FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 5, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PERRY PODDEY	:	
v.	:	Docket No. WEVA 93-339-D
TANGLEWOOD ENERGY, INC.	:	

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

DECISION

BY: Riley, Commissioner[2]

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the question of whether Administrative Law Judge Arthur Amchan properly considered and applied certain penalty criteria in section 110(i) of the Mine Act[3] in assessing a $100 civil penalty against Tanglewood Energy,

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[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), Commissioners Holen, Marks and I have designated ourselves a panel of three Commissioners to exercise the powers of the Commission.

[2] I am the only Commissioner in the majority on all issues presented.

[3] 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 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.

Inc. ("Tanglewood") for discharging Perry Poddey in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and whether the judge erred in deducting unemployment compensation from back pay he awarded Poddey.[4] 15 FMSHRC 2401 (November 1993) (ALJ). For the reasons that follow, the Commission vacates the penalty and remands for assessment consistent with this decision, and reverses the judge's deduction of unemployment compensation.

I.

Factual and Procedural Background

Tanglewood operates the Coal Bank 12 Mine, an underground coal mine in Randolph County, West Virginia. On November 3, 1992, Kenneth Tenney, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation to Tanglewood alleging a violation of 30 C.F.R. § 75.523-3(a) (1995) because a scoop operated by Poddey was not equipped with an automatic emergency-parking brake.[5] 15 FMSHRC at 2403; Gov't Ex. 1. Although the brake was subsequently installed, the bolt securing it to the scoop repeatedly became loose, rendering the brake ineffective. *Id.* at 2403-04. Poddey reported the problem to the operator's mechanic, Doug McCoy, who tightened the bolt on several occasions. *Id.* at 2404. On January 4, 1993, Poddey again reported the problem to McCoy and to Section Foreman Jeff Simmons, suggesting installation of a second bolt on the brake assembly. *Id.* The maintenance crew was informed of the request, but the work was not performed before the following morning. *Id.*

On January 5, Inspector Tenney inspected the scoop and discovered that the brake was inoperable. *Id.* Poddey informed him that the brake assembly bolt was loose and that he had previously reported the problem. *Id.* The inspector issued a citation alleging a violation of section 75.523-3(a). *Id.*; Gov't Ex. 3.

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30 U.S.C. § 820(i).

[4] Section 105(c)(1) provides in part:

> 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 statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this [Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

[5] Section 75.523-3(a) provides in part that, "[e]xcept for personnel carriers, rubber-tired, self-propelled electric haulage equipment used in the active workings of underground coal mines shall be equipped with automatic emergency-parking brakes . . . ."

At the end of the shift, Simmons installed the second bolt on the brake assembly. 15 FMSHRC at 2404. Simmons later recounted the circumstances surrounding issuance of the citation to his supervisor, Randy Key, and indicated that Poddey had a month within which to repair the brake himself. *Id.* at 2405.

On January 6, upon reporting to work, Poddey was directed to telephone Key. *Id.* During the conversation, Key chastised Poddey for complaining to MSHA and advised him that it was his responsibility to have installed the bolt. *Id.* at 2405-06. Poddey then confronted Simmons, accusing him of falsely informing Key that he had deliberately reported the brake problem to MSHA. *Id.* at 2406. Poddey told Simmons that if the foreman had a problem with him, they should settle it "outside the gate." *Id.*; Tr. I 116.[6] Simmons immediately called Key to inform him of the incident. 15 FMSHRC at 2407. Key traveled to the mine and, at the end of the shift, discharged Poddey. *Id.*

Poddey filed a discrimination complaint with MSHA and the Secretary of Labor filed the present complaint pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[7] The Secretary proposed that a civil penalty be assessed against Tanglewood in the range of $2,500 to $3,000. S. Amend. Complaint at 3-4. On May 25, 1993, Poddey was temporarily reinstated to his job. 15 FMSHRC at 2407-08. The matter proceeded to hearing before Judge Amchan.

The judge determined that Tanglewood had violated section 105(c) by discharging Poddey. *Id.* at 2414. He concluded Poddey had engaged in protected activity when he reported the malfunctioning brake to the mechanic, Simmons and Inspector Tenney, and that Poddey's discharge was motivated in part by that protected activity. *Id.* at 2408-09. He determined that, although Tanglewood fired Poddey "for what it perceived to be a threat to . . . Simmons, or at

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[6] References to "Tr. I" are to the transcript of the hearing that took place on September 1, 1993; "Tr. II" references are to the September 2 transcript.

[7] Section 105(c)(2) provides in part:

> 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. . . . 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 . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c).

least insubordinate behavior," Tanglewood had failed to rebut the prima facie case of discrimination. *Id.* at 2409, 2414. He reasoned that Poddey had been unjustly blamed for not repairing the brake, and that Poddey's invitation to fight Simmons and other remarks did not forfeit Poddey's statutory rights to protection from retaliation. *Id.* at 2409-14.

The judge determined that, although Tanglewood had a "relatively large number of previous violations," assessment of a $100 civil penalty was appropriate based on his findings of gravity and negligence. *Id.* at 2415. He reasoned that, while Key and Simmons provoked the outburst leading to Poddey's discharge by unjustifiably blaming Poddey for the violation, there was no evidence that they "did so with the intention of generally discouraging safety complaints or cooperation with MSHA." *Id.* The judge observed that the penalty was warranted nonetheless because Poddey's discharge did, in fact, tend to inhibit employees in exercising their rights under the Act. *Id.* The judge also ordered Tanglewood to pay Poddey "full backpay and benefits with interest, less the payments he received in unemployment compensation." *Id.* at 2416.

The Secretary filed a petition for discretionary review, challenging the civil penalty assessment and backpay award.[8]

II.

Disposition

A. Civil Penalty

1. General Principles

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act. *Id., citing Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings are supported by substantial evidence.[9] Assessments "lacking record support,

[8] Tanglewood declined to file a brief.

[9] 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 the Commission does not lightly overturn a judge's factual findings and credibility resolutions, neither is it 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.

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). The judge must make findings of fact on the criteria 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 determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

2. Negligence[10]

The Secretary argues that, in applying the negligence criterion, the judge should have considered whether the operator intended to commit the violation of section 105(c) rather than whether it intended to generally discourage protected activities. S. Br. at 10. The Secretary asserts that Tanglewood's violation was intentional, and that the judge "ignored both logic and the law" in finding low negligence. *Id.* at 11-12.

Commissioner Marks and I agree with the Secretary that the proper inquiry before the judge in his consideration of negligence was whether Tanglewood intended to commit the violation rather than whether it intended to chill future protected activities. Commissioner Marks and I disagree, however, that a finding that the operator engaged in certain intentional conduct in violation of section 105(c) necessarily leads to a determination of high negligence.

The Commission has previously recognized that a finding of high negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991). Although Key's actions in discharging Poddey were intentional, there were mitigating circumstances that do not support a finding that such actions demonstrated an aggravated lack of care. Tanglewood discharged Poddey for what it perceived to be a threat, or at least insubordinate behavior, toward Simmons. 15 FMSHRC at 2409. Poddey confronted Simmons, yelling at him, accusing Simmons of lying when he told Key that Poddey had deliberately informed MSHA about the brake problem, and invited Simmons to fight "outside the gate." 15 FMSHRC at 2406-07; Tr. I 116, 273; Tr. II 19-21. In view of these mitigating circumstances, Commissioner Marks and I conclude that substantial evidence supports

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1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). The Commission is 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).

[10] All Commissioners vote to affirm the judge's finding of low negligence. Commissioners Marks and I agree that the proper inquiry before the judge was whether Tanglewood intended to commit the violation of section 105(c). Commissioner Holen concludes that the proper inquiry was whether the violation resulted from more than ordinary negligence. Slip op. at 13 (Commissioner Holen, concurring).

the judge's finding that Tanglewood's violation of section 105(c) involved a low level of negligence.[11] Accordingly, the Commission affirms, in result, the judge's negligence finding.

3. Gravity[12]

The Secretary argues that, in determining gravity, the judge erred in considering whether the operator "intended to 'generally discourag[e] safety complaints or cooperation with MSHA'" and that, rather, a chilling effect on protected activities should be presumed for any violation of section 105(c). S. Br. at 12-15, *quoting* 15 FMSHRC at 2415. The Secretary submits that the judge should have considered "what effect on miners the violation in fact created." *Id.* at 12. He asserts that the gravity of Tanglewood's violation was serious because there was compelling evidence that Poddey's discharge had a severe chilling effect on Poddey and other miners at the No. 12 Coal Bank. *Id.* at 15-18.

Contrary to the Secretary's assertions, it appears that the judge's reference to the operator's intent to discourage safety complaints or cooperation with MSHA was related only to his consideration of the negligence criterion. Consistent with the Commission's recent holding in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 558 (April 1996), Commissioner Holen and I reject the Secretary's argument that a chilling effect on protected activities should be presumed for any violation of section 105(c). In *Carroll Johnson*, the Commission explained that the Mine Act does not provide for such a presumption and that 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." *Id.* (citations omitted). The Commission noted that "Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of illegal discharge" and that Congress did not intimate that a chilling effect should be presumed for every violation. *Id.* The Commission concluded that determinations of whether a chilling effect resulted from a section 105(c) violation should be made on a case-by-case basis. *Id.*

In making such a determination, the Commission held that both subjective and objective evidence should be considered and that a finding of chilling effect does not *a fortiori* mean the gravity of the violation is high. *Id.* at 558-59. For objective evidence, the Commission recognized the appropriateness of considering whether the adverse action "reasonably tended to discourage miners from engaging in protected activities," citing by analogy authority relating to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)

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[11] Commissioner Marks and I note that the Secretary in his regulations for proposing civil penalties defines high negligence in part by the lack of mitigating circumstances. *See* 30 C.F.R. § 100.3(d).

[12] Commissioner Holen and I affirm in result the judge's finding of low gravity. Commissioner Marks would recognize a presumption of chilling effect on protected activities in every instance of a section 105(c) violation and would reverse the judge's finding of low gravity.

(1994). *Id.* at 558, *citing in part 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). Subjective evidence of a chilling effect includes testimony of the complainant or other miners. *Id.* at 559.

Applying this test, Commissioner Holen and I reject the Secretary's contention that Poddey's discharge created a chilling effect at the mine. The Secretary relies upon Inspector Tenney's testimony that, after Poddey's discharge, he received such comments from miners at Coal Bank No. 12 as, "Don't tell anybody I said so." S. Br. at 16. Such subjective evidence reveals that, although miners were cautious and wary of retaliation, they were nonetheless communicating their safety and health concerns. Nor do Commissioner Holen and I find objective evidence of a chilling effect. As the judge found, "there is no indication that [Tanglewood] would have so retaliated but for the unusual circumstances of this case." 15 FMSHRC at 2415. Because Poddey was discharged in part as a result of his heated confrontation with Simmons, the discharge would not "reasonably tend[] to discourage miners from engaging in protected activities." *Carroll Johnson*, 18 FMSHRC at 558.

To the extent the judge found that Poddey's discharge tended to create a chilling effect (15 FMSHRC at 2415), Commissioner Holen and I conclude for the reasons discussed above that such a finding is not supported by substantial evidence. Accordingly, the Commission affirms the judge's finding of low gravity.

4. History of Previous Violations[13]

The Secretary argues that, although the judge correctly found the operator had a "relatively large number of previous violations," the judge erred in failing to give weight to those violations because there was no evidence of violations of section 105(c). S. Br. at 18. The Secretary avers that an operator's complete history of violations should be considered and that the judge ignored such evidence including that the operator was delinquent in the payment of penalties, and that numerous prior violations involved "a significant threat to miner safety." *Id.* at 18-23.

All Commissioners agree with the Secretary that the judge's consideration of previous violations is not limited to only those involving section 105(c). The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations . . . . Past violations of *all* safety and health standards are considered for this component." *Carroll Johnson*, 18 FMSHRC at 557, *quoting Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). All Commissioners disagree with the Secretary, however, that the judge was required to consider evidence of the operator's alleged delinquency in the payment of civil penalties. As the Commission recently held in *Secretary of Labor on behalf of James Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996), an operator's delinquency in regard to payment of civil penalties "is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." Commissioner Holen and I also reject the Secretary's argument that the judge was constrained to consider the seriousness of the previous violations. Such consideration is not required by section 110(i) of the Act or by the Secretary in his regulations for proposing penalties. *See, e.g.*, 30 C.F.R. § 100.3(c).

Nonetheless, the judge's terse finding that Tanglewood had "a relatively large number of previous violations" (15 FMSHRC at 2415) does not provide the necessary foundation for our review of the appropriateness of the $100 penalty, which was a significant reduction of the $2,500 to $3,000 penalty proposed by the Secretary. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994) (adequate findings are "critical" where a judge assesses a penalty that significantly departs from that proposed by the Secretary). Accordingly, the Commission vacates the penalty and remands for the assessment of a civil penalty with further findings.

[13] All Commissioners remand the judge's history of previous violations determination for further findings. All Commissioners reject the Secretary's argument that the judge erred in failing to consider the operator's payment history. Commissioner Holen and I also reject the Secretary's argument that the judge was required to consider the seriousness of past violations. Commissioner Holen further rejects his argument that the judge erred in failing to consider that the mine had been targeted under MSHA's Joint Mine Assistance Program.

B. Unemployment Compensation[14]

In *Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993), a three-member majority of the Commission adopted as agency policy the deduction of unemployment compensation from backpay awards. *Id.* at 618. The majority reasoned that the issue was a matter of agency discretion and that such a deduction comports with the Mine Act's goal of making miners whole. *Id.* at 616-18. It noted that the "Commission seeks to fashion relief that is just and does not overcompensate the discriminatee." *Id.* at 617 (citation omitted). The majority stated that the employer would still be required to place the discriminatee in the position he was in but for the unlawful discrimination, but that the employer should not additionally compensate the miner for funds that he or she received as earnings for working during the interim or as unemployment compensation. *Id.* at 617-18. The majority noted that when "an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating." *Id.* at 618 n.11 (citation omitted).

Commissioner Backley dissented in *Meek*, concluding that, although the deduction of unemployment compensation was a matter of agency discretion, the majority had abused its discretion. *Id.* at 621. He concluded that the majority had acted arbitrarily by relying upon a rationale rejected by the Supreme Court in *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951). Commissioner Backley explained that, in finding that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from back pay, the Supreme Court rejected the arguments that unemployment compensation should be treated as earnings or considered as direct payments from the employer and properly set off against back pay. *Id.* at 621-22, *citing Gullett*, 340 U.S. at 363, 364. Commissioner Backley further concluded in his *Meek* dissent that the majority's policy failed to fairly balance the interests of the parties, noting that by ensuring that "illegally discharged miners not receive a windfall, [the majority] has adopted a *national* policy which will at times provide an employer with a windfall" under state unemployment compensation laws, and that their choice of employer over the victim of wrongdoing seemed "illogical and unfair." *Id.* at 625 (emphasis in original). Commissioner Backley also noted the majority of courts of appeals have opted not to deduct unemployment compensation, and that four circuits (the Third, Fourth, Ninth, and Eleventh) have removed the matter from district court discretion, holding as a matter of law that unemployment compensation should not be deducted from backpay awards.[15] *Id.* at 623.

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[14] All Commissioners reverse the judge's deduction of unemployment compensation from Poddey's backpay award. Commissioner Marks and I reach our determination based on the rationale set forth in the dissents in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 621-26 (April 1993), and *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2221-29 (November 1994). All Commissioners reverse based on the applicability of the court's holding in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996) to the instant case, which arises in the Fourth Circuit.

[15] Meek did not appeal the Commission's decision.

In *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208 (November 1994), the Commission again considered the appropriateness of deducting unemployment compensation from backpay awards. Before the Commission, the Secretary urged the Commission "to adopt Commissioner Backley's position" in *Meek*.[16] *Id.* at 2221. Two Commissioners voted to affirm the judge's decision to deduct unemployment compensation based on the reasoning and conclusions set forth in *Meek*. 16 FMSHRC at 2216-20. Two Commissioners voted to reverse based on the rationale of Commissioner Backley's dissent in *Meek*.[17] *Id.* at 2221-29. The effect of the tie vote was to let stand the judge's ruling. *Id.* at 2208 n.1 (citation omitted).

The Commission's decision in *Nantz* was appealed to the U.S. Court of Appeals for the Sixth Circuit. The appeal was dismissed on motion, without resolution of the issue of deduction of unemployment compensation. *Secretary of Labor v. Nally & Hamilton Enterprises*, No. 94-4325, 6th Cir. (June 21, 1995).

In *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996), the court reversed that portion of a Commission administrative law judge's decision directing the Secretary to deduct unemployment compensation from the backpay awards of five miners who had been discharged in violation of section 105(c) of the Act. *Id.* at 116. The administrative law judge's decision had adhered to *Meek*, 15 FMSHRC at 616-18. *Id.* at 113. In reaching its conclusion, the Court relied upon *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991), in which the Supreme Court recognized that the Secretary's reasonable interpretation of a regulation promulgated by the Secretary, pursuant to her authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (1994) ("OSH Act"), was entitled to deference over a reasonable, but conflicting, interpretation by the Occupational Safety and Health Review Commission ("OSHRC"). *Wamsley*, 80 F.3d at 114. The *Wamsley* Court analogized that this Commission, which it considered a "neutral arbiter" that possesses "nonpolicy-making adjudicative powers," should have deferred to the interpretation disallowing deduction of unemployment compensation advanced by the Secretary, whom it

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[16] The Secretary was not a party to *Meek*.

[17] The dissenting Commissioners also noted that subsequent to the issuance of *Meek*, the Eighth Circuit reversed the district court's deduction of unemployment compensation from a backpay award in a case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1994), stating in part that, "no circuit that has considered the matter has determined that unemployment benefits should, as a general rule, be deducted from backpay awards in discrimination cases." 16 FMSHRC at 2227-28, *quoting Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1113 (8th Cir. 1994) (emphasis omitted). The Eighth Circuit joined the majority of circuits in holding as a matter of law that unemployment benefits should not be deducted from backpay awards. *Gaworski*, 17 F.3d at 1114.

considered to be endowed with "historical familiarity and policymaking expertise."[18] *Id.* at 114-15, *quoting Martin*, 499 U.S. at 153, 154, 155.[19]

In the instant case, Judge Amchan, citing *Meek*, directed that Poddey's backpay award be reduced by the amount of unemployment compensation he had received. 15 FMSHRC at 2416. Commissioner Marks and I are persuaded by the rationale of the dissents in *Meek*, 15 FMSHRC at 621-26, and *Nantz*, 16 FMSHRC at 2221-29, that unemployment compensation should not be deducted from backpay awards. Therefore, the Commission's holding that unemployment compensation benefits should be deducted, enunciated in *Meek* and *Nantz*, is overruled. Accordingly, the Commission reverses the judge's deduction of unemployment compensation from Poddey's backpay award. Because the instant case arises within the Fourth Circuit, the court's holding in *Wamsley* also requires reversal of the judge's deduction.

[18] I do not subscribe to the rationale enunciated by the court in *Wamsley*. As the Commission recognized in *Drummond Co.*, 14 FMSHRC 661, 674-75 (May 1992), the "Mine Act expressly empowers the Commission to grant review of 'question[s] of law, policy or discretion,' and to direct review *sua sponte* of matters that are 'contrary to . . . Commission policy' or that present a 'novel question of policy . . . .'" *Id.*, *quoting* 30 U.S.C. §§ 823(d)(2)(A)(ii)(IV) & (B). I agree that, since Congress authorized the Commission to direct such matters for review, it intended that the Commission possess "the necessary adjudicative power to resolve them." *Drummond*, 14 FMSHRC at 675. I suggest that the Supreme Court expressly applied its holding in *Martin* only to the "division of powers between the Secretary and the Commission under the OSH Act" (499 U.S. at 157) because no comparable policy jurisdiction was expressly granted to OSHRC. *Drummond*, 14 FMSHRC at 675 n.15.

[19] I observe that the Supreme Court in *Martin* and the Fourth Circuit in *Wamsley* reached their determinations without citing and applying the analytical framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

III.

Conclusion

For the reasons discussed above, the Commission affirms in result the judge's finding of low negligence, affirms his finding of low gravity, vacates the penalty and remands for assessment with further findings on the operator's history of previous violations. The Commission reverses the judge's deduction of unemployment compensation from Poddey's backpay award.

James C. Riley, Commissioner

Commissioner Holen, concurring:

I agree with the majority in result on all issues but disagree with their rationale on the issues of negligence, history of violations, and the deduction of unemployment compensation from back pay awards.

I.

Negligence

Commissioners Marks and Riley conclude that the proper inquiry before the judge in determining negligence was whether the operator intended to commit the violation. Slip op. at 5. Although the operator did so intend, they affirm the judge's conclusion of low negligence only because there were mitigating circumstances. Slip op. at 5-6.

I agree in result that the operator's negligence here was low, but I disagree that the proper inquiry before the judge was whether the violation resulted from intentional conduct or that an intentional violation absent mitigating circumstances necessarily establishes high negligence. Under Commission case law, the proper inquiry as to negligence is whether the violation resulted from more than ordinary negligence. Higher levels of negligence and unwarrantable conduct are found only when the operator's conduct is determined to have been aggravated. In *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991), the Commission stated:

> 'Highly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

13 FMSHRC at 770, *quoting Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (February 1991). In *Mettiki*, the Commission found that the operator's intentional conduct in modifying electrical equipment, although violative, did not result from high negligence. 13 FMSHRC at 770-71. *See also American Mine Services, Inc.*, 15 FMSHRC 1830, 1831-33 (September 1993), and cases cited therein.

II.

History of Violations

I agree with the majority that, in assessing a civil penalty, the judge should consider an operator's previous violations of all standards and that an operator's delinquency in the payment of civil penalties should not be considered because delinquency is not one of the section 110(i) criteria. I agree with Commissioner Riley that the judge did not err in failing to consider the seriousness of the operator's previous violations because such consideration is not required under section 110(i) of the Mine Act. Slip op. at 8.

The opinion does not address the Secretary's argument that the judge erred in his penalty assessment in failing to consider that the mine had been targeted as a problem mine under MSHA's Joint Mine Assistance Program. S. Br. at 23. I would reject the Secretary's argument because such consideration is not specified under section 110(i). I note, in addition, that such consideration also is absent from the Secretary's regulations that govern his penalty proposals. 30 C.F.R. § 100.3.

III.

Deduction of Unemployment Compensation

Commissioners Marks and Riley reverse the judge's deduction of unemployment compensation from Mr. Poddey's back pay award because they disagree with the Commission's precedent. Slip op. at 11. I take strong exception to their casual approach in overruling the Commission's established law.

I concur with the majority's disposition of deduction of unemployment compensation because I am constrained to do so by the decision of the United States Court of Appeals for the Fourth Circuit in *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110 (4th Cir. 1996). *See RNS Services, Inc.*, 18 FMSHRC 523, 531 (April 1996) (Commissioner Doyle, concurring). I join Commissioner Riley, however, in respectfully disagreeing with the court's reasoning. Slip op. at 11 n.18.

A. *Wamsley* Decision

In *Wamsley*, the Fourth Circuit reversed the Commission's deduction of unemployment compensation from back pay awards in discrimination cases filed pursuant to section 105(c) of the Mine Act, 30 U.S.C. § 815(c). The court concluded that the Supreme Court's decision in *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991), controlled and it held that the Commission was required to defer to the Secretary's interpretation of the Act if it found that interpretation to be reasonable. 80 F.3d at 114. In so concluding, the court stated that the Commission's duties under the Mine Act were those of a "'neutral arbiter' that possesses 'nonpolicymaking adjudicatory powers.'" *Id.*, *quoting Martin*, 499 U.S. at 154, 155. Without deciding whether the Commission's or the Secretary's interpretation was the "correct" one, the court found that the Secretary's reading of the Act was "reasonable" and reversed the Commission. 80 F.3d at 115.

The *Wamsley* decision, in my opinion, misinterprets the Commission's role in administering the Mine Act. *Wamsley* also incorrectly applies the Supreme Court's holding in *Martin.*

The Mine Act plainly sets forth the Commission's authority and responsibility to fashion remedial relief in discrimination cases:

> 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 . . . with back pay and interest or such remedy as may be appropriate. . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . shall be assessed against the person committing such violation.

30 U.S.C. § 815(c)(3) (emphasis added). *See* 30 U.S.C. § 815(c)(2). *See also* S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) ("*Leg. Hist.*"). As the Supreme Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, where "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter." 467 U.S. 837, 842 (1984). Such unambiguously expressed Congressional intent is present in sections 105(c)(2) and (3).

Moreover, the Commission, as the administrative agency vested with authority to decide Mine Act discrimination complaints, is always present in such proceedings; the Secretary, however, may or may not be present. Section 105(c)(3) provides that, where the Secretary has refused to proceed with a discrimination complaint, a miner may file an action on his own behalf before the Commission, i.e., he may hire private counsel or appear *pro se*. The Commission's paramount role in directing relief in discrimination cases is consistent with its authority independent of the Secretary in assessing penalties for all violations, including those involving discrimination against miners. Section 110(i) of the Mine Act provides, "The Commission shall have authority to assess all civil penalties provided in this [Act]." 30 U.S.C. § 820(i). Similarly, section 110(k) states that the Secretary may not compromise, mitigate, or settle any proposed penalty that has been contested without the Commission's approval. 30 U.S.C. § 820(k).[1] *E.g.*, *Knox County Stone Co.*, 3 FMSHRC 2478, 2478-82 (November 1981).

[1] The Mine Act contains other references to the Commission's role in making policy. For example, in specifying the procedures for the Commission's *sua sponte* review of judges' decisions, 30 U.S.C. § 823(d)(2)(B) states that the Commission may, in its discretion, grant review of decisions that "may be contrary to law or Commission policy" or that present a "novel question of policy." *See Thunder Basin Coal Co. v. Reich*, 510 U.S. __, 114 S.Ct. 771, 127 L. Ed. 2d 29, 38 n.9 (1994).

At issue in *Martin* was an ambiguous regulation[2] issued by the Secretary under the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 651 et seq. (1994), and adjudicated before the Occupational Safety and Health Review Commission. In deferring to the Secretary's interpretation of the regulation, the Supreme Court relied on both the Secretary's role in drafting it, which placed her in a better position to be familiar with its purpose, and on her role in enforcing the regulation, which gave her expertise to assess the effect of a particular interpretation. 499 U.S. at 152-53.

The issue of deducting unemployment compensation does not involve the choice of conflicting interpretations of a regulation. Rather, the issue involves interpretation of a remedial provision of the Mine Act. The Supreme Court's primary rationale for deferring to the Secretary's interpretation of a regulation in *Martin* is absent here. The Secretary holds no advantage over the Commission in discerning the meaning of the statutory provision authorizing the Commission to structure appropriate relief to miners who are victims of discrimination. Moreover, the Supreme Court in *Martin* emphasized that its holding was limited to "the division of powers between the Secretary and the Commission under the OSH Act."[3] 499 U.S. at 157. The Supreme Court stated in *Thunder Basin Coal Co. v. Reich* that this Commission "was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act." 510 U.S. __, 114 S.Ct. 771, 127 L. Ed. 2d 29, 42 (1994), *quoting Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Committee on Human Resources*, 95th Cong., 2d Sess., 1 (1978).

The Commission, by a majority of three Commissioners, adopted its policy of subtracting unemployment compensation from back pay awards in *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (April 1993).[4] The Secretary was not a party to that case, either before the administrative law judge or before the Commission on review. Thus, even if *Wamsley* were correct as to deference, the Secretary had not presented the Commission with a position or interpretation to which it might defer. Nor was it apparent from other Commission cases dealing with back pay

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[2] The regulation at issue involved the use of respirators by employees who were exposed to coke oven emissions exceeding certain limits. The employer was charged with failing to assure that employees were supplied with properly fitting respirators, thereby exposing them to impermissible emission levels. The Occupational Safety and Health Review Commission ("OSHRC") vacated the citation, holding that assurance of a properly fitting respirator was not required by the regulation cited as the basis for liability but by another regulation. 499 U.S. at 148-49.

[3] No policy jurisdiction comparable to that granted to this Commission was expressly granted to OSHRC. *Drummond Co.*, 14 FMSHRC 661, 674-75 & n.15 (May 1992).

[4] The Commission concluded in *Meek* that it had the authority under the Mine Act's remedial scheme "to adopt an appropriate policy concerning the deduction of unemployment compensation," *Meek,* 15 FMSHRC at 616, and that such deduction "is a reasonable and sound policy that fully effectuates the Mine Act's goal of making whole miners who have been wrongfully discharged in violation of the Act," *id.* at 618.

awards that the Secretary had established any position on the deduction issue. *See, e.g., id.* at 618 n.12, *citing Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 15 FMSHRC 237, 241 (February 1993) (ALJ); *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972 (June 1993) (complaint filed under section 105(c)(3)). Indeed, in *Nantz*, the Secretary stipulated that whether or not unemployment compensation should be deducted from a miner's back pay award was within the discretion of the presiding judge. *Nantz*, 15 FMSHRC at 241. Similarly, when the Commission extended its policy of reimbursing discriminatees for expenses reasonably incurred in pursuing their claims, to include wages lost due to attendance at deposition and hearing (*Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 560-61 (April 1996)), the Secretary had taken no position on this issue of remedial relief. The Commission in *Carroll Johnson* agreed with the argument of the intervenor, United Mine Workers of America.

Congress clearly assigned the Commission responsibility in discrimination cases to grant "such relief as it deems appropriate." 30 U.S.C. § 815(c)(3). That responsibility does not allow the Commission to abandon its statutory interpretations adopted in the course of its adjudications in order to defer to the Secretary when he chooses to offer an interpretation.[5]

[5] The Mine Act's legislative history states, "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." *Leg. Hist.* at 637. This general admonition, however, does not overcome the statutory provisions of the Mine Act and the more specific legislative history. Nor can I agree with the Fourth Circuit that the Mine Act so severely limits the Commission's review authority that it cannot decide which of two statutory interpretations is "correct" but simply must adopt the Secretary's if his interpretation is "reasonable." *Wamsley*, 80 F.3d at 115.

B. Reversal of Precedent

The Commission's rule of deducting unemployment compensation from back pay awards, adopted in *Meek*, 15 FMSHRC at 616-18, was reaffirmed in *Ross*, 15 FMSHRC at 976-77, and *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2216-20 (November 1994). A majority of two here overrules the Commission's precedent because they are "persuaded by the rationale of the dissents in *Meek* and *Nantz*." Slip op. at 11, *citations omitted*. Commissioners Marks and Riley change the law according to their policy preferences, placing little weight on the Commission's prior holdings.

In the past, membership changes generally occurred at the Commission without major disruption to the decisional process or disturbance of earlier holdings. Thus, the Commission built a sound and stable body of law. When the Commission changed its law, it did so for sound reasons such as rulings made by the Supreme Court. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993) (Secretary's authority to vacate citations is unreviewable based on *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985)).

On the merits of the issue, I would reaffirm *Meek*. I note, moreover, that it is likely the state unemployment fund will require Mr. Poddey to repay to it the amount of unemployment compensation that is restored to him by this decision. *See Meek*, 15 FMSHRC at 617 n.10.

Arlene Holen, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur with my colleagues in the disposition of the negligence criterion.

With respect to the gravity criterion, Commissioners Holen and Riley have again rejected the Secretary's call for Commission recognition that violations of section 105(c) serve to chill miners' future invocation of protected activities because of a fear of similar adverse action. I dissent for the same reasons expressed in my dissent in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 563 (April 1996). I have concluded that a presumption of a chilling effect should be made in every instance of a section 105(c) violation.

With respect to the previous history criterion, I concur with the majority opinion, except that I do not join Commissioners Holen and Riley in their rejection of the Secretary's argument that the judge failed to consider the seriousness of past violations. What is the effect of their ruling? Are our judges now relegated to merely *counting* the number of previous violations with no consideration given to the circumstances surrounding the past violations? Do my colleagues conclude that all violations are fungible? Certainly no one could dispute that a previous history of ten roof control violations resulting in injury and loss of life is far more significant than a previous history of twenty roof control violations that arose because specific plan provisions were not followed, e.g., bolting pattern deficiencies that posed non-S&S risks. Their lapse of judgement is serious. It is clearly relevant and most important for the trial judge to be made aware of and to consider, not only the *quantity* of past instances of violation, but also any circumstances that may suggest that such past violations constituted serious health or safety threats to miners.

I am in agreement with the majority disposition regarding the unemployment compensation issue. However, because of the views espoused by Commissioner Holen and the notation of Commissioner Riley, I am compelled to set forth the following to ensure that the Commission's institutional integrity be maintained.

Both of my colleagues have an apparent difficulty embracing the concept that this Commission has the obligation to **defer** to the Secretary's reasonable statutory interpretations as enunciated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Notwithstanding Commissioner Holen's expression of deep consternation, stemming from her perception that the majority in this case fails to adhere to the "Commission's established law" (by rejecting her policy choice to require a set off of unemployment compensation from back pay awards made under section 105(c) of the Act), Commissioner Holen, herself, fails to adhere to controlling Supreme Court precedent. Nowhere in her concurring opinion is the *Chevron* case considered or even cited for this purpose![1] Yet that

[1] However, in her concurring opinion Commission Holen does cite *Chevron* in connection with her conclusion that the intent of Congress, regarding the meaning of sections 105(c)(2) and (3) of the Act is clear and unambiguous. This, however, is curious in view of the

case, and its mandate to appellate courts to defer to agency interpretations of statutory provisions squarely applies to this case.

By my colleagues' failure to apply *Chevron*, one could conclude that *Chevron* has been deleted from our jurisprudence. However that's not the case and to be sure there is no misunderstanding, I submit the following which I suggest provides unequivocal direction to this Commission in the disposition of this issue!

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, **the court does not simply impose its own construction on the statute**, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. ([footnote] **The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.**)
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> 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may

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fact that both majority opinions in *Meek* and *Nantz* were grounded only on Commissioner Holen's *policy preferences* after concluding that the Act is silent on the issue of unemployment compensation. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (April 1993); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2216 (November 1994). See also *infra* n.4.

> not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations
>
> > 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'
> >
> > '. . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'

Chevron, 467 U.S. at 842-45 (footnotes and citations omitted, emphasis supplied). *Accord*, *Smiley v. Citibank*, 517 U.S. ___, 116 S.Ct. 1730, 135 L. Ed. 2d 25, 31 (1996), *citing Chevron*, 467 U.S. at 843-44 ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

Notwithstanding the foregoing, Commissioner Holen unsuccessfully attempts to demonstrate that the Commission has controlling policy authority in "directing relief in discrimination cases." Slip op. at 15 (Commissioner Holen, concurring). Support for her position is based on the fact that Congress provided the miners with a private right under section 105(c)(3), independent of the Secretary, if the Secretary finds no violation occurred. Commissioner Holen's reliance on that provision of the Act for her contention is woefully off the mark.

In authorizing a private right of action to miners under section 105(c)(3), Congress was clearly providing a tangible means by which miners could obtain that which Congress intended --

that access to **all** relief necessary to make the miner whole be assured.[2] Commissioner Holen's position in this case, and in the two Commission decisions being overruled[3] today, only frustrate that Congressional intention.

Last, but by no means least, Commissioner Holen's invective suggesting that my position on this issue (to not set off unemployment compensation received by the miner from back pay awards) is based merely on superficial "policy preferences" is astonishing! Slip op. at 18. (Commissioner Holen, concurring). The Commission's majority decisions in *Meek* and *Nantz* admittedly relied on the policy preferences of Commissioner Holen.[4] However, by some process known only to Commissioner Holen, those ill chosen policy choices, that flagrantly ignored the vast preponderance of federal case law, are apparently believed by her to have become ensconced into the "Commission's established law," that should forever be held inviolate! Nonsense.

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[2] It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The special relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

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

[3] *Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993); *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208 (November 1994).

[4] "[W]e conclude that deducting unemployment compensation from a backpay award is a reasonable and sound policy that fully effectuates the Mine Act's goal . . . ." *Meek*, 15 FMSHRC at 618 (emphasis supplied). "The Commission . . . now adopts a policy for its administrative law judges, in order to ensure equality of treatment . . . ." *Id*. (emphasis supplied). "The Commission recently decided . . . that, as a matter of agency policy, unemployment compensation . . . should be deducted in determining backpay awards." *Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 976 (June 1993) (emphasis supplied). "[T]he Commission determined [in *Meek*] that a policy of deducting unemployment benefits comports with the Mine Act's goal of making the miners whole. It adopted this policy to be followed by its judges." *Nantz*, 16 FMSHRC at 2216 (citations omitted, emphasis supplied). "The Commission, by a majority of three Commissioners, adopted its policy of subtracting unemployment compensation from back pay awards in *Meek v. Essroc Corp* . . . ." Slip op. at 17 (Commissioner Holen, concurring) (emphasis supplied).

For the reasons clearly and convincingly set forth in former Commissioner Backley's dissent in *Meek* and for the same reasons amplified in the *Nantz* dissent, an opinion I am pleased to have signed, I continue to conclude that unemployment compensation received by the miner should not be set off from back pay awards.

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Marc Lincoln Marks, Commissioner