FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 24, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CARROLL JOHNSON	:	
and	:	Docket Nos. SE 93-182-D
	:	SE 93-104
UNITED MINE WORKERS OF AMERICA	:	
v.	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Doyle, Holen, Marks and Riley, Commissioners[1]

DECISION

BY: Doyle, Holen and Riley, Commissioners

These discrimination and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the issue of whether Administrative Law Judge Avram Weisberger properly considered and applied the penalty criteria in section 110(i) of the Mine Act[2] in assessing civil penalties of $1,000 and $2,000

[1] Chairman Jordan has recused herself in this matter. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), we have designated ourselves a panel of four Commissioners to exercise the powers of the Commission.

[2] Section 110(i) sets forth six criteria for assessment of penalties under the Act.

> The Commission shall have authority to assess all civil penalties provided in [the Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in

against Jim Walter Resources, Inc. ("JWR") for violations of sections 103(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 813(f) & 815(c). 15 FMSHRC 2588 (December 1993) (ALJ).

The Commission granted the Secretary of Labor's petition for discretionary review, which challenges the judge's penalty assessment for the violation of section 105(c). A petition for discretionary review filed by the United Mine Workers of America ("UMWA"), intervenor, was also granted. The UMWA challenged penalty assessments for both violations as well as the judge's failure to address its request that the complainant be reimbursed for expenses incurred as a result of pursuing his discrimination action. The Commission heard oral argument. For the reasons that follow, we vacate and remand.

I.

Factual and Procedural Background

On Saturday, November 23, 1991, Carroll Johnson, chairman of the UMWA safety committee and authorized miners' representative, accompanied Terry Gaither and Milton Zimmerman, inspectors from the Department of Labor's Mine Safety and Health Administration ("MSHA"), during a follow-up inspection to evaluate measures implemented by JWR to reduce respirable dust levels on the No. 1 longwall section of its No. 7 underground coal mine.[3] 15 FMSHRC at 2589-90. During the inspection, Johnson traveled 250 to 300 feet ahead of the inspectors to observe the water sprays on the longwall shearer. *Id.* at 2590-91. Johnson informed longwall coordinator Thom Parrott that the sprays might not be operating properly. *Id.* Parrott shrugged his shoulders and did not respond. *Id.* at 2591. Johnson then informed Inspector Gaither, who told Parrott that the sprays might have to be cleaned. *Id.* Parrott shut down the shearer for cleaning and telephoned Richard Donnelly, the deputy mine manager, to inquire whether Johnson was permitted to separate himself from the inspection party. *Id.* Donnelly responded that he was not and instructed Parrott to tell Johnson to stay with the inspectors and not to conduct his own inspection. *Id.* at 2591-92; Tr. 458. Parrott so directed Johnson. 15 FMSHRC at 2592.

> business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i)

[3] A withdrawal order had been previously issued, pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), because JWR failed to reduce the level of respirable dust as directed by MSHA as a result of a citation issued during a section 103(g) inspection. 15 FMSHRC at 2589.

Later during the inspection, Johnson traveled 15 to 40 feet from the inspectors to view the shearer. 15 FMSHRC at 2591-92. Seeing Johnson apart from the inspectors, Parrott told Johnson that he was relieved of his duties. *Id.* Parrott telephoned Donnelly, who affirmed Johnson's discharge. Tr. 466-67. Upon learning of Johnson's discharge, Inspector Zimmerman issued a citation for violation of section 103(f) of the Mine Act[4] and told Donnelly that he would issue a section 104(b) withdrawal order if miner representation were not permitted. 15 FMSHRC at 2599; Gov't Ex. 17. Johnson was then reinstated as the miners' representative for the remainder of his shift. 15 FMSHRC at 2601; Tr. 72-73; Gov't Ex. 17.

Upon reporting to work on Monday, November 25, 1991, Johnson received a 5-day suspension with intent to discharge. 15 FMSHRC at 2599. The following day, prior to a union grievance meeting, Johnson was reinstated and compensated for wages lost as a result of the suspension. *Id.* at 2599; Tr. 273-77.

Based on the foregoing events, the Secretary determined that, in addition to the cited section 103(f) violation, Johnson had been discriminated against in violation of section 105(c) of the Mine Act[5] and filed a complaint of discrimination with the Commission.

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[4] Section 103(f) provides, in part:

> [A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection . . . .

30 U.S.C. § 813(f).

[5] Section 105(c) provides, in relevant part:

> (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, representative of miners or applicant for employment in any coal or other mine subject to this [Act] . . . because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c).

Following hearing, the judge determined that JWR violated section 103(f) by interfering with Johnson's walkaround rights as the miners' representative. 15 FMSHRC at 2601. He also determined that JWR violated section 105(c) by discharging Johnson because he was engaged in protected activity while accompanying the inspectors and that JWR's decision to discipline Johnson was motivated in part by Johnson's refusal to obey JWR's order to stay with the inspectors. *Id.* at 2597.

The judge assessed civil penalties of $1,000 for the section 103(f) violation and $2,000 for the 105(c) violation. 15 FMSHRC at 2600-01. The judge evaluated JWR's history of violations by determining whether similar violations had previously occurred. *Id.* at 2597-99. In evaluating the gravity of the violations, the judge found that the evidence of a chilling effect on miners was "too speculative." *Id.* at 2600 n.10. Regarding good faith in abating the violations, the judge found that Johnson was reinstated on November 23 as walkaround representative after the inspector threatened to issue a 104(b) withdrawal order. *Id.* at 2601. He also found that Johnson was reinstated on November 26 and subsequently compensated for all lost wages. *Id.* at 2600.

II.

Disposition

A. General Principles

The Mine Act requires that, in contested civil penalty cases, the Commission make an independent penalty assessment based solely on the statutory criteria of section 110(i) of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are supported by substantial evidence.[6] The Commission has stated that findings of fact must be made that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a

[6] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g.*, *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Id.* at 292-93. The Commission explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact . . . bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 294 (citation omitted).

While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In the instant case, the petitioners take issue with the judge's treatment of three of the penalty criteria: the operator's history of previous violations; the gravity of the violation; and whether the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

B. Penalty for the Section 105(c) Violation

1. History of Previous Violations

In analyzing the history criterion, the judge cited the following legislative history of the Mine Act:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the *same standard*, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed.

15 FMSHRC at 2598 (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 43 (1977) ("S. Rep."), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978) ("*Legis. Hist.*") (emphasis supplied by judge)). The judge then concluded that evidence of previous violations, including cases resolved through settlement, was insufficient to warrant increasing the civil penalty because none of the parties presented "any 'history of previous violations' similar to the one at issue, i.e., interference with the right of a walkaround who was not in the immediate vicinity of the inspectors." 15 FMSHRC at 2598-99; *see also id.* at 2597-98 n.6.

The Secretary and the UMWA claim the judge erroneously limited his consideration of JWR's history of previous violations to cases involving "interference with the right of a walkaround who was not in the immediate vicinity of the inspectors." S. Br. at 7-13; UMWA Br. at 8-12. They take exception to the judge's refusal to consider JWR's general history of violations or previous section 105(c) violations, including those resolved through settlement. S. Br. at 13-17; UMWA Br. at 8-9. JWR contends the judge properly gave limited weight to past incidents of alleged discrimination. JWR Br. at 7. It also argues that section 105(c) cases involving safety-related complaints are not particularly relevant to this case and that the judge

properly attributed little weight to settled cases involving dissimilar conduct. *Id.* at 8-9.

Section 110(i) provides in part that, in assessing civil penalties, "the Commission shall consider the operator's history of previous violations . . . ." 30 U.S.C. § 820(i). Thus, the language of section 110(i) does not limit the scope of history of previous violations to similar cases. The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component." *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). The appropriate weight, if any, to be attached by the judge to older violations should be based on relevancy.

The judge failed to consider the operator's general history of previous violations submitted into evidence by the Secretary as the Assessed Violation History Report. Gov't Ex. 13. That exhibit, which relates exclusively to JWR's No. 7 mine, lists a history of 679 paid violations that occurred within 24-months of the subject violation.[7] *Id.*

Thus, we conclude that the judge erroneously limited the scope of the history criterion. We therefore remand the matter to the judge to evaluate the operator's history of violations.

2. Gravity

The Secretary's argument that the judge incorrectly applied the gravity criterion is supported by the UMWA. S. Br. at 17-24; UMWA Br. at 10-11. The Secretary also contends that the Mine Act's legislative history indicates every violation of section 105(c) is presumed to have a chilling effect on miners' protected safety activities. S. Br. at 18-19. The Secretary and the UMWA further assert that a chilling effect occurred in this case.[8] S. Br. at 17-24; UMWA Br. at 10-11. JWR responds that Johnson's suspension would not deter other miners from reporting safety problems because a case involving proximity to MSHA inspectors is unlikely to arise again. JWR Br. at 6. It also asserts that Johnson has not been intimidated from exercising his right to complain to MSHA. *Id.* at 6-7.

We reject the Secretary's argument that a chilling effect should be presumed in every discrimination case. The Mine Act does not provide for such a presumption. References to chilling effect in the legislative history are made in connection with the temporary reinstatement provision "to protect miners from the adverse and chilling effect of loss of employment." Conf.

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[7] The Secretary, by regulation, has limited the length and content of violation history for purposes of his penalty proposal to "the number of assessed violations in a preceding 24-month period." 30 C.F.R. § 100.3(c).

[8] The Secretary and the UMWA's challenge regarding the gravity criterion is limited to the judge's rejection of their "chilling effect" argument. No other argument regarding the seriousness of the violation is advanced.

Rep., *reprinted in Legis. Hist.* at 1362; Floor Debate, *reprinted in Legis. Hist.* at 1088-89 (statement of Senator Church). Contrary to the Secretary's assertions, this legislative history does not suggest that a chilling effect should be presumed to result from every section 105(c) violation. In our view, Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of an illegal discharge. We therefore hold that the Mine Act does not support such a presumption and that a determination of whether a chilling effect resulted from a section 105(c) violation is to be made on a case-by-case basis.

The Secretary has urged that, in evaluating whether there is evidence of a chilling effect, the Commission adopt an objective standard, which does not require proof that adverse action actually discouraged miners from engaging in protected activities, but rather requires consideration of whether the adverse action "reasonably tended to discourage miners from engaging in protected activities."[9] Although the authority cited by the Secretary relates to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1994),[10] we conclude that the Congressional objectives reflected in that section and in the Mine Act's section 105(c) are essentially the same, i.e., to provide legal protection against adverse action to employees who exercise rights afforded by law.[11] We also conclude, however, that

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[9] S. Post Oral Arg. Letter (January 22, 1996) (citing *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988), *cert. denied sub nom. A.G. Boone Co. v. NLRB*, 490 U.S. 1065 (1989); *Southwest Regional Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 743-44 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981)).

[10] Section 8(a)(1) states:

> (a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer --
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

[11] The Commission has recognized that case law interpreting the National Labor Relations Act, upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues. *See, e.g., Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206 (February 1994) (showing of facial discrimination); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (April 1993) (deduction of unemployment compensation from backpay award); *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-32 (February 1984), *aff'd sub nom. Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985) (mitigation defense to backpay award).

subjective evidence of a chilling effect, e.g., testimony of the complainant or other miners, is relevant to consideration of the gravity of a section 105(c) violation. Accordingly, we hold that both subjective and objective evidence should be considered in evaluating whether a chilling effect resulted from adverse action. We agree with the Secretary that, in the event that a chilling effect is found, such a determination does not *a fortiori* mean the gravity of the violation is high. That is a fact-specific conclusion. *See* Oral Arg. Tr. 19-22, 56.

In evaluating whether Johnson's suspension had a chilling effect on other miners, the judge concluded the evidence was "too speculative."[12] 15 FMSHRC at 2600 n.10. In so doing, the judge appears to have applied only a subjective standard. There is no indication that the judge evaluated the gravity of the violation within its factual context, i.e., whether JWR's removal of a miners' representative who was accompanying MSHA during an inspection would reasonably tend to discourage other miners from engaging in protected activities. Because the judge did not evaluate any objective factors in determining whether a chilling effect resulted from the violation, we remand the matter to the judge for reconsideration of the violation's gravity.

3. Good Faith

The UMWA argues that substantial evidence does not support the judge's determination that JWR demonstrated good faith in abating the section 105(c) violation. UMWA Br. at 12-13. Intervenors also assert that Johnson was reinstated only after the inspectors threatened to issue a section 104(b) withdrawal order, that he was fired again two days later when he reported for work on Monday, and that he was reinstated the following day only after UMWA officials interceded. *Id.* JWR responds that it engaged in good faith abatement by allowing Johnson to complete the walkaround, resuming the dispute after the inspection, and by promptly reinstating him. JWR Br. at 7-8 n.3.

The judge found that the section 105(c) violation initially occurred on Saturday when Johnson was ordered to leave the work area, and recurred on Monday when he was suspended with intent to discharge. 15 FMSHRC at 2599-2600. With respect to Saturday's action, the judge noted that Johnson was reinstated after the inspector informed JWR of its violative conduct and warned the company that a section 104(b) withdrawal order would be issued. *Id.* at 2599 & n.9. With respect to adverse action on Monday, the judge found that, since Johnson was reinstated on Tuesday and compensated for all lost wages, he did not suffer any damages. *Id.* at 2600.

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[12] Johnson testified "I feel like they're out to get me as a result of this." Tr. 180. On cross examination, however, he agreed that he has "never been intimidated or chilled or afraid to the point that [he] declined to exercise the right to go to MSHA . . . ." Tr. 201-02. Daryl Dewberry, UMWA District No. 20 executive board member, testified that at least 70 percent of miners who have reported violations requested that they not be identified, due to fear of retaliation. Tr. 299-300. Recalling the incident with Johnson, Dewberry stated that irreparable harm occurred in the minds of Johnson and other miners. Tr. 304.

Although the foregoing findings are relevant to the good faith criterion, the judge did not set forth his conclusions as to whether JWR's conduct demonstrated good faith in abating the violation. *See* 15 FMSHRC at 2600. Thus, there is no basis for our review of this issue. We therefore remand the matter to the judge to determine whether the operator's actions demonstrated good faith.

Thus, we vacate the penalty assessed by the judge for the section 105(c) violation and remand for consideration of the operator's history of violations, the gravity of the current violation, and the operator's good faith. The judge shall enter findings for each criterion and, based on his conclusions, assess an appropriate civil penalty.

C. Penalty for the Section 103(f) Violation

The UMWA argues that substantial evidence does not support the judge's determination that JWR demonstrated good faith in abating the section 103(f) violation. UMWA PDR at 3-4; UMWA Br. at 12. The UMWA asserts that, as in the case of the section 105(c) violation, Johnson was reinstated only after the inspectors threatened to issue a section 104(b) withdrawal order unless Johnson was allowed to continue to assist them. *Id.* JWR responds that it engaged in good faith abatement by allowing Johnson to complete the walkaround on Saturday before resuming the dispute. JWR Br. at 7-8 n.3.

Although the judge found it important that Johnson was reinstated after the inspector threatened JWR with the issuance of a section 104(b) order, he did not set forth his reasoning as to whether such action demonstrated good faith. *See* 15 FMSHRC at 2601. Because there is no basis for our review of this issue, we vacate the penalty assessed for the section 103(f) violation and remand for determination of whether the operator demonstrated good faith. The judge shall enter his findings and, based on his conclusion, assess an appropriate civil penalty.

D. Expenses

The UMWA argues that the judge failed to address its request that Johnson be reimbursed for expenses incurred as a result of pursuing his discrimination action, including lost wages due to his attendance at deposition and hearing. UMWA PDR at 4; UMWA Br. at 13. JWR responds that it is not required to compensate Johnson for such lost wages. JWR Br. at 9.

Section 105(c)(2) of the Mine Act authorizes the Commission to remedy discrimination by "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." 30 U.S.C. § 815(c)(2) (emphasis added). The Senate Report on the Mine Act explains:

> It is the Committee's intention that . . . the Commission require[] all relief that is necessary *to make the complaining party whole* . . . including, but not

> limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. . . .

S. Rep. 37, *reprinted in Legis. Hist.* at 625 (emphasis added).

The Commission has observed that "[t]he remedial goal of section 105(c) is to 'restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination.' . . . 'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" *Secretary of Labor ex rel. Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2049 (December 1983) (citations omitted). The Commission has awarded expenses incurred by miners in pursuing successful discrimination cases. *See, e.g.*, *Metric Constructors*, 6 FMSHRC at 234 ("[r]ecovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole") (citing *Secretary of Labor ex rel. Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 143-44 (February 1982) (reimbursement of incidental, personal expenses incurred due to attendance at discrimination hearing appropriate)) .

We hold that reimbursement to Johnson of all such reasonably incurred costs and expenses, including wages lost as a result of pursuing his discrimination action, is appropriate. Review of the record, however, indicates no evidence was offered regarding Johnson's expenses or lost wages. Accordingly, we remand to afford all parties the opportunity to submit evidence concerning the appropriate amount, if any, of expenses, including lost wages, to be awarded.

III.

Conclusion

For the foregoing reasons, we vacate the judge's assessment of civil penalties for both violations and remand for reconsideration consistent with this opinion. We also remand for determination of the amount of expenses to be awarded.

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

With the exception of the disposition regarding the gravity criterion of the section 105(c) violation, I am in full agreement with my colleagues' opinion.

In deciding the gravity issue, the majority rejects the Secretary's call for the Commission to recognize that when an operator violates section 105(c), either by firing or by taking some other adverse action against a miner who has merely acted as the Mine Act encourages (such as reporting an unsafe condition, as was done in this case), such action has the effect of intimidating or "chilling" future protected activities of the complainant and/or his co-workers. The majority is unwilling to presume that such a natural reaction will occur. They require evidence of those feelings. I do not. It is precisely for this type of circumstance, where it is not possible to gauge the true effect upon all who are impacted, that a presumption is necessary and appropriate.

Contrary to my colleagues, I view the cited legislative history on this issue (*see* slip op. at 7) to clearly support such a presumption. The deep concern reflected by the Congress "to protect miners from the adverse and chilling effect of loss of employment" was not intended to be read narrowly. Rather, that powerful statement of Congressional intent reflects their recognition of the obvious, which is that firing or demoting or any other reprisal taken against an employee because he or she has acted within the protection of the law will send a message to the other employees: if you act in the same way, you will be similarly treated!

Accordingly, I agree with the Secretary that a presumption of a chilling effect should be made in every instance of a section 105(c) violation.

Marc Lincoln Marks, Commissioner