Temporary Reinstatement for Discriminatory Recalls Under the Federal Mine Safety and Health Act of 1977

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Introduction

Secretary of Labor ex rel. *Piper v. KenAmerican Resources, Inc.*[1] represents the mounting difficulty in applying the temporary reinstatement provision[2] of the Federal Mine Safety and Health Act of 1977[3] ("Mine Act" or "Act"), section 105(c)(2), in the context of layoffs and recalls.[4] *Piper* adds a new layer of complexity to an emerging body of case law by laying a foundation for the application of temporary reinstatement in the context of discriminatory recalls.[5] To complicate matters, the recent temporary reinstatement decisions by the Federal Mine Safety and Health Review Commission ("Commission"), regarding layoffs and recalls, coincides with the Department of Labor's unprecedented increase in filing of temporary reinstatement requests and the severe economic downturn in the Appalachian coalfields.[6] Inevitably, this increased caseload and the downturn in the U.S. coal industry will eventually prompt the Commission to articulate a legal standard for the application of temporary reinstatement in discriminatory recall cases.

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1. 35 FMSHRC 1969 (July 2013).

2. 30 U.S.C. § 815(c)(2) (2006) (temporary reinstatement provision).

3. *Id.* §§ 801 *et seq.*

4. *See* Sec'y of Labor *ex rel.* Rodriguez v. C.R. Meyer & Sons Co., 35 FMSHRC 1183 (May 2013); Sec'y of Labor *ex rel.* Ratliff v. Cobra Natural Res., LLC, 35 FMSHRC 394 (Feb. 2013); Sec'y of Labor *ex rel.* Shemwell v. Armstrong Coal Co. (Shemwell II), 34 FMSHRC 1580 (July 2012); Sec'y of Labor *ex rel.* Shemwell v. Armstrong Coal Co. (Shemwell I), 34 FMSHRC 996 (May 2012); Sec'y of Labor *ex rel.* Gatlin v. KenAmerican Res., Inc., 31 FMSHRC 1050, 1053–54 (Oct. 2009); Sec'y of Labor *ex rel.* Ondreako v. Kennecott Utah Copper Corp., 25 FMSHRC 585 (Oct. 2003).

5. *See Piper*, 35 FMSHRC at 1970–71 (dealing with failure to recall the complainant during a recall).

6. *See infra* Part I.A–B.

This Comment argues that the term "miner" in section 3(g) of the Mine Act[7] is ambiguous, and therefore the term must be interpreted in the context of the particular Mine Act section in which it appears—in this case the temporary reinstatement provision. Such an interpretation will include miners who are laid off and then "blackballed" by not being recalled. Moreover, this Comment concludes that a workable standard for the application of the temporary reinstatement provision in the context of discriminatory recalls will use a case-by-case approach, since it provides the malleability needed to respond to changes in the mining industry as they occur. Such an approach will further build upon the majority's reasoning in *Secretary of Labor* ex rel. *Piper v. KenAmerican Resources, Inc.* and incorporate elements from the Commission's previous decisions involving tolling and discriminatory layoff cases. Furthermore, a case-by-case approach will help balance two competing themes in the Mine Act's legislative history and jurisprudence—that section 105(c) of the Mine Act must be construed expansively, to assure that miners will not be inhibited in exercising their rights under the Act, and that miners must have an "active part" in enforcing the Act.

Part I describes the coincidence of relevant trends in the mining industry that serve as the backdrop to the Commission's recent decisions regarding temporary reinstatement in the context of layoffs and recalls. This includes the correlation between the 2010 Upper Big Branch mine disaster and the Department of Labor's recent increase in filing temporary reinstatement cases; the current layoffs in the coal mining industry, focusing on the vulnerability of those working in the Appalachian coalfields; and the socioeconomic impacts of coal mining in the Appalachian region. Part II then provides a brief explanation of the temporary reinstatement provision. Part III summarizes the temporary reinstatement case of *Piper*, which involves an alleged discriminatory recall. Part IV analyzes the recent Commission cases that have dealt with temporary reinstatement in the context of layoffs—tolling and discriminatory layoff cases. Part V discusses the statutory interpretation of the term "miner" in the temporary reinstatement provision. Part VI concludes by suggesting that a workable legal standard for the application of the temporary reinstatement provision in the context of discriminatory recalls will use a case-by-case approach.

7. 30 U.S.C. § 802(g) (2006).

I. Relevant Trends in the Mining Industry

A. *The 2010 Upper Big Branch Mine Disaster and the Department of Labor's Increase in Filing for Temporary Reinstatement*

The 2010 Upper Big Branch ("UBB") mine disaster was the country's worst mine disaster in the last four decades.[8] On April 5, 2010, a massive coal dust explosion occurred at the Upper Big Branch Mine-South just outside of Montcoal, West Virginia, killing twenty-nine miners.[9] Among a slew of Mine Act violations, the investigatory report by the Mine Safety and Health Administration ("MSHA") found that the mine operator "intimidated miners from voicing [their safety] complaints, either internally or to MSHA."[10] More disturbing, MSHA stated that "[d]espite the recognition by many miners of hazards throughout UBB, no one had made a complaint to MSHA since June 8, 2006. MSHA did not receive any complaint related to underground hazards at UBB prior to the accident."[11] Likewise, the witnesses at the hearing before the House Education and Labor Committee testified that the mine operator threatened and retaliated against miners who complained about health and safety conditions.[12]

Following the UBB disaster, the Department of Labor increased its filing of temporary reinstatement cases.[13] In 2012, the Department of Labor filed forty-six temporary reinstatement requests on behalf of miners who submitted complaints of discrimination in the form of a suspension, layoff, discharge, or other adverse action.[14] This amount was more than double any

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8. Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES (Apr. 9, 2010), http://www.nytimes.com/2010/04/10/us/10westvirginia.html.

9. COAL MINE SAFETY AND HEALTH, MSHA, U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION NO. 46-08436, FATAL UNDERGROUND MINE EXPLOSION APRIL 5, 2010, UPPER BIG BRANCH MINE-SOUTH, PERFORMANCE COAL COMPANY MONTCOAL, RALEIGH COUNTY, WEST VIRGINIA, 1, 12 (2010), http://www.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf.

10. *Id.* at 40.

11. *Id.* at 58–59.

12. *Upper Big Branch Mine Tragedy: Field Hearing before the H. Comm. on Educ. & Labor*, 111th Cong. 32–34 (2010) (statement of Stanley "Goose" Stewart, Upper Big Branch Miner), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56355/pdf/CHRG-111hhrg56355.pdf.

13. Press Release, U.S. Dep't of Labor, U.S. Labor Department's MSHA Continues Increased Emphasis on Miner Discrimination Complaints, 46 Requests for Temporary Reinstatement Made in 2012 (Jan. 29, 2013), *available at* http://www.msha.gov/MEDIA/PRESS/2013/NR130129.pdf [hereinafter DOL Jan. 29, 2013 Press Release].

14. *Id.* The Commission has defined an "adverse action" as "an act of

previous year.[15] This increase in filings is likely, if not mainly, due to the UBB disaster and the subsequent federal investigation of the explosion, which revealed serious issues of discrimination and retaliation by the mine operator.

B. Current Layoff Trends in the Coal Mining Industry

Any legal standard used to grant an application of temporary reinstatement in the context of discriminatory recalls will more likely affect those working in the Appalachian coalfields due to the current economic downturn in the coal mining industry. Production in the Appalachian coalfields "is being squeezed by economics, government regulations and even its own geology."[16] Much of Appalachia's easy-to-reach coal seams are gone,[17] and now it takes more workers to maintain production levels, resulting in higher labor costs.[18] Additionally, there is increased economic pressure due to competition with high-producing western mines that can mine coal at a cheaper price,[19] as well as, the boom in oil and gas production that has led to an overall decline in the U.S. coal industry.[20] Likewise, coal companies in the Appalachian

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commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." Sec'y of Labor *ex rel.* Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012) (citing Pendley v. FMSHRC, 601 F.3d 417, 428 (6th Cir. 2010)); *but see* Sec'y of Labor *ex rel.* Price v. Jim Walter Res., Inc., 12 FMSHRC 1521, 1533 (Aug. 1990) (citing Sec'y of Labor *ex rel.* Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1848 n.2 (Aug. 1984) ("An adverse action under section 105(c) of the Mine Act is not simply any operator action that a miner does not like.")).

15. DOL Jan. 29, 2013 Press Release, *supra* note 13. Comparatively, the Agency filed an average of twenty-five temporary reinstatement requests per year between 2009 and 2012, and an average of six temporary reinstatement requests per year between 1993 and 2008. *Id.* The Department also filed thirty-four discrimination complaints in 2012, which was also more than in any previous year. *Id.*

16. *Appalachian Coal Mining Faces Grim Future*, USA TODAY (May 19, 2013), http://www.usatoday.com/story/money/business/2013/05/19/woes-for-appalachian-coal-mining/2159139/ (stating coal operations in eastern Kentucky and southern West Virginia are facing declining reserves, higher production costs, and competition from other coal basins and natural gas).

17. *Id.*

18. *Id.*

19. *Id.*; *see also* Patrick Charles McGinley, *Climate Change and the War on Coal: Exploring the Dark Side*, 13 VT. J. ENVTL. L. 255, 275 (2011) ("Midwestern utility companies eschewed Appalachian coal for cheaper western coal."). In 2010, according to the U.S. Energy Information Administration, two massive surface mines in Wyoming accounted for 20% of the nation's coal output. *Id.* By comparison, all the mines in Central Appalachia produced just 17% of U.S. coal in 2011. *Id.*

20. Marie Cusick, *U.S. Demand for Coal Hits 63-Year Low*, STATEIMPACT. NPR.ORG (May 7, 2013, 10:01 AM), http://stateimpact.npr.org/pennsylvania/2013/

region have begun expressing their concerns to their investors.[21] For example, Alpha Natural Resources, which operates eighty-nine mines in Central Appalachia, said in its 2012 annual report that it expects production in those mines to decline by 10% by 2017.[22] Another report projected a 31% drop in Central Appalachia coal production between 2011 and 2020.[23]

Coal mining jobs are also part of a market that depends upon political and other business factors.[24] President Barack Obama has made fighting climate change a second-term priority,[25] and is directing the Environmental Protection Agency ("EPA") to complete carbon emissions standards for new and existing power plants,[26] thereby pushing for cleaner-burning plants.[27] Consequently, electric utilities, which have traditionally been Appalachia's best coal customers, are retiring coal-fired plants or upgrading plants to burn cheaper natural gas, and this trend is likely to continue.[28] Moreover, tougher federal regulations enforced by the Obama administration have been cited as a reason for slowed coal production in the region.[29] For example, the federal government halted about forty mining permits in eastern Kentucky causing the loss of about 3600 mining jobs.[30]

While the coal mining industry has historically been characterized by boom and bust cycles, thereby causing layoffs and job creation,[31] this might not be a typical bust cycle.[32] The looming

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05/07/u-s-demand-for-coal-hits-63-year-low/; *see also Appalachian Coal Mining Faces Grim Future*, *supra* note 16.

21. *Appalachian Coal Mining Faces Grim Future*, *supra* note 16.

22. *Id.*

23. *Id.* (concluding from government data that production will fall from 185 million tons in 2011 to 128 million tons by 2020).

24. Taylor Kuykendall, *Retraining for 'Life After Coal Mining'*, GROUNDED: A STATE J. ENERGY BLOG (Nov. 15, 2012, 5:59 PM), http://www.statejournal.com/story/19837430/retraining-for-life-after-coal-mining.

25. Cusick, *supra* note 20 (referencing President Obama's State of the Union address).

26. Marie Cusick, *Corbett Calls Obama's Climate Change Proposal a War on Coal and Jobs*, STATEIMPACT.NPR.ORG (June 25, 2013, 10:01 PM), http://stateimpact.npr.org/pennsylvania/2013/06/25/corbett-calls-obamas-climate-change-proposal-a-war-on-coal-and-jobs/.

27. Noah Adams, *In Kentucky's Coal Country, A Resentment for Obama*, NPR (Jan. 21, 2013, 5:05 PM), http://m.npr.org/story/169913701.

28. *Appalachian Coal Mining Faces Grim Future*, *supra* note 16.

29. *Id.*

30. *Id.*

31. *See* McGinley, *supra* note 19, at 271–77 (describing volatility of the U.S. coal industry from 1940 to 2009); Jessica Lilly, *Can West Virginia's Laid Off Coal Miners Find New Careers?*, W.VA. PUB. BROAD. (Nov. 12, 2013), http://wvpublic.org/post/can-west-virginias-laid-coal-miners-find-new-careers.

potential for more layoffs in the coal mining industry is evidenced by the federal government pouring grant money into the Appalachian region.[33] In 2013, the Department of Labor awarded a $1,800,000 National Emergency Grant ("NEG") to WorkForce West Virginia (which is in partnership with the United Mine Workers of America ("UMWA") Career Centers, Inc.)[34] to provide retraining and reemployment services to dislocated coal miners and displaced homemakers impacted by mass layoffs and coal mine closures.[35] According to WorkForce West Virginia, more than 4200 West Virginia coal miners have lost their jobs since March 2012.[36] This grant will help participants find new career paths outside the coal mining industry and long-term reemployment opportunities.[37]

Similarly, in 2013, the Department of Labor awarded a $5,192,500 NEG to Eastern Kentucky Concentrated Employment Program, Inc. to assist coal miners and their families affected by layoffs in eastern Kentucky.[38] Coal mining has been a bedrock industry in the rural Appalachian regions of Kentucky since the early 1900s and has furnished well-paying jobs to this historically poor area.[39] This grant mirrors the one in West Virginia.[40]

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32. Lilly, *supra* note 31 (quoting Mr. Brett Dillon).

33. *Id.*

34. *Id. See also WV Dislocated Coal Industry Workers,* UMWA CAREER CENTERS, INC, http://umwacc.com/news/ (last visited Aug. 2, 2013).

35. *Training Grant for Dislocated Coal Miners and Displaced Homemakers*, WORKFORCE W. VA., http://www.wvcommerce.org/App_Media/assets/doc/businessandworkforce/workforcewv/Miner_Training_Grant_QA_Final_9_24_12.pdf (last visited Dec. 1, 2013). The inclusion of displaced homemakers is due to the fact that single-income households are common in the coalfields because miners' wages have allowed many families to live comfortably with just one source of income. Kuykendall, *supra* note 24.

36. Lilly, *supra* note 31.

37. *Training Grant for Dislocated Coal Miners and Displaced Homemakers*, *supra* note 35; *see also* Jessica Lilly, *Retraining Available for Jobless Miners*, W.VA. PUB. BROAD. (Nov. 1, 2013, 12:47 PM), http://wvpublic.org/post/retraining-available-jobless-miners (stating to date, more than 140 miners have completed retraining through this grant).

38. Press Release, U.S. Dep't of Labor, US Department of Labor Announces $5.2 Million Grant to Assist Eastern Kentucky Coal Miners, Spouses Affected by Layoffs (Mar. 4, 2013), *available at* http://www.doleta.gov/ETA_News_Releases/20130361.cfm [hereinafter DOL Mar. 4, 2013 Press Release].

39. Joshua Wright, *After 3,000 Coal Mining Layoffs, Eastern Kentucky Regroups with Help from $5.2M Training Grant*, EMSI (May 8, 2013), http://www.economicmodeling.com/2013/05/08/after-3000-coal-mining-layoffs-eastern-kentucky-regroups-with-help-from-5-2m-training-grant/.

40. *See* DOL Mar. 4, 2013 Press Release, *supra* note 38 (describing the grant).

C. *The Economics and Social Inequalities of Coal Mining*

The softening of the coal mining industry only exacerbates the socioeconomic impacts that coal mining has had on Appalachia, thereby potentially increasing the vulnerability of coal miners in the region to discriminatory layoffs and recalls. "Coal has made, and kept, the people of Appalachia poor . . . The percentage of persons below the poverty level in the coal counties is nearly twice the national average, with a median household income of between one half and two-thirds of the national average."[41] Coal counties also have poverty rates substantially above the national median (particularly for White families, children, and dependent populations),[42] low median levels of education and high levels of unemployment, and high levels of per-capita disability and supplemental Social Security income.[43]

Moreover, "[t]he economic dependence on the coal mining industry combined with the devastating environmental and health effects associated with coal mining, have resulted in unusable real estate, lower education levels, and a generally lower standard of living than anywhere else in this country."[44] Professor Patrick Charles McGinley explains that these socioeconomic impacts are negative externalities of the coal and energy industries.[45] Hence, poverty in the Appalachian region is characterized by a lack of

41. Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905, 906 (2002) (stating that for decades the four-state Appalachian coalfields region has been the poorest in the nation). A "coal county" is a county in which mining provides more than 3% of total income. *See* Amy Glasmeier, *Living in Coal Country: What Kind of a Life is That?*, NPR, http://www.npr.org/documents/2006/jan/sagoeconomicprofile.pdf (last visited Oct. 30, 2013).

42. Glasmeier, *supra* note 41. For example, in 2003, median household income was substantially below the national median. *Id.*

43. *Id.*; *see also 60 Minutes: Disability, USA* (CBS television broadcast Oct. 6, 2013), *available at* http://www.cbsnews.com/videos/disability-usa/ (discussing upcoming Senate Homeland Security and Governmental Affairs hearing on Social Security Disability fraud, and looking at the local Social Security Office in Huntington, West Virginia where workers describe Social Security Disability as a "vital" part of the local economy).

44. Davis, *supra* note 41, at 907; *see also* Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 93–94 (2011) (arguing social inequalities and health disparities have long characterized the region, which is plagued with characteristics of poverty such as drug abuse, subpar living conditions, and poor education); McGinley, *supra* note 19, at 280 & n.114 (describing social and environmental impacts of surface and underground mining in the Appalachian region).

45. McGinley, *supra* note 19, at 265 (listing such negative externalities as family and community disruption; economic stagnation; and accompanying lack of educational, employment, and economic development opportunities—many or all of which are borne by coalfield communities).

economic diversification, which results in few meaningful job opportunities.[46] Employee bargaining power is diminished in isolated Appalachian coal mining communities because they are built around monopsonistic coal mine operators, and there is an absence of meaningful alternative employment.[47] The result is a situation where there is a single employer.[48]

In these economically impoverished areas, coal mining might be the only industry for hundreds of miles.[49] "For those living in [these] mining communities, low levels of education, poor health conditions, unstable work histories, and limited access to jobs paying a living wage explain why people work in the mines."[50] The problems associated with the depressed regional economy are compounded by the fact that Appalachian miners are well compensated for their locality.[51] For example, starting salaries in the mines are just under $100,000 per year for those right out of high school.[52] As Mr. Brett Dillon, director of the UMWA Career Center office in Beckley, West Virginia and former coal miner explains: "There's very few jobs in West Virginia that pays what a coal miner makes or better."[53]

These negative externalities, when taken in conjunction with the region's history of worker oppression,[54] "make Appalachian workers less mobile, first by funneling them into the relatively well-paying mining jobs and then by making it more costly for them to quit those jobs, even when faced with dangerous safety conditions. These restraints on the free movement of labor results in [a] labor market failure."[55]

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46. Lofaso, *supra* note 44, at 93.

47. *Id.* at 92, 95 (stating underground coal miners who work in West Virginia, Kentucky, and Pennsylvania typically live in the surrounding Appalachian countryside, and such isolated mining towns constitute textbook examples of labor market monopsony); *but see* William M. Boal, *Testing for Employer Monopsony in Turn-of-the-Century Coal Mining*, 26 RAND J. ECON. 519, 534 (1995) (concluding employer monopsony played a small part in setting wages in turn-of-the-century coal mining).

48. *See* Lofaso, *supra* note 44, at 92 (defining monopsony).

49. *Id.* at 93–94.

50. Glasmeier, *supra* note 41.

51. Lofaso, *supra* note 44, at 92.

52. Kuykendall, *supra* note 24; *but see* Lofaso, *supra* note 44, at 92 (stating in 2009, the mean annual wage of U.S. coal miners ranged from $45,690 to $47,650).

53. Kuykendall, *supra* note 24 (quoting Mr. Brett Dillon).

54. *See, e.g.*, Lofaso, *supra* note 44, at 91–96 (describing the power disparity between Appalachian coal miners and operators); McGinley, *supra* note 19, at 269–72 (summarizing labor-management conflicts between the 1900s and 1940s in the Appalachian coalfields).

55. Lofaso, *supra* note 44, at 95; *see also* William M. Boal & Michael R.

II. Temporary Reinstatement Under the Mine Act

Section 105(c) of the Mine Act, the anti-discrimination provision, prohibits operators from discriminating against "any miner, representative of miners or applicant for employment in any coal or other mine" for exercising their rights under the Mine Act.[56] Any miner, miner representative, or applicant for employment who believes that he or she has been discriminated against may file a discrimination complaint with the Secretary of Labor ("Secretary").[57]

Specifically, section 105(c)(2) of the Mine Act, the temporary reinstatement provision, provides that "if the Secretary finds that such [a discrimination] 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 [discrimination] complaint."[58] In other words, the temporary reinstatement provision permits a preliminary proceeding prior to the adjudication of a discrimination complaint[59] that is only available to miners, and not miner representatives or applicants for employment.[60] In essence, an order granting temporary reinstatement permits a miner to remain on the job while his or her discrimination case is pending before the Commission.[61]

The scope of the temporary reinstatement proceeding is narrow[62] and is held for the purpose of determining whether the miner's complaint is not frivolously brought.[63] The "not frivolously brought" standard is not defined in the Mine Act;[64] however, it is

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Ransom, *Monopsony in the Labor Market*, 35 J. ECON. LITERATURE 86, 92–93 (1997) (explaining in terms of labor market monopsony that post-hire exploitation of workers is only possible if moving costs are important to the worker, turnover costs are unimportant to the employer, and the employer does not commit to future wages).

56. 30 U.S.C. § 815(c)(1) (2006).

57. *Id.* § 815(c)(2).

58. *Id.* (emphasis added); *see also* 29 C.F.R. § 2700.45 (2012) (temporary reinstatement procedure).

59. Sec'y of Labor *ex rel.* Price v. Jim Walter Res., Inc., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom.* Jim Walter Res., Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

60. Sec'y of Labor *ex rel.* Young v. Lone Mountain Processing, Inc., 20 FMSHRC 927, 931 (Sept. 1998).

61. ABA SECTION OF LABOR & EMP'T LAW, OCCUPATIONAL SAFETY AND HEALTH LAW 648–55 (Randy S. Rabinowitz et al. eds., 2d ed. 2008).

62. *Id.*

63. *Id.* The Secretary has the burden of proof to establish that the complaint was not frivolously brought. 29 C.F.R. § 2700.45(d) (2012).

64. Sec'y of Labor *ex rel.* Bussanich v. Centralia Mining Co., 22 FMSHRC 153,

indistinguishable from the "reasonable cause to believe" standard applied in other statutes.[65] Furthermore, the Commission has specified that the scope of a temporary reinstatement proceeding does not include an adjudication of the merits of the underlying discrimination complaint.[66] Hence, the proceeding will not consider whether there is sufficient evidence of discrimination to justify *permanent* reinstatement.[67] In addition, it is well-established that the Administrative Law Judge ("ALJ" or "judge") should not resolve disputes of fact or credibility during the temporary reinstatement proceeding.[68] Thus, a temporary reinstatement proceeding is "truncated" in nature, and the parties cannot be expected to conduct a preliminary adjudication of the merits of the discrimination claim.[69]

The Commission reviews the judge's temporary reinstatement order under the substantial evidence test for an abuse of discretion.[70] "'Substantial evidence' means 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'"[71]

III. *Secretary of Labor* ex rel. *Piper v. KenAmerican Resources, Inc.*

Piper represents how coal miners will be more susceptible to discriminatory layoffs and recalls due to the boom and bust cycles of the U.S. coal mining industry.[72] *Piper* concerns an alleged discriminatory recall in the temporary reinstatement context and factually represents how layoffs and recalls affect coal miners.[73]

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157 (Feb. 2000).

65. *Id.* (citation omitted); *see also* Jim Walter Res., Inc. v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990) (discussing the "not frivolously brought" standard).

66. Disciplinary Proceeding, 24 FMSHRC 465, 467 n.2 (May 2002).

67. *Jim Walter Res., Inc.*, 920 F.2d at 744 (citing 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44(c) (1989)) (emphasis added); *see also* Sec'y of Labor *ex rel.* Price v. Jim Walter Res., Inc., 9 FMSHRC 1305, 1306 (Aug. 1987).

68. Sec'y of Labor *ex rel.* Albu v. Chicopee Coal Co., 21 FMSHRC 717, 719 (July 1999).

69. *Disciplinary Proceeding*, 24 FMSHRC at 467 n.2.

70. Sec'y of Labor *ex rel.* Ratliff v. Cobra Natural Res., LLC, 35 FMSHRC 394, 396 (Feb. 2013) (citing *Albu*, 21 FMSHRC at 719); Sec'y of Labor *ex rel.* Peters v. Thunder Basin Coal Co., 15 FMSHRC 2425, 2426 (Dec. 1993). The terms of the Mine Act require the Commission to apply the substantial evidence test when reviewing the judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I) (2006).

71. Sec'y of Labor *ex rel.* Bussanich v. Centralia Mining Co., 22 FMSHRC 153, 157 n.5 (Feb. 2000) (quoting Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989)).

72. *See supra* Part I.B.

73. Sec'y of Labor *ex rel.* Piper v. KenAmerican Resources, Inc., 35 FMSHRC

On December 31, 2012, Mr. Darrick Piper was one of ten miners who were laid off due to deteriorating economic conditions at KenAmerican's Paradise Number 9 Mine,[74] a large underground coal mine in Muhlenberg County located in western Kentucky.[75]

On February 1, 2013, Mr. Piper filed a discrimination complaint with MSHA alleging, in part, that he was discharged in retaliation for engaging in protected activity in violation of section 105(c)(2) of the Mine Act, due to a report that he had made in October 2012 that he believed that his face boss was using drugs.[76] The Secretary then filed an application for temporary reinstatement on March 19, 2013, requesting an order requiring KenAmerican to reinstate Mr. Piper.[77] However, the Secretary later submitted an unopposed motion to dismiss the application after determining that its investigation had not yielded enough facts on the merits to support a violation of section 105(c) of the Mine Act.[78] Accordingly, the ALJ dismissed the proceeding.[79]

At the end of February 2013, KenAmerican lifted its hiring freeze and the mine operator considered recalling the ten miners who had been laid off on December 31st.[80] The mine operator invited six of the laid-off miners to speak with it, and of those six, four of the laid-off miners were offered the chance to return to work, which three accepted.[81] During this time, Mr. Piper was not contacted by KenAmerican and thus was not recalled.[82]

On March 27, 2013, after Mr. Piper had learned about KenAmerican recalling the other employees, he contacted the mine operator to ask about returning to work.[83] The mine's manager of human resources refused to speak with Mr. Piper due

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1969, 1970 (July 2013).

74. *Id.* at 1969.

75. Sec'y of Labor *ex rel.* Lear v. KenAmerican Res., Inc., Docket No. 2014-708-D, slip op. at 2 (F.M.S.H.R.C. Sept. 8, 2014) (ALJ), http://www.fmshrc.gov/decisions/alj/ALJd_09082014-KENT%202014-708-D%20Decision%20and%20Order%20of%20Temporary%20Reinstatement.pdf; Muhlenberg County, Kentucky, http://www.muhlenbergcounty.ky.gov/ (last updated Aug. 22, 2007). Even though Muhlenberg County is in western Kentucky's coalfield region, as opposed to the eastern Appalachian region, *Piper* still typifies the impacts that layoffs and recalls have on coal miners in Appalachia.

76. *Piper*, 35 FMSHRC at 1970.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1970–71.

81. *Id.*

82. *Id.* at 1971.

83. *Id.*

to his pending February 1st discrimination complaint.[84] Consequently, Mr. Piper believed that the mine operator had "blackballed" him.[85] As a result, he filed a second discrimination complaint with MSHA on March 27, 2013, while his March 19th application for temporary reinstatement was still pending for his February 1st discrimination complaint.[86]

In his second complaint, Mr. Piper alleged that he had not been included in KenAmerican's recall of laid-off employees because of his February 1st discrimination complaint.[87] Subsequently, on May 14, 2013, the Secretary filed a second application for temporary reinstatement for Mr. Piper's second discrimination complaint.[88] In this application, the Secretary alleged that the mine's human resources manager refused to speak with Mr. Piper about the recall, and contacted and recalled other employees from the December 31st layoff.[89]

On June 6, 2013, the ALJ issued a decision in which he concluded that the March 27th discrimination complaint was not frivolously brought, and Mr. Piper was a "miner" for purposes of section 105(c)(2) of the Mine Act and thus was eligible for temporary reinstatement.[90] Accordingly, KenAmerican was ordered to provide temporary reinstatement to Mr. Piper.[91]

On review, the issue before the Commission was whether Mr. Piper was a "miner," and therefore afforded coverage under the Mine Act's temporary reinstatement provision.[92] The Commission majority resolved this issue based on the facts of the case, since Mr. Piper engaged in protected activity by filing a discrimination complaint when he was employed as a "miner"—the February 1st discrimination complaint.[93] This protected activity carried over to Mr. Piper's second discrimination complaint—not being recalled from the layoff.[94] Therefore, since Mr. Piper was engaged in protected activity—filing the February 1st discrimination complaint—while employed by KenAmerican, he was found to be a

84. *Id.*
85. *Id.* (Mr. Darrick Piper's testimony before the ALJ).
86. *Id.* at 1970–71.
87. *Id.* at 1970.
88. *Id.*
89. *Id.*
90. *Id.* at 1971.
91. *Id.*
92. *Id.*
93. *Id.* at 1971–74.
94. *Id.* at 1972–73.

miner for purposes of the Act.[95] Consequently, the majority left unresolved whether or at what point coverage ends under the temporary reinstatement provision for a laid-off miner who is not recalled, or whether an individual must be employed when he or she engages in protected activity to be covered by the temporary reinstatement provision.[96]

Chairman Jordan, concurring in result, illustrated another way to reach the conclusion that Mr. Piper was a "miner" for purposes of temporary reinstatement.[97] Chairman Jordan would have granted *Chevron* deference[98] to the Secretary's interpretation of the term "miner" in section 105(c)(2) of the Act.[99] She agreed with the Secretary that the term "miner" in this section was ambiguous.[100] Chairman Jordan found that the Secretary's interpretation of the term "miner," which included laid-off employees who make a non-frivolous discrimination complaint, was reasonable because it furthered the purpose of the Mine Act, and was consistent with the Supreme Court's interpretation of the term "employee," under Title VII of the Civil Rights Act of 1964[101] ("Title VII"), in the context of general employment discrimination.[102]

Subsequently, *Piper* was appealed to the Sixth Circuit and then voluntarily dismissed in an unpublished opinion.[103]

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95. *Id.* at 1974.

96. *See id.* at 1972 ("We need not explore in this case the full contours of the distinction between a 'miner' and an 'applicant for employment' under section 105(c)(2); rather, we conclude that under the facts of this case Piper must be regarded as a 'miner' for temporary reinstatement purposes.").

97. *Id.* at 1975–77.

98. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); Performance Coal Co. v. FMSHRC, 642 F.3d 234 (D.C. Cir. 2011) (explaining application of *Chevron* deference under the Mine Act); *see also* Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (citing *Chevron*, 467 U.S. 837) (stating that under the Mine Act, when the Secretary and the Commission are divided on the interpretation of the Act, it is the Secretary (rather than the Commission) who is entitled to the deference described in *Chevron*).

99. *Piper*, 35 FMSHRC at 1975.

100. *Id.*

101. 42 U.S.C. § 2000e *et seq.*

102. *Piper*, 35 FMSHRC at 1976 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997) (citing 42 U.S.C. § 2000e-2(a))).

103. FMSHRC, *Commission Decisions on Appeal*, http://www.fmshrc.gov/content/commission-decisions-appeal-0 (last updated Sept. 17, 2014).

IV. Recent Commission Temporary Reinstatement Layoff Cases

The Commission majority in *Piper* seems to use the substantial evidence test to evaluate the judge's decision by utilizing a factual inquiry to determine whether there was an employment relationship at the time when the protected activity occurred, rather than focusing on when the adverse action occurred.[104] Focusing on when the protected activity occurs represents a different approach compared to the recent Commission temporary reinstatement decisions dealing solely with layoffs, which consists of two categories—tolling cases and discriminatory layoff cases.[105] These cases focus on facts surrounding the layoff, rather than the protected activity. Tolling cases allow a limited inquiry during the temporary reinstatement proceeding to determine if the layoff properly included the complainant,[106] while discriminatory layoff cases treat the layoff as an adverse action and thus apply the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act.[107]

A. Tolling Cases

The Commission's tolling cases cumulated in *Secretary of Labor* ex rel. *Ratliff v. Cobra Natural Resources, LLC*, which brought together three previous Commission decisions.[108] For the first time the Commission stated that a limited inquiry is permitted during the temporary reinstatement proceeding to determine whether the mine operator's obligation to reinstate a miner can be tolled due to a layoff that occurs after the adverse action against the complainant.[109] To toll temporary reinstatement, a mine operator must affirmatively prove, by a

104. *See* Sec'y of Labor *ex rel.* Ratliff v. Cobra Natural Res., LLC, 35 FMSHRC 394, 396 (Feb. 2013) (citing Sec'y of Labor *ex rel.* Albu v. Chicopee Coal Co., 21 FMSHRC 717, 719 (July 1999)) (stating that the Commission reviews a judge's temporary reinstatement order under the substantial evidence test for an abuse of discretion); Sec'y of Labor *ex rel.* Peters v. Thunder Basin Coal Co., 15 FMSHRC 2425, 2426 (Dec. 1993) (same).

105. *See* cases cited *supra* note 4.

106. *See* Sec'y of Labor *ex rel.* Gatlin v. KenAmerican Res., Inc., 31 FMSHRC 1050, 1055 n.5 (Oct. 2009) (instructions on remand).

107. *See Ratliff*, 35 FMSHRC at 397.

108. *Id.* (citing Shemwell I, 34 FMSHRC 996 (May 2012); *Gatlin*, 31 FMSHRC 1050; Sec'y of Labor *ex rel.* Ondreako v. Kennecott Utah Copper Corp., 25 FMSHRC 585 (Oct. 2003)).

109. *Id.* at 396–97 (quoting *Shemwell I*, 34 FMSHRC at 1000).

preponderance of the evidence, that the "layoff properly included" the complainant.[110]

Hence, during the temporary reinstatement proceeding and after the initial showing that the complaint was not frivolously brought, the judge may consider evidence offered by the mine operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to a business reduction or similar conditions.[111] In determining whether the layoff properly included the complainant, the judge should look at the mine operator's layoff procedures and determine how the mine operator actually made layoff decisions—i.e., whether the mine operator actually followed its layoff procedures.[112] The judge may also consider any challenges by the Secretary that the complainant's inclusion in such a layoff was, or might have been, related to the complainant's protected activity.[113] Thus, Commission precedent recognizes that a change in the mine operator's circumstances may be relevant to tolling temporary reinstatement when the adverse action precedes a layoff, and therefore permits a limited inquiry during the temporary reinstatement proceeding for the mine operator to raise an economic defense.[114]

B. Discriminatory Layoff Cases

Ratliff also distinguished discriminatory layoff cases from tolling cases.[115] Discriminatory layoff cases fall under the "not frivolously brought" standard because a layoff is a termination of employment.[116] A discriminatory layoff must be evaluated as a potentially wrongful adverse action, and if the objectivity of the layoff is challenged during the temporary reinstatement proceeding, the judge must apply the "not frivolously brought"

110. *Id.* at 397 (citing *Gatlin*, 31 FMSHRC at 1055).

111. *Id.* (citing *Gatlin*, 31 FMSHRC at 1054).

112. *See Gatlin*, 31 FMSHRC at 1055 n.5 (explaining that, on remand, KenAmerican should explain how all of the factors it considered (mining experience, skill level, performance, and years of service) "were applied to Mr. Gatlin or why any factor not applied was deemed irrelevant" since it only asserted that three of these factors were relevant in laying off Mr. Gatlin).

113. Sec'y of Labor *ex rel.* Ratliff v. Cobra Natural Res., LLC, 35 FMSHRC 394, 397 (Feb. 2013).

114. *Id.* (citing *Shemwell I*, 34 FMSHRC at 1000); *see also Gatlin*, 31 FMSHRC at 1054 (citing Sec'y of Labor *ex rel.* Shepherd v. Sovereign Mining Co., 15 FMSHRC 2450 (Dec. 1993)).

115. *Ratliff*, 35 FMSHRC at 397 (citing Sec'y of Labor *ex rel.* Ondreako v. Kennecott Utah Copper Corp., 25 FMSHRC 585, 586–87 (Oct. 2003)).

116. *Id.*

standard contained in section 105(c)(2) of the Mine Act.[117] Therefore, no limited inquiry is permitted during a temporary reinstatement proceeding for discriminatory layoff cases, as it is in tolling cases.

Moreover, the ultimate determination concerning the appropriate remedy for any alleged discrimination, including the duration of the mine operator's reinstatement obligation, if any, is made during the discrimination proceeding on the merits.[118] This approach corresponds with the general employment discrimination jurisprudence that treats a discriminatory layoff as a discrete adverse action.[119]

V. Statutory Interpretation of the Term "Miner" in the Temporary Reinstatement Provision

The temporary reinstatement provision of the Mine Act provides that "if the Secretary finds that such [a discrimination] 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 [discrimination] complaint."[120] The plain language of the temporary reinstatement provision explicitly limits temporary reinstatement only to miners, and not miner representatives or applicants for employment.[121] Likewise, the Commission has held that temporary reinstatement is only available to miners, and not to miner representatives and applicants for employment.[122]

In the context of discriminatory recalls, *Piper* left unresolved whether or at what point coverage under the temporary reinstatement provision ends for a laid-off miner.[123] Similarly, it is unclear whether an individual must be employed when he or she engages in protected activity to be covered by the temporary

117. *Id.*

118. *Id.* at 398.

119. *See* 2 EMP'T DISCRIMINATION COORDINATOR ANALYSIS OF FEDERAL LAW § 73:26 (last updated Nov. 2013) ("The typical discriminatory layoff is a completed act and therefore would not be considered a continuing violation, but rather a discrete discriminatory or retaliatory act.").

120. 30 U.S.C. § 815(c)(2) (2006) (temporary restatement provision) (emphasis added).

121. *Compare id.* § 815(c)(1) (anti-discrimination provision), *with id.* § 815(c)(2) (temporary restatement provision).

122. Sec'y of Labor *ex rel.* Young v. Lone Mountain Processing, Inc., 20 FMSHRC 927, 930 (Sept. 1998).

123. *See* Sec'y of Labor *ex rel.* Piper v. KenAmerican Resources, Inc., 35 FMSHRC 1969, 1971–73 (July 2013).

reinstatement provision.[124] The answers to these questions inevitably turn on the meaning of the term "miner" in section 3(g) of the Mine Act.[125]

The term "miner" in section 3(g) of the Mine Act[126] is ambiguous. Consequently, its meaning must be interpreted within the specific context of the temporary reinstatement provision to effectuate the purpose of the Mine Act.

A. The Term "Miner" in Section 3(g) of the Mine Act Is Ambiguous

The term "miner" in section 3(g) of the Mine Act is defined as "any individual working in a coal or other mine."[127] Within the specific context of the temporary reinstatement provision, the term "miner" is ambiguous for two reasons. First, the verb "working" has no temporal qualifier that is consistent with either current or past employment.[128] Thus, "working" could be either present or past tense.[129] Second, Congress chose the verb "working," rather than "employed." The word "working" is broader than the word "employed."[130] The verb "work" means "[t]o exert

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124. *See id.* at 1972. *See also* Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463 (Dec. 1980) (stating the Commission does not need to reach the issue of the necessity of an employment relationship to trigger the protection against retaliation under section 110(b) of the Coal Act).

125. *See* 30 U.S.C. § 802(g) (2006) (defining "miner"); *Piper*, 35 FMSHRC at 1972 ("We need not explore in this case the full contours of the distinction between a 'miner' and an 'applicant for employment' under section 105(c)(2); rather, we conclude under the facts of this case Piper must be regarded as a 'miner' for temporary reinstatement purposes.").

126. 30 U.S.C. § 802(g) (2006). The two-step *Chevron* analysis is used to review the Secretary's interpretation of the Mine Act. *See, e.g.*, N. Fork Coal Corp. v. FMSHRC, 691 F.3d 735, 739 (6th Cir. 2012).

127. 30 U.S.C. § 802(g) (2006); *see also* 29 C.F.R. § 2700.2 (2012) ("For purposes of this part, the definitions contained in section 3 of the [Mine] Act . . . apply.").

128. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (reasoning the term "employee" under 42 U.S.C. § 2000e(b) could have expressly included a qualifier); *but see* McKnight v. Gen. Motors Corp., 550 F.3d 519, 522, 526 (6th Cir. 2008) (citing 42 U.S.C. § 12111(8)) (finding former employees are not covered by the Americans with Disabilities Act's definition of qualified individual because the statute uses present tense verbs).

129. *See Robinson*, 519 U.S. at 341 (utilizing same reasoning under Title VII).

130. *See, e.g.*, Big Ridge, Inc., 34 FMSHRC 1003, 1044 (May 2012) (Comm'r Duffy, dissenting) (reasoning that a request for medical records refers to "'all individuals working at your mine,' rather than to 'all individuals employed by you,'" thereby such verb usage "would seem to hold the operator accountable for the medical records of employees of independent contractors who have no employment relationship with the operator"). *Big Ridge* illustrates that the word "working" is broader than the word "employed." This case was a consolidated case dealing with citations issued by the Secretary for violations of 30 C.F.R. § 50.41 when several mine operators "failed to cooperate with a 30 C.F.R. Part 50 audit by refusing to

effort; to perform, either physically or mentally,"[131] while "employ" means "1. [t]o make use of. 2. [t]o hire."[132] Thus, the verbs "working" and "employed" are not synonymous.[133]

Moreover, the legislative history of the definition of the term "miner" in the predecessor acts[134] does not provide much guidance. The Coal Act defined the term "miner" as "any individual working in a coal mine,"[135] while the Metal and Nonmetal Act did not define the term "miner" at all.[136]

Furthermore, within the context of the Mine Act as a whole, the term "miner" remains ambiguous for three more reasons. First, the Mine Act does not define the other classes protected under section 105(c)—the terms "representatives of miners" and "applicants for employment."[137] Hence, the meaning of the term "miner" cannot be deduced by looking to these other terms.

Second, the term "miner," based on the language of section 3(g), has to be read in conjunction with the Mine Act's definition of "mine."[138] A "mine" is defined as:

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provide the requested information" regarding medical and payroll information. *Id.* at 1005–06. "The Secretary considered the records necessary to determine compliance with [the] regulatory [Part 50] reporting requirements." *Id.* at 1005. MSHA inspectors appeared at the mines in question on more than one occasion, requesting that the operators furnish this documentation, as well as issuing request letters for this documentation. *Id.* at 1008. Commissioner Duffy, in his dissent, considered the language of the request letters. *Id.* at 1044.

131. BLACK'S LAW DICTIONARY 1599 (7th ed. 1999).

132. *Id.* at 543.

133. This view is also shared by the Commission. *See* Cyprus Empire Corp., 15 FMSHRC 10, 13 (Jan. 1993) (stating an individual's status as a miner is determined by whether he or she works in a mine, not by whether he or she is employed by a mine operator).

134. *See* Federal Metal and Nonmetallic Mine Safety Act of 1966 (Metal and Nonmetal Act), Pub. L. No. 89-577, 80 Stat. 772 (1966) (formerly codified at 30 U.S.C. §§ 721–740), *repealed by* Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 306(a), 91 Stat. 1290, 1322 (1977) (codified at 30 U.S.C. §§ 801 *et seq.*) *and* Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. No. 91-173, 83 Stat. 742 (1969), *amended by* Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.*

135. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 3(g), 83 Stat. 742, 744 (1969) (general definition section).

136. Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, § 2, 80 Stat. 772–73 (1966) (general definition section).

137. *Compare* 30 U.S.C. § 802 (2006) (general definition section), *with id.* § 815(c) (anti-discrimination provision); *but see* 30 C.F.R. § 40.1(b) (2012) (defining miner representative).

138. *Compare* 30 U.S.C. § 802(g) (2006) (defining "miner"), *with id.* § 802(h)(1) (defining "mine"); *see also* Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 704 (3d Cir. 1979) ("As its standard, the statute looks to whether one *works* in a mine, not . . . whether one is involved in extraction or nonextraction operations.") (emphasis in original); 53A AM. JUR. 2D *Mines and Minerals* § 17 (2006) (indicating

> (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.[139]

This definition offers little guidance regarding the necessity of an employment relationship or any temporal qualification of the term "miner;" rather it focuses on the location of the work. Moreover, when faced with uncertainty concerning coverage of an individual under the anti-discrimination provision, the Commission has historically treated the term "miner" as a functional definition by focusing on the individual's duties in relation to the mine operator.[140]

Third, the definition of the term "miner" is not consistently used throughout the Mine Act as a whole.[141] The term "miner" has different meanings in Title IV, the section dealing with black lung benefits,[142] and the mandatory health and safety training provision in section 115(a).[143] Additionally, the Commission has found that miners on strike are not miners under section 3(g).[144]

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a related issue of whether a person is a "miner" under Title IV of the Mine Act is whether the operation is a mine); 3-54 LARSON'S WORKERS' COMPENSATION LAW § 54.04[1] (2014) (describing the uncertainty that arose regarding the term "miner" under Title IV of the Mine Act, yet this uncertainty was generally resolved on the definition of "coal mine" in 30 U.S.C. § 902(d)).

139. 30 U.S.C. § 802(h)(1) (2006); *cf. id.* § 802(h)(2) (defining "coal mine" for purposes of Titles II, III, and IV).

140. *See, e.g.*, S. Ohio Coal Co. v. Marshall, 464 F. Supp. 450, 454 (S.D. Ohio 1978) (citing McGee v. United States, 402 U.S. 479, 486 (1971)) (regarding whether a section foreman is a "miner" for purposes of the Mine Act's temporary reinstatement provision and stating that such factual issues could include the nature of individual's duties and his relationship in a given position with the mine operator); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 (Jan. 1981) (concluding that rock pickers were miners under section 3(g) because of their duties—they broke, loaded, and hauled the rock out of the quarry); *see also* TIMOTHY M. BIDDLE ET AL., *§ 201.04 Federal Protected Rights of Miners*, *in* 6-201 AMERICAN LAW OF MINING (2d ed.) (stating it is likely that anyone who works on mine property would be considered a miner for purposes of the anti-discrimination provision).

141. Brock *ex rel.* Williams v. Peabody Coal Co., 822 F.2d 1134, 1151 (D.C. Cir. 1987) (Ginsburg, J., concurring) (stating the term "miner" may be interpreted differently across the Mine Act).

142. 30 U.S.C. § 901–944 (2006) (Black Lung Benefits Act).

143. 30 U.S.C. § 825(a) (2006).

144. Cyprus Empire Corp., 15 FMSHRC 10, 13 (Jan. 1993).

1. Title IV of the Mine Act

Title IV of the Mine Act, dealing with black lung benefits, defines the term "miner" as:

> [A]ny individual who work*s* or has work*ed* in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who work*s* or *has* work*ed* in coal mine construction or transportation in or around a coal mine, to the extent such individual was expos*ed* to coal dust as a result of such employment.[145]

Here, the use of both present and past tense indicates coverage of current or past employment, unlike the general definition in section 3(g).[146]

Notably, the Mine Act expanded the black lung statutory definition of "miner" in three ways: (1) the word "employed" was replaced with "works or has worked" in or around a coal mine; (2) the Act incorporated the "preparation" component that was already present in the regulation;[147] and (3) added a new sentence expressly dealing with "construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."[148] These concurrent changes suggest that if Congress wanted to limit the general definition of "miner" to those in an employment relationship, it would have done so.[149] Significantly, Congress deliberately chose to replace the word "employed" with the verb "work," thereby favoring a broader verb that is not limited to the employment relationship.[150]

Additionally, like the general definition of "miner" in section 3(g), uncertainty about the black lung definition of "miner" has generally been resolved based on the definition of "coal mine" in conjunction to the definition of "miner,"[151] thereby firmly lodging the concept of "preparing" into "mine" and "miner."[152]

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145. 30 U.S.C. § 902(d) (2006) (emphasis added).

146. *Compare id.*, *with id.* § 802(g).

147. 3-54 LARSON'S WORKERS' COMPENSATION LAW § 54.04, *supra* note 138. These two changes thus became the following: "'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902 (2006).

148. 3-54 LARSON'S WORKERS' COMPENSATION LAW § 54.04, *supra* note 138 (citing 30 U.S.C. § 902).

149. *See* Vulcan Constr. Materials, L.P. v. FMSHRC, 700 F.3d 297, 309 (7th Cir. 2012) (presuming Congress' choice of language is deliberate (citing Russello v. United States, 464 U.S. 16, 23 (1983))).

150. *See supra* notes 130–133 and accompanying text.

151. 3-54 LARSON'S WORKERS' COMPENSATION LAW § 54.04, *supra* note 138

While the black lung provision is demonstrative of the deliberate and purposeful drafting by Congress, it is not a suitable analogue for interpreting section 3(g) of the Mine Act, because it represents a different regulatory regime. Moreover, the black lung definition of miner is narrower than the Act's general definition of miner.[153] Nevertheless, it demonstrates that Congress purposely chose the verb "work" over the verb "employed," and thus the meaning of these two verbs cannot be treated synonymously when defining the term "miner" in section 3(g) of the Mine Act.

2. Mandatory Health and Safety Training Provision

Laid-off individuals are not considered miners under section 3(g) for purposes of section 115(a) of the Mine Act.[154] Section 115(a) provides the minimum requirements for a mandatory health and safety training program for miners.[155] This provision explicitly uses the term "miner."[156] In *Brock* ex rel. *Williams v. Peabody Coal Co.*,[157] the D.C. Circuit held that "an individual is not a 'miner' who can claim a training right under section 115(a) unless he or she is *employed* in a mine."[158] The D.C. Circuit reasoned that "Congress enacted section 115(a) . . . to create a safe and healthy work environment," but that laid-off individuals "are not exposed to that environment."[159] Consequently, the court

(citing 30 U.S.C. § 902(d)).

152. *Id.*

153. *Compare* Falcon Coal Co., Inc. v. Clemons, 873 F.2d 916, 921–22 (6th Cir. 1989) (finding a night watchman at a strip mine is not a "miner" because his work does not involve work integral to the "extraction" of coal), *and* Wisor v. Dir. Office of Worker's Comp. Programs, U.S. Dep't of Labor, 748 F.2d 176, 179 (3d Cir. 1984) (concluding a person employed as a clay miner who is completely disabled by black lung due to work necessitating digging through coal deposits to reach clay was not a "miner," because the "claimant must satisfy the situs test by showing that he was employed by a coal mining company"), *with* Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 704 (3d Cir. 1979) (stating the term "miner" in section 3(g) is to be broadly interpreted), *and* Dir. Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Consolidation Coal Co., 884 F.2d 926, 934 (6th Cir. 1989) (reversing a Benefits Review Board holding that a coal mine employee who had worked as a loader and belt operator and then in the machine shop was not a "miner").

154. Brock *ex rel.* Williams v. Peabody Coal Co., 822 F.2d 1134, 1149 (D.C. Cir. 1987).

155. *See* 30 U.S.C. § 825(a) (2006) (mandatory health and safety training provision).

156. *See id.* § 825(a)(1)–(5) (using terms: "new miner," "all miners," "any miner," and "miner").

157. 822 F.2d 1134.

158. *Id.* at 1149 (emphasis in original).

159. *Id.* at 1148.

reasoned that requiring laid-off individuals to receive such safety training serves no statutory purpose.[160]

This only further supports the reasoning that the term "miner" does not have the same meaning in all sections of the Mine Act; rather the term standing alone is ambiguous, and thus each section must be analyzed to determine whether the context gives the term further meaning.[161]

3. Striking Miners

In *Cyprus Empire Corp.*,[162] the Commission concluded that striking employees were not miners entitled to walkaround rights pursuant to section 103(f) of the Mine Act.[163] The Commission emphasized the presence of the verb "working" in the definition of "miner" in section 3(g) of the Act, and reasoned that individuals on strike are not working in a mine.[164] However, the Commission noted that an individual's status as a miner is determined by whether he or she works in a mine, and not by whether he or she is employed by a mine operator.[165]

Subsequently, in *Aloe Coal Co.*,[166] the Commission held that striking individuals are not miners for purposes of section 103(g)(1) of the Mine Act.[167] The Commission reasoned that section 103(g)(1) is intended to encourage miners to become involved in identifying hazards and to afford them an active part in correcting those hazards by providing the right to request an inspection whenever they reasonably believe that there is a violation or a danger.[168]

The Commission's reasoning that striking miners are not miners under section 3(g) mirrors the D.C. Circuit's reasoning in

160. *Id.*

161. *See, e.g.*, *id.* at 1151 (Ginsburg, J., concurring) (stating the term "miner" may be interpreted differently in the Mine Act); *see also* 30 C.F.R. §§ 46.2(g)(1) & 48.2(a)(1) (2012) (defining the term "miner" under the education and training requirements).

162. Cyprus Empire Corp., 15 FMSHRC 10, 15 (Jan. 1993).

163. *Id.* at 14 (citing 30 U.S.C. § 813(f)); *but see id.* at 15 (stating this holding does not affect the right of miners to refuse to work pursuant to section 105(c) of the Mine Act).

164. *Id.* at 13.

165. *Id.*

166. 15 FMSHRC 4 (Jan. 1993) (citing 30 U.S.C. § 813(g)(1)) (right of miner representative or miner to obtain an immediate inspection by the Secretary).

167. *Id.* at 8 (stating that nowhere in section 103(g)(1) or the legislative history is there any indication that the section was meant to limit the Secretary's broad authority to inspect mines under section 103(a)).

168. *Id.*

Williams that laid-off miners are not exposed to the safety and health concerns that the Mine Act is meant to protect against.[169] Consequently, the meaning of the term "miner" must effectuate the purpose of the provision in which it is located.[170]

B. The Term "Miner" in the Temporary Reinstatement Provision Includes Laid-off Miners Who Are "Blackballed" by Not Being Recalled

The term "miner" is ambiguous, and thus must be interpreted to effectuate the statutory purpose of the temporary reinstatement provision. Such an interpretation must include individuals who are laid off and then "blackballed" by not being recalled based on the legislative history of the temporary reinstatement provision and the Commission's jurisprudence that an employment relationship is not necessary to be a "miner" under section 3(g) of the Act.

1. Legislative History

The legislative history presents two competing themes regarding the temporary reinstatement provision: (1) section 105(c), the anti-discrimination provision in which the temporary reinstatement provision is located, must be construed expansively to assure that miners will not be inhibited in exercising their rights under the Mine Act; and (2) miners must play an "active part" in enforcing the Act. Section 105(c) must be interpreted expansively due to Congress' desire to protect the health and safety of miners.[171] In enacting the Mine Act, Congress made clear its intent that section 105(c) "be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation."[172] Congress' concern for the safety and health of miners is further evidenced by the strong remedial purpose of the Mine Act, contained within section

169. *Compare id.*, *with* Brock *ex rel.* Williams v. Peabody Coal Co., 822 F.2d 1134, 1149 (D.C. Cir. 1987).

170. *See Cyprus Empire Corp.*, 15 FMSHRC at 15 (indicating 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).

171. Jim Walter Res., Inc. v. FMSHRC, 920 F.2d 738, 751 (11th Cir. 1990) (citing Brock *ex rel.* Parker v. Metric Constructors, Inc., 766 F.2d 469, 472 (11th Cir. 1985) ("[It is] the accepted view that section 105(c) should be interpreted expansively to protect the health and safety of miners.").

172. Sec'y of Labor *ex rel.* Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012) (quoting S. REP. NO. 95-181, at 36 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3436).

105(c).[173] Accordingly, an expansive interpretation of the term "miner" is needed to effectuate the Act's anti-discrimination provision.[174]

The legislative history of section 105(c) also reveals that Congress recognized that if the nation's mine safety and health program was to be effective, then miners had to play an "active part" in enforcing the Mine Act.[175] The Senate report for the Mine Act specifically stated:

> If 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. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.[176]

These two themes are in competition with one another because interpreting section 105(c) expansively is limited by Congress' intent that miners must play an "active part" in enforcing the Mine Act, which in turn suggests that Congress did not want miners to sit on their rights. Inevitably, including individuals who are laid off and then "blackballed" by not being recalled as miners under the temporary reinstatement provision would satisfy Congress' intent that section 105(c) be interpreted expansively. However, this relates back to the question about whether an individual must be employed when he or she engages in protected activity to be covered by the temporary reinstatement provision in order to satisfy Congress' intent that miners must play an "active part" in enforcing the Mine Act. Satisfaction of this "active part" requirement will turn on the facts of a given case based on the allegations regarding why the complainant was not recalled, but in itself does not preclude laid-off miners from invoking the temporary reinstatement provision.

In addition to the two themes mentioned above, Congress noted the power imbalance between miners and mine operators.[177] The Committee stated that:

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173. *See Parker*, 766 F.2d at 472 (describing the Mine Act's remedial purpose as strong in relation to section 105(c)(1)).

174. *Id.* (citations omitted).

175. Council of S. Mountains, Inc. v. FMSHRC, 751 F.2d 1418, 1419 (D.C. Cir. 1985) (citing S. REP. NO. 95-181 (1977)).

176. S. REP. NO. 95-181, at 35, 37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3435, 3437; *see also* H.R. REP. NO. 95-655 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 3485, 3499–3501.

177. *See, e.g.*, Lofaso, *supra* note 44, at 92 ("Compared to mine operators, coal miners are in a relatively weak position.").

> [M]ining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity . . . The Committee feels that this 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.[178]

This statement echoes concerns about employer monopsony—i.e., that in places like rural Appalachia, coal mining is essentially the only industry.[179] Moreover, concern about the financial position of miners aligns with the historical boom and bust cycles of the mining industry,[180] thereby making it more likely that Congress contemplated some coverage of laid-off individuals under the temporary reinstatement provision.

The Senate Report suggests that Congress was well aware of the inequalities and power disparities in the mining industry when it drafted the Mine Act.[181] This is precisely why an order for temporary reinstatement permits a miner to remain on the job and not forgo lost income while his or her discrimination case is pending before the Commission.[182] Therefore, in order to effectuate the statutory purpose of the temporary reinstatement provision in light of Congress' concerns, an interpretation of the term "miner" in that provision must include individuals who are laid off and then "blackballed" by not being recalled.

2. An Employment Relationship Is Not Necessary to Be a "Miner" Under Section 3(g) of the Mine Act

An employment relationship is not necessary to be considered a "miner" under section 3(g) of the Mine Act, even though *Piper* seems to frame the scope of the term "miner" in the temporary reinstatement provision around the factual inquiry of whether there was an employment relationship at the time the protected activity occurred.[183] The Commission's jurisprudence has stated

178. S. REP. NO. 95-181, at 35, 37 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3435, 3437; *see also* H.R. REP. 95-655 (Conf. Rep.) (1977), *reprinted in* 1977 U.S.C.C.A.N. 3485.

179. *See supra* Part I.C.

180. *See* McGinley, *supra* note 19, at 271–77 (describing volatility of the U.S. coal industry from 1940 to 2009).

181. *See* S. REP. NO. 95-181, at 1–5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401–05.

182. *See* ABA SECTION OF LABOR & EMP'T LAW, *supra* note 61.

183. Sec'y of Labor *ex rel.* Piper v. KenAmerican Resources, Inc., 35 FMSHRC 1969, 1971–74 (July 2013).

that nowhere in the Mine Act is one's status as a "miner" contingent upon an employment relationship with the owner or mine operator.[184] This is because section 3(g), which defines the term "miner," uses the verb "working" rather than the verb "employed."[185] Moreover, the Commission has stated that it believes that the Mine Act is not an employment statute, but instead a health and safety statute.[186] Such a belief aligns with the well-established principle that the term "miner" in section 3(g) should be construed expansively[187] and interpreted to effectuate the provision in which the term is located.[188] Thus, for purposes of the temporary reinstatement provision, the term "miner" should extend beyond the existence of an immediate employment relationship.

Nevertheless, the existence of an employment relationship does have some significance in the context of discriminatory recalls, because the presence of an employment relationship presents a greater opportunity for retaliation[189]—i.e., not being recalled. Similarly, the Commission has recognized that "discrimination may manifest itself in subtle or indirect forms of adverse action."[190] Such subtle or indirect forms of discrimination could encompass a discriminatory recall, especially in a boom and bust industry like mining. A series of layoffs and recalls could conceal what is ultimately the adverse action of a discriminatory termination when an individual is not recalled from a layoff.[191]

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184. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 & n.11 (Jan. 1981); *see also* Cyprus Empire Corp., 15 FMSHRC 10, 13 (Jan. 1993) (stating an individual's status as a miner is determined by whether he or she works in a mine, not by whether he or she is employed by a mine operator); Sec'y of Labor *ex rel.* Logan v. Bright Coal Co., Inc., 6 FMSHRC 2520, 2525–26 (Nov. 1984) (holding a person's status as an informer is not dependent on whether that person is an employee of a mine operator).

185. *See* 30 U.S.C. § 802(g) (2006); *Cyprus Empire Corp.*, 15 FMSHRC at 13; *El Paso Rock Quarries, Inc.*, 3 FMSHRC at 37; *see also supra* Part V.A.

186. *See* UMWA *ex rel.* Rowe v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (Sept. 1985) (citing 30 U.S.C. § 825).

187. *See* Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 704 (3d Cir. 1979).

188. *See Cyprus Empire Corp.*, 15 FMSHRC at 14–15.

189. *See Logan*, 6 FMSHRC at 2520–21 (regarding the informer's privilege).

190. Sec'y of Labor *ex rel.* Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1848 n.2 (Aug. 1984); *but see* Fucik v. United States, 655 F.2d 1089, 1096 (Ct. Cl. 1981) (qualifying this by stating that an adverse action does not mean any action which an employee does not like).

191. Ultimately, an adverse action only needs to be conduct that is detrimental to one's employment relationship, and not being recalled would satisfy this definition. *See* Sec'y of Labor *ex rel.* Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012) (citing Pendley v. FMSHRC, 601 F.3d 417, 428 (6th Cir. 2010)) (defining adverse action).

This further supports the argument that laid-off miners are covered under the temporary reinstatement provision of the Mine Act; however, an immediate employment relationship is not necessary for such coverage.

VI. A Workable Legal Standard for Discriminatory Recalls in the Context of Temporary Reinstatement Will Likely Use a Case-by-Case Approach

A workable legal standard for the application of temporary reinstatement in discriminatory recall cases will likely use a case-by-case approach. This will provide the malleability needed to navigate the boom and bust nature of the mining industry given the facts of a particular case. Moreover, such an approach will further build upon the majority's reasoning in *Piper* and incorporate elements from the Commission's previous decisions involving tolling and discriminatory layoff cases. Similarly, a case-by-case approach balances the two competing themes from the Mine Act's legislative history and jurisprudence that section 105(c) must be construed expansively to assure that miners will not be inhibited in exercising their rights under the Mine Act, but at the same time miners must play an "active part" in enforcing the Act and not sit on their rights. Finally, anti-discrimination provisions in other statutes support the use of a case-by-case approach in the context of discriminatory recalls, but such statutes are not dispositive in formulating, refining, and applying a legal standard, because the concept of temporary reinstatement is unique to the Mine Act.[192]

A. Relation to the Commission's Previous Decisions Involving Tolling and Discriminatory Layoff Cases and the Legislative History of the Mine Act

Evaluating an allegation of an adverse action against a miner within the context of an alleged discriminatory recall demands a case-by-case approach in which the Commission closely examines the surrounding facts and circumstances of a given case.[193] A case-by-case approach is needed because different treatment does not

192. *See* James H. Swain, *Protecting Individual Employees, Is It Safe to Complain About Safety?*, 9 U. BRIDGEPORT L. REV. 59, 125 (1988) (stating the Mine Act covers only employees in the mining industry).

193. *See Pendley*, 34 FMSHRC at 1930 (citing *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2) (stating determinations regarding whether an adverse action occurred in a discrimination case must be made on a case-by-case basis and will involve an examination of the surrounding circumstances).

always amount to illegal discrimination under the Mine Act, especially when there is a sufficient lawful reason for the challenged difference.[194] As such, the Commission has recognized that a layoff for economic reasons is a lawful reason for different treatment of miners.[195] This is precisely why a change in the mine operator's circumstances is relevant to tolling temporary reinstatement and the mine operator can raise a subsequent layoff as an economic defense to temporary reinstatement.[196]

A case-by-case approach, in the context of discriminatory recalls, will permit a limited inquiry at the temporary reinstatement proceeding to determine if the recall properly excluded the complainant. Even though temporary reinstatement proceedings are limited in scope and do not entail a trial of the merits or the resolution of creditability issues,[197] *Ratliff* suggests that limited inquiries are permissible in some circumstances during a temporary reinstatement proceeding.[198] Thus, a temporary reinstatement proceeding in the context of discriminatory recalls could similarly permit an analogous limited inquiry during the temporary reinstatement proceeding to that used in tolling cases. Additionally, the "not frivolously brought" standard would still apply in discriminatory recall cases, just like discriminatory layoff cases, because not being recalled, like being laid off, is a termination of employment and so the judge must still apply the "not frivolously brought" standard contained in section 105(c)(2).[199]

Moreover, a case-by-case approach balances the two competing themes that appear in the Mine Act's legislative history as well as in the jurisprudence regarding other sections of the

194. Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2540 (Dec. 1990) (quoting Sec'y of Labor *ex rel.* Price v. Jim Walter Res., Inc., 12 FMSHRC 1521, 1532–33 (Aug. 1990)) (finding no discrimination with respect to the employment relationship when an employer did not pay an employee, called as a witness against it, the difference between what the employee would have earned had he worked and what the party calling him as a witness was willing to pay).

195. *See* Sec'y of Labor *ex rel.* Gatlin v. KenAmerican Res., Inc., 31 FMSHRC 1050, 1054 (Oct. 2009) (citing Simpson v. Kenta Energy, Inc., 11 FMSHRC 1638, 1639 (Sept. 1989)) (permitting tolling a mine operator's temporary reinstatement obligation when a layoff occurs for economic reasons).

196. *See* Sec'y of Labor *ex rel.* Ratliff v. Cobra Natural Res., LLC, 35 FMSHRC 397 (Feb. 2013) (citing Shemwell I, 34 FMSHRC 996, 1000 (May 2012)); *see also Gatlin*, 31 FMSHRC at 1054 (citing Sec'y of Labor *ex rel.* Shepherd v. Sovereign Mining Co., 15 FMSHRC 2450 (Dec. 1993)).

197. *See supra* notes 62–69 and accompanying text.

198. *See Ratliff*, 35 FMSHRC at 397 (citing *Gatlin*, 31 FMSHRC at 1055) (regarding tolling a mine operator's obligation to restate a miner).

199. *Id.* (regarding discriminatory layoff cases).

Mine Act: (1) that section 105(c) must be construed expansively to assure that miners will not be inhibited in exercising their rights under the Mine Act, and (2) that miners must play an "active part" in enforcing the Act and not sit on their rights.[200] A case-by-case approach will balance these two competing themes by allowing the term "miner" to include those individuals who are laid off, thereby allowing an expansive construction of section 105(c), while also allowing the Commission to determine, at a later point in time, what the term "active part" entails based on when protected activity occurs given the facts of a particular case under review. Determining what the term "active part" means given the facts of a particular case will resolve both the uncertainty surrounding whether an individual must be employed when he or she engages in protected activity to be covered by the temporary reinstatement provision, and the question concerning at what point coverage under the temporary reinstatement provision ends for a laid-off miner.

B. Relation to Anti-Discrimination Provisions in Other Statutes

Even though the concept of a statute ordering temporary reinstatement while a discriminatee's complaint is pending is unique to the Mine Act,[201] anti-discrimination provisions in other statutes support the use of a case-by-case approach in the context of discriminatory recalls. Various Commission decisions have referenced case law interpreting the anti-discrimination provisions contained in the National Labor Relations Act[202] ("NLRA") and Title VII in resolving questions concerning the proper construction of the Mine Act's anti-discrimination provision.[203]

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200. *See* Aloe Coal Co., 15 FMSHRC 4, 8 (Jan. 1993) (citing 30 U.S.C. § 813(g)(1)) (wanting miners to have an active part in requesting inspections under section 103(g)(1) of the Mine Act); *see also supra* note 176 and accompanying text (recognizing miners have to play an active part in enforcing the Mine Act for the nation's mine safety and health program to be effective).

201. *See* Swain, *supra* note 192.

202. 29 U.S.C. §§ 151 *et seq.*

203. *See e.g.*, Berwind Natural Res. Corp., 21 FMSHR 1284, 1309 (Dec. 1999) (citing Swift v. Consolidation Coal Co., 16 FMSHRC 201, 206 (Feb. 1994)) (standard for facial discrimination); Delisio v. Mathies Coal Co., 12 FMSHRC 2535, 2542–45 (Dec. 1990) (legality of operator's policy of paying employees who testify as witnesses on its behalf, but not paying employee for time spent testifying as another party's witness); Local 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1501 n.6, 1504–05 (Nov. 1988) (appropriate rate of interest on backpay awards), *aff'd sub nom.* Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990); Metric Constructors, Inc., 6 FMSHRC 226, 231–33 (Feb. 1984) (mitigation defense to backpay award), *aff'd*, Brock *ex rel.* Parker v. Metric Constructors, Inc.,

Both the NLRA and Title VII support using a case-by-case approach with a multi-factor analysis in the context of discriminatory recalls. The NLRA supports a case-by-case approach in discriminatory recall cases that looks at the facts and circumstances of a given case.[204] Similarly, Title VII suggests that several factors can be considered under such an approach, which are: (1) whether the layoff suggested a possibility of reemployment, (2) whether there is a claim of continuing discrimination after a layoff, and (3) whether the company had bound itself by some procedure (preferably written) in making recall decisions.[205] These Title VII factors are similar to those used in Mine Act tolling cases[206] and amount to a case-by-case approach based on the facts and circumstances of the case.

Conclusion

The definition of "miner" in section 3(g) of the Mine Act is ambiguous and thus must be interpreted within the specific context of section 105(c)(2) of the Mine Act. The legislative history of section 105(c)(2) suggests that Congress provided for temporary reinstatement under the Act to provide some equitable balance given the socioeconomic inequalities that faced miners and also contemplated the boom and bust cycles in the mining industry. Consequently, such an interpretation will include miners who are laid off and then "blackballed" by not being recalled.

Today, the economic realities facing the coal mining industry make the prospect of layoffs and recalls more likely; therefore, a case-by-case approach will provide the malleability needed to make the application of the Mine Act's temporary reinstatement provision conform to changes in the industry as they occur. Moreover, such an approach further builds upon the Commission

766 F.2d 469 (11th Cir. 1985) (interpreting the definition of "operator" under section 2(d) of the Mine Act). Moreover, the NLRA served as a model for the framers of Title VII. *Berwind*, 21 FMSHRC at 1313 (citing Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983), *abrogated by* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006)).

204. *See* Skyline Homes, Inc. v. NLRB, 323 F.2d 642, 647 (5th Cir. 1963) (regarding discriminatory recalls under section 8(a)(1) of the NLRA, in which it should be considered whether the discriminatee was not offered reemployment based on the facts and circumstances of the case).

205. Cox v. U.S. Gypsum Co., 409 F.2d 289, 290–91 (7th Cir. 1969) (involving a Title VII sex discrimination case where five women were laid off, men with less seniority were recalled, and new men were hired to fill jobs that these women were qualified to perform).

206. *See* Sec'y of Labor *ex rel.* Gatlin v. KenAmerican Res., Inc., 31 FMSHRC 1050, 1055 n.5 (Oct. 2009).

majority's reasoning in *Piper* and incorporates elements from the Commission's previous decisions involving tolling and discriminatory layoff cases. Similarly, this approach balances the two competing themes in the Mine Act's legislative history and jurisprudence that section 105(c) must be construed expansively to assure that miners will not be inhibited in exercising their rights under the Mine Act, and miners must have an "active part" in enforcing the Act and not sit on their rights.