FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 9, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CHARLES H. DIXON BERNARD EVANS, RICHARD GLOVER, EDGAR OLDHAM, MARK MARCH, DON RILEY, CHARLES JOHNSON and ELEVEN (11) UNNAMED EMPLOYEES OF PONTIKI COAL CORPORATION	:	
v.	:	Docket No. KENT 94-1274-D
PONTIKI COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). By order dated November 17, 1995, the Commission granted the Secretary of Labor=s unopposed petition for interlocutory review of Administrative Law Judge Gary Melick=s February 6, 1995 order. In the February 6 order, the judge determined that the Commission has no jurisdiction over complaints filed by the Secretary regarding (1) discrimination under section 105(c) of the Act, 30 U.S.C. ' 815(c), against individuals who have not filed initiating complaints, and (2) acts of discrimination not alleged in the initiating complaint. At the same time, the Commission also granted the unopposed petition

[1] Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

for interlocutory review filed by Pontiki Coal Corporation (APontiki@) challenging the judge=s September 29, 1995, order. In his September 29 order, the judge ruled that the determination as to when Charles H. Dixon became a representative of miners depends upon when he was so designated by at least two miners at the subject mine. The Commission stayed proceedings before the judge pending resolution of these appeals.

For the reasons that follow, we reverse the judge=s February 6 order and direct the judge to resume proceedings with respect to all complainants and allegations in the Secretary=s complaint. We also vacate that portion of our November 17 order directing review of Pontiki=s petition, and deny Pontiki=s petition.

I.

Factual Background

Pontiki operates the Pontiki No. 2 Mine, an underground coal mine in Lovely, Kentucky. Jt. Stip. 1. On March 11, 1994, Pontiki=s vice president for operations, Charles Wesley, held a meeting with all three shifts of miners at the No. 2 Mine and told them that the company would recognize and welcome the participation of any miner employed by Pontiki properly designated as a miners= representative, but that it would not recognize non-employees, including officials of the United Mine Workers of America (AUMWA@), as miners= representatives because the company did not believe non-employees could serve as miners= representatives. Jt. Stip. 16.

During that meeting, the employees were also told that Pontiki would actively oppose the designation of any non-employee as a miners= representative, including non-employee UMWA officials, that if such a designation occurred Pontiki might have to expend considerable legal fees to defend its position that only Pontiki employees are entitled to act as representatives of miners at the mine, and that costs incurred could affect their job security. Jt. Stip. 17. Wesley stated that Pontiki would not post any certification that appointed non-employees as representatives and that such action would cost the company $5000 per day in penalties assessed by the Department of Labor=s Mine Safety and Health Administration (AMSHA@). S. Mot for Summ. Decision, Gov=t Ex. 3 at 2. Wesley also stated that the money could be put on the bathhouse floor and divided up among the miners, which he calculated would amount to about $1800 per miner. *Id.* Gov=t Ex. 3, p.2.

On April 14, 1994, UMWA employee Charles H. Dixon filed with MSHA information required under 30 C.F.R. Part 40[2]. Jt. Stip. Doc. C. The Part 40 filing consisted of a ACertificate

[2] 30 C.F.R. ' 40.1, entitled ADefinitions,@ provides in relevant part (emphasis in original):

> As used in this Part 40 . . .
> (b) *Representative of miners* means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and (2) *Representatives authorized by the miners, miners or their representative, authorized miner representative*, and other similar terms as they appear in the Act.

30 C.F.R. ' 40.2, entitled ARequirements,@ provides in relevant part:

(a) A representative of miners shall file with the Mine Safety and Health Administration District Manager for the district in which the mine is located the information required by '40.3 of this part. Concurrently, a copy of this information shall be provided to the operator of the mine by the representative of miners.

(b) Miners or their representative organization may appoint or designate different persons to represent them under various sections of the [A]ct relating to representatives of miners.

(c) All information filed pursuant to this part shall be maintained by the appropriate Mine Safety and Health Administration District

of Representation@ designating the UMWA as miners= representative, including Dixon, six other non-employee UMWA officials, and three Pontiki employees. Jt. Stip. Doc. C. On April 15, 1994, Pontiki received its copy of the Part 40 filing. Jt. Stip. 18. That same day, Pontiki posted on the mine bulletin board the Part 40 filing, Dixon=s transmittal letter and a notice stating that Pontiki had posted the designation papers Aunder protest@ because Pontiki refuses to recognize non-employees as miners= representatives. Jt. Stip. 19 & Doc. D.

Office and shall be made available for public inspection.

On April 26, 1994, Dixon filed a discrimination complaint with MSHA pursuant to the provisions of section 105(c)(2) of the Act.[3] Jt. Stip. 20 & Doc. E. After conducting an investigation of the complaint and making a determination of violation, the Secretary filed a complaint with the Commission on September 2, 1994, which was amended on October 3, 1994. The amended complaint alleged that Pontiki discriminated against Dixon, six other non-employee miners= representatives listed on the Part 40 designation, and 11 unnamed miners who had designated the UMWA officials to be their representatives. Am. Compl. && 5,6. It alleged that from March 1994 on, Pontiki discriminated against Dixon and the 17 other individuals by (1) refusing to recognize the non-employee miners= representatives, (2) posting the designation with the admonishment that it would refuse to recognize non-employee miners= representatives, and (3) holding employee meetings and threatening employees with possible job loss if they continued their effort to designate non-employee miners= representatives. *Id.* & 6.

II.

Procedural Background

Before the judge, Pontiki filed a motion to dismiss on the grounds, inter alia, that the Commission lacks jurisdiction over individuals who have not filed initiating complaints with MSHA under section 105(c)(2) of the Act, and for whom the Secretary has not issued a written determination concerning their complaints. P. Mot. to Dismiss at 3-4. The judge granted partial dismissal, ruling that the Commission had no jurisdiction over individuals who had not filed an initiating complaint with MSHA. Feb. 6 Order at 4. The judge also determined that he lacked jurisdiction over allegations of discrimination not set forth in the initiating complaint. *Id.*

The judge further concluded that he was Awithout jurisdiction to consider any alleged acts of discrimination occurring before April 15, 1994[,]@ the date Pontiki received the Part 40 filing

---

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

> Any . . . representative of miners who believes that he has been . . . interfered with, or otherwise discriminated against . . . may, within 60 days after such violation occurs, file a complaint with the Secretary. . . . Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as [s]he deems appropriate . . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the . . . representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. . . .

30 U.S.C. ' 815(c)(2).

notifying it of Dixon=s status as a representative of miners. Feb. 6 Order at 5. However, following a hearing held on March 9, 1995 on the motion to dismiss, the Secretary entered into evidence an affidavit by Dixon averring that, prior to March 11, 1994, five miners had signed the Part 40 designation appointing Dixon as their representative. Aff. of Charles Dixon (March 2, 1995, & 5). Based on this evidence, the judge issued an amended order dated March 10, 1995, deferring, for a hearing on the merits, the determination of when Dixon became a representative of miners. Am. Order Granting Partial Dismissal.

The Secretary then filed a petition for discretionary review (APDR@) challenging the judge=s February 6 order. On March 21, 1995, the Commission denied the PDR as premature on the ground that the February 6 order was not a final decision. On April 6, 1995, Pontiki moved for reconsideration of the March 10 amended order. On September 29, 1995, the judge denied Pontiki=s motion for reconsideration. Both the Secretary and Pontiki filed motions for certification of the February 6 and September 29 orders, respectively. The judge denied both motions and these petitions for interlocutory review followed.

III.

Disposition

The Secretary argues that the judge erred in dismissing her complaint filed with the Commission on behalf of the individuals whose names did not appear on the complaint filed with MSHA because the language of the statute, the statute=s purpose and Commission precedent all establish that section 105(c) authorizes her to file a complaint whenever she learns through investigation of an initiating complaint that the operator has engaged in unlawful conduct. S. Pet. at 8-11. Stressing the broad and liberal construction to be accorded the Act=s anti-discrimination provisions, the Secretary contends that the judge and the Commission should defer to her interpretation of section 105(c). *Id.* at 9-11. The Secretary further argues that, under the plain language of section 105(c)(2), she is required to conduct such investigation Aas [s]he deems appropriate,@ and that nothing in that section precludes the Secretary from filing a complaint if she learns during the investigation of an initiating complaint that the operator has engaged in unlawful acts of discrimination (1) against miners who did not file an initiating complaint, or (2) which were not specifically set forth in the initiating complaint. *Id*. at 13-15.

Pontiki argues that the judge correctly determined that the Commission lacks jurisdiction over claims asserted by the Secretary on behalf of the 17 individuals who failed to file a complaint with the Secretary under section 105(c)(2). P. Resp. Br. at 33. According to Pontiki, a person who believes he has been discriminated against must first Afile a complaint with the Secretary alleging such discrimination.@ *Id.* at 10. Pontiki contends that the judge correctly determined that the section 105(c)(2) complaint filed with the Commission on behalf of the individuals who did not file their own initiating complaints with MSHA must be dismissed. *Id*. at 11-14. Pontiki asserts that the Commission need not reach the Secretary=s contention that the judge erred by

dismissing the complaint insofar as it contained allegations not included in the initiating complaint. *Id.* at 6-8.

With respect to the September 29 order, Pontiki argues that the judge erred in ruling that Dixon could have become a representative of miners as soon as two miners designated him as such, and prior to the filing of his Part 40 papers. P. Br. at 8-22. Pontiki asserts that the standard adopted by the judge is inconsistent with the decision of the court of appeals in *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (A*UP&L*@). P. Br. at 13-16. Pontiki further argues that the Commission cases relied upon by the judge have not survived *UP&L*, and in any case do not support his ruling. *Id.* at 16-22.

The Secretary responds that the judge correctly deferred to her interpretation of the term Aminers= representative@ as including all individuals authorized by two or more miners to represent them for purposes of the Act. S. Br. at 9-10. The Secretary asserts that her interpretation is consistent with the language of her Part 40 regulations, their purpose, and the Mine Act. *Id.* at 11-13. She contends that *UP&L* is inapplicable because it involved a representative=s attempt to assert walkaround rights. *Id.* at 16-19. The Secretary further argues that Commission decisions recognize that an individual becomes a miners= representative when two or more miners so designate him or her, and that these holdings are unaffected by *UP&L*. *Id.* at 19-21.

1. Whether Dixon=s Initial Complaint was Properly Brought on Behalf of the Miners Who Designated Dixon as their Representative

Pontiki argues that the Act precludes the filing of complaints by a representative of miners on behalf of the miners he represents. P. Resp. Br. at 10. Pontiki=s contention rests on the use of the singular pronoun in section 105(c)(2) of the Act, which states that A[a]ny . . . representative of miners who believes that *he* has been . . . discriminated against . . . may . . . file a complaint with the Secretary alleging such discrimination.@ *Id.* (emphasis supplied).

We reject this argument. Section 105(c)(2) specifically lists a Arepresentative of miners@ as a person authorized to file a complaint, and does not restrict the ambit of any such complaint. Pontiki=s construction of section 105(c)(2) is at variance with the notion of a *representative* of miners who, as the statutory title suggests, is expected to act on behalf of miners. *See also* the regulatory definition of miners= representative at n.2, *supra*. Nothing in the language or legislative history of the Act suggests that Congress intended, by use of the word Ahe,@ to prevent miners= representatives from acting in that very capacity. Thus, section 105(c)(1) states:

> [n]o person shall . . . interfere with the exercise of the statutory rights of any miner, representative of miners . . . because of the exercise by such miner [or] representative of miners . . . *on behalf of himself or others* of any statutory right afforded by this [Act].

30 U.S.C. ' 815(c)(1) (emphasis supplied).

The purpose of legislatively authorizing, empowering, and protecting a class of persons known as a Arepresentative of miners@ was to enable miners to appoint someone to help them ensure that their work environment would be free from health and safety hazards, and to ensure that their statutory rights would be protected. Absent that function, the Arepresentative of miners@ has no purpose under the Act. We therefore conclude that Congress= inclusion of representatives of miners among the parties protected under section 105(c) was intended not only as a way to protect the individual representative (who may not even be an employee,[4] and thus may not be at risk of incurring the usual types of retaliation suffered by employees) from operator discrimination, but also as a further protection to the miners, whose representative may be more informed regarding the protections under the Act, and can therefore more readily enlist the protection of MSHA. *See Utah Power & Light Co.*, 897 F.2d 447, 451 (10th Cir. 1990). Thus, Dixon had the lawful authority to file a complaint of discrimination both on his own behalf and on behalf of those miners he was designated to represent.

We also disagree with the rationale relied on by the judge to preclude Commission jurisdiction over the miners who had signed Dixon=s authorization but had not signed the initiating complaint filed with MSHA. The judge reasoned that Dixon=s complaint was filed by Dixon Aalone@ and processed as an individual complaint by the Secretary. In support of this finding, the judge stressed that Dixon Ais the only named complainant and only Dixon=s signature appears on the Complaint.@ Feb. 6 Order at 4. The judge added that the Secretary=s letter to Dixon following the investigation referred to A>your= complaint of discrimination and conclude[d] that >you= have been discriminated against.@ *Id.* In light of these findings, the judge concluded: AThere is, accordingly, no legal basis for the Secretary=s expanded complaint filed with this Commission alleging discrimination against persons other than Charles Dixon.@ *Id.*

By focusing on Dixon=s name and signature on the complaint, the judge has misconstrued its core purpose. The complaint clearly challenges Pontiki=s refusal to recognize the lawful representatives of miners pursuant to the designation filed by Dixon. It contains the following requests for relief:

> (1) [t]hat management be directed to immediately cease and desist from interferring [sic] *with the statutory rights of the miners* to freely choose a miners= representative.
>
> (2) that Pontiki . . . properly post *the Miners[=] Certificate of Representation* without any protests.
>
> (3) [t]hat Pontiki . . . immediately post a notice to employees

[4] The caselaw is clear that non-employees may serve as miners= representatives. *See Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275 (10th Cir. 1995); *Kerr-McGee Coal Co. v. FMSHRC*, 40 F.3d 11257 (D.C. Cir. 1994), *cert denied*, 115 S.Ct. 2611 (1995).

> which apologizes *to the miners for the company=s interference with their statutory rights.*
>
> (4) that MSHA properly fine Pontiki . . . for the company=s treatment and intimidating *interference with the miners= statutory rights*.
>
> (5) that management conduct a meeting *with the miners* whereby [Dixon] can be properly introduced as *the miners[=] authorized representative*.

Jt. Stip. Doc. E (emphasis supplied).

Thus, the complaint contains allegations of illegal discrimination against the miners as a group and clearly reflects that Dixon filed the complaint in his representative capacity, not simply on his own behalf. Additionally, since the gravamen of both Dixon and the Secretary=s complaint is Pontiki=s refusal to recognize the designation of non-employee representatives of miners and Pontiki management=s threatening statements to the miners, we do not agree with the judge that the Secretary has in any meaningful sense Aexpanded@ Dixon=s initiating complaint.

In sum, we conclude that Dixon=s complaint is an adequate predicate to the complaint filed by the Secretary on behalf of the miners whom Dixon represented. Accordingly, we reverse the judge=s determination that he had no jurisdiction over the Secretary=s complaint as it pertains to these individuals.

Whether Dixon, as a representative of *miners*, may file a complaint on behalf of other *miners= representatives* under section 105(c)(2) is a question we need not address. In this case, as we explain in Part III-B, we conclude that the Secretary=s complaint alleging discrimination against the other miners= representatives is based on, and reasonably related to, his investigation of the same complaint filed by Dixon, and therefore falls within the Commission=s jurisdiction.

B. Whether the Secretary=s Complaint is Limited to the Individuals and Charges Set Forth in the Initiating Complaint

In contending that the Secretary=s complaint is overbroad, Pontiki relies on section 105(c)(2) and argues that the Secretary is limited to filing complaints only on behalf of those who have filed an initiating complaint. The Secretary contends that section 105(c)(2) permits her to file a complaint alleging all discrimination her investigation may have uncovered, even discrimination that affected individuals who did not file an initiating complaint. We are thus presented with a question of statutory construction on which the Secretary has offered her interpretation of the Mine Act. In such circumstances, the first inquiry is Awhether Congress has directly spoken to the precise question in issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). If a statute is clear and unambiguous, effect must be given to its language.

Chevron, 467 U.S. at 842-43. When a statute is silent or ambiguous with respect to the question at issue, however, we defer to the interpretation of the agency charged with administering the statute, so long as that interpretation is reasonable. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir 1994), *aff'g* 15 FMSHRC 587 (April 1993).

Under section 105 of the Mine Act, Congress reserved final authority to the Commission for determining both the validity and scope of complaints but charged the Secretary with administration of the statute. Thus, if a Mine Act provision is not clear, we ask whether her interpretation is reasonable. Here, section 105(c)(2) is silent concerning the relationship between the initiating complaint and the Secretary's complaint filed with the Commission. Accordingly, we proceed to examine the reasonableness of the Secretary's interpretation that she is not limited to the bare allegations of the initiating complaint to MSHA in drawing up her complaint to the Commission.

We find that the Secretary's interpretation is consistent with the language of section 105(c)(2) governing the issuance of her complaint. That language specifies that, upon receipt of an initiating complaint,

> the Secretary . . . shall cause *such investigation to be made as [s]he deems appropriate*. . . . If upon such investigation, the Secretary determines *that the provisions of this subsection have been violated*, [s]he shall immediately file a complaint with the Commission . . . alleging *such* discrimination . . . .@

30 U.S.C. ' 815(c)(2) (emphasis supplied).

We conclude that the Secretary reasonably interprets Asuch discrimination@ to refer to the discrimination uncovered during the Secretary's investigation of Dixon's initiating complaint. We also conclude that the scope of the Secretary's investigation, and her authority under section 105(c)(2) to issue a complaint based upon her investigation, are broader than Pontiki contends. This is consistent with our conclusion that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (February 1994) (Athe anti-discrimination section should be construed >expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'@) (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)).

The Secretary's interpretation of section 105(c)(2), insofar as she claims authority to file a complaint reasonably related to the initiating complaint, is also consistent with other Mine Act provisions giving the Secretary broad authority to investigate and remedy violations of the Mine Act. As the Secretary points out (S. Pet. at 12-13) and Pontiki concedes (Oral Arg. Tr. on

Review at 30-31), under section 104(a) of the Act, 30 U.S.C. ' 814(a), the Secretary is required to issue a citation for any violation of the Act she uncovers upon inspection or investigation.

In addition, the Secretary=s interpretation of section 105(c)(2) is consistent with Commission precedent recognizing that it is the scope of the Secretary=s *investigation*, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (April 1991), the operator moved to dismiss a discrimination claim prosecuted by an individual miner under section 105(c)(3) of the Act on the grounds that the miner=s complaint differed substantially from the complaint he initially filed with MSHA, and that MSHA had never investigated the allegation contained in the section 105(c)(3) complaint. The Commission stated:

> If the Secretary=s . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to ' 105(c)(3) have not been met.

Id. at 546. The corollary to this holding is that the prerequisites *were* met if the investigation had included the matters contained in the section 105(c)(3) complaint. Our holding here merely applies this corollary to a complaint filed by the Secretary herself under section 105(c)(2).

Moreover, in this case the complaint filed by the Secretary alleges the same discriminatory conduct alleged by Dixon in the initiating complaint filed with MSHA. Both complaints concern Pontiki=s refusal to acknowledge non-employee representatives of its miners. Thus, the Secretary=s addition of the names of other representatives of miners similarly affected, like her addition of the unnamed miners, changes neither the relief sought nor the basis of the charge as originally filed. The Secretary=s complaint merely identifies those who were affected by the alleged discriminatory conduct. We also find that the issues raised in the Secretary=s complaint do not deviate from those set forth in Dixon=s complaint to MSHA.[5]

Accordingly, we reverse the judge=s determination that the Commission lacks jurisdiction over the Secretary=s complaint as filed in this case.

C. Whether Dixon Became a Representative of Miners Prior to His Part 40 Filing

Based on his order dismissing the Secretary=s complaint on behalf of all individuals other than Dixon, the judge initially determined that he had no jurisdiction to consider any alleged acts of discrimination occurring before April 15, 1994, the date Pontiki received a copy of the certificate of representation filed by Dixon. Feb. 6 Order at 4. On March 10, 1995, the judge amended this ruling and set an evidentiary hearing to determine the date on which Dixon was

[5] In light of these conclusions, we need not determine in this case the extent of the Secretary=s authority to file with the Commission a complaint of discrimination that contains allegations of discrimination not set forth in the initiating complaint.

designated by two miners to be their representative. By order dated September 29, 1995, the judge denied Pontiki=s motion for reconsideration of the March 10 amended order.

Given our reversal of the judge=s dismissal of the miners from this proceeding, the date that Dixon became a miner=s representative is no longer relevant. There is no dispute that Dixon was a miner=s representative on April 26, 1994, the date he filed his complaint with MSHA.[6] Nor is there a dispute that the miners on whose behalf Dixon filed the initiating complaint, and on whose behalf the Secretary filed his section 105(c)(2) complaint, were miners at the time the allegedly discriminatory actions took place. Accordingly, the judge has jurisdiction over all acts of discrimination alleged in the complaint.

Because we need not reach the issue whether Dixon became a representative of miners prior to April 15, 1994, we vacate that portion of our order dated November 17, 1995 granting Pontiki=s petition for interlocutory review, and we deny Pontiki=s petition.

IV.

Conclusion

For the foregoing reasons, we reverse the judge=s February 6, 1995 partial dismissal of the Secretary=s complaint. We vacate our grant of Pontiki=s petition for interlocutory review, deny the petition, lift the stay previously imposed in our order of November 17, 1995, and direct the judge to resume proceedings with respect to all alleged discriminatees and issues set forth in the Secretary=s complaint.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner

[6] Before the judge, Pontiki at one point disputed Dixon=s status as a miner=s representative even after the April 15, 1994 Part 40 filing. Feb. 6 Order at 5. However, Pontiki has apparently abandoned that position. *See* P. Mot. for Certification at 10; P. Br. at 22.

_____

James C. Riley, Commissioner