ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 16-1250

MICHAEL WILSON	)
	)
Petitioner	)
	)
v.	)
	)
FEDERAL MINE SAFETY & HEALTH	)
REVIEW COMMISSION and	)
JIM BROWNING	)
	)
Respondents	)

Petition for Review of a Final Order of the
Federal Mine Safety & Health Review Commission

BRIEF FOR MICHAEL WILSON

TONY OPPEGARD
Attorney-at-Law
P.O. Box 22446
Lexington, Kentucky 40522
859-948-9239
tonyoppegard@gmail.com

WES ADDINGTON
Attorney-at-Law
APPALACHIAN CITIZENS' LAW CENTER
317 Main Street
Whitesburg, Kentucky 41858
606-633-3929
wes@appalachianlawcenter.org
Attorneys for Michael Wilson

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	)
Respondents	)

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Comes Michael Wilson ("Wilson"), through counsel, pursuant to Circuit Rule 28, and hereby states as follows:

(A). **<u>Parties and Amici</u>**. The following parties appeared before the Federal Mine Safety & Health Review Commission below: Michael Wilson (Complainant) and Jim Browning (Respondent).

The following are parties before this Court: Michael Wilson ("Wilson"); the Federal Mine Safety & Health Review Commission ("the Commission"); and Jim Browning ("Browning").

(B). **<u>Rulings Under Review</u>**. The Decision and Order under review in this

Court was issued by an Administrative Law Judge of the Federal Mine Safety & Health Review Commission on May 18, 2016. See *Michael Wilson v. Jim Browning, 38 FMSHRC 1161 (ALJ, 2016)*. Said Decision and Order granted the summary judgment motion filed by Browning, the Respondent below, and denied Wilson's summary judgment motion. Said Decision and Order can be found in the joint appendix at ______.

On June 23, 2016, the Commission issued a Notice wherein it declined to review the ALJ's Decision and Order, pursuant to the Petition for Discretionary Review filed by Wilson under §113 (d)(2) of the Mine Act, 30 USC §823 (d)(2). Therefore, the Decision of the ALJ became the final decision of the Commission, pursuant to §113 (d)(1) of the Mine Act, 30 USC §823 (d)(1).

(C). **Related Cases**. The case on appeal has not previously been before this Court or any other court. Counsel is not aware of any other related cases currently pending in this Court or any other court.

Respectfully submitted,

Tony Oppegard

____

TONY OPPEGARD
Attorney-at-Law
P.O. Box 22446
Lexington, Kentucky 40522

859-948-9239
tonyoppegard@gmail.com

WES ADDINGTON
Attorney-at-Law
APPALACHIAN CITIZENS LAW CENTER
317 Main Street
Whitesburg, Kentucky 41858
606-633-3929
wes@appalachianlawcenter.org

Attorneys for Michael Wilson

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GLOSSARY

FMSHRC = Federal Mine Safety & Health Review Commission

MSHA = Mine Safety & Health Administration

UMWA = United Mine Workers of America

JURISDICTION

Wilson's Complaint of Discrimination/Interference before the Federal Mine Safety & Health Review Commission was founded upon §105(c)(3) of the Federal Mine Safety & Health Act of 1977 ("the Mine Act"), 30 USC §815(c)(3), and upon Commission Procedural Rule 40(b), 29 CFR §2700.40(b).

Jurisdiction in this Court is founded upon §106(a)(1) of the Mine Act, 30 USC §816(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the ALJ err in granting summary judgment to the Respondent, Jim Browning, in this case involving interference with the statutory rights of Michael Wilson, a representative of miners ("miners' rep"), under §105(c)(1) of the Federal Mine Safety & Health Act of 1977 ("the Mine Act"); and in denying Wilson's motion for summary judgment?

2. In granting summary judgment to Browning, did the Administrative Law Judge ("ALJ") view the facts in the light most favorable to Wilson, the non-moving party?

3. Is summary judgment appropriate when the person charged with harassment/interference under §105(c)(1) of the Mine Act does not justify his actions with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights?

4. Is it legally permissible under §105(c)(1) of the Mine Act for a non-management employee to berate a representative of miners, tell him to go home, and accuse him of trying to hurt the company - while the miners' rep is performing his statutory duties - simply because that non-management employee does not have the authority to discipline the miners' rep?

5. Is it legally permissible under §105(c)(1) of the Mine Act for a non-management employee to harass and berate a miners' rep so long as he does it only

once?

6. Is a non-management employee's harassment of a miners' rep somehow mitigated under §105(c)(1) of the Mine Act because the harassment took place in front of several other employees (i.e., not in private)?

7. Is it permissible for an ALJ to consider that the representative of miners continued to act as a miners' rep after an incident of harassment in concluding that the harassment committed by the non-management employee did not rise to the level of interference when, in fact, the miners' rep had immediately filed an interference claim with MSHA against the hourly employee and the harasser had been disciplined by the mine operator for his conduct?

8. Does a non-management employee's harassment of a representative of miners insulate him from liability under §105(c)(1) of the Mine Act, whereas a management employee who engaged in the same conduct would be found liable for unlawful interference (i.e., is there a different legal standard for what constitutes "interference" under §105(c)(1) depending on whether the person charged with the unlawful conduct is a member of management or a non-management employee?

9. Are various factual findings by the ALJ supported by substantial evidence?

10. What is the proper legal standard to be used in *interference* cases under §105(c)(1) of the Mine Act when the person alleging interference is a non-employee representative of miners and the person alleged to have interfered with the statutory rights of the miners' rep is an hourly (non-management) employee?

STATEMENT OF THE CASE

This is a Petition for Review, brought pursuant to §106(a)(1) of the Federal Mine Safety & Health Act of 1977 ("Mine Act"; "the Act"), 30 USC §816(a)(1), by Michael Wilson, a non-employee "representative of miners" at Armstrong Coal Company's Parkway mine. Wilson seeks review of the May 18, 2016 decision of an Administrative Law Judge of the Federal Mine Safety & Health Review Commission ("Review Commission"; "the Commission"; "FMSHRC"), which granted summary judgment to Jim Browning, a coal miner against whom Wilson filed a Complaint of Discrimination/Interference under §105(c)(3) of Mine Act, 30 USC §815(c)(3), with the Commission after the Mine Safety & Health Administration ("MSHA"; "federal mine safety agency) declined to prosecute his case.

The ALJ's decision, styled *Michael Wilson v. Jim Browning, 38 FMSHRC 1161 (ALJ, 2016)*, became the final decision of the Commission when Wilson's Petition for Discretionary Review - filed pursuant to §113(d)(2) of the Mine Act,

30 USC §823(d)(2) - was declined by the Review Commission on June 23, 2016.

The issue of what is the proper legal standard to be used in *interference* cases under §105(c)(1) of the Mine Act when the person alleging interference is a non-employee representative of miners and the person alleged to have interfered with the statutory rights of the miners' rep is an hourly (non-management) employee is an issue of first impression in the D.C. Circuit.

STATEMENT OF FACTS & PROCEDURAL HISTORY

A "representative of miners", commonly referred to as a "miners' rep", is a term of art under the Mine Act. As used in 30 CFR Part 40, a "representative of miners" is "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act". 30 CFR §40.1(b)(1).[1] Miners' reps are also called "walkarounds" because they have the right, pursuant to §103(f) of the Mine Act, 30 USC §813(f), to accompany/travel with federal mine inspectors during MSHA's physical inspections of the mine.

Although traveling with federal mine inspectors - during which miners' reps

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[1] The process for designating a person or organization as a representative of miners is set forth at 30 CFR Part 40. Essentially, two or more miners working at the subject mine must sign a form designating the person or organization as their representative, and that form (with other information) must be filed with MSHA. The federal mine safety agency then notifies the mine operator of the designation, and the operator must post the name of the miners' rep at the subject mine.

can point out what they believe to be violations of the federal mine safety law (*see* Wilson's affidavit at p.1) - is the most commonly known activity engaged in by miners' reps, in fact, they have many other rights under the Mine Act and its implementing regulations, all of which are critical to mine safety. For example, miners' reps have the right to receive copies of all citations and orders issued to the mine operator by MSHA; to review daily reports regarding mine inspections for hazardous conditions; to participate in pre and post-inspection conferences between MSHA and the mine operator; to review the mine's roof control plan before the operator submits it to MSHA for approval; to request an immediate inspection of the mine if they believe a violation exists; to review the mine's evacuation and employee training records; and to participate in accident investigations conducted by MSHA. *See, generally, Thunder Basin Coal Company v. Reich, 114 S.Ct. 771, 774, n. 2-3 (1994); Council of Southern Mountains, Inc. v. FMSHRC, 751 F.2d 1418, 1421, n. 13-15 (D.C. Cir. 1985); Kerr-McGee Coal Corp. v. FMSHRC, 40 F.3d 1257, 1260, n. 5 (D.C. Cir. 1994), cert denied, 115 S.Ct. 2611 (1995); U.S. Dept. of Labor v. Wolf Run Mining Company, 452 F.3d 275 (4th Cir. 2006).*

According to this Court, Congress provided for miner participation in the inspection process - "in order to encourage miner awareness of health and safety

concerns" - by conferring "walkaround rights" on designated miners' reps. *Kerr-McGee Coal Corp. v. FMSHRC, supra at 1260.*

It is well-established that non-employees such as Wilson may serve as representatives of miners so long as they are duly designated by at least two working miners at the subject mine. *Thunder Basin Coal Company v. Reich, supra; Council of Southern Mountains, Inc. v. FMSHRC, supra; Kerr-McGee Coal Corp. v. FMSHRC, supra; U.S. Dept. of Labor v. Wolf Run Mining Company, supra; Utah Power & Light Company v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990).*

In fact, this Court has said that, "third party representatives can often contribute to an inspection in ways that miners themselves cannot. Non-employees may, for example, provide valuable safety and health expertise, use their knowledge of other mines to spot problems and suggest solutions, and take actions without the threat of pressure from the employer... The involvement of third parties in mine safety issues therefore is consistent with Congress's legislative objectives of improving miner health and mine safety". *Kerr-McGee Coal Corp. at 1263.*[2]

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[2] A similar position was expressed by the U.S. Court of Appeals for the 10th Circuit, which stated that, "[m]iners may benefit in a number of ways from nonemployee representatives participating in walkarounds ... [A] nonemployee

On June 18, 2015, Michael Wilson ("Wilson"), a non-employee "representative of miners" at the Parkway mine ("the mine")[3], an underground coal mine operated by Armstrong Coal Company ("Armstrong Coal"; "Armstrong"; "the company"), filed a "Discrimination Complaint"[4] with MSHA against Jim Browning ("Browning"), an hourly/non-management employee of Armstrong Coal, alleging that Browning had interfered with his statutory rights as a "representative of miners" when Browning harassed him on June 13, 2015, as he was reviewing Armstrong Coal's preshift/onshift examination record books in the

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representative may have greater expertise in health and safety matters than an employee representative". *Utah Power & Light at 451.* In this regard, it should be dnoted that Wilson had 41 years experience as an underground miner *(see "Affidavit of Michael Wilson" at 1)*.

[3] Wilson had previously worked at the mine for nearly 6 years as a continuous miner operator and a loader operator before retiring on May 6, 2015, about 5 weeks before the incident which gave rise to this interference action (*see Wilson affidavit at pp. 1-2)*.

[4] The pre-printed form that miners must fill out in order to allege a violation of §105(c)(1) of the Mine Act, 30 USC §815(c)(1), is labeled "Discrimination Complaint" by MSHA (*see* Wilson's complaint form which initiated this case at _____). However, in section 2 of that form, Wilson specifically alleged that Browning's acts constituted "interference". In addition, on page 2, which is labeled "Discrimination Report", Browning stated that "Browning's actions constitute interference with my rights as a 'representative of miners' under the Mine Act, and violate section 105(c) of the Act" (*see* Wilson's discrimination report form at _____).

bath house at the mine.[5] Pursuant to 30 CFR §§ 75.360(h) and 75.363(d), the designated representative of miners has the right to inspect said record books, which must be retained for one year on the mine's surface by the mine operator. In other words, Browning harassed Wilson while Wilson was in the midst of performing his statutory right as a miners' rep to examine the company's safety record books.

After investigating Wilson's complaint of interference, MSHA notified Wilson - by letter dated October 21, 2015 - that the agency did "not believe that there is sufficient evidence to establish ... that a violation of Section 105(c) occurred". *See Exhibit B to Wilson's "Complaint of Discrimination" filed with FMSHRC.* Therefore, the Secretary of Labor ("the Secretary") declined to file a discrimination case on Wilson's behalf with the Review Commission.

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[5] Pursuant to §303(d)(1) of the Act, 30 USC §863(d)(1), and 30 CFR §75.360, within 3 hours immediately preceding the beginning of any work shift, certified persons must examine every place in the mine where miners may work or travel, and conduct various tests and examinations for hazardous conditions. Pursuant to §303(e) of the Act, 30 USC §863(e), and 30 CFR §75.362, at least once during each coal producing shift, each working section in the mine must be examined for hazardous conditions by certified persons.

Pursuant to 30 CFR §75.360(g) and 30 CFR §75.363(b), the results of these preshift and onshift examinations and tests for hazardous conditions must be recorded in record books maintained by the mine operator, These records are commonly referred to as "preshift and onshift reports".

Accordingly, Wilson filed his own action - pursuant to §105(c)(3) of the Mine Act, 30 USC §815(c)(3) - on November 18, 2015.

On January 6, 2016, the presiding ALJ set the case for trial on March 16, 2016 (*see ALJ Order at _____).* On February 29, 2016, Browning filed a motion for summary decision. On March 29, 2016, Wilson filed a cross-motion for summary decision. The matter was fully briefed by the parties,[6] and on May 18, 2016, the ALJ issued a Decision and Order granting Browning's motion for summary decision and denying Wilson's cross-motion for summary decision.

Aside from the pleadings in the case, there were four key documents that were submitted to the ALJ along with the parties' summary judgment motions: (1) the affidavit of Wilson; (2) the affidavit of Justin Greenwell, a miner who witnessed Browning's harassment of Greenwell on June 13, 2015; (3) the statement that Browning gave to the MSHA special investigator who investigated Wilson's interference claim[7]; and (4) Browning's affidavit.

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[6] On March 29, 2016, Wilson also filed a response in opposition to Browning's motion. On April 29, 2016, Browning responded to Wilson's motion; and Wilson filed a reply memorandum on May 16, 2016.

[7] Browning was interviewed by MSHA Special Investigator Michael Dillingham on July 13, 2015 (i.e., less than one month after the incident that gave rise to this interference case). Pursuant to a writen request from counsel for Wilson, MSHA provided the undersigned with the recording of the agency's interview of Browning. The undersigned attorney for Wilson gave the CD

Viewing the facts in light most favorable to Wilson, these are the facts that were presented to the ALJ:

Wilson, who worked as a coal miner for 41 years, worked for Armstrong Coal at its Parkway underground mine from the time the mine opened in August, 2009, until May 6, 2015. Wilson was a continuous miner operator at the mine for nearly six years[8] until he became a "Part 90" miner on or about April 17, 2014.[9] After MSHA notified Armstrong Coal that Wilson had exercised his option under 30 CFR Part 90 to work in a low-dust area of the mine, he was re- assigned as a loader operator on the mine surface.

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recording to a freelance court reporter, who transcribed the interview. Copies of the audio recording and the interview transcript were then provided to the ALJ and to opposing counsel below. References to the interview transcript herein are designated "Interview at _____" followed by the page number of the transcript. References to Wilson's and Greenwell's affidavits are designated respectively "Wilson aff. at _____ and "Greenwell aff. at ______" followed by the page number.

[8] A continuous miner is a "machine with rotating drum heads that extracts coal by grinding it from the mine face". *Gilbert v. FMSHRC, 866 F.2d 1433, 1435, n. 1 (D.C. Cir 1989)*

[9] §203(b)(1) of the Mine Act, 30 USC §843(b)(1), provides that miners who have pneumoconiosis (black lung disease) shall be given the option of transferring to an area of the mine where they will be exposed to lower concentrations of respirable coal dust. 30 CFR Part 90 implements this mandatory health standard. *Secretary of Labor o/b/o Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989).*

Wilson was officially designated as a "representative of miners" at the Parkway mine on or about February 28, 2014. After becoming a miners' rep, Wilson regularly traveled with MSHA inspectors when they inspected the mine. Because Wilson would point out violations to the federal mine inspectors, he was disliked by mine management and by many of his co-workers at the mine. As a result, he was consistently harassed and discriminated against by Armstrong's mine management.

Wilson retired from his job with Armstrong Coal on May 6, 2015. Although he was no longer employed by the company, Wilson continued to act as a representative of miners at the Parkway mine because he knew the mine had safety problems and he wanted to help keep his former co-workers safe. Because he is not employed by Armstrong Coal, Wilson does not get paid for traveling with federal mine inspectors or for performing any other duties as a non-employee representative of miners.

When Wilson showed up at the mine for the first time as a non-employee miners' rep - on May 11, 2015 - the company became very upset. The company's lawyer called one of Wilson's attorneys around 7:00 AM that day to ask why Wilson was at the mine. From that point forward mine management, as well as many of the miners at the Parkway mine, were hostile towards Wilson.

On Saturday morning, June 13, 2015, Wilson drove to the Parkway mine in his capacity as a representative of miners. Wilson was sitting at a table in the company's bath house - on which the company keeps its preshift/onshift examination book - reviewing the examination book when Browning walked up behind him and started harassing him.

Browning was standing about 1½ feet from Wilson and was leaning down over him. In a loud voice, Browning accused Wilson of looking at the books so that he could find a violation and have MSHA issue a citation to the company. Browning told Wilson several times in a loud voice to put the book down and to leave the mine property and go home. Browning told Wilson that he didn't work at the mine anymore, that he was an ex-miner, and that there were other miners' reps at the mine. Browning also told Wilson that he (Wilson) was taking money out of his (Browning's) pocket[10], and that he (Wilson) had a "personal vendetta against the company" (Greenwell affidavit at 1).[11] Wilson told Browning that he

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[10] The ALJ's decision says that Wilson "claims" that Browning made this accusation *(38 FMSHRC at 1162)*. However, in his interveiw with MSHA, Browning admitted that he accused Wilson of taking money out of his pocket *(Interview at 12)* and explained to the special investigator what he meant by the statement *(Interview at 32-33)*.

[11] In addition, according to Greenwell, Browning told Wilson, "You need to leave. We have miners' reps. We don't need you here. Go home. You are trying to hurt the company and you're costing me money. Go home." *Id.* Browning also

wasn't leaving because it was his right as a miners' rep to look at the records.

During this incident, Browning never asked Wilson whether he was aware of any safety hazards in the mine, nor did Browning mention anything about his work duties for that shift. Browning was not one of the miners who had signed for Wilson to be designated as a miners' rep, and he had never before talked to Wilson about anything that Wilson had done as a representative of miners. For example, Browning had never before asked Wilson about any unsafe conditions that he had observed in the mine, or whether there were any dangers of which he (Browning) needed to be aware. On the day in question, Browning wasn't trying to get information from Wilson to help protect himself on the job. Rather, Browning was just mad that Wilson was performing his duties as a miners' rep - i.e., looking at Armstrong's preshift and onshift reports - because he thought Wilson's actions might result in the company getting a citation (which might affect him financially)[12].

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argued (incorrectly) that reviewing the safety examination book wasn't part of a miners' rep's duties. *Greenwell affidavit at 2.*

[12] Browning explained to MSHA what he meant by his comment that Wilson was taking money out of his pocket: "[I]f your company is getting violations wrote up against them, that means that ... they're having to pay for a violation ... [s]o he's taking money away from the company which could potentially have come back to me in a ... coal royalty or he could be taking money away from me ... if he got the mines closed for a day or two for something, then I

After Browning harassed Wilson for a few minutes, the mine superintendent, Danny Thorpe, came up to Browning, told him to leave and escorted him out of the bath house. **Armstrong Coal suspended Browning for one day for his conduct** (*see Browning's verified answers to Wilson's 1st set of interrogatories, #2; 38 FMSHRC 1162)*. Throughout this incident, Browning was obviously mad. Browning wasn't calmly talking with Wilson to obtain information; he was yelling at Wilson because he didn't like Wilson being a miners' rep at the Parkway mine. There was no physical contact between Browning and Wilson during this incident.

In Wilson's opinion, some miners' reps would be discouraged and less likely to exercise their rights as a representative of miners if they were harassed/interfered with in the manner in which Browning harassed/interfered with him. Although Wilson continued to act as a representative of miners after the incident on June 13, 2015 - because he was determined not to let a miner force him to stop performing his duties as a safety advocate/miners' rep - Browning's

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would be out of work" (Interview at 33).

In addition, it must be noted that the ALJ's decision failed to mention that none of Browning's comments to Wilson were safety-related or expressed any concern for safety at the mine.

harassment made it more difficult for Wilson to perform his statutory duties.[13]

SUMMARY OF WILSON'S ARGUMENT

Wilson argues herein that the ALJ did not heed the bedrock principle that §105(c) of the Mine Act must be liberally construed to effectuate the safety-enhancing purpose of the law; that the ALJ erred in her interpretation of the case law regarding claims of *interference* under §105(c); that the ALJ did not view the facts in the light most favorable to Wilson regarding Browning's motion for summary judgment; and that Browning's admissions in his interview with the MSHA special investigator establish that he interfered with Wilson's statutory rights as a non-employee representative of miners, which entitle Wilson to summary judgment.

ARGUMENT

THE ALJ ERRED IN GRANTING SUMMARY JUDGMENT TO BROWNING & IN DENYING WILSON SUMMARY JUDGMENT

A. CASE LAW INTERPRETING THE MINE ACT

Section 105(c)(1) of the Mine Act provides, in pertinent part, as follows:

"**No person shall** discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise

[13] Wilson filed his discrimination complaint - alleging interference under the Mine Act's anti-discrimination provision - against Browning individually a few days later (June 18, 2015).

interfere with the statutory rights of any miner, **representative of miners** or applicant for employment ... **because such** miner, **representative of miners** or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation ... or **because of the exercise by such** miner, **representative of miners** or applicant for employment **on behalf of himself or others of any statutory right afforded by this Act**" (emphasis added).

The Mine Act's anti-discrimination provision, as well as the similar provision under the Mine Act's predecessor legislation (the Federal Coal Mine Health & Safety Act of 1969, 30 USC §801, et seq.) have been the subject of numerous cases before this Court.[14]

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[14] See, for example, *Donovan o/b/o Anderson v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984)(although not a "miner", bookkeeper for mining company protected by Mine Act's anti-discrimination provision for refusing to lie to MSHA investigators); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir 1974)(coal miner brought himself within coverage of the Coal Act's anti-discrimination provision by reporting safety violation); Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988)(establishing standard for constructive discharge under §105(c)(1) of the Mine Act); Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir 1989)(miner has right to refuse to perform work he reasonably and in good faith believes to be unsafe); Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424 (D.C. Cir. 1989)(substantial evidence supported FMSHRC's decision that miner was unlawfully discharged for refusing to continue handling electrical cable that had shocked him); Leeco, Inc. v. Hays, 965 F.2d 1081 (D.C. Cir. 1992)(case of miner who was fired for not performing unsafe work remanded to FMSHRC to determine whether miner's failure to inform foreman that he was not greasing all of continuous haulage system was nonetheless protected by §105(c)(1) of the Mine Act); Secretary of Labor o/b/o Keene v. Mullins, 888 F.2d1448 (D.C. Cir. 1989)(coal company's offer to rehire miner under the same unlawful and unsafe*

This Court has also dealt with cases involving representatives of miners and "walkaround rights" under the Mine Act.[15]

The bedrock principle of all of these cases is that the Mine Act is remedial legislation and, as such, its anti-discrimination provision must to construed expansively to effectuate the Act's safety-enhancing purpose. For example, quoting from the Mine Act's legislative history, this Court has stated that §105(c)(1) "should be construed expansively to assure that miners **will not be inhibited in any way from exercising any right afforded by the legislation**". *Donovan o/b/o Anderson v. Stafford Construction Company, supra at 960*

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conditions that he had complained about and for which he had been unlawfully discharged constitutes a separate violation of the Mine Act's anti-discrimination provision); Donovan o/b/o Chacon v. Phelps Dodge Corporation, 709 F.2d 86 (D.C. Cir. 1983)(substantial evidence supported ALJ's decision, which had been reversed by FMSHRC, that miner was singled out and unlawfully discharged for pressing safety reforms); Secretary of Labor o/b/o Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989)(*Part 90 miner is protected from reduction in pay not only upon initial transfer to avoid exposure to respirable coal dust, but also upon subsequent transfers for other reasons).*

[15] See, for example, *Kerr-McGee Coal Corp. v. FMSHRC, 40 F.3d 1257 (D.C. Cir. 1994), cert denied, 115 S.Ct. 2611 (1995)(under the Mine Act, labor organizations may serve as miners' reps at non-union mines); Council of Southern Mountains, Inc. v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985)(non-employee representatives of miners do not have statutory right to monitor safety training programs on company property); United Mine Workers of America v. FMSHRC, 671 F.2d 615 (D.C. Cir. 1982)(miners' reps entitled to be paid for accompanying MSHA inspectors during "spot" inspections of mines).*

(emphasis added). The Court concluded that the Mine Act "must be broadly interpreted in order to further the congressional aim of making this Nation's coal and other mines safe places to work" *Stafford Construction Company at 961.* In *Secretary of Labor o/b/o Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989)*, the Court observed that "several times" before it had said that "the primary purpose of the Mine Act was to protect mining's most valuable resource - the miner" and that "Congress intended the Act to be liberally construed to achieve this goal". *Bushnell at 1437 (internal quotations omitted).*

Indeed, the Court has emphasized that the Mine Act "was, in large part, a response to the history of frequent and tragic mining disasters in the United States ... Congress further recognized that if its national mine safety and health program was to be truly effective, miners *and their representatives* must play an active part in enforcing the Act. In order to promote miner *and representative* participation, section 105(c)(1) of the Act protects both miners *and their representatives* from discharge *or any other form of interference* or discrimination because of the exercise of a statutory right afforded by the Act". *Council of Southern Mountains, Inc. v. FMSHRC, supra at 1420 (emphasis added).* [16]

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[16] See also *Phillips v. Interior Board of Mine Operations Appeals, supra at 781 ("the fundamental purpose of the Act [is] to compel safety in the mines"); Simpson v. FMSHRC, supra at 463 (rejecting the Commission's "severely*

However, the research done by the undersigned attorneys for Wilson does not reveal any decisions issued by the Court regarding *interference* claims under §105(c)(1).

B. THE ALJ DECISION[17]

The ALJ's decision - which granted Browning's motion for summary decision and denied Wilson's motion for summary decision - found that Wilson, as a representative of miners, was a member of a protected class. However, the ALJ ruled that Browning's conduct on the day in question did not rise to the level of unlawful interference because (1) it was "a single altercation between a miner [Browning] and a representative [Wilson] with no discernible effect on protected activity" *(38 FMSHRC at 1167)*; (2) Browning's actions as an hourly employee had "less coercive effect" than those cases involving a supervisor's conduct because Browning had "no authority" over Wilson *(38 FMSHRC at 1166)*; (3)

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restrictive interpretation" of the legal standard to be employed in constructive discharge cases arising under the Mine Act's anti-discrimination provision); *Secretary of Labor o/b/o Keene v. Mullins, supra at 1452 (miners must also be protected against "subtle forms of discrimination")*

[17] It is black letter law that summary judgment is only appropriate where there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law. *Solomon v. Vilsack, 763 F.3d 1 (D.C. Cir. 2014);* and that the facts must be considered in the light most favorable to the non-moving party. *Wilson v. Cox, 753 F.3d 244 (D.C. Cir. 2014); Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999).*

Browning's "tone" toward Wilson, which was "aggressive" and "could have been interpreted as intimidating", was "mitigated slightly" because it took place in the company's bath house "in front of several witnesses" (*Id.*); and (4) Browning continued to act as a miners' rep after Browning harassment of him. Therefore, the ALJ concluded that, under the circumstances, "a reasonable miner [sic] would not have been dissuaded from exercising his rights in this situation" *(38 FMSHRC at 1167)*.[18]

The ALJ's reasoning, however, is flawed in every respect. Specifically: (1) The ALJ apparently did not take into account that perhaps this was an isolated incident of harassment precisely because Wilson took legal action against Browning a few days later by filing a complaint with MSHA alleging that Browning had interfered with his statutory rights and/or because he was suspended by Armstrong Coal for his conduct. Indeed, **it is also anomalous to rule that Browning did not interfere with Wilson's rights when Browning's employer suspended him for the remainder of the shift (and told Browning not to confront Wilson again) because of his harassing conduct**.[19]

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[18] The standard does not concern a reasonable miner, but, rather, a reasonable non-employee representative of miners.

[19] Apparently the ALJ thought it insignificant that the mine superintendent had to intervene and remove Browning from the bath house in order to stop the

(2) The ALJ's assertion that Browning's conduct had a less coercive effect than it would have had if an Armstrong supervisor had yelled at Wilson and repeatedly told him to go home (because he was hurting the company) is clearly erroneous. That is, because Wilson was a **non-employee** representative of miners, mine management had no more authority to discipline Wilson than did Browning. In other words, the interference in this case is the fact that Browning berated and harassed Wilson while Wilson was trying to perform his duties as a miners' rep, not because of any potential punitive action that could have been taken against Wilson in the future (i.e., a threat of reprisal).

(3) The fact that Browning harassed Wilson in front of miners in the company's bath house - as opposed to harassing him away from company property or in a private office at the mine site - is not somehow a "mitigating factor". If anything, the location where the incident occurred actually made the harassment worse because it reasonably could have emboldened other miners to harass Wilson as well. **Indeed, if the ALJ's decision is allowed to stand, it will send a troubling invitation to the miners at the Parkway mine - as well as to miners**

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harassment. That is, the incident lasted "a few minutes" *(38 FMSHRC 1165)* only because mine management intervened. Had the superintendent not removed Browning from the situation, there is no way to know how long the harassment might have continued.

throughout the nation who are hostile toward the concept of miners' reps - that they are free to yell at, demean, and repeatedly tell a non-employee miners' representative to get off mine property and go home while that miners' rep is in the midst of performing his duty of trying to make the mine a safer place to work.[20] *Cf., Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 781, n. 32 (D.C. Cir 1974)("To hold that only a discharge after a formal proceeding has been instituted is protected, but that a discharge after the miner has taken the first step in the complaint procedure by complaining to his foreman is not protected, would be to invite all employers to gut the Safety Act by quick discharges of complaining employees").* Certainly, when Congress created the position of "representative of miners", it did not intend for those representatives to be harassed and bullied at the mine while exercising the rights Congress gave to them.

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[20] At this point, it is worth noting that the ALJ twice mischaracterized Browning's harassment of Wilson as an "altercation" between the two. Taken in the light most favorable to Wilson, there is nothing in Wilson's affidavit, or in the affidavit of Greenwell, who witnessed the entire event, to conclude that the incident was anything more than Browning harassing Wilson. Therefore, the ALJ's finding that there was an "altercation" between Browning and Wilson, which implies that both men engaged in a heated argument, is not supported by substantial evidence. Similarly, the ALJ's statement that both men became aggressive ("the two disagree over who was the first to become aggressive") finds no record support vis-a-vis Browning motion for summary judgment.

(4) The fact that Browning continued to act as a miners' rep **after the harassment** does not diminish or excuse Browning's conduct, as found by the ALJ. Indeed, Commission case law regarding interference holds that "**interference ...does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere* with the free exercise of employee rights**". *Secretary of Labor o/b/o Gray v. North Star Mining & Brummett, 27 FMSHRC 1, 9 (2005), quoting American Freightways Co., 124 NLRB 146, 147 (1959).* **Here, Browning was trying to bully Wilson into leaving the mine and abandoning his exercise of statutory rights as a representative of miners**. The fact that he did not succeed should not somehow inure to his benefit. Indeed, it is difficult to understand how yelling at a miners' rep while he is reviewing safety records, and telling him repeatedly to put down the records and go home because he supposedly is harming the company, could not *tend to interfere* with the free exercise of statutory rights by a miners' representative. In light of such harassing behavior, would not most non-employee miners' reps have second thoughts about whether it is worth their time and effort

to continue acting as a non-paid representative of miners?[21]

One of the problems with the ALJ's analysis of this case is that she relied on Commission case law that deals with the treatment of *employee miners' reps by members of mine management*, whereas in the case of Wilson we have *a non-employee miners' rep who was harassed by an hourly employee*.

C. "INTERFERENCE" CASE LAW UNDER §105(c) AND ITS APPLICATION TO THIS CASE

Indeed, although the Commission - through the unanimous vote of five Commissioners - recently approved of the legal test used by an ALJ in an *interference* case under §105(c) of the Mine Act,[22] the existence of a distinct cause of action for *interference* has not always been explicitly recognized by the Commission and its ALJs. [23]

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[21] It is important to remember that when Wilson traveled to the mine to perform his duties as a miners' rep, he was acting on behalf of the miners at the Parkway mine who designated him as their representative - i.e., he was not acting on his own behalf. Therefore, when the statutory rights of a miners' rep are subjected to interference, the miners on whose behalf the representative of miners is acting are harmed as well.

[22] *See Secretary of Labor o/b/o McGary & Bowersox, et al. v. Marshall County Coal Co., et al., 38 FMSHRC _____ (August 26, 2016).*

[23] Prior to the explicit evaluation of cases under an interference standard, the Commission and its ALJs - without specifically labeling a case as one of *interference* and/or employing a different legal analysis than that used in traditional discrimination cases under *Secretary of Labor o/b/o Pasula v.*

In the past couple of years, however, the Commission and its ALJs at least have explicitly evaluated cases using an ***interference*** analysis. See, for example, *Reuben Shemwell v. Armstrong Coal Company, 36 FMSHRC 2352 (ALJ, August 2014)(creating impression of surveillance & implied threat of reprisal);* ***Lawrence Pendley v. Highland Mining Co. & James Creighton, 37 FMSHRC 301 (ALJ, Feb. 2015)(harassment & intimidation of a non-employee representative of miners by an hourly employee)***[24]*; Scott D. McGlothlin v. Dominion Coal*

Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981) and *Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981)*(commonly referred to as the *"Pasula-Robinette test")* - did nonetheless recognize this separate prohibition under §105(c). See, for example, *Moses v. Whitley Development Corp., 4 FMSHRC 1475 (Aug. 1982)(coercive interrogation and implied threat of reprisal); Secretary of Labor o/b/o Carson v. Jim Walter Resources, Inc., 15 FMSHRC 1992 (ALJ, Sept. 1993) (interrogation and implied threat of reprisal); Secretary of Labor o/b/o Johnson v. Jim Walter Resources, Inc., 15 FMSHRC 2367 (ALJ, Nov. 1993)(interrogation and threats of reprisal)*; *Secretary of Labor o/b/o Gray v. North Star Mining & Brummett, 27 FMSHRC 1 (2005)(interrogation and threats).*

[24] In *Pendley*, the ALJ ruled that Creighton, a non-management employee, had unlawfully interfered with ths statutory rights of a non-employee miners' rep, Pendley, on two separate occasions, while Pendley was accompanying a federal mine inspector in the company bath house before going underground. On both occasions, Creighton went out of his way to stand close to Pendley, in an intimidating manner, for 15-40 and 30-60 seconds (i.e., a shorter period of time than Browning hovered over Wilson while yelling at him). Because the ALJ found that "Creighton's conduct tended to interfere directly with Pendley's walkaround rights" *(Pendley at 315),* he found that Creighton had violated §105(c)(1).

Although the *Pendley* decision is not binding precedent on this Court, the

Corporation, 37 FMSHRC 1256 (ALJ, June 2015)(interference with miner's Part 90 rights); Secretary of Labor o/b/o Greathouse, et al. v. Monongalia County Coal Co., et al., 37 FMSHRC 2892 (ALJ, Dec. 2015)(company's bonus plan interferes with miners' safety rights).

The existence of a distinct cause of action for ***interference*** was explicitly recognized for the first time by the Commission in the plurality opinion of Chairman Jordan and Commissioner Nakamura in the case of *UMWA o/b/o Franks & Hoy v. Emerald Coal Resources, 36 FMSHRC 2088 (August 2014), vacated and remanded 620 Fed Appx. 127 (3rd Cir. 2015).*[25]

Under that test, a violation of the *interference* provision of §105(c)(1) occurs when:

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

Commission or even the other Commission ALJs, it is the case most closely on point with the instant case. Therefore, it is of some value to compare how the ALJ in *Pendley* evaluated the case with how the ALJ here evaluated *Wilson*.

[25] After *Franks & Hoy* was remanded to the FMSHRC by the rd Circuit, it was, in turn, remanded to the ALJ, who issued a decision on April 11, 2016, in which she employed the analysis first set forth in the plurality opinion prior to the remand. See *UMWA o/b/o Franks & Hoy v. Emerald Coal Resources, 38 FMSHRC 799, 804-806 (ALJ, 2016)*. The case did not return to the Commission for review, however, because it was settled after the ALJ's decision on remand.

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

Franks & Hoy, 36 FMSHRC at 2108 (2014).[26]

The test set forth above was recently approved of by the full Commission in *Secretary of Labor o/b/o McGary & Bowersox, et al. v. Marshall County Coal Co., et al., 38 FMSHRC _____ (August 26, 2016).*[27]

In *McGary,* the Commission ruled that the statements made by a coal company CEO at mandatory employee meetings - i.e., that miners who file §103(g) complaints with MSHA (30 USC §813(g)) , seeking an immediate inspection of the mine, must also concurrently notify the company of the unsafe condition alleged in the §103(g) complaint - *interfered with* the miners' statutory right to make a §103(g) complaint.

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[26] As the plurality opinion stated: "We agree with the Secretary and the UMWA that the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework". *Franks & Hoy at 2103, n. 22.* In addition, the concurring opinion of Chairman Jordan & Commissioner Nakamura provided a detailed analysis of why a separate interference claim is supported by the Mine Act and by Commission precedent. *Franks & Hoy at 2104-2108.*

[27] However, the Commission still has not set forth a definitive test to be used in all interference cases. *See Secretary of Labor o/b/o McGary & Bowersox, et al., supra at 7, n. 11*

In so doing, the Commission stated that the "harassment proscribed by the Mine Act 'must be determined by what is said and done, and by the circumstances surrounding the words and actions'". *McGary at 11, quoting Moses, 4 FMSHRC at 1479, n. 8.* This must be done in order to determine whether the comments and conduct "would **tend to chill** the exercise of [statutory] rights by miners". *McGary at 13.*

Under the second prong of the *Franks & Hoy* test, the Commission said that an "operator [person] may defend against an otherwise valid interference claim if it offers a 'legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights'". The FMSHRC gave an example of when it might be lawful for an employer to interfere with statutory rights: "when it is necessary to address a safety or health concern". *McGary at 14, quoting Franks & Hoy at 2016.* The Commission went on to say, however, that "even when an employer [person] establishes a justification under the second step, the operator's [person's] actions must be 'narrowly tailored' to promote that justification as part of the balancing of the operator's [person's] interests with the protected rights of employees [representatives of miners]". *McGary at 15, quoting Franks & Hoy at 2018, n. 14.*

Most importantly, the Commission agreed with the ALJ that the company

CEO's statements "went beyond what was necessary to establish a safe environment at the mine. Rather they were calculated to discourage miners from using the MSHA complaint process*". McGary at 16.*

Here, the ALJ never reached the second prong of the *Franks & Hoy* test, apparently because she determined that Browning's actions, which had no safety purpose whatsoever, did not tend to interfere with Wilson's exercise of his statutory right to be from interference while performing his duties as a representative of miners.

Had the ALJ considered the second prong under *Franks & Hoy*, it would have been obvious that Browning did not have a "legitimate and substantial reason" for yelling at Wilson to put down the safety examination book and go home. When one reads the 52-page transcript of Browning's interview with MSHA (i.e. facts that are taken in the light most favorable to Browning)[28], it is clear that Browning never raised any safety or health issue with Wilson on the morning of June 1, 2015, nor did he justify, in any way, his actions of that morning. **What Browning was trying to do was to discourage Wilson from exercising his rights, the same conduct that was found to be unlawful in**

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[28] The ALJ did not mention Browning's interview with MSHA in her decision.

McGary. Indeed, the ALJ's finding that the harassment that Browning subjected Wilson to didn't rise to the level of prohibited interference defies common sense. The ALJ completely ignored the imperative that the Mine Act's provisions must be construed expansively to ensure that miners' reps are not inhibited in any way from exercising their statutory rights and, instead, used a "severely restrictive interpretation" of *interference* to erroneously grant judgment to Browning. *Simpson v. FMSHRC, 842 F.2d 453 at 463*. Indeed, in light of the harassing behavior to which Browning admitted in his interview with MSHA, it should not even be necessary to remand this case to the Commission. *Cf. Stafford Construction Company at 961.*

CONCLUSION

Because the ALJ did not consider the facts in the light most favorable to Wilson regarding Browning's motion for summary judgment, because Browning's admissions regarding his words and conduct constitute interference under §105(c)(1), and because the ALJ construed the interference standard in a severely restrictive manner that is incompatible with the applicable case law, the ALJ's decision should be reversed and summary judgment should be granted to Wilson.

Respectfully submitted,

Tony Oppegard

TONY OPPEGARD
Attorney-at-Law
P.O. Box 22446
Lexington, Kentucky 40522
859-948-9239
tonyoppegard@gmail.com

WES ADDINGTON
Attorney-at-Law
APPALACHIAN CITIZENS' LAW CENTER
317 Main Street
Whitesburg, Kentucky 41858
606-633-3929
wes@appalachianlawcenter.org

Attorneys for Michael Wilson

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief for Michael Wilson was served on all counsel of record via the Court's electronic filing system (CM/ECF) on this 24th day of October, 2016.

Tony Oppegard

TONY OPPEGARD
Attorney for Michael Wilson

ADDENDUM

STATUTES CITED:

30 USC §813(f)

(f) Participation of representatives of operators and miners in inspections

Subject to regulations issued by the Secretary, 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 made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 USC §813(g)

(g) Immediate inspection; notice of violation or danger; determination

(1) Whenever a representative [1] of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint

indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

(2) Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

30 USC §815(c)(1)

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(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 chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of

miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his [1] paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section), and

thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. 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, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

30 USC §816(a)(1)

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be

conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

30 USC §823(d)(2)

(d) Proceedings before administrative law judge; administrative review

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A)

(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it

shall remand the case for further proceedings before the administrative law judge. (The provisions of section 557(b) of title 5 with regard to the review authority of the Commission are expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

30 USC §843(b)(1)

(b) Evidence of pneumoconiosis; option to transfer; wages

(1) On and after the operative date of this subchapter, any miner who, in the judgment of the Secretary of Health and Human Services based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 2.0 milligrams of dust per cubic meter of air.

30 USC §863(d)(1)

(d) Pre-shift examinations and tests; scope; violations of mandatory standards; notification; posting of "DANGER" signs; restriction of entry; records; re-entry

(1) Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is

traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a “DANGER” sign conspiciously [1] at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

30 USC §863(e)

(e) Daily examinations and tests; scope; imminent danger; withdrawal of persons; abatement of danger

At least once during each coal-producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. Any such condition shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 814(d) of this title, until the danger is abated. Such examination shall include tests for methane with a means approved by the Secretary for detecting methane and for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary.

<u>REGULATIONS CITED</u>:

29 CFR §2700.40(b)

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

30 CFR §40.1(b)(1)

(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

30 CFR §75.360(g)

(g) Recordkeeping. A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination, and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions and violations of mandatory health or safety standards found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

30 CFR §75.360(h)

(h) Retention period. Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

30 CFR §75.362

(a) (1) At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

(2) A person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour after the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include: Air quantities and velocities; water pressures and flow rates; excessive leakage in the water delivery system; water spray numbers and orientations; section ventilation and control device placement; roof bolting machine dust collector vacuum levels; scrubber air flow rate; work practices required by the ventilation plan; and any other dust suppression measures. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and indicates that the dust controls are functioning properly.

(3) On-shift examinations shall include examinations to identify violations of the standards listed below:

(i) §§ 75.202(a) and 75.220(a)(1) - roof control;

(ii) §§ 75.333(h) and 75.370(a)(1) - ventilation, methane;

(iii) §§ 75.400 and 75.403 - accumulations of combustible materials and application of rock dust;

(iv) § 75.1403 - other safeguards, limited to maintenance of travelways along belt conveyors, off track haulage roadways, and track haulage, track switches, and other components for haulage;

(v) § 75.1722(a) - guarding moving machine parts; and

(vi) § 75.1731(a) - maintenance of belt conveyor components.

(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

(c) Persons conducting the on-shift examination shall determine at the following locations:

(1) The volume of air in the last open crosscut of each set of entries or rooms on each section and areas where mechanized mining equipment is being installed or removed. The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

(2) The volume of air on a longwall or shortwall, including areas where longwall or shortwall equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall.

(3) The velocity of air at each end of the longwall or shortwall face at the locations specified in the approved ventilation plan.

(4) The volume of air at the intake end of any pillar line -

(i) Where a single split of air is used in the intake entry furthest from the return air course immediately outby the first open crosscut outby the line of pillars being mined; or

(ii) Where a split system is used in the intake entries of each split immediately inby the split point.

(d) (1) A qualified person shall make tests for methane -

(i) At the start of each shift at each working place before electrically operated equipment is energized; and

(ii) Immediately before equipment is energized, taken into, or operated in a working place; and

(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

(2) Except as provided for in paragraph (d)(3) of this section, these methane tests shall be made at the face from under permanent roof support, using extendable probes or other acceptable means. When longwall or shortwall mining systems are used, these methane tests shall be made at the shearer, the plow, or the cutting head. When mining has been stopped for more than 20 minutes, methane tests shall be conducted prior to the start up of equipment.

(3) As an alternative method of compliance with paragraph (d)(2) of this section during roof bolting, methane tests may be made by sweeping an area not less than 16 feet inby the last area of permanently supported roof, using a probe or other acceptable means. This method of testing is conditioned on meeting the following requirements:

(i) The roof bolting machine must be equipped with an integral automated temporary roof support (ATRS) system that meets the requirements of 30 CFR 75.209.

(ii) The roof bolting machine must have a permanently mounted, MSHA-approved methane monitor which meets the maintenance and calibration requirements of 30 CFR 75.342(a)(4), the warning signal

requirements of 30 CFR 75.342(b), and the automatic de-energization requirements of 30 CFR 75.342(c).

(iii) The methane monitor sensor must be mounted near the inby end and within 18 inches of the longitudinal center of the ATRS support, and positioned at least 12 inches from the roof when the ATRS is fully deployed.

(iv) Manual methane tests must be made at intervals not exceeding 20 minutes. The test may be made either from under permanent roof support or from the roof bolter's work position protected by the deployed ATRS.

(v) Once a methane test is made at the face, all subsequent methane tests in the same area of unsupported roof must also be made at the face, from under permanent roof support, using extendable probes or other acceptable means at intervals not exceeding 20 minutes.

(vi) The district manager may require that the ventilation plan include the minimum air quantity and the position and placement of ventilation controls to be maintained during roof bolting.

(e) If auxiliary fans and tubing are used, they shall be inspected frequently.

(f) During each shift that coal is produced and at intervals not exceeding 4 hours, tests for methane shall be made by a certified person or by an atmospheric monitoring system (AMS) in each return split of air from each working section between the last working place, or longwall or shortwall face, ventilated by that split of air and the junction of the return air split with another air split, seal, or worked-out area. If auxiliary fans and tubing are used, the tests shall be made at a location outby the auxiliary fan discharge.

(g) Certification.

(1) The person conducting the on-shift examination in belt haulage entries shall certify by initials, date, and time that the examination was made. The certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

(2) The certified person directing the on-shift examination to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan shall:

(i) Certify by initials, date, and time on a board maintained at the section load-out or similar location showing that the examination was made prior to resuming production; and

(ii) Verify, by initials and date, the record of the results of the examination required under (a)(2) of this section to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. The verification shall be made no later than the end of the shift for which the examination was made.

(3) The mine foreman or equivalent mine official shall countersign each examination record required under (a)(2) of this section after it is verified by the certified person under (g)(2)(ii) of this section, and no later than the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The record shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(4) Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

30 CFR §75.363(b)

(b) A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found and shall include the nature and location of the hazardous condition or violation and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found.

30 CFR §75.363(d)

(d) Retention period. Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.