ORAL ARGUMENT NOT REQUESTED

No. 13-3804

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENAMERICAN RESOURCES, INC.,

Petitioner,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION,
on behalf of DARRICK PIPER,

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over proceedings for review of a decision of the Federal Mine Safety and Health Review Commission (Commission) under § 106 of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 816. The Commission had jurisdiction over this matter under §§ 105(c) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(c), 823(d). The Secretary disagrees with the assertion of Petitioner KenAmerican Resources, Inc., *see* KenAmerican Br., p. 2, that the Commission's temporary reinstatement order is a final order. *See Vulcan Constr. Materials, L.P. v. Fed. Mine Safety & Health Review Comm'n*, 700 F.3d 297, 300 (7th Cir. 2012). The Court does, however, have jurisdiction over this matter because KenAmerican's appeal of the Commission's temporary reinstatement order falls within the collateral order exception to the finality rule. *Id.*; *Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 920 F.2d 738, 744–45 (11th Cir. 1990).

STATEMENT OF THE ISSUE

Whether the Commission properly concluded that Respondent Darrick Piper was a "miner" within the meaning of the Mine Act's temporary reinstatement provision, 30 U.S.C. § 815(c)(2), and was therefore eligible for temporary reinstatement.

STATEMENT OF THE CASE

A. Nature of the Case and Statutory Framework

The Mine Act was enacted to improve safety and health in the nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines . . . in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." *Id.* § 801(c).

Sections 101 and 103 of the Mine Act authorize the Secretary, acting through the Mine Safety and Health Administration (MSHA), to promulgate mandatory safety and health standards for the nation's mines and to conduct regular inspections of those mines. *Id.* §§ 811, 813. Section 104 of the Mine Act authorizes the Secretary to issue citations and orders for violations of the Mine Act and MSHA standards. *Id.* § 814.

Section 3(g) of the Mine Act defines a "miner" as "any individual working in a coal or other mine." *Id.* § 802(g). The term "miner" is used in a wide variety of substantive sections in the Mine Act.

Section 105(c) of the Mine Act prohibits operators from discriminating against "any miner, representative of miners or applicant for employment in any coal or other mine" for exercising any Mine Act right. *Id.* § 815(c). Any "miner,"

"representative of miners," or "applicant for employment" who believes that he has been discriminated against may file a complaint with the Secretary. *Id.* § 815(c)(2).

Section 105(c)(2) of the Mine Act requires the Secretary to begin an investigation of a miner's discrimination complaint within fifteen days. *Id.* If the Secretary finds that the miner's complaint was "not frivolously brought," he must apply to the Commission for an order temporarily reinstating the miner, and the Commission, on an expedited basis, must order the miner to be reinstated "pending final order on the complaint." *Id.* The Commission has held that only a "miner," and not a "representative of miners" or an "applicant for employment," is eligible for temporary reinstatement. *Sec'y of Labor ex rel. Young v. Lone Mountain Processing*, 20 FMSHRC 927, 930–31 (1998).

If, after an investigation, the Secretary determines that a violation has occurred, § 105(c)(2) of the Mine Act provides that he must file a complaint with the Commission. 30 U.S.C. § 815(c)(2). If the Secretary determines that a violation has not occurred, § 105(c)(3) of the Mine Act authorizes the miner to bring an action in his own behalf before the Commission. *Id.* § 815(c)(3). The Secretary must notify the miner of his determination whether a violation has occurred within ninety days of receiving the miner's underlying discrimination complaint. *Id.* § 815(c)(2).

The Commission is an independent adjudicatory agency established under

the Mine Act to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. *Id.* § 823; *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204 (1994); *Pendley v. Fed. Mine Safety & Health Review Comm'n*, 601 F.3d 417, 421 (6th Cir. 2010); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). Commission administrative law judges hear discrimination cases brought under § 105(c). *Pendley*, 601 F.3d at 421.

By filing a petition for discretionary review, a party may seek review of an adverse judge's decision before the Commission. 30 U.S.C. § 823. An adversely affected party may obtain review of a Commission decision in an appropriate court of appeals. *Id.* § 816.

B. Statement of Facts

On December 31, 2012, KenAmerican laid off ten miners at its Paradise No. 9 Mine, including Piper, then a shuttle car operator. App., p. 15. Piper was told that the layoff was prompted by economic conditions and that miners were selected for layoff based on excessive absenteeism. App., pp. 85, 89–90. On February 1, 2013, Piper filed a discrimination complaint with MSHA, alleging that he had been improperly laid off for reporting that a supervisor was using drugs and for missing work because of a knee injury. App., pp. 100, 102–03.

On two occasions in January and February 2013, Piper spoke with the mine's human resources director, Ron Winebarger, to ask whether and when he

would be called back to work at the mine. App., p. 16. Winebarger testified that he told Piper that he was "welcome to apply" after the hiring freeze ended and that he would be given "due consideration." App., pp. 16, 90. Piper also spoke with the mine's general manager, Randy Wiles, to ask the same questions. App., p. 16. Piper testified that Wiles told him that "the way people are quitting around here right now, there's a good chance that you will get your job back." App., p. 16.

At the end of February 2013, Winebarger and the general mine foreman, Joe Manning, met to consider rehiring the ten miners who had been laid off. App., pp. 16–17, 66. They invited six to come in to meet with them and ultimately offered four the opportunity to return to work; three accepted. App., p. 17. Piper was not contacted. App., p. 17.

On March 27, 2013, after hearing that other laid-off miners had been recalled, Piper called Winebarger to ask again about returning to work. App., p. 17. Winebarger testified that he told Piper, "I can't talk to you right now. You have a discrimination complaint against us, and I can't talk to you about this right now." App., p. 17. Piper concluded that KenAmerican was blackballing him because of the complaint he filed regarding the December 2012 layoff. App., p. 19.

On March 27, 2013, Piper filed a second discrimination complaint with MSHA, alleging that KenAmerican had unlawfully excluded him from recall from the December 2012 layoff. App., p. 111.

C. Course of Proceedings and Disposition Below

Piper filed his first discrimination complaint with MSHA on February 1, 2013. App., p. 100. On March 14, 2013, having determined that the February complaint was not frivolously brought, the Secretary filed with the Commission an application for Piper's temporary reinstatement. App., pp. 130–33. On April 4, 2013, prior to a scheduled hearing on the application, the Secretary moved to dismiss his application for temporary reinstatement, having determined that the facts disclosed during his investigation of the case did not support a violation of § 105(c). App., pp. 127–29. On April 8, 2013, the administrative law judge granted the Secretary's unopposed motion and dismissed the application for temporary reinstatement. App., p. 109.

Piper filed his second discrimination complaint with MSHA on March 27, 2013. App., p. 111. On May 14, 2013, having determined that the March complaint was not frivolously brought, the Secretary filed with the Commission a second application for Piper's temporary reinstatement. App., p. 138. On May 30, 2013, at KenAmerican's request, an expedited hearing was held before the administrative law judge. App., p. 61.

On June 6, 2013, the judge issued a decision ruling that Piper was a "miner," and was therefore eligible for temporary reinstatement, because he was working in a mine "when he began engaging in the protected activities that set the chain of

claimed discrimination and adverse actions in motion." App., p. 70. The judge found that Piper engaged in protected activities when he complained that his supervisor was using drugs, when he missed work because of injuries, and when he filed the February 1, 2013, discrimination complaint with MSHA. App., pp. 68–69. The judge ruled that Piper's discrimination complaint was not frivolously brought. App., p. 74. The judge ordered Piper's temporary reinstatement. App., p. 74.

KenAmerican filed a petition with the Commission for review of the judge's temporary reinstatement order. App., p. 47.

On July 3, 2013, the Commission issued a decision affirming the judge's temporary reinstatement order. App., p. 20. Two Commissioners were of the opinion that Piper was a "miner" eligible for temporary reinstatement, and not an "applicant for employment" as KenAmerican claimed, because "[h]e had actively worked in KenAmerican's mine" and his second discrimination complaint "clearly related back to, and was connected with," his active employment at the mine. App., pp. 18–19. The two Commissioners stated that their conclusion was consistent with Congress's intent to protect complaining miners from retaliation in order to encourage the exercise of miners' statutory rights. App., p. 19. The Chairman, concurring, was of the opinion that the meaning of the word "miner" as used in § 105(c)(2) was ambiguous and that deference was owed to the Secretary's reasonable interpretation of "miner" as including laid-off employees who claim

that they have been excluded from recall because of prior discrimination complaints. App., pp. 21–23. The Chairman found the Secretary's interpretation reasonable because it furthered the purpose of the Mine Act and was consistent with the Supreme Court's Title VII case law interpreting the word "employee." App., p. 22 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

On July 9, 2013, KenAmerican filed a petition for review of the Commission's decision with this Court. App., pp. 1–2.

SUMMARY OF THE ARGUMENT

The Commission properly concluded that Piper is a "miner" for purposes of § 105(c)(2) of the Mine Act. The statutory definition of "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g). KenAmerican asserts that the Commission erred because, when the discrimination that Piper alleged in his second complaint occurred, he was on layoff status and thus could not be a "miner" as defined in the Mine Act. The term "miner," however, is ambiguous; like the term "employee" as used in Title VII, the word's proper interpretation depends on the context and purpose of the statutory provision in which it appears.

Section 105(c)(2) gives "miners" the right to file complaints if they believe they have experienced various forms of unlawful discrimination, including discharge. Thus, an individual who is not currently working in a mine may nevertheless be a "miner" under this section. The same section of the Mine Act

contains the temporary reinstatement provision, whose purpose is to encourage miners to file discrimination complaints with the Secretary by protecting miners from even temporary lack of employment. It is consistent with both the context and the purpose of that provision to conclude that, because Piper was working in a mine at the time he engaged in the protected activity that is inextricably linked to, and allegedly precipitated, KenAmerican's later adverse action, he is a "miner" and is therefore eligible for temporary reinstatement.

ARGUMENT

The Commission's Conclusion that Piper Is a "Miner" Within the Meaning of § 105(c)(2), and Is Therefore Eligible for Temporary Reinstatement, Is Consistent with the Structure and the Purpose of the Mine Act

A. Standard of Review

Determination of whether Piper is a "miner" entitled to temporary reinstatement under the Mine Act requires the Court to review the Secretary's interpretation of § 105(c)(2) of the Act. "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The Court determines whether a statutory provision is plain or ambiguous "by reference to the language itself, the specific context in which that language is used, and the broader context

of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997). If the plain meaning of a provision cannot be determined, the Court may look to the legislative history of the statute to discern its meaning. *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769–70 (6th Cir. 2005).

If a statutory provision is ambiguous, the Secretary's interpretation is entitled to deference. *North Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 741 (6th Cir. 2012). When the Secretary "is applying [his] expertise in advocating for a particular interpretation of the Mine Act," *id.* at 742, this Circuit affords the Secretary's litigation position "deference to the extent it has the 'power to persuade,'" *id.* at 743 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

B. The Term "Miner" Is Ambiguous Because in Some Contexts, Including the Antidiscrimination Provisions of § 105(c), It Necessarily Refers to Individuals Who Are Not Currently "Working in a Coal or Other Mine"

The Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). That definition applies in all the various contexts in which the term "miner" is used throughout the Mine Act, but it does not always refer to a person who is currently working in a mine. In particular, a "miner" who believes he has been discriminatorily discharged is entitled to file a complaint. *Id.* § 815(c)(2). Necessarily, a miner who files such a complaint is not currently working in a mine. To make sense of this portion of § 105(c)(2) and to accomplish

the provision's objective, the term "miner" in this context must refer to an individual who was working in a mine when he engaged in the protected activity that allegedly led to his unlawful discharge.

The term "miner" as used in the Mine Act is similar to the term "employee" as used in Title VII of the Civil Rights Act of 1964, which prohibits discrimination against "employees" on various bases, including retaliation for exercising Title VII rights. *See* 42 U.S.C. § 2000e-3. Contrary to KenAmerican's assertion, *see* KenAmerican Br., p. 19, Title VII does provide a definition of "employee": "an individual employed by an employer." 42 U.S.C. § 2000e(f). As the Supreme Court observed in *Robinson v. Shell Oil Co.*, that definition "lacks any temporal qualifier" — that is, it "is consistent with either current or past employment" — and several "provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'" 519 U.S. 337, 342 (1997). In particular, when the term appears in sections that authorize remedial action in the form of "reinstatement . . . of employees," *e.g.*, 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16(b), it "necessarily refers to former employees." *Robinson*, 519 U.S. at 342. The Court explained that "[o]nce it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue

in dispute." *Id.* at 343–44.

Applying the same reasoning here, the term "miner" standing alone is ambiguous as to when a person must be "working in a . . . mine" to be a "miner" — that is, the word "working," like the word "employed," "lacks any temporal qualifier." *Id*. at 342. As noted above, the term "miner" as used in § 105(c) necessarily includes an individual who believes he has been unlawfully discharged but who was working in a mine when he engaged in activity protected by the Mine Act. It is therefore consistent with the broader context of the Mine Act to interpret "miner" in § 105(c)(2) as including an individual who is working in a mine when he engages in protected activity that is linked to an adverse action that occurs when he is no longer working in a mine. Whether this interpretation properly resolves the term's ambiguity, however, depends further on whether it is consistent with the "primary purpose" of the specific statutory provision in which it is used. *Id.* at 346; *see Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, . . . the meaning well may vary to meet the purposes of the law . . . ."); *Cyprus Empire Corp. v. Sec'y of Labor*, 15 FMSHRC 10, 15 (1993) ("The term 'miner' must be interpreted in the context of the particular Mine Act section in which it appears in order to effectuate the safety purposes of each section.").

C. The Conclusion that Piper Is a "Miner" Eligible for Temporary Reinstatement Is Consistent with the Protective Purpose of § 105(c)(2)

This Court has recognized that § 105(c) of the Mine Act "was intended to encourage miners to play an 'active part in the enforcement of the Act' and protect them 'against any possible discrimination which they might suffer as a result of their participation.'" *North Fork*, 691 F.3d at 738 (quoting S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Comm. on Human Res., Subcomm. on Labor, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978) [hereinafter *Legislative History*]). In this context, Congress viewed the temporary reinstatement provision of § 105(c)(2) as necessary "[t]o protect miners from the adverse and chilling effect of loss of employment while [the complaint is] being investigated," S. Rep. No. 95-461, at 52 (1977) (Conf. Rep.), *Legislative History* at 1330, and to provide "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," S. Rep. No. 95-181, at 37, *Legislative History* at 625. As this Court has observed with regard to Title VII and other employment statutes, antiretaliation provisions must be construed so as "not to frustrate the purpose of these Acts, which is to prevent fear of economic retaliation from inducing employees 'quietly

to accept [unlawful] conditions.'" *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993) (alteration in original) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

In *Robinson*, applying the interpretive principle discussed in section B, *supra*, to Title VII's provision prohibiting retaliation against "employees" for engaging in protected activities, the Court concluded that the ambiguous term "employees" in that context encompasses former employees. 519 U.S. at 346. In reaching that conclusion, the Court found "persuasive" the Equal Employment Opportunity Commission's argument that "exclusion of former employees from the protection of [Title VII's antiretaliation provision] would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims." *Id.* Similarly, if laid-off miners are to be encouraged to file discrimination complaints with the Secretary when they believe that their prior health and safety complaints motivated their layoffs, they must trust that they will not suffer adverse consequences merely for having filed such discrimination complaints — including the adverse consequence of being denied reemployment when the operator recalls other laid-off miners.

What is thus relevant for purposes of §105(c)(2) is that Piper was working in a mine when he engaged in the protected activities that allegedly gave rise to the chain of adverse actions against him. Therefore, KenAmerican's focus on the fact that Piper was on layoff status when he sought and was denied recall, *see, e.g.*, KenAmerican Br., p. 13, is misplaced. Further, the Commission and circuit court cases on which KenAmerican relies do not require that Piper be considered an "applicant for employment" rather than a "miner" for purposes of § 105(c)(2).

KenAmerican first argues that Piper is not eligible for temporary reinstatement based on *Secretary of Labor ex rel. Young v. Lone Mountain Processing*, 20 FMSHRC 927 (1998). *See* KenAmerican Br., pp. 10–13. In that case, the Commission held that an applicant for employment is not entitled to temporary reinstatement to a job he never held at a mine with which he had no connection. *Lone Mountain*, 20 FMSHRC at 930. KenAmerican argues that the complainant in *Lone Mountain* was not a "miner" because he "could not be considered to be 'working' for Lone Mountain Processing *at the time of the alleged discriminatory conduct*," KenAmerican Br., p. 12, but in fact the complainant had not worked for the operator at any time at all. Thus, as the Commission observed in the present case, Piper is unlike the complainant in *Lone Mountain* because Piper "had actively worked in KenAmerican's mine" and therefore held a position to which he is capable of being reinstated. App., p. 18; *see also* App., p. 18 n. 2.

KenAmerican next discusses two circuit court cases in an attempt to bolster its argument that the term "miner" should be interpreted narrowly in all contexts related to § 105(c). *See* KenAmerican Br., pp. 16–19 (discussing *Brock ex rel. Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987); *Emery Mining Corp. v. Sec'y of Labor*, 783 F.2d 155 (10th Cir. 1986)). The courts in those two cases ruled that operators did not violate § 105(c)'s discrimination prohibition when they considered laid-off employees' training status in making recall decisions, *see Peabody*, 822 F.2d at 1151, and declined to pay for applicants' pre-employment training after hiring, *see Emery*, 783 F.2d at 159, because § 115 of the Mine Act, 30 U.S.C. § 825 — the source of the requirement that "miners" receive health and safety training — applies only to individuals employed in mines. The issue in each of those cases was the definition of "miner" not as used in § 105(c)(2) but, rather, as used in § 115. *See Peabody*, 822 F.2d at 1140; *Emery*, 783 F.2d at 158. Indeed, KenAmerican itself quotes the D.C. Circuit's observation in *Peabody* that "'the success of the Secretary's argument depends almost entirely on whether the individuals passed over qualified as "miners" *under section 115* while on layoff.'" KenAmerican Br., p. 17 (emphasis added) (quoting *Peabody Coal Co.*, 822 F.2d at 1140); *see also Peabody*, 822 F.2d at 1151 (R.B. Ginsburg, J., concurring) (rejecting the Secretary's position "solely on the language and structure of section 115" and stressing that identical words appearing in different

provisions and addressing different purposes may have different meanings).

As discussed in section B, *supra*, the term "miner" is ambiguous and must therefore be interpreted in the context of the Mine Act provision in which it is used. In *Peabody* and *Emery*, the question was whether individuals not currently working in mines were entitled to the health and safety training guaranteed to "miners" by § 115. Under those circumstances, it is reasonable to conclude that what determines whether a person is a "miner" for purposes of § 115 is whether the individual was employed by the operator — that is, working in a mine — at the time he received (or should have received) the training. *See Emery*, 783 F.2d at 158. In that context, such an interpretation of the term "miner" serves § 115's purpose of ensuring that all individuals working in mines receive health and safety training while limiting to the operator's current employees its statutory obligation to ensure that "miners" are properly trained. *Cf. Peabody*, 822 F.2d at 1148 (noting that § 115's purpose was "to create a safe and healthy work environment, but individuals while on layoff simply are not exposed to that environment," and concluding that "[r]equiring that such individuals receive safety training would therefore serve no statutory purpose").

By contrast, this case presents the question of whether the complainant is a "miner" under the temporary reinstatement provision of § 105(c)(2). The purposes of this statutory provision are best served by interpreting the term "miner" to

include those individuals who were working in mines when they engaged in the statutorily protected activities that allegedly gave rise to the complained-of discrimination, for it is precisely those individuals whom Congress intended to encourage to exercise their rights under the Mine Act and to protect from temporary economic harm. Thus, Piper is a "miner" for purposes of § 105(c) because he was working in a mine when he engaged in the protected activities that allegedly gave rise to the ensuing chain of adverse actions.

If KenAmerican's approach were accepted, the protective purpose of § 105(c)(2) would be thwarted. An operator could first impose a layoff for apparently neutral reasons and then selectively recall only those miners who had not exercised their statutorily protected right to file a discrimination claim, yet the operator would be immune to any obligation to temporarily reinstate those miners who had filed claims. Indeed, accepting KenAmerican's argument, an operator could expressly link its decision not to recall the complaining miners to the fact that they had filed discrimination complaints — which in effect is what Human Resources Director Winebarger did when he admittedly told Piper he could not discuss recalling Piper. Under those circumstances, a fear of such adverse consequences would inform, and tend to chill, every miner's decision whether to file a discrimination complaint alleging that the layoff was unlawfully based on earlier protected activities — as well as the original decision whether to engage in

those protected activities at all. KenAmerican's approach should be rejected because it would effectively nullify the temporary reinstatement provision of § 105(c)(2) under these circumstances. *See, e.g.*, *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (accepting the Secretary's interpretation rather than one that "would render the . . . law meaningless").

Finally, KenAmerican's approach, if accepted, could produce effects inconsistent with the statutory purpose even beyond the situation presented here. In this case, the operator, as part of its litigation strategy, asserts that Piper is an "applicant for employment." Under different facts, however — for example, where a laid-off individual ordinarily would be automatically recalled according to seniority under a collective bargaining agreement and would not apply for reemployment — the operator could assert that a laid-off individual was not even an "applicant for employment." Applying the operator's approach advanced here, he would not be a "miner," and unless he happened to be a "miners' representative," he would not be eligible to file a discrimination complaint under § 105(c) at all. Such a result would thwart not only the purposes of § 105(c)(2)'s temporary reinstatement provision but § 105(c)'s antiretaliation scheme in its entirety.

CONCLUSION

For the reasons set forth above, Piper was not an "applicant for employment," and instead was a "miner," for purposes of the temporary reinstatement provision in § 105(c)(2) of the Mine Act. Having filed the initial discrimination complaint against KenAmerican alleging retaliation for protected activities while working in the operator's mine, Piper was eligible for temporary reinstatement following KenAmerican's refusal to recall him because he filed that complaint. Therefore, this Court should dismiss KenAmerican's petition for review and affirm the decision of the Commission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Sixth Circuit Rule 32, I hereby certify that this Response Brief for the Secretary of Labor contains 4695 words as determined by the word count of the word processing system used to prepare the brief.

/s/ Anna Laura Bennett
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CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing brief in the Court's record of this action on October 15, 2013, by using the Court's CM/ECF electronic filing system, which will send notice to the following:

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ADDENDUM

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c)

(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 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.