ORAL ARGUMENT SCHEDULED FOR
MAY 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

Petitioner,

v.

TWENTYMILE COAL COMPANY

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

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ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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# RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. The parties who appeared before the Federal Mine Safety and Health Review Commission are the Secretary of Labor and Twentymile Coal Company. The parties in this Court are the Secretary of Labor, Twentymile Coal Company, and the Commission. No amici appeared before the Commission, and there are no amici in this Court.

(B) Rulings Under Review. Both the Secretary of Labor and Twentymile Coal Company seek review of the decision of the Commission issued on August 12, 2004, in Twentymile Coal Co., FMSHRC Docket Nos. WEST 2000-480-R and WEST 2002-131, and reported at 26 FMSHRC 666 (2004). Twentymile seeks review of the Commission's actions in finding that Twentymile violated a training standard, modifying the withdrawal order alleging the violation to a citation, and finding that, as modified, the citation gave Twentymile adequate notice of the violation alleged. The Secretary seeks review of the Commission's action in refusing to assess a penalty for Twentymile's violation.

(C) Related Cases. This case was not previously before this Court or any other court. Other than the two dockets, Nos. 04-1292 and 04-1312, consolidated into one case by order of the Court dated September 8, 2004, counsel for the Secretary are unaware of any other related cases pending in this Court or any other court.

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## GLOSSARY OF ABBREVIATIONS AND ACRONYMS

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| 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 |
| Stip. | Stipulation |
| Tr. | Transcript |
| Twentymile | Twentymile Coal Co. |

## STATEMENT REGARDING JURISDICTION

The Secretary's Statement Regarding Jurisdiction is set forth in her opening brief, pp. 1-2, and will not be repeated here.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether the Commission acted properly in affirming the administrative law judge's finding that Twentymile Coal Company violated the training standard at 30 C.F.R. § 48.7(c) when it failed to provide new task training to miners engaged in unplugging its newly-installed rock chute.

2. Whether the Commission acted properly in modifying the withdrawal order issued by the Secretary under Section 104(g) of the Mine Act to a citation under Section 104(a) of the Act.

3. Whether, as modified by the Commission, the Section 104(a) citation gave Twentymile adequate notice of the violation alleged against it.

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the bound Addendum to this brief beginning at page A-1.

## STATEMENT OF THE CASE

The Secretary's Statement of the Case is set forth in her opening brief, pp. 3-15, and will not be repeated here.

## STATEMENT OF FACTS

The Secretary's Statement of Facts is set forth in her opening brief, pp. 15-22, and will not be repeated here.

## SUMMARY OF ARGUMENT

The Secretary of Labor ("Secretary") issued a withdrawal order under Section 104(g) of the Mine Act alleging that Twentymile Coal Co. ("Twentymile") violated the new task training requirement at 30 C.F.R. § 48.7(c) by assigning miners to unplug its newly-installed rock chute without providing them with new task training. The administrative law judge affirmed the order, as amended, reasoning that unplugging the rock chute constituted a distinct new task for which new task training was required. The Federal Mine Safety and Health Review Commission ("Commission") modified the order to a citation under Section 104(a) of the Mine Act, and affirmed the citation as so modified.

The judge's finding that Twentymile violated the new task training standard is both legally correct and supported by substantial evidence. The judge correctly found that the evidence established that unplugging the rock chute was a distinct new task for which new task training was required because it was a job that occurs on a "regular basis." The judge's finding that Twentymile violated the training standard can also be affirmed because substantial evidence supports a finding that, as a new subtask within the general task of "beltman," unplugging the rock chute was a new job for which new task training was required.

Twentymile cannot challenge the Commission majority's modification of the Section 104(g) order to a Section 104(a) citation because it failed to urge that objection before the

Commission, either during oral argument or by filing a motion for reconsideration. In any event, the Commission majority acted properly in modifying the withdrawal order to a citation. Section 104(a) of the Mine Act authorizes the Secretary to issue a citation if she believes that a mine operator has violated any standard.

As modified by the Commission, the Section 104(a) citation gave Twentymile adequate notice of the violation at issue in the case. Twentymile knew which miners it assigned to perform work at the rock chute, and it knew what work assignment it gave those miners. Twentymile has failed to demonstrate any prejudice to it from the wording of the order issued by the Secretary, either as originally worded or as amended at the hearing.

## ARGUMENT

### I.

### THE COMMISSION ACTED PROPERLY IN AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT TWENTYMILE VIOLATED THE TRAINING STANDARD AT 30 C.F.R. § 48.7(c) WHEN IT FAILED TO PROVIDE NEW TASK TRAINING TO MINERS ENGAGED IN UNPLUGGING ITS NEWLY-INSTALLED ROCK CHUTE

### A. Introduction

The primary issue in this case is whether the Secretary properly alleged, and the Commission properly affirmed, that Twentymile failed to provide required new task training to miners it assigned to unplug its newly-installed rock chute. Task training is an essential aspect of the Mine Act's overall program for providing training to miners to prevent accidents that can result in injury or death. See generally S. Rep. No. 95-181,

95th Cong., 1st Sess. 49-51, 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 ("Leg. Hist."), at 637-39 (1978) (discussing the Mine Act's training program and emphasizing that providing health and safety training to miners is "essential" to achieving the goals of the Act). Unlike other types of training, which involve formal training subjects and time-in-training requirements and must be given at prescribed times or intervals and at particular locations, task training is an unstructured type of training that is to be given whenever the need arises. "[T]ask training need not be formal or elaborate and may be provided readily to miners assigned on an ad hoc, temporary, or limited basis." 26 FMSHRC at 680 (J.A. 186).

When a mine operator assigns any miner to perform an activity that is performed on a regular basis but is new to that miner, the operator must ask itself whether there are any safety or health implications of that activity that differ from those of tasks in which the miner may already be trained and proficient. If so, the operator is required to bring to the attention of the miner assigned to perform the new task the manner in which the task differs from tasks he has performed in the past, the safety and health hazards involved in the task, and how those hazards can be minimized or avoided. New task training is easy for mine operators to provide -- and is essential to miner health and safety.

B. Applicable Principles and Standard of Review

In construing a statute, the Court "looks first for the plain meaning of the text." United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002). Accord Bullcreek v. NRC, 359 F.3d 536, 541 (D.C. Cir. 2004). If the language of the statute has a "plain and unambiguous meaning," the Court's inquiry ends so long as the resulting "statutory scheme is coherent and consistent." Barnes, 295 F.3d at 1359 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (internal quotation marks omitted)). Accord Bullcreek, 359 F.3d at 541.

In deciding whether a statute's meaning is plain, a court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." Natural Resources Defense Council, Inc. v. Browner, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (internal citations omitted). "If this search yields a clear result, then Congress has expressed its intention as to the question * * *." Ibid.

"[W]hen the statute is silent or ambiguous with respect to the specific issue, the question for [the] court * * * is whether the Secretary's interpretation is a permissible construction of the statute." Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (quoting Secretary of Labor v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (internal quotation marks omitted)). The Court should defer to "a reasonable interpretation" by the Secretary. Excel, 334 F.3d at 6 (quoting Chevron, 467 U.S. at 844). "Moreover, in the statutory scheme of the Mine Act, the Secretary's litigating position [before the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a * * * health and safety standard, and is therefore deserving of deference." Excel, 334 F.3d at 6 (brackets by the Court) (citations and internal quotation marks omitted).

An agency's interpretation of a standard the agency has promulgated under a statute it is entrusted with administering is entitled to deference, and the agency's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the standard. Martin v. OSHRC, 499 U.S. 144, 150-51 (1991); Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 534-35 (D.C. Cir. 2004);

Excel, 334 F.3d at 6. A standard must be interpreted in a manner that furthers the purposes of the standard and the underlying statute, not in a manner that thwarts those purposes. Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 320 (D.C. Cir. 1990) (a regulation must be interpreted in a manner that furthers the safety purpose of the statute); GAF Corp. v. OSHRC, 561 F.2d 913, 915 (D.C. Cir. 1977) (a regulation must be interpreted in a manner that furthers the purpose of the regulation).

Finally, the factual findings of the administrative law judge must be affirmed if they are supported by substantial evidence on the record as a whole. Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 92 (D.C. Cir. 1983) (applying Section 113(d)(2)(A)(ii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(ii)). "Substantial evidence" means such "relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." American Fed. of State, County & Municipal Employees Capital Area Council 26 v. FLRA, 395 F.3d 443, 447 (D.C. Cir. 2005). The "possibility of drawing two inconsistent conclusions from the evidence does not prevent [a judge's] finding from being supported by substantial evidence." Schoenbohm v. FCC, 204 F.3d 243, 246 (D.C. Cir.), cert. denied, 531 U.S. 968 (2000).

C. The Judge's Finding that Twentymile Violated 30 C.F.R. § 48.7(c) Because Unplugging the Rock Chute Constituted a Distinct "Task" for Which New Task Training Was Required Is Supported by Substantial Evidence and Accords with Applicable Law[1]

1. The judge's interpretation of the standard is reasonable

Subpart A of 30 C.F.R. Part 48, which applies to underground miners, sets forth requirements with respect to five categories of training: new miner training, experienced miner training, new task training, annual refresher training, and hazard recognition and avoidance training. Section 48.7(c) of Subpart A, which pertains to new task training and is the provision at issue in this case, states in relevant part:

> Miners assigned a new task * * * shall be instructed in the safety and health aspects and safe work procedures of the task * * *[2] prior to performing such task.[3]

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[1] Commissioners Beatty, Jordan, and Young affirmed the judge's finding of a violation on this ground. 26 FMSHRC at 671 (J.A. 177). As discussed below in subsection D, Chairman Duffy and Commissioner Suboleski affirmed the judge's finding of a violation on the ground that, as a subtask within the general task of "beltman," unplugging the rock chute required new task training. That ground was the ground the Secretary advanced before the judge.

[2] New task training may be given "by a qualified trainer, or a supervisor experienced in the assigned task, or other person experienced in the assigned task." 30 C.F.R. § 48.7(e). See Tr. 195, 253 (J.A. 126, 141).

[3] It is uncontested that, if any task training was required in this case, it was task training required by Section 48.7(c). 25 FMSHRC at 383 (J.A. 163); Twentymile Opening Br. 16; Tr. 113 (J.A. 106). It is also uncontested that none of the six miners named in the amended order received task training in unplugging the rock chute before engaging in that activity on June 6, 2000.

The term "task," as used throughout Subpart A, is defined as "a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f). Although neither Section 48.7(c) nor Section 48.2(f) explicitly addresses whether the job of unplugging Twentymile's rock chute constituted a distinct "task" for which new task training was required, the judge properly determined that, read in a safety-promoting context, those provisions are reasonably interpreted to require just that. 25 FMSHRC at 382-84 (J.A. 162-64).

In determining whether the job of unplugging the rock chute occurred on a "regular basis,"[4] the judge considered

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Ex. G-8 (J.A. 33-37); Tr. 32, 39, 125, 128 (J.A. 85, 87, 109).

[4] Citing the definition of "regular" in Webster's Third New Intn'l Dictionary (2002) at 1913, the judge correctly held that the phrase "regular basis" in Section 48.2(f) connotes "repetition and recurrence." 25 FMSHRC at 384 (J.A. 164). The judge reasonably concluded "[w]hile there may be a point at which a recurrence is so distant as to render it outside the standard, a job that recurs as much as two or three times a year is of the kind * * * contemplated within [the standard's] meaning." Ibid. See also 26 FMSHRC at 676-78 (J.A. 182-84). It is established law that statutory and regulatory terms are ordinarily to be given their common dictionary meanings. Indiana Michigan Power Co. v. Dept. of Energy, 88 F.3d 1272, 1275 (D.C. Cir. 1996); Walker Stone Co., Inc. v. Secretary of Labor, 156 F.3d 1076, 1081 (10th Cir. 1998).

The dictionary definition of "regular" applies to something that recurs at "stated, fixed or uniform intervals" (emphasis

whether a "reasonably prudent operator familiar with the mining industry and the protective purposes of the standard [would] have recognized that unplugging the rock chute would occur on a regular basis * * *." 25 FMSHRC at 383-84 (J.A. 163-64). After reviewing the record evidence, the judge answered that question in the affirmative. 25 FMSHRC at 384 (J.A. 164). Recognizing that the newly-installed rock chute had never become plugged before, the judge found that Twentymile reasonably should have anticipated that the chute would become plugged on a regular basis. Ibid. The judge inferred this from the fact that Twentymile had constructed the rock chute with four access doors and two internal monitoring devices to indicate when material stopped flowing in the chute, and the fact that other transfer chutes at the mine had become plugged on a regular basis. Ibid. See Tr. 86, 163 (J.A. 99, 118).

The judge recognized that determining whether a job occurs on a "regular basis" depends on "the conditions and work practices existing at the particular mine involved * * *."

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supplied) -- and the judge reasonably stated that the unplugging job would recur as much as two or three times a year. R. Lincoln Derrick, Twentymile's own safety manager, acknowledged that task training was given for the analogous activity of moving longwall equipment, even though such moves occurred only approximately every eight months. Tr. 294-95 (J.A. 151-52).

25 FMSHRC at 383 (J.A. 163). Twentymile asserts that, because Section 48.2(f)'s definition of "task" is phrased in terms of job duties that "occur on a regular basis" (emphasis supplied), the Commission erred in affirming the judge's finding by engaging in "speculation" as to whether the job of unplugging the rock chute would occur on a regular basis. Twentymile Opening Br. 19-23. Twentymile is mistaken. Because the rock chute was newly installed, one cannot look to the history of the rock chute to answer the question. Using common sense and the rule of reason, the judge in this case could only look to the construction of the rock chute, which indicated recognition of a real possibility that the rock chute would become plugged, and to the fact that other chutes at the mine had become plugged, to determine whether the operator reasonably should have anticipated[5] that the rock chute would become plugged on a regular basis.[6]

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[5] Predicting future events on the basis of presently known facts is hardly a practice unheard of in the law. For example, "[h]earings on preliminary injunctions necessarily look to the future and decisions must rest on comparative, tentative assessments of the course of events if the injunction is issued, and if it is not." FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1080 (D.C. Cir. 1981).

[6] Twentymile is also mistaken in suggesting that the judge erred in considering the history of chutes becoming plugged "regularly in other mines." Twentymile Opening Br. 20. The judge reasonably confined his analysis to the construction of the rock chute and to the history of other chutes at this mine

The approach advocated by Twentymile -- that one can find that a job duty "occur[s] on a regular basis" only after it has occurred on a regular basis -- stands the logic and the purpose of the new task training requirement on its head. If miners assigned to a job duty must repeatedly be subjected to the hazards inherent in that assignment before it can be said to occur on a regular basis, those miners will repeatedly be subjected, without training, to the very hazards that new task training is intended to address. Under Twentymile's approach, the very element that made task training in this case so important -- i.e., the fact that the task had not been performed before -- would mean that new task training was not required. Conversely, under Twentymile's approach, waiting until a miner has repeatedly engaged in a job duty before it can be considered to occur with regularity would mean that the task is no longer "new" to that miner -- which misses the very purpose of new task training. The Secretary cannot have intended an anomalous interpretation under which task training is not required precisely when it is most needed. See Chemical Mfrs. Ass'n v. EPA, 919 F.2d 158, 165 (D.C. Cir. 1990) (rejecting as "anomalous at best" an interpretation that would subject to less stringent

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becoming plugged. 25 FMSHRC at 384 (J.A. 164). See Tr. 171, 190-91, 222, 223, 227-28 (J.A. 120, 125, 133, 134, 135).

regulation facilities that Congress identified as particularly hazardous).

By definition, new task training is particularly appropriate, and particularly important, in cases involving newly-installed equipment. As the Commission majority stated,

> [T]he installation of a new piece of equipment requires an operator to consider whether tasks involving the equipment will occur on a regular basis. Where a task cannot be scheduled, but is reasonably foreseeable as a recurring duty with discrete health and safety concerns, an operator is expected to provide proper planning and communication to ensure that workers performing the task receive appropriate training. To hold otherwise would be to defer training necessary to guard against the hazards associated with the job until an unfortunate experience ratifies the need for task training. Jams, clogs, or other failures are, of course, not scheduled events.

26 FMSHRC at 678 (J.A. 184). As the Commission further stated, imposing a "literal definition" of the term "regular" would "create a situation in which the health and safety aspects of events that are reasonably foreseen as recurring, but not at scheduled or fixed intervals, would escape the mine's training program[,] * * * [c]ontrary to the general intent of the Mine Act and more specifically to the training provisions." Ibid.

Applying a rigidly literalistic interpretation of the phrase "occur on a regular basis" to Subpart A's new task training provision would be particularly inappropriate because that phrase appears in the definitional section that applies throughout Subpart A, and hence is couched in general enough terms to be applicable to all Subpart A training requirements where it appears. When the definition of "task" is specifically applied to new task training, it must be interpreted in a manner that is consistent with the purpose of new task training. See 2A Norman J. Singer, Statutes and Statutory Construction § 47.07, at 230 (6th ed. 2000) ("In order to avoid repugnance with other parts of the act and conflict with legislative intent, the words [in a statutory definition] may be restricted or expanded by the subject matter") (footnote omitted). See also Cole v. U.S. Capital, Inc., 389 F.3d 719, 725-27 (7th Cir. 2004) (a statutory definition must be interpreted in the context of the purpose of the statutory provision to which it is applied); U.S. Dep't of Labor v. North Carolina Growers Ass'n, 377 F.3d 345, 353 (4th Cir. 2004) (same). The judge's interpretation of the phrase "occur on a regular basis" in this case advances the purpose of the new task training provision; Twentymile's interpretation vitiates it.

Twentymile also suggests that, because no evidence was presented that the rock chute became plugged again after June 6, 2000, the judge was required to infer that the chute would not become plugged on a regular basis. Twentymile Opening Br. 13, 18, 24. Again, Twentymile is mistaken. The fact that the chute may not have become plugged again after June 6, 2000,[7] does not establish that, on June 6, 2000, Twentymile should not reasonably have anticipated that it would become plugged again, and hence have provided new task training. More important, it is uncontested that after June 6, 2000, Twentymile made significant alterations to the chute for the very purpose of reducing the likelihood that it would become plugged again, including the installation of additional plug indication switches at each access door, a permanently mounted washing system, and two electromagnetic vibrators. Ex. R-5 (J.A. 75-76); Tr. 179-180 (J.A. 122). Those alterations affirmatively indicate that the operator anticipated that, after June 6, 2000, the chute, as configured on June 6, 2000, was likely to become plugged on a regular basis. Under the judge's analysis, the issue in this case is whether the operator reasonably should have anticipated that the chute, as configured at the time of

[7] There is, of course, no record evidence as to whether the rock chute became plugged again after the evidentiary hearing closed in May 2002.

the events in question, would become plugged on a regular basis, and hence should have provided the miners with appropriate task training before assigning them to unplug the chute. Twentymile's approach would defeat the safety purpose of the new task training standard because it would permit an operator to justify a failure to provide training entirely on the basis of operational changes it made after the fact -- i.e., after the operation for which training was needed was completed.

Twentymile is also incorrect in its assertion that the Secretary must establish that any individual miner will be regularly exposed to the hazards inherent in the task before that miner can be required to receive task training. Twentymile Opening Br. 16-19. Section 48.2(f) defines "task" as "a work assignment that includes duties of a job that occur on a regular basis * * *." (Emphasis supplied). By the plain language of Section 48.2(f), it is the nature of the job assigned to the miner -- i.e., a job that occurs "on a regular basis" at the mine[8] -- that determines whether it constitutes a "task" for which training is required, not whether the job will be regularly performed by a particular miner. The hazards associated with a new task threaten the miner assigned to

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[8] Unless the requirement for task training was limited to jobs that occur on a regular basis, it would be difficult, if not impossible, to find someone at the mine qualified to instruct miners in such tasks.

perform that task, and may threaten others, even if that miner is only assigned to perform it once. If Twentymile's interpretation were accepted, an operator could assign a different untrained miner every time a regularly occurring task needs to be performed and never provide task training to any of the miners, thereby exacerbating the hazards of the task by ensuring that only untrained miners perform it. There could be few more obvious ways of ensuring that miners will get hurt.

2. Substantial evidence supports the judge's finding

Substantial evidence supports the judge's finding that Twentymile reasonably should have anticipated that the rock chute would become plugged on a regular basis. It was "obvious" to William Denning, MSHA District 9 Staff Assistant to the District Manager, that the four access doors designed into the side of the rock chute were installed to facilitate all types of maintenance, including maintenance to "keep the material flowing properly through that chute." Tr. 86, 112-13 (J.A. 99, 105-06). See also Tr. 146 (J.A. 114). Twentymile also constructed the rock chute with two internal monitoring devices that would notify the operator if material stopped moving through the chute. Tr. 163 (J.A. 118). The other chutes at the mine became plugged on a regular basis, as often as every four to five months, and required unplugging by the conveyor maintenance

crew. Tr. 171, 190-91, 222, 223, 227-28 (J.A. 120, 125, 133, 134, 135). Finally, the fact that the rock chute became plugged after less than two weeks of operation supports the judge's finding that Twentymile reasonably should have anticipated that it would become plugged on a regular basis: The judge's finding that it was reasonably likely that the rock chute would become plugged on a regular basis does not represent "a gloss of speculation and anticipation," as Twentymile contends (Twentymile Opening Br. 20); it represents an exercise of the judge's authority to draw "reasonable inferences * * * from the evidence." United States Testing Co. v. NLRB, 160 F.3d 14, 18 (D.C. Cir. 1998). Under the "substantial evidence" standard of review, a factfinder's reasonable inferences are owed deference by the Court. Ibid.

Twentymile argues that unplugging the rock chute was not a "new" task because there were no hazards associated with performing work around the newly-installed rock chute that the miners were not previously trained to recognize in performing other work. Twentymile Opening Br. 24-26. Twentymile is incorrect on two grounds. First, simply because a danger similar to a danger involved in unplugging the rock chute existed elsewhere in the mine does not mean that such a danger would have been recognized by a miner in the context of the rock

chute or that the means of avoiding such a danger would have been the same at the rock chute as elsewhere. For example, the design of the rock chute made spills from its multiple access doors more likely than spills elsewhere (where chutes did not have access doors), and taking shelter under the rock chute's platforms (as, by happenstance, miners Winey and Fadely were able to do) was a safety measure unavailable elsewhere. Tr. 40 (J.A. 87).

Second, the rock chute did pose dangers dissimilar to those encountered elsewhere in the mine. For example, while other transfer chutes at the mine were smaller and angled at approximately 60 degrees from the horizontal, the rock chute descended at a straight 90 degrees. Tr. 181, 222 (J.A. 123, 133). The dangers inherent in the rock chute's unique design included the openings that miners and material could fall through, the access doors that might be opened or, if insecurely closed, come open when they should not, confined working spaces, narrow landings, and high vertical ladders. Tr. 42, 111 (J.A. 88, 105). Indeed, the injuries sustained by miner Webb illustrate precisely what could happen when a miner was permitted to work at the rock chute without task training.[9] The

[9] The record indicates that the lack of task training probably contributed to the accident. Ex. G-5 (J.A. 26-27); Tr. 117, 239 (J.A. 107, 138).

nature of the task training required to be given to miners before they were assigned to unplug the rock chute was described with particularity by Inspector Gibson and included training in "opening and closing doors * * *, ascending and descending of the ladder * * * [, and] hazard recognition" at the chute. Tr. 62 (J.A. 93). See also Exs. G-4, G-12 (J.A. 16, 44-54); Tr. 111, 119 (J.A. 105, 107).

D. The Judge's Finding that Twentymile Violated 30 C.F.R. § 48.7(c) Should Also Be Affirmed Because, As a Subtask Within the General Task of "Beltman," Unplugging the Rock Chute Required New Task Training[10]

Even if the judge did not act properly in finding that Twentymile reasonably should have anticipated that the rock chute would become plugged on a regular basis -- and, as established above, he did -- the Secretary carried her burden of proof in another manner. As she argued to the judge at the hearing and to the Commission on review, the Secretary carried her burden of proof because she established (1) that the rock chute was an integral part and extension of the mine's existing

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[10] Commissioner Suboleski and Chairman Duffy concurred in finding that the standard was violated, but did so on the basis of this rationale. 26 FMSHRC at 671, 689-91, 692 (J.A. 177, 195-97, 198). Contrary to Twentymile's suggestion (Twentymile Opening Br. 22), Commissioner Suboleski did "join in the majority decision as to the fact of the violation"; he simply did so on the basis of the rationale advanced by the Secretary at trial, rather than on the basis of the analysis adopted by the judge.

conveyor system; (2) that the existing conveyor system required the unplugging of transfer chutes on a regular basis; and (3) that the rock chute posed a distinct set of safety hazards to miners working around it.[11]

The rock chute was an integral part and extension of the mine's conveyor system. Tr. 40-41, 106, 145 (J.A. 87-88, 104, 114). In fact, the rock chute replaced a series of four conveyor belts. Tr. 169 (J.A. 120). The rock chute was one of the mine's several transfer chutes. Tr. 228, 229 (J.A. 135).

Maintaining the entire conveyor system was a daily activity for the mine's beltmen. Tr. 66-67, 113, 192, 228 (J.A. 94, 106, 125, 135). The position of "beltman" includes working at transfer chutes. See Ex. G-10 (J.A. 38-40) (position description of beltman); Tr. 107-09, 193, 230 (J.A. 104-05, 126, 135). The existing conveyor system required the unplugging of transfer chutes on a regular basis. Tr. 190-92, 223, 227-28 (J.A. 125, 134, 135).

Finally, working at the rock chute was a "subtask" within the general task of "beltman"; it posed its own distinct dangers

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[11] The judge and the Commission did not rely on or address this argument below. On appeal to the Commission, however, the Secretary, as the prevailing party on the merits, may advance an argument that would provide another avenue by which the Commission could have reached the same result. Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970); LaShawn A., by Moore v. Kelly, 990 F.2d 1319, 1325 (D.C. Cir. 1993), cert. denied, 510 U.S. 1044 (1994).

and therefore required its own task training. Tr. 109, 149 (J.A. 105, 115). As with any substantially new activity within a miner's general job description (such as operating a new truck assigned to a truck driver or maintaining a new piece of machinery assigned to a mechanic), unplugging the rock chute presented its own specific dangers and thus required specific task training to address those dangers. Tr. 86, 121 (J.A. 99, 108). See Tr. 237 (J.A. 137). A number of those dangers were associated with working around the rock chute regardless of whether the job was to unplug the chute or to perform some other type of maintenance on it. Tr. 86 (J.A. 99). Accordingly, Twentymile should have provided new task training with respect to the rock chute before sending any miners to perform any work at the chute.

Contrary to Twentymile's suggestion (Twentymile Opening Br. 23-25), it is not sufficient that an operator provide task training only in the dangers associated with a general job description such as "beltman." Tr. 126 (J.A. 109). As Roderic Breland, MSHA Western Regional Manager for Educational Field Services, testified, Twentymile has recognized "elemental breakdowns of job occupations [and] recognize[d] there are tasks within the overall task of a beltman." Tr. 125 (J.A. 109). See also Tr. 235, 237 (J.A. 137). Thus, beltmen were task-trained

in belt moves and splices. Ex. G-8 (J.A. 33-37); Tr. 125 (J.A. 109). See also Ex. G-12 (J.A. 44-54). Indeed, Crew Foreman Winey set forth "cleaning plugged chute" as the "task" being performed at the time of the accident on Twentymile's own incident investigation form. Ex. G-11 (J.A. 41); Tr. 238 (J.A. 137).

The training required for any particular task depends on the miner's work duties and his exposure to dangers. Tr. 112 (J.A. 105). As Winey, Twentymile's own witness, recognized, task training needs to be "updated fairly routinely. It's ongoing." Tr. 240 (J.A. 138). "Partial training" in the general task, i.e., training that adequately addresses the new subtask, is all that is required; in fact, that is the manner in which task training is normally provided. Tr. 120-121, 240, 290 (J.A. 107-08).[12]

As new tasks are developed at the mine, it is the operator's responsibility to determine what dangers are associated with those new tasks and what task training miners assigned to those tasks will need. Tr. 129-131, 289 (J.A. 110, 150). Miners assigned to such tasks without task training are a

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[12] Edwin Brady, Twentymile's conveyance manager, acknowledged that there are numerous "tasks within the job of beltman" and that "[a]n underground conveyance system is one that continuously changes * * *." Tr. 155-56, 195 (J.A. 116, 126). Brady stated that Twentymile provided task training for several subtasks performed by beltmen, including belt moves, splicing, and winders. Tr. 203-04 (J.A. 128).

danger not only to themselves, but to others working around them. Tr. 44 (J.A. 88).

In short, as the serious accident in this case illustrates, assignment to perform a new element of an existing task that poses its own set of dangers -- in this case, unplugging the rock chute as part of general conveyor maintenance -- requires task training in that new element. Tr. 86, 98, 107 (J.A. 99, 102, 104). Twentymile's failure to provide such training with respect to unplugging the rock chute violated Section 48.7(c).

## II.

## THE COMMISSION ACTED PROPERLY IN MODIFYING THE ORDER ISSUED BY THE SECRETARY UNDER SECTION 104(g) OF THE MINE ACT TO A CITATION UNDER SECTION 104(a) OF THE ACT

### A. Twentymile's Argument Is Not Properly Before the Court

A three-member Commission majority, reasoning that a withdrawal order under Section 104(g) of the Mine Act is statutorily required to specify the miners being withdrawn and to be issued on the spot, and determining that the order issued in this case failed to satisfy those requirements, found that the order was invalid. 26 FMSHRC 672-75 (J.A. 178-81). Emphasizing that the fact of violation survived, however, and exercising the Commission's statutory authority to modify orders, the Commission majority modified the order issued under Section 104(g) of the Act to a citation under Section 104(a).

26 FMSHRC at 672 (J.A. 178) (citing Section 105(d) of the Act, 30 U.S.C. § 815(d)).[13]

Twentymile asserts that the Commission acted improperly because, Twentymile argues, a withdrawal order under Section 104(g) is the only remedy the Mine Act permits for failure to train miners. Twentymile Opening Br. 29-31. Twentymile failed to urge this argument before the Commission, however, either during oral argument, when the Commission sua sponte raised the possibility of modifying the Section 104(g) order to a Section 104(a) citation, or by filing a petition for reconsideration after the Commission issued its decision. See 29 C.F.R. § 2700.78 (permitting parties to file petitions for reconsideration). Section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), states that, absent "extraordinary circumstances," "[n]o objection that has not been urged before the Commission shall be considered by the court * * *." Because Twentymile failed to urge the argument in question before the Commission, and because that failure is not excused by the existence of extraordinary circumstances, the argument cannot be considered by the Court. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S.

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[13] Commissioners Suboleski and Jordan found it unnecessary to reach this issue. 26 FMSHRC at 689 n.28, 693 n.29 (J.A. 195 n.28, 199 n. 29). The Secretary believes that the majority was authorized to modify the order to a citation; the Secretary takes no position as to whether, in the circumstances, the majority was required to do so.

645, 665-66 (1982) (applying statutory language identical to Section 106(a)(1)'s); Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (same); Lee Lumber & Building Material Corp. v. NLRB, 310 F.3d 209, 216-17 (D.C. Cir. 2002) (same).

B. Twentymile's Argument Is Not Persuasive

In any event, Twentymile's argument is unpersuasive. Section 104(a) states in relevant part:

> If, upon inspection or investigation, the Secretary or [her] authorized representative believes that an operator of a coal or other mine * * * has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, [s]he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis supplied). The language of Section 104(a) could hardly be plainer: the Secretary is authorized to issue a citation if she believes that a mine operator has violated any standard. See Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1290 (D.C. Cir. 1990) ("the phrase 'any independent contractor performing services * * * at [a] mine' means just that -- any independent contractor performing services at a mine") (footnote omitted) (discussing Section 3(d) of the Mine Act, 30 U.S.C. § 802(d)).

Nothing in Section 104(g) militates against such a reading

of the language of Section 104(a).[14] Section 104(g) merely authorizes the Secretary to issue a withdrawal order if she finds that a miner has not received the training required by the Secretary; it contains no language that relates in any way to issuance of a citation under Section 104(a) for violation of a training standard. It is a fundamental principle of statutory construction that when two statutory provisions are involved, the provisions must be interpreted, if possible, in a manner that gives effect to the language of both. Independent Insurance Agents of America, Inc. v. Hawke, 211 F.3d 638, 643-44 (D.C. Cir. 2000); Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997); Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995). An interpretation that the Mine Act both

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[14] Section 104(g) of the Mine Act provides in relevant part:

> If, upon any inspection or investigation * * * the Secretary * * * shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of the Act, the Secretary * * * shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until [the] Secretary determines that such miner has received the training required * * *.

30 U.S.C. § 814(g)(1).

authorizes the Secretary to issue a Section 104(g) order withdrawing untrained miners and authorizes the Secretary to issue a Section 104(a) citation alleging a training violation comports with that principle.[15] Twentymile's interpretation flouts that principle because it effectively rewrites the statutory language by inserting the word "only" into the Act where Congress did not use it (i.e., Section 104(g)) and deleting the word "any" from the Act where Congress did use it (i.e., Section 104(a)).

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[15] For the reasons stated above, the Secretary submits that the interpretation advanced above reflects the plain meaning of the statute. If the statute does not have a plain meaning -- i.e., if it is ambiguous -- the Secretary submits that her interpretation is reasonable and entitled to deference. "[I]n the statutory scheme of the Mine Act, 'the Secretary's litigating position [before the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a health and safety standard,' and is therefore deserving of deference." Excel, 334 F.3d at 6 (citation omitted). An agency interpretation is entitled to "'particular deference'" if it is an interpretation "'of longstanding duration[.]'" Id. at 7-8 (quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)). Although the Secretary did not issue a Section 104(a) citation in this case, the Secretary's longstanding practice has been to issue Section 104(a) citations, where appropriate, in training cases. See, e.g., Western Fuels-Utah, 900 F.2d at 319-20 (the Secretary issued a Section 104(g) order and a Section 104(a) citation); Mingo Logan Coal Co., 19 FMSHRC 246, 247 (1997), aff'd, 133 F.3d 916 (4th Cir. 1998) (Table). See generally MSHA Program Policy Manual, Vol. I, "Section 104(g)(1) Orders of Withdrawal -- Untrained Miners" (May 16, 1996) (describing the circumstances in which MSHA issues a Section 104(a) citation for a training violation), available at www.msha.gov ("Compliance Info").

In addition to disregarding the statutory language, Twentymile's argument defies common sense. As the legislative history explains, inadequate miner training was one of Congress' principal concerns in enacting the Mine Act. S. Rep. No. 95-181 at 4-5, 49-51, reprinted in Leg. Hist. at 592-93, 637-39. If Twentymile's argument were accepted, however, the Secretary could take enforcement action against inadequate training -- i.e., issue a Section 104(g) withdrawal order -- only if an MSHA inspector were on the spot, i.e., present when inadequately trained miners were present.[16] Under such a scheme, training violations would be more difficult for the Secretary to combat than other violations -- which, under the terms of Section 104(a), an MSHA inspector who believes a violation "has occurred" may cite even if he was not on the spot when it occurred. See Emerald Mines Co. v. FMSHRC, 863 F.2d 51, 58 (D.C. Cir. 1988) (interpreting similar terms in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1)). The notion that Congress intended the Secretary to have diminished enforcement authority when combating one of the problems with which Congress

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[16] MSHA inspectors are not always present in mines. MSHA is statutorily required to inspect underground mines four times a year and surface mines two times a year. Section 103(a) of the Mine Act, 30 U.S.C. § 813(a).

was most concerned is "anomalous at best." Chemical Mfrs. Ass'n, 919 F.2d at 165.

In short, Congress did not intend the Secretary to have diminished enforcement authority with respect to training violations; it intended her to have enhanced enforcement authority -- i.e., authority to issue a Section 104(g) order and authority to issue a Section 104(a) citation -- with respect to training violations.[17] The legislative history does not describe the Section 104(g) order as an exclusive enforcement sanction; it describes it as a "special enforcement sanction[.]" S. Rep. No. 95-181 at 50, reprinted in Leg. Hist. at 638.

Implicitly invoking the maxim expressio unius est exclusio alterius, Twentymile attempts to prop up its argument by pointing to the fact that Section 107(a) of the Mine Act, 30 U.S.C. § 817(a), specifically states that the issuance of a withdrawal order does not preclude the issuance of Section

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[17] Moreover, Section 110(a) of the Mine Act provides:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *.

30 U.S.C. § 820(a). If the Secretary were precluded from citing training violations because they were not observed while they were occurring, but were discovered after-the-fact, she would be unable to fully implement the clear mandate of Section 110(a).

104(a) citation, and Section 104(g) does not so state. Twentymile Opening Br. 29-31. The expressio unius maxim, however, is a non-dispositive principle whose force in a particular situation "'depends entirely on context * * *.'" Martini v. Federal National Mortgage Ass'n, 178 F.3d 1336, 1342-43 (D.C. Cir. 1999), cert. dismissed, 528 U.S. 1147 (2000) (quoting Shook v. District of Columbia Financial Responsibility & Management Assistance Auth'y, 132 F.3d 775, 782 (D.C. Cir. 1998)). The maxim loses force when there are "other plausible explanations for an omission" -- a possibility that "grow[s] more likely as the contrasted contexts grow more remote from each other." Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773, 779 (D.C. Cir.), cert. denied, 498 U.S. 849 (1990). This Court has frequently found the maxim, standing alone, to be "too thin a reed" to support an argument that Congress has unambiguously addressed an issue (Martini, 178 F.3d at 1343 (citation and internal quotation marks omitted) (collecting cases)), and has stated that an agency's refusal to read an ambiguous statute in the manner suggested by the maxim is entitled to deference if the agency's interpretation "is otherwise reasonable." Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 694 (D.C. Cir. 1991).

In this case, there is a plausible explanation other than Twentymile's for the fact that Section 107(a) specifies that the issuance of a withdrawal order does not preclude the issuance of a Section 104(a) citation, and Section 104(g) does not. Section 104(g) pertains to situations that are violations of a training standard. Because Congress had already made clear at the beginning of Section 104 that the Secretary could issue a Section 104(a) citation for a violation of "any standard" -- a phrase that plainly included a violation of a training standard -- Congress had no need to make that clear again in Section 104(g). In contrast, Section 107(a) pertains to situations -- "imminent hazards" -- that may or may not be violations of a standard. See Section 3(j) of the Mine Act, 30 U.S.C. § 802(j) (defining "imminent danger"). Because the situations Section 107(a) addresses are not necessarily violations of a standard, Congress may have felt a need to make clear that, if the situation in a particular case were a violation of a standard as well as an imminent danger, the Secretary could issue a Section 104(a) citation as well as a Section 107(a) withdrawal order.

In short, because Section 107(a) is relatively remote in placement from Section 104(a), and because Section 107(a) addresses a different class of situations than Section 104(a),

Congress may well have felt a need in drafting Section 107(a) "to clarify what might be doubtful" -- "in Macbeth's words, 'to make assurance doubly sure'" -- a need it did not feel in drafting Section 104(g). Shook, 132 F.3d at 782. Particularly in light of such a plausible explanation, Twentymile's reliance on the expressio unius maxim is insufficient to support an argument that, as shown above, is inconsistent with the statutory language and common sense to begin with.

## III.

## AS MODIFIED BY THE COMMISSION, THE SECTION 104(a) CITATION GAVE TWENTYMILE ADEQUATE NOTICE OF THE VIOLATION ALLEGED AGAINST IT

Twentymile argues that the Section 104(g) order, as amended at the hearing and subsequently modified to a Section 104(a) citation by the Commission, did not give it adequate notice of the violation alleged against it. Twentymile Opening Br. 31-37. Specifically, Twentymile argues that the citation failed to inform it of the "identity of the miners to be trained" (Twentymile Opening Br. 32-35) and of the "identity of the task on which the miners needed to be trained." Twentymile Opening Br. 35-37. The Commission unanimously found that Twentymile received adequate notice of the violation alleged against it. 26 FMSHRC at 671 (J.A. 177). The Commission was correct.

A. Applicable Principles

In interpreting the statutory requirements pertaining to citations issued under the Occupational Safety and Health Act, this Court has stated:

> [I]t is a familiar rule that administrative pleadings are very liberally construed and very easily amended. The rule has particular pertinence here, for citations under the * * * Act are drafted by non-legal personnel, acting with necessary dispatch. Enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by [her] inspectors.

National Realty & Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1264 (D.C. Cir. 1973). "'The most important characteristic of administrative pleadings is their unimportance. And experience shows that unimportance of pleadings is a virtue. * * *.'" Ibid. (quoting 1 K. Davis Administrative Law Treatise § 8.04 at 523 (1958)). Accord Donovan v. Royal Logging Co., 645 F.2d 822, 826-27 (9th Cir. 1981); Minerals Industries & Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1292-93 (5th Cir. 1981). The key concepts in evaluating the adequacy of administrative pleadings are "fair notice" (National Realty, 489 F.2d at 1264) and lack of "prejudice." Royal Logging, 645 F.2d at 827.

The primary purpose of notice pleading is to enable the responding party to defend itself in litigation. As this Court

has stated in discussing the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure:

> The Federal Rules [of Civil Procedure] establish a regime in which simplified pleadings provide notice of the nature of claims, allowing parties later to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues through the liberal opportunity for discovery and other pretrial procedures established by the Rules.

Atchinson v. District of Columbia, 73 F.3d 418, 421 (D.C. Cir. 1996) (internal quotation marks omitted). Accord Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1085-86 (D.C. Cir. 1998). "In other words, a plaintiff need not allege all the facts necessary to prove its claim so long as it provides enough factual information to make clear the substance of that claim." Caribbean Broadcasting, 148 F.3d at 1086 (citing Atchinson, 73 F.3d at 421-22).

B. The Citation Was Adequately Specific Based on the Order as Issued

Section 104(a) provides in relevant part:

> Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

(Emphasis supplied). Order No. 7618153, as written by the MSHA

inspector and issued on June 16, 2000, referred to "[p]ersonnel * * * who had reason to work from or travel on ladders and landings of the 'Rock Chute' * * *" and stated: "The 'Rock Chute' is new to this * * * mine and the miners listed above had little, if any, training pertaining to such an installation and unplugging the plugged rock chute."

Nothing in the language of Section 104(a) required the inspector to specify by name the miners whose lack of training constituted the violation. As to which miners were referred to, the judge reasoned:

> Twentymile, not the inspector, controlled work assignments at the mine. Presumably, the company knew whom it would assign "to work from or travel on ladders and landings." * * *. [A] class description * * * was permissible because of the operator's presumed knowledge.

25 FMSHRC at 382 (J.A. 162). Importantly, if even one of the miners referred to in the citation was assigned to perform a new task without receiving new task training, the Secretary established a violation.

Twentymile's argument that the Secretary was required to notify it at the time the order was issued of the name of every miner who needed task training in order "to enable the operator to discern what conditions require abatement (i.e., which miners required training) and to promptly abate the violation"

(Twentymile Opening Br. 34) is unpersuasive for two reasons. First, the violation occurred, and was considered by the Secretary to have been abated, long before the order was issued. 26 FMSHRC at 670, 675 (J.A. 176, 181). Accordingly, at the time it was cited, Twentymile did not have to do anything to abate the violation. Second, and in any event, Section 104(a), unlike Section 104(g), does not involve a withdrawal order requiring that miners be trained before they can be permitted to re-enter the mine. In fact, Section 104(a) does not specify any particular manner in which an operator must abate a violation. For this reason, training of the miners involved in the violation was not necessarily the only manner in which to achieve abatement. Indeed, having long since removed the miners involved in the violation from the vicinity of rock chute, Twentymile achieved abatement by agreeing to properly train miners before assigning them to perform work at the rock chute in the future. As the Commission noted,

> [b]ecause the assignment of miners to the task of unplugging the chute is wholly within Twentymile's control, for purposes of abatement, the class of miners requiring training must necessarily be broadly defined to identify potential miners who may be assigned to the same task in the future and, thus, also require task training.

26 FMSHRC at 675 (J.A. 181).

As to the task for which training was required, the judge, noting that "the order was issued in the context of the accident investigation," concluded:

> Everyone at the mine knew the accident occurred during Twentymile's attempts to unplug the rock chute. The order described the task by describing what the subject miners were doing: "These persons entered the area to work at unplugging the chute before they received safety training." There was no doubt as to the task for which training was required.

25 FMSHRC at 382 (J.A. 162). The Commission, noting that Twentymile's own accident report described the task as "cleaning plugged chute," found that the judge's conclusion "is well supported by the record." 26 FMSHRC at 676 (J.A. 182). Because both the names of the miners and the nature of the task were either already known to or readily ascertainable by the operator of the mine, the judge's reasoning is persuasive. See Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1990) (specificity requirements for pleading under Federal Rule of Civil Procedure 9(b) are relaxed "when factual information is peculiarly within the defendant's knowledge or control"); United States ex rel. Russell v. Epic Healthcare Management Group, 193 F.3d 304, 308 (5th Cir. 1999) (same).

Indeed, as the judge found, "the record is devoid of evidence that the wording of the order in any way hindered

Twentymile in its ability to present a cogent case." 25 FMSHRC at 382 (J.A. 162). The record shows that Twentymile understood the allegations against it well enough both to withdraw the six miners referred to in the order (Tr. 24, 28 (J.A. 83, 84)) and to defend itself at the hearing. See, e.g., Tr. 60-61 (J.A. 92-93). Simply stated, the judge properly found, and Twentymile does not meaningfully dispute, that Twentymile suffered no prejudice from the wording of the order as issued. The specificity requirements of Section 104(a) were therefore satisfied.

C. The Citation Was Adequately Specific Based on the Order as Amended

The judge found that, even if the order lacked sufficient specificity as written, "the flaw was corrected when the order was amended without objection to include the names of those who were not given the requisite task training." 25 FMSHRC at 382 (J.A. 162). Not only did the Secretary amend the order to specify the six named miners at the hearing (Tr. 71 (J.A. 95)), she provided Twentymile with the names of the six miners in her responses to two sets of interrogatories dating back to September 12, 2000 (less than three months after the order was issued and more than 20 months before the hearing). Exs. R-1, R-2 (J.A. 69-72); Tr. 71 (J.A. 95). As the Commission stated, "In light of this identification of the miners included in the

citation, Twentymile cannot seriously contest its ability to respond to the violation alleged at trial." 26 FMSHRC at 675 (J.A. 181).

## CONCLUSION

For the reasons stated above, the Court should affirm those portions of the Commission's decision affirming Twentymile's violation of 30 C.F.R. § 48.7(c), modifying the Section 104(g) order to a Section 104(a) citation, and sustaining the Section 104(a) citation as adequately specific.

Respectfully submitted,

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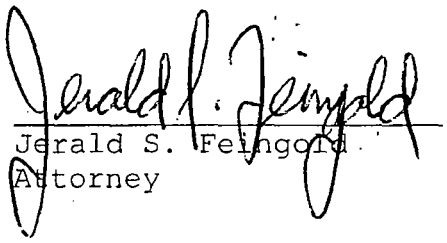
CERTIFICATE OF COMPLIANCE

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 Response Brief for the Secretary of Labor contains 9,251 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 Response Brief for the Secretary of Labor were served by overnight delivery this 28th day of March, 2005, on:

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# ADDENDUM

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ment. Raymer v. U. S., C.A.Ky.1981, 660 F.2d 1136, certiorari denied 102 S.Ct. 2009, 456 U.S. 944, 72 L.Ed.2d 466.

There is no private cause of action for violations of this chapter. Ayala By and Through Ayala v. Joy Mfg. Co., D.C.Colo.1984, 580 F.Supp. 521.

This chapter, purpose of which is to protect health and safety of miners and which to that end provides for standards for safety and health and enforcement procedures to insure that standards are met, did not create independent cause of action against the United States in favor of owners and operators of small independent coal mine for alleged improper closure of mine. Bernitsky v. U.S., D.C.Pa. 1979, 463 F.Supp. 1121, affirmed 620 F.2d 948, certiorari denied 101 S.Ct. 208, 449 U.S. 870, 66 L.Ed.2d 90.

## § 802. Definitions

For the purpose of this chapter, the term—

(a) "Secretary" means the Secretary of Labor or his delegate;

(b) "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof;

(c) "State" includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands;

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

(e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine;

(f) "person" means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization;

(g) "miner" means any individual working in a coal or other mine;

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of subchapters II, III, and IV of this chapter, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite

from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

(i) "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine;

(j) "imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated;

(k) "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person;

(*l*) "mandatory health or safety standard" means the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the standards promulgated pursuant to subchapter I of this chapter;

(m) "Panel" means the Interim Compliance Panel established by this chapter; and

(n) "Administration" means the Mine Safety and Health Administration in the Department of Labor.

(*o*) "Commission" means the Federal Mine Safety and Health Review Commission.

(Pub.L. 91-173, § 3, Dec. 30, 1969, 83 Stat. 743; Pub.L. 95-164, Title I, § 102(b), Nov. 9, 1977, 91 Stat. 1290.)

### Historical Note

**1977 Amendment.** Par. (a). Pub.L. 95-164, § 102(b)(1), substituted "Secretary of Labor" for "Secretary of the Interior".

Par. (d). Pub.L. 95-164, § 102(b)(2), (4), substituted "supervises a coal or other mine or any independent contractor performing services or construction at such mine" for "supervises a coal mine".

Pars. (e), (g). Pub.L. 95-164, § 102(b)(4), added "or other" following "coal" wherever appearing.

Par. (h). Pub.L. 95-164, § 102(b)(3), added subpar. (1), designated existing provisions as subpar. (2), and, in subpar. (2), as so designated, added "For purposes of subchapters II, III, and IV of this chapter," following "(2)".

Par. (j). Pub.L. 95-164, § 102(b)(4), added "or other" following "coal".

Pars. (n), (*o*). Pub.L. 95-164, § 102(b)(5), added pars. (n) and (*o*).

**Effective Date of 1977 Amendment.** Amendment by Pub.L. 95-164 effective 120 days after Nov. 9, 1977, except as otherwise provided, see section 307 of Pub.L. 95-164, set out as a note under section 801 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-173, see 1969 U.S. Code Cong. and Adm.News, p. 2503. See, also, Pub.L. 95-164, 1977 U.S.Code Cong. and Adm. News, p. 3401.

### Code of Federal Regulations

Black lung benefits—Federal Coal Mine Health and Safety Act of 1969, see 20 CFR 410.101 et seq.
Independent contractors, general provisions, see 30 CFR 45.1 et seq.

### Notes of Decisions



**1. Uniform construction of definitions**

In light of different remedial purposes of the subchapters of this chapter, construction placed on particular definitions in one subchapter cannot be mechanically applied to all

**Termination of Advisory Committees.** Advisory committees in existence on Jan. 5, 1973, to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the two-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. See section 14 of Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 770, set out in Appendix 2 to Title 5, Government Organization and Employees.

**Legislative History.** For legislative history and purpose of Pub.L. 91-173, see 1969 U.S. Code Cong. and Adm.News, p. 2503. See, also, Pub.L. 95-164, 1977 U.S.Code Cong. and Adm. News, p. 3401.

**Cross References**

Establishment of advisory committee and review of standards, see section 961 of this title.
Recommendation of advisory committees appointed under this section in promulgation of safety rule, see section 811 of this title.

## § 813. Inspections, investigations, and recordkeeping

**(a) Purposes; advance notice; frequency; guidelines; right of access**

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

**(b) Notice and hearing; subpoenas; witnesses; contempt**

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths.

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to accompany federal mine inspector. Monterey Coal Co. v. Federal Mine Safety and Health Review, C.A.7, 1984, 743 F.2d 589.

Mine safety official's memorandum, which was written after start of coal miner strike and which called for spot inspections on week before and week after strike ended did not modify provisions of section 813 of this title requiring regular inspections of mines and did not preclude issuance of citations for violations of safety standards found during such regular inspection. Sewell Coal Co. v. Federal Mine Safety & Health Review Com'n, C.A.4, 1982, 686 F.2d 1066.

18. Safety orders

Under this section providing that in the event of an accident occurring in a coal mine, representative of Secretary of the Interior may issue appropriate orders to insure safety of any person in mine, mine may be closed upon the occurrence of an accident if such is deemed appropriate under circumstances. CF&I Steel Corp. v. Morton, C.A.10, 1975, 516 F.2d 868.

19. Accident reports

To extent that civil penalties imposed administratively were based on grand jury proceedings, plaintiff industry and its foreman had no opportunity to contest basis of administrative citation, which exposed them to substantial civil penalties with prospect of further findings of unwarranted failure to comply with safety and health standards which might result in termination of operations on premises, and there was prospect of irreparable harm, for purposes of injunctive relief, and same was true of prospect of defendants' publication of accident report based on information from grand jury's secret proceedings. Kocher Coal Co. v. Marshall, D.C.Pa.1980, 497 F.Supp. 73.

## § 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(c) Exempt persons

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e) Pattern of violations; abatement; termination of pattern

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons re-

ferred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

**(f) Respirable dust concentrations; dust control person or team**

If, based upon samples taken, analyzed, and recorded pursuant to section 842(a) of this title, or samples taken during an inspection by an authorized representative of the Secretary, the applicable limit on the concentration of respirable dust required to be maintained under this chapter is exceeded and thereby violated, the Secretary or his authorized representative shall issue a citation fixing a reasonable time for the abatement of the violation. During such time, the operator of the mine shall cause samples described in section 842(a) of this title to be taken of the affected area during each production shift. If, upon the expiration of the period of time as originally fixed or subsequently extended, the Secretary or his authorized representative finds that the period of time should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Secretary or his authorized representative has reason to believe, based on actions taken by the operator, that such limit will be complied with upon the resumption of production in such mine. As soon as possible after an order is issued, the Secretary, upon request of the operator, shall dispatch to the mine involved a person, or team of persons, to the extent such persons are available, who are knowledgeable in the methods and means of controlling and reducing respirable dust. Such person or team of persons shall remain at the mine involved for such time as they shall deem appropriate to assist the operator in reducing respirable dust concentrations. While at the mine, such persons may require the operator to take such actions as they deem appropriate to insure the health of any person in the coal or other mine.

(g) Untrained miners

(1) If, upon any inspection or investigation pursuant to section 813 of this title, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 825 of this title, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 825 of this title.

(2) No miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall be discharged or otherwise discriminated against because of such order; and no miner who is ordered withdrawn from a coal or other mine under paragraph (1) shall suffer a loss of compensation during the period necessary for such miner to receive such training and for an authorized representative of the Secretary to determine that such miner has received the requisite training.

(h) Duration of citations and orders

Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 815 or 816 of this title.

(Pub.L. 91-173, Title I, § 104, Dec. 30, 1969, 83 Stat. 750; Pub.L. 95-164, Title II, § 201, Nov. 9, 1977, 91 Stat. 1300.)

**Historical Note**

1977 Amendment. Subsec. (a). Pub.L. 95-164 substituted provisions directing the Secretary to issue a citation to the operator based upon the belief of the Secretary or his authorized representative, after inspection or investigation, that there has been a violation of this chapter or any mandatory health or safety standard, rule, order, or regulation for provisions that had related to the issuance of a withdrawal order upon a finding that an imminent danger existed.

Subsec. (b). Pub.L. 95-164 substituted provisions setting out the steps to be taken if, upon any follow-up inspection of a coal or other mine, the authorized representative of the Secretary finds that a citation violation has not been abated and that the time for abatement should not be extended for provisions that had set out the steps to be taken in the case of a violation that did not create an imminent danger.

Subsec. (c). Pub.L. 95-164 redesignated subsec. (d) as (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub.L. 95-164 redesignated subsec. (c) as (d) and in subsec. (d) as so redesignated substituted reference to "citation" for reference to "notice". Former subsec. (d) redesignated (c).

Subsec. (e). Pub.L. 95-164 substituted provisions relating to the steps to be taken if an operator has a pattern of violations of mandatory health or safety standards for provisions setting out the requisites of notices and orders issued pursuant to this section.

Subsec. (f). Pub.L. 95-164 redesignated subsec. (i) as (f). Former subsec. (f), relating to the delivery of notices and orders issued under this section, was incorporated into subsec. (a).

Subsec. (g). Pub.L. 95-164 added subsec. (g). Former subsec. (g), relating to the modification and termination of notice, was incorporated into subsec. (h).

Subsec. (h). Pub.L. 95-164 added subsec. (h). Provisions of former subsec. (h), which related to steps to be taken when a condition existed which could not be abated through the use of existing technology, were covered in the general revision of subsecs. (d) and (e).

Subsec. (i). Pub.L. 95-164 redesignated former subsec. (i) as (f).

Effective Date of 1977 Amendment. Amendment by Pub.L. 95-164 effective 120 days after Nov. 9, 1977, except as otherwise provided, see section 307 of Pub.L. 95-164, set out as a note under section 801 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-173, see 1969 U.S. Code Cong. and Adm.News, p. 2503. See, also,

there are no exceptions for fault. Allied Products Co. v. Federal Mine Safety and Health Review Commission, C.A.5, 1982, 666 F.2d 890.

Under this chapter, knowledge of preshift examiner of conditions was imputable to coal mine operator, under common-law principles of respondeat superior. Pocahontas Fuel Co. v. Andrus, C.A.4, 1979, 590 F.2d 95.

6. Persons ordered withdrawn

Mine Safety and Health Administration inspector was authorized to issue postaccident order that everyone be withdrawn from mine, including those persons normally exempted from withdrawal orders. Miller Min. Co., Inc. v. Federal Mine Safety and Health Review Com'n, C.A.9, 1983, 713 F.2d 487.

## § 815. Procedure for enforcement

### (a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

### (b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

(B) In determining whether to propose a penalty to be assessed under section 820(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator

charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 814 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814 of this title. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference

and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his [1] paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

(d) Contest proceedings; hearing; findings of fact; affirmance, modification, or vacatul of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this title, the Secretary shall immediately advise

the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

(Pub.L. 91-173, Title I, § 105, Dec. 30, 1969, 83 Stat. 753; Pub.L. 95-164, Title II, § 201, Nov. 9, 1977, 91 Stat. 1303.)

1 So in original. Probably should be "this".

### Historical Note

**1977 Amendment.** Subsec. (a). Pub.L. 95-164 substituted provisions under which the Secretary must notify the operator of the civil penalty he proposes to assess following the issuance of a citation or order and the operator must give notice that he will contest the citation or proposed assessment for provisions under which an operator was required to apply for review of an order issued under section 814 of this title and under which an investigation was made, hearings held, and information presented.

Subsec. (b). Pub.L. 95-164 substituted provisions relating to the steps to be taken following the failure of the operator to correct violations, including provisions relating to temporary relief formerly contained in subsec. (d), for provisions requiring the Secretary to make findings of fact and to issue a written decision upon receiving the report of an investigation.

Subsec. (c). Pub.L. 95-164 added subsec. (c). Former subsec. (c), directing the Secretary to take action under this section as promptly as possible, was incorporated into a part of par. (3).

Subsec. (d). Pub.L. 95-164 added subsec. (d). Former subsec. (d) redesignated (b)(2).

**Effective Date of 1977 Amendment.** Amendment by Pub.L. 95-164 effective 120 days after Nov. 9, 1977, except as otherwise provided, see section 307 of Pub.L. 95-164, set out as a note under section 801 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-173, see 1969 U.S. Code Cong. and Adm.News, p. 2503. See, also, Pub.L. 95-164, 1977 U.S.Code Cong. and Adm. News, p. 3401.

### Cross References

Judicial review, see section 816 of this title.
Modification, termination or vacation of citations or orders pursuant to this section, see section 814 of this title.
Penalties, see section 820 of this title.

### Code of Federal Regulations

Civil penalties for violations of the Federal Mine Safety and Health Act of 1977, see 30 CFR Chap. I, Subchap. P.
General practices and procedures, see 29 CFR 2700.1 et seq.
Miners' representatives, see 30 CFR 40.1 et seq.
Responsibilities and conduct of employees, see 29 CFR 2702.1 et seq.

### Notes of Decisions

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with them meaningful risk of erroneous deprivation in that administrative review of field investigators' credibility determinations was on paper record and postorder hearing in which operator was limited to challenging whether determination that miner's complaint was not frivolously brought did not serve to correct erroneous credibility determinations. Southern Ohio Coal Co. v. Donovan, D.C.Ohio 1984, 593 F.Supp. 1014, affirmed 774 F.2d 693.

17. —— Necessity of request

This section providing that penalty may be assessed against coal mine operator only after the operator has been given an "opportunity" for a public hearing does not require Secretary to grant a formal hearing in absence of request for hearing. National Independent Coal Operators Ass'n v. Kleppe, Dist.Col.1976, 96 S.Ct. 809, 423 U.S. 388, 46 L.Ed.2d 580.

Regulations of Secretary of Interior establishing procedures for assessment of civil penalties for violation of mandatory health and safety standards in coal mines did not violate this chapter where they provided for imposition of penalty without a formal hearing in absence of request for such by the operator, but made formal adjudication available to mine operator who either contested occurrence of violation or contested amount of proposed penalty. National Independent Coal Operator's Ass'n v. Morton, 1974, 494 F.2d 987, 161 U.S.App.D.C. 68, affirmed 96 S.Ct. 809, 423 U.S. 388, 46 L.Ed.2d 580.

18. Burden of proof

Under this chapter, administrative law judge and Federal Mine Safety and Health Commission properly relied upon Pasula test, under which, in a "mixed motive" case, although complainant must bear ultimate burden of persuasion, employer, to sustain affirmative defense, must prove by preponderance of all evidence that, although part of his motive was unlawful, he was also motivated by miner's unprotected activities and would have taken adverse action against miner in any event for unprotected activities alone. Boich v. Federal Mine Safety and Health Review Com'n, C.A.6, 1983, 719 F.2d 194.

19. Evidence considered by commission

In light of underlying concerns of this chapter of not only how dangerous a condition may be to warrant an employee walking off the job but also general policy of antiretaliation, and in light of fact that considerations underlying standards of gravity of injury in this chapter and in wage agreement were different, arbitrator's decision that allegedly abnormal noise produced by continuous miner machine operated by employee did not warrant employee's leaving the job was not binding on administrative law judge or on the Commission. Consolidation Coal Co. v. Marshall, C.A.3, 1981, 663 F.2d 1211.

Administrative law judge considering application alleging employment discrimination because of miner's safety complaint may not find violations of mandatory safety standards outside the particular statutory procedure created for adjudication of safety violations. Baker v. U.S. Dept. of Interior Bd. of Mine Operations Appeals, 1978, 595 F.2d 746, 193 U.S.App.D.C. 361.

20. Injunction

If coal mine owner or operator could demonstrate, in particular factual context, that irreparable harm would be done by failure of the Secretary of the Interior to utilize his discretion in order to provide hearing before mine closure order was issued and that no countervailing interests of safety were involved, injunctive power of court could be invoked. Lucas v. Morton, D.C.Pa.1973, 358 F.Supp. 900.

## § 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is

affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree [1] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

(2) In the case of a proceeding to review any order or decision issued by the Commission under this chapter, except an order or decision pertaining to an order issued under section 817(a) of this title or an order or decision pertaining to a citation issued under section 814(a) or (f) of this title, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal or other mine.

(3) In the case of a proceeding to review any order or decision issued by the Panel under this chapter, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding.

(b) Petition by Secretary for review or enforcement of final Commission orders

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in the Court of Appeals for the District of Columbia Circuit, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within 30 days after issuance of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any

Note 11

ment of discharged miner was not moot even though new regulations governing temporary reinstatement had been promulgated where operator's challenge was based on failure of Commission to hold a hearing before ordering temporary reinstatement and new regulations did not require hearing prior to temporary reinstatement. Southern Ohio Coal Co. v. Donovan, D.C.Ohio 1984, 593 F.Supp. 1014, affirmed 774 F.2d 693.

De novo hearing in the district court with respect to enforcement of civil penalties assessed under this chapter is not limited to the amount of penalties but may include the issue of liability. U.S. v. Fowler, D.C.Va.1980, 484 F.Supp. 843, affirmed 646 F.2d 859.

Orders to withdraw all miners pending termination of an imminent danger are reviewable by the Court of Appeals whereas orders to pay civil penalties because of violation of mandatory standards under this chapter including violations for which no withdrawal order was issued, are reviewable in the district courts. Andrus v. Double "O", Inc., D.C.Tenn.1977, 466 F.Supp. 8, affirmed 617 F.2d 602, certiorari denied 101 S.Ct. 355, 449 U.S. 952, 66 L.Ed.2d 215.

**12. Admissibility of evidence**

Despite contention that site where accident occurred was a mining facility and thus was regulated by the Mining Enforcement Safety Administration and not by the Occupational Safety and Health Administration, it was not error for district court to allow Occupational Safety and Health Administration regulations into evidence, in suit by employee of independent contractor to recover from owner's managing agent for injuries sustained at job site, where it was unclear whether the bridge that the employee was painting at the time of the accident was a mine and thus actually regulated by Mining Enforcement Safety Administration and where Occupational Safety and Health Administration regulations were applicable to electrical substations and the bridge which the employee was painting was directly over an electrical substation. Vagle v. Pickands Mather & Co., C.A.Minn.1979, 611 F.2d 1212, certiorari denied 100 S.Ct. 704, 444 U.S. 1033, 62 L.Ed.2d 669.

Court, in reviewing Interior Board of Mine Operations Appeals' decision that conditions in mine, at time withdrawal order was issued, constituted an imminent danger to safety of miners, was required to appraise the evidence in light of the entire record, taking into account a contrary report of the administrative law judge. Freeman Coal Mine. Co. v. Interior Bd. of Mine Operations Appeals, C.A.7, 1974, 504 F.2d 741.

**13. Remand**

Although Court of Appeals concluded that findings were supported on record and affirmed withdrawal order of Mine Safety and Health Administration based upon finding of "imminent danger" concerning strength of barrier pillar which separated coal mine subject to order and adjacent mine which had filled with water, court was empowered to remand for additional evidence concerning condition of barrier pillar, where there had been a delay of more than one year since entry of withdrawal order and conditions at mine remained the same. Westmorland Coal Co. v. Federal Mine Safety and Health Review Commission, C.A.4, 1979, 606 F.2d 417.

**14. Stay of order**

In event that Secretary, which had issued a notice of violation against coal company because of excessive noise, issued a closure order which would become effective before the coal company was accorded an administrative hearing on claim that its use of earmuffs plan abated the violation, company could apply to court for a stay of that order pending such hearing. Kanawha Coal Co. v. Andurs, C.A.4, 1977, 553 F.2d 361.

Coal mine operator could, contemporaneous with appeal to Secretary from issuance of notice of violation and four withdrawal orders by representative of the Secretary, have applied for a temporary stay of the notice and orders of withdrawal and if such temporary relief had been denied him, he could then, but only then, have appealed to the Court of Appeals, not the district court, for relief. Sink v. Morton, C.A.W.Va.1975, 529 F.2d 601.

## § 817. Procedures to counteract dangerous conditions

**(c) Withdrawal orders**

If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the

issuance of a citation under section 814 of this title or the proposing of a penalty under section 820 of this title.

**(b) Notice to mine operators; further investigation; findings and decision by Secretary**

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds (A) that conditions exist therein which have not yet resulted in an imminent danger, (B) that such conditions cannot be effectively abated through the use of existing technology, and (C) that reasonable assurance cannot be provided that the continuance of mining operations under such conditions will not result in an imminent danger, he shall determine the area throughout which such conditions exist, and thereupon issue a notice to the operator of the mine or his agent of such conditions, and shall file a copy thereof, incorporating his findings therein, with the Secretary and with the representative of the miners of such mine. Upon receipt of such copy, the Secretary shall cause such further investigation to be made as he deems appropriate, including an opportunity for the operator or a representative of the miners to present information relating to such notice.

(2) Upon the conclusion of an investigation pursuant to paragraph (1), and an opportunity for a public hearing upon request by any interested party, the Secretary shall make findings of fact, and shall by decision incorporating such findings therein, either cancel the notice issued under this subsection or issue an order requiring the operator of such mine to cause all persons in the area affected, except those persons referred to in subsection (c) of section 814 of this title to be withdrawn from, and be prohibited from entering, such area until the Secretary, after a public hearing affording all interested persons an opportunity to present their views, determines that such conditions have been abated. Any hearing under this paragraph shall be of record and shall be subject to section 554 of Title 5.

**(c) Form and content of orders**

Orders issued pursuant to subsection (a) of this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering.

**(d) Findings; duration of orders**

Each finding made and order issued under this section shall be given promptly to the operator of the coal or other mine to which it pertains by the person making such finding or order, and all of such findings and orders shall be in writing, and shall be signed by the person making them. Any order issued pursuant to subsection (a) of this section may be modified or terminated by an authorized representative of the Secretary. Any order issued under subsection (a) or (b) of this section shall remain in effect until vacated, modified, or terminated by the Secretary, or modified or vacated by the Commission pursuant to subsection (e) of this section, or by the courts pursuant to section 816(a) of this title.

**(e) Reinstatement, modification, and vacatur of orders**

(1) Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such

not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any such mine. The mere designation of a health and safety official under this subsection shall not be construed as making such official subject to any penalty under this chapter.

(Pub.L. 91-173, Title I, § 109, Dec. 30, 1969, 83 Stat. 756; Pub.L. 95-164, Title II, § 201, Nov. 9, 1977, 91 Stat. 1310.)

**Historical Note**

**1977 Amendment.** Pub.L. 95-164 substituted provisions relating to the posting of orders and decisions for provisions setting out an enumeration of penalties, which provisions, as revised, were transferred to section 820 of this title.

**Effective Date of 1977 Amendment.** Amendment by Pub.L. 95-164 effective 120 days after Nov. 9, 1977, except as otherwise provided, see section 307 of Pub.L. 95-164, set out as a note under section 801 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 91-173, see 1969 U.S. Code Cong. and Adm.News, p. 2503. See, also, Pub.L. 95-164, 1977 U.S.Code Cong. and Adm. News, p. 3401.

**Code of Federal Regulations**

Legal identity, notification of, see 30 CFR 41.1 et seq.
Miners' representatives, see 30 CFR 40.1 et seq.

## § 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

## § 823. Federal Mine Safety and Health Review Commission

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

(1) The terms of the members of the Commission shall be six years, except that—

(A) members of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for a term of two years, two for a term of four years and two for a term of six years; and

(B) a vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, relating to classification and general pay rates. Upon the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the administrative law judges assigned to the Arlington, Virginia, facility of the Office of Hearings and Appeals, United States Department of the Interior, shall be automatically transferred in grade and position to the Federal Mine Safety and Health Review Commission. Notwithstanding the provisions of section 559 of Title 5, the incumbent Chief Administrative Law Judge of the Office of Hearings and Appeals of the Department of the Interior assigned to the Arlington, Virginia facility shall have the option, on the effective date of the Federal Mine Safety and Health Amendments Act of 1977, of transferring to the Commission as an administrative law judge, in the same grade and position as the other administrative law judges. The administrative law judges (except those presiding over Indian Probate Matters) assigned to the Western facilities of the Office of Hearings and Appeals of the Department of the Interior shall remain with that Department at their present grade and position or they shall have the right to transfer on an equivalent basis to that extended in this paragraph to the Arlington, Virginia administrative law judges in accordance with procedures established by the Director of the Office of Personnel Management. The Commission shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission. Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of Title 5.

(c) Delegation of powers

The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a

# CHAPTER XXVII—FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

# PART 2700—PROCEDURAL RULES

## Subpart A—General Provisions

Sec.



## Subpart B—Contests of Citations and Orders



## Subpart C—Contests of Proposed Penalties



## Subpart D—Complaints for Compensation



## Subpart E—Complaints of Discharge, Discrimination or Interference



## Subpart F—Applications for Temporary Relief



## Subpart G—Hearings



## Subpart H—Review by the Commission



## Subpart I—Miscellaneous



AUTHORITY: 30 U.S.C. 815, 820 and 823.

SOURCE: 58 FR 12164, Mar. 3, 1993, unless otherwise noted.

(d) *Scope of review.* Unless otherwise specified in the Commission's order granting interlocutory review, review shall be confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review.

[58 FR 12164, Mar. 3, 1993, as amended at 64 FR 48714, Sept. 8, 1999; 67 FR 18485, Apr. 16, 2002]

### § 2700.77 Oral argument.

Oral argument may be ordered by the Commission on its own motion or on the motion of a party. A party requesting oral argument shall do so by separate motion no later than the time that it files its opening or response brief.

### § 2700.78 Reconsideration.

(a) A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission. Any response must be filed with the Commission within 10 days of service of the petition.

(b) Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not stay the effect of a decision or order of the Commission and shall not affect the finality of a decision or order for purposes of review in the courts.

### § 2700.79 Correction of clerical errors.

The Commission may correct clerical errors in its decisions at any time.

## Subpart I—Miscellaneous

### § 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Individuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) *Grounds.* Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(1) *Disciplinary referral.* Except as provided in paragraph (e) of this section, a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(2) *Inquiry by the Commission.* The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

(3) *Transmittal and hearing.* Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. The Commission shall specify the disciplinary issues to be resolved through hearing and may designate counsel to prosecute the matter before the Judge. The Judge shall provide the opportunity for reply and hearing on the specific disciplinary matters at issue. The individual shall have the opportunity to present evidence and cross-examine witnesses. The Judge's decision shall include findings of fact and conclusions of law and either an order dismissing the proceedings or an appropriate disciplinary order, which may include reprimand, suspension, or disbarment from practice before the Commission.

(d) *Appeal from Judge's decision.* Any person adversely affected or aggrieved by the Judge's decision is entitled to

TABLE 47.92—HAZARDOUS CHEMICALS EXEMPT FROM LABELING—Continued

| Exemption | Conditions for exemption |
|---|---|
| Hazardous substance | When the subject of remedial or removal action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in accordance with EPA regulations. |
| Hazardous waste | When regulated by EPA under the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act. |
| Raw material being mined or processed | While on mine property, except when the container holds a mixture of the raw material and another hazardous chemical and the mixture is found to be hazardous under § 47.21—Identifying hazardous chemicals. |
| Wood or wood products, including lumber | Wood or wood products are always exempt from labeling. |

[67 FR 42388, June 21, 2002; 67 FR 42966, Sept. 11, 2002; 67 FR 63255, Oct. 11, 2002]

# PART 48—TRAINING AND RETRAINING OF MINERS

## Subpart A—Training and Retraining of Underground Miners

Sec.



## Subpart B—Training and Retraining of Miners Working at Surface Mines and Surface Areas of Underground Mines



AUTHORITY: 30 U.S.C. 811, 825.

SOURCE: 43 FR 47456, Oct. 13, 1978, unless otherwise noted.

## Subpart A—Training and Retraining of Underground Miners

### § 48.1 Scope.

The provisions of this subpart A set forth the mandatory requirements for submitting and obtaining approval of programs for training and retraining miners working in underground mines. Requirements regarding compensation for training and retraining are also included. The requirements for training and retraining miners working at surface mines and surface areas of underground mines are set forth in subpart B of this part.

### § 48.2 Definitions.

For the purposes of this subpart A—

(a)(1) *Miner* means, for purposes of §§ 48.3 through 48.10 of this subpart A, any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular, basis. Short

term, specialized contact workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under § 48.6 (Experienced miner training) of this subpart A may, in lieu of subsequent training under that section for each new employment, receive training under § 48.11 (Hazard training) of this subpart A. This definition does not include:

(i) Workers under subpart C of this part 48, including shaft and slope workers, workers engaged in construction activities ancillary to shaft and slope sinking, and workers engaged in the construction of major additions to an existing mine which requires the mine to cease operations;

(ii) Any person covered under paragraph (a)(2) of this section.

(2) *Miner* means, for purposes of § 48.11 (Hazard training) of this subpart A, any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine. This definition excludes persons covered under paragraph (a)(1) of this section and subpart C of this part.

(b) *Experienced miner* means:

(1) A miner who has completed MSHA-approved new miner training for underground miners or training acceptable to MSHA from a State agency and who has had at least 12 months of underground mining experience; or

(2) A supervisor who is certified under an MSHA-approved State certification program and who is employed as an underground supervisor on October 6, 1998; or

(3) An experienced underground miner on February 3, 1999.

(c) *New miner* means a miner who is not an experienced miner.

(d) *Normal working hours* means a period of time during which a miner is otherwise scheduled to work. This definition does not preclude scheduling training classes on the sixth or seventh working day if such a work schedule has been established for a sufficient period of time to be accepted as the operator's common practice. Miners shall be paid at a rate of pay which shall correspond to the rate of pay they would have received had they been performing their normal work tasks.

(e) *Operator* means any owner, lessee, or other person who operates, controls or supervises an underground mine; or any independent contractor identified as an operator performing services or construction at such mine.

(f) *Task* means a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge.

(g) *Act* means the Federal Mine Safety and Health Act of 1977.

[43 FR 47459, Oct. 13, 1978, as amended at 63 FR 59759, Oct. 6, 1998]

### § 48.3 Training plans; time of submission; where filed; information required; time for approval; method for disapproval; commencement of training; approval of instructors.

(a) Each operator of an underground mine shall have an MSHA approved plan containing programs for training new miners, training experienced miners, training miners for new tasks, annual refresher training, and hazard training for miners as follows:

(1) In the case of an underground mine which is operating on the effective date of this subpart A, the operator of the mine shall submit such plan for approval within 90 days after the effective date of this subpart A.

(2) Within 60 days after the operator submits the plan for approval, unless extended by MSHA, the operator shall have an approved plan for the mine.

(3) In the case of a new underground mine which is to be opened or a mine which is to be reopened or reactivated after the effective date of this subpart A, the operator shall have an approved plan prior to opening the new mine, or reopening or reactivating the mine.

(b) The training plan shall be filed with the District Manager for the area in which the mine is located.

(c) Each operator shall submit to the District Manager the following information:

(1) The company name, mine name, and MSHA identification number of the mine.

(2) The name and position of the person designated by the operator who is

§ 48.8, if the miner missed taking that training during the absence.

[43 FR 47459, Oct. 13, 1978, as amended at 47 FR 23640, May 28, 1982; 58 FR 10335, Mar. 30, 1988; 58 FR 12415, Apr. 14, 1988; 63 FR 59760, Oct. 6, 1998; 67 FR 42388, June 21, 2002]

### § 48.7 Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction.

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) *Health and safety aspects and safe operating procedures for work tasks, equipment, and machinery.* The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, including information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. The training shall be given in an on-the-job environment; and

(2)(i) *Supervised practice during nonproduction.* The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; or

(ii) *Supervised operation during production.* The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) *New or modified machines and equipment.* Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different operating procedures.

(4) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, including information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program, prior to performing such task.

(d) Any person who controls or directs haulage operations at a mine shall receive and complete training courses in safe haulage procedures related to the haulage system, ventilation system, firefighting procedures, and emergency evacuation procedures in effect at the mine before assignment to such duties.

(e) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.

[43 FR 47459, Oct. 13, 1978, as amended at 44 FR 1960, Jan. 8, 1979; 47 FR 23640, May 28, 1982; 67 FR 42388, June 21, 2002]

### § 48.8 Annual refresher training of miners; minimum courses of instruction; hours of instruction.

(a) Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.