ORAL ARGUMENT SCHEDULED FOR
MAY 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 04-1292 (Consolidated with No. 04-1312)

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

Petitioner,

v.

TWENTYMILE COAL COMPANY

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

REPLY BRIEF FOR THE SECRETARY OF LABOR

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Commission	Federal Mine Safety and Health Review Commission
J.A.	Joint Appendix
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
Twentymile	Twentymile Coal Co.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the bound Addendum to the Secretary's opening brief and/or the Addendum to Twentymile's response brief.

SUMMARY OF ARGUMENT

Congress did not affirmatively indicate in the Mine Act that the Commission may remedy the Secretary's purported failure to propose a penalty "within a reasonable time" under 30 U.S.C. § 815(a) by refusing to assess a penalty. Therefore, under the principles set forth by the Supreme Court in Brock v. Pierce County, 476 U.S. 253 (1986), the Commission may not impose such a remedy. The language of 30 U.S.C. § 815(d), contrary to Twentymile's interpretation, does not authorize the Commission to impose that remedy, and instead authorizes the Commission to review a citation or order, and to vacate the penalty merely as an adjunct of vacating the citation or order. Twentymile's interpretation of the statutory provision is irreconcilable with sister statutory provisions and is illogical on its face.

Even if Congress authorized the Commission to vacate a penalty proceeding to remedy the amount of time it took the Secretary to propose a penalty, the Commission erred in doing so without first considering whether Twentymile was prejudiced by that amount of time under the principles set forth by the Supreme Court in Pioneer Investment Services Co. v. Brunswick

Associates Ltd. Partnership, 507 U.S. 380, 395, 398 (1993). The fact that Pioneer dealt with a Chapter 11 bankruptcy proceeding is irrelevant to whether its principles should apply in a case brought under the Mine Act. Similarly, the fact that Pioneer benefited a private litigant in that case is irrelevant to whether the government may invoke its principles in other cases, such as this case. The Secretary proved that Twentymile was not prejudiced by the amount of time it took the Secretary to propose a penalty.

Finally, the Commission erred in its calculation of the amount of time it took the Secretary to propose a penalty because it began its calculation from the time the Secretary issued the order rather than from the time the accident investigation was terminated. The language of 30 U.S.C. § 815(a), contrary to Twentymile's interpretation, does no more than state that a citation or order cannot be issued before the Secretary has engaged in some degree of inspection or investigation. The fact that the Secretary may be able to determine that a violation of a standard had occurred does not mean that she had determined the cause of an accident, or that she had developed and completely reviewed and analyzed all the facts and evidence, information which the Secretary properly puts to a variety of uses.

ARGUMENT

I.

CONGRESS DID NOT INTEND TO AUTHORIZE THE COMMISSION TO REFUSE TO ASSESS A PENALTY FOR AN AFFIRMED VIOLATION

Under the principles set forth in Brock v. Pierce County, 476 U.S. 253 (1986), the Commission may remedy the Secretary's purported failure to propose a penalty "within a reasonable time" under Section 105(a) of the Mine Act, 30 U.S.C. § 815(a), by refusing to assess a penalty only if there is an affirmative indication that Congress intended to authorize the Commission to devise such a drastic remedy. See Secretary's Opening Br. 28-31. There is no affirmative indication that Congress intended to do so. On the contrary, there are a number of affirmative indications -- the legislative history of Section 105(a) itself,[1] Section 110(a) of the Act, 30 U.S.C. § 820(a), and

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[1] The legislative history of Section 105(a) states in relevant part:

> The Committee notes * * * that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty promptly shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess., at 34, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978) (emphasis supplied). Twentymile's argument that the underlined statement

Section 110(i) of the Act, 30 U.S.C. § 820(i) -- that Congress did not intend to do so. See Secretary's Opening Br. 31-35.

Relying on a provision the Commission did not rely on, Twentymile argues that Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), clearly gives the Commission the authority to do what it did because it gives the Commission the authority to issue an order "affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." Twentymile Response Br. 4-9. It is a cardinal rule of statutory construction, however, that "the meaning of statutory language, plain or not, depends on context": "'[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used * * *.'" King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) (quoting NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)). Accord Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("[t]he literal language of a provision taken out of context cannot provide

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refers only to cases in which prompt proposal of a penalty was not possible (Twentymile Response Br. 17-18) is wrong. The statement speaks in terms of "any" proposed penalty proceeding. "'[A]ny' * * * means just that -- any * * *." Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1290 (D.C. Cir. 1990) (emphasis in original).

conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use"). Twentymile's reading of Section 105(d) is irreconcilable with Sections 110(a) and 110(i) -- which, as both the Commission and the Courts have consistently and correctly held, require that a penalty be assessed for every violation and that, in assessing a penalty, the Commission consider only the six factors specified in Section 110(i). See Secretary's Opening Br. 32-35. Because Twentymile's reading of Section 105(d) is irreconcilable with the long-recognized meaning of Sections 110(a) and 110(i), it should be rejected. See Bell Atlantic, 131 F.3d at 1047-48 (stressing that a court analyzing the relationship between two provisions in the same statute "must analyze the language of each to make sense of the whole," and rejecting a plain meaning reading of one provision because if that provision were read "as an independent, affirmative grant of authority" it would vitiate the limitations set forth in another provision).

Twentymile's reading of Section 105(d) should also be rejected because it is illogical on its face. If the Commission could affirm a citation or order and then vacate the penalty -- that is, if the individual words of Section 105(d) could be read in isolation from each other -- the Commission could also vacate a citation or order and affirm the penalty. Such a result would

be absurd: "a penalty under the Mine Act is predicated upon the existence of a violation." Old Ben Coal Co., 7 FMSHRC 205, 209 (1985). Accord Westmoreland Coal Co., 11 FMSHRC 275, 276 (1989). The only logical way to read Section 105(d) is to read its words as fitting together to form a logical whole -- that is, to read the phrase "affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty" as referring to affirming, modifying, or vacating the entire proceeding (the citation or order and the penalty) as a whole.[2]

In addition, Twentymile's reading of Section 105(d) should be rejected because it is implicitly inconsistent with the very same Commission power -- the power to assess penalties -- which Twentymile repeatedly invokes. Reading Section 105(d) as Twentymile reads it -- that is, reading it as authorizing the Commission to affirm, modify, or vacate the penalty

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[2] The foregoing reading is not, as Twentymile suggests (Twentymile Response Br. 6), precluded by the fact that Section 105(d) uses the word "or." Courts should not "rush to conclude that legislators always intend the word 'or' to be disjunctive," and should conclude that the word "or" was intended to be conjunctive where the context so dictates. Unification Church v. INS, 762 F.2d 1077, 1084-85 (D.C. Cir. 1985) (citing, inter alia, De Sylva v. Ballentine, 352 U.S. 570 (1956)). Section 105(d)'s use of the word "or" should not be read in a way that would, as explained above, both vitiate the terms of Sections 110(a) and 110(i) and produce an absurd result. Section 105(d)'s use of the word "or" can be read as reflecting nothing more than Congress' desire to use a short-hand way of succinctly expressing all of the alternatives and combinations encompassed in the phrase "affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty."

independently of what the Commission does with respect to the citation or order -- suggests that the Commission's statutory role is to review the Secretary's proposed penalty. The Commission's statutory role, however, is not to review, i.e., affirm, modify, or vacate, the Secretary's proposed penalty; the Commission's role is to assess a penalty de novo. Sellersburg Stone Co., 5 FMSHRC 287, 289-94 (1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Accord Cantera Green, 22 FMSHRC 616, 620 (2000). The only way to read Section 105(d) consistently with that principle is to read the phrase "affirming, modifying, or vacating the Secretary's proposed citation, order, or penalty" as meaning that the Commission is authorized to review the citation or order, and to vacate the penalty merely as an adjunct of vacating the citation or order.

The foregoing analysis is bolstered by the titles of the statutory sections in which Section 105(d) and Sections 110(a) and 110(i) appear. The title of a statutory section, although not dispositive, can aid in interpreting an ambiguous statutory text. INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991); Delta Airlines, Inc. v. DOT, 51 F.3d 1065, 1070 (D.C. Cir. 1995). Sections 110(a) and 110(i) appear in a section titled "Penalties"; Section 105(d) appears in a section titled "Procedure for enforcement." The titles

themselves suggest that the substantive question of what authority the Commission has with respect to penalties, and indeed the entire penalty scheme of the Mine Act, are dealt with in the provisions of Section 110, and that Section 105(d) should be read as merely addressing the purely procedural question of what happens with respect to the penalty when the Commission vacates the citation or order.

In sum, Twentymile's interpretation of Section 105(d) is irreconcilable with the long-established and correct interpretation of Sections 110(a) and 110(i), and is illogical on its face. Twentymile's interpretation of Section 105(d) treats the words of Section 105(d) as "pebbles in alien juxtaposition" (King, 502 U.S. at 221 (citation and internal quotation marks omitted)) in two ways: it reads Section 105(d) in isolation from Sections 110(a) and 110(i), and it reads the words of Section 105(d) in isolation from each other. Certainly, Section 105(d) does not provide the kind of "clear indication" (Bro. of Railway Carmen Div., Transportation Communications Int'l Union v. Pena, 64 F.3d 702, 704 (D.C. Cir. 1995)) required under Brock to establish that Congress intended

to authorize the Commission to invent the drastic remedy it invented here.[3]

II.

IN ANY EVENT, THE COMMISSION ERRED IN VACATING THE PENALTY BECAUSE IT DID NOT CONSIDER WHETHER TWENTYMILE WAS PREJUDICED BY THE AMOUNT OF TIME THE SECRETARY TOOK TO PROPOSE A PENALTY

Twentymile contends that a "two-pronged test" must be applied to determine whether a penalty should be vacated because of delay. According to Twentymile, the Commission may vacate a penalty if an operator can show either unreasonable delay in

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[3] Twentymile seems to suggest (Twentymile Response Br. 4) that Brock and its progeny are inapplicable here because the Commission did not prevent the Secretary from exercising her statutory authority -- i.e., the authority to propose a penalty -- and instead merely exercised its own statutory authority in refusing to assess a penalty. The suggested distinction is a distinction without a difference because, under either theory, the result is the same: the Commission deprived the Secretary of the ability to enforce the Act through the imposition of a penalty.

In any event, the Commission's action was impermissible even if the Brock analysis is not applicable. It is axiomatic that a federal administrative entity such as the Commission is a "'creature of statute'" and has no authority other than "'those authorities conferred upon it by Congress.'" California Independent System Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (quoting Atlantic City Electric Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001))). In undertaking to remedy the Secretary's purported failings by refusing to assess a penalty for an assessed violation, the Commission exercised an authority Congress did not give it. The Commission not only deprived the Secretary of her ability to enforce the Act through the imposition of a penalty; it abdicated its own statutory responsibility to assess a penalty for every violation.

proposing the penalty or prejudice to the operator from the delay. Twentymile Response Br. 22-27. Twentymile is incorrect.

The principles articulated by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395, 398 (1993), establish that prejudice is a critical factor in considering whether to impose the harsh remedy of dismissal for a procedural failure. See Secretary's Opening Br. 39-40. Twentymile asserts that because Pioneer dealt with a Chapter 11 bankruptcy proceeding, the Court's holding should not apply to a Mine Act case. Twentymile Response Br. 23-24. Twentymile is mistaken. Pioneer applies to -- and explicitly drew from -- the "excusable neglect" concept embodied in Rule 60(b) of the Federal Rules of Civil Procedure, and has been widely applied by the courts in a variety of "excusable neglect" contexts. As the Second Circuit Court of Appeals has observed:

> Although Pioneer interpreted "excusable neglect" in the context of Bankruptcy Rule 9006(b)(1), the Court analyzed that term as it is used in a variety of federal rules, including Rule 60(b)(1). For that reason, we have held that Pioneer's "more liberal" definition of excusable neglect is applicable beyond the bankruptcy context where it arose.

Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 365-66 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004) (citation and internal quotation marks omitted) (dealing with the issue of excusable neglect in failing to file a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)). Accord George Harms Construction Co. v. Chao, 371 F.3d 156, 163 (3d Cir. 2004) (stating that Pioneer's interpretation of excusable neglect "extends to other federal procedural rules * * *," and applying Pioneer to a Rule 60(b)(1) reopening request before the Occupational Safety and Health Review Commission). As noted by the Second Circuit, "[t]he term 'excusable neglect' appears frequently in the United States Code and Federal Rules as a basis for motions to extend time limitations." Silivanch, 333 F.3d at 366 n.6 (citing, as examples, 2 U.S.C. § 394(c)(2); 28 U.S.C. § 2107(c); Fed. R. Bkrtcy P. 7013, 8002(c)(2) & 9033(c); Fed. R. Crim. P. 45(b)(1)(B); Fed. R. Civ. P. 6(b)(2), 13(f) & 60(b)(1)). See also Yesudian v. Howard University, 270 F.3d 969, 971 (D.C. Cir. 2001) (affirming a finding of excusable neglect for late filing of memorandum in opposition, and applying the Pioneer standard as "the standard typically deployed").

Twentymile's suggestion that harsher "excusable neglect" principles should be applied to the government than to a private

litigant (Twentymile Response Br. 23-24) should be rejected. Nothing in Pioneer or its progeny remotely suggests that the government should be treated more harshly than a private litigant. On the contrary, this Court has applied the same procedural requirements to the government as to private litigants. See, e.g., Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897, 902-03 (D.C. Cir. 1996) (reversing denial of the government's reopening request under Rule 60(b)(6)). Applying harsher principles to the government would be particularly inappropriate in a Mine Act case because such an approach could "'short circuit * * * a major aspect of the Mine Act's enforcement scheme'" (Rhone-Poulenc of Wyoming Co. v. FMSHRC, 57 F.3d 982, 984 (10th Cir. 1995) (citation and internal quotation marks omitted)) and make the safety of miners "forfeit to the accident of noncompliance with statutory time limits * * *." United States v. Montalvo-Murillo, 495 U.S. 711, 720 (1990).

Citing, inter alia, this Court's decision in Shea v. Donohoe Construction Co., 795 F.2d 1071, 1075 (D.C. Cir. 1986), Twentymile attempts to evade the principles articulated in Pioneer by asserting that "prejudice is inherent in any delay." Twentymile Response Br. 25-26. The mere existence of delay, however, does not eliminate the need to consider the presence or

absence of prejudice in conducting an "excusable neglect" analysis; if it did, the Supreme Court would have had no reason in Pioneer to identify the presence or absence of prejudice as an element to be considered separate and distinct from the length of and reason for the delay. Pioneer, 507 U.S. at 395.

The relevant passage in Shea, which Twentymile quotes only in part, should be quoted in full:

> [E]ven without a showing of prejudice, we agree, as at least two of our sister circuits have held, that prejudice to defendants resulting from unreasonable delay may be presumed, and that there is no hard and fast requirement that the party aggrieved by such unreasonable delay always present specific evidence of the exact nature of the prejudice.

795 F.2d at 1075 (citations and internal quotation marks omitted) (emphases supplied). The passage should be read not as indicating that the presence or absence of prejudice is irrelevant, but as indicating that the burden of proof with respect to prejudice is not on the defendant. See In re: Kmart Corp., 381 F.3d 709, 714 (7th Cir. 2004), cert. denied, __ U.S. __, 125 S.Ct. 933 (2005) (under Pioneer, the burden was on the plaintiff "to prove a lack of prejudice"). In this case, the Secretary proved that there was no prejudice by pointing out that, beginning with the issuance of the order ten days after the events in question, Twentymile was adequately informed of

the allegations against it. See Secretary's Response Br. 35-39.[4] The fact that, as Twentymile effectively concedes, there was no prejudice should have been considered by the Commission under the principles of Pioneer. See Yesudian, 270 F.3d at 971 (taking into consideration, in applying Pioneer, the fact that lack of prejudice was "fully conceded" by the party seeking dismissal on lateness grounds).

III.

THE COMMISSION ERRED IN CALCULATING THE TIME IT TOOK THE SECRETARY TO PROPOSE A PENALTY FROM WHEN THE ORDER WAS ISSUED INSTEAD OF FROM WHEN THE INVESTIGATION WAS TERMINATED

Again relying on a statutory interpretation the Commission did not rely on, Twentymile argues that, under Section 105(a) of the Act, the "reasonable time" for proposing a penalty starts to run from the issuance of a citation or order because the issuance of a citation or order "signals the termination of the inspection or investigation." Twentymile Response Br. 28-29. Twentymile's interpretation should be rejected because it is inconsistent with the words of Section 105(a). The fact that Section 105(a) states that the time starts to run from "the

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[4] If Twentymile believed that the amount of time passing while the Secretary was in the process of proposing a penalty might be prejudicing it, it could have sought an order lifting the stay or compelling the Secretary to propose the penalty. It did neither until almost 14 months after the order was issued. See Secretary's Opening Br. 30-31 n.13. Twentymile's own inaction indicates that it was not being prejudiced.

termination of [the] inspection or investigation," not that the time starts to run from the issuance of the citation or order, indicates that Congress intended that the time start to run at some point different from the issuance of the citation or order. See Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581, 583 (D.C. Cir. 1990) ("when Congress * * * employs different words, it usually means different things") (citation and internal quotation marks omitted), cert. denied, 508 U.S. 906 (1993)). The fact that Section 105(a) also states that a citation or order is issued "after an inspection or investigation" does not compel a contrary result; that language does no more than state the common-sense proposition that a citation or order cannot be issued before the Secretary has engaged in some degree of inspection or investigation.[5]

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[5] Although it may sometimes take until the termination of an accident investigation for the Secretary to determine what standards, if any, were violated, the Secretary was complying with the mandate of Section 104(a) of the Mine Act when she issued an order in this case well before the termination of the accident investigation. Section 104(a) states in relevant part:

> If, upon inspection or investigation, the Secretary * * * believes that an operator * * * has violated [the] Act, or any mandatory health or safety standard * * *, [s]he shall, with reasonable promptness, issue a citation to the operator.

Twentymile's interpretation of Section 105(d) should also be rejected because it is inconsistent with the nature and purpose of inspections and investigations. This case perfectly illustrates this point. Although the Secretary determined ten days after initiating her accident investigation that a violation of a training standard had occurred, and so issued the order, she continued her investigation in order to determine all the facts relating to the accident as those facts might affect (1) the appropriate penalty to be proposed, (2) whether "significant and substantial" and/or "unwarrantable failure" special findings should be made with respect to the violation (see 30 U.S.C. § 814(d)(1)), (3) whether a special investigation should be pursued (see 30 U.S.C. §§ 820(c); 820(d)), and (4) whether additional action, such as proposed rulemaking, would be in order. As noted in MSHA's Accident/Illness Investigations Procedures Handbook, "[t]he causes of accidents are determined after a complete review and analysis of all the facts and evidence." MSHA Handbook Series, Handbook No. PH00-1-5, "Accident/Illness Investigation Procedures," Ch. 3, p. 13 (Nov. 2000), available at www.msha.gov ("Compliance Info," "Enforcement-MSHA's Handbook Series"). The fact that the Secretary was able to determine that a violation of a standard

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30 U.S.C. § 814(a) (emphases supplied).

had occurred ten days after the accident in no way meant that she had determined the cause of the accident, or that she had developed and completely reviewed and analyzed "all the facts and evidence." In other words, the fact that the Secretary issued an order ten days after the accident in no way meant that the Secretary had terminated her investigation.[6]

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[6] Although Twentymile correctly notes that MSHA's Program Policy Manual indicates that a "reasonable time after the termination of [an] inspection or investigation" is "normally defined as within 18 months of the issuance of a citation or order" (emphasis supplied) (see Twentymile Response Br. 29), the Manual does not preclude that, in any particular case, there may be valid reasons why the inspection or investigation took longer. MSHA Program Policy Manual, Vol. III, Part 100.6(f), "Referral of Citations/Orders for Assessment," available at www.msha.gov ("Compliance Info"). Moreover, the same paragraph in the Manual also states that, "in the case of a fatal accident, [a reasonable time is] within 18 months of the issuance of the accident report." Ibid. Because this case involved a very serious injury akin to a fatality, a "reasonable time" should be viewed as akin to 18 months, a standard under which even a 17-month time would be viewed as reasonable on its face, without the need for explanation.

In any event, statements in MSHA's Program Policy Manual cannot be relied on to prevent the Secretary from carrying out her statutorily-mandated enforcement duties. As the Commission majority stated in reference to the cited policy provision, "MSHA's policy statements such as a PPL or MSHA's Program Policy Manual are not binding on the Secretary or the Commission." 26 FMSHRC at 685, n.25 (J.A. 191 n.25). D.H. Blattner & Sons, Inc., 18 FMSHRC 1580, 1586 (1996), (quoting King Knob Coal Co., 3 FMSHRC 1417, 1420 (1981)), aff'd, 152 F.3d 1102 (9th Cir. 1998). See Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir. 1989).

CONCLUSION

For the reasons set forth above and in her opening brief, the Secretary requests that the Court grant the relief requested in her opening brief. Secretary's Opening Br. 46-47.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(d) and 32(a)(2), and the Court's order of January 12, 2005, I hereby certify that this Reply Brief for the Secretary of Labor contains 4,137 words as determined by Word, the processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Reply Brief for the Secretary of Labor were served by overnight delivery this 28th day of March, 2005, on:

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