FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SPEED MINING, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket Nos. WEVA 2002-187-R
	)	WEVA 2004-188-R
SECRETARY OF LABOR,	)	WEVA 2004-195-R
MINE SAFETY AND HEALTH	)	
ADMINISTRATION (MSHA),	)	
	)	
Respondent.	)	

BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

In this case, the administrative law judge found that Speed Mining, Inc. ("Speed") failed to comply with the conditions of a mine-specific modification of MSHA's oil and gas wells standard when it mined through one inactive gas well, and mined by (i.e., within 150 feet of) another inactive gas well, before either well was cleaned and plugged. Speed primarily argues that it mined through or mined by many similar wells in the past using the same methods as it used here, and that it was never cited before for violating the modified standard. MSHA's previous approvals to mine through or mine by similar wells, however, were based on Speed's representations that it was in compliance with the modified standard. There is no evidence that MSHA knew that Speed was not in compliance with the modified standard when it approved the previous mine-throughs or mine-bys. In

addition, there is substantial evidence that the citations in this case were issued because (1) MSHA became aware of hazards resulting from Speed's past cleaning and plugging techniques, (2) MSHA began to question the reliability of the cleaning and plugging information submitted by Speed, (3) MSHA discovered inconsistencies between Speed's representations and the actual condition of the assertedly cleaned and plugged wells, and (4) Speed failed to provide additional information to MSHA to show that Wells 242 and 384 were plugged in accordance with the modified standard. Nothing in Speed's arguments invalidates the judge's conclusion that the Secretary's interpretation of the modified standard was reasonable, and that Speed violated that interpretation.

ISSUES

1. Whether the judge correctly found, with respect to Well 242, that Speed failed to comply with the Secretary's reasonable interpretation of the provision of the modified standard that required Speed to clean the borehole before it was plugged.

2. Whether the judge correctly found, with respect to Well 384, that Speed failed to comply with the Secretary's reasonable interpretation of the provision of the modified standard that required Speed to perforate or rip the remaining well casing, at intervals close enough to permit expanding cement to infiltrate the annulus.

STATUTORY AND REGULATORY BACKGROUND

A. Section 101(c) of the Mine Act

Section 101(c) of the Mine Act gives the Secretary the discretionary authority to modify the application of any mandatory safety standard to a specific mine if

> ... the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

30 U.S.C. § 811(c).

B. The MSHA Standard Applicable to Oil and Gas Wells

The safety standard at 30 C.F.R. § 75.1700 requires operators to establish and maintain a 300-foot barrier around oil and gas wells unless the Secretary

> permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine ....

30 C.F.R. § 75.1700.

C. The Modified Standard

The modified standard provided that mining through or near plugged oil or gas wells is conditioned upon compliance with specified terms and conditions. When cleaning and preparing oil and gas wells, Paragraph 1(a)(1) provided:

> A diligent effort shall be made to clean the borehole to the original total depth. If this depth cannot be reached, the borehole shall be cleaned out to a depth that would permit the placement of at least 200 feet of expanding cement below the base of the lowest minable coalbed.

When cleaning the borehole, Paragraph 1(a)(2) provided:

> [A] diligent effort shall be made to remove all the casing in the borehole. If it is not possible to remove all the casing, the casing which remains shall be perforated, or ripped, at intervals close enough to permit expanding cement slurry to infiltrate the annulus between the casing and the borehole wall for a distance of at least 200 feet below the base of the lowest mineable coal bed.

FACTS

Speed operates the American Eagle Mine, an underground coal mine in Kanawha County, West Virginia. Tr. 40; Stip. 1. The mine is located in the Eagle Coal Seam, which is approximately 1,000 feet below the surface and is intersected by numerous oil and gas wells in the Cabin Creek Oil Field. Tr. 41-43. The oil and gas wells extend from the surface to depths ranging from 3,000 to 6,000 feet. Tr. 41-43; JX-3 at tab 1.

The wells in the Cabin Creek Oil Field were drilled in the early 1900s and, although some are active, most ceased production in the 1950s and were plugged with various materials by the oil companies. Tr. 42-44, 58. The once active wells initially contained outer and inner casings, but some of the

casings have since been removed from the inactive wells. Tr. 43, 58, 198-99, 323-24. Because oil or gas may migrate from the spaces surrounding the casings of the inactive wells that were plugged many years ago, mining in an area that intersects a plugged well is hazardous. Tr. 57-58, 262, 281.

Section 75.1700 addresses the hazard of oil or gas migrating from a well by requiring that barriers be established within 300 feet of the well. Tr. 56; see 30 C.F.R. § 75.1700, supra at p. 3.[1] In April 2001, Speed petitioned MSHA for a modification of Section 75.1700 to reduce or eliminate the 300-foot barrier requirement of the standard. In its petition for modification, Speed submitted a number of conditions to MSHA that it would follow in order to provide no less than the same measure of protection afforded by Section 75.1700. See JX-3 at tab 1.

In July 2001, MSHA granted the petition for modification. Tr. 65-66.[2] The modification allowed Speed to mine through or near the plugged wells provided that it complied with certain conditions, which included the requirements that the borehole be cleaned before it is filled with cement and that any well casing

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[1] During the hearing, Speed withdrew its assertion that Section 75.1700 did not apply to abandoned or inactive oil and gas wells. Tr. 411-12.

[2] The Secretary granted an amendment to the modification on May 23, 2003. JX-3 at tab 3; Stip. 6.

that could not be removed be perforated, or ripped, at intervals close enough to allow expanding cement to infiltrate the space between the casing and the borehole.[3] Tr. 26, 50-55; JX-3 at tab 3.

On November 4, 2003, Speed requested permission from MSHA to mine through Wells 242 and 384.[4] Regarding Speed's request to mine through Well 242, Speed stated that it cleaned and plugged the well on October 9, 2003. Speed stipulated that it did so by removing some, but not all, of the material previously used to plug the well. Stip. 15. At the time it requested permission to mine through the well, Speed asserted that it plugged the well in accordance with Section 101(c) of the Mine Act. Stip. 15, 16. On November 13, 2003, MSHA issued a permit to mine through Well 242 based on Speed's representations and supporting documentation. On July 22, 2004, Speed mined through Well 242.

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[3] The wells consist of one or more inner pipes called casings. The open space surrounding the casing is called the annulus, and extends out to the walls of the borehole. When the wells ceased to be productive, they were capped for environmental purposes, but not for the purpose of safely mining coal. Tr. 234-35. Removing or ripping the casing allows cement to be pumped into all of the voids in the borehole. Tr. 280-81. When cement is properly pumped into all of the voids, the well is sealed sufficiently to ensure that noxious gases and pressurized fluids do not escape when the well is mined through. Ibid.

[4] The casings were removed from Well 242 and the well was plugged with cement and clay in 1956. Stip. 15. Well 384 was drilled in 1988, produced natural gas for about one year, and was capped by Unocal in 1990. JX-3 at tab 4.

Stips. 17 & 18.

Also on November 13, 2003, MSHA issued a permit to mine through Well 384 based on information provided by Speed, which included an affidavit that the well was plugged in accordance with Section 101(c) of the Mine Act on August 15, 2003. Stips. 8 & 9. On July 13, 2004, however, the MSHA District Manager notified Speed that it was not to mine within 150 feet of the well until additional proof that the well was plugged in accordance with the modified standard was provided. Stip. 10. Although Speed had neither removed nor perforated the two outer casings in Well 384 at the time it made the request to mine through the well, Speed asserted that it was entitled to mine within 150 feet of the well under the modified standard. Accordingly, on July 19, 2004, Speed requested that it be issued a citation for mining within 150 feet of Well 384. Tr. 307; Stips. 11-14.

On July 19, 2004, MSHA issued a citation to Speed alleging a significant and substantial ("S&S") violation of Section 75.1700 consisting of mining through Well 242 without having cleaned the borehole in accordance with paragraph 1(a)(1) of the modified standard. JX-1; 3 at tab 3. The citation stated that the well was not drilled out properly because there was cement and a gel substance between old cement in the center of the well and the borehole wall. JX-1.

MSHA also issued a citation alleging an S&S violation of Section 75.1700 consisting of mining within 150 feet of Well 384 without perforating, or ripping, any remaining casings at intervals spaced close enough to permit expanding cement slurry to infiltrate the area outside the casings in accordance with paragraph 1(a)(2) of the modified standard. JX-2, 3 at tab 3. MSHA also issued a Section 104(b) order alleging a failure to abate the violation. JX-2.

Speed contested both of the citations and the order. At Speed's request, the judge held an expedited hearing in the case.

On March 15, 2004, Speed filed a petition for modification of the existing modified standard. 69 Fed. Reg. 13593 (March 23, 2004). On September 8, 2004, the MSHA Administrator issued a proposed decision and order to amend the existing modified standard. On October 8, 2004, Speed filed a request for a hearing on the proposed amendment.

THE JUDGE'S DECISION

The judge found that Speed violated the modified standard with respect to both wells. As to Well 242, Speed asserted that it was sufficient to use a 6½-inch-diameter drill bit to clean a borehole that was at least 12¼ inches in diameter before it plugged the borehole with cement. Speed also asserted that only paragraph 1(d) of the modified standard applied to the

circumstances where the well is to be used for degasification.

The judge found that Speed violated the clear language of paragraph 1(a)(1) of the modified standard. Dec. at 3. In so finding, the judge relied on the MSHA inspector's observation of material other than cement in the area where the borehole had been intersected by the longwall. Ibid. The judge also relied on the credited testimony of the Secretary's expert witness that using the smaller diameter drill bit with water jets could still leave material in the borehole. Ibid. The judge found unpersuasive Speed's argument that paragraph 1(d) was the applicable provision. Dec. at 4-5.

As to Well 384, Speed acknowledged that it did not perforate or rip the two remaining casings, but asserted that it was in compliance with the spirit of paragraph 1(a)(2) because the two annuli were previously filled with expanding cement, rendering the perforation process unnecessary. The judge rejected Speed's argument, and instead relied on the plain language of paragraph 1(a)(2) of the modified standard in finding a violation. Dec. at 5-6.

The judge vacated the Section 104(b) order as unreasonable under the facts of the case. Dec. at 6-7.[5] Speed appealed the judge's findings of the two violations to the Commission.

[5] The Secretary did not appeal the judge's vacating of the order to the Commission.

ARGUMENT

THE SECRETARY'S INTERPRETATION OF THE PROVISIONS OF THE MODIFIED STANDARD WITH RESPECT TO WELLS 242 AND 384 IS REASONABLE, AND SPEED FAILED TO COMPLY WITH THE SECRETARY'S REASONABLE INTERPRETATION

A. Standard of Review

Once a modification of a mandatory safety standard is approved and adopted, its provisions and revisions are enforceable as mandatory standards. Lang Brothers, Inc., 14 FMSHRC 413, 422 (Sept. 1991). See UMWA v. FMSHRC, 931 F.2d 908, 909 (D.C. Cir. 1991) (modification of 30 C.F.R. § 75.1002); 30 C.F.R. § 44.4(c). If the meaning of a provision contained in the modified standard is plain, the provision must be enforced in accordance with that meaning unless such enforcement would lead to absurd results. See Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 7 (D.C. Cir. 2003) (standard); Lodestar Energy, Inc., 24 FMSHRC 689, 693 (July 2002) (standard).

Courts use the traditional tools of statutory construction in determining whether the meaning of a provision is plain. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C.Cir. 2000) (Clean Air Act). The traditional tools include the text, the history, the overall structure and design, and, especially important here, the purpose of the provision. See ibid. See also Consolidation Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993) (applying traditional tools of construction to ascertain a

standard's plain meaning). Where a plain meaning can be ascertained from the provision itself, that meaning controls unless the literal application of the provision will produce a result "demonstrably at odds with the intentions of its drafters." Environmental Defense Fund, Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). See Consolidation Coal, supra.

If the meaning of a provision is ambiguous, deference must be given to the reasonable interpretation of the government agency vested with the authority to administer and enforce the provision. See Excel Mining, 334 F.3d at 7; Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463 (D.C. Cir. 1994); Energy West Mining Co., 17 FMSHRC 1313, 1317 and n.6 (Aug. 1995) (ventilation plan). The agency's interpretation is reasonable as long as it is not inconsistent with the language and the purpose of the provision. Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 535-36 (D.C. Cir. 2004).

B. The Judge Correctly Found, With Regard to Well 242, that Speed Failed to Comply With the Secretary's Reasonable Interpretation of the Provision of the Modified Standard that Required Speed to Clean the Borehole Before It Was Plugged

1. The Secretary's Interpretation Is Consistent With the Plain Language of the Provision

The citation with respect to Well 242 alleged that Speed

failed to comply with paragraph 1(a)(1) of the modified standard because the borehole was not adequately cleaned before the well was plugged. The relevant language of paragraph 1(a)(1) required Speed to make a "diligent effort to clean the borehole ...." Jx-3 at tab 3. The issue is whether all material needed to be removed from the borehole before it was plugged.

The judge found that the Secretary's interpretation that all material needed to be removed before the well was plugged is consistent with the clear language of the provision that required Speed to clean the borehole. Dec. at 3. The judge noted that according to the testimony of MSHA Senior Mining Engineer Eric Sherer, the Secretary's expert witness, the Secretary's interpretation was consistent with the safety purpose of the provision. Dec. at 4.[6] The purpose of the provision was to ensure the integrity of the well plug to reduce or eliminate hazards from oil or gas that might migrate from the well into the mining area. Ibid.

Speed argues, Petition at 7, that paragraph 1(a)(1) of the modified standard was ambiguous because the term "clean" was not defined. In support of its argument, Speed asserts, Petition at 6-8, (1) that MSHA was familiar with Speed's cleaning and

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[6] Sherer has worked on many petitions for modification of MSHA's oil and gas wells standard, and worked specifically on the modified standard at issue in this case. Tr. 262, 274-75.

plugging techniques and approved the mine-through or mine-by of other similar wells in the past, (2) that local MSHA officials never before issued Speed a citation alleging a violation when non-cement material remained in the borehole before it was plugged, and (3) that there is no industry standard that requires all non-cement material to be removed from the well prior to plugging. Speed therefore requests, Petition at 10, that the Commission interpret the provision as it was assertedly interpreted "by local MSHA officials on numerous similar occasions prior to the current controversy" -- i.e., as allowing some amount of non-cement material to remain in the borehole before it was plugged. Speed's request should be denied because its argument lacks merit.

The judge correctly found that the requirement that the borehole be cleaned was clear: it required all material to be removed from the borehole. The requirement contained no exceptions; there was no qualifying or limiting language, such as language speaking in terms of "partially" or "substantially" cleaned. The standard "means what it says." Pigford v. Veneman, 292 F.3d 918, 924 (D.C. Cir. 2002). A contrary conclusion would read into the provision "a limitation ... that has no basis in the [provision's] language" (Utah Power and Light Co. v. Secretary of Labor, 897 F.2d 447, 451 (10th Cir. 1990)) and "directly contradict[s] the unrestricted character of

[the] words [used]." Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995). Accord Hercules, Inc. v. EPA, 938 F.2d 276, 280 (D.C. Cir. 1991) (rejecting an interpretation that would read into the controlling provision" a drastic limitation that nowhere appears in the words [chosen] and that, in fact, contradicts the unrestricted character of the words").

The Secretary's interpretation is supported by the ordinary dictionary definition of the word "clean."[7] The common dictionary definition of the verb "clean" is "to make ... free of dirt or any foreign or offensive matter" and "to brush, scrape, or blow clean of dirt or other accumulation - often used with *out*." Webster's Third New International Dictionary, p. 419 (2002). A common dictionary definition of the adjective "clean" is "free from or freed of dirt, filth, refuse, or remains." Webster's at p. 418. See also The American Heritage Dictionary of the English Language, 4th Ed. (2000) (defining the adjective "clean" as "free from dirt, stain, or impurities; unsoiled" and "free from foreign matter"). In addition, "clean out" means to "strip or exhaust of all contents ...." Webster's at p. 419. Under these commonly used definitions, Speed was required to remove any and all foreign material in the borehole before it

[7] When examining the text of a provision, words are normally presumed to have their ordinary, dictionary meaning. See, e.g., Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993).

plugged the well.

The Secretary's interpretation is supported by the legislative history of the Mine Act. Section 317(a) of the Mine Act, later codified as 30 C.F.R. § 75.1700, was adopted without change from Section 317(a) of the Federal Coal Mine Health and Safety Act of 1969. Discussing what was at that time Section 217(a) of S. 2917, the Senate Report indicated that there were hazards caused by mining through or near oil and gas wells that were difficult to control and that, therefore, operators were prohibited from mining through or near oil or gas wells. See Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Committee Print), at 84-85 from S. Rep. No. 91-411). The requirement that the borehole be completely cleaned ensures the integrity of the plug when mining through or near the well, and thus protects miners from hazards associated with leaking oil and gas well plugs.

The Secretary's interpretation is also supported by the purpose of the provision: to provide a safe working environment when mining through or near oil or gas wells. In response to problems present in longwall coal mining systems, the U.S. Bureau of Mines, Mine Enforcement and Safety Administration ("MESA"), developed and tested well-plugging techniques in the 1970's. See Tr. 224-27, referring to SX-1 (Componation, Paul J., Tisdale, Jack E., and Pasini, Joseph, III, Cleaning Out,

Sealing and Mining Through Wells Penetrating Areas of Active Coal Mines in Northern West Virginia, IR1052, MESA, 1977) ("the MESA report")). MESA developed a detailed protocol for redrilling and plugging abandoned oil and gas wells. Ibid. The protocol was intended to protect miners from methane ignition, crude oil inundation, and water inundation, while allowing wells to be mined through. Ibid. The MESA protocol is the basis for all modifications allowing mining through suitably sealed oil and gas wells that have been granted by MSHA. Ibid.

When material is left in the borehole before it is plugged, the plug may be structurally unsound, and thus enable oil or gas to infiltrate into the working area. Tr. 262-64, 301; JX-3 at tab 3. Those substances may be under pressure in a well and may cause injury to miners exposed to them. Speed's own expert witness, Joseph Pasini, testified that he was aware of an incident where water was blown out of a plugged well with sufficient force to seriously injure a longwall shearer operator. Tr. 240-41, 245. Although Pasini did not think that cleaning all the material from the borehole was the industry standard, he acknowledged that there can be dangers present in mining through abandoned oil and gas wells, Tr. 220, and that cleaning all of the old material from the borehole before plugging it would be ideal. Tr. 201-02.

Moreover, even if the industry standard was not to clean

completely, standard industry practice may be an unreliable interpretive tool. See General Dynamics Corp. v. OSHRC, 599 F.2d 453, 464 (1st. Cir. 1979) (refusing to rely on industry practice to establish the adequacy of a company's safety program because "such a standard would allow an entire industry to avoid liability by maintaining inadequate safety training"). Industry practice may not trump the requirements of a regulatory provision when the provision would not otherwise be unconstitutionally vague. Ibid.

Despite the clarity apparent on the face of the provision, Speed maintains, Petition at 7, that the provision was vague and confusing. As shown above, the meaning of the term "clean" was clear.[8] Assuming, however, that the meaning of the provision was ambiguous, as Speed asserts, Petition at 7-10, the Commission should defer to the Secretary's interpretation of the provision because that interpretation is reasonable, i.e., it is

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[8] Speed's argument, Petition at 10, that it did not have fair notice of MSHA's interpretation lacks merit. As demonstrated above, the language and purpose of the provision and the legislative history of the Mine Act gave Speed fair notice that the borehole must be cleaned completely before the well was plugged. See Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148, 156 (2d Cir. 1999) (fair notice was provided by the plain meaning of the standard and the objectives of the Mine Act); Freeman United Coal Mining Co. v, FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (fair notice was provided by the plain language of the standard). Speed's "disagreement with the clear import" of the provision of the modified standard does not reflect, in the modified standard as it has been applied, "vagueness of

consistent with the provision's language and purpose. See, e.g., Energy West, 40 F.3d at 461 (ambiguity in the Mine Act with respect to occupational injury information); Lodestar, 24 FMSHRC at 693.

Speed's claim, Petition at 8 n.6., that the Secretary's interpretation is not entitled to deference because it represents an arbitrary and unannounced change from past practice is unsupported by the law and the facts of this case. An interpretation may be set forth for the first time during the litigation of a case so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment." Bigelow v. Dept. of Defense, 217 F.3d 875, 878 (D.C. Cir. 2000) (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)). We show below that there is no reason to suspect that the interpretation set forth during this case is anything other than the position of the agency. In addition, there is no evidence that MSHA ever before had any reason to address the issue, and there is no evidence that MSHA ever adopted a different interpretation or contradicted its position here. Accordingly, the Secretary's interpretation is entitled to deference because it reflects the agency's considered opinion.

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constitutional dimension." United States v. Thomas, 864 F.2d 188, 199-200 (D.C. Cir. 1988).

Speed's assertion, Petition at 7, 10, that "the existence of some amount of non-cement material in the borehole has never, before now, been deemed by the local MSHA enforcement officials as being violative of the modification," and that "somebody at MSHA decide[ed] to interpret the modification in a new way" by not allowing some amount of non-cement material to remain in the borehole before the well was plugged, is fundamentally flawed. Speed's assertion is based on the faulty assumption that MSHA permitted Speed to plug wells similar to Well 242 without cleaning all the non-cement material and that MSHA changed its position in this case. The evidence does not support Speed's assumption.

The evidence which Speed relies on, Petition at 6-8, in asserting that it mined through or mined by thirty wells with MSHA approval since the modification was granted without receiving a citation, and that MSHA was present on three occasions when wells similar to Well 242 were drilled and plugged, does not establish that MSHA changed its interpretation of the modification provision. Senior Mining Engineer Sherer testified that, in the past, MSHA relied on information and affidavits submitted by Speed indicating that the cleaning of a borehole was done in accordance with the modified standard. Tr. 285. MSHA had no independent knowledge of the extent to which a borehole was cleaned before being plugged. Ibid. For example,

with respect to Well 242, Speed stipulated that it submitted a letter to the Acting District Manager stating, "Well 242 has been plugged to 101c Petition standards," and that accompanying the letter was a plugging affidavit purporting to show that the well had been plugged on October 9, 2003. Stip. 16. When Speed represented to MSHA that it was in compliance with the modified standard, MSHA was entitled to rely on that representation. See Honeywell International, Inc. v. EPA, 372 F.3d 441, 447 (D.C. Cir. 2004) (the agency "was entitled to rely on ... representations by parties who were uniquely in a position to know the relevant information") (internal quotation and citations omitted)). Thus, Speed cannot now deny MSHA's reliance on Speed's past representations.

Moreover, there is unrefuted testimony by Sherer that questions began to arise about the accuracy of the drilling affidavits submitted by Speed. Tr. 285.[9] For example, drilling affidavits asserted that plugs consisting of a certain thickness of cement were placed at a certain depth in the well, but the drilling logs did not indicate that those plugs were intersected when the well was redrilled. Ibid. With respect to Well 242, Sherer testified that the drilling affidavit was written in 1956

[9] Paragraph 2q of the modified standard required Speed to file a plugging affidavit and a certification that the well had been plugged as described. CX-3 at tab 3.

and that "there was supposed to have been a cement plug placed around the coal seam, which in fact was not there." Tr. 285.

The testimony of Pasini, Speed's expert witness, is consistent with Sherer's testimony. Passini acknowledged that plugging affidavits have been unreliable because of changing conditions, and that the MESA report -- which Pasini co-authored -- advised operators to exercise "caution" because several records for wells plugged since 1950 proved to be unreliable. Tr. 232-33. Pasini also acknowledged that he had heard of at least one incident where a miner was injured because water was blown out of a previously plugged well. Tr. 240-41, 245. Accordingly, because MSHA (1) became aware of hazards resulting from Speed's cleaning and plugging techniques, (2) began to question the reliability of the cleaning and plugging information submitted by Speed, (3) discovered inconsistencies between Speed's representations and the actual condition of the assertedly cleaned and plugged wells, and (4) had not observed Speed's cleaning of the well before it was plugged, MSHA did exactly what it was supposed to do under the circumstances -- it took a closer, first-hand look at the circumstances.[10] Taking a

[10] Although Speed makes much of the fact that MSHA inspectors were present at the time of the mine-through of Well 242 on July 22, 2004, MSHA Inspector Gilbert Young testified that he and the other inspectors were told of the mine-through by a foreman but that they did not actually see the mine-through until after it was completed. Tr. 318. After the mine-through, MSHA took

closer look at the circumstances is not changing one's interpretation.

Similarly, Speed's assertion, Petition at 8-9, that the MSHA inspector did not issue a citation or give any indication that Speed violated the modified standard at the time of the mine-through of Well 242 does not establish that the inspector's interpretation was different from the agency's interpretation. The fact that the inspector did not issue a citation on the spot, but rather waited to analyze the material from the borehole, merely shows diligence and prudence by the inspector in determining that the material found in the borehole was not cement before issuing a citation.

Likewise, Speed's reliance, Petition at 9-10, on the actions of two different District Managers with respect to Well 384, which the judge found to be "seemingly contradictory," does not support Speed's assertion that the Secretary changed her interpretation in this case. Then District Manager Edwin Brady notified Speed on November 13, 2003, that MSHA was approving the mine-through of Well 384 based on documentation submitted by Speed. CX-5. On July 13, 2004, District Manager Jesse Cole informed Speed that MSHA was denying Speed's request to mine

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pictures of the well, and took samples of the material found in the well, to determine whether Speed was in compliance with the modified standard. Tr. 318-25.

through Well 384 because (1) the information provided by Speed to MSHA did not indicate that the annuli were properly grouted, (2) Speed stated to MSHA that it did not perforate the two remaining casings, and (3) MSHA did not receive a permit from the West Virginia Office of Miners' Health, Safety, and Training -- which, like MSHA, has a requirement to perforate the casing before plugging the well. CX-7. See Tr. 109. The actions which both District Managers took with respect to Well 384 are consistent with Sherer's testimony with respect to Well 242 that MSHA questioned the reliability of the documentation submitted by Speed and began to look more closely at Speed's mining techniques after hazards arose which indicated that wells were not being plugged in accordance with the modified standard. In addition, with respect to Well 384, MSHA never received the additional information which it requested from Speed regarding compliance with the modified standard. Tr. 305-08.

In any event, even if the inspector's interpretation or the former District Manager's interpretation was different from the Secretary's interpretation, an interpretation by the MSHA inspector or District Manager cannot be used to "undermine the correct enforcement of [the modified standard]." Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984) (citation and internal quotation marks omitted). Accord RAG Cumberland Resources LP v. FMSHRC, 272 F.2d 594, 598 (D.C.

Cir. 2001). See also Bigelow, 217 F.3d at 880-81 (courts do not review and defer to the interpretations of lower-level agency employees; they review and defer to the authoritative interpretation of the agency itself); Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (Sept. 2000). Moreover, because there has been no affirmative misconduct by the inspector or the District Manager, their conduct cannot estop the Secretary. See Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); Linkous v. United States, 142 F.3d 271, 277-78 (5th Cir. 1998); Frillz, Inc. v. Lader, 104 F.3d 515, 518 (1st Cir.), cert. denied, 522 U.S. 813 (1997). Accordingly, Speed's reliance, Petition at 9-10, on the interpretation of the provision by "local MSHA officials" in support of its assertion that the Secretary exceeded the limits of Executive power, and that the Commission should interpret the provision of the modified standard as permitting some non-cement material to remain in the borehole before it was plugged, is misplaced.

Even if the Commission were to agree that Speed's suggested interpretation, Petition at 10, that some non-cement material should have been allowed to remain in the borehole before it was plugged is plausible, the question to be decided here is whether the Secretary's interpretation is permissible. It is. See Udall v. Tallman, 380 U.S. 1, 4 (1965) ("The ... interpretation may not be the only one permitted by the language ... but it is

quite clearly a reasonable interpretation; courts must therefore respect it."). The Secretary's interpretation is permissible because it is consistent with the provision's language and its purpose. See, e.g., Cold Spring Granite Co. v. FMSHRC, 98 F.3d 1376, 1378 (D.C. Cir. 1996) ("the Secretary's plausible and sensible reading of his own regulation would prevail even if the company had presented an equally plausible alternative construction, which it has not").

2. The Judge's Finding of a Violation of the Modified Standard With Respect to Well 242 is Supported By Substantial Evidence

The citation alleged that cement and bentonite were found in Well 242. JX-1.[11] Senior Mining Engineer Sherer testified that a clay-like material that was not cement was left in the borehole. Tr. 265-66, 301. Speed stipulated that it removed some but not all of the material that was in the middle of the borehole and that that material, which was sampled by MSHA, was not cement. Tr. 327; Stip. 15. The judge found that the borehole of Well 242 was not cleaned in accordance with the modified standard because Speed's drilling method could not adequately clean the well and because material other than cement was found in the shaft of the well after it was mined through.

[11] Bentonite is a type of clay formed from volcanic ash. See Dictionary of Mining, Minerals, and Related Terms, 2d Ed. (1997) at p. 48.

Dec. at 3.[12]

The Commission is bound to uphold the judge's finding of a violation as long as it is supported by substantial evidence. Secretary of Labor v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983). Under the plain meaning of the provision, the violation was established by (1) Speed's stipulation that it only removed some of the material from the borehole, (2) Speed's stipulation that the material sampled from the borehole by MSHA was not cement, (3) the inspector's testimony that the material in the borehole was not cement, (4) Sherer's testimony that a clay-like material was left in the borehole, and (5) Sherer's credited testimony that Speed's drilling method was inadequate because it could leave material behind.

Speed argues, Petition at 11-13, that the judge erred in finding a violation of the modified standard because there was no evidence that "unconsolidated" or "loose" material remained in the borehole before the well was plugged, and the drilling method it used adequately cleaned all loose material from the well. Speed's argument fails because Speed erroneously assumes that cleaning the borehole of "loose" material means something

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[12] Speed used a 6½-inch-diameter drill bit with water jets to clean an area that was at least 12¼ inches in diameter. Dec. at 3. In other words, Speed attempted to clean an area using a drill bit that was only slightly more than half as wide as the area.

less than cleaning the borehole of all material. It does not.

Senior Mining Engineer Sherer testified that to clean the borehole adequately, so that the strength of the plug is not compromised, you must "dislodge any unconsolidated material within the hole" and "you'd want to clean rock to rock." Tr. 265; see also Tr. 288.[13] "Unconsolidated" or "loose" material is material that is "not fastened" to the walls of the borehole. See The American Heritage Dictionary of the English Language, 4th Ed. (2000) (defining "loose" as "not fastened, restrained,

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[13] Speed cursorily suggests, Petition at 7 n.5, that paragraph 1(a)(1) of the modified standard was not applicable to the circumstances here and that, in the past, MSHA only required that the borehole either be "re-drilled" or "cleaned out" in accordance with paragraph 1(d)(1) of the modified standard. Speed's suggestion is little more than a passing comment, designed to provide information buttressing Speed's argument that paragraph 1(a)(1) is vague and confusing rather than to carve out an independent ground for inquiry. Because Speed failed to provide a "modicum of developed argumentation," Speed's suggestion is not an "objection" under Sections 106(a) and 113(d)(2)(A)(iii) of the Mine Act. See Frank Lill & Son, Inc. v. Secretary of Labor, 362 F.3d 840, 844 (D.C. Cir. 2004); see also P. Gioisi and Sons, Inc. v. OSHRC, 115 F.3d 100, 106-07 (1st Cir. 1997). In addition, Speed's suggestion is not an "argument" within the meaning of Rule 28(a)(9) of the Federal Rules of Appellate Procedure and, accordingly, the Commission need not address the suggestion. See Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("judges are not like pigs, hunting for truffles buried in briefs") (internal quotation and citations omitted)). In any event, for the reasons stated in the judge's decision, Dec. at 4-5, the judge's finding that paragraph 1(a)(1) was applicable here because it had not been superceded by paragraph 1(d)(1) is supported by substantial evidence and should be affirmed. Moreover, Eric Sherer's testimony that paragraph 1(a)(1) explicitly applied to Speed's plugging activities, Tr. 293, and that, as its author, he believed that

or contained"); Webster's at p. 1335 (defining "loose" as "not rigidly fastened or securely attached"). Thus, Sherer's testimony that Speed had to "clean rock to rock" and "dislodge any unconsolidated material," which is any material that is not attached to the walls, is no different from the Secretary's plain language interpretation that the borehole be cleaned of all material.

Alternatively, even if cleaning the borehole of "loose" material means something less than cleaning the borehole completely -- which it does not -- Sherer's testimony cannot be used to undermine the plain meaning of the provision. See Emery Mining, supra. The provision's plain meaning was that the borehole must be cleaned of all material.

Although Speed claims, Petition at 12-13, that there is testimony by its President and General Operations Manager, Peter Hendrick, and its expert witness, Pasini, that Speed's drilling method adequately cleaned the borehole, Speed's reliance on this testimony is misplaced. Pasini admitted that he did not know whether Speed's drilling method removed all the clay from the annulus. Tr. 238-39. Moreover, the testimony of Hendrick and Pasini was refuted by the testimony of the Secretary's expert witness, Sherer, that the water jets used by Speed did not

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paragraph 1(d)(1) was not intended to supplant paragraph 1(a)(1), is consistent with the Secretary's interpretation.

enhance the cleaning ability of the drill because they were directed at the bit, to clean and cool it. Tr. 283-84.

The judge credited the testimony of the Secretary's expert witness, and Speed fails to demonstrate any abuse of the judge's exercise of discretion. See Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995) (judge's credibility determinations are reviewed under an abuse of discretion standard). Here, the judge found more persuasive Sherer's testimony that a 6½-inch drill bit would not adequately clean a 12¼-inch borehole because it could leave material behind and the water jets used by Speed did not enhance the cleaning ability of the drill. Accordingly, substantial evidence supports the judge's finding that the borehole was not cleaned before it was plugged.

C. The Judge Correctly Found, With Regard to Well 384, that Speed Failed to Comply With the Secretary's Reasonable Interpretation of the Provision of the Modified Standard that Required Speed to Perforate or Rip the Remaining Well Casings Before the Well Was Plugged

The citation with respect to Well 384 alleged that Speed failed to comply with paragraph 1(a)(2) of the modified standard because two remaining well casings were not perforated or ripped before the well was plugged. JX-2. Paragraph 1(a)(2) of the modified standard required that "the casing which remains shall be perforated, or ripped, at intervals spaced close enough to permit expanding cement slurry to infiltrate the annulus ...."

JX-3, tab 3. The undisputed evidence shows that on August 15, 2003, Speed only pulled the 4½-inch casing from the well and left intact, without perforating or ripping, the 7-inch and 9 5/8-inch casings before it plugged the well. Tr. 96-97; Stip. 14. The issue is whether Speed was required to perforate or rip the remaining well casings before plugging the well if expanding cement was previously used to fill the well's two annuli without perforating or ripping the casings.[14] The judge found that the Secretary's interpretation was consistent with the plain language of the provision: the requirement to perforate or rip remained even if expanding cement was previously used to fill the annuli. Dec. at 5-6.

Speed argues, Petition at 13-15, that the phrase "to permit expanding cement slurry to infiltrate the annulus between the casing and the borehole wall" qualifies both the word "perforated" and the word "ripped." Speed therefore concludes that the requirement to perforate or rip the remaining casings applied only when the annuli had not been filled with cement. Petition at 15-16. Speed's conclusion is erroneous.

Like any qualifying phrase, the phrase "to permit expanding cement slurry to infiltrate the annulus between the casing and

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[14] The first annulus was the space between the 7-inch casing and the 9 5/8-inch casing, and the second annulus was the space between the 9 5/8-inch casing and the outer wall of the borehole. Tr. 280-81; see CX-5, 6.

the borehole wall," did not relax or eliminate the words it qualified; it further defined them. See, e.g., Louisiana Ins. Guar. Ass'n v. Rapides Parish Police Jury, 182 F.3d 326, 331 (5th Cir. 1999) (Louisiana legislature restricted the scope of a statutory definition through an amendment that added the qualifying phrase "pursuant to a contract with a contractor or subcontractor"); United States v. Seidlitz, 589 F.2d 152, 157 (4th Cir. 1978) (qualifying term restricts the statute's scope). Here, the qualifying phrase did not suggest that Speed did not have to perforate or rip the casings; it specified the precise manner in which Speed had to perforate or rip the casings, i.e., "at intervals close enough to permit expanding cement slurry to infiltrate the annulus between the casing and the borehole wall for a distance of at least 200 feet below the base of the lowest minable coal bed." JX-3 at tab 3. The qualifying language indicated that Speed had to perforate or rip the casings, and that it had to do so in a specialized manner. Although the judge stated that the phrase did not qualify the words "perforate" and "rip," what he clearly meant, and correctly meant, is that the phrase did not relax or eliminate the words "perforate" and "rip": "the requirement to perforate or rip still remain[ed]," and the parties stipulated that neither perforation nor ripping was done. Dec. at 6.

It is not a defense, as Speed claims, Petition at 15-17,

that it accomplished the purpose of the provision if it violated the plain terms of the provision. See Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (if the meaning of a provision's language is plain, that meaning is controlling and cannot be overridden by reference to the provision's primary or general purpose); National Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) ("Subject to the standard proviso about absurd results, when the statute itself resolves the problem at hand that is an end to matters."). Here, the provision did not state that Speed had to do whatever it chose to do that would accomplish the provision's purpose; it stated that Speed had to perforate or rip in a manner that would accomplish the provision's purpose. See Consolidation Coal Co. v. FMSHRC, 136 F.3d 819, 823 (D.C. Cir. 1998).

Speed's argument, Petition at 15-17, that perforating or ripping the casings would have been a wasted effort, and that compliance with the provision's plain meaning would therefore produce an absurd result, lacks merit. Speed's argument is based on two erroneous assumptions: (1) that there would not have been any room in either annulus for additional cement to infiltrate because the two annuli had previously been filled with expanding cement, and (2) that according to the Secretary's expert witness, the amount of cement previously used to fill the annuli was reasonable. Petition at 16-17 and n.11.

Speed's first assumption, that there was no room for additional cement to infiltrate the annuli, is erroneous because it is based on testimony by President Hendrick and Joseph Pasini that failed to take several significant facts into account. The Secretary's expert witness, Eric Sherer, testified that (1) the competency of the previously poured cement used to fill the two outer annuli could have deteriorated or shifted since the cement was poured approximately fifteen years ago, (2) the walls of the well could have caved in in the softer or less competent areas, and (3) the walls of the well could have eroded because of the movement of fluid through the borehole. Tr. 281. Sherer further testified that the integrity of the seal would have been compromised by the occurrence of any of those conditions and that, if the annulus is not sealed properly, it could allow the migration of oil and gas into the mine opening as the well is intersected. Tr. 280-81. Sherer's testimony was not refuted by either Hendrick or Pasini.

Speed's second assumption is erroneous because it is based on misleading and out-of-context reliance on testimony by the Secretary's expert witness that a reasonable amount of cement was previously used to fill the annuli. Speed's reliance is misplaced because Sherer qualified his testimony that the volume of cement was reasonable for one annulus by stating that the volume was reasonable <u>if</u> "the hole is <u>exactly</u> 12 and a quarter

inches in diameter." Tr. 300. Speed ignores that testimony, and Sherer's further testimony that there was no way of knowing the exact dimensions of the borehole. Sherer testified:

> [Well] 384 has two annuluses, or annuli. One between the 7 and 9[]5/8 inch, two being the other between the 9[]5/8 inch tubing [and] the inside of the borehole, the 12 and a quarter inch borehole []. What we don't know is what real size that 12 and a quarter inch borehole was. As far as we know, we don't have a caliper log on it. These boreholes, even though they're drilled with a 12 and a quarter inch bit, in places they can be significantly larger than 12 and a quarter inches, when they -- if they cave in, or the hole erodes. Thus we have no way of knowing at this point in time what the true volume of that outer annulus is.

Tr. 280-281. Because there was no way of knowing the true volume of the outer annulus, Sherer testified unequivocally that the volume calculations performed by Speed did not preclude the existence of voids in the annulus. Tr. 301.

The foregoing unrefuted testimony demonstrates that a number of conditions could have enlarged the size of the borehole since the time the annuli were filled with cement. It also demonstrates that there was uncertainty as to whether the amount of cement previously used to fill the annuli was adequate to preclude the existence of voids. Accordingly, compliance with the plain meaning of the provision would not be an absurdity. Indeed, the MESA report, co-authored by Speed's own expert witness, recommended that "the casing must be ripped or

milled out to allow the cement to fill the annular space behind the casing," Tr. 227, and Speed itself acknowledges, Petition at 17, that "where there is uncertainty, it makes sense to perforate." Here, the evidence shows that there was uncertainty; therefore, it would have made perfect sense to perforate the remaining casings.

CONCLUSION

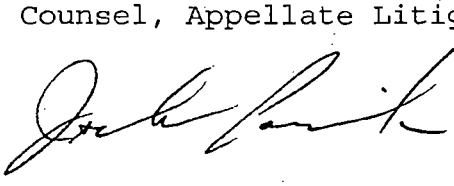
For all the foregoing reasons, the Commission should affirm the judge's findings with respect to both violations of the modified standard.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation



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

CERTIFICATE OF SERVICE

I certify that a copy of the Secretary's brief was mailed on October 15, 2004, to:

Timothy M. Biddle, Esq.
Daniel W. Wolff, Esq.
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595

Jack Powasnik

U.S. Department of Labor

Office of the Solicitor
Division of Mine Safety & Health
1100 Wilson Boulevard
Arlington, Virginia 22209-2296

October 15, 2004

By Federal Express

Richard L. Baker
Executive Director
Federal Mine Safety and Health Review Commission
601 New Jersey Ave. NW
Suite 9500
Washington, D.C. 20001-2021

Re: Secretary of Labor v. Speed Mining, Inc.,
FMSHRC Docket No. WEVA 2004-187-R

Dear Richard Baker:

I am enclosing the original and seven copies of the Secretary's brief in the above case.

Very truly yours,

Jack Powasnik
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard, 22nd floor
Arlington, VA 22209-2296
(202) 693-9344

cc: Timothy M. Biddle, Esq.
Daniel W. Wolff, Esq.