FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 7, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of MARK GRAY	:	Docket No. KENT 2009-1429-D
	:	
v.	:	
	:	
NORTH FORK COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), Administrative Law Judge Gary Melick had ordered miner Mark Gray temporarily reinstated to his position at North Fork Coal Corporation ("North Fork") following Gray's discharge by the operator. 31 FMSHRC 1143, 1146 (Sept. 2009) (ALJ). Following the Secretary of Labor's subsequent announcement that she would not be filing a discrimination complaint on Gray's behalf, the judge dissolved the order of reinstatement. 31 FMSHRC 1420, 1421 (Dec. 2009) (ALJ). Gray soon thereafter filed his own discrimination complaint pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).

Both the Secretary and Gray filed timely petitions for discretionary review, challenging the dissolution of the reinstatement order in light of the pendency of Gray's section 105(c)(3) case. The Commission granted both petitions. A Commission majority now reverses the judge's decision to dissolve reinstatement, and holds that Gray's right to reinstatement remains in effect.

I.

Factual and Procedural Background

Gray was discharged from his position as a roof bolter at North Fork's No. 4 Mine in Partridge, Kentucky, on May 15, 2009. 31 FMSHRC at 1144. According to Gray, his termination

was due to his refusal to perform work he considered dangerous and to his complaints about safety hazards at the mine over the course of the previous month. *See id*. at 1144-45 (detailing Gray's safety complaints and work refusal). Consequently, Gray filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging that his discharge by North Fork was unlawful under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). *Id*. at 1144.

On August 13, 2009, the Secretary filed an application with the Commission to temporarily reinstate Gray to his position with North Fork, and on September 2, 2009, the judge held the hearing that North Fork had requested on the Secretary's application. In his order temporarily reinstating Gray, the judge applied the "not frivolously brought" standard for temporary reinstatement found in section 105(c)(2). *Id*. at 1143-44. The judge concluded that, under that low standard, there was sufficient evidence that Gray had engaged in protected activity by complaining of unsafe working conditions to his immediate supervisor and engaging in a protected work refusal, and that Gray's discharge was motivated by that protected activity. *Id*. at 1145. Consequently, the judge issued an order temporarily reinstating Gray. *Id*. at 1146. The parties soon thereafter agreed that Gray would not return to work but rather his reinstatement would be economic, and on September 17, 2009, the judge issued an order to that effect. 31 FMSHRC 1167, 1168 (Sept. 2009) (ALJ).

On November 3, 2009, North Fork moved to terminate temporary reinstatement on the ground that the Secretary had failed to file a timely discrimination complaint. In its motion North Fork argued that section 105(c)(2) of the Mine Act requires that the Secretary notify the miner, within 90 days of receiving the miner's complaint, whether discrimination had occurred. Mot. at 2-4.

The Secretary did not file a response addressing North Fork's motion to terminate. Rather, on November 23, 2009, the Secretary informed the judge that, three days earlier, she had sent written notification to Gray that, as a result of her investigation of his complaint, she had decided not to file a complaint pursuant to section 105(c)(2) with the Commission on Gray's behalf. 31 FMSHRC at 1420. The letter was copied to North Fork and stated:

> A careful review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that facts disclosed during the investigation do not constitute a violation of Section 105(c). Therefore, discrimination, within the confines of the Mine Act, did not occur.

NF Statement in Opp'n to PDR, Attachment. On December 2, 2009, the judge held that the order of temporary reinstatement must be dissolved and the temporary reinstatement proceeding dismissed. 31 FMSHRC at 1420.

On December 30, 2009, Gray, through his own counsel, filed an action on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). The case was docketed with the Commission at KENT 2010-0430, and is presently pending before another Commission administrative law judge

Both the Secretary and the Gray petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of Gray's section 105(c)(3) action. In granting both petitions, the Commission directed that the issue of the Secretary's standing to bring an appeal be addressed in the briefs.

II.

Disposition

The Commission recently addressed the issue this case raises in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009). In *Phillips*, Commissioners were evenly divided on the question of whether the judge correctly decided that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. 31 FMSHRC at 978-1004. Gray stated in his petition that review was again appropriate because, unlike when it decided *Phillips*, the Commission now has its full five-member complement of Commissioners. G. PDR at 2.

The judge in *Phillip*s had ordered dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ). The effect of the Commission's split decision was to allow the judge's decision to stand, as if affirmed. 31 FMSHRC at 979 (citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992)).[1] The judge's order was appealed only by the miner (who also filed his own discrimination action under section 105(c)(3)), but the Secretary participated as an amicus curiae.

In *Phillips*, Commissioners Duffy and Young voted to affirm in result the judge's dissolution of the temporary reinstatement order and dismissal of the temporary reinstatement proceeding. They did so on the ground that, under the plain meaning of section 105(c), a reinstatement order can only remain in effect while the Secretary is pursuing a section 105(c)(2) action; once she had determined that discrimination has not occurred, reinstatement is no longer appropriate. 31 FMSHRC at 980-89.

[1] We note that in this case the judge relied on the Commission's disposition in *Phillips*, which the judge described as affirming the judge's order below. 31 FMSHRC at 1420. To be clear, the judge's decision in *Phillips* stood *as if* affirmed, because the Commission was evenly split on the case. 31 FMSHRC at 979.

Chairman Jordan and Commissioner Cohen voted to reverse the judge's order, and would have had the temporary reinstatement order remain in effect. Chairman Jordan did so on the ground that the plain language of section 105(c) mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, whether it be under section 105(c)(2) or section 105(c)(3). *Id*. at 990-97. Commissioner Cohen found the language of section 105(c) to be ambiguous, that deference was due the Secretary's construction of the statutory provision, and that the Secretary's interpretation of the provision to require that temporary reinstatement remain in effect while the miner pursues relief under section 105(c)(3) is a reasonable one. *Id*. at 998-1004.

On review, the Secretary maintains that section 105(c) can only be read one way: a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether that final order is obtained pursuant to section 105(c)(2) by the Secretary, or by miner under section 105(c)(3). S. Br. at 3-4. The Secretary takes issue with the opinion of the Commissioners Duffy and Young in *Phillips*, both with regard to their conclusion that the Mine Act, by its plain meaning, prohibits the continuation of temporary reinstatement beyond the Secretary's determination that no discrimination occurred (S. Br. at 9-20), and their holding that the Secretary is not due deference in her interpretation of section 105(c) with respect to the question at hand because she does not participate in section 105(c)(3) cases. *Id*. at 5-7. The Secretary also takes the position that, because she has exclusive authority to apply for an order of temporary reinstatement, section 113(d)(2)(A)(i) of the Mine Act confers standing upon her to appeal a judge's decision to dissolve such an order, because she is a "person adversely affected or aggrieved" by the judge's decision. *Id*. at 20-28 (quoting 30 U.S.C. § 823(d)(2)(A)(i)).

North Fork responds that the Secretary lacks standing in this case because, by declining to pursue Gray's discrimination complaint under section 105(c)(2), she has essentially removed herself from the case. NF Br. at 3-4. North Fork maintains that temporary reinstatement is only effective as long as there is a complaint pending under section 105(c)(2), be it the miner's complaint filed with the Secretary or the Secretary's complaint filed with the Commission. *Id*. at 5-6. According to North Fork, because the miner's subsequent pursuit of his discrimination claim under section 105(c)(3) is described therein as an "action," it does not serve to extend the period during which the miner may be temporarily reinstated. *Id*. at 6-7. North Fork further maintains that this interpretation of section 105(c) is supported by the legislative history of the Mine Act, and that even if the Mine Act was ambiguous on this point, the Secretary's interpretation is not entitled to deference because the Secretary does not administer section 105(c)(3). *Id*. at 7-10. North Fork closes by arguing that to require that temporary reinstatement survive a finding by the Secretary that there has been no discrimination would deprive operators of due process of law. *Id*. at 11-14.

Gray in his initial brief chose to incorporate by reference the Secretary's brief. In his reply brief, Gray disputes that the Secretary does not have a role in a discrimination case brought under section 105(c)(3), and thus argues that her interpretation of section 105(c) is entitled to deference

and that she has standing to appeal the judge's dissolution order in this case. G. Reply at 1-3. Gray further contends that the multiple references in section 105(c)(2) to the "complaint" filed by the miner with the Secretary makes it impossible to hold that the reference to "pending final order on the complaint" can only mean the complaint filed by the Secretary with the Commission. *Id*. at 4-5.

The Secretary responded to North Fork's due process argument in her reply brief. There, she argues that the temporary reinstatement procedures of section 105(c)(2) have been upheld as non-violative of the Due Process Clause of the Fifth Amendment. S. Reply Br. at 2-7. According to the Secretary, any additional period of time a miner is reinstated while a section 105(c)(3) case is litigated does not deprive the operator of due process. *Id*. at 7-10.

A. Standing

Section 113(d)(2)(A)(i) of the Mine Act provides that "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission." 30 U.S.C. § 823(d)(2)(A)(i). Thus, we must decide whether, in the circumstances of this case, the Secretary is a "person adversely affected or aggrieved" by the judge's decision and, thus possessed of standing to petition for review of that decision. We conclude that she does.

In *Mid-Continent Resources, Inc*, 11 FMSHRC 2399 (Dec. 1989), the Commission determined that the appropriate question was whether the entity seeking review has

> shown a direct and concrete interest in this litigation and demonstrated that the outcome below has had an adverse impact on that interest. We stress at the outset that not every disagreement with a judge's decision amounts to a legally recognizable interest that is adversely affected. Rather, more substantial involvements such as a direct stake in the property or events that are the subject of the litigation, some concrete involvement in the controversy between the parties, or some direct effect of the judgment on a recognizable interest of the nonparty are required.

Id. at 2403.[2]

The Secretary easily meets this test. She clearly has demonstrated "some concrete involvement in the controversy between the parties" (which suffices under the Commission's disjunctive standard), as she filed the temporary reinstatement application and was a party in the proceeding before the judge. The judge's decision in this case was issued over her strenuous

[2] In *Mid-Continent*, an amicus in the proceedings before the judge sought party status on review. Here, of course, the Secretary was a party at the trial level.

objection. Moreover, the Secretary's interest in promoting miner safety and health is affected by the outcome of this appeal, as the discontinuation of temporary reinstatement could have a chilling effect on the willingness of miners to bring health and safety complaints. As "the designated champion of employees within [the] statutory scheme," the Secretary has a recognizable interest in this appeal. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-33 (1995).

Notably, under section 106(b) of the Mine Act, 30 U.S. C. § 816(b), the Secretary has the right to obtain review of "any final order of the Commission" in a Court of Appeals. If Congress authorized the Secretary to appeal any adverse order of the Commission to the courts, it would be illogical for her not to have the right to initially appeal the judge's adverse order to the Commission.

We reject North Fork's argument, NF Br. at 3, that because the Secretary concluded that section 105(c)(1) had "not been violated," she no longer has an interest in the temporary reinstatement proceeding in which the judge upheld her determination that the miner's underlying complaint was "not frivolously brought." These are not equivalent findings. Moreover, the statutory scheme is replete with other rights and responsibilities of the Secretary in temporary reinstatement proceedings and section 105(c)(3) discrimination matters, even when she has withdrawn from the discrimination case. For example, as Gray notes in his brief, the Secretary is still charged with issuing a civil penalty under section 110(a) of the Act if the miner prevails. 30 U.S.C. § 820(a). She also has the right to seek an injunction, restraining order, or other appropriate order in federal court if the operator fails to pay that penalty or fails to comply with a reinstatement order in a section 105(c)(3) case. 30 U.S.C. § 818(a)(1)(A). Thus, North Fork's assertion that the Secretary has "essentially remove[d] herself from the case," NF Br. at 3, quoting *Phillips*, 31 FMSHRC at 987 (opinion of Commissioners Duffy and Young), is misplaced. In sum, we find that the Secretary has standing to appear as a party in this appeal.

B. Statutory Interpretation

The question presented in this case is whether, under the provisions of section 105(c) of the Mine Act,[3] a temporary reinstatement order remains in effect after the Secretary has

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[3] Section 105(c) provides in part:

> (c)(1) 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 . . . because such miner . . . has filed or made a complaint under or related to this Act . . . .
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> (2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. . . .
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . .

determined that the allegations made by the miner in his or her discrimination complaint filed with MSHA do not constitute a violation of section 105(c)(1) of the Mine Act.

Under the Mine Act, a miner's temporary reinstatement remains in effect "pending final order on the complaint." 30 U.S.C. § 815(c)(2). Because the plain language of the statute mandates that temporary reinstatement continue until the Commission issues a final order regarding the merits of the miner's allegations of discriminatory conduct, we reverse the judge's order dissolving the miner's temporary reinstatement in this case.

A miner who alleges an illegal discharge may obtain temporary reinstatement in accordance with section 105(c), which provides in relevant part:

> [a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall . . . cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, *the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint*.

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

> of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance.

30 U.S.C. § 815(c).

Upon completion of her investigation, the Secretary makes a determination as to whether discrimination occurred. If the Secretary determines that the Act was violated, she must "immediately file a complaint with the Commission." *Id*. If the Secretary concludes that no violation occurred, she must notify the miner of that fact and the miner, pursuant to section 105(c)(3), has the right to "file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3). The issue in this case is whether the temporary reinstatement remains in effect while the miner proceeds on his own behalf to litigate his or her discrimination claim before the Commission.

In considering this question of statutory construction, we are mindful that 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 v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). 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. *Id.*; *Local Union 1261*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).[4] The issue before us is the duration of temporary reinstatement. Congress directly addressed this issue in section 105(c)(2) of the Act, which directs the Commission to "order the immediate reinstatement of the miner *pending final order on the complaint*" (emphasis added). We conclude that the plain language of the Mine Act clearly expresses the intent of Congress that a temporary reinstatement order stays in effect until there is a final Commission order on the merits of the miner's discrimination complaint to MSHA, whether that complaint is brought to the Commission by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3).

The legal question here involves the phrase "pending final order on the complaint." We conclude that "complaint" in this context means that miner's complaint to MSHA. The language of section 105(c)(2) supports this view, as the phrase "pending final order on *the* complaint" appears after five references to the miner's complaint to MSHA, and *before* any mention of the Secretary's complaint to the Commission. We also note that in this case in particular, it must refer to Gray's complaint to MSHA because, as Gray correctly points out, the Secretary's complaint never existed in the case. G. Reply Br. at 5.

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[4] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

The reference to "final order" refers to the *Commission's* final order, and not a determination by the Secretary. Our dissenting colleagues have previously indicated their agreement on this point. *See Phillips*, 31 FMSHRC at 981. The Mine Act sets forth the method by which the Commission issues a final order in a discrimination proceeding. If, after conducting her investigation, the Secretary decides that the Act has been violated, pursuant to section 105(c)(2) she is required to file a complaint with the Commission and to "propose an order granting appropriate relief." 30 U.S.C. § 815(c)(2). The Commission, after affording an opportunity for a hearing, is required to "issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief." *Id*. The Commission's order "become[s] final 30 days after its issuance." *Id*.

If the Secretary notifies the miner of her determination that no violation of section 105(c)(1) occurred, "the complainant," pursuant to section 105(c)(3), is entitled to "file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3). The Commission is required to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate." *Id*. This Commission order "become[s] final 30 days after its issuance." *Id*.

Thus, in accordance with the plain meaning of the statute, there is no "final order on the complaint" until the Commission issues an order which either affirms, modifies, or vacates the Secretary's proposed order in accordance with section 105(c)(2); or dismisses or sustains the complainant's charges in accordance with section 105(c)(3). It is clear that a final order in either case must be based on the Commission's findings of fact and the Commission's determination of whether discriminatory conduct in violation of section 105(c)(1) occurred.[5]

There has been no final Commission order on Gray's complaint. Therefore, the statutory prerequisite that would justify dissolution of his temporary reinstatement order is lacking. Although our affirming colleagues appear to treat it as such, the judge's order dissolving the miner's temporary reinstatement cannot constitute the prerequisite "final order on the complaint." To consider it in this manner would amount to a ruling that the final order on the complaint, necessary to dissolve the temporary reinstatement, is the order dissolving the temporary reinstatement.

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[5] North Fork contends that if the miner does not choose to go forward under section 105(c)(3), under our view of the statutory language there would never be a Commission final order on the discrimination complaint. NF Br. at 7. Since temporary reinstatement remains in effect "pending a final order on the complaint," the temporary reinstatement could never be dissolved. However, the requirement that temporary reinstatement remain in effect "pending final order on the complaint" necessarily implies that there is a possibility of obtaining a Commission final order on the discrimination complaint under sections 105(c)(2) or 105(c)(3). In the event the miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable.

The judge did not dissolve the miner's temporary reinstatement because of a final Commission order. The judge never considered the merits of Gray's claim. The sole basis of the judge's decision was the Secretary's determination that a violation of section 105(c) had not occurred, and her notification that she would not be filing a complaint on the miner's behalf.

Although they agree that the Secretary's determination regarding the results of her investigation does not constitute a final order under section 105(c), our colleagues nevertheless proceed to make the duration of the temporary reinstatement contingent on just this determination. Ignoring the statute's plain language, they conclude that if the Secretary determines that there has been no discrimination, the temporary reinstatement order would cease to be effective, and the judge should issue an order dissolving the temporary reinstatement and dismissing the temporary reinstatement proceeding. 31 FMSHRC at 981-82. The statute requires a final order from the Commission, not a determination from the Secretary, in order to dissolve a grant of temporary reinstatement. Our colleagues fail to realize that the judge lacked the necessary statutory prerequisite for dissolving the temporary reinstatement because no final order had been issued on the miner's complaint.

Our colleagues have been led astray by their narrow focus on section 105(c)(3)'s reference to the complainant's right to file an "action" in his own behalf before the Commission.[6] They consider the reference to filing an "action" under section 105(c)(3) as an indication that there no longer exists a complaint that can be the subject of a Commission order. Since temporary reinstatement stays in effect pending the Commission's "final order on the complaint," initiating an "action" under section 105(c)(3) must, in their view, extinguish the miner's temporary reinstatement. *Id*. at 981. Our colleagues' position is untenable in light of the pertinent statutory language and the Commission case law.

Much as our colleagues would like to erect an impenetrable analytical barrier between the miner's initial filing of a discrimination complaint to the Secretary and the miner's subsequent action before the Commission, neither the statutory language nor the Commission case law permit them to do so. Although section 105(c)(3) refers to an "action" before the Commission, the person who files this action is referred to in that section as the "*complainant*." 30 U.S.C. § 815(c)(3) (emphasis added). Thereafter, the Commission is instructed to afford an opportunity for a hearing and to "issue an order based upon findings of fact, dismissing or sustaining the *complainant's* charges." *Id*. (emphasis added). The reference to "complainant" is an acknowledgment that the proceeding under section 105(c)(3) involves the same alleged discriminatory conduct that prompted the miner's complaint to the Secretary under section 105(c)(2). The statute does not direct the miner to file a complaint under section 105(c)(3) because the miner has already filed a complaint. That is why the miner is referred to in section 105(c)(3) as the "complainant."

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[6] Section 105(c)(3) states that "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

Commission rulings have made that fact clear. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the operator argued that the complainant's amended filing pursuant to section 105(c)(3) differed too substantially from his complaint filed with the Secretary. The Commission agreed that the proceeding under section 105(c)(3) must be based on the matter initially investigated by the Secretary under section 105(c)(2) or else "the statutory prerequisites for a *complaint* pursuant to § 105(c)(3) have not been met." *Id*. at 546 (emphasis added); *accord Sec'y on behalf of Dixon v. Pontiki Coal Corp*., 19 FMSHRC 1009 (June 1997). The Commission's reference to the section 105(c)(3) proceeding as a "complaint" in *Hatfield* was not an isolated occurrence. In *Roland v. Secretary of Labor*, 7 FMSHRC 630 (May 1985), the Commission pointed out that "[s]hould the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3) . . . may file a discrimination *complaint* on his own behalf before the Commission." 7 FMSHRC at 635 (emphasis added).

Additional language in the Mine Act refutes the contention that Congress considered claims brought under section 105(c)(2) and (c)(3) to be such entirely separate proceedings, that they deemed it appropriate to provide temporary reinstatement pursuant to only one of them. Section 105(c)(3) states that "[p]roceedings under this section shall be expedited by the Secretary and the Commission." 30 U.S.C. § 815(c)(3). This mandate, however, undeniably applies to section 105(c)(2) actions as well (otherwise the reference to the Secretary makes no sense). Indeed, the Commission has interpreted it in this manner. *See Sec'y on behalf of Noe v. J & C Mining, LLC*, 22 FMSHRC 705, 706 (June 2000) (stating, in a section 105(c)(2) case, that "the Commission will be expediting these proceedings as it is statutorily required to do"). Likewise, section 105(c)(3) refers to Commission orders issued "under this paragraph" being "subject to judicial review in accordance with section 106." 30 U.S.C. § 815(c)(3). Clearly, however, a Commission order issued under section 105(c)(2) is also subject to judicial review.

The legislative history of the Mine Act underscores the strained nature of our colleagues' reading of the statute. The Conference Report states that:

> The Commission must afford an opportunity for a hearing, and thereafter, issue an order, based upon findings of fact, dismissing or sustaining *the complaint*, and granting such relief as may be appropriate. If the *complainant* prevailed in an action which he brought himself after the Secretary's determination, the Commission order would require that the violator pay all expenses reasonably incurred by the *complainant* in bringing the action.

S. Conf. Rep. No. 95-461, at 52-53 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1330 (1978) ("*Legis. Hist.*") (emphases added).[7]

[7] To support their interpretation of current law, our colleagues rely on the language of pending legislation, H.R. 5663 (the Robert C. Byrd Miner Safety and Health Act of 2010) and its

The Commission's Procedural Rules also demonstrate that the significance our colleagues place on the use of the word "action" in section 105(c)(3), as opposed to the word "complaint" in section 105(c)(2), is misplaced. Our rule clearly contemplates that a miner filing a claim under section 105(c)(3) does so by filing a "complaint." Procedural Rule 40(b) states:

> A discrimination complaint under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), have not been violated.

29 C.F.R.§ 2700.40(b).

Our dissenting colleagues have found support, and our concurring colleague finds ambiguity, in the Conference Report's instruction that the Secretary shall "seek temporary reinstatement of the complaining miner pending final outcome of the investigation." 31 FMSHRC at 985 (citing S. Conf. Rep. No. 95-461, at 52 (1977), *Legis. Hist.* at 1330); slip op. at 22-23. The literal application of this language, however, would result in the dissolution of the temporary reinstatement order upon conclusion of the Secretary's investigation, even if the Secretary determines that section 105(c)(1) was violated.

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accompanying House committee report. Slip op. at 27-28. Ironically, that bill clarifies the Mine Act to conform with our view of current law that temporary reinstatement remains in effect until the Commission disposes of a discrimination complaint on the merits, whether or not the Secretary pursues the complaint. H.R. 5663, 111th Cong. § 401 (2010).

We believe the dissent's reliance is premature and misplaced, given that Congress has not yet passed this legislation and could conceivably fail to enact it. Moreover, as one court has noted:

> The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. . . . The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value.

Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App.2d 41, 58 (1968).

That the temporary reinstatement provision was hardly viewed in the cramped fashion suggested by our colleagues is evidenced by the Senate Report, wherein the drafters explained that:

> The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

S. Rep. No. 95-181, at 37, *Legis. Hist*. at 625.

Because, under section 105(c)(3), a miner "brings his own action at his own expense and is in charge of his case," 31 FMSHRC at 984, our affirming colleagues have concluded that the need to account for harm due to "bureaucratic delay" does not exist. *Id.* Underlying this statement is the unsubstantiated notion that somehow a miner in a section 105(c)(3) proceeding will be able to control how quickly his or her case is resolved. Our affirming colleagues are concerned that if a miner remains temporarily reinstated during a section 105(c)(3) proceeding, there is little incentive for the miner to advance the proceeding expeditiously. 31 FMSHRC at 986 n.7. Of course, the corollary to this concern is that when the complainant miner is not temporarily reinstated, there is every incentive for the respondent mine operator to delay the section 105(c)(3) proceeding. While both scenarios are problematic, the appropriate question for us to consider is: which one caused Congress greater concern?

By making temporary reinstatement dependent on a determination that the miner's discrimination claim is "not frivolously brought," 30 U.S.C. § 815(c)(2), Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 n.11 (11th Cir. 1990).[8] While the employer's loss of its ability to control its workforce is not to be taken lightly, the legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36, *Legis. Hist*. at 624. Recognizing the important role that individual miners play in ensuring a safe and healthy working environment, Congress was also acutely aware that "mining often takes place in remote sections of the country where work in the mines offers the only real employment

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[8] Our colleagues invoke the Court's observation that "deprivation of an employer's right to control the makeup of its workforce is only a '*temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or by a decision on the merits in the employer's favor.'" 31 FMSHRC at 986 (citing *Jim Walter*, 920 F.2d at 748 n.11 (emphasis in original)). However, it appears the Court's comment was prompted by prior Commission Rule 44(f), 29 C.F.R. § 2700.44(f) (subsequently re-numbered as Commission Rule 45(g), 29 C.F.R. § 2700.45(g)), *id.* at 741, rather than by an independent interpretation of the statute.

opportunity." S. Rep. No. 95-181, at 35, *Legis. Hist*. at 623. The temporary reinstatement provision was viewed as "an essential protection" for miners who might not be able "to suffer even a short period of unemployment." S. Rep. No. 95-181, at 37, *Legis. Hist*. at 625. This Congressional balancing of equities applies equally to a section 105(c)(2) case brought by the Secretary, and to a section 105(c)(3) claim, brought by the miner on his own behalf after the Secretary declines to go forward.

Temporary reinstatement is imposed pursuant to a Commission order that the miner's discrimination claim was not frivolously made. The Secretary's decision not to proceed with the discrimination complaint does not transform that complaint into a frivolous action.[9] To hold otherwise would require us to conclude that Congress implemented a statutory provision (section 105(c)(3) of the Mine Act) devoted to the litigation of frivolous claims. To the contrary, not only does the Secretary's negative determination not reduce the complaint to a frivolous claim, the Commission has explicitly acknowledged that it "may find discrimination where the Secretary has not" and that "the Secretary's determination not to prosecute [a] discrimination case . . . is not probative of whether [the operator] discriminated against the miners." *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1117 (July 1995). Indeed, there have been numerous cases in which the Secretary declined to file a complaint and the miner successfully proceeded on his own behalf. *See, e.g.*, *Ross v. Shamrock Coal Co.,* 15 FMSHRC 972, 974-76 (June 1993); *Meek v. Essroc Corp*., 15 FMSHRC 606, 612-13 (Apr. 1993); *Womack v. Graymont Western US, Inc.*, 25 FMSHRC 235, 261-63 (May 2003) (ALJ); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (Feb. 1999) (ALJ); *Paul v. Newmont Gold Co.*, 18 FMSHRC 181, 191 (Feb. 1996) (ALJ).

Consequently, because the Secretary's decision not to go forward on the miner's behalf does not vitiate the previous finding that his or her complaint was not frivolously brought, the temporary reinstatement, which is based on that finding, must remain in effect "pending final order on the complaint."[10] Balancing the equities does not require the opposite conclusion. Requiring the temporary reinstatement to remain in effect pending the miner's litigation under section 105(c)(3) is no more inequitable than the Commission's determination that a temporary reinstatement order remains in effect pending appeal to the Commission, notwithstanding the fact that a Commission judge concluded, subsequent to a hearing on the merits, that no discrimination occurred. *See Sec'y on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999). In *Bernardyn*, the Commission recognized that the statutory language, providing for

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[9] We are mindful that the Secretary's determination is made without the benefit of discovery or a full hearing.

[10] In *Jim Walter,* the Eleventh Circuit explained that the basis for a temporary reinstatement order and the underlying merits of a miner's claim are "conceptually different," and it ruled that the temporary reinstatement order was a collateral order completely separate from the merits of the action. 920 F.2d at 744.

temporary reinstatement "pending final determination on the merits of the complaint," required this result. 21 FMSHRC at 950.[11]

In passing the Mine Act, Congress created two different mechanisms for bringing discrimination complaints, under which either the Secretary or the claimant may prosecute the case. Under either procedure, the same underlying complaint (filed initially with MSHA) is at issue. The statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on this complaint. Here, there has been no such final order on the miner's complaint. Thus, we reject the judge's conclusion that temporary reinstatement does not extend to proceedings brought by a miner under section 105(c)(3). We hold that, pursuant to the plain meaning of the Mine Act, a temporary reinstatement order remains in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3).

C. Due Process

We also find the operator's due process challenge unavailing. In *Jim Walter*, the Court held that the due process requirement that the operator be given the "opportunity to be heard 'at a meaningful time and in a meaningful manner'" was clearly met by a temporary reinstatement proceeding under section 105(c)(2) of the Mine Act. 920 F.2d at 748 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)). Despite the strenuous efforts of North Fork to distinguish a discrimination proceeding under section 105(c)(2) from that brought by a miner under section 105(c)(3), the reasoning of the Court in *Jim Walter* (regarding the due process afforded an operator in a temporary reinstatement hearing) applies with equal force whether the underlying discrimination proceeding continues under sections 105(c)(2) or 105(c)(3). As the Court explained:

> At [the temporary reinstatement hearing], the employer has the opportunity to test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary

[11] We recognize that in *Bernardyn*, the Commission refers to prior Procedural Rule 45(g), 29 C.F.R.§ 2700.45(g) (1999), which provided for dissolution of a temporary reinstatement order if the Secretary determined that discrimination did not occur, as a "gap filling provision designed to deal with a situation not addressed by the statute – the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)." 21 FMSHRC at 950. We believe this comment, which is dictum, to be incorrect since we have concluded that the referenced situation is addressed by the statutory language "pending final order on the complaint" and requires the maintenance of temporary reinstatement until there is a final determination by the Commission on the merits of the miner's claim of discrimination.

> reinstatement. . . . Most importantly, section 105(c)(2) requires that an *independent* decisionmaker determine whether a miner's complaint in a particular dispute meets the "not frivolously brought" standard. . . . [T]he statute grants [the employer] the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal. Thus, the risk of an erroneous deprivation from the standard of proof is substantially lessened by the provision of the panoply of additional procedural guarantees in section 105(c)(2).

920 F.2d at 747-48. What North Fork neglects to point out is that the "panoply of additional procedural guarantees in section 105(c)(2)" relied on by the Court in *Jim Walters* is identical whether the subsequent discrimination case proceeds with or without the Secretary. In both instances, there is a determination by an administrative law judge after an evidentiary hearing that the miner's complaint was "not frivolously brought."

North Fork also argues that there is no "expeditious review" because a miner's case brought pursuant to section 105(c)(3) can take years. NF Br. at 13. However, as we noted *supra* at 12, Congress mandated *in section 105(c)(3)* that "[p]roceedings under this section shall be expedited by the Secretary and the Commission." In addition, pursuant to the Commission's procedural rules, an operator can always file a motion to expedite the case. Commission Procedural Rule 52, 29 C.F.R. § 2700.52. Moreover, despite North Fork's argument that neither the Mine Act nor its implementing regulations establishes a deadline for section 105(c)(3) review, this is also true of a discrimination case brought by the Secretary under section 105(c)(2).

North Fork also contends that there is no "reliable initial check against mistaken decisions" (in violation of the standard set forth by the Supreme Court in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987)),[12] when the Secretary decides not to file a section 105(c)(2) complaint and reinstatement continues despite the Secretary's finding that no violation occurred. NF Br. at 13. However, this claim is unpersuasive, as, consistent with Commission precedent, reinstatement continues when a case is appealed to the Commission even after a *judge* determines that no discrimination occurred. *See Bernardyn*, 21 FMSHRC at 949-50.

Consequently, we reject the operator's claim that the continuation of temporary reinstatement violates the due process clause.

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[12] We note that in *Brock*, the Supreme Court held that the lack of an evidentiary hearing before temporary reinstatement pursuant to the Surface Transportation Assistance Act did not deny procedural due process. 481 U.S. at 258-68. Of course, in the case before us, an evidentiary hearing was held and the judge ruled that the applicable legal standard of "not frivolously brought" had been met.

D. Conclusion

The judge's order dissolving the temporary reinstatement is reversed. The miner is ordered economically reinstated to his former position, retroactive to September 14, 2009, including any pay increases, bonuses, and other benefits, as specified in the judge's September 17, 2009 order. *See Sec'y on behalf of Williamson v. CAM Mining*, *LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).

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Mary Lu Jordan, Chairman

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Patrick K. Nakamura, Commissioner

Commissioner Cohen, concurring:

I concur with sections II.A. (standing) and II.C (due process) of the opinion in these proceedings by my colleagues Chairman Jordan and Commissioner Nakamura. I also concur in result with section II.B of their opinion, and join them in reversing the judge's order dissolving Mark Gray's temporary reinstatement, and ordering Mr. Gray's economic reinstatement to his former position, retroactive to September 14, 2009, at his former rate of pay.

I join with my colleagues in concluding that a temporary reinstatement order stays in effect pending final resolution of a discrimination complaint filed with the Mine Safety and Health Administration ("MSHA"). I write separately because I find that the relevant statutory language – "pending final order on the complaint" – does not, as my colleagues conclude, have a plain meaning. I therefore find that the Commission must defer to the Secretary's reasonable interpretation of the statute.[1] This is the position I articulated in my opinion in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, 998 (Sept. 2009). Nothing that has been said or written in this case has persuaded me to change my conclusions in *Phillips*.

I.

In order to determine whether Congress' intention as to the question at issue can be gleaned from the "plain meaning" of the statutory language, we employ the "traditional tools of statutory construction." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). These include examination of the statute's text, legislative history, and structure, as well as its purpose. *See Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). As the D.C. Circuit recognized in *Bell Atlantic*, a court utilizes the text, history, and purpose of a statute to determine whether they convey a plain meaning that *requires* a certain interpretation. *Id*. at 1049 (emphasis in original).

Statutory language is considered ambiguous if reasonable minds may differ as to its meaning, and when it is open to two or more constructions. 73 Am. Jur. 2d Statutes § 114. Consequently, we must determine "whether the language of [the] statute is susceptible to more than one natural meaning." *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (citation omitted).

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[1] The first inquiry in statutory construction 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). If a statute is clear and unambiguous, effect must be given to its language. *See id.* at 842-43. If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See id.* at 843-44. Under *Chevron II*, deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (*citing Chevron*, 467 U.S. at 844).

II.

The critical statutory language in this case is from section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2): Upon a finding that a miner's complaint was not "frivolously brought," the Commission shall order "immediate reinstatement of the miner pending final order on the complaint" (emphasis added). The entire Commission agrees that the phrase "final order" refers to an order of the Commission rather than an administrative determination of the Secretary not to pursue the case. *Phillips,* 31 FMSHRC at 981 (opinion of Commissioners Duffy and Young), 991 (opinion of Chairman Jordan). Hence, the dispute relates to the meaning of the word "complaint": Either it refers to the complaint the miner initially files with the Secretary of Labor alleging discrimination, or it refers to the complaint the Secretary subsequently may file with the Commission pursuant to section 105(c)(2).

The most natural reading of the text of the statute is that of the Secretary, Mr. Gray, and my colleagues Chairman Jordan and Commissioner Nakamura. The word "complaint" is used five times in section 105(c)(2) before the phrase "pending final order on the complaint" appears, each time referring to the complaint filed by the miner with the Secretary. Only after the language creating the right to temporary reinstatement is set forth does Congress refer to the "complaint" filed by the Secretary with the Commission for the first time. Thus, the word "complaint" occurs seven times in section 105(c)(2), and the first five times it clearly refers to the miner's complaint filed with the Secretary.

Moreover, the word "complaint" is used three times in the sentence which includes the phrase "pending final order on the complaint." The first two times, it clearly refers to the miner's complaint with the Secretary. It is difficult to understand how Congress would use the word "complaint" twice to mean one thing and then, in the same sentence, use the same word to refer to something entirely different. The same word should not have multiple meanings when used in the same sentence. *Lewis v. Philip Morris, Inc.,* 355 F.3d 515, 536 (6th Cir. 2004).

However, the statutory text is not free from ambiguity. The word "complaint" in section 105(c)(2) also refers to the complaint filed by the Secretary with the Commission ("If, upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . ."). Under section 105(c)(3), when the Secretary declines to file a complaint with the Commission, the original "complainant" has a right to file an "action" with the Commission. It can rationally be argued, as my colleagues Commissioners Duffy and Young do, *Phillips,* 31 FMSHRC at 981, 983-84, that the "action" filed under section 105(c)(3) is analytically different for purposes of temporary reinstatement than a "complaint" filed under section 105(c)(2) by the Secretary.[2] Since the word "complaint" is susceptible to different meanings, I conclude that it is ambiguous.

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[2] Yet, it is the "complainant" who files the "action" under section 105(c)(3), and "complainant" would rationally refer back to the miner or other party who originally filed the complaint with the Secretary under section 105(c)(2).

Moreover, each of the proponents claiming that the statute has a plain meaning can point to a literal impossibility created by the other proponents' interpretation.

As Mr. Gray and Chairman Jordan and Commissioner Nakamura point out, if the complaint to the Secretary is "not frivolously brought," section 105(c)(2) creates the right to "immediate reinstatement of the miner pending final order on the complaint." G. Br. at 5; slip op. at 8. The interpretation by Commissioners Duffy and Young that "complaint" refers to the Secretary's complaint with the Commission is a literal impossibility because at the time that temporary reinstatement comes into existence, the Secretary's complaint with the Commission is not in existence. Indeed, as in this case, it may never come into existence. It is hard to understand why Congress would have intended the phrase "pending final order on the complaint" to refer to the Secretary's non-existent complaint, when the miner's complaint to the Secretary is already in existence.

However, Commissioners Duffy and Young point out a literal impossibility resulting from the interpretation of Chairman Jordan and Commissioner Nakamura. Slip op. at 31. Assuming a miner is placed in temporary reinstatement under section 105(c)(2) and the Secretary does not file a complaint with the Commission, if the miner does not file an "action" under section 105(c)(3), the Commission will never have an opportunity to issue a "final order on the complaint." The miner's complaint with the Secretary no longer exists, having perished with the Secretary's finding of no discrimination upon investigation and the miner's failure to file an action within 30 days under section 105(c)(3). However, read literally, the right to temporary reinstatement continues because there has been no final order by the Commission on the complaint. Clearly, Congress did not intend this result either. Chairman Jordan and Commissioner Nakamura assert that if the miner does not file an action under section 105(c)(3), "obviously the temporary reinstatement provision would no longer be applicable." Slip op. at 10 n.5. I agree that temporary reinstatement ceases in this scenario, but I do not think it is "obvious" under a literal reading of the statute.

Thus the literal impossibilities created by each of the "plain meaning" interpretations of the statute confirm that the statute actually is ambiguous.

In terms of the statute's structure, Commissioners Duffy and Young describe a "two-track system" where the miner's "complaint" in section 105(c)(2) is distinctly different from the miner's "action" in section 105(c)(3). *Phillips,* 31 FMSHRC at 983-84. According to them, temporary reinstatement applies in section 105(c)(2) cases but not in section 105(c)(3) proceedings. *Id.* However, this analysis is undercut by the fact that section 105(c)(3) contains three provisions which are not explicitly stated in section 105(c)(2), but which are clearly applicable to 105(c)(2):

> Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with

> section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

30 U.S.C. § 815(c)(3). Indeed, if the Secretary is uninvolved with proceedings under section 105(c)(3), as Commissioners Duffy and Young, suggest, then there would be no reason for Congress to say that the Secretary, together with the Commission, is charged with expediting proceedings "under this section."

Commissioners Duffy and Young assert that if, upon investigation, the Secretary determines that the provisions of section 105(c) have not been violated, "[a]s a practical matter, this terminates the Secretary's involvement in the case." Slip op. at 29. This statement assumes that the miner is unsuccessful in his action under section 105(c)(3). But if the miner should prevail in this action, then, as Mr. Gray points out, the Secretary must issue a civil penalty to the operator under section 110(a), and may seek an injunction, restraining order, or other appropriate order in federal district court under section 108 if the operator, for example, should fail to comply with an order to reinstate the prevailing miner or fail to pay the civil penalty assessed in the case. G. Br. at 2. Thus, "as a practical matter" the Secretary's involvement is terminated only if the miner doesn't prevail.[3]

With regard to the legislative history, as I pointed out in my opinion in *Phillips,* 31 FMSHRC at 1001, it may be read to support either of the conflicting interpretations.

The Secretary relies on the Senate Report, which states that Congress intended that section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." 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 Health Act of 1977*, at 624 ("*Legis. Hist*."). The Secretary quotes the same report to the effect that upon determining that the complaint was not frivolously brought, she shall seek "an order of the Commission temporarily reinstating the complaining miner pending *final outcome* of the investigation *and complaint*" as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Br. at 17-19 (citing S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis in brief)).

In contrast, Commissioners Duffy and Young cite the Conference Report, which states that the Conference Committee adopts the Senate version of the provision, but which, according to the Conference Committee, provides that if the complaint was not frivolously brought, the Secretary shall "seek temporary reinstatement of the complaining miner pending the *final outcome of the investigation*." *Phillips,* 31 FMSHRC at 985 (citing S. Conf. Rep. No. 95-461, at 52-53 (1977), *Legis. Hist*. at 1330-31) (emphasis in opinion of Commissioners Duffy and Young).

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[3] Even so, the Secretary may have become involved to expedite the proceedings under section 105(c)(3).

Thus, the Conference report referred to temporary reinstatement until completion of the investigation (if the Secretary did not find discrimination), while the Senate Report spoke of temporary reinstatement until the resolution of the entire complaint. The legislative history can be interpreted quite differently depending on which report is quoted.

Commissioners Duffy and Young assert that a provision of the proposed Robert C. Byrd Miner Safety and Health Act of 2010 ("proposed Byrd Act"), H.R. 5663, supports their view that termination of a miner's temporary reinstatement is mandated by the plain meaning of section 105(c)(2) of the existing Mine Act upon the Secretary's investigative finding of no discrimination. Slip op. at 27-28. The proposed Byrd Act, as approved by the House Committee on Education and Labor on July 21, 2010, would amend the temporary reinstatement provision of the Mine Act so as to clearly state that a miner's temporary reinstatement continues until all proceedings on the miner's discrimination complaint are concluded, irrespective of whether the Secretary files a complaint with the Commission. Commissioners Duffy and Young insist that this Congressional proposal is a "vindication" of their view that under existing law an order of temporary reinstatement must be dissolved if the Secretary does not file a discrimination complaint with the Commission. *Id*. They base this assertion on the fact that H.R. Rept. No. 111-579, which contains the proposed Byrd Act, does not state that *Phillips* was "wrongly decided." *Id*. at 28. In point of fact, (1) *Phillips* was not "decided" at all but rather was a 2-2 tie vote of the Commission which allowed the underlying ALJ decision to stand, and (2) the discussion of the provision in House Rept. No. 111-579 does not address either the time or the circumstances when temporary reinstatement ceases. *See* House Rept. No. 111-579, Part I, at 42 (Summary of Bill), 62-63 (solution to the problem of protecting miners from retaliation), and 98-99 (Section-by-Section analysis) (2010). The likelihood is that the drafters of the proposed Byrd Act recognized that present section 105(c) is ambiguous.

Hence, I conclude that the statute is ambiguous, a conclusion reinforced by the Commission's previous statement that "the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c)" is "a situation not addressed by the statute." *Sec'y on behalf of Bernardyn v. Reading Anthracite Co.,* 21 FMSHRC 947, 950 (Sept. 1999) (emphasis added). If the Commission decided in *Bernardyn* that the statute is ambiguous, it is difficult to understand the Commission now saying that the statute has a plain meaning.

III.

Since the statute is ambiguous, *Chevron II* requires the Commission to defer to the interpretation of the Secretary, if that interpretation is reasonable. As stated in *Energy West*, 40 F.3d at 460, "we will defer to an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." Commissioners Duffy and Young assert that, assuming the statute is ambiguous, this is not a case where the Commission is required to defer to the reasonable interpretation of the Secretary. Slip op. at 31 n.5. I disagree, and conclude that the principle of deference is plainly applicable.

Commissioners Duffy and Young assert that the principle of deference does not apply here because, within the *Energy West Mining* framework, section 105(c) is not a "statute [the Secretary] is charged with administering." According to my colleagues, the Secretary "admits that section 105(c) has been *specifically* designed to give the Commission, and not the Secretary, the final word in discrimination cases under the Mine Act." *Id*. (emphasis in original). However, my colleagues misconstrue the Secretary's position. In terms of deference principles, the Fourth Circuit, in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), analyzed an analogous situation involving whether, under section 105(c) of the Mine Act, unemployment compensation should be deducted from a back pay award. The Secretary and the Commission proposed conflicting answers. The Secretary claimed deference for her interpretation and the mine operator claimed deference for the Commission's interpretation. The Court concluded that it was the Secretary, based on her "constant contact with the daily operations of the mines," who was entitled to deference. *Id*. at 113-15. As a decision involving consideration of deference in the context of a discrimination case, *Wamsley* has controlling weight.

Thus, since the statute is ambiguous, it is part of the Secretary's function to offer an interpretation of the parameters of temporary reinstatement under the Act. Pursuant to *Chevron II* and its progeny, the Commission must defer to it if is reasonable.[4]

IV.

The final inquiry is whether the Secretary's interpretation of the statute is reasonable. As I stated in *Phillips,* 31 FMSHRC at 1002-04, the Secretary's interpretation is reasonable, and therefore entitled to deference. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

As indicated above, and in the opinion of Chairman Jordan and Commissioner Nakamura, the Secretary's interpretation that temporary reinstatement must be continued if a miner proceeds in a discrimination action under section 105(c)(3) is consistent with the text of the statute, the structure of the statute, and one version of the legislative history. It is also consistent with the purpose of the statute.

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[4] Commissioners Duffy and Young, quoting the Secretary's acknowledgment that she may be wrong in failing to find a violation of section 105(c)(1) in a specific case (as evidenced by the fact that in numerous cases over the years, a miner prevailed in a section 105(c)(3) action even though the Secretary declined to file a complaint under section 105(c)(2)), S. Br. at 17, also assert that it is "not logical" for the Secretary to claim deference as to general legal principles relating to temporary reinstatement. Slip op. at 31 n.5. However, the flaw in logic is on the part of my colleagues, not the Secretary. The fact that the Secretary may be wrong in failing to detect discrimination in particular cases (after an investigation lacking the tools of discovery and subpoena power) is entirely unrelated to whether deference should be given to the Secretary's interpretation of the temporary reinstatement provision, assuming that interpretation is reasonable.

Commissioners Duffy and Young assert, essentially, that if the Secretary finds, upon investigation, that the statute was not violated, it renders the Commission's determination that the miner's complaint was "not frivolously brought" a nullity. However, temporary reinstatement during the litigation of a discrimination complaint is a provisional measure. The requirement of "not frivolously brought" is a lesser hurdle than proof of the ultimate fact of discrimination. *See Jim Walter Res., Inc. v. FMSHRC,* 920 F.2d 738, 744 (11th Cir. 1990) ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement."). Hence, it is not inconsistent for the Secretary to say that her investigation (without discovery or subpoena power) may not have found discrimination, but the miner is still entitled to temporary reinstatement if he chooses to file an action under section 105(c)(3). Indeed, unless our holding in *Bernardyn, supra* (temporary reinstatement order remains in effect pending appeal to the Commission after a Commission judge concludes that discrimination was not proven), was wrongly decided, which my colleagues do not assert, it would be incongruous to conclude that temporary reinstatement must cease upon the Secretary's investigative finding of no discrimination. After all, the judge who found no discrimination in *Bernardyn* did so after discovery and a full evidentiary hearing, a much more thorough proceeding than the Secretary's initial investigation in this case.

Moreover, a finding that a discrimination complaint was "not frivolously brought" is made by a Commission judge after a hearing.[5] It is no more dependent on the Secretary's investigative finding that a violation of the statute did not occur than is a Commission judge's finding in an operator's appeal from a citation that a violation of a mandatory safety standard did occur.

The Secretary has a vital interest in ensuring that miners who file section 105(c) complaints are entitled, as a class, to temporary reinstatement until the Commission issues a final order – regardless of whether the Secretary has determined, for whatever reason, that a miner has not demonstrated to her satisfaction that discrimination has occurred in a particular case. Because "enforcement of the [Mine] Act is the sole responsibility of the Secretary," *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006), she has an interest in ensuring that section 105(c) is interpreted in an expansive manner, as vigorous protection for miners who make safety complaints. The unfettered right of miners to complain about safety issues without fear of economic penalty is an important and necessary adjunct to the Secretary's effective enforcement of the Act. The legislative history of the Mine Act clearly demonstrates the importance Congress attached to temporary reinstatement, and its concern about miners who would otherwise be out of work while their discrimination complaints were being processed: "[T]emporary reinstatement is

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[5] As Chairman Jordan and Commissioner Nakamura note, slip op. at 16-17, it is the right to a hearing which protects the operator's due process rights. *See Jim Walter, supra*. I note that when *Jim Walter* was decided, Commission Rule 45(g) required that temporary reinstatement end when the Secretary decided not to proceed under section 105(c)(2). In 2006, the Commission revised Rule 45(g) so as to delete this provision. 71 *Fed. Reg.* 44,190, 44,199 (Aug. 4, 2006).

an *essential protection* for complaining miners who may not be in the financial position to suffer even a short period of unemployment pending the resolution of the discrimination complaint." S. Rep. No. 95-181, at 37, *Legis. Hist.* at 625 (emphasis added).

Anything that could potentially interfere with or diminish the willingness of any miner to complain about safety in his or her workplace – including the prospect of being fired in retaliation for complaining and not having the right to temporary reinstatement at any point before a final resolution of the complaint – would thwart the Secretary's overarching mission to make our nation's mines safer. It would also assign to the complaining miner all risk of error when it is the miner who is least able to bear such risk. *See Jim Walter*, 920 F.2d at 748 n.11 (Congress "clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding"). I find that to cut off a complaining miner's entitlement to the protections afforded by temporary reinstatement at <u>any time</u> before his or her complaint has been fully adjudicated is at odds with what the Mine Act stands for.

Hence, I conclude that the judge erred when he issued an order dissolving Mark Gray's temporary reinstatement, and join with my colleagues in the majority in reversing that order, and restoring to Mr. Gray the economic benefits of his former position.

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Robert F. Cohen, Jr., Commissioner

Commissioners Duffy and Young, dissenting:

We continue to hold to the view on this issue we expressed in our opinion upholding the judge's decision to dissolve the order of temporary reinstatement in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, 980-89 (Sept. 2009). As we expressed in that case, the structure of and language used in section 105(c) of the Mine Act, 30 U.S.C. § 815(c), as well as the legislative history and historical background of the provision,[1] leads to only one conclusion: the availability of the temporary reinstatement remedy is inextricably linked to the Secretary's continued participation before the Commission in the reinstated miner's complaint of unlawful termination under the Act. Once the Secretary has, for whatever reason, chosen to end her participation in the underlying discrimination case, the extraordinary right to temporary reinstatement ceases, and the judge has no choice but to dissolve the order of reinstatement. That is the case where the Secretary has refused to go forward with a complaint of discrimination under section 105(c)(2), as she has here, and where she has filed such a complaint but refused to follow through with a hearing before a Commission judge, as she has in the companion case we issue today, *Baird v. PCS Phosphate Company*, Docket No. SE 2010-74-DM.

If anything, legislative events since the Commission issued its *Phillips* decision have confirmed that this was the position of Congress when it enacted the Mine Act and section 105(c). On July 21, 2010, the House Committee on Education and Labor approved H.R. 5663, the Robert C. Byrd Miner Safety and Health Act of 2010. Section 401 of the bill would amend the temporary reinstatement provisions of the Mine Act to read as follows in a new section 105(c)(3)(B):

> (B) REINSTATEMENT.—If the Secretary finds that [the discharged employee's discrimination] complaint [to the Secretary] was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner or other employee until there has been a final Commission order disposing of the underlying complaint of the miner or other employee. If either the Secretary or the miner or other employee pursues the underlying complaint, such reinstatements shall remain in effect until the Commission has disposed of such complaint on the merits, regardless of whether the Secretary pursues such complaint by filing a complaint under subparagraph (D) or the miner or other employee pursues such

[1] Our colleagues Chairman Jordan and Commissioner Nakamura question whether the literal language of the Conference Report on the Mine Act should be looked to in discerning legislative intent. Slip op. at 13. In *Phillips*, however, we did not state that the report language in question should be taken literally; rather, we cited it as a strong indication that the ultimate drafters of the Mine Act viewed the Secretary's continued participation in the discrimination proceedings as a prerequisite to the miner's continued right to temporary reinstatement. *See Phillips*, 31 FMSHRC at 985.

> complaint by filing an action under paragraph (4). If neither the Secretary nor the miner or other employee pursues the underlying complaint within the periods specified in paragraph (4), such reinstatement shall remain in effect until such time as the Commission may, upon motion of the operator and after providing notice and an opportunity to be heard to the parties, vacate such complaint for failure to prosecute.

Cf. Chisom v. Roemer, 501 U.S. 380, 396 (1991) (revisions and lack of revisions in subsequent legislation, as well as silence in extensive legislative history, taken into account in discerning legislative intent).

H.R. 5663, should it eventually become law, would give the Secretary in future cases exactly what she is seeking in this case through her petition for review. The extent of the right to temporary reinstatement is a policy choice best entrusted to Congress, not shifting Commission majorities or a Secretary of Labor tempted to save resources by sponsoring a miner only for temporary reinstatement but leaving him to fend for himself in the subsequent, more rigorous, discrimination proceeding.

Morever, there is no indication that the House Education and Labor Committee views the result in *Phillips* as having been contrary to existing law. The report that accompanies the bill is not reticent in discussing relevant administrative and court decisions under existing law. However, while the report mentions three separate times that the bill would change the Mine Act's anti-discrimination provisions, in none of those instances does it state that *Phillips* was wrongly decided under the version of section 105(c) that is now in effect. *See* H.R. Rep. No. 111-579, Part 1, at 42 (Summary of Bill), 62-63 (solution to the problem of protecting miners from retaliation), and 98-99 (Section-by-Section Analysis) (2010). Consequently, we view the apparent necessity to revise section 105(c) as a vindication of our view that, under existing law, the judge has no choice but to dissolve temporary reinstatement upon the Secretary's exit from the underlying discrimination proceeding.

Congress – that body whose laws we enforce, consistent with its intent – is hardly alone in viewing the miner's action and remedies as separate from those pursued by the Secretary. Our administrative law judges have considered that a miner who disclaims any private remedy effectively terminates his case before the Commission. *See Alvarez v. Loudoun Quarries,* 32 FMSHRC 1346, 1349-50 (Sept. 2010) (ALJ) (complainant's unqualified rejection of reinstatement from point of termination to present renders claim moot because damages are precluded); *Sonney v. Alamo Cement Co.,* 29 FMSHRC 310, 312-15 (Apr. 2007) (ALJ) (claim is moot "when it is *impossible* for the court to grant any effectual relief" to a prevailing party) (emphasis added, citations omitted). Thus, the notion advanced here that the Secretary's public duty continues in the miner's private case is alien to and unprecedented in our jurisprudence.

This is critical, because the temporary reinstatement the Secretary secures for the miner, pending her investigation and determination of whether a violation of the Act has occurred or not, is inextricable from her public duty as the steward of the Act and the protector of the rights of miners who labor under it. She has a duty to faithfully and thoroughly investigate the underlying facts, and that duty runs not only to the individual miner whose complaint to the Secretary initiates the investigation, but to all miners. But the Act goes further in defining her obligations: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated," she is required to notify the claimant, who may initiate an action on his or her own behalf. 30 U.S.C. § 815(c)(3). As a practical matter, this terminates the Secretary's involvement in the case.[2]

This public duty must be related back contextually to the original action initiated by the Secretary for temporary reinstatement. Importantly, the initial determination as to whether or not the complaint is frivolously brought is made by the Secretary. Yet this determination is made before the completion of the investigation the law requires her to undertake. Our colleagues Chairman Jordan and Commissioner Nakamura downplay the significance of the investigation commanded by the statute, stating that the Secretary's determination is made without the benefit of discovery or a full hearing. Slip op. at 15 n.9. There are several manifest weaknesses in this argument.

First, the initial determination of non-frivolousness is also made without discovery, and the hearing provided for is exceedingly narrow, with a forgiving standard of proof. Second, while the Secretary does not have the benefit of discovery, she has access, through her investigatory powers, to both sides of the case, presumably including witnesses and documentation. Third, it is the Secretary's burden to establish, by a preponderance of the evidence, that discrimination has occurred. That is the purpose of the hearing. Yet her determination must be grounded, not on an unlikelihood that her action will be successful, but on a determination by the Secretary, after a "*full* administrative investigation," *see Hatfield*, 13 FMSHRC at 545 (emphasis added), "that the provisions of this subsection have *not been violated*." 30 U.S.C. § 815(c)(3) (emphasis added).

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[2] Our colleagues observe that we have held that a miner's action under section 105(c)(3) must be based on the matter initially investigated by the Secretary pursuant to section 105(c)(2). Slip op. at 11-12 (citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991)). This is true, but misses the point of *Hatfield*. The Commission held in that case that "the statutory scheme provides to miners a *full* administrative investigation and an evaluation of an allegation of discrimination, *as well as the right to a private action in the event that the administrative evaluation results in a determination that no discrimination occurred*." *Hatfield*, 13 FMSHRC at 545 (citations omitted, emphases added). The miner in *Hatfield* had made no specific allegations of protected activity in his complaint to MSHA. Thus, the Commission held that the Secretary was effectively prevented from carrying out her investigative duties under the Act, while observing the clear distinction between those duties and the *private* action available to the miner after a full investigation and a finding that no discrimination had occurred.

Our colleagues nonetheless hold that "[t]he Secretary's decision not to proceed with the discrimination complaint does not transform the complaint into a frivolous action," and then go on to state that "*because* the Secretary's decision not to go forward on the miner's behalf does not vitiate the previous finding that" the miner's complaint was not frivolously brought, temporary reinstatement must remain in effect. Slip op. at 15 (emphasis added). First of all, the Secretary most assuredly does *not* merely "decide not to proceed" or "decide not to go forward on the miner's behalf." Rather, as we have noted, she determines that a violation of the law has not occurred and discontinues the participation of the United States in the case.[3]

Secondly, our colleagues' reasoning greatly simplifies the problem before us in this case by assuming away the issue. While it is true that the statute does not expressly require the Secretary to find that the miner's action, upon investigation, appears to be "frivolous," the Act *does* require her to determine whether or not there is a sufficient factual and legal basis to permit continued prosecution of the matter complained of, and to act accordingly.[4] Permitting the Secretary to abandon meritorious claims is inconsistent with her public duties and with the express statutory mandate to determine through investigation whether or not the law has been violated.

Thus, the nature of the Secretary's investigation and the conclusion she reaches is inescapable. As we previously noted, a finding by the Secretary that the Act was not violated is a determination with legal effect and consequences. *Phillips*, 31 FMSHRC at 983. The Secretary has a clear obligation to file a complaint *immediately* on behalf of the miner if she determines the Act has been violated, and to notify the miner that she will not prosecute the claim, thereby permitting a private action, if she finds to the contrary.

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[3] Our colleagues claim that Congress would not permit a frivolous action before the Commission. Slip op. at 15. Congress has expressly determined that the United States should not participate in an action where the Secretary, empowered to act on behalf of the United States and the miner, affirmatively finds that the terms of the Act have not been violated. The same subsection of the law empowers the Secretary, again acting on behalf of the United States, to protect the public interest in ensuring that those who draw attention to unsafe conditions or practices in our mines are not punished for doing so. The temporary reinstatement provided to secure this interest is imposed before the investigation commanded by the subsection. Congress clearly did not intend the inspection to be meaningless, superficial, or inconsequential.

[4] Assuming, *arguendo,* that when the government agency charged with the protection of miners and the interpretation and application of the Mine Act on their behalf expressly finds that there is insufficient legal or factual support to allow continued prosecution, the matter is not rendered frivolous as a matter of law, we would hold that an operator should be permitted to seek dissolution of the order of temporary reinstatement on the grounds that it has been found to be unsupported in fact or law. This would at least require the Secretary to explain why she has decided not to seek the vindication of a miner's rights in a case that may have merit or, in the alternative, why temporary relief should continue in a case that lacks merit.

Moreover, the center of our colleagues' case – that because there is no "order" terminating the complaint to MSHA, reinstatement must continue – is undercut by a fact acknowledged by the majority: there is no order disposing of the temporary reinstatement if the miner elects *not* to proceed with a private action within 30 days. Slip op. at 10 n.5. They attempt to finesse this by claiming that the "*possibility*" of a final order is a necessary implication requiring temporary reinstatement to continue during the interregnum between the Secretary's determination and the expiration of the 30-day period, on the one hand, or the miner's initiation of a private action on the other. *Id.* Why a complementary implication requiring dismissal does not arise if the miner elects to proceed with a private action is not explained, beyond the acknowledgment that if the "miner foregoes that possibility, obviously the temporary reinstatement provision would no longer be applicable." *Id*. We are baffled as to how the Secretary – whose judgement and expertise we acknowledge routinely – is unable to make a binding determination because the statute requires a final order, yet the decision of a miner is fatal and binding on the Commission, even though there has been no order in that instance either.[5]

Finally, our colleagues dismiss the operator's claim that its due process rights are violated by continuation of reinstatement even though the Secretary has found that the operator did not

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[5] As we explained in our opinion in *Phillips*, even if we were to find section 105(c) ambiguous on this issue, we do not believe this is an issue on which deference to the Secretary is appropriate. While on one hand the Secretary continues to argue that deference to her is required by *general* principles of administrative law and statutory construction (S. Br. at 5-7), she also admits that section 105(c) has been *specifically* designed to give the Commission, and not the Secretary, the final word in discrimination cases under the Mine Act, because the Secretary could be wrong in refusing to pursue a miner's discrimination complaint. *See id*. at 14-16. We fail to see why resort to general principles is necessary when Congress has directly spoken on the subject of the division of administrative authority. On the subject of general principles, we also note that the Secretary "could be wrong" about any number of matters entrusted to her, a fallibility which does not appear to similarly trouble her as she insists on deference to her expertise in this and other contexts. It is not logical for the Secretary to assert that we defer to her here, even as she acknowledges that her judgment is so likely to be flawed that we should, in effect, presume that the possibility of error or dereliction on her part justifies preserving a remedy in the face of her express finding that the miner is not entitled to it.

Commissioner Cohen in his concurrence argues that under *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), we must defer to the Secretary's interpretation of the statute. Slip op. at 24. We do not find *Wamsley* pertinent authority in this instance, however, because here, unlike in that case, the Secretary has ceased participating in the miner's discrimination case. The fact that the statute may require the Secretary to return to the case to protect the miner's interests and fulfill her duties under the Mine Act if the Commission upholds the miner's action (*see* slip op. at 6, 22) is of little consequence to the deference question, given the Secretary's intentional absence from the primary part of the proceeding – its merits – after her thorough investigation of those merits.

violate the law. Slip op. at 16-17, 19. We would not find it necessary to reach this claim. We would instead hold that the process as we have previously interpreted it does protect the operator's rights. The Secretary's duty to investigate and to prosecute only those claims which she finds factually and legally sufficient is an important component of the process designed to ensure that the rights of operators are not unreasonably constrained in this context.

We thus would affirm the judge's decision here to dissolve the order of temporary reinstatement, and respectfully dissent from the majority opinions reversing the judge's order.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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