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MAJOR DECISIONS OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION 2002-2007

Secretary of Labor on behalf of Garcia v. Colorado Lava, Inc.
24 FMSHRC 350 (April 2002)

This discrimination case involved a miner's allegation that he was not retained in his position by a new owner of a mine because of safety complaints he made to the Mine Safety and Health Administration ("MSHA") while he was employed by the previous owner of the mine.

The evidence established that Garcia, a front-end loader operator, complained of inadequate parking brakes on his equipment, and when the operator failed to rectify the condition, Garcia reported the matter to MSHA. MSHA examined the equipment and issued a citation. Garcia's supervisor suspected that Garcia had filed the complaint and made some derogatory remarks about him.

The property was subsequently sold and the new owners retained all but two employees. Garcia was one of the two not re-hired.

The judge granted the motion of Colorado Lava (the new owner) to dismiss the matter on the grounds that Garcia had not established a prima facie case of discrimination. While the judge found protected activity and adverse action, he determined that there was no motivational nexus between the two since the person responsible for not re-hiring Garcia was unaware of the protected activity and had no animus towards Garcia.

The Commission vacated and remanded the case to the judge, holding that he failed to consider all the evidence relating to the disparate treatment of Garcia that might have, by inference, established an illegal motivation for not re-hiring Garcia. Had the judge examined the evidence there might have been a sufficient basis for a prima facie case and the complaint could have proceeded to allow the operator to rebut the prima facie showing.

On remand, the judge found that the operator had not unlawfully discriminated against Garcia. 25 FMSHRC 144 (Mar. 2003) (ALJ). The Commission declined review, and Garcia appealed to the Tenth Circuit Court of Appeals; however, the parties settled the matter and the case was ultimately dismissed.

Commissioner Jordan filed a concurring opinion in the case.

This case was the subject of an Equal Access to Justice Act attorney fee application, decided by the Commission in 27 FMSHRC 186 (Mar. 2005), discussed below.

Secretary of Labor v. Vermont Unfading Green Slate Co.
24 FMSHRC 439 (May 2002)

This proceeding involved several citations issued to a quarry, one of which involved an alleged violation of the Mine Safety and Health Administration's machinery guarding rule. The judge had affirmed a citation issued for lack of guarding of a v-belt on a slate trimmer, but the operator (Vermont) had argued that the guarding requirement had been met because the pinch point in question was guarded by location.

The Commission vacated the judge's holding and remanded the matter by directing the judge to give further consideration to the operator's evidence.

An interesting aspect of the case involved the procedural rights of a pro se party in proceedings before the Commission. Vermont was not represented by counsel and was led to believe that both of the issuing inspectors would be present at the hearing. Only one inspector showed up for the hearing, however and he testified as to the interpretation of his missing colleague's inspection notes. Vermont protested but did not ask for a continuance to allow Vermont to subpoena the missing inspector. The Commission held that in the interest of justice, the pro se operator should be given the opportunity to call the missing inspector as a witness and to demonstrate alleged inconsistencies between the inspectors' descriptions of the conditions giving rise to the citation.

Commissioner Jordan wrote separately, concurring in part and dissenting in part.

On remand the operator was given the opportunity to depose the missing inspector but declined to do so, and the hearing record was closed. The citation was ultimately upheld. 24 FMSHRC 890 (Sept. 2002) (ALJ).

Secretary of Labor v. Virginia Slate Co.
24 FMSHRC 507 (June 2002)

This case was previously before the Commission on appeal. In May 2001, the Commission issued a decision affirming the judge's determination of no unwarrantable failure with regard to one citation, but vacating and remanding the judge's negative unwarrantable failure determinations for the remaining citation and three orders. The Commission also vacated and remanded the judge's penalty assessments because he failed to consider the relevant penalty criteria. 23 FMSHRC 482 (May 2001). After the judge issued his decision on remand, the case again came before the Commission on the Secretary of Labor's petition for discretionary review challenging the judge's unwarrantability determination with regard to two of the four violations on remand. The Commission also issued a direction for review concerning the issues raised by the judge's penalty assessments on remand.

In this second appellate decision, the Commission again vacated the judge's negative unwarrantability determination because he had failed to address all of the relevant factors. It also vacated and remanded his penalty assessments because they failed to include factual findings for all of the relevant penalty criteria. The case was remanded to the judge.

On remand, the judge found that one violation was the result of the operator's unwarrantable failure, and that one was not. 25 FMSHRC 105 (Mar. 2003). He also analyzed the penalties for the violations at issue, ordering a total penalty of $1,850.

***Secretary of Labor v. Freeman United Coal Mining Co.*, 24 FMSHRC 524 (June 2002), and *Secretary of Labor v. American Coal Co.*, 24 FMSHRC 613 (June 2002)**

These cases involve a violation of 30 C.F.R. § 75.1909 which requires that diesel powered equipment have an engine approved under subpart E of Part 7 of the regulations. That subpart contains the requirement actually at issue in these proceedings (30 C.F.R. § 7.90), which mandates that all approved diesel engines used in underground coal mines be identified by a "legible and permanent approval marking inscribed with the assigned Mine Safety and Health Administration ("MSHA") approval number and securely attached to the diesel engine" and which shall also contain information regarding the various parameters requisite for MSHA approval.

After MSHA revised Part 7 in 1996, engine manufacturers such as American Izuzu Motors notified their underground coal mine customers that the manufacturers would be issuing new approval plates for their engines that would specify that the engines complied with the requirements of revised Part 7. However, in the case of Izuzu, each new approval plate would cost $450.00. Under the circumstances, for example, Freeman would have to have paid $27,000.00 to cover the Izuzu engines used in its underground mines.

Freeman chose to manufacture its own approval plates. When an MSHA inspector discovered the Freeman-generated approval plates, however, he cited the operator for a violation of the approval standard on the grounds that only the manufacturer of an approved engine can supply the approval plate.

The judge in *Freeman* held that the plain language of section 7.90 only required the presence of an approval marking but did not require that the marking be supplied by the manufacturer only. He therefore dismissed the citations.

The same circumstances arose in *American Coal Co.*, but there the judge held that the regulation was ambiguous and that, therefore, he would defer to the Secretary's interpretation, i.e., that only the equipment manufacturer can supply the approval plate. He noted that an operator cannot determine that a particular engine is covered by an MSHA approval because it has no way of knowing whether the engine was manufactured according to the design drawings specifications upon which the MSHA approval was based.

On review in *Freeman*, Commissioners Jordan and Beatty, writing separately, voted to reverse the judge. In *American Coal*, the same two Commissioners, again writing separately, voted to affirm the judge. Commissioner Verheggen dissented in both cases. Commissioner Jordan held that the language of the regulation on its face required that only the manufacturer is authorized to provide the approval plate. Commissioner Beatty held that the regulation was ambiguous and that he would, therefore, defer to the Secretary. Chairman Verheggen, in dissent, held that the regulation is silent as to which entity - manufacturer or equipment owner - is responsible for the providing the approval plate. Accordingly, the mine operator can supply it provided that it complies with the criteria in section 7.90. Chairman Verheggen went on to state that if the Secretary wanted responsibility for fabrication of the approval plate to reside only with the manufacturer MSHA would have to accomplish that end through rulemaking.

Secretary of Labor v. Douglas R. Rushford Trucking
24 FMSHRC 648 (July 2002)

This case involving a miner fatality had been before the Commission on two previous occasions. Upon a second remand for reassessment of a civil penalty, the judge had assessed a penalty of $4,000, the same amount he had assessed in his previous decision. The Commission ruled that, once again, the judge had failed to adhere to its remand instructions. In particular, he had failed to acknowledge its holding that self-imposed ignorance could not be a mitigating factor in determining the level of the operator's negligence. The Commission vacated the penalty assessed by the judge and assessed a penalty of $15,000 against the operator.

Secretary of Labor v. Watkins Engineers and Constructors
24 FMSHRC 669 (July 2002)

This proceeding involved the Mine Safety and Health Administration's ("MSHA") jurisdiction over a cement plant. The case arose when one of Watkins' employees was severely injured after falling 70 feet at a construction site Watkins was supervising for a cement plant. Watkins argued that the ensuing citations were invalid on the grounds that MSHA lacked jurisdiction to inspect the plant. The plant in question stockpiled, crushed and then mixed limestone, shale, and quartz, all of which are mined at other locations.

The Mine Act defines a "coal or other mine" to include "facilities . . . used in . . . the milling of . . . minerals." Section 3(h) of the Act permits the Secretary of Labor to determine what constitutes "milling." The Commission rejected Watkin's assertion that this was an unconstitutional delegation of power. Watkins also argued that the memorandum of understanding between MSHA and the Occupational Health and Safety Administration ("OSHA"), whereby MSHA is given jurisdiction over cement and alumina plants restricts MSHA's jurisdiction to facilities engaged in separating the waste elements of minerals from valuable materials. The Commission also rejected this argument.

The Commission also affirmed the judge's determination that Watkins committed three

violations and affirmed his findings that two of the violations were due to the operator's unwarrantable failure.

Secretary of Labor v. Lodestar Energy, Inc.
24 FMSHRC 689 (July 2002)

The case involves a violation of 30 C.F.R. § 75.364(b)(1), which requires an examination of at least one entry of each intake air course every seven days to determine whether hazardous conditions exist. The ventilation regulations define "air course" as "an entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to the leakage." Lodestar operated an underground mine in which coal is produced by longwall methods. In this instance Lodestar had constructed three intake entries alongside a longwall panel. Intake air entered the No. 1 and No. 2 entries from a common source at crosscut 10, but between crosscuts 10 and 73, a distance of about 1.25 miles, the entries were separated by permanent ventilation controls and solid coal. At crosscut 73 however the air from the two entries remixes before exiting the mine.

The issue then was whether separate weekly inspections are required in entries with a common entry and exit even though they may be separated for some duration between the entry point and the exit point.

The Commission first determined that the standards did not specifically address the configuration existing in the Lodestar mine. The Commission rejected Lodestar's argument that only one entry need be inspected and its reliance on a prior Commission decision in *Mettiki Coal Corp*., 10 FMSHRC 1125 (Sept. 1988). The *Mettiki* decision was followed by the Mine Safety and Health Administration's ("MSHA's") revisions to its ventilation standards in 1992, in which the agency included a new definition of "air course." Thus the Commission upheld that the Secretary's interpretation of section 75.364 insofar as it requires an examination of each entry. Nevertheless the Commission remanded the matter to the judge to determine whether Lodestar had adequate notice of its responsibilities under the standard.

Commissioner Jordan wrote a dissenting opinion. She concluded that both entries were separate air courses and thus subject to the inspection requirement. However, because she found the language of the regulation plain, she determined that the operator had adequate notice of its provisions. Accordingly, she would have affirmed the judge's decision finding a violation.

On remand the judge ruled that the operator had adequate notice of the standard's requirements. 25 FMSHRC 57 (Feb. 2003) (ALJ).

(*The Commission lacked a quorum from August 2002 until spring of 2003, and could not, therefore, hear and decide cases for much of FY 2003.*)

Secretary of Labor v. Lodestar Energy, Inc.
25 FMSHRC 343 (July 2003)

Lodestar filed a petition for discretionary review of a judge's decision in a penalty proceeding in which the judge failed to modify an order issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

The judge affirmed the two underlying citations (for failing to properly seal circuit breakers, set the circuit breakers to trip at a required amperage, and train miners in the operation of circuit breakers, and for failing to provide a properly-functioning methane detector for a continuous miner), but found that neither violation was significant and substantial. However, the judge only modified one of the section 104(d) orders to a section 104(a) violation.

In its petition, Lodestar requested the Commission to modify the other section 104(d) order because the order lacked the required bases to stand as either a section 104(d)(1) order or 104(d)(1) citation. The Commission has recognized its authority, and that of its judges, to make such modifications pursuant to sections 104(h) and 105(d) of the Mine Act. The Secretary agreed that the modification should be made, noting that there had been no valid orders or citations issued under section 104(d) in the 90 days preceding the issuance of the orders at issue.

The Commission therefore modified the section 104(d)(1) order to a section 104(a) citation.

Secretary of Labor v. Western Industrial, Inc.
25 FMSHRC 449 (August 2003)

Western Industrial challenged a citation issued for its failure to provide and maintain safe access to working places (30 C.F.R. § 56.11001) on "fair notice" grounds and also disputed the judge's holding that it violated the regulation and that the violation was significant and substantial.

In his decision, the judge relied on a dictionary definition of "safe" to support his conclusion that Western Industrial had fair notice of the standard and credited the testimony presented by the Secretary's witnesses in upholding the violation. The Judge applied a "reasonably prudent person" standard to determine that Western Industrial had notice and should have recognized that its access was unsafe. The judge affirmed the violation, noting the detailed description of the access provided by the inspector and the hazards spotlighted in the inspector's testimony.

The Commission affirmed the judge, citing to the conclusory nature of the operator's witnesses, the detailed evidence of record and the deference granted to credibility determinations and factual determinations supported by substantial evidence. The Commission also found that

Western Industrial did not contend that the failure of notice was the result of an ambiguous standard. Rather, it contended that its safety director thought the access was safe.

The Commission also rejected Western Industrial's challenge to the citation on grounds that the violation was abated by moving a ladder two inches closer to a platform. The Commission concluded that the method of abatement was not pertinent to the existence of a violation.

Secretary of Labor v. Black Butte Coal Co.
25 FMSHRC 457 (August 2003)

Black Butte petitioned for interlocutory review of a judge's denial of its motion to dismiss. The motion was based on an allegation that the Secretary had failed to timely propose penalty assessments.

The Commission granted interlocutory review on grounds that the question, which was analogous to a statute of limitations issue, involved a controlling question of law that could materially advance the final disposition of the proceeding.

Section 105(a) of the Mine Act requires the Secretary to notify the operator of proposed penalty assessments "within a reasonable time" after issuing a citation or order. The proposed assessment had been sent to the operator thirteen months after the issuance of a citation arising out of a fatal accident.

According to the Secretary's counsel, the delay was due in part to the need to conduct a fatality investigation and write an accident report, which was released over a month after the citation was issued. She further explained that due to the operator's submission of 30 items of concern on the initial accident report, it was necessary to issue a revised report resulting in an additional three-month delay. She also cited an extremely high case load and less than normal staffing levels due to training and leave absences.

The Commission noted that the operator did not identify any evidence in the record to refute these allegations. The Commission affirmed the judge's exercise of discretion in accepting the Secretary's representations over the assertions of the operator and his finding that no prejudice arose from the delay.

Secretary of Labor v. Cougar Coal Co.
25 FMSHRC 513 (September 2003)

The Commission directed, on its own motion, review of a judge's dismissal of two citations under 30 C.F.R. §§ 50.10 and 50.12 and granted a petition for discretionary review filed by the Secretary, which contested the judge's negative unwarrantable failure and section 110(c) determinations, as well as the dismissal of the Part 50 violations.

In this case, a miner had disregarded repeated instructions to cut through a power line and not to attempt to disconnect the line. In attempting to disconnect the line from a power pole, the miner received a severe electric shock and fell 18 feet to the ground, sustaining serious injuries that required CPR and hospitalization.

The incident was not reported to the Mine Safety and Health Administration ("MSHA"), which learned about it during an inspection of another mine the next day. Cougar Coal cut the power line and removed it without MSHA's permission before MSHA was able to investigate the accident.

The Commission affirmed on substantial evidence grounds the judge's dismissal of the section 110(c) violation against the general mine manager, which was based on his credibility determination that the manager had expressly prohibited the actions resulting in the violation.

The Commission also affirmed the judge's determination that neither the violative conduct nor the order to cut the power line with a hacksaw constituted an unwarrantable failure. The miner's disregard of his superior's direction was not imputed to the operator, which was found to have taken reasonable steps to prevent the experienced miner from engaging in the violative conduct. The miner's actions were found to be inconsistent with his six-year work history under the general mine manager. Furthermore, the Commission noted that cutting the line presented no danger and was therefore insufficient to sustain an unwarrantable failure citation.

The Commission reversed the judge on the Part 50 citations. The judge had held that the incident did not amount to an "accident" and that the failure to immediately notify MSHA and to preserve evidence did not amount to violations. The Commission noted that the near-electrocution, fall from a dangerous height and head injury sustained on the way to the ground had a reasonable potential to cause death "per se." The Commission thus rejected Cougar's contention that the miner's consciousness and somewhat alert state after being revived by CPR at the scene indicated that the incident did not pose a reasonable potential to cause death.

Commissioner Beatty dissented from both the section 110(c) and unwarrantable failure portions of the decision.

Secretary of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.
25 FMSHRC 585 (October 2003)

In this proceeding seeking an order of temporary reinstatement, the Commission affirmed a judge's determination that the underlying discrimination complaint was not frivolous. The Secretary claimed that Ondreako was laid off by the operator after making safety complaints. The operator presented evidence which the judge found might amount to "a convincing defense to Ondreako's complaint in the underlying discrimination case," but declined to address conflicts

in testimony at this stage, noting the narrow scope of the hearing. He therefore ordered Ondreako reinstated to the position he held immediately prior to his lay-off, or to a similar position at the same rate of pay and with similar benefits.

The Commission affirmed the judge, noting the narrow scope of review and finding substantial evidence supported the judge's determination on the only issue before the Commission – i.e., whether the complaint was frivolously brought. The Commission also found that Kennecott's motion for a stay of temporary reinstatement failed to demonstrate "extraordinary circumstances" and was therefore denied.

Secretary of Labor v. Georges Colliers, Inc.
26 FMSHRC 1 (January 2004)

In this proceeding seeking attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), the Commission vacated and remanded a judge's denial of the application for an award. The judge had analyzed the application under tests applied to applicants who had prevailed in proceedings against the government. However, the EAJA was amended in 1996 to include certain adversary proceedings against private parties where the government's demand has been excessive and unreasonable. Under this standard, the private litigant was not required to prevail in the underlying action.

In this case, Georges Colliers had not prevailed and had in fact been found to have committed 559 violations, 272 of which were significant and substantial and 39 of which resulted from unwarrantable failure. Mine officials were found liable under section 110(c) for most of the knowing violations charged.

Under the standard applicable to fee awards covered by the 1996 amendments, the judge was required to compare the penalties imposed to the proposed assessments issued by the Secretary. He also needed to determine whether the Secretary acted reasonably in proposing a particular penalty. The case was remanded for these determinations, as well as for findings regarding the operator's submission of financial data and the Secretary's response. The Commission also stated that in the event that the judge determined that the Secretary's proposed penalties were excessive and unreasonable, he should address whether the operator committed willful violations or acted in bad faith, or whether special circumstances made an award unjust.

The Commission also allowed the case to proceed despite the late filing of the application by counsel for Georges Colliers. The Commission noted that there were unusual circumstances present because the judge's decision was not sent by certified mail, in accordance with Commission procedure, although the attorney applicant attributed the delay primarily to the fact that she received mail at a bank of mailboxes prone to misdelivery.

Commissioner Jordan dissented, and would have dismissed the application as untimely, finding the operator's excuse to be insufficient.

On remand, the judge concluded that the penalties proposed by the Secretary were neither excessive nor unreasonable and that therefore the operator was not entitled to fees. 26 FMSHRC 371 (Apr. 2004) (ALJ).

The Commission accepted a petition for discretionary review of the judge's decision on remand. It subsequently issued a second appellate decision *see Georges Colliers, Inc.*, (27 FMSHRC 362 (Apr. 2005) discussed below), involving the operator's EAJA application.

Secretary of Labor v. RAG Shoshone Coal Corp.
26 FMSHRC 75 (February 2004)

The Commission reversed a judge's decision upholding an occupational code used by the Secretary to designate the miner required to wear the device used to collect respirable coal dust samples pursuant to 30 C.F.R. § 70.207. The Mine Safety and Health Administration ("MSHA") uses a system of three-digit codes to identify occupations in mechanized mining units. Section 70.207(a) requires underground mine operators to submit five respirable dust samples bimonthly for the "designated occupation" of each mechanized mining unit. The codes are developed without public input and generally identify work positions.

Pursuant to a separate regulation, operators are also required to collect and submit samples for designated areas of the mine.

MSHA notified RAG Shoshone that it would be required to change its designated occupation for the longwall mechanized mining unit to the "060" occupation. This designation had been mandatory for approximately 85 percent of longwall operations in the United States. The 060 is identified as a "longwall Return-Side Face Worker." Although this is not a job description and does not identify any individual, MSHA has provided policy guidance explaining the use and implementation of the 060 as requiring operators to transfer the sampling device from miner to miner to ensure that it is always on the miner who "works nearest the return air side of the longwall face," in compliance with section 70.207(a).

RAG Shoshone was cited when it submitted dust samples for a different occupation, intending to challenge the validity of the 060 designation. A divided Commission reversed the judge's decision upholding the violation, finding that the use of the 060 code eradicated the regulatory distinction between occupational sampling and area sampling.

The Commission also held that the 060 code and the procedural requirements MSHA adopted through its use constituted a substantive rule, requiring notice and comment rulemaking. The use of the 060 code had legal effect in that, in the absence of the code, there would not be an adequate basis for the Secretary's issuance of the citations.

While the majority noted the mandatory transfer of the sampling device from a procession of miners, Commissioner Jordan's dissent asserted that the position description for the 060 code

was simply a restatement of the regulatory requirement under section 70.207(a), viewing this as a literal and plain application of the standard which required no further rulemaking because the standard had undergone notice and comment review.

The Secretary did not appeal the decision. The United Mine Workers of America, however, sought review of the decision in the D.C. Circuit Court of Appeals, but the Court granted RAG Shoshone's motion to dismiss the petition.

Secretary of Labor v. Cannelton Industries, Inc.
26 FMSHRC 146 (March 2004)

The Secretary filed a petition for discretionary review ("PDR") in this case arising out of the "pumper's exception" to the general requirement in 30 C.F.R. § 75.360 that preshift examinations occur before miners enter a mine. Cannelton was cited for failing to perform a preshift examination before certified pumpers entered an idle coal mine to inspect pumps used to keep water out of the mine.

The judge concluded that where a pumper is the only person entering an idle mine and he examines the areas where he works and travels, the pumper's exception provides the safeguards that a preshift examination would provide. The judge further noted that it made little sense to double the exposure to possible hazards in the mine by requiring another examiner to preshift those areas where the pumper will be traveling and working.

On review, the Secretary argued that the preshift requirement to inspect energized trolley wires (at issue here) is not within the scope of the pumper's exception under section 75.360(a)(2) because the wires are not located in an area where the miners (i.e. the pumpers) work or travel. The Secretary also cited language in section 75.360(a)(1), which states that "no person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval."

The Commission held that under the express terms of section 75.360(a)(1)'s discrete provisions, a certified pumper does not need a preshift examination to enter or remain in the mine. It also noted that the preamble to the regulations at issue made clear that the Secretary did not interpret the regulations to require preshift examinations of areas where miners do not work or travel.

Commissioner Jordan dissented from the Commission's decision.

The Commission also resolved a procedural matter by rejecting Cannelton's motion to dismiss the PDR on grounds that there had only been two Commissioners on the Commission at the time review was granted. Both Commissioners voted to grant review.

The Secretary appealed the Commission's decision to the D.C. Circuit. Spartan Mining Company was substituted as the successor to Cannelton. The Court of Appeals vacated the Commission's decision, ruling that the pumpers' exception permitted pumpers to conduct their own examinations only in areas where they were scheduled to work, but did not permit other areas to go unexamined. *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005).

Secretary of Labor v. Dacotah Cement Co.
26 FMSHRC 461 (June 2004)

This case addressed task training requirements for non-coal surface mines under 30 C.F.R. § 46.7. The Secretary's petition for discretionary review challenged a decision vacating a significant and substantial violation of the task training requirement. Two miners were assigned to change a hydraulic hose on a piece of mine equipment.

The more experienced miner began the task and was joined while in progress by the other miner, who had no recorded experience changing hydraulic hoses. The second miner received no instruction on the health and safety aspects of changing the hydraulic hose.

Although the hydraulic system had been de-energized, pressure had not been released using the pressure release valves. Thus, as the miners began loosening the hose, it was still pressurized and disconnected forcefully, injuring the miners.

The requirement for task training under subsection 46.7(d) may be satisfied by "[p]ractice under the close observation of a competent person." However, hazard recognition training specific to the assigned task must be provided in advance.

The judge found that the more experienced miner was adequately trained and able to supervise the other miner, but made no finding as to the other requirements in subsection (d). The Commission therefore reversed and remanded for a more thorough analysis of these other subsection (d) requirements.

Chairman Duffy and Commissioner Suboleski filed a concurring opinion.

On remand, the parties reached a settlement agreement. 26 FMSHRC 597 (July 2004) (ALJ).

Secretary of Labor v. RAG Cumberland Resources LP
26 FMSHRC 639 (August 2004)

In this case involving a bleeder system in an underground coal mine, the Commission unanimously agreed that the operator violated 30 C.F.R. § 334(b)(1) requiring that a bleeder system control air passing through the area and continuously dilute and move methane air mixtures away from active workings and out of the mine in an effective manner. The

Commission also ruled that the operator violated 30 C.F.R. § 75.363(a) because bleeder conditions were hazardous and were not immediately corrected. The Commission disagreed, however, as to whether the violation constituted an unwarrantable failure to comply with this latter standard, with three Commissioners finding that the Secretary had failed to establish unwarrantable failure. The majority took into account that the operator had not ignored the condition, but rather had begun to take steps to identify the problem and to make the appropriate ventilation changes to rectify the situation. The majority also noted that the Mine Safety and Health Administration had allowed the operator to continue operating under similar conditions on a prior occasion.

Commissioners Beatty and Jordan dissented in part, disagreeing with the majority's decision to reverse the judge's ruling that the violation of section 75.363(c) resulted from the operator's unwarrantable failure to comply with that standard.

The operator appealed the finding of a violation to the D. C. Circuit court, but the Secretary did not appeal the unwarrantable failure issue. The Court affirmed the Commission's ruling. 171 F. Appx. 852 (D.C. Cir. 2005).

The Court ruled that there was substantial evidence to support the Commission's finding that Cumberland's bleeder system was in violation of the regulation. It found that, based on the admissions of Cumberland's employees and the rising methane concentrations present during the time in question, there was a failure of Cumberland's bleeder system to perform in an effective manner.

Secretary of Labor v. Twentymile Coal Co.
26 FMSHRC 666 (August 2004)

In this case the Commission unanimously agreed that the operator had failed to provide task training in connection with the installation and use of a new loading chute in an underground mine, and that the violation was significant and substantial. Chairman Duffy and Commissioner Suboleski reached a finding of violation on grounds different from the majority's analysis. A majority also held that the 104(g) order that was issued should be modified to a citation. Commissioner Jordan and Commissioner Suboleski found it unnecessary to reach that issue.

The Commission split 3-2 on whether the civil penalty should be vacated on the grounds that the Secretary had taken 17 months to propose a civil penalty following issuance of the 104(g) order giving rise to the dispute. The majority held that the Mine Safety and Health Administration presented no valid excuse for the inordinate delay in processing the penalty and concluded that vacating the penalty was an appropriate remedy to encourage prompt assessment of penalties under the Act. The violation itself was not vacated, only the penalty.

Both parties appealed the decision to the D.C. Circuit Court of Appeals, and the appeals were consolidated. The Court deferred to the Secretary's interpretation of the training regulation

and upheld the Commission's finding of a violation. The Court held that it lacked jurisdiction to consider Twentymile's objection to the Commission's modification of the section 104(g) order to a citation because it did not urge its objection before the Commission. Finally, the Court found that there was no unreasonable delay in assessing a penalty, and that the Commission's refusal to impose a penalty was without foundation. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005).

On remand, the Commission reinstated the $1500 penalty originally assessed by the judge. 27 FMSHRC 715 (Nov. 2005).

Secretary of Labor on behalf of Gray v. North Star Mining, Inc.
27 FMSHRC 1 (January 2005)

In this discrimination case, the Commission vacated the judge's decision and remanded the matter for further proceedings. The miner bringing the complaint received a subpoena to testify before a grand jury investigation of Mine Act violations. He went to the courthouse but ultimately was not called as a witness. The Secretary filed a discrimination complaint claiming that North Star constructively discharged Gray because his supervisor threatened him on two occasions. In analyzing the testimony and observing the witnesses, the judge concluded that the miner and the supervisor were friends, and that the supervisor's remarks were no more than an exaggerated expression between friends.

The Commission held that the remarks must not only be analyzed in the context of what the supervisor intended, but also in relation to the totality of the circumstances, to determine whether they were coercive. The Commission also held that liability under section 105(c) of the Act can attach to an individual who threatens any miner who has been called to testify in any legal proceeding under the Act, because section 105 prohibits "any person" from interfering with a miner's protected rights. Accordingly, the Commission did not address the issue of whether the supervisor was appropriately charged as an operator. The Commission also noted that it appeared that North Star's liability had ceased, due to the abandonment of the constructive discharge claim on appeal. The case was remanded to the judge, (with Commissioner Jordan concurring), for further consideration of the facts and circumstances surrounding the statements to determine if they were coercive under Section 105(c)(1). The parties ultimately settled the matter whereby the operator paid the complainant for back wages and was assessed a civil penalty of $5,000.00, and the supervisor was assessed a penalty of $1,000.00. North Star was also ordered to pay $150 directly to Gray. 27 FMSHRC 398 (Apr. 2005) (ALJ).

Secretary of Labor v. Colorado Lava, Inc.
27 FMSHRC 186 (March 2005)

This case, brought under the Equal Access to Justice Act ("EAJA"), involved a miner's complaint of discrimination that was ultimately dismissed by the judge (*See Sec'y of Labor on behalf of Garcia v. Colorado Lava*, 24 FMSHRC 350 (Apr. 2002), discussed above). The

operator sought attorney's fees and costs under EAJA, setting forth two grounds for recovery: (1) that the Secretary's decision to proceed against it was not substantially justified, and (2) that the Secretary's demand was substantially in excess of what the judge ultimately determined and was unreasonable. The second ground was based on language in the 1996 amendments to EAJA, 5 U.S.C. § 504(a)(4). (The operator claimed that prior to the hearing, the Secretary had demanded that it pay Garcia $50,000 in exchange for dismissing the case, in addition to the Secretary's penalty of $10,000).

The judge denied the fee application. He ruled that the Secretary's position was substantially justified. Colorado Lava did not appeal this determination. As for the second claim, the Commission held that relief only small entities that do not prevail before the Commission on the merits in the underlying proceeding are eligible for relief pursuant to section 504(a)(4). Here, Colorado Lava did prevail in the discrimination suit. The Commission affirmed the judge's decision denying a fee award.

Secretary of Labor on behalf of Morales v. Arenero Rafael Color, Inc.
27 FMSHRC 226 (March 2005)

This temporary reinstatement proceeding involves Wilfredo Morales, a miner employed by Arenero as a heavy equipment operator until his discharge in 2004. Morales and three haulage truck drivers who were contract employees were reluctant to drive haulage trucks down a slope with loaded trucks because, according to Morales, they did not think it was safe. It had rained the night before and the road was wet and slippery. A few days later, Morales was discharged. The Commission ruled that substantial evidence supported the judge's determination that Morales' discrimination complaint was not frivolously brought. Accordingly, the Commission affirmed the judge's decision temporarily reinstating Morales.

Secretary of Labor v. Eastern Associated Coal Corp.
27 FMSHRC 238 (March 2005)

Eastern was charged with failing to provide hazard training to two employees of an independent contractor hired to rehabilitate the roof in Eastern's underground mine by grouting it. Eastern did not train the contract employees on its roof control plan, specifically the portion pertaining to roof grouting. A section of the roof fell during the operation and injured one of the miners.

Eastern argued the roof control plan was not required to be covered in hazard training, but rather would have been included within task training provided to the employees by their contractor/employer.

A majority of the Commission upheld the citation, holding that the hazard training regulation could be reasonably interpreted to include training on provisions of Eastern's roof control plan applicable to grouting. Chairman Duffy dissented.

Secretary of Labor v. Twentymile Coal Co.
27 FMSHRC 260 (March 2005)

In this case, Twentymile, the operator of an underground coal mine, hired an independent contractor to perform reclamation of a surface area of the mine. A Mine Safety and Health Administration ("MSHA") inspector issued six citations to the contractor for various violations relating to defects found on the contractor's mobile equipment, believing that there had been a general increase in contractor violations at the mine, the inspector also decided to issue identical citations to Twentymile.

The judge held that Twentymile could be held vicariously liable for the contractor's violations. On appeal, the Commission reversed the judge. The Commission determined that the Secretary had abused her discretion in holding Twentymile responsible after determining that control of the cited equipment was solely limited to the contractor, that Twentymile had adequately put the contractor on notice that it had to comply with MSHA regulations, that the contractor was fully familiar with its responsibilities to comply while on mine property, and that none of Twentymile's employees were exposed to the hazards arising from the violations.

Commissioner Jordan dissented.

The Secretary appealed the Commission's decision to the D.C. Circuit Court of Appeals. The D.C. Circuit reversed the Commission, holding that because the Mine Act lacked any meaningful standards to judge the Secretary's decision of which party to cite, the Commission is without authority to review such decisions. 456 F.3d 151 (D.C. Cir. 2006).

Secretary of Labor v. Georges Colliers, Inc.
27 FMSHRC 362 (April 2005)

On appeal for a second time (*see Georges Colliers, Inc.*, 26 FMSHRC 1 (Jan. 2004) discussed above), the Commission reviewed the judge's rejection of attorney's fees and costs under the Equal Access to Justice Act. The issues on review were: whether the Secretary's penalty proposals were substantially in excess of the decision of the administrative law judge and unreasonable when compared with the judge's decision; and whether special circumstances make an award unjust.

Despite concluding that the Secretary's actions were unreasonable under the circumstances of the case because she failed to respond to the operator's submission of financial information, the Commission upheld the judge and denied the fees. The Commission held that the initial penalties proposed by the Secretary were not excessive when compared to the ultimate penalties assessed by the judge. More importantly, the Commission held that the operator was not entitled to reimbursement because an award of fees would be unjust under the circumstances.

The case involved 559 violations, 272 of which were considered significant and substantial and 39 of which were attributed to by the operator's unwarrantable failure.

Secretary of Labor v. U.S. Steel Mining Co.
27 FMSHRC 435 (May 2005)

The Secretary cited the operator for failure to correct defects in preparation plant equipment when a Mine Safety and Health Administration ("MSHA") inspector found a half-inch wide hole in an enclosed conveyance system used to carry coal through the preparation plant. The inspector contended that air containing oxygen outside the system could enter the hole and cause an ignition.

Concluding that the judge had misapplied the reasonably prudent person test, a majority of the Commission remanded the case for reconsideration. Chairman Duffy and Commissioner Young found that the judge failed to use an objective standard when applying the reasonably prudent person test. Chairman Duffy and Commissioner Young noted that the judge failed to consider factual circumstances bearing on the application of the reasonably prudent person test, including countervailing opinion testimony of the operator's expert witness, the inspector's findings in a 2000 MSHA report that the system was safe despite containing 28 leaks and a key fact relied on by MSHA's expert witness which had not been established in the record.

Commissioner Suboleski concurred and Commissioner Jordan dissented.

On remand, the case was ultimately dismissed. 27 FMSHRC 518 (July 2005) (ALJ).

Secretary of Labor and UMWA, Local 1248 v. Maple Creek Mining, Inc.
27 FMSHRC 555 (August 2005)

The Commission granted review of petitions filed by the operator and three employees charged under section 110(c) of the Mine Act, 30 U.S.C. § 820(c) for a significant and substantial (S&S) violation of 30 C.F.R. 75.380 requiring each designated escapeway in an underground coal mine "be maintained to always assure passage of anyone, including disabled persons". The violation involved an accumulation of water in the primary escapeway in an area 40 to 50 feet in length, about 12 inches deep from rib to rib that created slippery walking conditions. Below, the judge affirmed the S&S violation and concluded that it was due to the operator's unwarrantable failure.

All four Commissioners affirmed the judge's findings that Maple Creek violated section 75.380(d)(1) and that the violation was S&S. Chairman Duffy and Commissioner Young, joined by Commissioner Jordan, also affirmed the judge's findings that the violation was unwarrantable and that one of the employees was individually liable for the violation under section 110(c). Chairman Duffy and Commissioner Young, joined by Commissioner Suboleski, reversed the judge's findings that the other two employees were individually liable for the violation under

section 110(c). Commissioner Jordan dissented on the section 110(c) violations, and Commission Suboleski dissented on the issue of unwarrantable failure.

Secretary of Labor v. Calmat Company of Arizona
27 FMSHRC 617 (September 2005)

Calmat operated an aggregate mine under the Mine Safety and Health Administration's ("MSHA") jurisdiction and an adjoining ready-mix concrete batch plant under the Occupational Safety and Health Administration's ("OSHA") jurisdiction. Upon discovering a contractor's employee standing on top of a piece of mobile equipment waiting to be trucked off the property, an MSHA inspector issued a training citation to Calmat. The operator argued that the violation occurred on that part of the property subject to the Occupational Safety and Health Administration's ("OSHA") jurisdiction. A majority upheld the citation as having been properly issued by the MSHA inspector, relying generally on an interagency memorandum of understanding governing jurisdiction over areas within the mine site.

Chairman Duffy concurred, writing separately.

Secretary of Labor v. National Cement Co. of California, Inc. and Tejon Ranchcorp
27 FMSHRC 721 (November 2005)

A Mine Safety and Health Administration ("MSHA") inspector issued a citation to the operator for a lack of adequate berms and guardrails on an access road on private land leading to a cement plant under MSHA's jurisdiction. The judge held that the statutory definition of "mine" could include the access road in question and that, therefore, MSHA had authority to issue the citation. The judge certified his decision for interlocutory review, which the Commission granted. On review, the issue was whether the private road that accesses the cement plant is a "mine" within the definition of the Mine Act.

On interlocutory review, a majority of the Commission vacated the judge's decision granting the Secretary's motion for summary decision and remanded for further proceedings. The majority reasoned that the Secretary's application of jurisdiction to the private road leading to the cement plant, under the plain language of the Mine Act, led to absurd results. In support of its position, the majority pointed to the fact that the operator of the cement plant did not own or control the access road and that the road was used by numerous third parties over which the operator could not assert control. The majority held that MSHA's jurisdiction extended only to that portion of the road exclusively used and controlled by National Cement (the portion leading to the gates of the cement plant).

Commissioner Jordan dissented.

The Secretary appealed the Commission's decision to the D.C. Circuit Court of Appeals, which vacated and remanded the case to the Commission for further proceedings. 494 F.3d 1066

(D.C. Cir. 2007). The D.C. Circuit concluded that the pertinent language of the Mine Act was ambiguous and because the Secretary's litigation position was that the language was plain, remanded the matter so that she could put forth her reasonable interpretation. The D.C. Circuit, acknowledging that the Secretary is entitled to deference, noted the "absurd results" identified by the operator. The case is currently pending before the Commission on remand.

Secretary of Labor v. Elk Run Coal Co.
27 FMSHRC 899 (December 2005)

In this appeal, the Secretary asked the Commission to review the judge's determination that a violation of a roof control plan was not significant and substantial ("S&S"). The operator was engaged in "pillar recovery" in which coal is extracted from support pillars as mining "retreats" back from earlier development. The violation concerned whether the operator had mined the pillars in the proper sequence as mandated by the roof control plan. The judge held that since the Secretary offered no evidence that the mine roof was undergoing stress and since there had been no prior roof falls in the area, the violation was not significant and substantial.

On review, the Commission found that the judge erred by grounding his S&S determination solely on the Secretary's failure to prove adverse roof conditions prior to the violation, while failing to address the remainder of the evidentiary record, including reconciling his finding of high gravity with his S&S determination. The Commission remanded the case to the judge to weigh the record evidence, assuming that normal mining were to continue, and determine whether any miner on any shift would have been exposed to the hazard arising out of the violation.

On remand, the judge considered the Commission's directions, and found that the violation was S&S. 28 FMSHRC 190 (Mar. 2006) (ALJ).

Secretary of Labor v. Martin County Coal Corp. and GEO/Environmental Associates
28 FMSHRC 247 (May 2006)

Commissioner Suboleski recused himself from this case, in which a divided Commission split on the issues remaining in litigation, which arose out of a massive 2002 coal slurry spill in Martin County, Kentucky. Chairman Duffy and Commissioners Jordan and Young reversed the judge's summary dismissal of a citation for failure to record an abatement in an impoundment examination report which was found to be based on a faulty factual premise. The Commission panel also unanimously affirmed the dismissal of a citation for not reporting readings from an "installed instrument," where those readings were taken by an inspector using a ruler that was not installed.

All three members also agreed to remand the issues of whether the failure to report "unusual" changes in water flow was significant and substantial, as well as the determinations of negligence, unwarrantable failure, and the proper penalty for the violation. However, the Commissioners split on the disposition of the underlying violation, with Chairman Duffy and Commissioner Young directing a remand because of critical gaps in the reasoning and language of the judge's decision. Commissioner Jordan would have found that substantial evidence supported a finding of violation. Chairman Duffy and Commissioner Young also agreed that the citation against GEO for failure to certify seals in the underground portion of the mine should be dismissed because Martin County, not GEO, was the "person owning, operating or controlling" the mine pursuant to 30 C.F.R § 77.216-4(a), noting that the regulations avoided the broader term "operator."

Commissioner Jordan would have affirmed the violation.

Finally, Commissioners Jordan and Young agreed on the basis for remanding the issue of whether coal slurry had been "periodically redirected" to cover a seepage barrier as they found to be required by the impoundment plan, while Chairman Duffy would have held the plan to be ambiguous and remanded on that basis.

On remand, the judge to whom the case was reassigned found that the increase in water flow was anticipated and was therefore not an "unusual" change that was required to be reported. The judge also found that the slurry was periodically redirected to cover the seepage barrier as required by the plan. Both citations were therefore dismissed. 29 FMSHRC 1017 (Nov. 2007)(ALJ). The Secretary did not seek review of the decision.

Secretary of Labor on behalf of McClain et al. v. Misty Mountain Mining, Inc.
28 FMSHRC 303 (June 2006)

A majority of the Commission, based on substantial evidence grounds, affirmed the judge's determination that an offer of reinstatement was not "temporary," but rather an offer to return the complainants to full employment. By not accepting the reinstatement offer, the miners' right to further back pay following the reinstatement offer was effectively terminated due to a failure to mitigate damages.

Commissioner Jordan dissented.

Secretary of Labor v. Sedgman and David Gill employed by Sedgman
28 FMSHRC 322 (June 2006)

In this case, a fatality occurred when a subcontractor's miner, working without direct supervision from Sedgman but with Sedgman's input and general knowledge, cut away critical structural support for a landing on which he was standing. Commissioners Jordan, Suboleski and Young affirmed violations against Sedgman, a contractor hired to demolish and replace steel

railings and other structures inside a coal preparation plant. Commissioners Suboleski and Young agreed that the Secretary did not abuse her discretion in citing Sedgman, with Commissioner Jordan concurring on separate grounds. All three Commissioners agreed on the interpretation of 30 C.F.R. § 77.200, finding that the provision's requirement to maintain structures in good repair applied during the process of demolition of those structures. The majority found that the stated purpose of the provision was to "prevent accidents and injuries" to miners and noted that the provision expressly applied to "all" structures.

Below, the judge reduced the Secretary's $35,000 proposed penalty to $1,000, but ultimately dismissed the penalty based on the Secretary's unreasonable delay. The majority found that the judge erred in vacating the penalty, concluding that the 11 month delay in assessing a penalty was not unreasonable particularly given the ongoing section 110(c) investigation. When assessing a penalty, the majority concluded that the judge failed to make findings on four of the six section 110(I) penalty criteria and erred in his negligence finding. The majority vacated the judge's $1,000 penalty and remanded the case to him.

Chairman Duffy dissented on the issue of the violation and concurred on the penalty issues.

On remand, the parties settled, agreeing to a penalty of $19,000. 28 FMSHRC 886 (Oct. 2006) (ALJ).

Secretary of Labor v. Plateau Mining Co., Inc.
28 FMSHRC 501 (August 2006)

In a case applying the provisions of 30 C.F.R. § 75.334(b)(1) governing bleeder systems, the Commission was divided evenly on the finding of a violation, leaving the judge's decision to stand as if affirmed. Commissioners Jordan and Young found substantial evidence to support the judge's conclusion that the bleeder system was not operating effectively and that the violation was significant and substantial. Chairman Duffy and Commissioner Suboleski would have vacated the judge's finding of a violation and remanded for re-evaluation of the record evidence and further consideration of the notice issue.

Commissioner Young joined Chairman Duffy and Commissioner Suboleski in vacating a violation of the ventilation plan for failure to include a breached undercast that Mine Safety and Health Administration acknowledged had at most an insignificant effect on airflow. However, the Secretary argued – and Commissioner Jordan, in her dissent, agreed – that the undercast did in fact affect airflow and should have been included in the operator's ventilation plan.

The operator appealed the Commission's decision on the bleeder system violation to the Tenth Circuit Court of Appeals. The Tenth Circuit reversed the Commission's split decision. 519 F.3d 1176 (10th Cir., 2008). The Court agreed that the Secretary's and the Commission's interpretation of the standard requiring a bleeder system to function effectively

was entitled to deference. Slip op. at 36-37. After reviewing the evidence, the Court concluded that substantial evidence did not support the judge's finding that the operator was on notice that its ventilation system was performing inadequately. *Id.* at 2, 38. The Court explained that "the fact that Plateau was operating its bleeder system in compliance with its ventilation plan does not itself preclude a finding of a . . . violation. . . . But the absence of any occurrence not anticipated by the MSHA-approved plan indicates that there was nothing that should have put Plateau on notice that additional action was necessary." *Id.* at 44.

Secretary of Labor v. Cumberland Coal Resources, LP
28 FMSHRC 545 (August 2006)

The Commission unanimously upheld one citation for the failure of a large longwall mine's "wraparound" bleeder system to comply with the requirement in 30 C.F.R. § 75.334(b)(1) to continuously dilute and move methane-air mixtures from the worked out areas of the mine. In the affirmed citation, the Commission found that substantial evidence supported the conclusion that the wraparound bleeder did not move air within all the required areas on the day of the inspection.

The Commission split evenly, however, on two subsequent citations for violation of the same provision, allowing the judge's finding of violation to stand as though affirmed. Commissioners Jordan and Young found that substantial evidence supported the judge's conclusion that the bleeder system was not functioning effectively during the subsequent inspections, noting sudden and significant increases in methane levels in response to minor changes to the bleeder system. The two Commissioners also rejected the argument that the operator did not have proper notice that provisions that had been negotiated in its ventilation plan could provide the basis for the evidence used to support the citation, including samples taken from the No. 2 entry considered to be part of the gob.

Chairman Duffy and Commissioner Suboleski concluded that substantial evidence did not support the judge's conclusion that the ventilation system was not effectively diluting and removing methane from the longwall panel. They agreed with the operator's contention that the Mine Safety and Health Administration ("MSHA") did not provide adequate notice of its use of air samples from the gob in enforcing violations that are normally supported by bleeder evaluation points established in the ventilation plan.

Commissioner Young joined Chairman Duffy and Commissioner Suboleski in vacating two imminent danger orders arising out of the same inspections, noting that the inspector had been directed to issue such orders based solely on methane readings taken from the monitoring point in the No. 2 entry. The majority noted that the modified ventilation plan approved by MSHA provided that such readings would require the longwall to be de-energized until the readings decreased, and that MSHA's actions left no room for the inspector to exercise his discretion.

Commissioner Jordan dissented from the majority's decision on the imminent danger orders.

The operator appealed this case to the Third Circuit Court of Appeals, which affirmed the Commission's decision. 515 F.3d 247 (3d Cir. 2008).

Secretary of Labor v. Jim Walter Resources, Inc.
28 FMSHRC 579 (August 2006)

In this case arising out of a 2001 explosion that killed 13 miners in Alabama, the Commission unanimously upheld the judge's finding of a violation for failure to record and certify that all miners had participated in fire drills conforming to 30 C.F.R. § 75.1101-23(c). The Commission also unanimously affirmed the judge's finding that the violation was not significant and substantial ("S&S").

Chairman Duffy and Commissioners Suboleski and Young also affirmed the judge's finding that a poorly-written and confusing fire fighting and evacuation plan did not apply to the explosion at issue because the only triggering events in the plan were carbon monoxide alarms and fires that could not be brought under control. Absent the occurrence of a triggering event, the majority reasoned that the Secretary was seeking to enforce a provision that she wished had been included in the plan but had been omitted. Commissioner Jordan dissented on this issue.

The Commission unanimously held that JWR violated the preshift examination requirement by allowing miners underground before a complete examination had been performed as required by 30 C.F.R. § 75.360(b)(3). However, Commissioner Suboleski dissented from the majority's affirmation of the judge's conclusion that the violation was S&S. Chairman Duffy joined Commissioner Suboleski in finding that the violation was not the result of the operator's unwarrantable failure, while Commissioners Jordan and Young would have affirmed the judge on this issue. As a result, the unwarrantable failure finding stood as if affirmed.

The Commission unanimously remanded the judge's penalty determination because of substantial divergence from the Secretary's proposed penalties without clear explanation and to ensure that no factors other than those required to be considered were taken into account in issuing the penalty.

On remand, the judge reconsidered the penalties, pursuant to the Commission's instructions, and assessed penalties of $5,000 (compared to $2,500 originally assessed) and $500 (the same as his original assessment) for the two violations which were upheld. 28 FMSHRC 1068 (Dec. 2006) (ALJ).

***Secretary of Labor v. Speed Mining, Inc.*, 28 FMSHRC 773 (September 2006) and**
***Secretary of Labor v. Imerys Pigments, LLC*, 28 FMSHRC 788 (September 2006)**

The Commission remanded these cases for reconsideration of the issue of a principal owner/operator's liability for violations committed by its independent contractors. The Commission had held in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), that the Secretary could be found to have abused her discretion in choosing to cite the principal operator. The Court of Appeals for the D.C. Circuit reversed that decision, as noted above. *Secretary of Labor v. Twentymile Coal Co.,* 456 F.3d 151 (D.C. Cir. 2006).

Chairman Duffy concurred.

Secretary of Labor v. Jim Walter Resources, Inc.
28 FMSHRC 983 (December 2006)

In an interesting case based on circumstantial evidence, a unanimous Commission affirmed a judge's decision to uphold a citation alleging a significant and substantial ("S&S") violation of 30 C.F.R. § 75.1725(c), which requires that no repairs or maintenance may be performed on machinery unless the power is off and the equipment is blocked against motion, except to the extent required to perform the repairs or maintenance. The citation arose from the Mine Safety and Health Administration's ("MSHA") investigation into the death of a miner who was found in a coal refuse pile outside the mine. An iron bar of the type witnesses said was used to clear jammed rock chutes was found stuck in the ductwork above the rotary breaker. MSHA's theory was that the deceased miner had been trying to clear a jammed rock chute with the iron bar without turning off the power and blocking the belt against motion and either fell on the moving belt or fell on the belt while it was not running, but without having the power turned off, and was transported out of the mine. Logs indicated short periods when the belts were turned off, and video showed the boots of an unidentified miner on a catwalk, but there was no direct evidence as to how the miner fell on the belt. The judge nonetheless found that the combination of facts and circumstances shown by MSHA supported a finding of violation. The Commission, in turn, affirmed the judge on substantial evidence grounds and also affirmed his S&S finding and the penalty.

Secretary of Labor v. Hanson Aggregates New York, Inc.
29 FMSHRC 4 (January 2007)

Chairman Duffy and Commissioner Young vacated and remanded the judge's grant of summary decision for the Secretary in a case arising from a fatal crane accident. Hanson had been cited under 30 C.F.R. § 56.14211 for failing to prevent accidental lowering of a hoist ball and hook. The majority found that there were factual issues that could not be resolved fully by the evidence presented by the parties and that summary decision was therefore improper. The judge had set out three scenarios, two of which were resolved by the evidence before him. However, the third scenario was discounted as "unlikely" based only on inferences from the evidence. The majority also noted that the standard provides that the operator is in compliance if it has provided a functioning device to prevent uncontrolled descent of the equipment.

Commissioner Jordan dissented.

On remand, the judge approved the parties' settlement in an unpublished order.

***Secretary of Labor v. Highland Mining Co.,* 29 FMSHRC 22 (January 2007); *Secretary of Labor v. Chestnut Coal*, 29 FMSHRC 26 and 29 FMSHRC 30 (January 2007); *Secretary of Labor v. Spartan Mining Co., Inc.*, 29 FMSHRC 34, 29 FMSHRC 38, and 29 FMSHRC 42 (January 2007); and *Secretary of Labor v. Mammoth Coal Co.*, 29 FMSHRC 46 (January 2007)**

In these similar proceedings, the Commission vacated the judges' dismissals of the contest proceedings filed by the operators and remanded the cases for further explanation of the judges' bases for dismissal versus consolidation of the contest proceedings with the penalty proceedings.

In *Highland* and *Mammoth*, the judges consolidated the contest proceedings with the related penalty proceedings and the cases were ultimately settled. In *Chestnut* and *Spartan*, the judge issued orders of dismissal on remand, explaining the basis for his dismissals of the contest proceedings.

Secretary of Labor v. San Juan Coal Co.
29 FMSHRC 125 (March 2007)

Commissioners Jordan and Young vacated and remanded a judge's finding that the operator had not unwarrantably failed to comply with 30 C.F.R. § 75.400, which prohibits accumulation of combustible materials. The majority found that the judge had not explained his weighing of the unwarrantable failure factors both individually and as a whole. The judge had found, in analyzing the extent of the violation and whether it was significant and substantial, that the accumulations were extensive and obvious and credited the inspector's testimony that they were the worst he had ever seen. The judge also characterized the operator's conduct as "highly negligent" but found that the operator was nonetheless not on notice that greater efforts were needed for compliance. The majority questioned the legal foundation of this conclusion and the weight assigned to this factor, as well as all of the factors as a whole.

Chairman Duffy dissented.

On remand, the parties settled the case. The operator accepted the citation as originally written and both parties agreed to a reduction in penalty from $6,300 to $3,500. 29 FMSHRC 697 (Aug. 2007) (ALJ).

Secretary of Labor on behalf of Pendley v. Highland Mining Co.
29 FMSHRC 164 (April 2007)

The Secretary and the operator entered into a settlement agreement in this discrimination case, which was approved by the judge. Mr. Pendley, the affected miner, objected to the settlement on grounds that it had not been discussed with him and he did not agree with its terms. The Commission deemed Mr. Pendley's objection to be a timely filed petition for discretionary review and granted review. The Secretary acknowledged that Mr. Pendley should have had an opportunity to review the settlement proposal and moved to reopen the proceedings. The Commission unanimously held that the settlement motion was prematurely filed and vacated the decision, remanding the case for further proceedings.

The miner's discrimination complaint is currently pending before the judge.

United Mine Workers of America, on behalf of Local 1248 v. Maple Creek Mining, Inc.
29 FMSHRC 583 (July 2007)

A unanimous Commission reversed a judge's determination that miners idled by a withdrawal order issued for an imminent danger under section 104(b) of the Mine Act were entitled to compensation under section 111 of the Act. The Secretary had purported to settle the underlying citation, reducing the penalty from $9,000 to $2,000, and recommending in the settlement motion that the underlying order be vacated. However, the order was not contested individually within 30 days and the Union asserted that it had therefore become a "final order" for section 111 purposes before the settlement was entered. Maple Creek did timely contest the penalties and argued that because the notice of contest included the section 104(b) withdrawal order at issue, it had timely contested the order as well and that the Mine Safety and Health Administration had indeed settled the case. Before the judge, the Secretary defended the settlement and her authority to vacate orders. Before the Commission, the Secretary changed her position and argued that the order had become final before it had supposedly been vacated by the settlement, and that the miners were therefore entitled to compensation.

The Commission's decision rested on precedent and the language and structure of the Mine Act, which have traditionally allowed operators to wait until the penalty phase to contest an order or citation. The fact that a separate penalty was not assessed specifically for the order did not preclude the operator from a timely challenge at the penalty phase because it was part of the proposed penalty assessment. The case was remanded to determine if there was any other basis for compensation. The judge determined that all outstanding claims for compensation had been satisfied. 29 FMSHRC 896 (Oct. 2007) (ALJ).

Vurnun Edwurd Jaxun v. Asarco, LLC
29 FMSHRC 616 (August 2007)

In this discrimination case, the Commission granted review to a miner who complained that the judge had dismissed his discrimination claim under section 105(c) of the Mine Act because he did not retain a lawyer to represent him in the proceedings. On review, Chairman Duffy and Commissioner Young voted to grant what they construed as the complainant's motion

to vacate the direction for review and to continue litigating the case at the trial level. The Commission did not rule on the Complainant's request to have the case assigned to a different judge. While the Commission vacated the grant of review, it discouraged dismissal of a case for not retaining an attorney as an extreme measure and noted that the Commission's Procedural Rules provide appropriate avenues for judges to protect the integrity of the Commission's hearing process and parties' due process rights.

Commissioner Jordan dissented.

The miner's discrimination complaint is currently pending before the judge.

Secretary of Labor v. Marfork Coal Co.
29 FMSHRC 626 (August 2007)

Commissioners Jordan and Young held that a judge, frustrated with an operator's contest of every citation prior to penalty proposals being issued by the Secretary, abused his discretion in dismissing citation contests filed by the operator. Finding the "voluminous" contests filed by the operator to be duplicative and wasteful, the judge dismissed the contest proceedings as unnecessary, in part because the operator had agreed to the Secretary's motion for a continuance and therefore obviously did not require an immediate hearing on the citations. The Secretary argued that the case was moot because penalties had been issued and that the judge should have the discretion in managing cases to dismiss proceedings absent an abuse of discretion. The operator argued that contesting the citations allowed it to begin settlement negotiations and discovery. The majority, while noting the burdens faced by judges confronted with a voluminous increase in citation contests, believed procedural adjustments could reduce that burden and that judges should have the discretion to dismiss cases, subject to a challenge on grounds that the judge had abused that discretion. In this case, the majority found that the judge had abused his discretion because the operator was able to cite reasons for contesting the citations and had not sought to delay the proceedings.

Chairman Duffy concurred.

On remand, the judge consolidated the contest proceedings with the associated penalty proceedings, which were then stayed. The case has been settled.

Secretary of Labor v. Austin Powder Co.
29 FMSHRC 909 (November 2007)

Commissioners Jordan and Young affirmed the judge's holding that the petitioner, an explosives contractor, was required to store all "detonators," including non-mass detonating units, in magazines pursuant to 30 C.F.R. § 56.6132. Austin Powder was cited for not storing such units in a fully-compliant magazine as required under the Mine Safety and Health Administration's ("MSHA") regulations. Austin Powder argued that MSHA's regulations were

not consistent with the Bureau of Alcohol, Tobacco and Firearms' ("BATF") regulations, which permit storage of certain detonators in less protective facilities, and that it did not have notice of MSHA's requirement. The majority in this case held that the plain language of the standard, which clearly defines "magazines" and detonators and plainly states that all of the latter must be stored in the former, was not ambiguous and clearly provided notice. The majority declined to consider Austin Powder's argument raised for the first time on review in its reply brief that MSHA's explosives regulations were preempted by BATF's regulations.

Chairman Duffy concurred.

Secretary of Labor v. The American Coal Co.
29 FMSHRC 941 (December 2007)

The Commission unanimously affirmed the judge's holding that the operator had violated 30 C.F.R. § 75.380's requirement that two separate and distinct escapeways be provided, albeit on a different basis than the judge. The problem arose from a stage loader which shifted during operation of the mine's longwall shearer. The migration was significant enough to require miners to have to crawl over the stage loader, at a point with minimal roof clearance, to access the escapeway. While the judge found that the escapeway began at the face in this case, and while the Secretary argued that the escapeway itself was not "travelable," the Commission held that the provision was violated because the escapeway, accessible only through extraordinary efforts by miners, was not "provided," as the standard requires. The Commission rejected the operator's notice agreement, concluding that the operator had actual notice here.

Secretary of Labor v. Emerald Coal Resources, LP and Cumberland Coal Resources, LP
29 FMSHRC 956 (December 2007)

Applying an arbitrary and capricious standard of review to this, the first case concerning Emergency Response Plans ("ERPs") required under the 2006 Mine Improvement and New Emergency Response ("MINER") Act, Commissioners Jordan and Young upheld the Mine Safety and Health Administration's ("MSHA") requirement that the operators in this case provide purchase orders for refuge chambers contained in their ERPs prior to approval of the plans. The refuge chambers had been selected to comply with the breathable air requirement of the MINER Act. The operators had concerns about some of the materials required for CO_2 scrubbing under the refuge chamber option and how they would perform with refuge chambers. Because the National Institute for Occupational Safety and Health ("NIOSH") was planning to test the scrubbing in the chamber environment, the operators sought to delay submission of purchase orders until 60 days after their plans had been approved. MSHA allowed some operators a shorter (one week or less) grace period and offered the operators in this case 10 days, but the parties could not reach agreement and MSHA cited the operators for not complying with the purchase order requirement.

The majority noted that all other operators had complied with the purchase order requirement and that Congress clearly stressed the urgency of immediate implementation of the breathable air and other requirements in its passage of the MINER Act. It concluded that MSHA therefore did not act unreasonably in requiring purchase orders to seek an assurance that the equipment in the plan had in fact been purchased and would therefore be in place as soon as possible. The majority also concluded that under the plan approval process, the operators had actual notice of MSHA's interpretation. The majority declined to consider the operator's equal protection argument because it was not raised before the judge or in the operators' petition to the Commission.

Chairman Duffy dissented.

Secretary of Labor v. Empire Iron Mining Partnership
29 FMSHRC 999 (December 2007)

Commissioners Jordan and Young upheld the Mine Safety and Health Administration's ("MSHA") decision to issue citations in the alternative for violations arising out of an investigation into a fatality at a taconite processing plant. MSHA initially cited the operator for violating either 30 C.F.R. § 56.14105, requiring power to be off and machinery to be blocked against hazardous motion during repairs or maintenance (except to the extent activation or motion was required to perform those tasks) and/or 30 C.F.R. § 56.12016, requiring electrically-powered equipment to be de-energized, locked out and tagged out prior to mechanical work being done on the equipment. The Secretary cited a Ninth Circuit decision (*Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982)) as creating doubt about whether the latter section could be cited. The citation was later modified to allege that the operator had only violated one of the provisions.

The judge allowed the alternative citations and found that the operator had violated section 56.14105. The operator sought review on the grounds that the Mine Act requires citation with particularity to only one mandatory standard per violation and that the abatement regime and structure of the Mine Act made compliance with multiple and perhaps conflicting requirements unreasonable.

The majority held that the Secretary acted reasonably and that the abatement and compliance required in this particular case was not duplicative. It noted the uncertainty created by, as well as its disagreement with, the court's holding in *Phelps Dodge*. However, the majority cautioned the Secretary that there might well be cases where alternative citations would be unreasonable or prejudicial. The majority also noted that the judge should have performed a more thorough analysis of the exception to § 56.14105, but found the judge's omission was harmless error in light of the qualified exception's requirement that miners be effectively protected against hazardous motion. Commission precedent supported the view that the exception's conditions were not satisfied by training and other procedures if miners disregarded

those safeguards. Abatement in this case was secured by additional training and procedures, as well as guarding the pinch point that was the cause of the miner's death in this case.

Chairman Duffy dissented.