously noted, *supra* slip op. at 10 n.5, That statutory provision affords miners the right to make anonymous complaints to the Secretary. 30 U.S.C. § 813(g).

[19] A number of Commission Judges have also applied *Franks* to interference claims. *See UMWA ex rel. Franks v. Emerald Coal Res.*, 38 FMSHRC 799 (Apr. 2016); *McGary v. Marshall County Coal Co.*, 37 FMSHRC 2597, 2603-04 (Nov. 2015); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015). One Commission Judge has rejected the *Franks* test. *Sec'y obo Pepin v. Empire Iron Mining Partnership*, *supra*.

history of the Mine Act and, importantly, one in keeping with Congressional intent to encourage miners to play an active role in maintaining safe and healthful conditions in the mines.[20]

II. Substantial Evidence Supports the Judge's Finding that the Bonus Plans Interfered with the Miners' Protected Rights.

A. A Reasonable Miner Would be Deterred from Exercising His or Her Rights as a Result of the Bonus Plans.

Concluding that the bonus plans discouraged miners from making safety complaints, reporting injuries, and serving as walk-around representatives, the Judge explained:

> While the bonus amounts are not extraordinarily large, the amounts for production crewmembers are large enough to matter to most miners. The witnesses at the hearing also emphasized the intensity of the peer pressure fostered by the plans. The bonus plans make it so that a miner must decide whether it is worth taking money out of his own pocket and those of his entire section every time he considers reporting an unsafe condition or an injury. This impact on a miner's decision to exercise his rights constitutes a coercive pressure analogous to the interrogation and harassment discussed by the Commission in *Moses* and *Gray*.

38 FMSHRC at 953 (citations omitted).

Ample evidence[21] supports the Judge's conclusion regarding the negative impact the plans had on the miners' exercise of rights, evidence the operator did not attempt to counter.

Miner Timothy McCoy, employed at the Marshall County Mine, testified that miners on his production crew did not report hazards to MSHA because they did not want to risk their bonuses. He described an incident in which roof bolts were not properly spaced over a power

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[20] Indeed, section 2(e) of the Mine Act states that mine operators, with the assistance of miners, have the primary responsibility to prevent the existence of unsafe and unhealthful conditions and practices in mines. 30 U.S.C. § 801(e).

[21] In his case-in-chief, the Secretary presented evidence from four miners to describe the effects of the bonus plans. The Secretary attempted to call additional miner witnesses, but the Judge excluded their testimony, finding that it would be cumulative. 38 FMSHRC at 944, n.1.

center, and being told by a miner that "[i]f I report this, we are going to have MSHA here tomorrow investigating it and tomorrow's bonus was out." Tr. 141.[22]

Testimony indicated that internal safety complaints also decreased after the bonus plans took effect. Ann Martin, the former mine safety committee chairman at the Harrison County Mine, described how "[d]uring my inspections on the section, I found it interesting that before the plan was implemented, the guys were just waiting to talk to you, converse with you, you know, per the plan itself, that changed because those guys were doing nothing more than setting on their equipment and mining coal." *Id.* at 158.

After shutting down a section because of ventilation issues, Martin was told by a miner "you just knocked us out of our Bonus Plan." *Id.* at 165. Upon being asked by another committeeman whether he would prefer to have the money rather than assure safe mining conditions, the miner's response was "yes." *Id.* Under the plan, foremen receive double the bonus their crews earn. *Id.* at 308. There was testimony that some foremen instructed miners that they "absolutely cannot shut down the belt." *Id.* at 58-60.

Miners who were injured but not incapacitated were tempted to "rough it out" so as to not lose the bonus for leaving the mine face. *Id.* at 54. Levi Allen, who had served as the local union president at the Marshall County Mine, described a specific incident in which an employee injured his shoulder while working but did not report the injury: "His exact words to me was he didn't want to screw everybody," Allen testified. *Id.* at 226. Allen explained that he rarely received calls before the plan about miners who left a shift without reporting an injury, but after the plans went into effect, the frequency of such calls tripled. *Id.* at 229.

Under the plan, bonus amounts were tied to one's presence on a working section. A production miner who left the section to accompany a federal inspector earned 10% of the bonus his or her section earned if the section met its production quota. After the bonus plans were implemented, safety committees had difficulty identifying miners willing to accompany inspectors. *Id.* at 47, 72-73, 152, 155, 166. Ann Martin testified: "I approached a young man who normally would jump at the chance to travel with the inspector and earn that experience, and his exact words to me were, 'No, Ann, I don't want to go today. We are set up for production bonus, so I want to go to the section.'" *Id.* at 152. Timothy McCoy testified that his coworkers on the production crew discouraged him from serving as a walk-around representative because a less experienced miner would be sent to replace him, and this would reduce the crew's ability to achieve a bonus. *Id.* at 113-14.

There was also abundant testimony describing safety issues that were being neglected while the bonus plans were in effect. Specifically, miners did not adequately rock dust, *id.* at 49, 52, 106, 119, 153, 217, failed to properly bolt the roof, *id.* at 105-6, 119,153, worked in poorly ventilated and high methane conditions, *id.* at 49, 51-2, 106, 108, 118-19, failed to clean up

[22] McCoy heard of other crews not filing section 103(g) complaints in similar situations. Tr. 114-15. At mines where the bonus plans were discontinued, section 103(g) reporting rebounded. *Id.* at 166.

accumulations, *id.* at 49, failed to maintain and inspect equipment, *id.*, and failed to change belt rollers, *id.* at 51.

The Judge found that "the effect of the bonuses is to create pressure on miners to maximize short-term production at the expense of safety," such that "each worker feels pressure to work as fast as possible so as not to take away from potential bonuses for the other workers," because "safety-related tasks take additional time, and miners are therefore reluctant to do them under the [plan] because they are less likely to achieve the production goals." 38 FMSHRC at 950.

We conclude that the Judge's finding that the first prong of the *Franks* test was satisfied is supported by substantial evidence. We turn now to the operators' justification of the plan.

B. The Operators' Justification for the Policy Does Not Outweigh the Resulting Interference with Miners' Rights.

Applying the second step of *Franks*, under which an operator may defend against an otherwise valid interference claim if it offers a "legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights," the Judge identified the Operators' proffered reason as improving production and safety at its mines. 38 FMSHRC at 954 (quoting *Franks*, 36 FMSHRC at 2108, 2116).

The opinion of Chairman Jordan and Commissioner Nakamura in *Franks* noted that where the employer established a justification under step two, the operator's actions must be "narrowly tailored" to promote that justification as part of the balancing of the operator's interests with the protected rights of miners. 36 FMSHRC at 2118 n.14 (citing *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007)). Even if the operator's actions are narrowly tailored, it is still necessary to balance the degree of interference with protected rights against the importance of the asserted business justification. *Franks*, 36 FMSHRC at 2108.

The Operators failed to present any evidence addressing this step of the *Franks* test. The Operators asserted that the purpose of the bonus plans was to enhance both safety and production at the attendant mines. However, they made no assessments as to the impact of the plans on safety before implementation, and were unable to discern the impact on either safety or production after the plans were implemented.[23] Finding that the Operators had failed to establish a legitimate and substantial reason for the plans which outweighed the impact on miners' protected rights, the Judge cited the same concerns. She concluded that "the harm to miners'

[23] As the Judge noted, 38 FMSHRC at 954, Murray Energy Senior Vice President John Forelli, who had designed the bonus plans, testified that two statistical analyses he had commissioned failed to reach a conclusion as to whether the bonus plans had improved production, and that his review of daily and quarterly safety reports did not show an impact on safety. Tr. 293-301. Significantly, however, as the Secretary notes, the combined non-fatal injury rate at the six mines went up by 18% during 2015, the year the bonus plans were put in place. S. Br. at 10, n.3.

rights is evident," while the Operators are "unable to show that the [plan has] actually been effective at improving or maintaining safety" and "unable to establish that the [plan] actually resulted in increased production." 38 FMSHRC at 954.

Given the totality of the circumstances, demonstrating the imbalance between the bonus plans' unsubstantiated benefits and the clear evidence of their chilling effect on the exercise of rights, we conclude that substantial evidence supports the Judge's conclusion that the Operators' bonus plans interfered with miners' protected rights in violation of section 105(c).

III. The Operators' Objections to the Judge's Evidentiary Rulings are not Meritorious

A. Admission of Hearsay Testimony

The Operators argue that the Judge erred in admitting and relying on hearsay testimony of miners' representatives. Their testimony described how the bonus plans negatively affected miners' willingness to exercise their protected rights (such as the right to report injuries to management, to report safety hazards to management and MSHA, and to exercise their walkaround rights). Our inquiry centers on whether this testimony was reliable, and whether its admission was unfair to the Operators.

We review the Judge's ruling under an abuse of discretion standard. *Shamokin Filler Co. Inc.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd, Shamokin Filler Co. Inc. v. FMSHRC*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1549 (2015) (mem.); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010) (holding that a judge's credibility determinations are reviewed under an abuse of discretion standard). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero v. Cyprus Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000).

Commission Rule 63(a) explicitly permits hearsay evidence "that is not unduly repetitious or cumulative." Comm'n Proc. Rule 63(a), 29 C.F.R. § 2700.63(a). *See also Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135 (May 1984) (holding that hearsay evidence is admissible so long as it is material and relevant). In *Mid-Continent Resources*, the Commission emphasized that "properly admitted hearsay testimony, and reasonable inferences drawn from it, may constitute substantial evidence upholding a judge's decision if the hearsay testimony is surrounded by adequate indicia of probativeness and trustworthiness." *Id.* at 1135-36. In that case, the Commission rejected the operator's argument that the Judge had erred in relying on the testimony of two MSHA inspectors about what they were told by a foreman.

In *Mid-Continent*, the Commission set forth a number of factors used to measure the probative value of hearsay evidence. Applying the relevant factors to the case at hand, we conclude that the Judge's finding of interference clearly rested on reliable evidence.

First, the statements of the miners' representatives were undisputed. *See Mid-Continent Res.*, 6 FMSHRC at 1137. The operators produced no contradictory evidence, never calling any witnesses who testified that their protected rights were not impacted by the bonus plan. The fact

that the operators did not refute the evidence in any way significantly weakens their argument that the evidence was not reliable.

Second, the hearsay testimony was consistent. *Id.* at 1136-37. All of the miners' representatives testified about incidents involving miners who chose to forego protected activity due to the bonus plan. Tr. 47, 54-55, 72, 107-08, 112, 114-15, 141, 152, 155-58, 167, 213, 226-229. *See Mid Continent Res.*, 6 FMSHRC at 1136-37 ("If there is more than one reported [hearsay] statement, we inquire whether the statements are consistent . . . . And we examine the content of any contradictory or corroboration evidence.").

As in *Mid-Continent*, the out-of-court statements in this matter "rest[ed] on personal knowledge gained from firsthand experience." *Id.* at 1136. The miners' representatives testified to the thoughts and motivations of miners reacting to the bonus plan, as it was related to them. Clearly, these miners had personal knowledge of their own responses to the bonus plan.

A final factor suggested by the Commission in *Mid-Continent* is whether the out-of-court declarant had an interest in the outcome of the case (and thus a reason to lie). *Id.* at 1136. Here, the record indicates that the miners felt that they benefited economically from the bonus plan, so they would have had no motivation to dissemble in order to shore up an interference claim challenging the plans.[24]

As the above discussion indicates, there is nothing that tempts us to call into question the reliability of the undisputed testimony admitted by the Judge.[25] Moreover, the use of relevant information from the miners' representatives permitted the Judge to avoid a hearing that would

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[24] In fact, in this case, miner witnesses had motivation not to come forward. Witnesses risked retaliation, not only from the Operators, but also from their bonus-seeking fellow miners. We agree with the Secretary that "[t]he very nature of an interference violation is that it deters or intimidates miners from coming forward to share their concerns with MSHA, management, and the Commission. To fault the Secretary for proffering obviously relevant testimony via representatives of miners, as he did here, would undermine the structure and purpose of the Mine Act, which specifically envisions representatives acting as advocates for miners." S. Resp. Br. to R. PDR at 42. These considerations are precisely *why* the Commission's rules permit hearsay testimony.

[25] To the extent that the Operators identify instances of double hearsay, we agree that a Judge must be particularly attentive and scrutinize such testimony for its probative value. However, under the circumstances, given the overwhelming reliable evidence of numerous examples of miners coerced into not exercising their protected rights in order to achieve a bonus under the plans, any error by the Judge in crediting and relying on such double hearsay is harmless.

have otherwise been replete with repetitious or cumulative testimony.[26] It was well within her discretion to make this choice.

Furthermore, as the Judge noted, much of the hearsay testimony to which the operators objected went to the state of mind of the miners (regarding the effect of the bonus plan). This would be admissible evidence under Federal Rule of Evidence 803(3), which states that out-of-court declarations are admissible to demonstrate "the declarant's then-existing state of mind (such as motive, intent, or plan)." Thus, for example, testimony by a safety committeewoman that a miner told her he didn't want to travel with an inspector because he wanted to go to the section demonstrates the miner's state of mind at the time he spoke. Tr. 152, 155, 167. This would be admissible under Federal Rule of Evidence 803(3).

Finally, in *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sept. 2016), the Commission rejected the contention of the operator that the Judge in that case had improperly relied on vague and speculative hearsay statements of miners who had been interviewed by MSHA accident investigators. We noted that the operator did not call the rank-and-file miners interviewed by MSHA as witnesses at the hearing to rebut MSHA's assertions. We held that the Judge did not err in admitting and relying on the testimony of the MSHA investigator concerning what he was told by the miners during the investigation, because the statements by the miners were "clearly material and relevant." 38 FMSHRC at 2366, n.13.[27]

The decision to admit evidence rests primarily in the province of the Judge.[28] Our analysis above confirms that the evidence in question was reliable and relevant, and that the Judge did not abuse her discretion in admitting it. We thus decline to take the extraordinary step of overturning the Judge's evidentiary ruling.

B. Cross-Examination

The Operators contend that the Judge committed procedural errors in not allowing them to cross-examine the Secretary's witness on prior inconsistent statements made in response to discovery requests. This argument is also without merit. As discussed in further detail below, the Judge imposed limits on cross-examination only after the Operators had successfully

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[26] Courts routinely use representative testimony to establish violations of the Fair Labor Standards Act on behalf of similarly situated employees who do not testify, when employers fail to maintain proper wage and hour records. *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297-98 (3d Cir. 1991).

[27] The Operators do not contend that the testimony of the miners' representatives was not relevant. They would be hard pressed to do so, given that the testimony addressed such issues as instances in which the bonus plan deterred miners from reporting hazards and injuries, refusing unsafe work, and serving as walkarounds. *See, e.g.*, Tr. 112, 152, 226.

[28] The Operators cite no case in which the Commission had found a Judge's reliance on hearsay evidence to be an abuse of discretion.

established potential inconsistencies in testimony and the Judge had taken notice of them. Tr. 69-72, 91-92, 167-70, 248-49. Since the Operators had already raised the issue of allegedly inconsistent testimony, any additional cross-examination would have had limited probative value. *See Shamokin Filler Co.*, 772 F.3d at 339 (holding the judge did not err in excluding evidence of limited probative value when the presentation of that evidence would unnecessarily delay the hearing). The Judge merely re-directed the Operators' counsel to focus his examination substantively, rather than to spend time proving the inconsistency.

Rule 63(b) requires that a party be permitted "to conduct such cross-examination as may be *required* for a full and true disclosure of the facts." Comm'n Proc. Rule 63(b), 29 C.F.R. § 2700.63(b) (emphasis added). A Judge's limitations on cross-examination are reviewed for abuse of discretion. *See Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555-56 (June 2014) (holding that the Judge did not err in enforcing time limits on some cross-examination).

The Operators first argue that the Judge twice limited their ability to impeach the Secretary's witnesses with allegedly prior inconsistent statements from their depositions. Counsel for the Operators attempted to impeach the witnesses by asking why they had mentioned a certain anecdote at trial but not in their depositions.[29]

The Operators additionally complain that they were not permitted to question two of the Secretary's witnesses about having testified to anecdotes that were not mentioned in the initial interrogatories exchanged by the parties during discovery. *See* R. PDR at 23-25 (citing Tr. 91-92, 248-49). However, the Secretary and the UMWA had objected to the interrogatories as being overly broad, unduly vague, and burdensome. Hence, these interrogatory responses were not inconsistent with the subsequent testimony. Moreover, at the hearing, the Judge appears to have been willing to assume that the anecdotes in question were not mentioned in the interrogatories, but the Judge found that this did not undermine the witnesses' credibility because they testified to the anecdotes at their depositions. *See* Tr. 91-92, 248-49.

In short, we reject these baseless objections by the Operators, and conclude that the Judge did not abuse her discretion.[30]

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[29] One of the two witnesses explained that she did not mention the incident at the deposition because the Operators' counsel had objected to the fact that the witness would not disclose the identity of the miners who allegedly were involved. Tr. 168-69.

[30] We reject the Operators' argument that the Judge erred by considering the evidence collectively as applying to each mine. In conjunction with streamlining this trial, the Judge limited the Secretary's presentation of redundant witnesses by prohibiting the Secretary from presenting a witness from each individual mine. The evidence reflected that the bonus plans at the mines were nearly identical. One individual drafted a single plan and met with each mine in implementing them. The only differences with the plans at Ohio County Mine and Powhatan No. 6 Mine were minimal – allowing a representative of the mine safety committee to conduct one additional inspection each month and permitting safety committee participation in determining whether injuries affecting bonuses were properly documented. This did not affect

IV. Conclusion

For the foregoing reasons, we would affirm the Judge's decision.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

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the application and analysis of the interference claims. Hence, the testimony of the Secretary's witnesses was applicable to all of the Operators' miners and the Judge did not abuse her discretion.

Acting Chairman Althen and Commissioner Young, in favor of reversing:

In 2011, the D.C. Circuit Court of Appeals, quoting liberally from a Commission dissent, noted that the plain language in section 105 was "a marvel of Congressional clarity" and "struggle[d] to see how Congress could have intended any other reading of the phrase" at issue in another provision of section 105. *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 238-39 (D.C. Cir. 2011). "Indeed, it is hard to imagine a clearer expression of congressional language." *Id.* at 239.

Indeed. Once again, it is hard to imagine how Congress could have more clearly required the prohibited actions in section 105(c) be improperly motivated in order to be actionable, than by pointedly including "because" or "because of" *four times* as a threshold requirement for a violation. As explained below, we would apply the plain language of the Mine Act's anti-interference provision and vacate the decision below.[1]

DISCUSSION

I. Plain Statutory Language, Reinforced by Legislative History, Clearly Requires that Interference be Motivated in Some Way by Rights Protected Under the Act

A. The Plain Language of Section 105(c)(1) Requires Proof that Protected Activity Motivated the Operators' Action.

The fundamental problem with the Secretary's argument is that he is not interpreting statutory language at all. He is impermissibly attempting to revise the statute by excising "because" from the text for interference claims alone.

The Secretary's effort "runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 134 S. Ct. 2384, 2389 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted). Section 105(c) identifies five actions – among them, interference – that may not be taken "*because*" of one or more of four specifically identified reasons. As relevant, section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . .

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[1] During oral argument, the Secretary conceded that he did not present evidence or argument that there was a motivational nexus between the Operators' implementation of the bonus plan and any prior or anticipated exercise of protected rights by miners. Oral Arg. Tr. 77-78. Therefore, there is no basis to find the Operators implemented the plans because of prior or anticipated protected activity, and accordingly, no reason to remand the case for reconsideration under the proper standard.

> [1] ***because such miner*** . . . has filed or made a complaint under or related to this chapter, . . . or [2] ***because such miner*** . . . is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or [3] ***because such miner*** . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or [4] ***because of the exercise by such miner*** . . . on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1) (emphasis added). In the present action, despite not presenting any evidence of the motivation for the bonus plans, the Secretary alleges that the Operators "interfere[d] with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . of any statutory rights afforded by this chapter."

Where the meaning of a statute is plain, we must apply the statute as written, looking first to the ordinary meaning of the words. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985))); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning." (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994))). If the words are clear, we may not make any further inquiry. *Schindler Elevator Corp.*, 563 U.S. at 412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Here, Congress repeatedly used the same term throughout section 105(c)(1) as a prerequisite for connecting a prohibited action to a miner's protected activity. That term is "because."

The motivation requirement of "because" is repeated *four times* – once for each class of protected conduct – in Section 105(c)(1), which is a single sentence. The Supreme Court has recently, and unanimously, instructed that the "presumption that a given term is used to mean the same thing throughout a statute" is "at its most vigorous when a term is repeated within a given sentence." *Mississippi ex rel Hood v AU Optronics Corp*, 571 U.S. 161, 134 S. Ct. 736, 743 (2014), citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Therefore, "because" – repeated four times in the single sentence that comprises the entirety of Section 105(c)(1) – has one meaning, and that meaning clearly relates squarely to motivation.[2]

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[2] "Because" is one of the 100 most-commonly-used words and most clearly understood words in the English language, as it is the natural beginning of any response to the question, "Why?" Our colleagues, though, maintain that the reasons "why" an operator has taken an action they deem to be interference are immaterial, despite the pointed inclusion of "because" four times in the text of section 105(c). There is an inherent irony in their incuriosity.

Absent a statutory definition, the ordinary meaning of a term, as provided in dictionaries, determines the plain meaning to the statute. *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013)("[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning."); *Martin County Coal Corp.*, 28 FMSHRC 2487, 267 (May 2006). Here, there is no doubt concerning the ordinary meaning. Dictionaries uniformly define "because" as "for the reason that." *See* Webster's Third New International Dictionary 194 (1993) ("for the reason that: on account of the cause that"); American Heritage Dictionary of the English Language 159 (2009) ("for the reason that; since"); Random House Dictionary of the English Language 184 (1987) ("for the reason that; due to the fact that").

Interpreting "because" as meaning "for the reason that" is particularly appropriate with respect to an anti-discrimination provision like section 105(c). The Supreme Court has repeatedly adopted such a definition of the term when asked to interpret federal anti-discrimination statutes. In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Court construed the term "because of" in the following provision: "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." *Id.* at 176 (alteration in original) (quoting 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act (ADEA)). In rejecting the idea that the ADEA authorizes a mixed-motive age-discrimination claim and holding that the term "because of" means that age must have been the "but-for" cause of the employer's action, the Court explained:

> The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); *see also* 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason of, on account of " (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking) process *and had a determinative influence on the outcome*. . . ."

557 U.S. at 176-77 (emphasis added).

The Supreme Court reaffirmed the *Gross* definition of "because" in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013):

> Concentrating first and foremost on the meaning of the phrase "'*because of* . . . age,'" the Court in *Gross* explained that the ordinary meaning of "'because of'" is "'by reason of'" or "'on

> account of.'" *Id.*, at 176, 129 S.Ct. 2343 (citing 1 Webster's Third New International Dictionary 194 (1966); 1 Oxford English Dictionary 746 (1933); The Random House Dictionary of the English Language 132 (1966); emphasis in original). Thus, the "requirement that an employer took adverse action 'because of' age [meant] that age was the 'reason' that the employer decided to act," or, in other words, that "age was the 'but-for' cause of the employer's adverse decision." 557 U.S., at 176, 129 S.Ct. 2343. *See also Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 63–64, and n.14, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007) (noting that "because of" means "based on" and that "'based on' indicates a but-for causal relationship"); *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 265-266, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (equating "by reason of" with "'but for' cause").

133 S. Ct. at 2527 (emphasis and alteration in original).[3]

Thus, "because of" is the same as "by reason of" or "on account of." Congress' repeated use of that term in section 105(c)(1) demonstrates an intention to prohibit interfering actions when taken "by reason of" or "on account of" the specifically-identified types of protected activity.[4] Substituting the definition for the word "because" makes this inescapably clear: "No person shall . . . interfere with the exercise of the statutory rights of any miner . . . [by reason of or on account of] . . . the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter."

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[3] Notably, in *Nassar*, the Court also stated,

> When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.

133 S. Ct. at 2522.

[4] The Secretary asserts that Congress' use of the term "because of" is ambiguous. S. Resp. Br. at 26. The foundational premise of this assertion, that section 105 is complex, is patently absurd. Section 105(c)(1) is hardly complex. It is a single (admittedly long) sentence comprising, in its entirety, barely 200 words. Reducing the sentence to its salient features reveals a quite simple structure: No person shall *a* or *b* or *c* or *d* or *e* because *w*, because *x*, because *y*, or because of *z*.

Indeed, from its very outset, the Commission recognized the meaning of "because" and required a motivational nexus between protected activity and violations of section 105(c). In *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981), the Commission held that "the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity."

Pasula and its progeny are not limited to any one of the four subgroups of unlawful conduct under section 105(c), but apply, broadly, to any "violation of section 105(c)(1)." *Id.* For all violations of section 105(c), protected activity must motivate at least in part the adverse action. The Commission has repeatedly affirmed the *Pasula* test identifying indicia necessary to "establish a nexus between the protected activity and the alleged discrimination" – most recently in the case of *Sec'y of Labor on behalf of Kevin Shafer*, 40 FMSHRC 39 (Feb. 2018).

Essentially, the Secretary argues that the same word – "because" – has different meanings in the very same instance of its use depending on which type of case he has decided to bring.[5] The Secretary's repeated attempts to rewrite unambiguous legislative terms must try the patience of the circuit courts that have reminded the Commission and the Secretary again and again that they may not exalt their policy desires over the words of Congress. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1161 (D.C. Cir. 2016) (rejecting Secretary's attempt to interpret section 105(c) to extend its reach as contrary to plain meaning of provision); *Performance Coal Co.*, 642 F.3d at 239 ("[T]he language Congress selected [is] plain, clear, and simple and we refuse to muddy it by finding ambiguity where none exists."); *Vulcan Constr. Materials, L.P. v. FMSHRC*, 700 F.3d at 309 (section 105(c) case); *see also N. Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 743-44 (6th Cir. 2012) (rejecting Secretarial attempt to extend reach of section 105(c) as entirely unpersuasive).[6]

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[5] Neither the Secretary nor our colleagues can adequately explain how, in a statute, the same instance of the same word can hold within it two incompatible meanings at the same time. There is no basis in law for this proposition. One wonders if they could turn to literature for support: "Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes.)" Walt Whitman, Song of Myself 51 (1892). Or perhaps they should look to quantum physics and liken section 105(c)(1) to Schrödinger's cat – the statute exists in a state of quantum superposition, where "because" means both "because" and nothing at the same time, until the Secretary brings a case and the word's meaning is revealed.

[6] As discussed further *infra*, we do not agree with and do not accept the Operators' argument that, because protected activity must motivate at least in part the Operators' action, an action taken to restrain possible future protected activity cannot violate section 105(c). An action motivated by a desire to foil anticipated protected activity is as fully within the scope of section 105(c) as if the protected activity had occurred. In this case, the Secretary conceded that he did not introduce any evidence of motivation. Therefore, we do not deal with a case involving a claim of an attempt to forestall anticipated protected activities.

Our colleagues' failure even to attempt to reconcile the plain language of the statute, by citing the straw man of the Operators' hyper-literal argument, has been held to be improper upon judicial review. We agree that the Operators' "literal" interpretation is incorrect.[7] But, as instructed by the D.C. Circuit, in a case *interpreting the very same provision*, "plain meaning and literal meaning are not equivalents." *Meredith v. FMSHRC*, 177 F.3d 1042, 1054 (D.C. Cir. 1999) (citing *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997)). In that case, the UMWA argued that, by its literal language, the term "person" included MSHA officials, thus allowing suits against MSHA officials for discrimination under section 105(c)(1) of the Act. *Id.* at 1052. The D.C. Circuit disagreed with that literal interpretation and found that "the text and structure of the Mine Act, as well as the legislative history, inexorably lead to a single conclusion. The Mine Act's anti-discrimination provision does not apply to MSHA employees for actions taken under color of their authority." *Id.* at 1053. Notably, although the court found that the literal reading of the statute was incorrect, the court did not then consider the statute to be ambiguous. The court considered Congress's intent to be clear and resolved the issue under the first prong of *Chevron*. *Id.* at 1053 n.9. Accordingly, the court vacated the Commission's decision, which had incorrectly defined "persons." *Id.* at 1044.

Similarly, in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759 (Aug. 2011), the Commission rejected an operator's literal reading of a standard to apply the standard's ordinary meaning. The operator argued that "maintain," as a verb, required a willful failure to act in order to be held liable for a violation. The Commission found that "its literal meaning is less complicated than what is suggested by the operator." *Id.* at 1763. Instead, the Commission applied "the ordinary meaning of 'maintain' and conclude[d] that the term is not ambiguous." *Id.* Even though the Commission reversed the judge's determination that there was no violation and rejected the operator's literal interpretation, the Commission nevertheless found "the standard's language plain and unambiguous," and "[did] not reach the Secretary's deference argument." *Id.* at 1764. Contrary to our colleagues' argument, rejecting a "literal" interpretation is not some sort of *deus ex machina* they can call upon to find ambiguity where there is none.

Finally, in addition to the commanding bulwark of cases we have cited to show the resolute refusal of appellate courts to exceed the limits of judicial authority to interpret statutes, we note the Supreme Court has recently provided an emphatic admonishment of a failure to do so. In *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the Court reversed –

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[7] Our colleagues' charge that the Act does not require "retaliatory motivation" and their indignation over the Operators' artificially narrow reading of section 105(c) is no exception. *See* slip op. at 10-11. We find that the requisite motivation for an operator's improper interference may be because of the operator's fear of the prospective exercise of protected rights or the operator's belief that a miner or group of miners has engaged in protected activity, regardless of whether any protected activity actually occurred. This is consistent with the Commission's holdings in *Moses* and *Gray*.

unanimously – a Ninth Circuit holding that application of statutory language as written could not have been what Congress intended.[8]

Somers, like the case at bar, construed statutory language designed to protect those who exercise protected rights, especially including the right to bring private wrongs to the attention of supervisors or authorities.[9] In a decision by Justice Ginsburg, the Court unanimously reversed the Circuit Court, finding, "[c]ourts are not at liberty to dispense with the condition – tell the SEC – Congress imposed." *Id.* at 777.

In the present case, the Secretary has not presented any evidence of any motivation to interfere with protected rights. Indeed, the Secretary has not even presented evidence that the miners *in this case* would suffer any harm from the application of the plain language requiring proof of a nexus between the Operators' conduct and rights protected under the Act. It would be astonishing for a court to endorse such a misreading of the plain words of the statute in this context, where there has been no attempt to show that construing the statute as written would be contrary to the purposes of the Act.

In attempting to overcome the exquisite clarity of section 105(c) our colleagues gamely assert that the plain language of section 105(c) leads to absurd results and/or is ambiguous. Slip op. at 10-11. These arguments only emphasize the weakness of their position. With respect to their absurdity argument, it is difficult to conceive of a more absurd result than construing section 105(c) – which four times expressly requires a motivational component for a violation – nonetheless *not* to require motivation and to permit imposition of monetary penalties upon operators for actions not motivated in any way by protected activities. In turn, there is nothing ambiguous about the word "because" or about the requirement that the interference occur "because" of protected activity.

As read by our colleagues, section 105(c) as a practical matter could prohibit virtually any form of incentive plan for miners. Congress certainly did not intend to abolish for the coal industry incentive programs used throughout American businesses without any recognition of that effect. In a given case, indeed even in this case, the Secretary might well be able to present evidence that the current or future exercise of protected activities motivated, at least in part, the introduction of an incentive program. In such case, the program would be unlawful. However,

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[8] The reversed courts cited to the "absurd results doctrine" to avoid the result required by the pain language of the statute. The District Court and the Ninth Circuit, in succession, adopted the Second Circuit's finding that applying the statute as written "would make little practical sense and undercut congressional intent. The Supreme Court unanimously held that courts must apply the plain language of the statute.

[9] It is perhaps obvious beyond need of mention, but *Somers* is a whistleblower case arising in the context of a statute written to provide protections to persons based on their *conduct*, rather than personal characteristics, and is thus much more like Section 105(c)(1) than the status-based protections giving rise to disparate-impact claims. *See* Part II, *infra* (discussing inapplicability of disparate-impact case law).

without any such evidence there is no basis to find the Operators introduced the plan "because" of protected activity. The Secretary made no effort to introduce such evidence in this case.

B. The Legislative History of Section 105(c)(1) Supports the Plain Language's Imperative for a Motivational Nexus.

Because the language of the law plainly excludes the Secretary's distortion, it is unnecessary to resort to legislative history. However, for purposes of a complete analysis, we note that the revisions made to section 105(c) of the Mine Act from its antecedent strengthened the requirement that actionable misconduct must be motivated by protected activity, and that the history shows that Congress clearly intended that improper actions be proscribed because of their relationship to protected activity.

Section 105(c)(1) is similar in purpose to its predecessor, section 110(b)(1) of the Coal Act, which used terms synonymous with those employed in the Mine Act. The earlier provision stated:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

83 Stat. 758-59. The changes made to the Coal Act's protections in Section 110(b) in drafting Section 110(c) of the Mine Act reinforced the requirement for motivation – literally. The Act's structure was changed to ensure "because" or "because of" was appended to each class of protected activity, making clear that improper motivation is essential to a finding of violation.

This change to emphasize by repetition the integral nature of the motivational requirement forecloses any misreading here. In essence, in the Mine Act, Congress repeated and amplified the requirement that the Secretary prove that an operator acted "because of" some prohibited reason. The motivational nexus set forth in the Mine Act flows logically from the antecedent Coal Act.

The Secretary intones the intents and purposes of the Mine Act, but its legislative history contains not a shred of authority for applying any type of disparate-impact analysis, or for discarding Congress' plain and direct articulation of violative interference. Indeed, the legislative history demonstrates the overarching relevance of the exercise of miners' rights under the Act, stating as a goal the protection of miners against forms of interference with those rights, such as "threats of reprisal." S. Rep. No. 95-181, at 36, *reprinted in Legis. Hist.* at 624. For there to be a threat of reprisal there must be an action that triggers the threat – that is, there must be a *cause* for the reprisal.

In fact, the legislative history of the Mine Act – with its references to threats as illustrative of "interference" – establishes that disparate-impact liability has no place in interpreting the interference clause of section 105(c)(1). The addition of the phrase "or otherwise interfere" simply recognizes that other forms of employer retaliation, such as threats, may *also* – or "otherwise" – constitute wrongful action when motivated by protected activity.[10]

The legislative history of the two statutes confirms this congressional intent. In proposing an amendment to the Coal Act that became section 110(b)(1) – the precursor to section 110(c) – Senator Edward Kennedy explained that it "would make it unlawful for any person to discharge or otherwise discriminate against a miner *for bringing suspected violations of this act to the attention of the authorities*." 115 Cong. Rec. 27948 (Oct. 1, 1969), *reprinted in* S. Subcomm. on Labor, S. Comm. on Labor and Pub. Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 Part I*, at 666 (1975) (emphasis added). He further explained that his amendment gave miners "the same safeguards that we give to other employees *who raise possible violations of the law*." *Id.* at 667-68 (emphasis added).

The available history of section 110(b)(1) of the Coal Act clearly supports the plain language's protection against operator conduct motivated by a desire to retaliate for a miner's assertion of his/her safety rights. Thus, a motivational nexus was the required for a successful claim under section 110(b)(1).

Regarding interference with protected rights under the Mine Act, at no point did Congress even hint at an intention to eliminate or qualify the motivation required by the Coal Act. On the contrary, the Committee on Human Resources explained, "if 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." It further stated that "[w]henever protected activity is in any manner *a contributing factor* to the retaliatory conduct, a finding of discrimination should be made." S. Rep. No. 95-181, at 35, 36, *reprinted in Legis. Hist.* at 623, 624 (emphases added).

Section 105(c)(1) provides protection against discrimination, discharge, and interference because of protected activity. It achieves those protections through direct and/or circumstantial evidence permitting reasonable inferences drawn from all the evidence presented in a case. To erase "because," and thus the necessary motivational nexus, from section 105(c)(1) is entirely contrary to the language and legislative history of the Mine Act and the Coal Act.

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[10] MSHA itself has recognized that the Mine Act does not reach mistreatment based on the types of characteristics that have supported disparate-impact analysis. MSHA's *A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977*, at 7 (Rev. 2017), states, "Discrimination on the basis of race, sex, age, religion, handicap, union activity, or any other non-mining status, is not covered by Section 105(c) of the Act." Rather, the prohibited actions are those taken for the reasons enumerated in the statute; if some other reason motivates an action, the Mine Act provides no recourse.

II. There's No Evidence or Rational Analysis to Support the Secretary's Application of Incongruous Legal Doctrine and Statutes Not Germane Here.

Unable to argue persuasively the definition of "because" in the context of the wording of the Mine Act or in an analysis of legislative history, the Secretary turns to a wholly different and completely irrelevant category of cases in an effort to obscure the clear wording of the Mine Act. The Secretary relies on *Texas Department of Housing Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), to support an argument that section 105(c)(1) should be read to embrace a "disparate impact" analysis. There is no foundation anywhere in the law for this discordant cherry-picking of out-of-context language from an exotic, context-sensitive legal doctrine.

A. Disparate-Impact Case Law is Not Applicable in This Case.

Disparate-impact cases use statistical evidence to show that members of a protected class defined by identifiable and usually immutable characteristics, have been disproportionately disadvantaged compared to members outside the class by policies that are facially-neutral. "[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . ." *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (quoting *Teamsters v. U.S.*, 431 U.S. 324, 335-336 n.15 (1977)).[11]

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[11] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Supreme Court explained the difference between "disparate treatment" and "disparate impact":

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Obviously, section 105(c) does not deal with separate or "disparate" groups. *All* miners are entitled to exercise protected rights without discrimination or interference because of their exercise of such rights. With the Secretary's resort to a theory of disparate-impact liability for interference cases, it appears that the Secretary has entirely failed to heed the Supreme Court's admonition, set forth in the context of interpreting discrimination provisions, to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008).

There is a total absence of *any* of these facts in the record of this case:

- There is no group of persons that Congress has chosen to protect on the basis that the group is subject to prejudice or discrimination based on characteristics.

- There are no distinguishing personal characteristics one might use to establish a disparity based on protected-group membership.

- There is no comparator class of persons against whom a disparate impact theory may be evaluated, and thus no showing that consequences of an action fall more harshly on one group than another.

- There are no statistics – indeed, no objective evidence of any sort – showing a disparity.

Because none of the predicate facts exist in this case, there is, of course, no showing of a disparate impact – which is an irresolvable problem for a disparate-impact case. In fact, there is not even really a theory here: just a slogan or a catchphrase. It matters not at all to our colleagues, who unquestioningly accept the Secretary's radical reliance on an extraordinary legal remedy, despite a total absence of the evidence used to prove that theory in its proper context.

Even properly-applied disparate-impact cases are rare. While the Secretary states – incorrectly – that *Inclusive Communities* "says nothing about applying only in exceptional circumstances," S. Resp. Br. at 25, the Supreme Court majority not only specifically acknowledged that "the underlying dispute in this case involves a novel theory of liability," but cited a historical review showing that such cases do, in fact, appear to be "exceptional." *Inclusive Communities*, 135 S. Ct. at 2522 (citing Seicshnaydre, Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, 360-63 (2013)) ("noting the rarity of *this type of claim*" (emphasis added)). The Secretary is thus either unaware of the exotic foundation of his own theory, or he has chosen to ignore what the Court said about it in *Inclusive Communities*.

The foregoing caveat would apply even to a true disparate-impact case, reflecting a justified caution in the Court's consideration of the scope of disparate-impact doctrine, even in a case with the requisite evidentiary support and a common foundation in civil rights law. Here, though, the Secretary produced none of the evidence required to support the theory *he himself has chosen to argue before us*, and which is spelled out as a prerequisite for the type of theory he espouses *in the very authority he has chosen to cite*. Simultaneously, he disclaims that authority's own acknowledgment that the approach it endorsed is highly unusual. The Secretary does all this in order to favor his policy preferences over the clear words of Congress.

B. *Inclusive Communities* Cannot Serve as a Template for Interpretation of Section 105(c).

Inclusive Communities is predicated entirely on the principle that cases of racial discrimination in housing may be based on the disparate impact that facially-neutral policies may have on racial or ethnic minorities.[12] The Secretary did not cite to *Inclusive Communities* before the Judge below, nor did the Secretary introduce any evidence pertaining to, or make any argument concerning the applicability of, disparate-impact analysis to the facts in this case. Thus, there are no distinct classes against whom any statistical or other objective analysis may be applied in order to infer an improper basis for the circumstances in which the law has found them.

As *Inclusive Communities* and other disparate-impact cases have made clear, a showing of discriminatory effect requires a sophisticated and thorough exposition grounded on record evidence. "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating *a causal connection* cannot make out a prima facie case of disparate impact." *Inclusive Communities*, 135 S. Ct. at 2523. None was provided below. Thus, the Secretary seeks to introduce before the Commission an entirely new argument upon which the

[12] The historical background of racial discrimination in housing and its persistent effects demonstrate why disparate-impact analysis was necessary to determine causation. Both before and after the Fair Housing Act, the federal government actively supported racial segregation for decades. *See* Federal Housing Administration, Underwriting Manual, pt. 2, ¶ 228 (Apr. 1936), https://catalog.hathitrust.org/Record/002137289 (last visited June 26, 2018). Outlining a policy known as "redlining," the Federal Housing Administration expressly approved of segregation and racial covenants to prevent minorities from purchasing homes and urged federal evaluators to "investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups." *Id.* ¶ 233. For an saddeningly long period, government, including in the provision of mortgage assistance and public housing assistance, entrenched institutional racism and furthered segregation. *See, e.g.*, *Gautreaux v. Romney*, 448 F.2d 731, 739, 740 (7th Cir. 1971) ("It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact.") (granting summary judgment for plaintiffs for violations of the Fifth Amendment and the Civil Rights Act of 1964); *Young v. Pierce*, 628 F. Supp. 1037, 1053 (E.D. Tex. 1985) ("The actions complained of here are not in any sense facially neutral: HUD supports those authorities it knows to discriminate."). It is against this background of government-assisted and government-subsidized racism that the Supreme Court adopted a disparate-impact theory of discrimination in *Inclusive Communities* – a far different historical context than that presented in this case. To be analogous, one would be required to show that the federal government, after passage of the Mine Act, had mine regulators working to suppress protected activity by miners. There is not a scintilla of evidence suggesting support for a parallel in the Mine Act experience to the government's suppression of fundamental civil rights in the exercise of official state housing policy.

Judge below was not given an opportunity to pass, and for which there is no substantial evidentiary support. This is impermissible as a matter of law. 30 U.S.C. §§ 823(d)(2)(A)(iii), (d)(2)(B).[13]

There also are critical distinctions between *Inclusive Communities*, decided by a majority of the Supreme Court, and *Smith v. City of Jackson* (an earlier disparate-impact case), which was a plurality decision. The Court found in *Inclusive Communities* that Congress had effectively ratified the application of disparate-impact analysis to the FHA by amending the FHA's anti-discrimination provisions in 1988 without addressing the "unanimous" body of circuit court opinion holding that its application was appropriate. *Inclusive Communities*, 135 S.Ct. at 2519-22. "Indeed, the inference of disparate-impact liability is even stronger here than it was in *Smith*. As originally enacted, the ADEA included the RFOA provision, *see* § 4(f)(1), 81 Stat. 603, whereas here Congress added the relevant exemptions in the 1988 amendments against the backdrop of the uniform view of the Courts of Appeals that the FHA imposed disparate-impact liability." *Id.* at 2521.

The Mine Act, of course, reveals no such historical context, no unanimous body of circuit court opinions, and no statutory revisions that are relevant to the consideration here. Further, Justice Kennedy, who authored the majority opinion in *Inclusive Communities*, was not part of the plurality that extended *Griggs*' disparate-impact holding beyond race discrimination cases in *Smith*.

In addition to noting the "significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 [that] counsel[ed] against transposing to the former our construction of the latter" in *Griggs*,[14] Justices O'Connor, Kennedy, and Thomas expressly disclaimed in *Smith* the linguistic contortion the Secretary has thrust before us. *Smith*, 544 U.S. at 2118. Criticizing the plurality's parsing of the language of the ADEA, such that in successive paragraphs, the term "because of" would have different meanings, Justice O'Connor noted that the language at issue in Section 4(a)(1) of the ADEA was clear:

> That provision requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961); see also *Teamsters v. United States*, 431 U.S. 324, 335-336, n. 15, 97 S.Ct. 1843, 52

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[13] We note the flaw of the Secretary's objection to the Operators' challenge to the ALJ's misconstruction of the law. It is our duty to interpret the law *de novo,* so, in any proper review, the Judge's error in applying the wrong legal standard must be uprooted.

[14] Justice Kennedy deemed this significant in *Smith*, which at least involved another disparate-impact claim. In nearly four decades of Mine Act jurisprudence before the Commission and the Appellate Courts, there has never been any suggestion of even a remote association between such claims, grounded on a statistical showing of disparity between groups, and interference claims under the Mine Act.

> L.Ed.2d 396 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others *because of* their [protected characteristic]. Proof of discriminatory motive is critical" (emphasis added)).

Smith, 544 U.S. at 249 (emphasis in original). Thus, the author of *Inclusive Communities* read "because of" precisely as we do, and even if there were any plausible basis for applying disparate-impact analysis to interference cases as a threshold matter (there is not), employing the doctrine here would require a radical leap over a fortified barricade of legal authority and practical and evidentiary barriers. If the Court was hesitant to expand the scope of disparate-impact liability to analogous anti-discrimination statutes, it surely would never approve of its application to a case with no elements in common and no evidence of any disparity.

A more thoughtful review in place of the Secretary's specious analysis of Supreme Court precedent makes abundantly clear that *Inclusive Communities* is wholly irrelevant to the case before us.[15] Section 105(c)(1) is different in kind from Title VII and the Fair Housing Act. The Mine Act's prohibition against interference is not aimed at facially-neutral employer policies affecting miners because of their membership in a protected group. In characterizing Section 105(c) as an "anti-discrimination law," somehow similar to Title VII, the FHA or the ADEA, the Secretary disregards the fact that he suggests an interpretation that he would apply only to *interference* claims, and not to discrimination claims – for which he acknowledges motivation is required.[16] *Cf.* S. Resp. Br. at 18.

Finally, the Secretary argues that the use of the word "otherwise" in section 105(c)(1) indicates an intent to apply a disparate-impact analysis, as in *Inclusive Communities*. That argument makes no sense, linguistically, logically, or legally. All of the actions prohibited by section 105(c) (discrimination, discharge, etc.) are forms of "interference" with protected rights. Use of the term "otherwise" simply extends the Act's prohibitions to include employer conduct, such as threats of reprisals, that does not rise to the level of a direct and adverse employment action, and represent nothing more than Congressional recognition that interference may be found – and proved – in operator actions beyond those expressly enumerated, *when those actions are taken "because of" the exercise of protected rights.*

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[15] We must note, again, that *Inclusive Communities* repeatedly and emphatically makes clear that it is entirely grounded in disparate-impact theory, and a citation to the points in the case supporting this limiting principle would read simply "*passim.*" A full reading of *Inclusive Communities* abundantly demonstrates: it is a case decided to address a particular problem using particular evidentiary methods not applicable here and requiring evidence that has not been produced in this case.

[16] This non-sequitur flows from the fact that the Mine Act is, of course, nothing like statutes which seek to protect group members from discrimination *because of their membership in a group*, even in its "anti-discrimination" provisions.

The Secretary's argument disregards the fact that *Inclusive Communities* itself, like the disparate-impact cases upon which it relies, continues to require that plaintiffs prove causation, i.e., that the harm they have suffered is "as a result of" or "because of" their race. His citation to a single word yanked out of context cannot serve to erase statutory language – especially where the Secretary acknowledges that his position would require "because" to be interpreted differently in successive clauses of the same sentence. While we feel duty-bound to respond to all of the Secretary's arguments, in fact the question is settled at the initial consideration of the statute's plain meaning. The Court's "inquiry ceases [in a statutory construction case] 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Secretary's argument would reduce Section 105(c)(1) to incoherence and inconsistency – the exact opposite of the clear command of the law.

Disparate-impact liability has been relied upon in rare circumstances, e.g., when it has been "necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination." *Smith*, 544 U.S. at 262 (O'Connor, J., joined by Kennedy and Thomas, JJ., concurring in the judgment). Finding no such necessity, the O'Connor opinion Justices declined to extend *Griggs* beyond the remediation of "historical racial discrimination" – the same evil targeted by the Fair Housing Act and addressed in *Inclusive Communities*.

The Secretary has not made a showing that the expansion of a doctrine from cases of racial discrimination is not merely permissible and convenient but *necessary* to achieve the purposes of the Act.[17] There was no evidence adduced in this case showing that any miner would be prejudiced unfairly or the Act's protections neutered by a requirement to show that the Operators' actions were motivated by protected activity. In sum, there is no authority for applying *Inclusive Communities* even if there were evidence showing how miners interfered with might theoretically have been disparately impacted by the Operators' bonus plan, and there is no evidence showing that it would be necessary – or even proper – to apply a disparate-impact analysis in contravention of the statute's plain language.

III. The Secretary has Misstated Section 8(a)(1) of the National Labor Relations Act, Which is Materially Dissimilar to Section 105(c) and Must Be Read As Adverse to the Secretary's Position

The Secretary urges that Commission precedent compels us to rely on the National Labor Relations Act ("NLRA") as persuasive authority. The Commission does use NLRA case law to assist its interpretations. *See Gray*, 27 FMSHRC at 9-10. We are not compelled to follow NLRA case law. More importantly, here, an honest reading of the relevant provision of the NLRA torpedoes the Secretary's argument amidships.

[17] Neither the Commission nor the Courts have decided the issue before us in this case. *Griggs* was decided in 1971, before the Mine Act was signed and forty-five years before we heard this case on review. If disparate impact were essential to the protection of miners' rights, one imagines we would have heard of the need before now.

Section 8(a)(1) of the NLRA provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1).

Unlike section 105(c)(1), section 8(a)(1) does not include any motivational requirement – that is, there is no "because" in it. Actions that "interfere" or rise to the level of "coercion" are likely to be similar in both contexts, but the Mine Act contains the explicit requirement that interference must be occur "because of" protected activity – section 8(a)(1) of the NLRA contains no such requirement.

Thus, the NLRA case law is irrelevant due to the omission of "because" from section 8(a)(1), which is material and presumptively intentional. The Court has stated that it has "often noted that when 'Congress includes particular language in one section of a statute but omits it in another' – let alone in the very next provision – this Court 'presume [s]' that Congress intended a difference in meaning." *Loughrin*, 134 S. Ct. at 2390 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).[18]

The Secretary further failed to note that, in 8(a), Congress did require motivation, but only in subsection (a)(4), which makes it an unfair labor practice "to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (emphasis added).

Of course, the NLRA is an entirely separate statute. There is no congruence between the respective provisions of the Mine Act and the NLRA because the latter does not include "because" – a crucial term with fatal significance here. The Secretary's misstatement of the law is thus readily exposed, and the NLRA's interference provision has no relevance here.

IV. There Is No Basis for Our Colleagues' Reliance Upon an "Absurd Results" Theory and No Grounds for Re-Writing The Statute to Avoid Them.

The real danger represented by the misreading of the Mine Act is demonstrated by the fact that it is unnecessary to any purpose save bureaucratic expedience. A decade after *Griggs* – and 35 years before we heard this case — the Commission addressed, and resolved, the same concerns our colleagues and the Secretary have raised. *See Pasula*, 2 FMSHRC at 2795-2801; *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Our colleagues' claim that absurd results will necessarily flow from a consistent, harmonious reading of the provisions of section 105(c)(1). Their claim is demonstrably false.

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[18] The Secretary's argument elides the fact that the Commission has never equated the two provisions, which are not, in fact, similar in their requirements. We have not held that actions need not be motivated by protected activity, because in the entire history of the Act, every case considered by the Commission has presented facts showing motivation, and it is apparent from circumstance that the law was clearly understood as meaning what it plainly says.

The historical record, in fact, suggests that the contrary is true. The Commission as a whole has never varied from the need to show motivation in the more than 30 years since adopting the *Pasula-Robinette* framework. Here, our colleagues pursue the abstraction the Secretary has thrown them to suggest easing his duty under the law: The obligation to prove violations by substantial evidence, including *all* of the elements Congress has provided.[19]

Pasula-Robinette has long provided a framework and clear authority for deriving improper motivation from circumstantial evidence. Without doubt, evidence of motivation may be drawn from circumstantial evidence. Rather than attempting to demonstrate an improper motive, the Secretary seeks to avoid the necessity for proof by eliminating an element of the violation.[20]

We do not accept the Operators' argument, relied upon by the majority for its assertion of absurdity, that a specific occurrence of protected activity necessarily must precede an operator action motivated by a desire to thwart or prevent protected activity. *See supra* slip op. at 34 n.6. Commission case law related to operator efforts to deter protected activity remains fully applicable.

Following *Pasula* and *Robinette*, *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), raised the issue of whether a miner was discharged because the operator suspected he had engaged in protected activity. The Commission highlighted the motivation requirement: "Section 105(c) prohibits discharge, discrimination, or interference 'because' of 'a miner's exercise of any statutory right afforded by [the] Act.'" *Id.* at 1480. The Commission then found that, if a suspicion of protected activity motivated the discharge, such discharge would violate section 105(c) *even if the suspicion turned out to be incorrect*. Thus, the Commission's reading of the law is both protective of miners' rights and faithful to its intent.

In *Gray v. North Star Mining*, 27 FMSHRC 1 (Jan. 2005), we similarly found interference, overturning a Judge's conclusion that a threat he found not to have been sincere did

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[19] Legal reasoning unrelated to facts of record such as that employed here is not only devoid of useful content, it is arguably foreclosed to us. The Supreme Court has stated that "[i]t has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Commission, as an adjudicative body, is likely equally constrained by the Supreme Court's admonition, and the Commission since its inception has repeatedly expressed that we need not reach issues unnecessary to the disposition of cases. *See, e.g.*, *Ross v. Monterey Coal Co.*, 3 FMSHRC 1171, 1173 n.6 (May 1981); *Kaiser Steel Corp.*, 1 FMSHRC 343, 345 n.6 (May 1979).

[20] The Secretary, quite unlike the Court in *Griggs*, has not demonstrated a change in the law that justifies unsettling our interpretation of "because of" in discrimination cases or decades of settled law governing our use of inferences to resolve questions of motivation. He has simply seized upon *Inclusive Communities* as an instrument of interest and convenience.

not constitute interference. We held that, in determining whether an actor's statements are coercive under the Mine Act, Judges must consider the totality of the circumstances. *Id.* at 10.

The Secretary argues that *Gray*'s holding is substantially broader and that "[t]he only reasonable way to read *Gray* is as adopting the NLRA interference test and rejecting the notion that the interferer's intent matters." S. Resp. Br. 19. The Secretary misreads the *Gray* decision by ignoring the case's factual context, where the motivation was apparent.[21] The Commission in *Gray* did not confront the issue in the present case — whether an employer's allegedly interfering actions must be motivated by protected activity in order to constitute a violation of section 105(c)(1). Rather, *Gray* was concerned with policing the line between allowable comments and questions about protected activity and impermissible coercive interrogations and harassment about protected activity.

In *Gray*, a co-worker asked Gray about whether he had testified against him before a grand jury in a case related to unsafe mining activities. 27 FMSHRC at 3. Such testimony is protected activity under the Mine Act. 30 U.S.C. § 815(c)(1). The miner said that there would not be any hard feelings "unless you put the screw to me, then I'll kill you." 27 FMSHRC at 3. Later, the same miner asked Gray about another miner's testimony, stating that "if anyone had laid the screws to him that he would whip their ass." *Id.* The Judge found that such comments did not constitute threats because the co-worker did not actually intend to kill or hurt Gray or the other miner. *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 25 FMSHRC 198, 215-16 (Apr. 2003) (ALJ).

In that case, whether or not the threats were genuine, they were clearly motivated by protected activity (testimony related to unsafe mining activities). Protected activity was at the core of the case. The issue of whether motivation was required for interference was not before the Commission. Rather, the Commission found that the Judge applied the wrong legal standard in determining whether such comments rose to the level of coercion. The Judge had framed the question in the case as whether "[the miner] meant the literal meaning of the words, 'I'll kill you,' or whether he was speaking figuratively, as in, 'I'll *really* be upset with you.'" 27 FMSHRC at 10.

The Commission found that the Judge focused too narrowly on the goal of the statements – that is, "largely, if not exclusively, [the miner's] intent or motive in making the statements." *Id.* The Commission found that the occurrence of a violation did not turn upon the literal truth of the murder threat. Instead, the miner's "statements could be coercive, even if he did not mean to literally kill or cause physical harm to Gray or other miners who testified against him." *Id.* "[T]he judge should have considered the effect of [the miner's] statements in this broader context and what other meanings could be reasonably inferred from them, *rather than limiting her consideration to their literal meaning and what* [*the miner*] *intended*." *Id.* (emphasis added).

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[21] As previously noted, Section III, *supra*, the Secretary also dissembles the statutory language of the NLRA, which was not in issue in *Gray* and which, read fairly, undercuts his argument.

Therefore, in *Gray*, the Commission's decision is consistent with a requirement that the employer's action have a motivational nexus with protected activity. As the Commission stated in *Moses*, "the 'more subtle forms of interference' are coercive interrogation and harassment **over the exercise of protected rights**." 4 FMSHRC at 1478 (emphasis added). Here, the Secretary has not sought to demonstrate that the challenged plan was motivated in any way by considerations of protected activity, preferring instead to attempt a sweeping change in the interpretation of clear language, solely to make it easier for him to prove interference as a general matter wholly unrelated to the circumstances of this case.

Obviously, this would open the door for almost unlimited interference claims. A miner presumably could establish a prima facie case of interference by testifying that a supervisor's chastisement for slow work led him to believe he should not adequately rock dust his assigned area. Of course, this would be a direct result of construing the statutory term "because" – repeated for emphasis and certainty in each provision of 105(c)(1) – to mean one thing in a discrimination case while construing it to mean literally nothing in an interference case.

Finally, we must point to the *coup de grace* foreclosing the Secretary's position. While the Secretary has disparaged the decision of an administrative law judge in *Pepin*, and while our colleagues fret that miners would not be able to pursue interference claims if required to show motivation, the Judge in *Pepin* found evidence of motivation and held the operator liable for interference with the miner's rights in that case. In that way, *Pepin* is indistinguishable from every interference case decided by the Commission.[22]

There has been no showing of absurd results flowing from a faithful reading of the statute. Unanimous authority, including recent Supreme Court cases, makes clear that such cases against the plain meaning of a statute are hard to make, even with compelling facts and even with Circuit Court support. It is an impossible proposition here.

V. The Secretary's Interpretation Is Not Entitled to Deference.

Given the clarity of the language of section 105(c), the Secretary's claimed entitlement to *Chevron* deference hardly requires a response.[23] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

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[22] Even in *Franks and Hoy*, evidence of motivation was sufficient to convince two Commissioners that the miners in that case had been discriminated against. *See Franks and Hoy*, (Opinion of Commissioners Young and Cohen).

[23] It bears noting that Justice Kennedy joined Justices O'Connor and Thomas in refusing to extend deference to the EEOC in *Smith*. *See* 544 U.S. at 263-65.

The deference question is never reached here because it fails necessarily under step one of *Chevron*. *See* Section I.A., *supra*. Even if we were to consider deference, though, analysis under *Chevron* is foreclosed as a matter of law in this case.

Since the turn of the century, the Supreme Court has repeatedly addressed and reshaped the scope of *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Gonzalez v. Oregon*, 546 U.S. 243, 255-56 (2006), the Court confirmed that even if statutory language is ambiguous, "[d]eference in accordance with *Chevron*, however, is warranted *only* 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Id.* at 255-56 (emphasis added) (quoting *Mead*, 533 U.S. at 226-27). Here, there can be no such claim.

The Secretary's interpretation in this case does not germinate from any rule carrying the force of law, a prerequisite for *Chevron* deference under *Gonzalez*, *Christensen*, and *Mead*. Rather, the Secretary announced this interpretation in briefs and litigating positions before the Commission, which are not legally binding on the opposing party, the regulated industry, or the government itself. As a plurality of circuit courts have held specifically in Mine Act cases, the Secretary's litigating positions do not warrant *Chevron* deference. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 158-60 (4th Cir. 2016); *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 742 (6th Cir. 2012); *Vulcan Const. Materials L.P. v. FMSHRC*, 700 F.3d 297, 315-16 (7th Cir. 2012). *But see Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (disregarding *Mead*'s holding to afford *Chevron* deference to the Secretary's litigating position); *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 512 (8th Cir. 2012) (agreeing with the D.C. Circuit's approach).

Rather than contend with the commonsense, plain meaning of the Mine Act, our colleagues argue not with our interpretation but rather with the Operators' hyper-literal and incorrect interpretation that, if motivation is required, section 105(c) could not apply until after protected activity occurs.

Knowing that construction cannot stand review, our colleagues' willingly embrace it in an effort to support their effort to read "because" out of the statute. The Operators and our colleagues erroneously conflate "literal meaning" and "plain meaning" and boldly declare that "[b]ecause a literal reading of the statute leads to absurd results, the interference provision of section 105(c) *must* be seen as lacking a plain meaning." Slip op. at 10 (emphasis added). The D.C. Circuit and the Commission, though, have previously rejected this reasoning. *See Meredith*, 177 F.3d at 1054; *Nally and Hamilton*, 33 FMSHRC at 1763-64.

Of course, we do not accept the notion that section 105(c) does not protect miners from operator activity motivated by a desire to interfere with protected activity that has not yet occurred. Section 105(c) applies fully if the Secretary or claimant demonstrates that an operator's action was motivated by a desire to prevent protected activity from occurring in the first place. Slip op. at 31-38. For example, a general pre-hiring announcement or policy that any

miner who files a section 103(g) complaint will be fired would violate section 105(c) because it is because of a right to engage in protected activity.

As we said at the outset, the Secretary did not introduce evidence or argue, let alone prove, that the bonus plans were motivated by the prospect of protected activity. Our colleagues, naturally, have made no effort at all to reconcile the plain language with the circumstances in this case because no evidence permitting such analysis was introduced, and because the circumstances fall squarely within the *Pasula-Robinette* formula we have unfailingly applied to cases arising undr Section 105(c)(1).

As a final point, this case does not involve mining activities with respect to which MSHA may claim any special expertise or experience. The issue does not turn on a policy interpretation of a safety standard in the Mine Act or promulgated by MSHA. Here, we reach a legal decision on the meaning of legal requirements of the Mine Act, not mining practices prescribed in the Act. The Secretary has not taken any formal action to formulate and announce a coherent policy on discrimination and interference; instead, he attempts to prevail in a particular case by claiming deference without any recognition or consideration of the broad scope of the principle that would result.

MSHA has not demonstrated that it has considered the effect that eliminating motive from an interference claim might have on literally thousands of daily events in which management communicates a mining technique, mining practice, or mine directive to miners. The Secretary has not allowed any public comment or participation regarding an attempt to expand of the scope of section 105(c). Indeed, notwithstanding the use of "because" repeatedly after the prohibitions against discrimination and interference and the Secretary's agreement that motivation is a prerequisite for discrimination, the Secretary asserts the illogical and, frankly, absurd position that the word "because" requires motivation when applied to discrimination cases but does not require motivation when applied to interference cases.[24]

Congress designated the Commission as the adjudicatory agency for Mine Act disputes. There is no reason for the Commission to defer to a litigation position on a purely legal matter on which the Secretary has not demonstrated any formal, thoughtful, or fully informed consideration, analysis, or reasoning. The Secretary's position has neither the attributes required for *Chevron* deference nor persuasiveness were we to apply the standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[24] This point is especially relevant where, as here, the Secretary attempts an unprincipled and significant legislative revision that effectively reads congressional language out of the statute.

CONCLUSION

A principal goal of the Mine Act is to foster cooperation between management and workers on safety matters and increase worker participation in achieving safe working conditions. It does not advance the interests served by the Act to disconnect a miner's allegation of interference with protected rights from any exercise of protected rights. Further, the course urged by our colleagues would do real violence to basic principles of statutory construction and Commission precedents and would ratify an effort by the Secretary to arrogate to him legislative power reserved to Congress by the Constitution. We would reverse the Judge and dismiss this case for a lack of substantial evidence on an essential element of the violation.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Appendix A

SECRETARY OF LABOR, MSHA, on behalf of RICKY BAKER and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION v. OHIO COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	Docket Nos.: WEVA 2015-905-D WEVA 2015-906-D WEVA 2015-907-D WEVA 2015-908-D LAKE 2015-616-D
SECRETARY OF LABOR, MSHA, on behalf of LEVI ALLEN and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION v. THE MARSHALL COUNTY COAL CO., McELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	
SECRETARY OF LABOR, MSHA, on behalf of MICHAEL PAYTON and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION v. MARION COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:	

SECRETARY OF LABOR, MSHA, on behalf of ANN MARTIN and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION	:
v.	:
HARRISON COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION	:
SECRETARY OF LABOR, MSHA, on behalf of MARK RICHEY and UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION	:
v.	:
THE OHIO VALLEY COAL CO., and MURRAY ENERGY CORPORATION	:

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