UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1124

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

Petitioner,

v.

TWENTYMILE COAL COMPANY

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

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

BRIEF FOR THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate
Litigation

JACK POWASNIK
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, Virginia 22209-2296
Telephone: (202) 693-9344

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 ("the Commission") are the Secretary of Labor ("the Secretary") and Twentymile Coal Company ("Twentymile"). The parties in this Court are the Secretary, Twentymile, and the Commission. No amici appeared before the Commission, and there are no amici in this Court.

(B) Rulings Under Review. The Secretary of Labor seeks review of the decision of the Commission issued on March 18, 2005, in Twentymile Coal Co., FMSHRC Docket No. WEST 2002-194, and reported at 27 FMSHRC 260 (March 2005) (App. 1).

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

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

GLOSSARY OF ABBREVIATIONS AND ACRONYMS viii

STATEMENT REGARDING JURISDICTION 1

STATEMENT OF THE ISSUE PRESENTED 2

PERTINENT STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 2

A. Overview of the Case 2

B. Nature of the Case, Course of Proceedings, and Disposition Below 3

STATEMENT OF FACTS 4

A. Statutory and Regulatory Background 4

B. Factual Background 7

C. The ALJ's Decision 11

D. The Commission's Decision 13

SUMMARY OF ARGUMENT 17

ARGUMENT

THE COMMISSION ERRED IN VACATING THE CITATIONS ISSUED TO TWENTYMILE ON THE GROUND THAT THE SECRETARY ABUSED HER DISCRETION IN CITING TWENTYMILE FOR VIOLATIONS COMMITTED BY AN INDEPENDENT CONTRACTOR ENGAGED BY TWENTYMILE TO PERFORM SERVICES AT TWENTYMILE'S MINE 20

A. Standard of Review 20

B. The Secretary's Decision to Cite Twentymile Was Not Reviewable 24

1. The Mine Act gives the Secretary discretionary authority to cite the owner or production operator of a mine for violations committed by an independent contractor performing services at the mine .. 24

2. There are no meaningful standards by which the Secretary's decision to cite Twentymile can be reviewed 26

B. If the Secretary's Decision to Cite Twentymile Was Reviewable, the Commission Erred in Finding That the Secretary's Decision Was an Abuse of Discretion 36

CONCLUSION 44

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

CASES — Page

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 26

Adams v. FAA,
1 F.3d 955 (9th Cir. 1993) 35

Baltimore Gas & Electric Co. v. FERC,
252 F.3d 456 (D.C. Cir. 2001) 29

*Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533
(D.C. Cir. 1986) 6, 23, 24, 25, 26, 30, 31, 32, 44

Buck Creek Coal Co., 17 FMSHRC 8 (Jan. 1995)
aff'd 52 F.3d 133 (7th Cir. 1995) 44

Bulk Transportation Services, Inc.,
13 FMSHRC 1354 (Sept. 1991) 43

Calvin Black Enterprises, 7 FMSHRC 1151 (Aug. 1985) 42

Chevron USA, Inc. v. Natural Resources
Defense Council, Inc., 467 U.S. 837 (1984) 21

*Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971) 22, 26, 27

Claybrook v. Slater,
111 F.3d 904 (D.C. Cir. 1997) 28

Consolidation Coal Co., 11 FMSHRC 1439 (Aug. 1989) 43

Cyprus Emerald Resources Corp.,
20 FMSHRC 790 (Aug. 1998) 41

Cyprus Industrial Minerals Co. v. FMSHRC,
664 F.2d 1116 (9th Cir. 1981) 25

* Authorities upon which we chiefly rely are marked with asterisks.

Davis v. Latschar,
202 F.3d 359 (D.C. Cir. 2000) 22

Dickson v. Secretary of Defense,
68 F.3d 1396 (D.C. Cir. 1995) 22

Donnelly v. FAA,
411 F.3d 267 (D.C. Cir. 2005) 23

Donovan on behalf of Chacon v. Phelps Dodge Corp.,
709 F.2d 86 (D.C. Cir. 1983) 23

Drake v. FAA,
291 F.3d 59 (D.C. Cir. 2002) 27, 28

Hall v. Clinton,
285 F.3d 74 (D.C. Cir. 2002) 27

Harlan Cumberland Coal Co.,
20 FMSHRC 1275 (Dec. 1998) 41

*Heckler v. Chaney,
470 U.S. 821 (1985) 23, 26, 27, 29, 30, 31, 33, 34, 35

ICC v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987) 34

Int'l Union, UMWA v. FMSHRC,
840 F.2d 77 (D.C. Cir. 1988) 24

Lincoln v. Vigil,
508 U.S. 182 (1993) 29, 31

Maple Creek Mining Co., 27 FMSHRC ___,
slip op. at 9 n.6 (Aug. 2005) 41

Mathies Coal Co., 6 FMSHRC 1 (Jan. 1994) 41

Mingo Logan Coal Co., 19 FMSHRC 246 (Feb. 1997),
aff'd, 133 F.3d 916 (4th Cir. 1998) 23

* Authorities upon which we chiefly rely are marked with asterisks.

Moog Industries, Inc. v. FTC,
355 U.S. 411 (1958) 30, 31

National Industrial Sand Ass'n v. Marshall,
601 F.2d 689 (3d Cir. 1979) 25

Old Ben Coal Co., 1 FMSHRC 1480 (Oct. 1979) 42

Padula v. Webster,
822 F.2d 97 (D.C. Cir. 1987) 31

Phillips Uranium Corp., 4 FMSHRC 549 (Apr. 1982) 42

RAG Cumberland Resources LP v. FMSHRC,
272 F.3d 590 (D.C. Cir. 2001) 21

Republic Steel Corp., 1 FMSHRC 5 (April 1979) 25

Secretary of Labor v. Excel Mining, LLC,
334 F.3d 1 (D.C. Cir. 2003) 21

Secretary of Labor v. FMSHRC,
111 F.3d 913 (D.C. Cir. 1997) 21

Secretary of Labor v. Keystone Coal Mining Corp.,
151 F.3d 1096 (D.C. Cir. 1998) 20

Secretary of Labor v. Twentymile Coal Co.,
411 F.3d 256 (D.C. Cir. 2005) 22

Secretary of Labor on behalf of Wamsley v.
Mutual Mining, Inc., 80 F.3d 110 (4th Cir. 1996).7, 30, 32

Sierra Club v. Whitman,
268 F.3d 898 (9th Cir. 2001) 35

Sioux Valley Rural Television, Inc. v. FCC,
349 F.3d 667 (D.C. Cir. 2003) 22

Steenholdt v. FAA,
314 F.3d 633 (D.C. Cir. 2003) 31, 33, 35

* Authorities upon which we chiefly rely are marked with asterisks.

Swift v. United States,
318 F.3d 250 (D.C. Cir. 2003) 29

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 7

Webster v. Doe,
486 U.S. 592 (1988) 28

STATUTES AND CODES

Administrative Procedures Act
5 U.S.C. § 701(a) 26
*5 U.S.C. § 701(a)(2) 26, 27

Federal Mine Safety and Health Act of 1977,
30 U.S.C. 801, et seq. (1977)

Section 2(g)(2), 30 U.S.C. § 801(g)(2) 5
Section 3(d), 30 U.S.C. §802(d) 5, 28
Section 101, 30 U.S.C. § 811 5
*Section 103(a), 30 U.S.C. § 813(a). 5
Section 104, 30 U.S.C. § 814 ..... 5, 28
Section 104(a), 30 U.S.C. § 814(a) 5, 28
Section 104(b), 30 U.S.C. § 814(b) 5
Section 105, 30 U.S.C. § 815 6
Section 105(a), 30 U.S.C. § 815(a) 6, 28
Section 105(d), 30 U.S.C. § 815(d) 1
Section 106, 30 U.S.C. § 816 1
Section 106(b), 30 U.S.C. § 816(b) 1
Section 110(a), 30 U.S.C. § 820(a) 6
Section 110(i), 30 U.S.C. § 820(i) 3
Section 113, 30 U.S.C. §823 ..... 5, 6, 13, 17, 18, 32, 33
Section 113(d), 30 U.S.C. § 823(d). 1
Section 113(d)(2)(A), 30 U.S.C. § 823(d)(2)(A). 1
Section 113(d)(2)(A)(ii),
30 U.S.C. § 823(d)(2)(A)(ii) 24
Section 113(d)(2)(A)(ii)(IV),
30 U.S.C. § 823(d)(2)(A)(ii)(IV). 14, 32
Section 507, 30 U.S.C. 956 ..... 14, 34

* Authorities upon which we chiefly rely are marked with asterisks.

30 C.F.R. § 45.2(d) 7
30 C.F.R. § 77.400(a) 8
30 C.F.R. § 77.404 8
30 C.F.R. § 77.412 8
30 C.F.R. § 77.1103(a) 8
30 C.F.R. § 77.1110 8

Miscellaneous

45 Fed. Reg. 44,494 (July 1, 1980) 6, 15

---

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

ALJ	Commission Administrative Law Judge
APA	Administrative Procedure Act
App.	Appendix
Commission	Federal Mine Safety and Health Review Commission
GX	Government's Exhibit
JX	Joint Exhibit
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
RX	Respondent's Exhibit
Secretary	Secretary of Labor
Stip.	Stipulation
Tr.	Transcript
Twentymile	Twentymile Coal Company

STATEMENT REGARDING JURISDICTION

The Court has jurisdiction over this proceeding for review of a decision of the Commission under Section 106 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 816. The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d).

The decision of the administrative law judge ("ALJ") in this case was issued on July 7, 2003. 25 FMSHRC 352 (July 2003) (App. 26). By order dated August 18, 2003, the Commission granted Twentymile's petition for discretionary review of the ALJ's decision pursuant to Section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A) (App. 37). The Commission issued its decision on March 18, 2005. 27 FMSHRC 260 (March 2005) (App. 1). The Commission denied the Secretary's petition for reconsideration of its decision on March 30, 2005 (App. 38). The Secretary filed a timely petition for review of the Commission's decision with the Court on April 15, 2005 (App. 39).

The Secretary has standing to appeal the Commission's decision under Section 106(b) of the Mine Act, 30 U.S.C. § 816(b). The Commission's decision represents a final Commission order that disposes of all of the parties' claims.

STATEMENT OF THE ISSUES PRESENTED

(1). Whether the Secretary's decision to cite Twentymile for violations committed by an independent contractor performing services at Twentymile's mine was unreviewable as a matter of law.

(2). Whether, if the Secretary's decision to cite Twentymile was reviewable, the Commission erred in finding that the Secretary's decision was an abuse of discretion.

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

A. Overview of the Case

It is settled law that, in enforcing the Mine Act, the Secretary has the discretion to cite the owner operator of a mine, an independent contractor performing services at the mine, or both for violations committed by the independent contractor. In this case, the Secretary decided to cite both, but the Commission found the citation of the operator to be an abuse of discretion. The Secretary contends, however, that her decision to cite the owner operator was not reviewable -- that is, there are no meaningful standards by which that decision can be

reviewed. Alternatively, the Secretary contends that, even if reviewable, the Commission erred in finding that that decision was an abuse of discretion.

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

On August 30, 2001, an MSHA inspector issued six citations to Twentymile, the owner operator of an underground coal mine, and to an independent contractor performing services at the mine, for the same alleged violations of MSHA safety standards at the mine. GX-2 (App. 42-64). The six violations involved defective equipment owned and operated by the independent contractor at the mine. Ibid.[1]

Twentymile contested the citations it received and the penalties proposed against it, and a hearing was held before a Commission ALJ. 25 FMSHRC 352 (July 2003) (ALJ) (App. 26).[2] Twentymile agreed that the conditions described in the citations constituted violations and that the proposed penalties were consistent with the penalty criteria set forth in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), but challenged the

---

[1] MSHA proposed a total penalty of $ 900 against Twentymile for the six citations. 25 FMSHRC at 362 (App. 36).

[2] The independent contractor did not contest the citations, and paid the total penalty of $ 352 MSHA proposed against it for the six citations it received. See RX-2 (App. 232-35).

propriety of citing it for the same violations as the independent contractor. Stip. 18 (App. 67-68). The ALJ found that the Secretary did not abuse her discretion in citing Twentymile for the violations committed by the independent contractor. 25 FMSHRC at 358-361 (App. 32-35). Twentymile appealed the ALJ's decision to the Commission.

Before the Commission, the Secretary argued that her decision to cite Twentymile for the violations was unreviewable -- that is, that there are no meaningful standards by which that decision can be reviewed -- and that, in any event, her decision was not an abuse of discretion. The Commission held that it has the authority under the Mine Act to review the Secretary's enforcement decisions, and a majority found that, in this case, the Secretary abused her discretion in deciding to cite Twentymile. 27 FMSHRC at 266-277 (Mar. 2005) (App. 7-18). On that basis, the Commission dismissed the citations issued to Twentymile.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. One of the stated purposes of the Act is to require that "each operator" of a mine

comply with mandatory safety and health standards promulgated by the Secretary. 30 U.S.C. § 801(g)(2).

Sections 101 and 103 of the Mine Act authorize the Secretary, acting through the Mine Safety and Health Administration ("MSHA"), to promulgate mandatory safety and health standards for the Nation's mines and to conduct regular inspections of those mines. 30 U.S.C. §§ 811 and 813. MSHA inspectors regularly inspect mines to assure compliance with the Mine Act and MSHA standards. 30 U.S.C. § 813(a).

Section 104 of the Mine Act provides for the issuance of citations and orders for violations of the Mine Act or MSHA standards. 30 U.S.C. § 814. If an MSHA inspector discovers a violation of the Mine Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or 104(b) of the Mine Act to the "operator." 30 U.S.C. §§ 814(a) and 814(b). An "operator" is defined as:

> 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.

30 U.S.C. § 802(d). This Court has recognized that there can be more than one "operator" at a mine -- that is, that both the production operator and an independent contractor can be an

"operator" -- and that the Secretary has the authority to cite the independent contractor, the production operator, or both for violations committed by the independent contractor. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535 (D.C. Cir. 1986) (discussing cases).

In 1980, the Secretary published enforcement guidelines setting forth guidance for MSHA inspectors to use in deciding whether, in individual cases, to cite a production operator for violations committed by an independent contractor. 45 Fed. Reg. 44,494 (1980). This Court has recognized that the Secretary's Enforcement Guidelines are not binding on the Secretary and do not prevent the Secretary from citing a production operator when the criteria set forth in the Guidelines are not met. Cathedral Bluffs, 796 F.2d at 536-39.

Sections 105(a) and 110(a) of the Mine Act provide for the proposal and assessment of civil penalties for violations of the Mine Act or MSHA standards. 30 U.S.C. §§ 815(a) and 820(a).

An operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an ALJ and appellate review in cases arising under the

Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996).

B. Factual Background

Twentymile is the owner operator of the Foidel Creek Mine, an underground coal mine in Routt County, Colorado. Stip. 1, 2 (App. 65).[3] Twentymile regularly uses independent contractors to perform large and small-scale projects at the mine. Tr. 67 (App. 119). In August 2001, Twentymile hired independent contractor Precision Excavating, Inc. ("Precision") to remove clay from a refuse pile at the mine. Tr. 70-71, 76, 83-84 (App. 121-22, 126, 131-32); Stip. 13 (App. 66). As an owner operator, Twentymile regularly conducts safety audits of the mine's surface and underground areas and, in doing so, inspects independent contractors' equipment. Tr. 87-88, 102, 106, 120, 123 (App. 135-36, 139, 143, 154, 157).

On August 30, 2001, MSHA Inspector Michael Havrilla conducted an inspection of the surface areas of the mine. Tr.

[3] Twentymile is also known as a "production operator" under MSHA's regulations and Enforcement Guidelines. A "production operator" is defined as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine." 30 C.F.R. § 45.2(d). See RX-34 (App. 227).

14-15 (App. 86-87). During the inspection, Havrilla observed Precision employees operating a pan scraper and a truck at the refuse pile. Tr. 43-44 (App. 111-12). MSHA issued six citations to Precision for the violations that Inspector Havrilla observed with respect to the scraper and the truck. Tr. 14, 20-30 (App. 86, 88-98); Stip. 15 (App. 66-67). MSHA also issued six citations to Twentymile for the same violations. Tr. 30-31 (App. 98-99); Stip. 15 (App. 66-67); GX-2 (App. 42-64).[4]

Inspector Havrilla testified as to why MSHA issued citations to Twentymile. Havrilla had been inspecting the Foidel Creek Mine approximately once a year since 1996. Tr. 13 (App. 85). In 1998 and 1999, Havrilla observed an increase in

---

[4] Five of the citations involved the service truck and one citation involved the pan scraper. GX-2 (App. 42-64). The citations alleged the following violations: (1) a violation of 30 C.F.R. § 77.412 consisting of an inoperable pressure gauge in the air compressor on the truck, (2) a violation of 30 C.F.R. § 77.400(a) consisting of a ten-by-ten inch opening on the truck's compressor which would allow contact with the drive belts and pulley, (3) a violation of 30 C.F.R. § 77.1110 consisting of failure to examine a fire extinguisher on the truck at least once every six months, (4) a violation of 30 C.F.R. § 77.404 consisting of the scraper being operated in an unsafe condition because the diesel fuel tank was leaking, (5) a violation of 30 C.F.R. § 77.1103(a) consisting of three unlabeled metal containers of gasoline on the truck, and (6) a violation of 30 C.F.R. § 77.1103(a) consisting of a plastic container of gasoline on the truck which did not meet National Fire Protection Association requirements. Tr. 14, 21-31 (App. 86, 89-99); GX-2 (App. 42-64).

the number of violations by some independent contractors performing services at the mine. Tr. 33-35 (App. 101-03); Stip. 17 (App. 67); JX-2 (App. 71-84). At about the same time, MSHA issued a memorandum to its district offices addressing an increase in accidents involving independent contractors nationwide. Tr. 33 (App. 101).

In 1999, Havrilla specifically discussed with Twentymile the increase in the number of violations committed by Bauer Brothers Construction, a hauling contractor performing services at the mine. Tr. 34 (App. 102). Because of the number of citations Bauer Brothers Construction received, Havrilla believed that the contractor was not taking adequate safety precautions with respect to its machinery. Ibid. Havrilla testified that he told Twentymile that an increase in contractor violations often results in an increase in accidents, and that Twentymile needed to take action to correct the problem. Ibid. To correct the problem, Havrilla testified that, rather than issuing citations to Twentymile for the contractor's violations, he suggested that Twentymile try to reduce the number of contractor violations through proper management. Ibid.

Inspector Havrilla testified that in November 2000, he noticed a decrease in the number of violations by independent

contractors at the Foidel Creek Mine. Havrilla testified that on August 30, 2001, however, the number of violations appeared to be on the rise again because of the number of violations by Precision that he observed during his inspection on that date. Tr. 35 (App. 103). During the inspection on August 30, 2001, Havrilla also learned from Precision's leadman that Twentymile did not inspect contractor's equipment before it was used at the mine, as most mine operators in the area do. Tr. 36 (App. 104). Havrilla testified that "most operators, just like the Twentymile property, have a location where vendors and contractors must check in ... and equipment is usually examined." Tr. 36 (App. 104); see also Tr. 54, 62, 117-19 (App. 116, 151-53).

In essence, MSHA issued citations to Twentymile in this case for five reasons: (1) because Twentymile did not examine the equipment or ensure that the independent contractor examined the equipment before it was operated at the mine; (2) because Twentymile did not examine the equipment while it was being operated at the mine; (3) because Twentymile employees would be exposed to hazards during any fire fighting that resulted from the violations; (4) because Twentymile exercised control over the hazardous conditions that required abatement; and (5)

because MSHA wanted to ensure that past contractor compliance problems were not resurfacing. Tr. 33-42 (App. 101-10). Havrilla testified that "[i]f I would not have come to the mine site to find these conditions, this would have been allowed to continue," and that "again, [I] am trying to protect the miners." Tr. 35-36 (App. 103-04).

Twentymile contested the citations, and the case was assigned to a Commission ALJ. Twentymile stipulated that it agreed with the occurrence of the violations and the appropriateness of the proposed penalties. Stip. 18 (App. 67-68). Twentymile, however, claimed that the Secretary should never be allowed to cite an owner operator for a violation committed by a contractor, and that, in any event, the Secretary abused her discretion in citing it for the same violations committed by its contractor. 25 FMSHRC at 354-55, 361 (App. 28-29, 35).

C. The ALJ's Decision

The ALJ held that the Secretary did not abuse her enforcement discretion in citing Twentymile for the violations committed by the independent contractor. 25 FMSHRC at 359 (App.

33).[5] The ALJ made three fundamental findings in affirming the citations issued to Twentymile: (1) that the Secretary presented a rational, reasoned basis for citing Twentymile based on the MSHA inspector's perception of an increase in the number of contractor violations at the mine; (2) that under MSHA's Enforcement Guidelines, Twentymile contributed to the violations committed by the contractor because Twentymile did not inspect the contractor's equipment when it entered the mine or at any time during its use at the mine; and (3) that under MSHA's Enforcement Guidelines, Twentymile exercised sufficient control over the independent contractor's equipment. 25 FMSHRC at 359-60 (App. 33-34).[6]

In rejecting Twentymile's argument that the Secretary abused her enforcement discretion, the ALJ emphasized that the MSHA inspector observed a number of obvious violations involving the independent contractor's equipment and, on inquiring further, discovered that neither Twentymile nor the contractor had inspected the equipment prior to its use at the mine. 25

---

[5] In finding that the Secretary did not abuse her discretion, the ALJ did not make any findings with respect to the Secretary's argument that the Secretary's decision to cite Twentymile was unreviewable.

[6] The ALJ agreed with Twentymile that its employees were not exposed to the hazards created. 25 FMSHRC at 360 n.2 (App. 34).

FMSHRC at 360-61 (App. 34-35).

The ALJ also rejected Twentymile's argument that an owner operator should never be cited for a violation committed by an independent contractor. 25 FMSHRC at 361 (App. 35). The judge found that Twentymile's argument "has been thoroughly discussed by the Commission and the Courts of Appeals" and that "Twentymile's argument[] [has] not been adopted." Ibid.

D. The Commission's Decision

Reaffirming many years of court and Commission case law, the Commission unanimously held that the Secretary has the statutory authority to cite more than one operator for a violation at a multi-operator mine site. 27 FMSHRC at 263-64 (App. 4). More specifically, the Commission unanimously held that the Secretary has the statutory authority to cite an owner operator, an independent contractor, or both for violations committed by the independent contractor. Ibid.

The Commission, however, unanimously rejected the Secretary's argument that her decision as to which operator or operators to cite for violations at a multi-operator site is unreviewable. 27 FMSHRC at 265-66 (App. 6-7). The Commission based that ruling on two grounds. First, the Commission reasoned that it has the authority under Section 113 of the Mine

Act to review the Secretary's enforcement decisions because that provision purportedly gives the Commission authority to review a "substantial question of law, policy or discretion," and contains no limits on the Commission's authority to do so. 27 FMSHRC at 265-66 (citing 30 U.S.C. § 823(d)(2)(A)(ii)(IV)) (App. 6-7). Second, the Commission reasoned that the purportedly APA-based case law the Secretary relied on is not applicable to Commission proceedings because Section 507 of the Mine Act, 30 U.S.C. § 956, states that "sections 701-706 of title 5 of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to the Act, or to any proceeding for the review thereof." 27 FMSHRC at 265 (App. 6).[7]

A majority of the Commission then found that the Secretary abused her discretion in citing Twentymile for the violations committed by its contractor in this case by purporting to apply an abuse of discretion standard of review consisting of three criteria culled from the Commission's own case law and the four criteria set forth in MSHA's Enforcement Guidelines. 27 FMSHRC at 266-77 (App. 7-8). The three case law-based criteria were (1) "[w]hether the production operator, the independent contractor, or another party was in the best position to affect

[7] On March 28, 2005, the Secretary filed a petition for reconsideration of this aspect of the Commission's decision. The Commission denied the petition on March 30, 2005. (App. 38).

safety matters," (2) "[w]hether and to what extent the production operator had day-to-day involvement in the activities in question," and (3) "[w]hether the production operator contributed to the violations committed by the independent contractor." 27 FMSHRC at 267 (App. 8). The Enforcement Guidelines criteria provide that enforcement action may be taken against a production operator for violations committed by an independent contractor (1) "when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." 27 FMSHRC at 267 (quoting 45 Fed. Reg. 44494, 44497 (July 1, 1980)) (App. 8).

Significantly, the Commission majority added a criterion not included in the Enforcement Guidelines: that for any of the four Guidelines criteria to be met, a "significant threshold" of production operator involvement must be reached. 27 FMSHRC at 273 (App. 14). In addition, the majority held that the MSHA

inspector's "subjective conclusion that there was a 'serious problem' with independent contractor violations at the mine is not an independent justification for citing the production operator in this case." 27 FMSHRC at 276 (emphasis in original) (App. 17).

Dissenting, Commissioner Jordan found that the majority's standard of review "dramatically departed" from Commission precedents, which state that an abuse of discretion occurs only when there is "no evidence" to support a prosecutorial decision, which give the Secretary broad leeway in deciding whom to cite, and which do not require that a "significant threshold" of the four criteria in the Secretary's Enforcement Guidelines be reached. 27 FMSHRC at 278-80 (App. 19-21). Commissioner Jordan also found that the Commission majority impermissibly second-guessed the ALJ's factual findings and that substantial evidence supported the ALJ's determination that the Secretary did not abuse her discretion in citing Twentymile. 27 FMSHRC at 281-82 (App. 22-23).

Commissioner Jordan found that there was evidence which satisfied the three criteria which the Commission traditionally relies on when reviewing the Secretary's enforcement decisions: (1) that Twentymile was substantially involved in the day-to-day

operations of the mine, (2) that Twentymile was in an excellent position to affect safety, and (3) that citing Twentymile was consistent with the purpose and policies of the Mine Act. 27 FMSHRC at 279, 281-82 (App. 20, 22-23). In addition, Commissioner Jordan found that substantial evidence supported the ALJ's finding that the first and fourth criteria of the Enforcement Guidelines were satisfied. 27 FMSHRC at 281-82 (App. 22-23).

The Secretary filed a timely petition for review of the Commission's decision with the Court on April 15, 2005. (App. 39-41).

SUMMARY OF ARGUMENT

1. The Mine Act gives the Secretary the discretion to cite the owner or production operator, the independent contractor, or both for violations committed by the independent contractor at the mine. Under the Mine Act, both the owner or production operator and an independent contractor can be an "operator" at a mine. In addition, under the Mine Act's scheme of no-fault liability, an owner or production operator is jointly liable for the violations committed by its independent contractor.

The Secretary's enforcement decision as to which operator or operators to cite in a particular case is unreviewable

because the language and structure of the Mine Act provide no meaningful standards of review. The Act's enforcement provisions contain no provisions whatsoever suggesting which operator or operators the Secretary should take action against. In addition, the overall structure of the Act shows that enforcement of the Act is vested exclusively with the Secretary. The Secretary's decision whether to take action against a production operator for violations committed by its independent contractor is an enforcement decision which involves a number of "administrative concerns" and, as such, is in an area in which the courts have traditionally not interfered. Because the Secretary's Enforcement Guidelines are not binding policy statements, they likewise do not provide a meaningful standard of review.

The Commission's conclusion that it may review the Secretary's enforcement decisions under the general review authority conferred on it under Section 113 of the Mine Act is fundamentally flawed. Both this Court and the Fourth Circuit have found that nothing in the Act gives the Commission the authority to intrude on policy-related decisions entrusted to the Secretary. In addition, even if the Commission could review the Secretary's policy-based decisions generally, Section 113 of

the Act provides no meaningful standards by which the Secretary's enforcement decisions at multi-operator cites can be reviewed.

Similarly flawed is the Commission's conclusion that the purportedly APA-based case law cited by the Secretary does not apply to Mine Act proceedings because the Mine Act provides that the review provisions of the APA do not apply to Commission proceedings. The traditional principle that a court cannot review agency action if the statute provides no meaningful standard of review is the basis of the unreviewability cases the Secretary relies on and the case law demonstrates that that principle, which predates the enactment of the APA, is fully applicable in non-APA-based cases.

2. Assuming arguendo that the Secretary's decision to cite Twentymile was reviewable, the Commission majority erred in finding that the Secretary's decision was an abuse of discretion. The Commission majority committed two distinct but interrelated legal errors. It substituted its own enforcement judgment for that of the Secretary, and it substituted its own evidentiary evaluation for that of the ALJ.

The evidence demonstrates that the Commission should have affirmed the ALJ's review of the Secretary's enforcement

decision because substantial evidence supports the ALJ's decision. The Commission majority, however, simply second-guessed the ALJ's findings in order to reach a different result.

In addition, the evidence establishes no abuse of discretion by the Secretary. The evidence establishes that there was a rational connection between the facts found and the Secretary's enforcement decision. The Commission, however, imposed an unusually demanding and nondeferential standard on the Secretary that is a significant departure from its own case law and contrary to the case law of this Circuit.

ARGUMENT

THE COMMISSION ERRED IN VACATING THE CITATIONS ISSUED TO TWENTYMILE ON THE GROUND THAT THE SECRETARY ABUSED HER DISCRETION IN CITING TWENTYMILE FOR VIOLATIONS COMMITTED BY AN INDEPENDENT CONTRACTOR ENGAGED BY TWENTYMILE TO PERFORM SERVICES AT TWENTYMILE'S MINE

A. Standard of Review

The first question presented -- whether the Mine Act gives the Secretary unreviewable discretion to cite an operator for violations caused by its independent contractor -- is a legal question. A court decides legal matters under a de novo standard of review. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1099 (D.C. Cir. 1998). When a legal

matter turns on an agency's construction of its governing statute, however, a court must apply the deferential standard of review required by Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). See Secretary of Labor v. FMSHRC, 111 F.3d 913, 917 (D.C. Cir. 1997). Under that standard, if "Congress has directly spoken to the precise question at issue, we must give effect to Congress' unambiguously expressed intent." Id. (quoting Chevron, 467 U.S. at 842-43 (internal quotations omitted)). "If the statute is silent or ambiguous with respect to the specific issue, we ask whether the agency's position rests on a permissible construction of the statute." Id. (quoting Chevron, 467 U.S. at 843 (internal quotations omitted)); Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003). The Court should defer to "a reasonable interpretation" by the agency. 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 litigation 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 (quoting RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590,

596 n.9. (D.C. Cir. 2001) (internal quotation marks omitted)). Accord Secretary of Labor v. Twentymile Coal Co., 411 F.3d 256, 261 (D.C. Cir. 2005).

The second question presented -- whether, if reviewable, the Secretary properly exercised her discretion in this case -- is subject to an abuse of discretion standard. Under an abuse of discretion standard, an agency's decision will be upheld "if the agency's path may reasonably be discerned." Dickson v. Secretary of Defense, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (citation and internal quotation marks omitted). "[A]n agency's explanation must minimally contain a rational connection between the facts found and the choice made." Ibid. The abuse of discretion standard is a "highly deferential" standard, Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000), and a reviewing court is not to "substitute its judgment for that of the agency." Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667, 674 (D.C. Cir. 2003) (citation and internal quotation marks omitted). The reviewing court presumes the validity of the agency's action, see, e.g., Davis, 202 F.3d at 365, and must affirm the action unless the decisionmaker below failed to consider relevant factors or made a clear error in judgment. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S.

402, 416 (1971). Even if the agency's decision is reviewable, the abuse of discretion standard should be especially deferential where, as here, the decision pertains to "an agency's exercise of its enforcement discretion -- an area in which the courts have traditionally been most reluctant to interfere." Cathedral Bluffs, 796 F.2d at 538.[8]

In addition, when reviewing an ALJ's factual findings, the Commission is required, under Section 113(d)(2)(A)(ii) of the Mine Act, to affirm the ALJ's findings if they are supported by "substantial evidence." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Donnelly v. FAA, 411 F.3d 267, 270-71 (D.C. Cir. 2005). Under Section 113(d)(2)(A)(ii), the Commission may not substitute its own view of the facts "for the view the judge reasonably reached." Donovan v. Phelps Dodge Corp., 709 F.2d 86, 90-91 (D.C. Cir. 1983). Instead, if the ALJ's findings are supported by substantial evidence, they must be affirmed by the Commission because the Commission is bound to uphold the ALJ's factual determinations even if its own views

---

[8] The Commission itself has repeatedly recognized that "it may find an abuse [of discretion] only if there is no evidence to support the [Secretary's] decision ...." 27 FMSHRC at 279 (emphasis by Commissioner Jordan, dissenting) (quoting Mingo Logan Coal Co., 19 FMSHRC 246, 249-50 n.5 (Feb. 1997), aff'd, 133 F.3d 916 (4th Cir. 1998) (table)) (App. 20).

are also supported by the record. Id. at 92.

B. The Secretary's Decision to Cite Twentymile Was Not Reviewable

1. The Mine Act gives the Secretary discretionary authority to cite the owner or production operator of a mine for violations committed by an independent contractor performing services at the mine

The Commission decision runs counter to several established legal principles. First, it is settled law that, under the Mine Act, there can be more than one "operator" at a mine -- that is, that both the owner or production operator of a mine, and an independent contractor performing services at the mine, can be an "operator" under the Act. Int'l Union, UMWA v. FMSHRC, 840 F.2d 77, 82-84 (D.C. Cir. 1988) (discussing cases). Accord Cathedral Bluffs, 796 F.2d at 535.

Second, it is also settled law that "multiple operators are jointly liable under the Act" -- or, put differently, that "the owner of a mine is liable without regard to its own fault for violations committed by or dangers created by its independent contractor." UMWA, 840 F.2d at 83-84 (discussing cases). The Act's scheme of no-fault liability reflects the reality that "the owner is generally in continuous control of conditions at the entire mine" and, "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and

health requirements by using independent contractors for most of the work." Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981). Accord Republic Steel Corp., 1 FMSHRC 5, 11 (April 1979) ("[a] mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of the workplace is restricted"), quoted in Cyprus Industrial, 664 F.2d at 1120.

Finally, and dispositively, it is settled law that the Mine Act gives the Secretary discretionary authority to cite the owner or production operator, the independent contractor, or both for violations committed by the independent contractor. Cathedral Bluffs, 796 F.2d at 534 (discussing cases); Cyprus Industrial, 664 F.2d at 1119; National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 702-03 (3d Cir. 1979). Indeed, in finding that the Secretary's Enforcement Guidelines are not binding on the Secretary, this Court stated:

> Our decision on this point is reinforced by the fact that the statement here in question pertains to an agency's exercise of its enforcement discretion -- an area in which the courts have been most reluctant to interfere. We think the policies underlying that restraint extend as well to interference by a quasi-judicial agency that

> has no enforcement responsibilities, such as the [Commission].

Cathedral Bluffs, 796 F.2d at 538 (Scalia, Cir. J.).

Thus, the Commission was not writing on a clean slate when it decided that the Secretary's exercise of her enforcement discretion at multi-operator mine sites is reviewable. That decision was wrong because, as the Secretary submits, there are no meaningful standards by which the Secretary's enforcement decisions at such sites can be reviewed.

2. There are no meaningful standards by which the Secretary's decision to cite Twentymile can be reviewed

Although agency action is generally presumed to be reviewable, see Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), the APA recognizes two exceptions to that principle: (1) where "statutes preclude judicial review," or (2) where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The second exception applies here.

In Overton Park, 401 U.S. at 410, the Supreme Court held that agency action is committed to agency discretion by law under Section 701(a)(2) of the APA in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." In Heckler v. Chaney, 470 U.S. 821, 830 (1985), the Supreme Court explained its decision in

Overton Park by stating that, under Section 701(a)(2) of the APA, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." Ibid.

Heckler involved a decision not to take enforcement action, and the Supreme Court held that, when a decision not to take action is involved, a presumption of unreviewability applies. Heckler, 470 U.S. at 831-32. This Court has declined to extend the Heckler presumption of unreviewability to a decision to take action. Hall v. Clinton, 285 F.3d 74, 79 (D.C. Cir. 2002) (Department of Justice's affirmative decision to represent First Lady).[9] Whether a presumption of unreviewability does or does not apply, however, "the end analysis" is the same: an agency's

[9] It is important to note that the reason a decision to take action is not presumptively unreviewable is that "the action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner[,]" and "[t]he action can at least be reviewed to determine whether the action agency exceeded its statutory powers." Heckler, 470 U.S. at 832, quoted in Hall, 285 F.3d at 79. Under the settled case law previously discussed, there can be no question that the Secretary acted within her statutory powers in citing the production operator in this case. Nor can there be any question that the Secretary violated any constitutional right or protection of the production operator in this case. See Heckler, 470 U.S. at 838; Drake v. FAA, 291 F.3d 59, 72 (D.C. Cir. 2002).

action is unreviewable if "there is no law to apply." Drake v. FAA, 291 F.3d 59, 71-72 (D.C. Cir. 2002) (citing Claybrook v. Slater, 111 F.3d 904, 908-09 (D.C. Cir. 1997)). The appropriate analysis requires careful examination of both the language and the overall structure of the statute in question. Webster v. Doe, 486 U.S. 592, 600-01 (1988); Drake, 291 F.3d at 420-21.

The language of the Mine Act provides no meaningful standards by which the Secretary's enforcement decisions at multi-operator mine sites can be reviewed, thus meeting the "no law to apply" test. Section 104(a) of the Act merely states that, if an MSHA inspector believes that "an operator" subject to the Act has violated the Act, he shall issue a citation to "the operator." Section 105(a) of the Act merely states that, if the Secretary issues a citation (or an ensuing order) under Section 104, he shall notify "the operator" of the proposed penalty. Section 3(d) of the Act affirmatively states that an "operator" means "any owner, lessee, or other person who operates, controls, or supervises a ... mine or any independent contractor performing services ... at such mine." 30 U.S.C. § 802(d) (emphasis added). The Act's enforcement provisions, which have consistently been construed as authorizing the Secretary to take enforcement action against more than one

operator at a multiple-operator site, say nothing about which operator or operators the Secretary should take action against in a particular case. They are entirely silent on the point. See Lincoln v. Vigil, 508 U.S. 182, 193-94 (1993) (decision to discontinue funding a program was unreviewable where the statute "[did] not so much as mention" the program); Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003) (decision to dismiss an action was unreviewable where the statute contained nothing setting "'substantive priorities'" or "circumscrib[ing] the government's 'power to discriminate among issues or cases it will pursue'" (quoting Heckler, 470 U.S. at 833));[10] Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456, 461 (D.C. Cir. 2001) (decision to settle an action was unreviewable where the statute was "utterly silent on the manner in which the [agency] is to proceed against a particular transgressor").

Similarly, the overall structure of the Mine Act provides no meaningful standards by which the Secretary's enforcement decisions at multi-operator sites can be reviewed. On the contrary, the overall structure of the Act supports the

[10] It should be noted that, in Swift, this Court applied the general rationale of Heckler even though it indicated that a decision to dismiss an action may be more amenable to review than a decision not to initiate an action. Swift, 318 F.3d at 253.

conclusion that the Secretary's enforcement decisions cannot be reviewed. The authority to enforce the Act is vested exclusively with the Secretary. Cathedral Bluffs, 796 F.2d at 533; Mutual Mining, 80 F.3d at 113-15. In deciding which operator or operators to cite in a particular case, the Secretary must engage in the same sort of "complicated balancing" of factors described by the Supreme Court in Heckler: "the agency must assess not only whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all." Heckler, 470 U.S. at 831.

Such "administrative concerns" (id. at 832) -- which constituted the primary basis for the Court's finding of unreviewability in Heckler -- are implicated regardless of whether the Secretary decides not to act against a particular operator or, as in this case, decides to act against that operator. See Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958) (decision whether to act against one entity before acting against other entities similarly situated "depend[ed] on a

variety of factors peculiarly within the expert understanding of the [FTC]"). See also Lincoln, 508 U.S. at 193 (agency allocation of funds among programs was unreviewable because, inter alia, such a decision "requires 'a complicated balancing of factors,'" including "'whether a particular program best fits the agency's overall policies,'" which "'are peculiarly within [the agency's] expertise'") (quoting Heckler, 470 U.S. at 831)). Because the question whether to act against the production operator for violations committed by the independent contractor in a particular case "pertains to an agency's exercise of its enforcement discretion -- an area in which the courts have traditionally been most reluctant to interfere," Cathedral Bluffs, 796 F.3d at 538 (citing Heckler and Moog) -- the fact that the Act vests enforcement authority exclusively with the Secretary supports the conclusion that the Secretary's resolution of that question is not reviewable.

The Supreme Court and this Court have recognized that, even if the statute in question does not provide meaningful standards to apply, an agency's actions may be reviewable if the agency itself has provided such standards in binding statements. Heckler, 470 U.S. at 836-37; Steenholdt v. FAA, 314 F.3d 633, 638 (D.C. Cir. 2003); Padula v. Webster, 822 F.2d 97, 100 (D.C.

Cir. 1987). Such statements provide such standards, however, only if the agency's statements are binding on the agency. Ibid. This Court has held that the Secretary's Enforcement Guidelines are not binding on the Secretary. Cathedral Bluffs, 796 F.2d at 536-39. See RX-34 (App. 228-29).

The Commission held that it can review the Secretary's enforcement decisions at multi-operator sites because Section 113 of the Mine Act, 30 U.S.C. § 823, gives the Commission broad authority to review an ALJ's decision if "a substantial question of law, policy, or discretion" is involved. 27 FMSHRC at 266-67 (citing, inter alia, 30 U.S.C. § 823(d)(2)(A)(ii)(IV)) (App. 7-8). Both this Court and the Fourth Circuit, however, have rejected the notion that Section 113 gives the Commission a policymaking role authorizing it to second-guess the Secretary's policy-based decisions. Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463-464 (D.C. Cir. 1996); Mutual Mining, 80 F.3d at 114 n.3 ("[T]o say that the Commission reviews cases involving questions of policy is not to say that is the final arbiter of such policies. . . . The Commission's jurisdiction is fully consistent with the deference that it, and this court, owe to the Secretary's reasonable interpretations of the Act."). Instead, both courts have concluded that the Commission is

required to give the Secretary's litigation positions the same deference courts traditionally give enforcement agencies' litigation positions. Ibid.

In any event, even if Section 113 gives the Commission the authority to review the Secretary's policy decisions generally, it gives the Commission no meaningful standards by which to review the Secretary's enforcement decisions at multi-operator sites. A provision that provides for review generally does not render a particular decision reviewable if there are no meaningful standards by which that decision can be reviewed. Steenholdt, 314 F.3d at 638-39. And because the Mine Act provides no standards at all by which to judge the Secretary's exercise of discretion to cite both the mine operator and an independent contractor, the exercise is unreviewable. Therefore, Section 113 (30 U.S.C. § 823) cannot mean what the Commission says it means -- which is, in effect, that the Commission has carte blanche to review every decision the Secretary makes, and substitute its own judgment for the Secretary's judgment, solely on the basis of what it believes "policy" should be.

The Commission also held that the reviewability principles set forth in Heckler and its progeny do not apply to Mine Act

proceedings because Section 507 of the Mine Act provides that Section 701 of the APA does not apply to Mine Act proceedings. 27 FMSHRC at 266 (citing 30 U.S.C. § 956) (App. 7).[11] The Commission fundamentally misconstrues the basis for Heckler and the other reviewability cases discussed above. The Supreme Court made it clear in Heckler itself that the APA was intended to codify, and not to alter, the traditional principles regarding reviewability -- including the principles under which an agency's decision is unreviewable because there are no meaningful standards by which it can be reviewed. Heckler, 470 U.S. at 832 (a decision not to take action "has traditionally 'been committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition"). Accord ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 281 (1987) ("the APA codifies the nature and attributes of judicial review," including both the tradition of

---

[11] Section 507 of the Mine Act provides:

> Except as otherwise provided in this chapter, the provisions of sections 501 to 559 and sections 701-706 of Title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof.

30 U.S.C. § 956.

unreviewability recognized in Heckler and the tradition of unreviewability with regard to an agency's refusal to reconsider a decision for material error). See Steenholdt, 314 F.3d at 638-39 (although review was sought not under the APA, but under a provision of the Federal Aviation Act specifically providing for review of FAA decisions like the one in question, the decision was unreviewable because there was "'no judicially-manageable standard'" by which it could be reviewed) (quoting Adams v. FAA, 1 F.3d 955, 956 (9th Cir. 1993)). See also Sierra Club v. Whitman, 268 F.3d 898, 902 (9th Cir. 2001) (finding unreviewability under Heckler principles in a non-APA context). Because the Secretary's decision whether to cite a production operator for violations committed by an independent contractor pertains to "an area in which the courts have traditionally been most reluctant to interfere," Cathedral Bluffs, 796 F.3d at 528 (emphasis added), it is unreviewable under principles predating the APA regardless of whether the APA applies.

Because the Mine Act provides no meaningful standards by which the Secretary's enforcement decisions at multi-operator mine sites can be reviewed, the Commission lacks authority to review such a Secretarial decision and thereby substitute its judgment for the Secretary's judgment. Yet, as we show below,

that is precisely what the Commission did here.

B. If the Secretary's Decision to Cite Twentymile Was Reviewable, the Commission Erred in Finding That the Secretary's Decision Was an Abuse of Discretion

As previously indicated, if the Secretary's decision to cite the operator was reviewable at all, it was subject to an abuse of discretion standard of review, and the ALJ's findings upholding it were subject to a substantial evidence standard. Accordingly, the Commission majority committed two distinct but interrelated legal errors when, applying a de novo standard, it substituted its own enforcement judgment for that of the Secretary, and substituted its own evidentiary judgment for that of the ALJ.

The Secretary set forth a discernible rationale for her decision to issue citations to the owner or production operator, Twentymile, for violations committed by the independent contractor, Precision. That rationale is multi-factored.

First, the MSHA inspector believed that the contractor violations might have signaled another increase in contractor violations at Twentymile's mine. Tr. 33-35 (App. 101-03). Inspector Havrilla testified that, during 1998 and 1999, the number of contractor violations at the Foidel Creek Mine increased. Tr. 33 (App. 101). Havrilla told Twentymile at that

time that the high number of contractor violations needed to be reduced or it would be held responsible for future contractor violations. Tr. 34 (App. 102). Havrilla testified that, during 2000, the number of contractor violations decreased, but that the number of contractor violations he observed during the August 2001 inspection indicated to him that the number of contractor violations might again be increasing. Tr. 35 (App. 103). Havrilla testified that he did not perform an "analysis" of the history of contractor violations at the mine, but he did review the history of violations at the mine to determine if there was a problem. Tr. 52 (App. 114). Havrilla testified that he was personally familiar with the general pattern of contractor violations at the mine because he had been inspecting the mine approximately once a year since 1996. Tr. 13, 33-35, 52 (App. 85, 101-03, 114).

Twentymile Safety Manager Robert Derick's own testimony supports the inspector's testimony that Twentymile had a problem with contractor violations at the mine. Derick's testimony shows that 42 citations were issued to various contractors working at the mine from September 13, 1999, to March 26, 2003. Tr. 130-38 (App. 159-67); RX-30 (App. 200-19).

Second, as the owner operator, Twentymile either controlled or supervised or had the right and ability to control or supervise the mining operation, including the contractor's work practices. There was undisputed evidence that, by contract, Twentymile could stop the contractor's work if a hazard was detected, terminate the contract for a safety violation, and conduct periodic safety and health inspections of the contractor's work area and equipment. Tr. 37-38, 74, 78-80, 102, 104-05, 109, 120, 144 (App. 105-06, 124, 128-30, 139, 141-42, 146, 154, 171); RX-26 (App. 179-89), RX-27 (App. 190-98).

Third, as the owner operator, Twentymile conducted periodic inspections of the mine, and it provided site-specific hazard training to the contractor's employees and ensured that those employees had MSHA-required training. Tr. 94-95, 102, 106-07, 111-12, 115-17, 120, 141-44 (App. 137-38, 139, 143-44, 147-48, 149-51, 154, 168-171).

Fourth, Twentymile contributed to the occurrence of the violations, or to the continued existence of the violations, by failing to inspect the contractor's equipment or verify that the contractor inspected the equipment. Tr. 39-41, 121-122 (App. 107-09, 155-56).

Finally, there is no dispute that Twentymile had control over the violative conditions that required abatement because it could have required the contractor to fix or remove the contractor's equipment if the equipment did not comply with MSHA's safety standards. Tr. 75, 95, 104-05, 109, 111 (App. 125, 138, 141-42, 146, 147).

The ALJ found that the foregoing evidence established that the Secretary did not abuse her discretion in citing Twentymile. 25 FMSHRC at 359 (App. 33). The ALJ found that the MSHA inspector perceived an increase in the number of contractor violations at the mine; that Twentymile contributed to the violations committed by the contractor because the MSHA inspector observed a number of obvious violations involving the contractor's equipment and, on inquiring further, discovered that neither Twentymile nor the contractor inspected the equipment prior to or during its use at the mine; and that Twentymile exercised sufficient control over the contractor's equipment because it could have taken the equipment out of service if it was not in compliance with MSHA's safety standards. 25 FMSHRC at 359-61 (App. 33-35). The ALJ applied the correct legal standard in finding that the Secretary did not abuse her enforcement discretion, and that finding is supported

by substantial evidence. The ALJ's decision, therefore, should have been affirmed.

In reversing the ALJ's decision, the Commission majority relied on four facts: (1) that the equipment that served as a basis for the violations was owned and operated solely by the contractor; (2) that the contractor was contractually required to comply with all safety regulations and inspect its equipment; (3) that Twentymile provided the contractor with a safety guide that included specific provisions for examining and repairing equipment; and (4) that Twentymile employees were not exposed to hazards resulting from the violative equipment. 27 FMSHRC at 268-72 (App. 9-13).

In addition, the Commission majority found that the ALJ erred in relying on the MSHA inspector's belief that there may have been a "serious problem" with contractor violations -- a belief the majority acknowledged was the inspector's "specific rationale" for citing Twentymile -- because the inspector's "subjective conclusion" was not a factor "traditionally applied by the Commission." 27 FMSHRC at 276 (App. 17).

The Commission majority's reliance on the four facts set forth above demonstrates that the Commission did not apply a substantial evidence standard of review to the ALJ's factual

findings. Rather, the majority discounted the valid and relevant evidence the ALJ relied on and substituted its own competing view of the facts. In addition, the ALJ's reliance on the MSHA inspector's subjective belief that Twentymile may have had a serious problem with contractor violations was perfectly consistent with Commission case law. The Commission has often found that the MSHA inspector's personal judgment must be given significant weight. Maple Creek Mining Co., 27 FMSHRC ___, slip op. at 9 n.6 (Aug. 2005) (relying on inspector's judgment) (citing Mathies Coal Co., 6 FMSHRC 1 (Jan. 1994)); Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1277 (Dec. 1998) (crediting opinion of MSHA inspector); Cyprus Emerald Resources Corp., 20 FMSHRC 790, 817 (Aug. 1998) (same); Buck Creek Coal Co., 17 FMSHRC 8, 14 (Jan. 1995) (crediting opinion of experienced MSHA inspector), aff'd 53 F.3d 133 (7th Cir. 1995). The Commission cannot justify substituting its enforcement judgment for the inspector's enforcement judgment simply by characterizing the inspector's judgment as "subjective."

Similarly, the Commission majority did not apply an abuse of discretion standard of review to the Secretary's enforcement decision. Rather, the Commission majority applied its own "general test" under the guise of an abuse of discretion

standard of review. 27 FMSHRC at 266-67 (App. 7-8). A survey of the Commission case law over the years shows that, in reviewing the Secretary's decision to cite an owner or production operator for violations committed by an independent contractor, the Commission initially asked "whether the Secretary's decision to proceed against an owner for a contractor's violation was made for reasons consistent with the purpose and policies of the [Mine] Act." Old Ben Coal Co., 1 FMSHRC 1480, 1485 (Oct. 1979). In subsequent cases, the Commission added additional factors to its review:

> [I]n choosing the entity against whom to proceed, the Secretary should look to such factors as the size and mining experience of the independent contractor, the nature of the task performed by the contractor, which parties contributed to the violation, and the party in the best position to eliminate the hazard and prevent it from recurring.

Calvin Black Enterprises, 7 FMSHRC 1151, 1155 (Aug. 1985); see also Phillips Uranium Corp., 4 FMSHRC 549, 552-553 (Apr. 1982) (vacating citations against an owner-operator after considering similar factors).[12] In 1989, the Commission began labeling its review an "abuse of discretion" standard of review.

---

[12] The Commission's 1982 decision in Phillips Uranium represents the last time, and indeed the only time, the Commission has actually overturned a Secretarial enforcement decision at a multi-operator site.

Consolidation Coal Co., 11 FMSHRC 1439, 1443 (Aug. 1989). In 1991, the Commission added the Secretary's Enforcement Guidelines as a factor to be considered in determining whether the Secretary's enforcement decision was an abuse of discretion. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1360-61 (Sept. 1991). Finally, in this case, the Commission majority treated the Enforcement Guidelines as mandatory factors, and indeed held that an Enforcement Guideline is "satisfied only if a significant threshold has been reached." 27 FMSHRC at 272-73 & n.19 (App. 13-14).

The foregoing discussion demonstrates that the Commission majority's review in this case went far beyond the abuse of discretion standard of review the majority assertedly applied. The majority's review consisted of more than an inquiry into whether there is a rational connection between the facts found and the Secretary's enforcement decision. Instead, the majority's review consisted of a number of factors the Secretary is required to meet -- factors which, as shown above, have increased over the years depending on the circumstances of the case. In addition, in this case, the Commission is now requiring the Secretary to have established that a "significant threshold" has been reached with respect to each of the four

criteria in the Secretary's Enforcement Guidelines -- notwithstanding the fact that this Court has held that the Enforcement Guidelines are not binding on the Secretary and that the Secretary's failure to comply with them cannot constitute a basis for overturning a Secretarial enforcement decision. Cathedral Bluffs, 796 F.2d at 538-39. The demanding and nondeferential standard applied by the Commission majority in this case is a far cry from an abuse of discretion standard of review.

In sum, the Commission majority committed legal error both because it applied an incorrect standard of review to the Secretary's enforcement decision and because it applied an incorrect standard of review to the ALJ's decision upholding the Secretary's decision. Because the ALJ's decision applied the correct legal standard and is supported by substantial evidence, the ALJ's decision should have been affirmed.

CONCLUSION

For the reasons stated above, the Secretary requests that the Court reverse the portion of the decision of the Commission finding that the Secretary's enforcement decision was reviewable. If the Court declines to do so, the Secretary requests that it reverse that portion of the Commission's

decision finding that the Secretary abused her discretion in citing Twentymile for the violations committed by Precision. In either event, the Secretary requests that the Court vacate the Commission's decision so as to leave the ALJ's decision standing as affirmed.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

JACK POWASNIK
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, VA 22209-2296
Telephone: (202) 693-9335

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(d) and 32(a)(2), I certify that this Brief for the Secretary of Labor contains 9,623 words as determined by Word, the processing system used to prepare the brief.

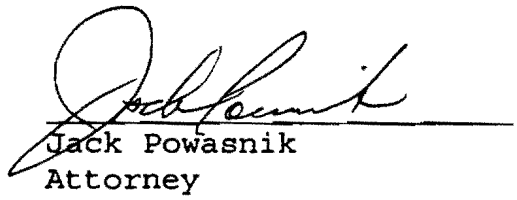
Jack Powasnik
Attorney

CERTIFICATE OF SERVICE

I certify that two copies of the Brief for the Secretary of Labor were served by overnight delivery on October 13, 2005, on:

R. Henry Moore, Esq.
Jackson Kelly
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, Pennsylvania 15222

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



Jack Powasnik
Attorney