UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 04-1427

CUMBERLAND COAL RESOURCES, LP,

Petitioner,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

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 THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate
Litigation

ROBIN A. ROSENBLUTH
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, Virginia 22209-2296
Telephone: (202) 693-9333

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission ("the Commission") and in this court are listed in the Brief for Cumberland Coal Resources, LP.

(B) Rulings Under Review. References to the ruling at issue appear in the Brief for Cumberland Resources, LP.

(C) Related Cases. This case was not previously before this Court or any other court. Counsel is unaware of any related cases pending in this Court or any other court.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

BEP	Bleeder Evaluation Point
Coal Act	Federal Coal Mine Health and Safety Act of 1969
Cumberland	Cumberland Coal Resource, LP
Commission/ FMSHRC	Federal Mine Safety and Health Review Commission
JA	Joint Appendix
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
Tr.	Transcript

STATEMENT OF THE ISSUES PRESENTED

Mine Safety and Health Administration standard 30 C.F.R. § 75.334(b)(1) requires that a bleeder system be used "to control the air passing through the area and to continuously dilute and move methane-air mixtures ... away from active workings." The questions presented are:

1. Whether the Secretary's interpretation that Section 75.334(b)(1) requires that a bleeder system dilute and move methane-air mixtures in an effective manner comports with the plain meaning of the standard.

2. Whether the Commission's finding that Cumberland violated Section 75.334(b)(1) is supported by substantial evidence.

PERTINENT STATUTES AND REGULATIONS

Except for what is set forth in the bound addendum to this brief beginning at page A-1, all pertinent statutes and regulations are contained in the brief for Cumberland.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

This proceeding arose out of a citation issued by the Secretary of Labor ("the Secretary") to Cumberland Resources, LP ("Cumberland"), alleging a violation of 30 C.F.R. § 75.334(b)(1). The mandatory mine safety standard at 30 C.F.R. § 75.334(b)(1)

states:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area[1] away from active workings and into a return air course or to the surface of the mine.

The Secretary interprets Section 75.334(b)(1) as requiring that a mine's bleeder system dilute and move methane-air mixtures in an effective manner. The Secretary proposed a $6000 penalty for the violation. Cumberland contested the citation and penalty, and a hearing was held before a Commission administrative law judge.

On November 28, 2001, the administrative law judge found that Cumberland violated Section 75.334(b)(1). 23 FMSHRC 1241 (JA 9). The judge assessed a $5000 penalty for the violation. 23 FMSHRC at 1256 (JA 24).

On August 10, 2004, the Federal Mine Safety and Health Commission ("the Commission") issued a decision unanimously affirming the judge's finding that Cumberland violated Section 75.334(b)(1). 26 FMSHRC at 639 (JA 34). The Commission agreed

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[1] 30 C.F.R. § 75.301 defines "worked-out area" as:

> An area where mining has been completed, whether pillared or non-pillared, excluding developing entries, return air courses, and intake air courses.

with the Secretary's interpretation of the standard, and it held that substantial evidence supported the judge's finding of a violation.

STATEMENT OF FACTS

A. Statutory Background

The Federal Mine Safety and Health Act ("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." 30 U.S.C. § 801(c).

Title III of the Mine Act established interim mandatory safety standards applicable to all underground coal mines until superseded by standards promulgated by the Secretary. 30 U.S.C. § 861. Section 101 of the Mine Act authorizes the Secretary to promulgate mandatory safety and health standards for the Nation's mines. 30 U.S.C. § 811. 30 C.F.R. § 75.334(b)(1) is one such standard. No mandatory standard promulgated by the Secretary may reduce the protection afforded miners by an existing mandatory standard. 30 U.S.C. § 811(a)(9).

Operators of underground coal mines are required to adopt

mine ventilation plans. 30 U.S.C. § 863(o). Ventilation plans are to be used not to impose general requirements on mine operators, but "rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 407 (D.C. Cir. 1976). The provisions of mine-specific ventilation plans are enforceable as mandatory standards. Id. at 409.

Section 103 of the Mine Act authorizes the Secretary to conduct regular inspections of the Nation's mines. 30 U.S.C. § 813. Inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Mine Act and its standards. 30 U.S.C. § 813(a).

Section 104 of the Mine Act provides for the issuance of citations and orders for violations of the Mine Act or its standards. 30 U.S.C. § 814. If an MSHA inspector discovers a violation of the Mine Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or 104(d) of the Mine Act. 30 U.S.C. §§ 814(a) and 814(d). Sections 105(a) and 110(a) of the Mine Act provide for the proposal and assessment of civil penalties for

violations of the Mine Act or its standards. 30 U.S.C. §§ 115(a) and 820(a).

The Federal Mine Safety and Health Review 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. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996). A mine operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823.

B. Regulatory Background

The Secretary's ventilation standards for underground coal mines are set forth in 30 C.F.R. §§ 75.300 et. seq. 30 C.F.R. Section 75.370 provides that every underground coal mine operator shall develop and follow a mine ventilation plan approved by MSHA. 30 C.F.R. § 75.334(b)(1) -- the cited standard at issue in this case -- requires that during pillar recovery, a bleeder system shall be used to "control the passing through the area and to continuously dilute and move methane-air mixtures." Section 75.334(c)(2) requires that the mine ventilation plan specify "the means to determine the

effectiveness of the bleeder system." Section 75.334(d) requires a worked-out area to be sealed if it cannot be determined that the bleeder system "is working effectively." 30 C.F.R. § 75.323(e) requires that the concentration of methane in bleeders immediately before the air in the split joins another split of air be less than 2%. 30 C.F.R. § 75.364(a)(2)(iii) requires operators to take methane readings in bleeder entries at the measurement point locations specified in the mine ventilation plan "to determine the effectiveness of the bleeder system."

C. Factual Background

Methane is contained in and liberated from coal. Methane may be liberated from coal in concentrations at or near 100%. 23 FMSHRC at 1244 (JA 12). The explosive range of methane-to-air mixtures is from 5% to 15%. 26 FMSHRC at 648 (JA 43).

Cumberland owns the Cumberland Mine, an underground coal mine in Waynesburg, Pennsylvania. 26 FMSHRC at 640 (JA 35). The mine liberates approximately 12,000 million cubic feet of methane a day and is the gassiest mine in Pennsylvania. Ibid.; Tr. 128 (JA 71). The amount of methane the mine liberates is deemed "excessive" under Section 303(i) of the Mine Act, 30 U.S.C. § 813(i). Because of the mine's high rate of methane

liberation, MSHA is required to conduct frequent spot inspections of the mine. 26 FMSHRC at 640 (JA 35).

On July 5, 2000, the Cumberland Mine was using the longwall method of mining. In longwall mining, mining machines extract coal from entire blocks or panels of coal. As the coal is extracted at the face of the panel, the roof behind the face collapses. Tr. 999-1000 (JA 119). On July 5, 2000, the mine's active longwall panel was the No. 42 longwall panel. The No. 42 longwall was located along the northern end of the gob. 26 FMSHRC at 641 (JA 36).[2] The gob was bounded on the eastern side by a set of bleeder entries and on the western side by a set of main entries.[3] 26 FMSHRC at 641 (JA 36); R-5 (JA 375), G-1 (JA 374). The gob was bounded on the southern side by the 1B right entry. 23 FMSHRC at 1258 (JA 26); G-1 (JA 374).

The longwall was ventilated by a bleeder ventilation system. 26 FMSHRC at 640-41 (JA 35-36). The bleeder system diluted methane coming out of the perimeter of the gob with

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[2] "Gob" is "[t]he space left by the extraction of a coal seam into which ... the immediate roof caves." Dictionary of Mining, Mineral and Related Terms, 239 (2d ed. 1977). See also 26 FMSHRC at 640 n.2 (JA 35).

[3] Bleeder systems are part of a mine's ventilation system used to ventilate pillared areas. R-1 at 1. Bleeder entries are special air courses designed and maintained as part of the ventilation system. R-1 at 27.

fresh air and carried the methane to a bleeder fan and then to the surface of the mine. 23 FMSHRC at 1244-45 (JA 12-13); Tr. 1670 (JA 214).

Methane exited the gob through bleeder evaluation points ("BEP's") into the bleeder entries. 26 FMSHRC at 641 (JA 36); Tr. 188-92 (JA 80-81). Methane from the gob in the eastern perimeter bleeder entries was diluted by fresh air that was split and directed to the surface by either the No. 1 bleeder shaft or the No. 2A bleeder shaft. 23 FMSRHC at 1245 (JA 13); Tr. 192-94 (JA 81-82). A bleeder shaft is a vertical opening from the coal seam to the surface. Tr. 194 (JA 109).

A bleeder exhaust fan was located at the surface of the No. 1 bleeder shaft. 23 FMSRHC at 1244 (JA 12). The No. 1 bleeder shaft was located in the southeastern corner of the gob. G-1 (JA 374). The No. 2A bleeder shaft was located in the northeastern corner of the bleeder system, near the face. Ibid. Methane from the gob was carried away to either the No. 1 or the No. 2A bleeder fan. 26 FMSHRC at 648 (JA 43); Tr. 764-65. The No. 1 fan and the No. 2A fan competed for air, a fact which affected how the methane-air mixtures moved through the bleeder system. 25 FMSHRC at 648 (JA 43); Tr. 899-90 (JA 138), 971-72.

Air entered the eastern bleeders at the northern end of the gob from the headgate of the No. 42 longwall panel through regulators. 23 FMSHRC at 1245 (JA 13); 26 FMSHRC at 641 (JA 36); Tr. 1956-62 (JA 255-56). Air traveling through the regulators was split near BEPs 18 and 18A. Some of the air that was split was directed to the No. 2A bleeder shaft and some was directed to the No. 1 bleeder shaft. 23 FMSHRC at 1245 (JA 13); 26 FMSHRC at 641 (JA 36); Tr. 193-94 (JA 81), 1261-62 (JA 179). Air that traveled in a southern direction down the eastern bleeder entry was diluted by air in the 1B right entry before it exited the No. 1 bleeder shaft. 26 FMSHRC at 650 (JA 45); Tr. 406-08 (JA 106), 505 (JA 111), Tr. 522-23.

Events of July 5, 2000

Around 10:00 a.m. on July 5, 2000, Fred Evans, the mine's foreman, convened a meeting to discuss an increase in the water gauge pressure readings at the No. 1 bleeder shaft exhaust fan. 23 FMSHRC at 1248 (JA 16); Tr. 1311-12 (JA 181). During the previous two weeks, the water gauge pressure readings had been steadily rising. Tr. 548-49 (JA 114). MSHA Ventilation Specialist Ronald Hixson and MSHA Ventilation Specialist Anthony Guley testified that the water gauge readings are monitored for consistency and that, as the water gauge readings increase, the

efficiency of the bleeder system decreases. Tr. 202-04 (JA 83), 550 (JA 115).

As a result of the July 5 meeting, Cumberland sent Jason Hustus, a Cumberland engineer, to measure the methane exiting the No. 1 bleeder shaft. At 3:30 p.m., Hustus measured 3.6% methane. Tr. 1134-36 (JA 152).

MSHA Assistant District Manager Kevin Strickland testified that, based on the design of the mine's bleeder system and the high readings at the No. 1 shaft, he was confident that in the afternoon of July 5 there were explosive levels of methane between the longwall panel and bleeder evaluation point ("BEP") 5A.[4] Tr. 724-25 (JA 129). MSHA Ventilation Specialist John Urosek testified that a level in excess of 2% methane exiting the bleeder shaft indicates that there is a problem in the bleeder system. Tr. 1029 (JA 153). MSHA Ventilation Specialist Hixson testified that methane should be dissipated by the time it reaches the No. 1 bleeder shaft. Tr. 406 (JA 106).

[4] BEP 5A was located in the eastern perimeter of the bleeder system. 23 FMSHRC at 1258 (JA 26). Bleeder shaft and BEP 5A readings for the three weeks preceding July 5 show that the quantity of methane at BEP 5A was approximately two times the quantity of methane at the No. 1 bleeder shaft. 23 FMSHRC at 1258 (JA 26); Tr. 127 (JA 71), 558-63 (JA 116-117), 681 (JA 125), 721 (JA 128), 724 (JA 129), 1215 (JA 174). Given that ratio, methane levels at BEP 5A would have been approximately 7.2% during the afternoon of July 5.

Cumberland Senior Mining Engineer Roger Peelor admitted that operating the mine with levels of 3.6% methane in the shaft was hazardous and that the condition had to be corrected immediately. Tr. 1725-31 (JA 221-22). Mine Foreman Evans acknowledged that if the methane levels at the No. 1 shaft had risen to 4%, the mine should have been evacuated because the high methane concentration would show that there was "trouble" in the bleeder system. Tr. 1895-96 (JA 245-46), 1953-54 (JA 254).

Manager of Engineering Gary Dubois acknowledged that the 3.6% methane concentrations at the No. 1 shaft reflected a problem that needed to be addressed. Tr. 1824 (JA 239). MSHA considers 4.5% concentrations of methane in the bleeder entries to constitute an "imminent danger." Tr. 401 (JA 104).[5]

The afternoon shift of July 5 began at 4:00 p.m. and continued until 12:00 midnight. 23 FMSHRC at 1248 (JA 16). During the shift there were 12 miners on the longwall section and from 80 to 100 miners underground. 26 FMSHRC at 643 (JA

[5] Under the Mine Act, an "imminent danger" means "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). When MSHA finds that an imminent danger exists, MSHA must issue an order withdrawing miners from the affected area. 30 U.S.C § 817(a).

38); Tr. 138 (JA 72), 322 (JA 96). It normally takes miners working underground approximately two hours to exit the mine. Tr. 241 (JA 87).

Between 6:00 p.m. and 7:30 p.m., Engineering Manager Dubois and Safety Manager Gary Bohach obtained repeated 3.6% methane readings at the No. 1 shaft. 26 FMSHRC at 643 (JA 38); 26 FMSHRC at 643 (JA 38); Tr. 1784 (JA 229). Cumberland did not take any additional readings for approximately three hours and left the No. 1 bleeder shaft unmonitored during that time. At some point, Cumberland decided to make ventilation changes to lower the methane levels. Tr. 1334 (JA 186). Cumberland decided to make the changes on the midnight shift. Tr. 1147 (JA 164). Miners continued to work underground until the start of the midnight shift. 26 FMSHRC at 643, 651 (JA 38, 46); Tr. 1784-85 (JA 229), 1828-29 (JA 229). Cumberland did not take any methane readings in the bleeder entries during that time. 26 FMSHRC at 651 (JA 46); Tr. 530-31 (JA 112).

At approximately 10:30 p.m., Dubois returned to the mine and took a methane reading that indicated the presence of approximately 3.6% methane at the No. 1 bleeder shaft. 26 FMSHRC at 543 (JA 38); Tr. 1784-85 (JA 229), 1827-28 (JA 239-40). Shortly after 1:30 a.m. on July 6, the methane readings at

the No. 1 shaft rose to 3.8%. At approximately 2:30 a.m., the methane readings rose to 4.2%. 23 FMSHRC at 1250 (JA 18); Tr. 240 (JA 47), 491.

When General Inside Laborer and Safety Committeeman Timothy Hroblak left the mine at approximately midnight that night, he and other miners were told by Cumberland of the high methane and increasing water gauge readings at the No. 1 shaft for the first time. Hroblak was upset that Cumberland had not evacuated the mine when the methane reached dangerous levels. Hroblak called MSHA about the situation. 23 FMSHRC at 1249 (JA 17); Tr. 121-22 (JA 69-70).

Ventilation Specialist Hixson arrived at the mine at approximately 1:30 a.m. Among other things, Hixson issued a citation alleging a violation of Section 75.334(b)(1). The condition was abated when Cumberland installed overcasts, or tubes, at BEPS 18, 20, and 21 causing air to move directly from the gob toward the No. 2A fan. 26 FMSHRC at 649 n.17 (JA 44); Tr. 594-95 (JA 120), 1920-22 (JA 250). This installation lowered the levels of methane at BEP 5A and the No. 1 bleeder shaft. 26 FMSHRC at 649 n.17 (JA 44).

D. The decision of the administrative law judge

Finding that Cumberland violated Section 75.334(b)(1), 23

FMSHRC 1241 (JA 9), the administrative law judge held that the plain language of the standard requires that a bleeder system dilute and move methane-air mixtures away from active workings in an effective manner. 23 FMSHRC at 1254 (JA 22). The judge found that the undisputed facts of the case, including (1) the rising water gauge pressure at the No. 1 bleeder shaft and (2) Cumberland's actions in initiating air changes in response to the high levels of methane coming out of the No. 1 bleeder shaft on July 5, 2000, established a violation of Section 75.334(b)(1). Ibid. Indeed, the judge found that the high levels of methane coming out of the No. 1 bleeder shaft were indicative of a serious underground explosion hazard. 23 FMSHRC at 1260 (JA 28).

E. The decision of the Commission

The Commission unanimously affirmed the judge's finding that Cumberland violated Section 75.334(b)(1). 26 FMSHRC at 639 (JA 34). Relying on the language of the standard, the legislative history of the Mine Act, and the purpose of the standard, the Commission held, in agreement with the Secretary, that the standard requires that a bleeder system "control air passing through the area and continuously [] dilute and move methane-air mixtures away from active workings and into a return

or to the surface in an effective manner." 26 FMSHRC at 647 (JA 42). Stating it another way, the Commission held that "a bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations." Ibid.

The Commission then found that substantial evidence supported the judge's finding that Cumberland's bleeder system was not controlling air passing through the area and continuously diluting and moving methane-air mixtures in an effective manner. In so finding, the Commission relied on testimony from both Cumberland's and the Secretary's witnesses that the high levels of methane coming out of the No. 1 bleeder shaft in concentrations of 3.6% methane were the result of an improper distribution of air-methane mixtures and showed that the bleeder system was not controlling air-methane mixtures and diluting methane coming out of the gob in an effective manner. 26 FMSHRC at 648-49 (JA 43-44). The Commission also relied on testimony about the design of the bleeder system and a comparison between methane readings at the No. 1 bleeder shaft and methane readings in the travelable bleeder entry in the weeks preceding the violation -- a comparison which indicated

that there were likely to be methane concentrations greater than 3.6% underground. 26 FMSHRC at 650 (JA 45).

Finally, the Commission found that Cumberland's violative conduct was compounded by evidence indicating that although it had reason to believe that the bleeder system was not functioning properly, Cumberland left miners working underground and failed to take methane readings underground. 26 FMSHRC at 651 (JA 46). The Commission also noted that Cumberland even left the No. 1 bleeder shaft unmonitored for at least three hours while miners worked underground. Ibid.

SUMMARY OF ARGUMENT

This case requires the Court to determine the meaning of 30 C.F.R. § 75.334(b)(1). The meaning of Section 75.334(b)(1) as interpreted by both the Secretary and the Commission -- that bleeder systems must dilute and move methane-air mixtures in an effective manner -- is the plain meaning of the standard. The correctness of the Secretary's plain meaning reading is apparent because it gives meaning to the standard. The standard requires the operator's bleeder system to "control" methane levels, and, under the natural meaning of that term, methane levels are not "control[led]" unless the explosion hazard has been effectively eliminated. The Secretary's reading is also apparent from two

related regulatory requirements, 30 C.F.R. § 75.334(c)(2) and(d), both of which also require the bleeder system to be effective. In addition, as required by the Mine Act, the Secretary's reading is necessary to afford miners the same protection as they were afforded under the Mine Act's interim mandatory standards and under its predecessor standard.

Interpreting Section 75.344(b)(1) to require that the bleeder system dilute and move methane effectively plainly serves the purpose (as well as the language) of the standard -- the prevention of deadly explosions and fires. On the other hand, interpreting the standard merely to require that a bleeder system dilute and move methane -- no matter how ineffectively -- is fundamentally at odds with the purpose of the standard. Under Cumberland's interpretation, the standard could not be cited until there was a complete breakdown in the bleeder system -- a circumstance that is highly likely to result in a catastrophic explosion and fire. Although Cumberland points to another standard, 30 C.F.R. § 75.323(e), requiring no more than 2% methane concentration "in a bleeder split of air immediately before the air in the split joins another split of air," nothing in the language, design, or purpose of the Secretary's ventilation standards supports Cumberland's argument that the

methane concentration limit in that standard is meant to be the indicator of adequate dilution.[6] Accordingly, the Court should reject a reading that produces a result so "absurd" and "demonstrably at odds with the intentions of [the] drafters." Mova Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1068 (D.C. Cir. 1998) (citations and internal quotation marks omitted).

Finally, under the legally correct interpretation of the standard, substantial evidence clearly supports the Commission's determination that Cumberland violated Section 75.334(b)(1). Indeed, much of that evidence comes from Cumberland's own witnesses, who acknowledged that the concentrations of methane measured at the mine during the inspection were at dangerous levels.

[6] As we explain later, more than 2% methane at the Section 75.323(e) evaluation point is one indicator that the ventilation system is not functioning effectively; however, less than 2% methane at the 75.323(e) evaluation point is not a reliable indicator that the ventilation system is functioning effectively.

ARGUMENT

I.

THE SECRETARY'S INTERPRETATION OF 30 C.F.R. § 75.334(b)(1) REQUIRING THAT A BLEEDER SYSTEM EFFECTIVELY DILUTE AND MOVE METHANE-AIR MIXTURES COMPORT'S WITH THE STANDARD'S PLAIN MEANING AND THE MINE ACT'S HISTORY AND PURPOSES

A. The Standard of Review

A court decides legal matters under a de novo standard of review. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1099 (D.C. Cir. 1998). In determining the meaning of a regulation, a court must give due deference to the agency's interpretation of its own regulation. Secretary of Labor v. Excel Mining, LLC, 334 F.3d at 5-6). If a regulation's meaning is plain, the regulation cannot be interpreted to mean something different from that plain meaning. Exportal LTDA v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). In determining whether a regulation's or a statute's meaning is plain, a court should apply all the traditional tools of construction, including both the particular regulatory language at issue and the language and design of the regulatory scheme as a whole. See City of Tacoma,

Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003), and Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997) (both involving construction of statutes), and National Wildlife Federation v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (involving construction of a regulation). Plain meaning is to be determined, not by reading specific words in isolation, but by reading specific words in the context of related provisions. Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (interpreting statute).

If a regulation's meaning is not plain, a reviewing court should give deference to the interpretation of the agency entrusted with administering the regulation so long as the interpretation is a permissible one. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Udall, 380 U.S. at 16-17; Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994). This is so even where the court finds an alternative interpretation to be equally or even more reasonable. Energy West Mining Co., 40 F.3d at 462-64. Accordingly, a court must accept the Secretary's interpretation of a standard unless it "'is plainly erroneous or inconsistent with the [standard]'" (Excel Mining, 334 F.3d at 5-6 (quoting Akzo Nobel Salt, 212

F.3d 1301 at 1303 (D.C. Cir. 2000)) -- that is, as long as it "fits... within the terms of [the standard] and is compatible with its purpose." Cold Spring Granite Co. v. FMSHRC, 98 F.3d 1376, 1378 (D.C. Cir. 1996). Accord Martin, 499 U.S. at 150-51. In fact, deference is at its highest when an agency is interpreting its own regulation, Udall, 380 U.S. at 15; when the regulation pertains to a complex and technical regulatory program, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 514 (1994); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991); and when the Secretary and the Commission each interpret the regulation identically. RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001). All three conditions are met here.

B. The Plain Meaning of the Standard Requires Bleeder Systems to be Effective

The interpretive issue in this case is whether Section 75.334(b)(1)'s requirement that a bleeder system be used to continuously dilute and move methane-air mixtures away from active workings requires a system that dilutes and moves such mixtures effectively to prevent the dangerous and potentially lethal buildup of methane gas. Cumberland's argument that even an ineffective system fully complies with the standard so long as it dilutes and moves the gas to some degree borders on the

frivolous, and was properly rejected by the Commission.

Indeed, the Secretary is under a mandate to issue standards "for the protection of life and prevention of injuries," 30 U.S.C. § 811(a). Therefore, that level of protection should be the presumed objective of every standard, even if the standard does not say so explicitly.

1. MSHA's objective to require effective bleeder systems is clear from the words of the applicable standard. When examining the text of a statutory or regulatory provision, words are normally presumed to have their ordinary, dictionary meanings. See Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993); Indiana Michigan Power Co. v. Dept. of Energy, 88 F.3d 1272, 1275 (D.C. Cir. 1996). Section 75.334(b)(1) requires that a bleeder system be used "to control the air passing through the area and to continuously dilute and move methane-air mixtures ... away from the worked-out area ..." (emphasis added). Webster's Third New International Dictionary, at 496 (unabridged ed. 2002), defines the verb "control" as meaning "to exercise restraining or directing influence over." Only a bleeder system that effectively diluted and moved methane-air mixtures could be said to be “exercising restraining and directing influence over the

air; a bleeder system that diluted methane-air mixtures ineffectively would not be controlling the air within the plain meaning of the standard.[7]

Under Cumberland's interpretation, a bleeder system would be in compliance with the standard as long as methane was being diluted to some degree and moved away from the face, even if too much methane was coming out of the gob at too great a rate and was overwhelming the bleeder system. A bleeder system would thus be in compliance even if the methane was being diluted but still reached explosive levels (5% to 15%) before it was removed into a return air course or to the surface. Such a bleeder system could not be said to be "controlling" the air passing through the area in any meaningful sense because it would not be causing the effect that the standard plainly contemplates. See Watt v. Alaska, 451 U.S. 259 (1981).[8] By ignoring the natural

[7] Similarly, a requirement that a heating system be used in work areas in cold environments to "control" air temperatures, plainly requires that the system heat the air to a temperature that is safe to work in, not merely that the heating system heat the air to any temperature, whether that temperature is safe or unsafe.

[8] "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose

meaning of the word control, Cumberland's interpretation "contravenes the principle that every word of a legal text should be given effect." Carus Chemical Co. v. U.S. EPA, 395 F.3d 434, 440 (D.C. Cir. 2005).

2. Cumberland's interpretation contravenes the principle that a statutory or regulatory scheme should be read as a whole so that "no part will be inoperative or superfluous, void or insignificant ...." 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) (citation omitted). Accord RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 733 (D.C. Cir. 1985). Cumberland's interpretation would deprive Section 75.334(b)(1) of "all substantive effect" (RCA Global, 758 F.2d at 733) because under it, the standard would essentially require nothing.

In addition, two related standards make explicit the effectiveness requirement that is at least implicit in Section 75.334(b)(1). Subsection (c)(2) of Section 75.334 requires that a ventilation plan specify "the means to determine the effectiveness of the bleeder system." There would be no point to requiring a means to determine whether the bleeder system is

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sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (2nd Cir.) (L. Hand, J.), aff'd, 326 U.S. 404 (1945).

effective if there were no requirement that the bleeder system be effective.

Similarly, Subsection (d) of Section 75.334 states:

> [I]f the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas, ... or it cannot be determined by examinations or evaluations under § 75.364 that the bleeder system is working effectively, the worked out area shall be sealed.

(Emphases added). Using the same "continuously dilute and move methane air mixtures ... away" language as in subsection (b)(1) of Section 75.334, this provision requires the mine to seal the worked-out area if that condition is not met or it cannot otherwise be determined that "the bleeder system is working effectively." Read together, the two subsidiary clauses of Subsection (d) plainly mean that the worked-out area shall be sealed (1) if the bleeder system does not continuously dilute and move methane-air mixtures or (2) if it cannot be determined whether the system effectively dilutes and moves such mixtures. The phrase "working effectively" in the second clause is a shorthand formulation of the phrase "continuously dilute and move methane-air mixtures" in the first clause; thus, the two phrases are equivalent to each other and refer to the same

requirement. A bleeder system cannot be said to 'continuously dilute and move methane-air mixtures' if it cannot be said to be "working effectively."

The requirement that bleeder systems operate effectively appears throughout the regulatory scheme, and demands similar interpretation in all its forms. See Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581, 582-83 (D.C. Cir. 1990), cert. denied, 508 U.S. 906 (1993) (stating the same language in one provision of a statute or regulation is presumed to have the same meaning as the identical language in another part of the statute or regulation.) Since subsection (d) explicitly makes effectiveness the benchmark for what it means for a bleeder system to be "continuously dilut[ing] and mov[ing] methane-air mixtures . . . away from worked-out areas," it necessarily means the same thing in subsection (b)(1) as well.

The entire regulatory scheme, therefore, plainly requires not only the mere existence of something that can be called a bleeder system, but "that the bleeder system is working effectively." 30 C.F.R. § 75.334(d). Cumberland's interpretation of the "continuously dilute and move methane-air mixtures ... away" language in both Section 75.334(b)(1) and Section 75.334(d) would produce the absurd result of permitting

an operator to use a bleeder system, and not seal the worked-out area, if the bleeder system was diluting and moving methane-air mixtures away from the worked out area to any degree, even if ineffectively, and even if the bleeder system was unable to protect miners from the hazards of dangerous methane accumulations. The Secretary could not have intended an interpretation of the "continuously dilute and move methane-air mixtures ... away" language in either Section 75.334(b)(1) or Section 75.334(d) that would lead to such a nonsensical and safety-defeating result. See Cold Spring Granite, 98 F.3d at 1378.

Moreover, Section 75.334(d)'s requirement that the worked-out area must be sealed if it cannot be determined that the bleeder system is effective assures that any doubts about the effectiveness of the bleeder system must be resolved on the side of safety. But Cumberland's interpretation of subsection (b)(1) cannot possibly work unless it would also read the "working effectively" determination requirement in subsection (d) out of the regulatory scheme. Accordingly, that Section 75.334(b)(1) requires a bleeder system to be effective is plain from the 'working effectively" language of its companion provision. See Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995) (when

interpreting two provisions, one must, where possible, give meaning to both and render neither superfluous).

3. It is well established that a regulation must be interpreted to harmonize with the objective of the statutory provision it implements. Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997) (refusing to give effect to an interpretation of a regulation that is not reasonable and consistent with the statute it implements); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). This principle is particularly applicable to the Secretary's ventilation standards, which are derived from the Mine Act's interim mandatory ventilation standards, because under the Mine Act, no mandatory standard promulgated by the Secretary may reduce the protection afforded miners by the interim mandatory standards. 30 U.S.C. § 811(a)(9).

Section 75.334(b)(1) is derived from Section 303(z)(2) of the Mine Act, 30 U.S.C. § 863(z)(2). Section 303(z)(2) requires that a bleeder system be maintained "so as continuously to dilute, render harmless, and carry away methane and other explosive gases within [extracted or abandoned] areas and to protect the active workings of the mine from the hazards of such

methane and other explosive gases." The interpretation that the present standard requires that a bleeder system dilute and move methane-air mixtures effectively, unlike Cumberland's interpretation, is consistent with the objective of Section 303(z)(2). A bleeder system that dilutes and moves methane-air mixtures effectively dilutes, renders harmless, and carries away methane and protects the active workings from the hazards of methane and other explosive gases. On the other hand, Cumberland's interpretation would, for example, require that methane be diluted to some extent but would still allow it to reach explosive levels. It would neither require that methane be rendered harmless nor protect the active workings of the mine. As a result, Cumberland's interpretation is inconsistent with, and less protective of miners' safety than, Section 303(z)(2) and must be rejected.

Section 303(z)(2) of the Mine Act was carried over verbatim from the Federal Coal Mine Health and Safety Act of 1969 ("the Coal Act"). In discussing Section 303(z)(2), the Senate and House Conference Committee Reports accompanying the Coal Act state, "When ventilation [of worked-out areas] is required, the Secretary or his inspector must be satisfied that the ventilation in such areas will be maintained so as continuously

to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such explosive gases. In other words, he must be assured that such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in the area." Senate Conference Report on S. 2917, Cong. Record pp. 39982-39999, December 18, 1969, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong. 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 1612-13 (1975) ("Legis. Hist."), and House Conference Report on S. 2917, 82, Legis. Hist. at 1526 (emphases added). Interpreting Section 75.334(b)(1) to require that a bleeder system dilute and move methane effectively provides the assurance referenced in the Senate and House Reports and achieves the objective of Section 303(z)(2) of the Mine Act. Cumberland's interpretation does not provide that assurance, and would be considerably less protective of miners' safety than the interim mandatory standards that Congress adopted in 1969.

4. Not surprisingly, the regulatory history of Section 75.334 reflects that the Secretary intended the standard to require that the bleeder system dilute and move methane-air

mixtures in an effective manner. Section 75.334 replaced Section 75.316-2(e) (1991). See 57 FR 20868-01, 20910 (May 15, 1992). The predecessor standard set forth general criteria MSHA District Managers were required to use in approving a mine's ventilation plan. 30 C.F.R. § 75.316-2 (1991). Section 75.316-2(e) (1991) set forth the specific criteria for bleeder systems that included specific criteria for determining whether the system was effective. Ibid.

Section 75.334 eliminated the specific criteria for bleeder systems under the predecessor standard. In the preamble to the final rule, the Secretary explained that Section 75.334 is no less protective of miners' safety than the predecessor standard despite this change:

> ... [T]he final rule [Section 75.334] requires that the bleeder system used be specified in the approved ventilation plan. Requiring the bleeder system to be specified and approved does not reduce the protection provided by the existing provisions addressing bleeders ... [I]nstead of stating that systems "equivalent" to this type of bleeder may be used, as under the existing standards, MSHA has required that the design and use of bleeder systems that will continuously dilute and move methane-air mixtures and other gases, dusts and fumes away from worked-out areas and into a return air course or to the surface be specified and approved in the ventilation plan. This permits the operator to tailor the bleeder system to the conditions in the particular

> mine where it will be used. MSHA recognizes that the methods that will effectively remove harmful gases from a worked-out area depend on particular mining conditions.

57 Fed. Reg. 20885-86 (emphases added). Thus, the Secretary intended that the "continuously dilute and move methane-air mixtures ... away" language in Section 75.334(b)(1) require bleeder systems to "effectively remove harmful gases from a worked-out area."

In addition, the purpose of Section 75.334 -- protecting miners from the dangers from the harmful build-up of gases in the worked-out areas -- is plainly served by the Secretary's interpretation. In promulgating the ventilation standards, the Secretary paid particular attention to the importance of ventilating pillared areas. The Secretary noted that the "[a]ccumulation of methane and oxygen-deficient atmospheres pose serious hazards in worked-out areas. The potential for ignitions and explosions is always present unless steps are taken to prevent these accumulations." 57 Fed. Reg. at 20866. The Secretary also recognized that "no aspect of safety in underground coal mining is more fundamental than proper ventilation. A basic tenet of mining safety states that ventilation must be sufficient[] to dilute, render harmless and

carry away the hazardous components of mine air, such as potentially explosive methane .... " 61 Fed. Reg. 9764 (March 11, 1996) (preamble to Secretary's 1996 ventilation rule for underground coal mines); see H. Rep. at 21, reprinted in Legis. Hist. at 1051 (in discussing pillared areas of mines, stating that "the most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts.").

5. Cumberland's principal argument (Br. at 28-29) is that the Secretary's interpretation that 75.334(b)(1) requires that a bleeder system dilute and move methane-air mixtures effectively is at odds with 30 C.F.R. § 75.323(e). Section 75.323(e) states that "the concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air ... shall not exceed 2.0 percent." [9] According to Cumberland, the 2% limit at the Section 75.323(e) evaluation point is the "level of methane that is the indicator of 'adequate' dilution" in an entire bleeder system. Br. at 34. In other words, according to Cumberland, if methane levels are below 2% at the Section 75.323(e) evaluation point, the bleeder

[9] An "air split" is "[t]he division of the main current of air in a mine into two or more parts." Dictionary of Mining, Mineral and Related Terms, 12 (2d ed. 1977).

system is adequately diluting methane, regardless of the methane levels at all other points in the system.

Contrary to Cumberland's argument, nothing in the language or purpose of Section 75.323(e) (and nothing in any other ventilation standard) supports a suggestion that a bleeder system's ability to effectively ventilate the worked-out area and dilute methane is to be determined solely by whether the system is in compliance with the 2% methane limit at the Section 75.323(e) evaluation point. If that were true, there would be no need for the requirement in 75.364(a)(2)(iii) that, to evaluate the effectiveness of a bleeder system, operators must measure methane concentrations at measurement point locations specified in the mine ventilation plan. Instead, mine operators would merely have to evaluate the bleeder system at the Section 75.323(e) points.

Indeed, and most fundamentally, if compliance with the 2% methane limit at the Section 75.323(e) evaluation points were the only indicator of a bleeder system's adequacy, there would be no identifiable need for the existence of Section 75.334(b)(1). If compliance with Section 75.323(e) were the only indicator of a bleeder system’s adequacy, the Secretary would only have promulgated Section 75.323(e).

The safety-defeating nature of Cumberland's position is demonstrated by the results it would allow. According to Cumberland, a bleeder system would be adequately diluting methane even if extensive parts of the system contained explosive levels of methane, as long as the methane was diluted to less than 2% before it joined another split of air. The Court should reject such an illogical interpretation.

The 2% limitation in Section 75.323(e) recognizes that, as a general matter, the converse of Cumberland's argument is true, i.e., a bleeder system is likely not to be functioning effectively to dilute methane if methane concentrations exceed 2% at the 75.323(e) evaluation points. Tr. 951; R-1 at 87 ("at the point the bleeder system can no longer reduce methane concentrations to below 2.0% before the bleeder split enters another split of air, the bleeder system has reached its limits and more pressure is necessary to increase airflow"). Contrary to Cumberland's argument, however, the fact that the 2% limit is complied with at the Section 75.323(e) evaluation points is not a reliable indicator of whether a bleeder system is diluting methane effectively in other parts of the system.

Moreover, like Section 75.334(b)(1), Section 75.323(e) is derived from Section 303(z)(2) of the Mine Act. As already

stated, Section 303(z)(2) was carried over from the Coal Act. The Conference Reports accompanying the Coal Act state:

> As an additional safeguard when ventilation is required, the conference agreement provides that air coursed through underground areas from which pillars are wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. The managers intend that this latter provision not be construed as permitting accumulations of methane near or in the explosive range in the pillared or abandoned areas on the basis that the methane in the return does not exceed such percentage, and also expect that the Secretary will establish a lower percentage as soon as technology permits.

Senate Conference Report on S. 2917, Cong. Record. pp. 39982-39999, December 18, 1969, Legis. Hist. at 1613 (1975), and House Conference Report on S. 2917, 82, Legis. Hist. at 1526 (emphases added). Cumberland's argument is fatally at odds with Congress' intent that the 2% methane limit for a split of air before it enters another split not be considered the measure of adequate dilution in other parts of the bleeder system. Cf. Legis. Hist., supra., at 1526, 1613 (mine inspector "must be assured that such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in the area") (emphases added).

Cumberland's argument is also at odds with the MSHA course book, Bleeder and Gob Ventilation Systems (R-1) on which it relies. Br. at 30. The text specifically states, "it must be recognized that bleeder splits leaving certain bleeder systems do not enter a return air course. The air instead is exhausted through openings directly to the surface. Measurements are required in these openings and they are part of the means for determining the effectiveness of the bleeder system." R-1 at 79-80 (emphasis added). See also R-1 at 87 (JA 305) ("The methane concentration in air that is sufficiently 'diluted' is not specified in the regulation except, as discussed previously, Section 75.323(e) limits the methane in the bleeder split of air to 2.0% immediately before it enters another split of air").

In short, the Secretary's interpretation of Section 75.334(b)(1) and 75.323(e) is easily harmonized with Section 75.323(e)'s requirement; and, unlike Cumberland's interpretation, it comports with the principle that when interpreting two provisions, one must, where possible, give meaning to both and render neither superfluous. Qi-Zhuo v. Meissner, 70 F.3d at 139.[10]

[10] Of course, even if the standard were ambiguous, the Secretary's permissible interpretation of her own regulation would be entitled to complete deference. See cases cited above,

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT CUMBERLAND VIOLATED SECTION 75.334(b)(1)

The standard of review for evaluating factual findings by the Commission is the substantial evidence test. To be affirmed, the Commission's findings of fact need only be supported by substantial evidence on the record considered as a

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pp. **[St. of Review section]**. Cumberland argues, however, that the interpretation advanced by the Secretary and accepted by the Commission might fail to provide mine operators with adequate notice of the conduct required. Br. at 30. In effect, Cumberland argues that the standard, as interpreted by the Secretary and the Commission, is vague on its face. When a law does not reach constitutionally protected conduct, however, a party asserting a facial vagueness challenge "must demonstrate that the law is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). Accord Navegar, Inc. v. United States, 103 F.3d 994, 1001-02 (D.C. Cir. 1997). "To sustain such a challenge, the complainant must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified ...." Hoffman, 455 U.S. at 495 n.7 (internal quotation marks and citation omitted). Cumberland has not demonstrated, and could not demonstrate, that the interpretation in question "is capable of no valid application" (Navegar, 103 F.3d at 1001) -- i.e., that there can be no cases in which a reasonable mine operator would understand that its bleeder system is not functioning effectively. (We show in part II that the standard is not vague as applied to the facts of this case.). In any event, Cumberland does not argue, and did not argue before the Commission, that it did not have adequate notice in this case. See 26 FMSHRC at 647. As a result the argument is waived. Excel Mining, 334 F.3d at 10 n.11 (D.C. Cir. 2003 (applying Section 106(a) of the Mine Act, 30 U.S.C. § 816(a)).

whole. Section 106(a) of the Act, 30 U.S.C. § 816(a); RAG Cumberland, 272 F.3d at 596. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Resort Nursing Home v. NLRB, 389 F.3d 1262, 1270 (D.C. Cir. 2004).

Cumberland primarily contends that because the bleeder system was diluting methane and carrying it out of the bleeder shaft to some degree, the Commission's decision is not supported by substantial evidence. Br. at 39. As demonstrated above, however, the Commission properly determined that, under Section 75.334(b)(1), a bleeder system must "control air passing through the area and continuously [] dilute and move methane-air mixtures away from active workings and into a return or to the surface in an effective manner." 22 FMSHRC at 647 (JA 42). Substantial evidence -- including testimony from Cumberland's own witnesses -- supports the Commission's affirmance of the judge's finding that the bleeder system was not diluting and carrying away methane effectively.

Cumberland's own witness, Safety Manager Bohach, testified that "what was happening is that the number one bleeder fan was not being satisfied, was not getting enough air though the air courses ...." Tr. 1572-73 (JA 201). MSHA Ventilation

Specialist Urosek agreed. Tr. 1376 (JA 188), 2027.

Safety Manager Bohach acknowledged that the 3.6% methane readings at the No. 1 shaft were "bad," although he later testified that by "bad" he meant "atypical" and that he would have expected 1.8% methane readings at the shaft. Tr. 1327-28 (JA 184). Bohach further testified that because the No. 1 bleeder fan was not being satisfied, the fan was pulling "harder" on the southeastern corner of the gob "[a]nd that air that was able to get back to that number one fan was not enough to be able to dilute the methane that was coming off of the gob." Tr. 1294-95 (JA 180). Senior Mining Engineer Peelor, another Cumberland witness, admitted that operating the mine with levels of methane in the shaft at 3.6% was hazardous. Tr. 1725-27 (JA 221). Peelor admitted that the condition had to be corrected as soon as possible and that “something had to be done to try to correct what was going on out at the shaft." Tr. 1731 (JA 222).[11] Cumberland’s own witness, Mine Foreman Evans,

[11] Cumberland implies that the only reason it took corrective action was because it knew that MSHA considered the amount of methane at the shaft to be a violation. Br. at 16. This argument is disingenuous. At the hearing, Peelor testified as follows:

JUDGE FELDMAN:

acknowledged that if the methane levels at the shaft had risen to 4%, the mine should have been evacuated because the high methane concentration would show that there was "trouble" in the bleeder system. Tr. 1954 (JA 254).

Moreover, the weekly examination records reflected that methane concentrations at the shaft were rising in the weeks before July 5, 2000. 23 FMSHRC at 1255 (JA 23). This pattern

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> Putting aside the law, I mean, is there any hazard involved [operating at 3.6 percent methane at the bleeder shaft]?
>
> A. Yes there are hazards involved with that.
>
> JUDGE FELDMAN:
> What, in your opinion, are the hazards?
>
> A. Operating at levels that high, I mean, just operating with methane, elevating levels of methane out of a ventilation shaft, we have to bring those back down.
>
> * * *
>
> JUDGE FELDMAN
> That's the [g]oal, but why do you have to bring them back down. . .
>
> A. With methane, you have a potential fuel. If you allow it to go unchecked, it can go into the explosive range. And it's our job to be able to keep that from happening. And when the problem was detected, we had to respond to it, thereby turning the fan down and trying to effect changes to bring those methane levels down.

Tr. 1727-28 (JA 221-2) (emphasis added).

indicated that methane levels underground were also rising. MSHA Ventilation Specialist Guley, Inside Laborer and Safety Committeeman Hroblak, and MSHA Assistant District Manager Strickland all testified that, based on the design of the bleeder system and a comparison of contemporaneous BEP 5A and No. 1 bleeder shaft methane concentrations, the quantity of methane at BEP 5A was approximately two times the quantity of methane at the No. 1 shaft. 23 FMSHRC at 1258 (JA 26); Tr. 127 (JA 71), 140-42 (JA 70-72), 558-59 (JA 116), 562-64 (JA 117), 681 (JA 125), 721 (JA 128), 724 (JA 129); G-7, page 64, lines 12, 18 (JA 282), page 68, line 9 (JA 284), page 70, line 32 (JA 285). Methane readings at BEP 5A and the No. 1 bleeder shaft for the three weeks before July 5, 2000, corroborate the 2:1 correlation. G-7, page 64, lines 12, 18 (JA 282), page 68, line 9 (JA 284), page 70, line 32 (JA 285). Moreover, the Commission's finding that methane in the bleeders was significantly higher than 3.6% -- the amount exiting the No. 1 shaft -- is supported by evidence that relatively fresh air traveling down the 1B entry (the southern perimeter) joined the air traveling down the eastern perimeter, after the eastern perimeter air had passed BEP 5A and before it exited the No. 1 shaft. 23 FMHSRC at 1258 (JA 26); 26 FMSHRC at 649 (JA 44), Tr.

497-05 (JA 109-111), 505 (JA 111), 522-23. See G-7, page 60, line 26 (JA 281); page 64, line 7; page 70, line 27 (JA 285; page 73, line 34 (JA 287). Thus, the air in the eastern perimeter had a higher methane concentration when it passed BEP 5A than it did when it exited the shaft and was measured at 3.6% methane on July 5.

MSHA Assistant District Manager Strickland testified that, based on the design of the bleeder system and the high readings at the No. 1 shaft, he was confident that there were explosive levels of methane somewhere between the longwall and BEP 5A. Tr. 724-25 (JA 129). MSHA Ventilation Expert Urosek testified that an excess of 2% methane exiting the bleeder shaft indicates there is a problem in the bleeder system. Tr. 1029 (JA 153). Ventilation Specialist Hixson testified that methane should be dissipated by the time it reaches the No. 1 shaft. Tr. 406 (JA 106).

Cumberland argues that the Commission erred in finding that comparison readings between the levels of methane at the No. 1 bleeder shaft and in the travelable bleeder entry indicated that there were higher levels of methane underground because the Commission did not consider bottle sample readings taken before July 5. Br. at 37, citing Tr. 1213; JA 318. Examination of the

comparison readings referred to by Cumberland, however, only bolsters the conclusion that there were higher levels of methane underground than at the No. 1 shaft.

In making this argument, Cumberland refers to four bottle samples taken on July 3 at the No. 1 shaft indicating methane levels of 3.63%, 3.20%, 3.31%, and 3.22%. R-7 (JA 318). Before the Commission, Cumberland suggested that those readings should be compared to a July 3, 2000, 3.8% methane reading taken underground at BEP 5A. Reply Br. at 9 (Certified Index at 3001 p. 9). Inasmuch as the 3.8% methane reading at BEP 5A was greater than all of the readings at the No. 1 shaft, the comparison supports the Commission's finding that there were higher levels of methane underground than were exhausting from the No. 1 shaft.

Moreover, if the same ratio between methane at BEP 5A and the average of the four readings taken at the bleeder shaft (3.34%) existed on the afternoon of July 5, 2001, when methane readings at the bleeder shaft were 3.6%, methane levels at BEP 5A would have been approximately 4% -- the level at which Cumberland conceded it would have withdrawn miners because there was a "problem" in the system. 23 FMSHRC at 1257 (JA 25); Tr. 1895-96 (JA 245-46), 1954 (JA 254).

In any event, as the Commission also noted, a comparison of a non-bottle sample taken on July 3 shows 3.8% methane at BEP 5A

and 1.8% or 1.9% methane at the No. 1 bleeder shaft -- readings that are close to a 2:1 ratio. 26 FMSHRC at 650 (JA 45). Moreover, even if there was one aberrational point on July 3 when the ratio between the methane levels at BEP 5A and the methane levels at the No. 1 shaft was not 2:1,[12] all of the evidence discussed above, including all of the other sample comparisons and the testimony from Cumberland's own witnesses that the amount of methane coming out of the bleeder shaft was hazardous and that air being pulled by the No. 1 fan was insufficient to dilute the air coming out of the gob, establishes that the bleeder system was in violation of Section 75.334(b)(1).

Finally, Cumberland asserts that substantial evidence does not support the Commission's decision because the Commission improperly applied a 2.0% limit to the air in the No. 1 bleeder shaft and at locations underground that could not be traveled. Br. at 36, citing 26 FMSHRC at 649 (JA 44). The Commission did not.

It is true that in affirming the judge's finding that high

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[12] Ventilation Specialist Urosek testified that if there was a 1:1 ratio on July 3, it might have been because around that time Cumberland was making changes to the ventilation system. Urosek testified that, as a result, the system might have been ventilating a part of the gob that had not been well ventilated before and a large amount of methane might have been pulled out of the gob. Tr. 2031-32.

methane levels at the No. 1 shaft showed that the bleeder system was not functioning effectively, the Commission cited testimony from the Secretary's witnesses that the effectiveness of the bleeder system is questioned if methane exiting the system contains more than 2% methane. J.A. 44, citing Tr. 406 (JA 106), 951 (JA 142). The Commission, however, also cited the testimony of Safety Manager Bohach that readings of 3.6% at the bleeder shaft were "atypical," and the testimony of Senior Mining Engineer Peelor and Engineering Manager Dubois that having 3.6% methane exiting from the No. 1 bleeder shaft revealed a problem that needed to be addressed. 26 FMSHRC at 649 (JA 44), citing Tr. 1665 (JA 213), 1726-28 (JA 221-222), 1736 (JA 224), 1824 (JA 239). The Commission made clear that it was not "suggest[ing] that a 2% methane limit applied to the bleeder shaft," and that it merely viewed such evidence as supporting the conclusion that, "regardless of whether a methane limit applies to a bleeder shaft, all parties agreed that the methane levels exhausting from the No. 1 bleeder shaft were elevated." 26 FMSHRC at 649 (JA 44). Indeed, the testimony set forth above establishes not only that all parties agreed that methane levels were elevated, but that all parties in essence agreed that the methane levels exhausting from the No. 1 bleeder shaft indicated that the bleeder system was not functioning effectively. Thus, under the Secretary's legally correct

interpretation of the applicable standard, the determination that a violation occurred was clearly supported by substantial evidence.

CONCLUSION

For the reasons stated above, the Secretary requests that the Court deny Cumberland's petition for review and affirm the Commission's decision.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

ROBIN A. ROSENBLUTH
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard, 22nd Floor
Arlington, Virginia 22209-2296
Telephone (202) 693-9333

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Local Rule 32, I certify that the foregoing brief contains 10,036 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32(a)(2), as determined by the Microsoft Word processing system used to prepare this brief.

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Robin A. Rosenbluth

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were sent by first class U.S. mail postage pre-paid this 31st day of May 2005, to:

Ralph Henry Moore II
Jackson Kelly PLLC
Three Gateway Center
401 Liberty Ave., Suite 1340
Pittsburgh, PA 15222

Thomas Stock, General Counsel
Federal Mine Safety and Health
Review Commission
601 New Jersey Ave., Suite 9500
Washington, D.C. 20001

_____
Robin A. Rosenbluth

ADDENDUM

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