

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

HOPKINS COUNTY COAL, LLC,)	
)	
Petitioner,)	
)	
v.)	Docket Nos. KENT 2009-820-R
)	KENT 2009-821-R
SECRETARY OF LABOR,)	KENT 2009-822-R
MINE SAFETY AND HEALTH)	KENT 2009-1441
ADMINISTRATION (MSHA),)	
)	
Respondent.)	
)	

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUES

1. Whether HCC's argument that the Secretary was not authorized to investigate a discrimination complaint filed by a miner who believed that he had been discriminated against in violation of the Mine Act is properly before the Commission—and if so, whether § 105(c) of the Act authorized the investigation.
2. Whether §§ 105(c) and 103(a) and (h) of the Mine Act authorized the Secretary to require HCC to provide personnel files requested by the Secretary during the discrimination investigation.
3. Whether the Secretary's request for personnel files violated HCC's Fourth Amendment rights.
4. Whether the § 104(b) withdrawal order designating no area affected was valid.

STATEMENT OF THE CASE

This case arises from a discrimination investigation conducted by MSHA in response to a complaint filed by Robert Gatlin, a former employee of Hopkins County Coal ("HCC"). During the investigation, MSHA requested certain HCC personnel files that were necessary to evaluate Gatlin's discrimination allegations. When HCC refused to provide the files, MSHA issued two citations and a withdrawal order against HCC. HCC appeals the decision of the Administrative Law Judge ("ALJ") affirming the citations and order and assessing civil penalties.

I. Statutory Background

In enacting the Mine Act, Congress recognized that "[i]f our national mine safety and health program is to be truly effective, miners will have to play an active part in the

enforcement of the Act.” S. Rep. No. 95-181, 95th Cong. 1st Sess. (1977) at 35, reprinted in 1977 U.S.C.C.A.N. 3401, 3404. Congress enacted the antidiscrimination provision of the Act, § 105(c), 30 U.S.C. § 815(c), to encourage miners to be “active in matters of safety and health,” and to protect them from “any possible discrimination which they might suffer as a result of their participation,” S. Rep. No. 95-181 at 35. “The [discrimination] complaint procedure, therefore, serves an important function in accomplishing the legislation’s broader goals of improving mine safety and protecting miners.” Vulcan Const. Materials, L.P. v. FMSHRC, 700 F.3d 297, 302 (7th Cir. 2012).

Section 105(c) prohibits discrimination against or interference with the statutory rights of a miner because he has filed a complaint related to the Mine Act, including a complaint related to safety hazards; initiated or participated in an enforcement proceeding; or otherwise exercised a statutory right afforded by the Act. 30 U.S.C. § 815(c)(1). Congress intended the scope of protected activities to be “broadly interpreted by the Secretary” to include, among other things, “refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act.” S. Rep. No. 95-181 at 35. Any miner “who believes” that he has been discriminated against in violation of the Act may file a complaint with the Secretary. 30 U.S.C. § 815(c)(2).

The Mine Act requires the Secretary to “rigorously” enforce miners’ § 105(c) rights by giving discrimination complaints “high priority.” S. Rep. No. 95-181 at 36. The Secretary must forward a copy of the complaint to the respondent and begin “such investigation as he deems necessary” within fifteen days of the filing of the complaint. 30 U.S.C. § 815(c)(2). If the Secretary finds that the complaint was not frivolously

brought, the Secretary must apply to the Commission for temporary reinstatement of the miner. Id. Within ninety days of the filing of the complaint, the Secretary must complete the investigation and notify the miner of his determination whether discrimination has occurred. Id. § 815(c)(3). If the Secretary determines that discrimination has occurred, the Secretary must immediately file a complaint with the Commission. Id. § 815(c)(2).

Other provisions of the Mine Act complement the Secretary's investigative authority under § 105(c). Section 103(a) authorizes representatives of the Secretary to conduct warrantless investigations in mines to determine, among other things, whether there is compliance with mandatory health or safety standards and "any . . . other requirements of [the Act]." Id. § 813(a). In addition, § 103(h) requires every operator to provide, in addition to records specifically required by the Act, "such information[] as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under [the Act]." Id. § 813(h).

II. Factual Background

Robert Gatlin was employed as a belt examiner at HCC's Elk Creek Mine. Dec.at 2. On January 8, 2009, Gatlin was terminated after he refused to perform a pre-shift examination. Id.; Tr. 116. Gatlin filed a discrimination complaint with the Secretary, with the assistance of a complaint processor, on January 20, 2009.¹ Dec. at 2; Tr. 44-45. The complaint stated:

I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments

¹ A complaint processor is an MSHA employee who helps miners file complaints. The complaint processor writes down the miner's allegations in the complaint, which is then forwarded to an investigator. Tr. 33, 35.

deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.

Dec. at 2.

The Secretary forwarded a copy of the complaint to HCC the same day it was filed. Dec. at 2. Because Gatlin had requested temporary reinstatement, MSHA investigators began a "fast track" investigation, Tr. 50, and Special Investigator Kirby Smith interviewed Gatlin the next day, Tr. 112. Smith testified that, during the interview, Gatlin made "some allegations of things that [Smith believed might] develop into . . . protected activity." Tr. 47. Specifically, Gatlin alleged that, as a belt examiner, he had been required to perform additional work beyond his regular job duties, which made his job so burdensome that he did not have enough time to correct the safety hazards he found. Tr. 47-48. Gatlin alleged that, as a result, he started listing more hazardous conditions in the pre-shift and on-shift examination book. Tr. 48. Additionally, Gatlin alleged he had been told he did not necessarily have to record a hazard if it was corrected. Tr. 47. As a result, Smith decided to "look[] into the possibility of a protected activity [related to] determining hazards and reporting safety hazards." Tr. 47. Smith suspected that Gatlin might have engaged in protected activity by reporting hazards to the operator. Tr. 88.

During the interview, Gatlin named several HCC managers who had knowledge related to his allegations. Tr. 50. On January 26, MSHA District Manager Carl Boone wrote to HCC and asked to interview those individuals as part of the investigation. Tr. 49-50. On February 6, HCC sent MSHA a letter refusing to arrange the interviews unless MSHA clarified the protected activity alleged by the complaint. Dec. at 2. Special Investigator Smith testified that he did not respond to HCC's request for clarification

because he had not yet established the protected activity and he was still investigating Gatlin's allegations. Tr. 52-53.

On February 23, District Manager Boone sent HCC another letter, requesting various documents that MSHA had determined were necessary to evaluate Gatlin's discrimination claim. Dec. at 3. Among other things, Boone requested Gatlin's personnel file and the personnel files of "all employees at the Elk Creek Mine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 – January 20, 2009 for engaging in the conduct which led to . . . [Gatlin's] termination." Dec. at 3. Special Investigator Smith testified that MSHA requested Gatlin's personnel file to determine his work history, including any disciplinary action taken against him, to find any information corroborating his allegations, and to evaluate his general credibility. Dec. at 4; Tr. 55-56, 68. Smith testified that MSHA requested the personnel files of similarly situated employees to determine whether there was evidence of disparate treatment. Dec. at 4; Tr. 56. HCC eventually agreed to produce all of the requested documents except the personnel files.² Dec. at 3-4. On March 17, Boone notified HCC that special investigators would go to the mine on March 23 to inspect the files. Dec. at 3.

On March 23, Smith and another special investigator went to the mine and requested the personnel files. Dec. at 4; Tr. 65-67. The mine's general manager, William Adelman, refused to produce the files. Dec. at 4; Tr. 67. Adelman testified that he believed that MSHA's request was vague and that privacy concerns prevented him from

² The other records requested were Gatlin's disciplinary records, HCC's employee manual, the documents relied upon by HCC in its decision to terminate Gatlin, and the pre-shift, on-shift, and conveyor belt examination books at Elk Creek Mine covering the period from July 1, 2008, to January 31, 2009. Dec. at 3.

releasing the files. Dec. at 4; Tr. 119-20, 142. Adelman, however, did not ask for clarification of the request or offer to produce the files in redacted form. Dec. at 4; Tr. 119-21, 126. Smith explained that MSHA investigators are exempt from HIPAA regulations, but Adelman continued to refuse to produce the files. Dec. at 4; Tr. 67. Smith then issued a § 104(a) citation for HCC's refusal to produce records in violation of §§ 103(a) and (h) of the Act, and gave HCC forty-five minutes to abate the violation. Dec. at 4-5; Tr. 67. After the abatement period expired, Smith issued a withdrawal order under § 104(b), designating no area affected. Dec. at 5-6; Tr. 71, 73. When Adelman continued to refuse to produce the files, Smith issued another § 104(a) citation for continuing to operate in the face of a withdrawal order. Dec. at 6; Tr. 74-75.

The same day, HCC filed a notice of contest with the Commission, and shortly thereafter requested an expedited hearing. Dec. at 6. Three days later, HCC agreed to produce Gatlin's personnel file and the files of four other employees whose personal information had been redacted, and the Secretary agreed to terminate the citations and order. Dec. at 7 n.8; Tr. 129-30. Based on the agreement, the ALJ denied the motion to expedite. Dec. at 7. The Secretary subsequently petitioned the Commission for an assessment of civil penalties, proposing a penalty of \$112 for the first 104(a) citation (No. 6694904), which cited HCC for failing to produce the records, and \$1,500 for the second § 104(a) citation (No. 6694906), which cited HCC for continuing to operate in the face of the withdrawal order. Dec. at 7.³

³ These amounts were proposed in the Secretary's amended petition for civil penalties. In the initial petition, the Secretary sought a lower penalty for the second § 104(a) citation and an additional penalty for the § 104(b) order. Pet. for the Assessment of Civil Penalty (Sept. 30, 2009). In the motion to amend the petition, the Secretary proposed to remove the penalty for the § 104(b) order and increase the penalty for the second § 104(a)

III. The ALJ's Decision

The ALJ found that the citations and order were valid. The ALJ rejected HCC's claim that the Mine Act does not authorize the Secretary to request personnel files during a discrimination investigation, reasoning that the Secretary's interpretation of what information may be required from an operator under §§ 103(a) and (h) of the Act is entitled to deference under Chevron USA, Inc. v. Natural Resources Defense Council, 468 U.S. 837, 842 (1984), as long as it is reasonable. Dec. at 14-15. The ALJ concluded that the Secretary's interpretation of those provisions as allowing access to the files was reasonable because the files could contain evidence relevant to an evaluation of the claim, such as evidence of protected activity, adverse action, and discriminatory intent. Dec. at 15-16. The ALJ rejected HCC's claim that the records request was a "fishing expedition," finding that Smith had credibly testified that he had "a reasonable understanding of [Gatlin's] claim" before requesting the files. Dec. at 16 n.15.⁴

The ALJ also concluded that the records request did not violate HCC's Fourth Amendment rights. Dec. at 11. The ALJ reasoned that under the Supreme Court's decision in Donovan v. Dewey, 452 U.S. 594, 604 (1981), warrantless inspections under the Mine Act are permissible because the mining industry is pervasively regulated and

citation. Mot. to Amend Petition (May 24, 2011). After the motion was granted, the docket corresponding with the § 104(b) order (KENT 2009-1441) was dismissed. Dec. at 7.

⁴ The ALJ also rejected various other arguments made by HCC to challenge the citations, including the claim that the privacy rights of HCC employees precluded disclosure of the personnel files, Dec. at 12-13, that disclosure of the files would violate HCC's obligations under HIPAA and Kentucky law, Dec. at 12, that employee consent was required for disclosure of the files, Dec. at 13, and that HCC lacked fair notice of the Secretary's interpretation of his investigative powers under the Act to grant access to the personnel files, Dec. at 18. Because HCC has failed to preserve these arguments on appeal to the Commission, this brief does not address them.

the certainty and regularity of the Act's inspection scheme provide an adequate substitute for a warrant. Dec. at 11. Although acknowledging that HCC has a general interest in the privacy of its personnel files, the ALJ concluded that "the Secretary's interest in promoting miner safety through the rigorous enforcement of . . . [§] 105(c) outweighs that interest." Dec. at 12.

Finally, the ALJ rejected HCC's argument that the § 104(b) withdrawal order was invalid. Dec. at 16-17. The ALJ reasoned that, although § 104(b) clearly requires the Secretary to find that a violation under §104(a) has not abated and that the abatement period should not be extended before issuance of such an order, it is unclear as to whether an area must have been affected. Dec. at 17. The ALJ therefore accorded Chevron deference to the Secretary's interpretation of the provision as allowing the order. Dec. at 17.

After finding that MSHA properly issued the citations and order, the ALJ assessed civil penalties for the two § 104(a) citations. Dec. at 19. The ALJ assessed the full proposed penalty for the first § 104(a) citation, but, finding that HCC's negligence was only moderate, not reckless, the ALJ reduced the penalty for the second §104(a) citation to \$1,050 (\$350 a day). Dec. at 19.

STANDARD OF REVIEW

The Commission reviews legal determinations made by the ALJ de novo. 30 U.S.C. § 823(d)(2)(A)(ii)(II); American Coal Co., 34 FMSHRC 1963, 1972 (2012). The ALJ's factual determinations are reviewed for substantial evidence. 30 U.S.C. § 823(d)(2)(A)(ii)(I); Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989).

ARGUMENT

I. Statutory Interpretation

In interpreting the Mine Act, the Commission must give effect to the plain meaning of the statute if the statute is clear and unambiguous. See Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); BHP Copper, 21 FMSHRC 758, 764 (1999). If, however, the statute is ambiguous or silent on the point in question, the Secretary's interpretation expressed in a litigation position before the Commission and in the issuance and enforcement of a citation is owed deference and is entitled to affirmance as long as it is reasonable. See Chevron 467 U.S. at 843-44; Bill Simola, Employed by United Taconite LLC, 34 FMSHRC 539, 550-51 (2012); Pattison Sand Co., LLC v. FMSHRC, 688 F.3d 507, 512 (8th Cir. 2012) (Secretary's litigation position before the Commission is entitled to full Chevron deference because it is "an exercise of delegated lawmaking powers") (quoting Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003); Vulcan Construction Materials, LP v. FMSHRC, 700 F.3d 297, 314-16 (7th Cir. 2012) (dictum) (Secretary's litigation position is entitled to full Chevron deference if it is embodied in the exercise of the delegated power to issue and enforce a citation). But see North Fork Coal Corp. v. FMSHRC, 691 F.3d 735, 742-43 (6th Cir. 2012) (Secretary's litigation position is only entitled to Skidmore deference if it is only offered in the course of litigation).

In this case, the Secretary's interpretations of ambiguous provisions of the Mine Act are entitled to Chevron deference both because they are the Secretary's litigation position and because they were embodied in the issuance and enforcement of a citation.

II. Petitioner’s Argument that the Secretary’s Lacked Statutory Authority to Investigate is Not Properly Before the Commission—and In Any Event, Section 105(c) of the Mine Act Authorized the Secretary’s Investigation

HCC claims for the first time on appeal that the Secretary lacked statutory authority to investigate Gatlin’s complaint because, according to HCC, that complaint did not allege protected activity. Br. at 4-6. Because HCC did not raise this argument below and the ALJ had no opportunity to pass on it, the Commission should decline to consider it. See 30 U.S.C. § 823(d)(2)(A)(iii) (“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.”); Beech Fork Processing, Inc., 14 FMSHRC 1316, 1319 (1992) (“The Secretary . . . failed to present this theory below for consideration by the judge and, therefore, has not preserved it for the Commission’s review.”).

In any event, HCC’s claim lacks merit. The Mine Act authorizes the Secretary to investigate every discrimination complaint filed by a miner, regardless of whether it alleges every element of a prima facie case of discrimination, and HCC’s arguments to the contrary conflict with both the plain language of the statute and congressional intent. Moreover, Gatlin’s complaint was not blatantly meritless, as HCC claims, but instead made various allegations that could have led to a finding of discrimination in violation of the Act. The Secretary’s investigation was therefore fully authorized.

The plain language of the Mine Act requires the Secretary to investigate every discrimination complaint filed by a miner, without reference to whether the complaint alleges every element of a prima facie case. If the meaning of the Act is not clear, the Secretary’s interpretation is entitled to deference because it is reasonable. See Chevron

467 U.S. at 843-44. Section 105(c) permits any miner “who believes” that he has been discriminated against in violation of the Act to file a complaint with the Secretary “alleging such discrimination”—it does not require the miner’s belief to be correct. 30 U.S.C. § 815(c)(2). Once the complaint is filed, “the Secretary . . . shall cause such investigation to be made as he deems appropriate,” *id.* (emphasis added), and based on that investigation, the Secretary “shall” determine whether to file a complaint on behalf of the miner within ninety days, *id.* § 815(c)(3)(emphasis added). The statute does not permit the Secretary to forgo the investigation necessary to make that determination simply because a complaint does not allege every element of a prima facie case. HCC’s interpretation would “read a limitation into the statute that has no basis in the statutory language,” Utah Power & Light Co. v. Sec’y of Labor, 897 F.2d 447, 451 (10th Cir. 1990) (per curiam), and it must be rejected.

Reading § 105(c) narrowly as authorizing an investigation only when the complaint alleges every element of a prima facie case would also conflict with congressional intent. “Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act.” Pontiki Coal Corp., 19 FMSHRC 1009, 1017 (1997); see also S. Rep. No. 95-181 at 36 (explaining that the statute should be “construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation”). Congress was aware that “mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity.” S. Rep. No. 95-181 at 35. Congress understood that the Secretary would therefore have to “rigorously” enforce miners’ § 105(c) rights to ensure that the economic repercussions of wrongful

discharge would not chill miners' participation in enforcing the Act. See id. at 46-37 (explaining that temporary reinstatement is "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint").

Consistent with congressional intent, the Commission has recognized that the Secretary's investigative authority is not limited by the specific allegations made in a miner's initiating complaint. For instance, if the Secretary's investigation reveals additional violations not specifically alleged in the initiating complaint, the Secretary may prosecute the additional violations as long as they are reasonably related to the initiating complaint. See Pontiki Coal, 19 FMSHRC at 1017 ("[I]t is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission."). Additionally, even a miner who has not engaged in protected activity may be protected by § 105(c) if his employer discriminates against him based on the suspicion that he has done so. See Moses v. Whitley Devel. Corp., 4 FMSHRC 1475, 1480 (1982). The Secretary must be allowed to investigate whether such discrimination has occurred, even if it turns out that the miner has not engaged in protected activity.

Under HCC's interpretation, the Secretary would be unable to investigate complaints from miners who do not clearly allege every element of a prima facie case, even if further investigation could reveal a viable claim. Such an interpretation could needlessly deprive many miners of the protection they are entitled to under the Act. Miners are not lawyers and, as Special Investigator Smith testified, they do not always

know “what a protected activity is” or how to articulate that activity at the complaint filing stage. Tr. 111. Smith has seen cases “where miners had made complaints about hazardous conditions at the mine, but . . . they couldn’t articulate them, and then through the course of the investigation during the interview process, [witnesses said] oh, yeah, they said this all the time.” Tr.111. Recognizing the limitations of pro se miners, the Commission liberally construes discrimination complaints filed with the Commission under § 105(c)(3) by pro se complainants. Ribble v. T & M Dev. Co., 22 FMSHRC 593, 595 n.3 (2000). Likewise, the Secretary must be permitted to liberally construe and investigate pro se initiating complaints, such as Gatlin’s, even if the complaint is vague or imprecise in some respect. To preclude the Secretary from doing so would deny protection to any number of miners whose claims are meritorious, but not well articulated. Cf. Marin v. Asarco, Inc., 14 FMSHRC 1269, 1273 (1992) (declining to impose sanctions on pro se litigant who withdrew her initial complaint for lack of protected activity because her decision to do so “[did] not indicate that her suit was groundless”). That is not what Congress intended.

In this case, Gatlin’s complaint made several allegations that, though vague, could have led to a viable claim.

First, Gatlin alleged that he had been directed to do more than his regular job duties, Dec. at 2, and he later alleged that the additional work interfered with his role as a belt examiner and created hazardous conditions, Tr. 47-48. A work refusal based on safety concerns can be protected activity. See Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989) (“It is . . . well settled that section 105(c)(1) protects a miner’s right to refuse work under conditions that he reasonably and in good faith believes to be

hazardous.”). Thus, further investigation could have led to a finding that Gatlin’s work refusal was protected activity.

Second, Gatlin alleged that he was terminated, in part, because of an unspecified “comment about the union.” Dec. at 2. The Mine Act establishes various rights related to unions and safety activities, see 30 U.S.C. §§ 813(c), (d), (f), (g), 815(d), and miners may complain about safety issues to their union safety committee, see Azko Salt Co., 17 FMSHRC 1368, 1375 (1995) (ALJ). If Gatlin’s comment related to one of those specified statutory rights or to a safety complaint made to the union, he could have engaged in protected activity.

Finally, Gatlin alleged that his name had been blackballed in the local mining industry. Section 105(c) protects miners from discrimination in the form of blackballing. See KenAmerican Res., 2013 WL 3759790 *2, 4-5 (FMSHRC July 3, 2013) (affirming temporary reinstatement of miner who claimed he was denied reemployment after a lay-off because he had been blackballed for filing a separate discrimination complaint), appeal pending, 6th Cir. No. 13-3804. Thus, investigation of Gatlin’s blackballing allegation could have led to a viable claim.⁵

Despite the foregoing allegations, which could have developed into a prima facie case, HCC claims the Secretary was obliged to end the investigation after reading the complaint, and suggests that the Secretary was not authorized to request records from HCC before determining whether protected activity occurred. Br. at 5-6. The Supreme Court, however, has recognized that an agency generally is not required to first determine

⁵ The potential for a blackballing claim was particularly concrete because Gatlin had previously filed a discrimination complaint against another company. See KenAmerican Resources, Inc., 31 FMSHRC 1050 (2009). If HCC terminated Gatlin because he participated in that case, Gatlin would have had a viable claim.

whether threshold elements of a statutory violation are met before investigating other elements of a claim. See Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 508-09 (1943) (Secretary's authority to subpoena payroll records from a federal contractor in an investigation under the Walsh-Healey Act is not conditioned on "first reaching and announcing a decision on" whether the contractor is covered by the Act); see also EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1076 (9th Cir. 2001) ("The principle . . . that courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law [] has been consistently reaffirmed by the Supreme Court.").

Moreover, the Mine Act provides no basis for HCC's claim, Br. at 6, that the Secretary should have conducted the investigation differently. Quite the contrary, the Act grants the Secretary broad authority to investigate each complaint "as he deems appropriate." 30 U.S.C. § 815(c)(2). Indeed, the Commission lacks jurisdiction to review the Secretary's decisions about how to investigate a complaint because such decisions are committed by law to the Secretary's discretion. See Webster v. Doe, 486 U.S. 592, 600 (1988) (CIA Director's termination decisions committed to agency discretion by law because statute allows termination whenever Director "shall deem [it] necessary or advisable"); Sec'y of Labor v. Twentymile Coal Co., 456 F.3d 151, 157-58 (D.C. Cir. 2006) (Commission generally lacks authority to review certain citation decisions because the Mine Act does not provide a meaningful standard).

That the Secretary's discretionary decisions about how to investigate are non-reviewable, of course, does not mean the Commission lacks jurisdiction to review whether particular records may be requested from an operator during an investigation.

Rather, as explained below, record demands are reviewable by the Commission in penalty contest proceedings such as this one, and they are judged by the reasonableness standard provided by § 103(h). Thus, recognizing the Secretary's statutory authority to investigate here does not mean granting the Secretary the power to initiate a "wholesale investigation of the operator's records" in every case, as HCC maintains, Br. at 6. If, as in HCC's far-fetched hypothesis, Br. at 5, a complaint alleged that a miner was fired because of his hair color, the reasonableness of a request for operator records would be reviewable under § 103(h).

Because the plain language of § 105(c) authorizes investigation of every complaint filed by a miner, because Congress intended the provision to be liberally construed to afford maximum protection to miners, and because Gatlin's allegations could have led to a viable claim, the investigation here was authorized.

III. Sections 105(c) and 103(a) and (h) of the Act Authorized the Secretary to Require HCC to Provide Personnel Files Needed for the Investigation

HCC claims that the Secretary's request for personnel files was not authorized by the Mine Act. Br. at 17-18. The request, however, was authorized both by the investigatory powers granted to the Secretary under §§ 105(c) and 103(a) of the Act and by the document provision requirements of § 103(h). HCC's claim that these provisions of the Act only authorize access to records required to be maintained by regulation is unavailing.

The Secretary's authority to investigate discrimination cases derives not only from § 105(c) of the Act, but also from § 103(a), which authorizes the Secretary to conduct investigations in mines, among other things, to determine "whether there is

compliance with the . . . requirements of [the Act].” 30 U.S.C. § 813(a). Under § 103(a), the Secretary may require operators to provide certain information necessary to complete an accident investigation expeditiously. See BHP Copper, 21 FMSHRC at 764-65 (holding that § 103(a) requires operators to provide the contact information of witnesses). Like accident investigations, discrimination investigations are a critical part of the Act’s health and safety enforcement scheme, S. Rep. No. 95-181 at 35, and they must be performed expeditiously, 30 U.S.C. § 815(c)(2)-(3). Thus, the Secretary’s power to investigate must encompass the power to obtain information, such as personnel files, needed to complete the investigation expeditiously. See BHP Copper, 21 FMSHRC at 764-65. “Unless the Secretary’s right to be on mine property and investigate [discrimination complaints] is a hollow one, it must carry with it the right to [obtain information necessary to evaluate the complaint].” Id. at 766.

Relating to this right, § 103(h) states that, “[i]n addition to such records as are specifically required by [the Act],” operators must provide “such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under [the Act].” 30 U.S.C. § 813(h). One of the Secretary’s functions under the Act is the investigation of discrimination claims. Id. § 105(c)(2). HCC was therefore obliged to comply with the Secretary’s request so long as the personnel files were “reasonably require[d]” for the investigation.

The ALJ properly found that the files were “reasonably required.” A complainant’s personnel file is relevant evidence in a discrimination investigation. See EEOC v. Children’s Hosp. Med. Ctr. of N. California, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc) (“[T]he charging parties’ personnel files . . . [are] clearly relevant and

material to the [discrimination] charges being investigated.”), overruled on other grounds as recognized in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1303 (9th Cir.1994).

Special Investigator Smith testified that Gatlin’s personnel file was required to establish his work history and determine whether it contained any information corroborating his claim or undermining his allegations, and to evaluate his general credibility. Tr. 55-56, 68. Smith explained, “I don’t want to go to court with a guy that’s missing every other Friday . . . or anything like that. I need to find out who I’m talking with.” Tr. 55-56.

The personnel files of similarly situated employees were required to determine whether there was any evidence of disparate treatment. Tr. 57. Smith testified that he “wanted to know . . . if anybody had been terminated, discharged, or reprimanded for the same conduct that they’re alleging [Gatlin was terminated for],” Tr. 56, and what “level of discipline [similarly situated employees] got.” Tr. 91. Evidence of disparate treatment is relevant both to establishing a prima facie case of discrimination and to evaluating an employer’s affirmative defenses. See Colorado Lava, Inc., 24 FMSHRC 350, 354 (2002) (disparate treatment can indicate that the adverse action was motivated by the miner’s protected activity); Pamela Bridge Pero v. Cyprus Plateau Mining Corp., 22 FMSHRC 1361, 1367 (2000) (plurality opinion) (disparate treatment is relevant to whether an operator’s proffered explanation for the adverse action is pretextual). The personnel files were therefore relevant and necessary to evaluate the merits of Gatlin’s discrimination claim.

Although HCC attempts to characterize the Secretary’s request as a “fishing expedition,” Br. at 18, the ALJ correctly rejected that claim. The ALJ found credible Special Investigator Smith’s testimony that he had formed a reasonable understanding of

Gatlin's claim before making the request. Dec. at 16 n.15. ; Tr. 47-50, 88. In addition, the request for files of similarly situated employees, which was sent to HCC through counsel, was not characterized by a "lack of clarity," as HCC claims. Br. at 17. The Secretary requested personnel files of other employees who had suffered adverse action for "engaging in the conduct which led to the termination of . . . Gatlin." Dec. at 3. A reasonable attorney would understand this language to be a request for the files of similarly situated employees—that is, employees who, like Gatlin, suffered an adverse action for alleged insubordination. HCC does not explain why, if opposing counsel was confused by the request for comparator files, counsel did not request clarification at the time the request was made.

Nor is there merit to HCC's claim, Br. at 16, that the information operators must provide under § 103(h) is limited to information that must be maintained by regulation. The Commission has already rejected this argument, and with good reason. See Big Ridge, Inc., 34 FMSHRC 1003, 1012 (2012) ("The language of section 103(h) does not limit the Secretary's access only to records that are specifically required to be maintained or prescribed by regulation, but instead gives [him] authority to request whatever information [he] deems relevant and necessary."), affirmed, Big Ridge, Inc. v. FMSHRC, 715 F.3d 631, 643 (7th Cir. 2013) (noting, in dicta, that the plain language of § 103(h) does not require rulemaking).

HCC's interpretation of § 103(h) cannot be reconciled with the plain language of the statute. Section § 103(h) does not say that operators must provide such information that the Secretary "may reasonably require" by regulation; it refers to such information as the Secretary "may reasonably require from time to time." (emphasis added). 30 U.S.C.

§ 813(h). Congress expressly required the Secretary to engage in rulemaking in various other parts of the Act, including provisions appearing in § 103 itself. See, eg., Id. §§ 813(c) (“The Secretary . . . shall issue regulations requiring operators to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents”) (emphasis added), 813(g)(2) (“The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation”) (emphasis added). It must be presumed that Congress’s failure to do so in § 103(h) was intentional. See Russello v. United States, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation marks, citation, and alteration omitted).

Also unavailing is HCC’s claim, Br. at 16-17, that the personnel files are off limits because § 103(h) provides for public inspection of records obtained under it. HCC argues that if personnel files were subject to § 103(h), HCC would be forced to disclose confidential and private information that would become available for public inspection. Br. at 17. HCC did not ask, however, to redact such information when faced with the records request. Dec. at 4; Tr. 126. In any event, other provisions of federal law protect information of this type from unwarranted public disclosure. Specifically, records collected during discrimination investigations are subject to the Privacy Act, which generally prevents unwarranted disclosure of confidential information about private individuals. See 5 U.S.C. § 552a(b) (“No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to

another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains”); Privacy Act Systems—DOL/MSHA-10, <http://www.dol.gov/sol/privacy/dol-msha-10.htm> (discrimination files are a Privacy Act “system of records”).

Finally, there is no merit to HCC’s contention that affirming the statutory authority for the records request here would effectively sanction “nearly any search of operator property for any reason whatsoever.” Br. at 18. Section 103(h) allows the Secretary to demand only those records that are reasonably required to fulfill the Secretary’s functions under the Act. 30 U.S.C. § 813(h). Thus, the Secretary’s ability to demand records from an operator is limited both by the scope of his functions under the Act and by the reasonableness of any particular document request.

For the foregoing reasons, the plain meaning of § 103(h), which complements the Secretary’s investigative authority under §§ 103(a) and 105(c), authorized the Secretary’s request for personnel files in this case. If the meaning of these provisions is not plain, the Secretary’s interpretation is entitled to deference because it reasonable. See BHP Copper, 21 FMSHRC at 764-65 (according Chevron deference to the Secretary’s interpretation of § 103(a) as requiring operators to disclose information necessary to investigate accidents expeditiously); Big Ridge, 715 F.3d at 641-42 (according Chevron deference to the Secretary’s interpretation of § 103(h) as requiring operators to provide information necessary to verify injury and illness reporting compliance).

IV. The Records Request Did Not Violate HCC’s Fourth Amendment Rights

HCC claims that the Secretary was required to obtain a warrant before requesting the personnel files because the files are not required to be maintained under the Mine Act

or MSHA's regulations. Br. at 15. HCC's claim is invalid. It is well established that one who "chooses to engage in [a] pervasively regulated business . . . does so with the knowledge that his business records . . . will be subject to effective inspection." New York v. Burger, 482 U.S. 691, 701 (1987) (internal quotation marks and citation omitted). Because the owner of a pervasively regulated business has a reduced expectation of privacy, the Supreme Court has held that administrative officials do not necessarily need to obtain a warrant before inspecting the owner's commercial property. Id. at 702. Rather, a warrantless inspection of a closely regulated business need only be reasonable to pass muster under the Fourth Amendment. Id. In Donovan v. Dewey, the Court recognized that mining is a pervasively regulated industry, and it upheld warrantless inspections under the Mine Act using three-part test. 452 U.S. 594, 599, 601-05 (1981). Under that test, an inspection is reasonable if it is (1) authorized by law; (2) necessary for the furtherance of federal interests; and (3) not so "random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." Id. at 599. Applying that three-part test in this case, the records request at issue was reasonable.

First, as explained above, the request was authorized by §§ 105(c) and 103(a) and (h) of the Mine Act.

Second, the antidiscrimination provisions of the Act are an important part of the Act's health and safety enforcement program, which furthers a "substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines." Donovan, 452 U.S. at 602. As the Seventh Circuit recently recognized, "[t]he importance of miner safety remains strong today." Big Ridge, 715 F.3d at 647

(taking note of the 2010 disaster at Upper Big Branch Mine). A warrant requirement would interfere with the Act's enforcement program by delaying the progress of discrimination investigations, curbing the scope of investigations, and weakening the protections afforded to whistleblowers under the Act. See Disciplinary Proceeding, 24 FMSHRC 28, 33 (2002) ("The natural effect of delaying both a miner's vindication of his rights to be free from discrimination and to obtain temporary reinstatement is that all miners will be discouraged in the future from asserting their rights under the Mine Act."). The Secretary's ability to make reasonable, warrantless record demands during a discrimination investigation is therefore necessary to the Act's effective enforcement.

Third, discrimination investigations are part of the "predictable and guided federal presence" established by the Act, under which the mine operator "is not left to wonder about the purposes of the inspector or the limits of his task." Donovan, 452 U.S. at 604 (internal quotation marks and citation omitted). The Act sets forth a nondiscrimination mandate, establishes a detailed complaint procedure that requires the Secretary to investigate, and advises operators that they will be required to provide information reasonably required during the investigation. 30 U.S.C. §§ 105(c), 103(a), (h). Under this statutory scheme, an operator "cannot help but be aware" that personnel files containing relevant evidence may be requested. Donovan, 452 U.S. at 603.

Although HCC argues that only records that are specifically required to be maintained by the Act or the regulations may be constitutionally demanded, Br. at 15, Donovan imposes no such limitation. HCC instead relies primarily on three non-binding, pre-Donovan cases that the Commission has already rejected as unpersuasive and inapposite. See Big Ridge, 34 FMSHRC at 1017, 1028-29 (rejecting the reasoning of

Sewell Coal Co., 1 FMSHRC 864 (1979) (ALJ); Youghiogeny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973); United States v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (1978)). As the Commission explained in Big Ridge, Consolidation Coal and Youghiogeny “no longer reflect accurately the current state of the law” because they asserted that a warrant was required for the inspection of files contained in mine offices, while Donovan upheld warrantless inspections of the entire mine with no such qualifications. 34 FMSHRC at 1028-29 (internal quotation marks, citation, and alterations omitted). Sewell, which relied on the reasoning of Consolidation Coal and Youghiogeny, is superseded by Donovan for the same reason. See Big Ridge, 715 F.3d at 640 (noting that Donovan “altered the constitutional analysis applicable to MSHA inspections,” and rejecting Sewell as unpersuasive because it “rested on constitutional avoidance grounds that are no longer pertinent”).⁶

The three cases are also inapplicable because they dealt with wholesale searches of mine offices, not with record requests. MSHA investigators did not “rummage in any wholesale way or [] initiate a general search” of HCC’s offices—the behavior disapproved of in Youghiogeny, 364 F. Supp. at 51 n.5—nor did they personally search through HCC’s mine office files, as in Sewell, 1 FMSHRC at 865, 873, and Consolidation Coal, 560 F.2d at 215, 217. Rather, the investigators simply requested a narrow subset of personnel files, which were reasonably required for the discrimination

⁶ HCC also relies on United States v. Blue Diamond Coal, Co., 667 F. 2d 510 (6th Cir. 1982). Br. at 8. That case is inapposite, however, because it held improper the warrantless seizure of statutorily required record books from a mine based on a “panoply” of interests – including the operator’s need to have the books on the premises for safety reasons and the public’s right to inspect them—which are inapplicable here. Blue Diamond Coal, Co., 667 F. 2d at 519-520.

investigation and could have been redacted. Thus, the three cases are inapposite to the issue presented in this case. See Big Ridge, 34 FMSHRC at 1017 (rejecting Sewell as inapposite because it involved a wholesale search, not a records requests).⁷

Finally, even assuming Donovan does not establish that the Secretary's request for personnel files was permissible, the request would still pass constitutional muster. Under the Seventh Circuit's analysis in Big Ridge, MSHA record requests may be analyzed, for Fourth Amendment purposes, as if they are administrative subpoenas. See Big Ridge, 715 F.3d at 645-46. As the Seventh Circuit explained, the Secretary's authority under the Mine Act to "inspect and copy specific documents in the possession of mine operators and . . . to issue citations and orders and impose penalties if mine operators do not cooperate" amounts to an "administrative subpoena in substance." Id. at 646. To satisfy the Fourth Amendment, an administrative subpoena need only be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." Id. (quoting See v. City of Seattle, 387 U.S. 541, 544 (1967)).⁸

⁷ The Commission did not, as HCC claims, endorse Sewell's reasoning in Peabody Coal Co., 6 FMSHRC 189 (1984), or BHP Copper, 21 FMSHRC at 767. Rather, in both cases, the Commission merely noted that Sewell was factually distinct. See Peabody, 6 FMSHRC at 186 n.5; BHP Copper, 21 FMSHRC at 767 n.15.

⁸ HCC erroneously argues that Big Ridge is distinguishable because a regulation authorized MSHA to obtain the records at issue in that case. In truth, the existence of the regulation was irrelevant to the court's Fourth Amendment analysis. See Big Ridge, 715 F.3d at 644-48. Indeed, the court upheld the records request after noting that it would have been authorized by the Act even if no regulation existed. See id. at 643 ("We read the plain text of the statute as not requiring MSHA to promulgate specific rules whenever it wants to be able to make reasonable demand for records under § 813(h).").

The Secretary's request here met that standard. As explained above, the request was limited in scope, as only personnel files pertaining to Gatlin and similarly situated employees were requested. It was relevant to the purpose of the discrimination investigation, as Gatlin's personnel file could corroborate or undermine his allegations, and comparator evidence from the files of other employees was relevant to disparate treatment. And it was specific enough so as not to be unreasonably burdensome, as only a subset of personnel files were requested and the request made reasonably clear which files should be produced. Indeed, General Manager Adelman testified that it took him only about five hours to search HCC's records for the four comparator files HCC eventually produced. Tr. 130

That the Act does not call the Secretary's power to require documents under § 103(h) an "administrative subpoena" does not, as HCC argues, Br. at 10-11, preclude the Commission from analyzing the records request as such. As the Seventh Circuit explained, for purposes of the Fourth Amendment analysis, it is proper to "look to the substance of MSHA's inspection power rather than how the Act nominally refers to those powers." Big Ridge, 715 F.3d at 646. The Seventh Circuit did not confer new subpoena powers upon the Secretary, but instead merely analyzed the substance of the Secretary's existing statutory authority to obtain records as an administrative subpoena for Fourth Amendment purposes. See id. Thus, contrary to HCC's claim, Br. at 10, this approach does not conflict with the principle that "[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute," U.S. ex rel. Richards v. De Leon Guerrero, 4 F.3d 749, 753 (9th Cir. 1993) (quoting Peters v. United States, 853 F.2d 692, 696 (9th Cir.1988)).

Nor is there merit to HCC's claim, Br. at 11, that the Secretary's authority to require records should not be analogized to an administrative subpoena because such subpoenas generally are not self-executing. As the Seventh Circuit explained, the Mine Act "provides operators with a variety of tools with which to defer and mitigate the imposition of penalties, thus mitigating the extent to which MSHA's document inspection demands may be more coercive than ordinary administrative subpoenas." Big Ridge, 715 F.3d at 646; see also Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994) (rejecting argument that Mine Act's penalty scheme is overly coercive). Mine operators can contest and receive a hearing on proposed penalties and orders before they become final, and they can request expedited review of § 104 orders. 30 U.S.C. § 815(d). Furthermore, penalties are not automatic, but rather are within the discretion of the Secretary to propose, and that of the Commission to assess or modify, based on specified factors. Id. §§ 815(b)(1)(B), § 820(i).

Thus, whether analyzed as a search under Donovan or as an administrative subpoena under Big Ridge, the records request here did not violate HCC's Fourth Amendment rights.

V. The Section 104(b) Withdrawal Order Was Valid

HCC's claim, Br. at 18-19, that the withdrawal order was invalid lacks merit. The plain language of the Mine Act requires MSHA to issue withdrawal orders provided two preconditions are met—and those preconditions were met in this case. If the meaning of the Act is not clear, the Secretary's interpretation is entitled to deference because it is reasonable. See Chevron, 467 U.S. at 843-44. Also unavailing is HCC's claim, Br. at 20, that rather than issuing an order and pursuing civil penalties for the citations, the

Secretary was restricted to seeking a civil injunction under § 108 of the Act. As the Commission has recognized, the Secretary may use either of these remedies to obtain compliance with § 103(h).

By its terms, § 104(b) of the Act requires MSHA to issue withdrawal orders whenever an MSHA investigator finds that: (1) the violation for which a § 104(a) citation was issued “has not been totally abated” within the period of time fixed; and (2) the time set for abatement “should not be further extended.” 30 U.S.C. § 814(b). Once those preconditions are met, the investigator “shall promptly issue” a withdrawal order after “determin[ing] the extent of the area affected by the violation.” *Id.* (emphasis added). The statute does not say that an area must have been affected. Rather, it simply says that the affected area must be determined – a determination that could include a determination that no area has been affected. If the meaning of the statute is unclear, the Secretary’s interpretation is reasonable because it comports with the remedial purpose of the Act. See Pattison Sand Co., LLC v. FMSHRC, 688 F.3d 507, 513 (8th Cir. 2012) (“The Act is remedial in nature and its terms should therefore be construed broadly.”).

The order here complied with the statute. After Smith issued the initial § 104(a) citation, HCC failed to abate the citation by providing the records within the time set. Dec. at 4-5; Tr. 71. Smith then determined that the period for abatement should not be further extended because there was no reasonable likelihood that HCC would provide the records. Tr. 73-74. Because the two preconditions for an order were met, Smith was required to issue the order after designating the area affected. See 30 U.S.C. § 814(b).

In addition, there is no merit to HCC’s claim, Br. at 20, that the Secretary’s only recourse here was to pursue an injunction under § 108(a)(1) of the Act, 30 U.S.C.

§ 818(a)(1). The Commission has already rejected the argument that the Secretary’s exclusive remedy to obtain information from an operator is under § 108(a) and affirmed the Secretary’s right “to proceed against [an operator] with a citation and penalty, instead of an injunction under [§] 108.” BHP Copper, 21 FMSHRC at 766; see also Thunder Basin, 510 U.S. at 204 (1994) (“The Secretary has broad authority to compel immediate compliance with Mine Act provisions through the use of mandatory civil penalties, discretionary daily civil penalties, and other sanctions.”). In the context of a discrimination investigation, such a restriction would frustrate the provisions enacted by Congress to ensure miners obtain prompt relief under § 105(c). The Secretary has only ninety days to complete the preliminary investigation, he must seek temporary reinstatement if the complaint is not frivolously brought, and, if discrimination is found, he must file a complaint immediately. 30 U.S.C. § 815(c)(2), (3). Confining the Secretary’s recourse when faced with a recalcitrant operator to a civil action in federal court would seriously undermine the Secretary’s ability to comply with that mandate.

Moreover, the Secretary’s enforcement of record requests through civil penalties does not insulate such demands from judicial review, as HCC claims. Br. at 20. “An operator who has been issued a citation can contest it, along with any proposed penalty, before an administrative law judge . . . subject to discretionary review by the Commission and an automatic right of review by the court of appeals.” BHP, 21 FMSHRC at 767 n.14; see also 30 U.S.C. §§ 820(i), 816. HCC has taken advantage of these avenues for judicial review in this case, which have provided a full opportunity—including the present appeal—to litigate the reasonableness of the Secretary’s records request under § 103(h).

For the foregoing reasons, the Secretary's decision to issue a withdrawal order and pursue civil penalties for the two § 104(a) citations was authorized by the Act.

CONCLUSION

For the foregoing reasons, the Commission should affirm the ALJ's decision.

Respectfully submitted,

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