ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1250

United States Court of Appeals
FOR THE DC CIRCUIT

MICHAEL WILSON,
Petitioner,

v.

FMSHRC, *et. al.*,
Respondents.

Petition for Review of the
Federal Mine Safety and Health Review Commission

BRIEF OF RESPONDENT

Erica Hashimoto
Director

Donna Farag
Luke Sullivan
Student Counsel

Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
applit@law.georgetown.edu

Counsel for Respondent, Jim Browning

December 23, 2016

Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Mine Safety Review Commission and in this Court are listed in the Brief for Petitioner at i. The Secretary of Labor also has entered an appearance and may seek leave to file an amicus brief.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Petitioner at i-ii.

C. Related Cases

This case has not previously been before this Court, and to the best of counsel's knowledge, there are no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY

The following abbreviations appear in this brief:

ACCA: Armed Career Criminal Act

FMSHRC or Commission: Federal Mine Safety and Health Review Commission

Mine Act or the Act: Mine Safety and Health Act of 1977

MSHA: Mine Safety and Health Administration

NLRA: National Labor Relations Act

NLRB: National Labor Relations Board

STATEMENT OF JURISDICTION

The Federal Mine Safety and Health Review Commission (Commission) had jurisdiction over Wilson's complaint pursuant to 30 U.S.C. § 815(c)(3). This Court has jurisdiction over Wilson's petition for review of a final order of the Federal Mine Safety and Health Review Commission because it was filed within thirty days of the Commission's final order. 30 U.S.C. § 816(a)(1). Browning prevailed on his motion for summary decision before the Administrative Law Judge (ALJ), and the Commission denied discretionary review on June 23, 2016. *See* Comm'n Notice Denying Pet. p. 1. When it did so, the ALJ's decision became the Commission's final decision. *See* 30 U.S.C. §823(d)(1). ("The decision of the administrative law judge shall become the final decision of the Commission . . . unless the Commission has directed that such decision shall be reviewed . . . ."). On Friday, July 22, 2016, Wilson submitted his petition for review of the Commission's decision. *See* Pet. For Review of an Order p. 2. Although it appears that this Court did not receive or docket the petition until Monday, July 25, 2016, Wilson timely filed the petition because July 23, 2016, the thirtieth day following the Commission's final decision, fell on a Saturday. This

Court therefore has jurisdiction to review the ALJ's decision, which now serves as the Commission's final decision.

STATEMENT OF THE ISSUES

I. Whether a single, brief verbal exchange between a non-management miner and a miners' representative, in which the miner verbalized no threats, constitutes unlawful interference under the Mine Act.

II. Whether the Mine Act provides a cause of action against an individual non-management miner where the legislative history and remedial scheme of the Act demonstrate that Congress intended to hold only mine management and their agents liable.

III. Whether the First Amendment protects the words of a non-management miner who conveys to a miners' representative his disagreement with the representative's actions.

STATEMENT OF THE CASE

This petition arises from a few minutes of testy words between two men in a coal mine: Respondent Jim Browning, an hourly, non-management employee at the mine, and Petitioner Michael Wilson, a miners' representative not employed at the mine. Wilson's Resp. in Opp'n to Mot. for Summ. Decision Exhibit E p. 6; Pet. for Discretionary Review p. 3. Because Wilson has petitioned for review of the ALJ's order granting Browning's motion for summary decision, the facts described below are presented "in the light most favorable" to Wilson. *See Sec'y of Labor, MSHA* v. *Hanson–Aggregate N.Y., Inc.*, 29 FMSHRC 4, 2007 WL 215634 at * 9 (Jan. 17, 2007) (citing *Poller v. Columbia Broad Sys., Inc.*, 368 U.S. 464, 473 (1962)).[1]

Statement of Facts

On June 13, 2015, Respondent Jim Browning, a pump man, worked as a non-management hourly miner at Armstrong Coal. Compl. Exhibit A; Wilson's Resp. in Opp'n to Mot. for Summ. Decision Exhibit E 15–16 p. 7 n.3. Petitioner Michael Wilson was a non-employee "representative

[1] As discussed below, Browning disputes Wilson's version of these events. *See infra* at 12-13 (quoting Resp. to Complainant's Summ. J. Mot., Affidavit of Jim Browning).

of miners" at Armstrong Coal Company's Parkway Mine.[2] *Id.* Exhibit B p. 1. Wilson had previously worked at the mine from August 2009 until he retired on May 6, 2015. *Id.* He became a miners' representative in February 2014, and after he retired, he continued to serve as a non-employee representative of miners. *Id.* at 1–2.

As a miners' representative, Wilson accompanied Mine Safety and Health Administration (MSHA) inspectors during their inspections. *Id.* at 1. Wilson alleged that he was "disliked by mine management" and many of his former co-workers because he would point out violations to the inspectors. *Id.* at 1–2. The first time Wilson went to Parkway Mine after his retirement, Armstrong Coal's lawyer called Wilson's lawyer to ask why Wilson was at the mine. *Id.* at 2. Since then, Wilson alleges that management and miners "have been hostile" towards him. *Id.*

On June 13, 2015, Wilson went to Parkway Mine in his capacity as a miners' representative to review the mine's examination books in the bathhouse. *Id.* At least one other miner was present with Wilson. *Id.* Exhibit C p. 1. At some point, Browning entered the room, walked a

[2] A miners' representative is any "person or organization which represents two or more miners at a coal or other mine." 30 C.F.R. § 40.1(b)(1).

foot and a half behind Wilson, leaned over him, and in a loud voice accused Wilson of looking at the books to find a violation and have MSHA cite the company. *Id.* Exhibit B p. 2. Browning told Wilson several times in a loud voice to put the book down and go home. *Id.* Browning also told Wilson that Wilson did not work at the mine anymore, that there were other miners' representatives at the mine, that Wilson had a "personal vendetta against the company," *id.* Exhibit C p. 1, and that Wilson was taking money out of Browning's pocket. *Id.* Exhibit B p. 2.

Wilson responded that he was not leaving "because it was [his] right as a miners' rep[resentative] to look at the books." *Id.* at 3. Browning replied: "No, that's not part of it. Go home." *Id.* Exhibit C p. 1–2. Within a few minutes of the conversation starting, the mine superintendent, Danny Thorpe, entered the bathhouse. *Id.* Exhibit B p. 3. Thorpe told Browning to leave and escorted him out, suspending him for the remainder of the day without pay. *Id.* Exhibit D.

Since that day, Wilson has continued to work as a miners' representative. *Id.* Exhibit B p. 3. He asserts that "in [his] opinion, some miners' reps would be discouraged and less likely to exercise their

rights" if they were spoken to in the manner Browning spoke to Wilson. *Id.* Wilson has not alleged any other encounters with Browning. *See* Pet. Br. at 20.

Administrative Proceedings

On June 18, 2015, Wilson filed a complaint with MSHA under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c). Compl. of Discrimination Exhibit A. After investigating that complaint and based upon its review of the information gathered during that investigation, MSHA informed Wilson that it did not believe there was "sufficient evidence to establish" a violation of Section 105(c). *Id.* Exhibit B. The Secretary of Labor thus declined to file a discrimination case with the Federal Mine Safety & Health Review Commission on Wilson's behalf. *Id.*

Wilson then filed a complaint with the Commission, alleging that Browning violated Section 105(c) of the Mine Act by interfering with his ability to exercise his rights as a miner's representative. Compl. of Discrimination p. 1.[3] Wilson asked the Commission to order Browning

[3] The complaint was labeled a "discrimination" complaint even though it alleged only an interference claim under the Mine Act. In spite of that label, the complaint could not, and did not, allege a claim under the

to (1) cease and desist from discriminating against/interfering with Wilson, (2) undergo comprehensive training by MSHA personnel on the statutory rights of miners' representatives, (3) pay a civil penalty, and (4) reimburse Wilson for all expenses incurred in the litigation including attorneys' fees.[4] *Id.* at 4–5. Browning and Wilson both moved for summary decision. Respondent's Mot. for Summ. Decision p. 1; Wilson's Resp. in Opp'n for Summ. Decision Exhibit B p. 1.

On May 1, 2016, the ALJ granted Browning's motion for summary decision. ALJ Decision and Order May 18, 2016 p. 7. The ALJ concluded that Browning's actions did not constitute interference with Wilson's exercise of his rights as a miners' representative. *Id.* The ALJ found that a "single altercation between a miner and a representative with no discernible effect on protected activity" was "simply beyond the

---

separate Mine Act provision prohibiting discrimination because such a claim would have required Wilson to prove an adverse employment action. *See*, *e.g.*, *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818. 1981 WL 141638 *11-12 (April 3, 1981).

[4] Wilson also requested that the Commission order Armstrong Coal, a non-party, to place a copy of any Commission decision in Browning's personnel file and to post the decision at Parkway mine and at "all of Armstrong's other mines in western Kentucky" in conspicuous places for sixty days. Compl. of Discrimination p. 4–5. Wilson asserted no statutory authority for the Commission to order Armstrong Coal, a *non-party*, to be subject to any requirements stemming from a violation of the Act.

scope of Section 105(c)." *Id.* Thus, the ALJ granted Browning's motion for summary decision, denied Wilson's cross motion for summary decision, and dismissed Wilson's discrimination complaint. *Id.* at 7.

Wilson petitioned the Commission for discretionary review of the ALJ's order. Pet. For Discretionary Review. The Commission denied that petition on June 23, 2016. Comm'n Notice Denying Pet. p. 1. Wilson then filed a petition for review in this Court on July 25, 2016. Pet. for Review of an Order of the FMSHRC.

SUMMARY OF THE ARGUMENT

This Court should deny the petition for review of the ALJ's finding that Browning, a non-management miner, did not interfere with Wilson's statutory rights under the Mine Act. First, Browning's words do not constitute Mine Act interference because the circumstances demonstrate that his words had no reasonable tendency to intimidate Wilson. Second, the Mine Act does not provide a cause of action against non-management miners like Browning. And third, Browning had a First Amendment right to communicate to Wilson—even in an unfriendly tone—his disagreement with Wilson's work as a miners' representative.

As to the first point, the totality of the circumstances provide substantial evidence supporting the ALJ's decision because (1) Browning had no authority or power over Wilson, (2) the legislative history of the Mine Act demonstrates that Congress did not intend for non-threatening words like these by a non-management miner to constitute interference, and (3) the limited duration of the interaction, combined with the fact that Browning never threatened Wilson with *anything,* puts these facts outside any interference findings by either this Court or the Commission. Substantial evidence therefore supports

the ALJ's finding that Browning did not interfere with Wilson within the meaning of the Mine Act.

Second, at a more fundamental level, Congress intended Section 815 to create a cause of action against those with authority and power in mines—mine management and operators.[5] Congress did not intend to create a cause of action against non-management miners like Browning with no economic or supervisory power. Thus, the Mine Act's legislative history and remedial scheme show that only mine operators and their agents can be held liable for interference with the statutory rights of the inspector. Because Browning did not "control or supervise the operation of coal mines," Congress intended the Mine Act to protect him, rather than to create a cause of action against him. S. Rep. No. 95-181, at 40–41 (1977). The Mine Act's remedial scheme, which provides remedies only against mine operators and their agents, further demonstrates that Congress did not intend to provide a cause of action against non-management miners, the intended beneficiaries of the Act.

---

[5] An operator is "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). This brief uses the terms mine operator and mine management interchangeably.

Third, Browning's words fall squarely within the First Amendment's protection of his right to express himself, as shown by the interference cases recognizing that even regulated employers have First Amendment rights to speak. Browning, an hourly employee with *no* power to take adverse action against Wilson, had a First Amendment right to express his views to Wilson, and those views and opinions need not have been expressed politely. The First Amendment protected Browning's right to express his views.

Finally, Wilson summarily asserts, in his Summary of the Argument and Conclusion, that this Court should grant his petition for review not only of the ALJ's grant of Browning's Motion for Summary Decision, but also of the ALJ's *denial* of Wilson's Motion for Summary Decision. *See* Pet. Br. at 15, 30. He limits his entire legal analysis of that point to, at most, one paragraph asserting that "[w]hen 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)," it is clear that "Browning was trying to discourage Wilson from exercising his rights." *Id.* at 29–30. But Wilson never acknowledges, much less explains, that Browning both challenged the accuracy of the transcript of the MSHA interview,

and, of more importance, alleged before the ALJ a completely different version of the facts that preclude summary decision for Wilson on this record. *See* Resp. to Complainant's Summ. J. Mot., Affidavit of Jim Browning (asserting that Browning had intended to discuss with Wilson bringing "safety violations to the attention of mine officials prior to pointing them out to a federal inspector" that might "help the mine to stay open since rumor had it that we could all lose our jobs" but that Wilson got "agitated" with him and prevented him from speaking about this). Without more, these conclusory assertions that Wilson is entitled to summary decision constitute an "asserted but unanalyzed contention" that Wilson has forfeited. *See*, *e.g.*, *City of Waukesha v. EPA*, 320 F.3d 228, 254 (D.C. Cir. 2003) (holding that two sentences generally raising an argument in an opening brief without explaining the legal implications of that argument "is the type of asserted but unanalyzed contention that the court will not address") (internal quotation marks and citations omitted). And even if this Court were to reach the issue, Browning's alternative factual allegations preclude summary decision for Wilson. *See Hanson-Aggregate N.Y., Inc.*, 29 FMSHRC 4, 2007 WL 215634 at * 9 (holding that motions for summary

decision require looking at the facts in the light most favorable to the non-movant).

ARGUMENT

The Mine Act provides as follows:

> No person shall discharge or in any manner discriminate against . . . or *otherwise interfere with the exercise of the statutory rights* of any 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 chapter.

30 U.S.C. § 815(c)(1) (emphasis added). After several devastating mine accidents, Congress enacted the Mine Act to protect miners—the "most precious resource" of the mining industry—by ensuring their health and safety. 30 U.S.C. § 801(a). Recognizing that mine operators needed incentives to prevent dangerous mine conditions, *id.* § 801(e), Congress set up a statutory framework in which the Mine Safety and Health Administration (MSHA) regularly inspects mines. In order to assist MSHA, the Mine Act not only provides miners' representatives with the right to accompany MSHA inspectors during their inspections to ensure operators comply with safety standards, *see* 30 U.S.C. § 813(f), but also provides all miners and their representatives with protection for reporting any safety violations at the mines. 30 U.S.C. § 815.

The Mine Act's focus on protecting non-management miners like Mr. Browning from the dangers posed by management's inattention to

safety illustrates that Congress never intended the Act's interference prohibition to penalize a non-management employee for uttering non-threatening words to a miners' representative. Although this Court has not yet considered the standard for interference claims under the Mine Act, it has held that conduct or words constitute interference under the National Labor Relations Act's (NLRA) parallel provision only when they have a "reasonable tendency" to coerce or interfere with rights protected by the Act. *See*, *e.g.*, *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). And the FMSHRC has both relied on NLRA decisions in construing the Mine Act's analogous provisions and expressly adopted the NLRA's "reasonable tendency" standard for determining Mine Act interference claims.[6] *Sec'y of Labor, MSHA on*

[6] Relying on another ALJ opinion, the ALJ in this case interpreted the "reasonable tendency" standard to require Wilson to establish (1) that the 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 protected rights," and (2) the person fails to provide a legitimate reason that outweighs the harm to the exercise of protected rights." ALJ Decision and Order May 18, 201 p.3 (citing *UMWA on behalf of Franks v. Emerald Coal Res. LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm'rs) (emphases added), *vacated*, 620 Fed. Appx. 127 (3d Cir. 2015). The full Commission has not adopted that test, *Sec'y of Labor, on behalf of McGary v. Monongolia Cty. Coal Co.*, 2016 WL 5868552 at *4 n. 11 (Oct.

behalf of Gray v. N. Star Mining, Inc., 27 FMSHRC 1, 9 & n.8, 2005 WL 415053 at *7 & n.8 (Jan. 12, 2005). Under the totality of the circumstances, Browning's remarks did not have *any*—let alone a reasonable—tendency to intimidate Wilson or otherwise interfere with his statutory rights. *See Dover Energy, Inc. v. NLRB,* 818 F.3d 725, 729–30 (D.C. Cir. 2016) ("The test for interference . . . consider[s] the *totality of the circumstances*, [in determining whether the employer's conduct] has a *reasonable tendency* to coerce or interfere with [employee] rights.").

I. NON-THREATENING WORDS SPOKEN BY BROWNING, A NON-MANAGEMENT MINER, DO NOT CONSTITUTE INTERFERENCE UNDER THE MINE ACT.

The Administrative Law Judge correctly held that Browning's single, purely verbal interaction with Wilson "does not rise to the level of [actionable] interference." ALJ Decision and Order May 18, 2016 p. 7. This Court must deny a petition for review if the ALJ's finding that no interference occurred is "supported by substantial evidence on the record considered as a whole." 30 U.S.C. § 816(a); *see*, *e.g.*, *Tasty*

27, 2016), but it does not appear to be materially different from the reasonable tendency standard.

Baking Co. v. NLRB, 254 F.3d 114, 123–24 (D.C. Cir. 2001) (reviewing for substantial evidence the Board's finding that the employer unlawfully interfered with employee's exercise of rights under the NLRA). In reviewing for substantial evidence, this Court's only task is to "determine whether there is such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion." *Jim Walter Res., Inc. v. Sec'y of Labor, MSHA*, 103 F.3d 1020, 1023–24 (D.C. Cir. 1997) (quoting *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1431 (D.C. Cir. 1989)).

The few minutes of hot words alleged by Wilson provide no evidence that Browning reasonably tended to interfere with Wilson's activities as a miners' representative. *See, e.g.*, *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1134–36 (D.C. Cir. 1994) (holding that statements by employer that "undoubtedly" implied that unionization would have "adverse effects on cost" that might threaten jobs were not unlawfully coercive threat constituting interference under the NLRA). The entire encounter involved Browning: (1) "accus[ing] Wilson of looking at the preshift/onshift book in order to find a violation and to have a citation issued against the company," (2) telling Wilson several times "to put the

examination book down and to go home," (3) saying Wilson no longer worked there and that the mine had other miners' representatives, and (4) complaining that Wilson was taking money out of Browning's pocket. Compl. of Discrimination p. 3–4.

Substantial evidence supports the ALJ's finding that these words did not reasonably tend to interfere with Wilson. First, Browning had no authority to exact *any* consequences on Wilson. Second, Congress never intended for words like these, spoken by a non-management miner like Browning, to constitute interference. Finally, the limited duration of the encounter culminating in Browning being asked to leave the worksite demonstrates that this does not come close to the cases in which the Commission and its ALJs have found interference.

First, Browning's position as an hourly, non-management employee demonstrates that his words did not interfere with Wilson's exercise of his statutory rights. The interference analysis must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gray*, 27 FMSHRC at 10, 2005

WL 415053, at *7 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Because Browning had no authority over Wilson, his words lacked any deterrent or chilling effect that could reasonably be construed as a threat. Although Browning vocalized his concern that Wilson's actions could affect his paycheck, this isolated comment from a non-management employee does not rise to the level of "threaten[ing] or disciplin[ing] a union official when it dislikes the way he carries out his union job." *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002) (citing NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1)). Substantial evidence therefore supports the ALJ's conclusion that Browning's statements did not interfere with Wilson's statutory rights.

Second, the Mine Act's legislative history demonstrates that Congress intended the Mine Act to protect the speech of miners like Browning, not subject them to liability for their words. *See infra* Section II. In enacting the Mine Act, Congress declared that the "the first priority and concern of all in the coal or other mining industry must be the health and safety of . . . *the miner*." 30 U.S.C. § 801(a) (emphasis added); *see also, e.g.*, *Prairie State Generating Co. v. Sec'y of Labor*, 792 F.3d 82, 84 (D.C. Cir. 2015) (observing that Congress

enacted the Mine Act "to protect America's miners"). To that end, the Act's legislative history demonstrates that Congress intended the Act's remedial scheme to deter people with *power and authority* to hurt vulnerable miners—*mine operators, the agents of mines, and mine management*—from violating the Act. *See* S. Rep. No. 95-181, at 40–41 (1977).

The Senate Committee on Human Resources did not mince words on this point: "The purpose of such civil penalties, of course, is not to raise revenues" but rather is to "induce those officials responsible for the operation of a mine to comply with the Act." *Id.* (quoting S. Rep. No. 91-411, at 39 (1969)). Because Congress understood that "the basic business judgments that control the operation of a coal mine are made . . . by persons at various levels of the corporate structure," to achieve its purpose Congress found it "necessary to place the responsibility for compliance with the Act . . . as well as the liability for violations on *those who control or supervise the operation of coal mines* as well as on those who operate them." *Id.* (quoting S. Rep. No. 91-411, at 39 (1969)). Congress thus created the Act's scheme of liability and remedies to incentive those who *control* the mine—operators and mine

management—to comply with the Act and, in turn, protect vulnerable miners like Browning.[7] This history demonstrates that Congress never intended Browning's innocuous statements to be "interference" within the Mine Act.

This is particularly so because the Mine Act's remedial scheme contemplates a multi-stage, time-intensive, costly process that a non-management miner would have to navigate alone, including (1) investigation by MSHA; (2) responding to any complaint filed with the Commission; (3) trial proceedings before an ALJ; (4) discretionary review by the Commission; and (4) review by a federal court of appeals. 30 U.S.C. §§ 815(c)(2)–(3), 816(a)(1). Although Browning has prevailed at every stage of these proceedings, his former employer has not represented him. Unlike mine management, who likely would have

[7] The legislative history also notes that the Act is intended to protect miners against "not only the common forms of discrimination" but "also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." S. REP. NO. 95-181, at 36 (1977). To that end, the report emphasizes that "the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." *Id.* Those statements demonstrate Congress' intent to make promises of benefit or threats of reprisal by mine management actionable. They say nothing about protected miners like Browning with no authority to promise benefit or threaten reprisal.

been represented by (and indeminified by) the company, Browning has borne the entire cost and stakes of this year and a half of litigation.

Congress could not have intended that individual miners like Browning, having uttered only a few moments of non-threatening words, would be required to finance more than a year of high-stakes litigation. Instead the legislative history demonstrates that Congress intended the Mine Act to create financial pressure on mine *operators* to comply with the Act, not non-management miners. S. REP. NO. 95-181, at 30 (1977) (noting that for civil penalties to be effective the "penalty should be of an amount which is sufficient to make it more economical for a [sic] *operator* to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance") (emphasis added).

The fact that this was a single conversation lasting only a few minutes also provides substantial evidence supporting the ALJ's no-interference finding. In *Tic-The Indus. Co. Southeast, Inc. v. NLRB*, 126 F.3d 334, 339 (D.C. Cir. 1997), this Court held that a "single, isolated comment" by a supervisor to an employee regarding a "preference for nonunion hiring" could not constitute substantial

evidence supporting an interference claim. *Id.* The Court reasoned that the "mere assertion that the [c]ompany preferred non-union hiring" could not have tended to interfere with that employee's, or any other employee's, exercise of protected activity." *Id.* Furthermore, "[n]othing in the record suggest[ed] that the supervisor had any authority to establish policies with respect to hiring or treatment of employees." *Id.* So too here. Browning's isolated comments to Wilson could not have tended to interfere with Wilson's exercise of any protected activity, particularly given the brevity of Browning's comments and his lack of any supervisory authority.

Wilson asserts that Browning's conduct "could have emboldened other miners to harass Wilson." Pet. Br. at 21. But he has alleged no facts to support a claim that other miners were in any way influenced by Browning's actions. Nor could he. Browning had no authority or economic power over his fellow miners. And because Browning was suspended without pay for a day as a result of his innocuous words, his fellow miners likely have a significant incentive to avoid Wilson altogether.

Finally, this isolated incident between Browning and Wilson does not constitute interference under the Commission's consistent interpretations of the Mine Act. In only one case has an administrative law judge found that a non-management employee's verbal comments constituted interference. *See Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 311–16, 2015 WL 731557 at *9–14 (Feb. 12, 2015). And it did so only because of a nearly decade-long hostile relationship between the two men that resulted in blows being thrown on one occasion and a gun being drawn and threatened to be used in another. *Id.* Given that extensive and violent ten year history, the ALJ concluded that the miner's comments could be deemed threatening and therefore constituted interference with the statutory rights of the representative. *Id. Pendley* well-illustrates why Browning's words do not constitute interference within the meaning of the Act. Unlike in *Pendley*, the relationship between Browning and Wilson is not riddled with repeated instances of verbal and physical altercations. Wilson alleges a single instance involving a few moments of comments by Browning. Substantial evidence therefore supports the ALJ's finding

that this single verbal statement directing a miners' representative to go home simply does not rise to the level of interference.

II. EVEN IF THE ALJ ERRED IN FINDING NO INTERFERENCE, THE MINE ACT DOES NOT PROVIDE A CAUSE OF ACTION AGAINST NON-MANAGEMENT MINERS LIKE BROWNING.

This Court also should deny the petition for review of the ALJ's order granting Browning's motion for summary decision because the Mine Act does not create a cause of action against Browning, a non-management miner acting on his own behalf. This Court reviews questions of law like this one *de novo*. *CalPortland Co. v. Federal Mining Safety & Health Review Comm'n*, 839 F.3d 1153, 1162 (D.C. Cir. 2016) (citing Am. Coal Co. v. *Federal Mining Safety & Health Review Comm'n*, 796 F.3d 18, 23 (D.C. Cir. 2015)). The Mine Act prohibits any "person" from discriminating against, discharging, or otherwise interfering with a miners' representative's exercise of statutory rights. 30 U.S.C. § 815(c). The Act's definition of person includes an "individual." *Id.* 802(f). Thus, the Act prohibits individuals, including non-management miners, from interfering with miners' representatives as they exercise their statutory rights. But the Act does not answer the

issue presented here: whether Congress provided a statutory *cause of action* against non-management miners.

The Mine Act's statutory scheme and legislative history demonstrate that Congress did not intend the Mine Act to create a cause of action against non-management miners. Congress instead focused on protecting miners like Browning. And although the ALJ did not rely on this ground in ruling for Browning, because the Commission and its ALJs (in contrast with the Secretary of Labor) do not make policy under the Mine Act, this Court can decide this issue.

A. The Mine Act's Statutory Scheme and Legislative History Demonstrate that Congress Did Not Intend To Create A Cause Of Action Against Non-Management Miners Under the Mine Act

Although not addressed by the ALJ, this case presents a more fundamental question regarding an individual miner's amenability to suit under the Mine Act when that miner is acting on his own behalf. The text of the Mine Act's remedial provisions demonstrates that Congress did not intend to create a cause of action against non-management miners. Instead, the Act was intended to create a cause of action against mine operators and, at most, their agents.

The relevant Mine Act provisions follow. Under Section 815, "no person" shall interfere with miners' representatives engaged in protected activity. 30 U.S.C. § 815(c). Violators of Section 815 "*shall* be subject to the provisions of Sections 818 and 820(a)." *Id.* § 815(c)(3) (emphasis added). Section 820(a) grants the Commission authority to assess civil monetary penalties against an "operator of coal or other mine." *Id.* § 820(a). Section 818 provides a broader remedy permitting the Secretary to institute a civil action for relief against a mine "operator or his agent." *Id.* § 818. Finally, Section 815 provides that the Commission can "grant[] 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." *Id.* § 815(c)(3).

Following the "cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), the Act's three provisions setting forth remedies demonstrate that Congress did not intend to create a cause of action against non-management miners like Browning. Because the statute provides that those who interfere with miners' representatives' rights "shall" be subject to two provisions—

Sections 818 and 820(a)—that apply only to mine operators and their agents, recognizing a cause of action against non-management miners would subject those miners to remedies that, by definition, cannot apply to them. 30 U.S.C. §§ 815(c), 818, 820(a). This anomalous result demonstrates that Congress did not intend to create a cause of action for interference against non-management miners like Browning.

To be sure, Section 815 permits, but does not require, the Commission to "grant[] such relief as it deems appropriate." *Id.* 815(c)(3). But this seemingly broad provision is limited by Section 815's example of an "appropriate" remedy. *See Begay v. United States*, 555 U.S. 137, 139–44 (2008) (stating that when a statute includes a broad provision and specific examples, courts "should read the examples as limiting" the broad provision). In *Begay*, the Armed Career Criminal Act's (ACCA) definition of a violent crime included specific examples, such as burglary and arson, and a broader residual clause that covered crimes that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* The Court held that the statute's specific examples "illustrate[d]" what fell within the statute's scope, and the broader residual clause covered only crimes

"roughly similar" to the examples. *Id.* at 142–44. So too here. As in *Begay*, Section 815's broader provision permitting the Commission to grant "appropriate" relief must be interpreted in light of the specific example of such appropriate relief. Section 815's example of "appropriate" relief—an order requiring the rehiring or reinstatement of the miner with back pay—does not apply to a non-management miner with no authority to rehire or reinstate miners. 30 U.S.C. § 815(c)(3). Viewed against the backdrop of the specific example, "appropriate" relief covers only relief against operators and their agents.

Further, this Court has recognized, albeit in a different context, that the Mine Act's statutory scheme and legislative history demonstrate that the Act is focused on mine operators and the mine's agents. In *Meredith v. Federal Mine Safety & Health Review Comm'n*, this Court analyzed the Mine Act's remedial scheme and legislative history. 177 F.3d 1042, 1055–56 (D.C. Cir. 1999). Although this Court acknowledged that the Act's remedies could be read broadly, it nevertheless concluded that the "focus" and "nature" of the remedies "strongly impl[ied]" that Congress intended that the remedies apply only "against *mine*

operators and their agents." *Id.* (emphasis added).[8] Here, as in *Meredith*, the focus and nature of the Act's remedial provisions demonstrate that Congress did not intend to create a cause of action against Browning.

Nor is it inconsistent with the Mine Act's use of the term "person" to conclude that Congress did not intend to create a cause of action against non-management miners. *See Spiegel v. Schulmann*, 604 F.3d 72, 79–80 (2d Cir. 2010) (per curiam) (holding that the provision of the Americans with Disabilities Act, 42 U.S.C. § 12203(a), prohibiting any "person" from discriminating does not provide a cause of action against individuals). In *Spiegel*, an individual who alleged that he was fired because of his weight sued the person who terminated him, alleging violations of the ADA. *Id.* Although the ADA, like the Mine Act, prohibits any "person" from discriminating against other individuals, the court nevertheless held that the ADA did not provide a cause of

[8] *Meredith* held that the Mine Act's anti-discrimination provisions did not apply to MSHA employees. 177 F.3d at 1052. A number of rationales supported the decision, including, but not limited to, the Mine Act's remedial provisions and legislative history. That the Act's statutory scheme and legislative history were not alone determinative of this Court's decision does not diminish the significance of this Court's conclusion that the Act appears to provide remedies only against mine operators and the management agents.

action against individuals because the ADA uses the remedial scheme provided for Title VII, and Title VII does not apply to individuals. *Id.* at 79. The court recognized that its conclusion that there was no cause of action against individuals was "arguably contrary" to a literal reading of the statute's use of the word person, but it nonetheless held that the statute's lack of remedial provisions for individuals demonstrated that Congress did not intend the ADA to create a cause of action against individuals. *Id.* at 79–80.

The Mine Act prohibits any "person" from interfering with other individuals. 30 U.S.C. § 815(c). Thus, as with the ADA, it is "arguably contrary" to a literal reading of the statute to hold that the Act does not create a cause of action against Browning. *Spiegel*, 604 F.3d at 79. But like the ADA, the Mine Act's remedial provisions do not apply to non-management miners like Browning. Just as the ADA's lack of remedial provisions for individuals reveal that Congress did not intend to create a cause of action against individuals, so too the Mine Act's lack of remedies for non-management miners demonstrate that Congress did not intend to create a cause of action against miners like Browning.

Finally, a cause of action against non-management miners is not necessary to protect miners' representatives from harassment because mine operators have an obligation to prevent interference with miners' representatives' rights. This case proves the point. Browning's supervisor suspended Browning without pay for his words, removing any hint whatsoever that other miners might follow Browning's lead. *Cf. Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 314, 2015 WL 731557 at *12 (Feb. 12, 2015) (holding that coal company was liable for interference in part because although management knew of the long "history of conflicts" between the miner and the miners' representative, it did not prohibit the miner from having contact with the miners' representative). And although Wilson argues that the fact of Browning's suspension is evidence of interference, it instead demonstrates that mine management has every incentive to take every step, as Armstrong Coal did by suspending Browning, to prevent any employees from expressing contrary views to a miners' representative.

B. Browning Raised this Argument Below, and Chenery *Does Not Bar This Court from Reaching this Issue*

Although the ALJ did not address whether the Mine Act creates a cause of action against non-management miners, this Court can reach this issue because (1) Browning raised the argument that the Mine Act does not apply to him before the ALJ, and (2) *Chenery* does not prevent this Court from denying the petition for review on a ground not addressed by the ALJ because the Commission and its ALJs do not make policy under the Mine Act. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (holding that when an administrative decision is valid "only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made," the reviewing court cannot affirm on grounds not reached by the agency).

1. In his briefs before the ALJ, Browning argued that the Mine Act applies only to those in positions of power. Most directly, he argued that the analogous NLRA provision looks at the actions of employers because "it is the **employer** who has the power to intimidate and interfere with the free exercise of employee rights under the NLRA." Resp. To Complainant's Summ. J. Mot. p. 10 (emphasis in original). The Mine Act, the brief goes on, "place[s] the onus upon the

complainant to prove a logical and reasonable threat by an entity with some type of power, historically economic power, over that miner." *Id.* (emphasis in original). He also argued that Wilson cited no Mine Act cases "solely against an hourly mine employee," *id.* at 4, and that in every case cited by Wilson, one party had "the authority or the power" to "threaten reprisal." *Id.* at 9. As "just a pumpman," Browning had "no authority over Wilson or anybody," *id.* at 7–9, and therefore could not interfere with anyone's rights. Browning also emphasized that as a non-management miner, he is member of the "protected class" the Act is "intended to protect." *Id.* at 2. A key point to Browning's argument before the ALJ, then, was that the Mine Act was not intended to apply to non-management miners who lack the authority or power to threaten reprisal.

To be sure, Browning did not direct the ALJ's attention to the legislative history cited above or to *Spiegel*, 604 F.3d 72. But this Court may consider new legal authority on appeal even if not cited below. *See, e.g.*, *Felter v. Kempthorne*, 473 F.3d 1255, 1261 (D.C. Cir. 2007) (noting that this Court is "careful to distinguish between failure to make an argument and failure to cite relevant legal authority"); *United*

States v. Rapone, 131 F.3d 188, 196–97 (D.C. Cir. 1997) (permitting the petitioner to cite a relevant statute for the first time on appeal because "not doing so could lead to the unacceptable result of "appellate affirmation of incorrect legal results").[9] And this Court will not affirm an incorrect result simply because of "shortages in counsel's . . . briefing." *See Rapone*, 131 F.3d at 197 (quoting *Elder v. Holloway*, 510 U.S. 510, 515 & n.3 (1994)).

2. *Chenery* bars courts from considering issues not decided by an agency only when those agencies make policy.[10] *See*, *e.g.*, *Shea v. Director, Office of Workers' Comp. Programs*, 929 F.2d 736, 739 n.4 (D.C. Cir. 1991). Because the Commission and its ALJs do not make policy, *Chenery* does not prevent this Court from denying the petition for review on grounds not decided by the ALJ.

---

[9] *Cf. Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (noting that when an issue is properly before an appellate court, the court is not limited to the particular legal theories advanced by the parties but, rather, has the "independent power to identify and apply the proper construction of governing law").

[10] Ordinarily, if a policy-making agency does not rule on a particular legal question, the reviewing court cannot affirm the order for grounds not relied on by the agency; doing so would "intrude on the domain" Congress exclusively entrusted to the agency. *See Chenery Corp.*, 318 U.S. at 88.

The Commission and its ALJs are not a policymaking entity because of the Mine Act's split-enforcement structure. Most administrative agencies exercise all administrative functions: rulemaking, enforcement, and adjudication. *See Prairie State Generating Co. v. Sec'y of Labor*, 792 F.3d 82, 86 (D.C. Cir. 2015). The Mine Act, by contrast, has a split-enforcement structure in which two separate agencies have complementary policymaking and adjudicative functions. *Id.* The Act assigns the Department of Labor (DOL) rulemaking and enforcement authority. 30 U.S.C. § 811(a) (providing authority for the Secretary of Labor to promulgate health or safety standards); 30 U.S.C. § 815(c)(2) (assigning the Secretary of Labor authority to investigate all discrimination and interference claims and bring claims on behalf of miners). The Act assigns adjudicatory power to the Commission and its ALJs, which operate independently of the Department of Labor. *Id.* § 823.

In split enforcement schemes such as the Mine Act's, entities that possess only adjudicatory power like the Commission are non-policymaking entities; the Secretary of Labor, with rulemaking and enforcement powers, makes policy. *See Martin v. Occupational Safety*

& Health Review Comm'n, 499 U.S. 144, 154–55 (1991). Analyzing the similarly split-enforcement structure of the Occupational Safety and Health Act—an Act whose structure "closely parallels" the Mine Act and on which the Mine Act's review process was modeled, *see Prairie State*, 792 F.3d at 91—the Supreme Court held that Congress intended to delegate to the OSHR Commission "nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency review context," not the power to make policy. *Martin*, 499 U.S. at 154. Like the OSHR Commission in *Martin*, the Commission and its ALJs are non-policymaking adjudicatory entities. *Cf. Prairie State Generating Co.*, 792 F.3d at 85–86 (emphasis added) (explaining that the Act's split-enforcement structure "reflects Congress's concern that the adjudicatory function be institutionally independent of potential influence by the agency responsible for *policymaking* and enforcement decisions") (citing S. Rep. No. 95-181, at 47 (1977)).

Because the Commission and its ALJs are non-policy making entities, *Chenery* "simply does not apply." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 305 (D.C. Cir. 2015); *see Sierra Club v. FERC*, 827 F.3d 36, 48–49 (D.C. Cir. 2016) (noting that *Chenery* does not apply

to actions that do "not depend upon a factual determination or a policy judgment that [the agency] alone is authorized to make") (alteration in original); *Shea*, 929 F.2d at 739 n.4; *Horne v. Merit Systs. Prot. Bd.*, 684 F.2d 155, 158 n.4 (D.C. Cir. 1982). In *Shea*, this Court held that *Chenery* did not apply when reviewing a decision of the Department of Labor's Benefits Review Board that, like the Commission and its ALJs, is a non-policymaking agency in a split-enforcement scheme. *Shea*, 929 F.2d at 739 n.4. Here, as in *Shea*, this Court reviews the order of a non-policymaking entity—the Commission. Thus, *Chenery* does not bar consideration of this issue.

III. BROWNING HAD A FIRST AMENDMENT RIGHT TO SPEAK THESE WORDS.

If this Court concludes that this speech constitutes interference under the Mine Act and that the Act provides a cause of action against non-management miners, Browning's core First Amendment right to express his views—particularly his views on an issue critical to his ability to earn a living—precludes liability under the Mine Act. *See NLRB v. Gissel Packing*, 395 U.S. 575, 617 (1969) (recognizing in the context of the NLRA that "an employer's free speech right to communicate his views to his employees is firmly established and

cannot be infringed by a union or the Board"). The First Amendment permits the Commission to penalize, at most, statements that "contain a threat of reprisal or force or promise of benefit." *Id.* at 618. Because Browning had no authority over Wilson and did not come close to threatening reprisal or force, the First Amendment precludes a finding of interference under the Mine Act.

Even viewing the facts in the light most favorable to Wilson, the words Browning spoke are protected under the First Amendment and therefore cannot create liability under the Mine Act.[11] In the analogous context of the NLRA, this Court has repeatedly held that the statute has to be interpreted in light of the First Amendment rights of employers, and it prohibits employer speech if—and only if—the speech includes "coercive statements that threaten retaliation against employees for the exercise of their rights to organize and to participate in union activities." *See*, *e.g.*, *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001).

---

[11] The ALJ concluded that Browning did not interfere with Wilson's rights and did not reach Browning's First Amendment argument. Because the Commission does not make policy under the Mine Act, *see infra* Section IIB, *Chenery* poses no bar to this Court affirming on grounds not decided by the ALJ.

The Mine Act's analogous interference provision likewise must be interpreted in light of the First Amendment rights of individual miners. To be sure, the NLRA (as distinct from the Mine Act) specifies that the expression of any "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). But as the Supreme Court has recognized, this provision "merely implements the First Amendment" rights of employers. *Gissel Packing*, 395 U.S. at 617. Indeed, this Court has rejected the argument that such statutory language is necessary for the First Amendment's free speech guarantee to apply. *See U.S. Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985, 991 (D.C. Cir. 1999) (rejecting Board's argument that, because the Railway Labor Act does not have a provision similar to Section 158(c), *Gissel Packing*'s First Amendment standard does not apply to cases under that Act).

The First Amendment protects Browning's words that were devoid of any threat of reprisal or force. *See U.S. Airways*, 177 F.3d at 991 (holding that Board violated employer's First Amendment rights by preventing employer from imparting truthful information that did not

"contain a threat of reprisal or force or promise of benefit") (citation and internal quotation marks omitted). Browning simply expressed to Wilson his views regarding Wilson's role at the mine, as is his right under the First Amendment. These words therefore do not constitute interference. *See Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1134–36 (D.C. Cir. 1994) (holding that letter from employer to employees stating that the company would not "BRING WORK INTO THIS PLANT—AND OUR CUSTOMER WILL SEEK OTHER ALTERNATIVES—IF THAT WORK CAN'T BE DONE AT A REASONABLE COST" retained First Amendment protection because it did not contain sufficient threat of reprisal or force).

Even if Browning's words had contained a hint of a threat, the fact that he had absolutely no power—economic or otherwise—over Wilson renders this protected speech outside of the scope of the Mine Act. See *Gissel Packing*, 395 U.S. at 617 (holding that the balancing of employers' free speech rights and the "equal rights of the employees to associate freely . . . must take into account the economic dependence of the employees on their employers"). The Court in *Gissel Packing* emphasized that because employees are economically dependent on

their employers, there is a "necessary tendency of the [employee], because of that relationship, to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *Id.* at 618. This Court therefore has recognized that the "force of the First Amendment has been held to vary with *context*," in particular the context of the employer/employee relationship. *See U.S. Airways*, 177 F.3d at 991 (citing *Gissel Packing*, 395 U.S. at 617). The context here—the fact that Wilson had *no* economic dependence on Browning, and Browning had no power over Wilson—militates in favor of First Amendment protection for this speech.

This is particularly so because as a non-management employee, Browning would have had absolutely no way of knowing that his remarks to a miner's representative could result in punishment and liability under the Mine Act. The Supreme Court in *Gissel Packing* recognized the concern that the line between permissible and impermissible speech by employers might be "too vague to stand up under traditional First Amendment analysis." 395 U.S. at 620. But it emphasized that "an employer, who has control over [the employer-employee] relationship and therefore knows it best, cannot be heard to

complain that he is without an adequate guide for his behavior." *Id.* Browning had no such luxury. As a non-management employee protected by the Mine Act, he had no way of knowing that the Mine Act could be used to penalize, rather than protect, his speech. After all, the Commission has found individual non-management miners liable for interference under the Act in only a handful of cases, and those involved both threatening conduct *and* speech. *See supra* Section I. Finding interference here would impermissibly chill the speech of all miners.

Congress enacted the Mine Act to protect the rights of miners, like Browning, to express their views on mine safety without threat of retaliation. *See infra* Section IIA. Interpreting the Mine Act to penalize Browning's speech based only on an honest disagreement about the role of the miners' representatives defies logic. *See Gen. Elec. Co., v. NLRB*, 117 F.3d 627, 632–633 (D.C. Cir. 1997) (holding that general manager's speech before union election telling employees that "'[w]e must learn to work together and get everyone involved in this business. I'm afraid that if we can't do that—we won't have a business here ten years from now'" constituted protected, non-threatening speech).

CONCLUSION

Substantial evidence supports the ALJ's conclusion that Browning's words do not constitute interference. Congress surely did not intend Browning, a non-management miner, to endure and finance a year and a half of costly litigation for expressing a few minutes of his views to Wilson. This was not interference. And even if it would have been interference by an employer, Congress never intended to create a cause of action against non-management miners like Browning. Finally, the First Amendment protected Browning's words because they neither were coercive statements nor did they threaten retaliation. This Court therefore should deny the petition for review.

Respectfully Submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel for Respondent
Georgetown Univ. Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

December 23, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,605 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Respectfully submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel for Respondent
Georgetown Univ. Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

December 23, 2016

CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on December 23, 2016, a copy of Respondent's Brief was served via the Court's ECF system on:

James Wesley Addington
Appalachian Citizens' Law Center, Inc.
317 Main Street
Whitesburg, KY 41858

Tony Oppegard
Law Office of Tony Oppegard
PO Box 22446
Lexington, KY 40522

John Thomas Sullivan
Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW
Suite 520N
Washington, DC 20004

Cynthia Liao
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Respectfully Submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel for Respondent
Georgetown Univ. Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

December 23, 2016

STATUTORY ADDENDUM

STATUTORY ADDENDUM
TABLE OF CONTENTS

29 U.S.C. § 158(C)

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

30 U.S.C. § 801

Congress declares that--

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

30 U.S.C. § 802(D)

For the purpose of this chapter, the term--

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

30 U.S.C. § 802(F)

(f) "person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization;

30 U.S.C. § 811(A)

(a) Development, promulgation, and revision

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendation of an advisory committee appointed under section 812(c) of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within 60 days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than 180 days. When the Secretary receives a recommendation, accompanied by appropriate criteria, from the National Institute for Occupational Safety and Health that a rule be promulgated, modified, or revoked, the Secretary must, within 60 days after receipt thereof, refer such recommendation to an advisory committee pursuant to this paragraph, or publish such as a proposed rule pursuant to paragraph (2), or publish in the Federal Register his determination not to do so, and his reasons therefor. The Secretary shall be required to request the recommendations of an advisory committee appointed under section 812(c) of this title if the rule to be promulgated is, in the discretion of the Secretary which shall be final, new in effect or application and has significant economic impact.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking a mandatory health or safety standard in the Federal Register. If the Secretary determines that a rule should be proposed and in connection therewith has appointed an advisory committee as provided by paragraph (1), the Secretary shall publish a

proposed rule, or the reasons for his determination not to publish such rule, within 60 days following the submission of the advisory committee's recommendation or the expiration of the period of time prescribed by the Secretary in such submission. In either event, the Secretary shall afford interested persons a period of 30 days after any such publication to submit written data or comments on the proposed rule. Such comment period may be extended by the Secretary upon a finding of good cause, which the Secretary shall publish in the Federal Register. Publication shall include the text of such rules proposed in their entirety, a comparative text of the proposed changes in existing rules, and shall include a comprehensive index to the rules, cross-referenced by subject matter.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed mandatory health or safety standard, stating the grounds therefor and requesting a public hearing on such objections. Within 60 days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the mandatory health or safety standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing. Any hearing under this subsection for the purpose of hearing relevant information shall commence within 60 days after the date of publication of the notice of hearing. Hearings required by this subsection shall be conducted by the Secretary, who may prescribe rules and make rulings concerning procedures in such hearings to avoid unnecessary cost or delay. Subject to the need to avoid undue delay, the Secretary shall provide for procedures that will afford interested parties the right to participate in the hearing, including the right to present oral statements and to offer written comments and data. The Secretary may require by subpoena the attendance of witnesses and the production of evidence in connection with any proceeding initiated under this section. If a person refuses to obey a subpoena under this subsection, a United States district court within the jurisdiction of which a proceeding under this subsection is conducted may, upon petition by the Secretary, issue an order requiring compliance with such subpoena. A transcript shall be taken of any such hearing and shall be available to the public.

(4)(A) Within 90 days after certification of the record of the hearing held pursuant to paragraph (3), the Secretary shall by rule promulgate, modify, or revoke such mandatory health or safety standards, and publish his reasons therefor.

(B) In the case of a proposed mandatory health or safety standard to which objections requesting a public hearing have not been filed, the Secretary, within 90 days after the period for filing such objections has expired, shall by rule promulgate, modify, or revoke such mandatory standards, and publish his reasons therefor.

(C) In the event the Secretary determines that a proposed mandatory health or safety standard should not be promulgated he shall, within the times specified in subparagraphs (A) and (B) publish his reasons for his determination.

(5) Any mandatory health or safety standard promulgated as a final rule under this section shall be effective upon publication in the Federal Register unless the Secretary specifies a later date.

(6)(A) The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

30 U.S.C. § 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) of this section, 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 U.S.C. § 815

(a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that

he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

(b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

(B) In determining whether to propose a penalty to be assessed under section 820(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that

the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 814 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if--

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814 of this title. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

(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.

(d) Contest proceedings; hearing; findings of fact; affirmance, modification, or vacatur of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this

title, the Secretary shall immediately advise the Commission of such notification, and 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 on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

30 U.S.C. § 816(A)

(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[1] 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.

(2) In the case of a proceeding to review any order or decision issued by the Commission under this chapter, except an order or decision pertaining to an order issued under section 817(a) of this title or an order or decision pertaining to a citation issued under section 814(a) or (f) of this title, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if--

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal or other mine.

(3) In the case of a proceeding to review any order or decision issued by the Panel under this chapter, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if--

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding.

30 U.S.C. § 818

(a) Civil action by Secretary

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent--

(A) violates or fails or refuses to comply with any order or decision issued under this chapter, or fails or refuses to comply with any order or decision, including a civil penalty assessment order, that is issued under this chapter,

(B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health and Human Services or his authorized representative, in carrying out the provisions of this chapter,

(C) refuses to admit such representatives to the coal or other mine,

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine,

(E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health and Human Services in furtherance of the provisions of this chapter, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health and Human Services determines

necessary in carrying out the provisions of this chapter.

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in a pattern of violation of the mandatory health or safety standards of this chapter, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.

(b) Jurisdiction; relief; findings of Commission or Secretary

In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

30 U.S.C. § 820(a)

(a) Civil penalty for violation of mandatory health or safety standards

(1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000.

(3)(A) The minimum penalty for any citation or order issued under section 814 (d)(1) of this title shall be $2,000.

30 U.S.C. § 823

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

(1) The terms of the members of the Commission shall be six years, except that--

(A) members of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for a term of two years, two for a term of four years and two for a term of six years; and

(B) a vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and general pay rates. Upon the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the administrative law judges assigned to the Arlington, Virginia, facility of the Office of Hearings and Appeals, United States Department of the Interior, shall be automatically transferred in grade and position to the Federal Mine Safety and Health Review Commission. Notwithstanding the provisions of section 559 of Title 5, the incumbent Chief Administrative Law Judge of the Office of Hearings and Appeals of the Department of the Interior assigned to the Arlington, Virginia facility shall have the option, on the effective date of the Federal Mine Safety and Health Amendments Act of 1977, of transferring to the Commission as an administrative law judge, in the same grade and position as the other administrative law judges. The administrative law judges (except those presiding over Indian Probate Matters) assigned to the Western facilities of the Office of Hearings and Appeals of the Department of the Interior shall remain with that Department at their present grade and position or they shall have the right to transfer on an equivalent basis to that extended in this paragraph to the Arlington, Virginia administrative law judges in accordance with procedures established by the Director of the Office of Personnel Management. The Commission shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission. Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of Title 5.

(c) Delegation of powers

The Commission is authorized to delegate to any group of three or more

members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(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.)

(e) Witnesses and evidence; subpoenas; contempt

In connection with hearings before the Commission or its administrative law judges under this chapter, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. § 820(A)

(a) Civil penalty for violation of mandatory health or safety standards

(1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000.

(3)(A) The minimum penalty for any citation or order issued under section 814 (d)(1) of this title shall be $2,000.

30 U.S.C. § 820(C)

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 C.F.R. 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 the purposes of the Act, and