ORAL ARGUMENT SCHEDULED FOR
MAY 16, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

Petitioner,

v.

TWENTYMILE COAL COMPANY

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

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

BRIEF FOR THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate
Litigation

JERALD S. FEINGOLD
Attorney

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

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 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. The Secretary of Labor seeks 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).

(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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

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

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

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

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

STATUTES AND CODES

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

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

Miscellaneous

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

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

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

STATEMENT REGARDING JURISDICTION

The Court has jurisdiction over this proceeding for review of a decision of the Federal Mine Safety and Health Review Commission ("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 in this case was issued on July 14, 2003. By order dated August 22, 2003, the Commission excused the late filing of Twentymile Coal Company's ("Twentymile's") petition for discretionary review of the judge's decision and granted review pursuant to Section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A). 25 FMSHRC 464, 465. The Commission issued its decision on August 12, 2004. The Commission denied reconsideration of its decision on August 25, 2004. The Secretary filed a timely petition for review of the Commission's decision with the Court on August 30, 2004, and Twentymile filed a timely petition for review on September 9, 2004.

The Secretary has standing to appeal the Commission's decision under Section 106(b) of the Mine Act, 30 U.S.C. § 816(b), and Twentymile has standing to appeal the Commission's decision under Section 106(a)(1) of the Act, 30 U.S.C.

§ 816(a)(1). The Commission's decision represents a final Commission order that disposes of all of the parties' claims.

STATEMENT OF THE ISSUES PRESENTED

(1). Whether, in refusing to assess a civil penalty for Twentymile's violation of a mandatory standard, the Commission disregarded the principles set forth by the Supreme Court in Brock v. Pierce County.

(2). Whether, in refusing to consider the fact that Twentymile was not prejudiced by the time it took the Secretary to propose a penalty, the Commission disregarded the principles set forth by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership.

(3). Whether, in calculating the time it took the Secretary to propose a penalty as starting when the citation was issued instead of when the accident investigation was terminated, the Commission disregarded the terms of Section 105(a) of the Mine Act.

(4). Whether, in substituting its view of the facts for the judge's view, the Commission exceeded its authority under Section 113(d)(2)(A)(ii) of the Mine Act.

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. Nature of the Case

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that there was "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines[.]" 30 U.S.C. § 801(c).

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(d) of the Mine Act. 30 U.S.C. §§

814(a) and 814(d). If the inspector finds that the violation is "significant and substantial" or the result of the mine operator's "unwarrantable failure to comply," he must include such findings in the citation. 30 U.S.C. § 814(d).[1] 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).

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings 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). A mine operator may contest a citation, order, or proposed civil penalty before a Commission administrative law judge. 30 U.S.C. §§ 815 and 823. Any person adversely affected or aggrieved by an administrative law judge's decision may seek review by filing a petition for discretionary review with the Commission. 30 U.S.C. § 823. Whether to direct review is

---

[1] A violation is "significant and substantial" if it is "of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard * * *." 30 U.S.C. § 814(d). If a violation is "significant and substantial," it may be subject to proposal of an increased civil penalty (see 30 C.F.R. § 100.3) and may, if followed by similar violations, lead to issuance of a withdrawal order. 30 U.S.C. § 814(d).

committed to the Commission's discretion. Ibid. Any person adversely affected or aggrieved by a Commission decision, including the Secretary, may obtain review by filing a petition for review with an appropriate court of appeals. 30 U.S.C. § 816(a) and (b).

This proceeding involves the civil penalty provisions of the Mine Act. Section 105(a) of the Mine Act states in relevant part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, within a reasonable time after the termination of such inspection or investigation, notify the operator * * * of the civil penalty proposed * * *.

30 U.S.C. § 815(a). Section 110(a) of the Act states in relevant part:

> 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). Section 110(i) of the Act states in relevant part:

> The Commission shall have the authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of 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 person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The mandatory safety standard at issue in this case is 30 C.F.R. § 48.7(c), which states:

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

The term "task" 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). The administrative law judge found, and the Commission affirmed, that Twentymile committed a significant and substantial violation of Section 48.7(c) when it failed to provide task training to its miners prior to their performing the new task of unplugging the new rock chute at its mine. The Commission nonetheless reversed the judge's imposition of a civil penalty for Twentymile's violation, refusing to impose any civil penalty for the violation because of the amount of time the Commission determined it took the Secretary to propose a civil penalty for the violation. The issues raised by the Secretary relate to

whether, under the Mine Act, the Commission can refuse to assess a civil penalty for an affirmed violation.

B. Course of Proceedings and Disposition Below

This case arose when, after investigating an accident in which a miner was seriously injured when he fell from a ladder on the side of the mine's rock chute, MSHA issued Twentymile an order under Section 104(g)(1) of the Mine Act, 30 U.S.C. § 814(g)(1),[2] for violating a training standard requiring that miners be tasked-trained before being assigned to perform new tasks. Stip. 21 (J.A. 12-13); Tr. 39 (J.A. 87). Twentymile contested the order, and the case was assigned to an administrative law judge of the Commission.

In his decision of July 14, 2003, the judge affirmed the Section 104(g) order, as amended, finding that Twentymile committed a significant and substantial violation of Section

---

[2] Section 104(g)(1) of the Mine Act provides that if an authorized representative of the Secretary

> find[s] employed at a coal or other mine a miner who has not received the requisite safety training * * *, [he] 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 * * *, and be prohibited from entering such mine until [it is] determine[d] that such miner has received the training required * * *.

30 U.S.C. § 814(g)(1).

48.7(c) when six of its miners engaged in unplugging the rock chute without having been task-trained in that task. The judge first held that the order as issued, and as amended at the hearing, was sufficiently specific to "ascertain the conditions that require[d] correction and prepare adequately for a hearing." 25 FMSHRC 373, 381 (J.A. 161). The judge noted that the order, as initially written to cover "[p]ersonnel * * * who had reason to work from or travel on the ladders and landings of the 'Rock Chute,'" gave Twentymile adequate notice of who was subject to the order. The judge concluded that "Twentymile * * * controlled work assignments at the mine" and "[p]resumedly * * * knew whom it would assign 'to work from or travel on the ladders and landings.'" 25 FMSHRC at 382 (J.A. 162). The judge further concluded that, even if the order as initially written lacked sufficient specificity because it failed to name the individual miners involved, "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." Ibid. The judge noted that "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." Ibid.

In affirming the allegation that Twentymile violated Section 48.7(c), the judge noted that it was uncontested that

"none of the miners * * * assigned to unplug the chute was trained in the job prior to being sent to do it." 25 FMSHRC at 383 (J.A. 163). The judge concluded that the job of unplugging the rock chute was a "new task" requiring prior task training under Section 48.7(c) because it was a "work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge" to perform safely. 25 FMSHRC at 383-84 (J.A. 163-64). In determining whether the job of unplugging the rock chute was one that occurs on a "regular basis" (see 30 C.F.R. § 48.2(f)), the judge employed a "reasonably prudent person test." Ibid. He concluded that the job would occur on a regular basis because "it was reasonable for Twentymile management to anticipate that the chute would clog as mining continued." 25 FMSHRC at 384 (J.A. 164). The judge found that Twentymile "actually foresaw the event" on the basis of several factors: (1) that the chute was provided with four observation doors; (2) that Twentymile had "installed two internal devices to indicate when material stopped flowing in the chute * * *"; (3) that other chutes at the mine were known to have a "recurring problem" of jamming with "the same type of wet, sticky material" that was directed down the rock chute; and (4) that, because miners had been sent to unplug other chutes at the mine at least every several

months, "it was reasonable to expect the rock chute would clog at least as frequently." Ibid.

In affirming the allegation that Twentymile's violation of Section 48.7(c) was significant and substantial, the judge found that "[t]he miners' lack of training made it reasonably likely that an accident would occur." 25 FMSHRC at 385 (J.A. 165). The judge further found that "given the heights at which miners could be traveling or working and the heavy material that could spill from the chute, any such accident was reasonably likely to cause a serious injury." Ibid. The judge concluded that "Twentymile's failure to provide the required training made it reasonably likely the miners assigned to unplug the rock chute would not have sufficient knowledge of available techniques and procedures to protect themselves from the hazards associated with the job." Ibid.

Finally, the judge held that the time the Secretary took to propose a civil penalty against Twentymile did not, as Twentymile argued, warrant dismissal of the penalty proceeding. 25 FMSHRC at 386-88 (J.A. 166-68). Noting that MSHA's accident investigation report was not issued until January 4, 2001, the judge found that "the delay in sending the report and [special] assessment form to the Assessment Office [on July 31, 2001]" was "understandable" and was "caused by a shift in personnel and by

the failure of the person who should have completed the form to understand that it was one of his duties." 25 FMSHRC at 388 (J.A. 168). The judge also found it "understandable that MSHA did not propose penalties while the report and special assessment form remained unfinished" because the proposed penalty "could have been impacted by the report and form." Ibid. Finally, the judge found that "the lapse in time between the citation of the violation and the proposal of the penalty was not prejudicial to Twentymile." Ibid. Twentymile appealed the judge's decision to the Commission.

In its decision of August 12, 2004, the Commission unanimously affirmed the judge's findings that Twentymile violated 30 C.F.R. § 48.7(c) in failing to provide task training to miners assigned the new task of unplugging the rock chute, and that the violation was significant and substantial. 26 FMSHRC 666, 671, 676-81 (J.A. 177, 182-87).[3] A Commission

[3] At oral argument, the Commission raised sua sponte the issue of whether the Secretary erred procedurally in issuing Twentymile an order under Section 104(g) of the Mine Act rather than a citation under Section 104 of the Act. A three-member Commission majority held that an order issued by the Secretary pursuant to Section 104(g) of the Mine Act must (1) identify with specificity the miners who must be withdrawn from the mine for failure to receive required training and (2) provide for the immediate withdrawal of the miners in question. Finding that the Section 104(g) order issued in this case was issued long after the violation had been abated, the majority modified the order to a citation with significant and substantial findings issued pursuant to Section 104(a) of the Act. 26 FMSHRC at 672-

majority (Commissioners Jordan and Young dissented), however, vacated the civil penalty assessed by the judge, holding that the assessment of any penalty for the violation the Commission affirmed would be inappropriate because the Secretary waited an unreasonable amount of time[4] before proposing a penalty. 26 FMSHRC at 671, 681-88 (J.A. 177, 187-94).[5] The majority rejected as a matter of law the argument that, at a minimum, a showing of prejudice to the operator must be established before the extraordinary remedy of vacating a penalty can be considered. 26 FMSHRC at 682-83 (J.A. 188-89). The majority held that either a showing of unreasonable delay in the issuance of a proposed penalty or a showing of prejudice to the operator

---

75 (J.A. 178-81). The majority then concluded that the citation, as so modified, and as amended at trial, was sufficiently specific to provide Twentymile with notice of the conditions at the mine that were the basis of the violation. 26 FMSHRC at 675-76 (J.A. 181-82). The remaining two Commissioners found it unnecessary to reach the issue of whether the Section 104(g) order should be modified to a Section 104(a) citation. 26 FMSHRC at 689 n.28, 693 n.29 (J.A. 195 n.28, 199 n. 29).

[4] The majority determined that "there was nearly a 17-month delay from the date of the section 104(g) order, June 16, 2000, until the issuance of the proposed penalty assessment for the alleged violation on November 9, 2001." 26 FMSHRC at 683 (J.A. 189).

[5] This resolution of the case had never been suggested by Twentymile and was not addressed in the parties' briefs or at oral argument before the Commission. Twentymile had requested that the case be dismissed outright.

from the delay may justify relief from the proposed penalty. 26 FMSHRC at 682 (J.A. 188).

The majority determined that although there was no evidence of any prejudice to Twentymile from the length of time it took the Secretary to propose a penalty -- and although Twentymile alleged no prejudice -- the Secretary failed to establish adequate cause for that length of time and the judge erred "as a matter of law" in finding that the delay was reasonable. 26 FMSHRC at 684 (J.A. 190). Relying in significant part on Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), which gives the Commission "authority to assess all civil penalties provided in th[e] Act," the majority concluded that the Commission was "ultimately responsible for ensuring that civil penalties are assessed in a fair and expeditious manner" and was authorized to vacate the penalty in this case "in order to vindicate the Congressional imperative that mine safety and health violations be remedied through the prompt and fair imposition of appropriate sanctions." 26 FMSHRC at 687, 688 (J.A. 193, 194).

In a dissenting opinion, Commissioners Jordan and Young stressed that the judge found that the time it took the Secretary to propose a penalty did not prejudice Twentymile, a finding the operator did not contest, and that any delays in proposing the penalty were "understandable" and resulted from "a

change in personnel and the failure of the person responsible to understand his duties." 26 FMSHRC at 693 (J.A. 199). The dissenters concluded that the majority erred in holding "as a matter of law" that the amount of time taken to propose a penalty was "per se" unreasonable, thereby unlawfully "substituting their judgment for that of the judge." Ibid. Reviewed under the "substantial evidence" standard, the dissenters determined, the judge's conclusion that the amount of time it took the Secretary to propose a penalty was reasonable should be affirmed. 26 FMSHRC at 694 (J.A. 200).

The dissenters noted that the amount of time taken to propose a penalty in this case was similar to that in other cases the Commission had affirmed as a reasonable amount of time, and that the legislative history of the Mine Act makes clear that Congress "explicitly rejected the suggestion that [] delay should necessarily result in termination of penalty proceedings." 26 FMSHRC at 694-95 (J.A. 200-01). The dissenters stated that the majority's "drastic course" of vacating the penalty under the circumstances in this case would not "serve the deterrent purposes intended by the enforcement provisions of the Mine Act" and "can only erode a miner's confidence in the agency's ability to ensure that violations of mandatory health and safety standards will be subject to an

appropriate sanction." 26 FMSHRC at 696 (J.A. 202) (citation and internal quotation marks omitted).[6]

On August 20, 2004, the Secretary filed a petition for reconsideration of the Commission's decision. The Commission majority denied the petition for reconsideration on August 25, 2004. The Secretary filed a timely petition for review of the Commission's decision with the Court on August 30, 2004, and Twentymile filed a timely petition for review on September 9, 2004.

STATEMENT OF FACTS

Twentymile Coal Company operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. Stip. 7 (J.A. 11). On June 6, 2000, Kyle Webb, a roof bolter on the continuous mining crew,[7] was seriously injured at the mine's newly-installed rock chute. Twentymile installed the chute as an integral part of the mine's belt conveyor system, and the

---

[6] Dissenting Commissioner Young agreed with the majority that, if the Secretary's delay in proposing a penalty is unreasonable or results in prejudice to the operator, the Commission may vacate the penalty. 26 FMSHRC at 693 n.30 (J.A. 199 n.30). Dissenting Commissioner Jordan saw no need to address the issue of whether the Commission may vacate a penalty because she found that there was no prejudice to Twentymile and that the judge properly found adequate cause for the delay in proposing the penalty. Ibid.

[7] The crew worked together at the face producing coal by means of a continuous mining machine.

chute became fully operational on May 26, 2000. Stip. 16 (J.A. 11); Tr. 40-41, 86, 106, 113, 145, 168 (J.A. 87-88, 99, 104, 106, 114, 119).[8] The chute was developed to divert and transfer rock from the upper level conveyor belt, where it was mixed with coal, to the lower level, from where it was carried out of the mine by conveyor belt. Stips. 11 and 12 (J.A. 11); Tr. 20, 159, 229 (J.A. 82, 117, 135). The chute was a transfer point on the mine's belt conveyor system. Tr. 229 (J.A. 135).

The rock chute was used to transport material produced on two continuous miner sections and traversed a significant geologic fault in the strata of the mine. Tr. 20, 158, 188 (J.A. 82, 117, 124). Although the mine has several other smaller chutes, those chutes typically are angled at approximately 60 degrees from the horizontal (rather than angled 90 degrees straight down, like the rock chute) and differ significantly in design from the rock chute. Tr. 181, 222-23 (J.A. 123, 133-34). Those chutes historically have become plugged on a recurring basis. Tr. 190-91, 223, 227-28 (J.A. 125, 134, 135).

---

[8] Maintenance on the belt conveyor system was performed on a daily basis, and transfer points such as the rock chute were part of the mine's conveyor system. Tr. 192-93, 227-28, 230 (J.A. 125-26, 135). Such maintenance was performed by beltmen and was considered a normal "task" at the mine, but the work of beltmen was not included in the tasks set forth in the mine's training plan. Ex. G-13 (J.A. 64-65); Tr. 288-89 (J.A. 150).

The rock chute has a unique design and is five feet square, extending approximately 50 feet deep. Stip. 13 (J.A. 11); Tr. 222-23 (J.A. 133-34). It can handle 5,500 tons of rock per hour and was constructed with two internal indicator switches near the bottom to signal if it becomes plugged. Tr. 163, 179 (J.A. 118, 122).[9] The chute is located inside a circular vertical shaft known as the "glory hole" that measures approximately 12 feet in diameter. Tr. 79-80 (J.A. 97).

At the time of the accident, a ladder extended along the side of the rock chute from the top to the bottom of the shaft. Stip. 14 (J.A. 11). Four landings accessed by the ladder were spaced at equal intervals (approximately every ten feet) along the chute. Stip. 15 (J.A. 11); Tr. 50 (J.A. 90). At each landing was an access door that could be opened to observe or gain access to the interior of the chute. Stip. 15 (J.A. 11); Tr. 146, 163 (J.A. 114, 118). The doors were secured by two external latches held in place by eye bolts which had to be loosened to free the latch. Tr. 95, 163 (J.A. 101, 118).

On June 6, 2000, near the end of the afternoon shift, the rock chute became plugged and the conveyor belt feeding the

---

[9] After the accident, Twentymile took several corrective actions to lessen the likelihood of the rock chute becoming plugged, 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. 179-80 (J.A. 122).

chute automatically stopped, as it was designed to do. Stip. 17 (J.A. 12); Tr. 168 (J.A. 119). Edwin Brady, the mine's conveyance manager, learned of the plug from two electricians. Tr. 154, 163, 186 (J.A. 116, 118, 124). Brady immediately traveled to the top of the chute and climbed down the ladder to the landing closest to the top. Tr. 166-67 (J.A. 119). Brady loosened the eye bolt, lifted the latch, opened the access door, and observed that rock was jammed inside. Brady testified that he secured the door and latch and climbed down to the other three landings, where he performed the same operation and observed the same condition of jammed rock all the way to the bottom of the chute. Tr. 166-67, 204-06 (J.A. 119, 128-29).

At the bottom of the chute, Brady met two members of the production crew, beltmen Craig Bricker and Rick Fadely. Stip. 18 (J.A. 12); Tr. 169, 170, 189 (J.A. 120, 125). Brady instructed Fadely to climb to the lowest landing, open the access door, and try prying the jammed rock loose with a steel bar. Tr. 169 (J.A. 120). Fadely attempted unsuccessfully to loosen the jammed rock in this manner. Brady then suggested that the men attempt to unplug the chute with water, and took Bricker with him to get a hose. Tr. 172 (J.A. 120).

Kevin Olson, the acting shift foreman, also became aware that the rock chute was plugged. Tr. 26, 206 (J.A. 84, 129).

At the beginning of the evening shift, Olson assigned Matthew Winey, the production crew foreman, to go to the bottom of the chute and get it unplugged. Tr. 26, 190, 209, 213-14, 243 (J.A. 84, 125, 130, 131, 139). Olson did not tell Winey how to perform this assignment. Winey instructed the members of his crew to travel to the bottom of the chute, where they arrived at different times. Tr. 214-15, 225 (J.A. 131-32, 134).[10] No one on Winey's crew had ever been on the chute ladder before. Tr. 188-89 (J.A. 124-25).

When Winey arrived at the bottom of the chute, Bricker and Fadely were already helping Brady connect the sections of the hose. Tr. 191 (J.A. 125). Eric Hough, another member of Winey's crew, was also present. Tr. 174 (J.A. 121). See Tr. 211, 213 (J.A. 131). Fadely and Winey climbed to the lowest level with the hose. Tr. 215 (J.A. 132). Winey took the hose and attempted to spray the jammed material loose, but Fadely took the hose from Winey when Winey began splashing water onto himself and Fadely. Tr. 191-92, 216, 223, 225-26 (J.A. 125, 132, 134). At the same time, Brady began to hit the bottom of the chute with a hammer. After about five minutes of applying both approaches, the jammed material started to move. At no time before or during the unplugging operation did any miner

---

[10] Some members of Winey's crew did not arrive at the chute until after the accident. Tr. 225 (J.A. 134).

receive safety training with respect to the operation. Tr. 192, 224, 225 (J.A. 125, 134).

Kyle Webb was a 26-year-old miner on Winey's crew. Tr. 94 (J.A. 101). At some point shortly before the jammed material started to move, Webb climbed the ladder past Winey and Fadely. Stip. 19 (J.A. 12); Tr. 80, 132, 140, 216 (J.A. 97, 110, 112, 132). Winey observed Webb climb past him. Tr. 216 (J.A. 132). No one, however, asked Webb where he was going or what he was doing, cautioned him, or tried to stop him. Tr. 226 (J.A. 134).

About five minutes after Webb climbed the ladder past Winey and Fadely, and almost simultaneously with when the jammed rock started to move in the chute, Webb fell from above and rock started to fall around the ladder between the chute and the shaft. Stip. 20 (J.A. 12); Tr. 217-18, 226 (J.A. 132, 134). The top access door had come open and, as the material in the chute started to move, it spilled out the open door and off the platform. Stip. 20 (J.A. 12); Tr. 26, 175 (J.A. 84, 121).[11] Webb fell past Winey and Fadely and landed on the bottom landing, and rock fell on top of him. Tr. 49, 80 (J.A. 90, 97). Fadely and Winey took cover under the landing by which they were working. An electrician at the top of the chute heard the

[11] It was never determined how the top access door came to be open or where Webb was situated on the ladder at the time of the accident. Tr. 49, 264 (J.A. 90, 144).

miners yelling from below, climbed down the ladder, and closed the access door. Tr. 176, 218 (J.A. 121, 132). Efforts to rescue Webb then began. Webb was airlifted to a hospital, where he was diagnosed with a fractured skull and other serious injuries. Tr. 83, 115 (J.A. 98, 106).

MSHA immediately began an accident investigation under the lead of Inspector Phillip Gibson. Tr. 18-19 (J.A. 82). Gibson inspected the rock chute and the site of the accident. Tr. 20 (J.A. 82). After MSHA's investigators interviewed Winey, Fadely, Brady, and two members of Brady's crew, they reviewed the mine's training records. Tr. 25, 32, 38 (J.A. 84, 85, 87). They determined that no miner who engaged in unplugging the chute on June 6, 2000, had received task training in that activity.

Twentymile completed an accident investigation form and filed it with MSHA. The form was signed by Production Crew Forman Winey and stated that the "task being performed" at the time of the incident was "cleaning plugged chute," but left incomplete the line indicating the person's "experience at [the] task" and whether the person had been "task-trained." Ex. G-11 (J.A. 41); Tr. 86-87, 114-15, 221, 238 (J.A. 99, 106, 133,

137).[12] The form stated that the operator "should have planned and talked more" to prevent accidents such as the one that occurred. Ex. G-11 (J.A. 41); Tr. 117, 239 (J.A. 107, 138). Twentymile's required training plan, which had not been updated since 1993, contained nothing about task training in chute maintenance. Ex. G-13 (J.A. 64-65); Tr. 127-28, 285 (J.A. 109, 149).

On the basis of MSHA's investigation, the interviews, and the relevant records, Inspector Gibson issued a Section 104(g)(1) order on June 16, 2000, alleging that Twentymile committed a significant and substantial violation of 30 C.F.R. § 48.7(c) when it permitted miners to unplug the rock chute without having received task training. Stip. 21 (J.A. 12-13); Tr. 39 (J.A. 87). On July 11, 2000, Twentymile filed a notice of contest. Tr. 88 (J.A. 99). On August 1, 2000, the judge stayed the contest proceeding pending the issuance of a proposed civil penalty but permitted the parties to continue discovery. Tr. 88 (J.A. 99). On January 4, 2001, MSHA issued its accident investigation report. Ex. G-5 (J.A. 17-32). The MSHA district office forwarded the accident investigation report and a special assessment form regarding the violation alleged in the order to

---

[12] The report also listed the five other miners named by MSHA in the amended order as witnesses to the accident, placing them at the scene. Ex. G-11 (J.A. 41); Tr. 116 (J.A. 106).

MSHA's assessment office on July 31, 2001, and the assessment office issued a proposed penalty on November 9, 2001. Tr. 76-77 (J.A. 96-97).

SUMMARY OF ARGUMENT

The issue in this case is whether, under the Mine Act, the Commission can affirm a violation of a mandatory standard cited by the Secretary but vacate the civil penalty assessed for the violation, and order that no penalty be assessed, because of the amount of time it took the Secretary to propose the penalty. The Commission majority concluded that "the extraordinary remedy of vacating the civil penalty" (26 FMSHRC at 685 (J.A. 191)) was warranted by the circumstances surrounding the Secretary's proposal of a penalty in this case -- an action unprecedented in more than 25 years of Mine Act litigation before the Commission.

The Commission majority's action in vacating the civil penalty ignored the well-developed body of case law holding that, because of the public interest in seeing that important public rights are enforced, a failure to comply with a statutory procedural requirement does not void subsequent agency enforcement action unless there is an indication that Congress intended to remove the power to enforce the statute, especially where there are less drastic remedies available. The plain language of Section 105(a) of the Mine Act and its legislative

history indicate that the "reasonable time" provision is directory rather than a jurisdictional mandate, failure to comply with which can vitiate the penalty proceeding.

This principle is supported by the language of Sections 110(a) and 110(i) of the Act, which plainly indicate that a penalty must be assessed for all violations of the Mine Act and Mine Act standards and that, in assessing penalties, the Commission can only consider six specified factors. The majority's action in vacating the penalty for Twentymile's violation is also internally inconsistent: if the prompt imposition of a penalty is vital to the success of the Mine Act's enforcement scheme, the imposition of no penalty utterly defeats that enforcement scheme.

Even if the Commission could lawfully vacate the civil penalty because of the amount of time it took the Secretary to propose a penalty, the Commission majority erred in vacating the penalty without first considering whether Twentymile was prejudiced by the amount of time it took to propose the penalty. It is undisputed that Twentymile was not prejudiced.

In addition, the Commission majority erred in vacating the civil penalty because it miscalculated the amount of time it took the Secretary to propose the penalty. The "reasonable time" requirement of Section 105(a) of the Mine Act runs from

the termination of MSHA's inspection or accident investigation. The majority erred in calculating the amount of time the Secretary took to propose a penalty from the time Twentymile was cited, rather than from the time the accident investigation report was complete and the investigation terminated.

Finally, the Commission majority erred by substituting its view of what constituted adequate cause for any delay by the Secretary in proposing a civil penalty for the view of the judge, who heard the evidence and weighed the facts. The majority improperly found that the amount of time the Secretary took to propose a penalty was unreasonable "as a matter of law," rather than examining the record to determine whether substantial evidence supported the judge's finding to the contrary.

ARGUMENT

IN REFUSING TO ASSESS A PENALTY FOR TWENTYMILE'S VIOLATION OF A STANDARD, THE COMMISSION DISREGARDED ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW AND THE PENALTY PROVISIONS OF THE MINE ACT

A. 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 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)).

B. The Role of Penalties in Enforcement of the Mine Act

In Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989), this Court recognized that Congress intended the imposition of adequate civil penalties to be the fundamental mechanism for enforcing the Mine Act. Examining the legislative history of the Mine Act, the Court stated:

> Congress maintained and upgraded the civil penalty scheme of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act") in order to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." Indeed, the sponsor of the 1977 Mine Act singled out the civil penalty as "the mechanism for encouraging operator compliance with safety and health standards." * * *. The Supreme Court as well has recognized that "[t]he importance of [the civil penalty provision] in the enforcement of the [Coal] Act cannot be overstated" because monetary penalties provide a "deterrence" that necessarily

> infrequent inspections cannot generate. Thus, Congress envisioned penalties that would "be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."

Coal Employment Project, 889 F.2d at 1132-33 (internal citations omitted) (emphasis supplied).

C. In Refusing to Assess a Penalty for Twentymile's Violation of a Standard, the Commission Disregarded the Principles Set Forth by the Supreme Court in Brock v. Pierce County

The Commission's refusal to assess a penalty for Twentymile's violation of a standard in this case is subject to the principles set forth by the Supreme Court in Brock v. Pierce County, 476 U.S. 253 (1986). In Brock, the Court addressed whether the Secretary of Labor lost the authority to recover misused funds under the Comprehensive Employment and Training Act because he failed to issue a final determination of misuse within the 120-day period specified for such action in the statute. The Court began its analysis by stating:

> This Court has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided. We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less

> drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

476 U.S. at 260 (citations, internal quotation marks, and footnote omitted). The Court then analyzed the statutory language and design and the legislative history and determined that there was "simply no indication * * * that Congress intended to remove the Secretary's enforcement powers" if he failed to issue a final determination within the 120-day period. 476 U.S. at 266. The Court concluded that Congress intended the 120-day period "to spur the Secretary to action, not to limit the scope of his authority." 476 U.S. at 265.

Since Brock, the Supreme Court has never construed a statutory provision stating that the Government shall act within a specified time period, without more, as a jurisdictional limit precluding later action. Barnhart v. Peabody Coal Co., 537 U.S. 149, 158-59 (2003) (summarizing cases). This Court has also never construed such a provision as divesting the Government of authority to act. See, e.g., Bro. of Railway Carmen Div., Transportation Communications Int'l Union v. Pena, 64 F.3d 702, 704 (D.C. Cir. 1995); Gottlieb v. Pena, 41 F.3d 730, 733-37 (D.C. Cir. 1994) (summarizing cases). Underlying all of the case law is the principle that "[t]here is no presumption or general rule that for every duty imposed upon the * * *

Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent." United States v. Montalvo-Murillo, 495 U.S. 711, 717 (1990). When Congress has not affirmatively indicated that the Government's failure to act within a specified time limit precludes it from subsequently acting to enforce the law and protect the public, courts should not, and cannot, "invent a remedy to satisfy some perceived need to coerce * * * the Government into complying with the statutory time limit[.]" Montalvo-Murillo, 495 U.S. at 721. Accord Brock, 476 U.S. at 265-66; Gottlieb, 41 F.3d at 734, 736.

The question in this case is whether there is "a clear indication" (Railway Carmen, 64 F.3d at 704) that Congress intended to authorize the Commission to remedy the Secretary's purported failure to propose a penalty "within a reasonable time" under Section 105(a) of the Mine Act by refusing to assess a penalty and thereby depriving the Secretary of the power to enforce the Act through the imposition of a penalty. The Secretary submits that there is "simply no indication" (Brock, 476 U.S. at 266) that Congress intended to authorize the Commission to devise such a drastic remedy.[13] On the contrary,

---

[13] It should be noted that in this case, as in Brock, there were "less drastic remedies available for failure to meet a statutory deadline." Brock, 476 U.S. at 260. If Twentymile was

the Secretary submits, there are a number of strong indications that it did not.

The foregoing analysis is supported most explicitly by the text and the legislative history of Section 105(a) itself. Section 105(a) merely states that the Secretary shall propose a penalty "within a reasonable time after the termination of [an] inspection or investigation" that results in the issuance of a citation or order. Section 105(a) specifies no consequence if the Secretary fails to propose a penalty "within a reasonable time." Significantly -- indeed, the Secretary submits, dispositively -- the report of the Senate Committee that drafted the provision that became Section 105(a) stated:

> After an inspection, the Secretary shall within a reasonable time serve the operator by certified mail with the proposed penalty to be assessed for any violations. The bill requires that the representative of miners

---

concerned that the Secretary's delay in proposing a penalty was defeating its ability to obtain a penalty proposal that could be reviewed by the Commission and a court of appeals, it could have applied for a court order compelling the Secretary to propose a penalty. See Gottlieb, 41 F.3d at 734 (citing Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984)). If Twentymile was concerned that the Secretary's delay in proposing a penalty was prejudicing its ability to defend itself against the underlying citation, it could have asked the Commission judge to lift his order staying the merits proceeding pending the proposal of a penalty -- an order to which Twentymile had consented. Twentymile did not ask the judge to lift the stay until August 9, 2001, almost 14 months after the order was issued, when it did so in response to the judge's status inquiry. August 9, 2001, letter of R. Henry Moore (J.A. 8).

> at the mine also be served with the penalty proposal. To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and the miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty promptly shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 34, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978) (emphasis supplied). Refusing to assess a penalty for an affirmed violation is "vitiat[ing] [a] proposed penalty proceeding."[14]

In addition, the Secretary's analysis is supported by Sections 110(a) and 110(i) of the Mine Act. Section 110(a) states that "[t]he 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 th[e] Act, shall be assessed a civil penalty by the Secretary * * *." The first sentence of

---

[14] Dismissing a penalty proceeding outright (which is what Twentymile asked the judge in this case to do), or assessing a penalty and then vacating it (which is what a Commission judge did in a case decided after the Commission decided this case, Sedgman and David Gill, FMSHRC Nos. SE 2002-111, etc., petitions for discretionary review granted, Dec. 10, 2004), are also "vitiat[ing] [a] proposed penalty proceeding."

Section 110(i) states that "[t]he Commission shall have authority to assess all civil penalties provided in th[e] Act." Both the courts and the Commission have interpreted the quoted provisions to mean that a penalty must be assessed for every violation of a standard. Asarco, Inc.-Northwestern Mining Dept. v. FMSHRC, 868 F.2d 1195, 1197-98 (10th Cir. 1989); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982); Spurlock Mining Co., 16 FMSHRC 697, 699 (1996); Tazco, Inc., 3 FMSHRC 1895, 1896-97 (1981).[15] As the Commission explained in Tazco after analyzing the quoted provisions and the relevant legislative history:

> The language of the two subsections -- indeed, the language of all of section 110 -- is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels. * * *.
>
> [B]oth the text and legislative history of section 110 make clear that the Secretary must propose a penalty assessment for each alleged violation and that the Commission and its judges must assess some penalty for each violation found.

3 FMSHRC at 1896-97 (emphasis supplied). Accord Old Ben Coal

---

[15] This Court has not directly addressed the proposition cited above. In Western Fuels-Utah, Inc. v. FMSHRC, 870 F.2d 711, 714-16 (D.C. Cir. 1989), the Court questioned whether Section 110 by itself provides a basis for imposing vicarious liability under the Mine Act. That proposition is different from the cited proposition, and the Court's analysis is in no way inconsistent with the cited proposition.

Co., 7 FMSHRC 205, 208 (1985), and cases there cited. "When a violation occurs, a penalty follows." Asarco, 868 F.2d at 1197.

The Secretary's analysis is also supported by the second sentence of Section 110(i). That sentence states that, in assessing penalties, the Commission "shall consider" six factors: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in attempting to achieve rapid compliance after notification of the violation. It is an established principle of statutory construction that the "'mention of one thing implies the exclusion of another thing.'" Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997) (quoting Ethyl Corp. v. EPA, 51 F.3d 1053, 1061 (D.C. Cir. 1995)). Because Section 110(i) specifies the six factors the Commission shall consider in assessing penalties, the Commission may not consider others. See Ethyl, 51 F.3d at 1058, 1061 (because the statute specified the factors on which EPA was to base its decisions, EPA could not consider others). The Commission has recognized as much and has repeatedly held that, in assessing penalties, it and its judges may not consider factors other than the six factors

specified in Section 110(i). See, e.g., RAG Cumberland Resources LP, 26 FMSHRC 639, 658-59 (2004) (the judge erred in considering the breach of a Mine Act purpose), petition for review on other grounds filed December 20, 2004 (D.C. Cir. No. 04-1427); Ambrosia Coal & Construction Co., 18 FMSHRC 1552, 1565 (1996) (the judge erred in considering deterrence). If the Commission may not assess a penalty on the basis that that penalty will deter the operator from committing future violations, it may not do what it did here: refuse to assess a penalty on the basis that that refusal will coerce the Secretary into acting more promptly in future cases.

In refusing to assess a penalty in this case, the Commission majority made no mention of the principles set forth in Brock. Instead, the majority attempted to justify its refusal primarily on the ground that the first sentence of Section 110(i) states that "[t]he Commission shall have the authority to assess all civil penalties provided in th[e] Act." 26 FMSHRC at 687 (J.A. 193). The majority's analysis ignores the principle that "'the meaning of statutory language, plain or not, depends on context,'" and that a court "charged with understanding the relationship between two different provisions within the same statute * * * must analyze the language of each to make sense of the whole." Bell Atlantic Telephone, 131 F.3d

at 1047 (quoting Bailey v. United States, 516 U.S. 137, 145 (1995)). Accord Halverson, 129 F.3d at 184-86. When the first sentence of Section 110(i) is read in context -- that is, read in conjunction with Section 110(a) and with the second sentence of Section 110(i) -- it compels the conclusion that the Commission must assess a penalty for every violation. The fact that Section 110(i) gives the Commission the authority to assess penalties does not mean that the Commission has the authority to refuse to assess penalties.

More broadly, the Commission majority attempted to justify its refusal to assess a penalty on the ground that such a sanction was necessary to vindicate "the overriding purposes" and "uphold the integrity" of the Mine Act. 26 FMSHRC at 686-88 (J.A. 192-94). The short answer to the majority's approach is that the balancing of interests under the Act "is a task for Congress" (Brock, 476 U.S. at 266), not a task for the Commission, and Congress struck a different balance. If Congress had intended to authorize Section 105(a)'s "reasonable time" provision to be applied as the Commission applied it here -- an application that "bestow[s] upon the [mine operator] a windfall" and makes the safety of miners "forfeit to the accident of noncompliance with statutory time limits" (Montalvo-

Murillo, 495 U.S. at 720) -- Congress would have said so. It did not.[16]

Finally, the Commission majority attempted to justify its refusal to assess a penalty on the ground that it was leaving the finding of a violation intact and that finding would become part of the operator's history of violations in assessing future penalties. 26 FMSHRC at 685 (J.A. 191). The majority's rationalization is internally inconsistent: if prompt imposition

---

[16] The Commission speculated that Congress "would not find parity" if the Secretary were allowed to take 17 months to propose a penalty while the operator was statutorily required to contest the penalty within 30 days. 26 FMSHRC at 686-87 and n.27 (J.A. 192-93 and n.27) (citing Section 105(a) of the Act). The Commission's speculation represents "a classic apples-and-oranges-mix[.]" Time Warner Entertainment Co., L.P. v. FCC, 240 F.3d 1126, 1141 (D.C. Cir.), cert. denied sub nom. Consumer Federation of America v. FCC, 534 U.S. 1054 (2001). In deciding what penalty to propose, the Secretary must carefully consider and weigh the six factors specified in Section 105(b)(1)(B) of the Act (the same factors specified in Section 110(i)); in deciding whether to contest a proposed penalty, the operator need only make a yes-or-no litigation decision and file a brief notice of contest. See Section 105(a) of the Act. In proposing a penalty, the Secretary acts to enforce an important public interest; in contesting a penalty, the operator does not. For both of these reasons, the fact that Congress imposed a 30-day requirement on the filing of penalty contests is in no way inconsistent with the conclusion that Congress intended to impose a longer, and directory rather than mandatory, time period on the issuance of penalty proposals. See Gottlieb, 41 F.3d at 735-36 (to accommodate the Secretary of Transportation's stated need for flexibility "to ensure the just and fair handling of cases[,]" and "[i]n view of the complexities likely to be presented in individual cases and the competing interests at stake, Congress understandably required the Secretary to act promptly, but also declined to dictate what would happen if the Secretary failed to do so").

of a penalty is "vital to the success" of the statutory program (26 FMSHRC at 686 (J.A. 192)), refusal to assess a penalty fundamentally undercuts that program. More importantly, the majority's rationalization is inconsistent with Congress' intent: as this Court has recognized, Congress intended the imposition of a sufficient civil penalty to be "the mechanism for encouraging operator compliance with safety and health standards." Coal Employment Project, 889 F.2d at 1132 (internal quotation marks and citation to legislative history omitted) (emphasis supplied).[17] See 26 FMSHRC at 696 (J.A. 202) (dissent) (refusal to assess a penalty "can only erode a miner's confidence in the agency's ability to ensure that violations of mandatory health and safety standards will be subject to an appropriate sanction").

In sum, the Secretary submits that the meaning of the statute is plain: Congress did not intend to authorize the Commission to remedy the Secretary's failure to propose a penalty "within a reasonable time" by resorting to the drastic remedy of refusing to assess any penalty at all. If the meaning

---

[17] The Secretary fully appreciates the importance of the prompt imposition of penalties, and has implemented several measures to ensure that MSHA proposes penalties promptly. The statutory responsibility for ensuring that MSHA proposes penalties promptly, however, is vested with the Secretary, not with the Commission. See United States v. James Daniel Good Real Property, 510 U.S. 43, 64-65 (1993).

of the statute is not plain -- that is, if Congress' intent is not unambiguous -- the Secretary's analysis is entitled to acceptance because it is reasonable.

D. In Refusing to Consider the Fact that Twentymile Was Not Prejudiced by the Amount of Time It Took the Secretary to Propose a Penalty, the Commission Disregarded the Principles Set Forth by the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership

Even if the Commission could lawfully refuse to assess any penalty for an operator's violation under the Mine Act because of the amount of time it took the Secretary to propose a penalty, it could not properly do so without first considering whether the operator was prejudiced by that amount of time. In Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), the Supreme Court addressed when to excuse a party's failure to comply with a court-ordered filing deadline under the Bankruptcy Code -- an issue analogous to the issue in this case. The Court concluded as follows:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be "excusable," we conclude that the determination is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission. These include * * * the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.
>
> * * * *

> * * * [T]he lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

507 U.S. at 395, 398 (footnotes omitted) (emphases supplied). In so concluding, the majority specifically rejected the dissent's position that the Court should "permit judges to take account of the full range of equitable considerations only if they have first made a threshold determination that the movant is 'sufficiently blameless' in the delay * * *." Id. at 395 n.14. Lower courts have applied the principles set forth in Pioneer to a variety of procedural situations and have emphasized that, under Pioneer, the absence of any prejudice to the moving party or the interests of efficient judicial administration, and the good faith of the nonmoving party, should be given particular consideration in deciding whether to grant a motion to dismiss. See, e.g., George Harms Construction Co. v. Secretary of Labor, 371 F.3d 156, 163-64 (3d Cir. 2004) (applying Fed. R. Civ. P. 60(b)(1) to an Occupational Safety and Health Review Commission proceeding); United States v. Brown, 133 F.3d 993, 996-97 (7th Cir.) (applying Fed. R. App. P. 4(b) to a criminal appeal), cert. denied, 523 U.S. 1131 (1998)).

Courts have likewise held that prejudice is a critical factor when considering whether to impose dismissal or default for procedural errors under Federal Rules of Civil Procedure 55

and 60(b). Panhandle Co-op. Ass'n, Bridgeport, Nebraska v. EPA, 771 F.2d 1149, 1153 (8th Cir. 1985); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976). In cases involving delay in issuing criminal indictments and delay in issuing citations under the Occupational Safety and Health Act, the courts have consistently held that the objecting party must show prejudice. See, e.g., United States v. Rein, 848 F.2d 777, 781 (7th Cir. 1988) (criminal proceeding); Havens Steel Co. v. OSHRC, 738 F.2d 397, 399 (10th Cir. 1984), and Donovan v. Royal Logging, 645 F.2d 822, 827-28 (9th Cir. 1981) (OSHA proceedings).

Finally, the Commission itself has employed a similar sort of analysis in addressing a similar sort of situation under the Mine Act. In Old Dominion Power Co., 6 FMSHRC 1886 (1984), aff'd on other grounds, 772 F.2d 92 (4th Cir. 1985), the operator argued that a citation should be dismissed on the ground that it was not issued with "reasonable promptness" within the meaning of Section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The Commission rejected the operator's argument and emphasized:

> Most important, * * * Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding.

Id. at 1894 (emphasis supplied).

In direct contravention of the principles set forth above, the Commission majority in this case (26 FMSHRC at 682

(J.A. 188)), and the Commission in previous cases, has held that a showing of prejudice to the operator is not a prerequisite to an action by the Commission vitiating a proposed penalty proceeding, and that such prejudice is to be considered only after a finding of adequate cause for delay in proposing the penalty. See Steele Branch Mining, 18 FMSHRC 6, 14 (1996) (adopting the two-step analysis set forth by the Commission in Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089, 2092-93 (1993), aff'd on other grounds, 57 F.3d 982 (10th Cir. 1995)). The Commission majority held that "[t]he judge in this case determined that the lapse in time between the order and the penalty proposal was not prejudicial to Twentymile, 25 FMSHRC at 388 [J.A. 168], and the operator does not challenge that conclusion on review." 26 FMSHRC at 682-83 (J.A. 188-89). For that reason and the reasons set forth above, the majority erred in vacating the civil penalty in this case. Such an approach is particularly inappropriate under the Mine Act because it "'represents a drastic course [that] would short circuit the penalty process, and hence a major aspect of the Mine Act's enforcement scheme'" (Rhone-Poulenc, 57 F.3d at 984 (quoting Salt Lake County Road Dept., 3 FMSHRC 1714, 1716 (1981)), even when, as the Commission majority acknowledged in this case (26 FMHRC at 682-83 (J.A. 188-89)), it is undisputed that the operator suffered no prejudice. For this reason too, the

Commission's action in this case is inconsistent with effective enforcement of the Mine Act.

E. In Calculating the Time It Took the Secretary to Propose a Penalty as Starting When the Order Was Issued Instead of When the Accident Investigation Was Terminated, the Commission Disregarded the Terms of Section 105(a) of the Mine Act

Even if the Commission did not err for either of the reasons advanced above, it erred because, in calculating the time it took the Secretary to propose a penalty in this case, it impermissibly added an extra seven months. Section 105(a) of the Mine Act states in relevant part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, within a reasonable time after the termination of such inspection or investigation, notify the operator * * * of the civil penalty proposed * * *.

30 U.S.C. § 815(a) (emphases supplied). Under the plain language of Section 105(a), a "reasonable time" is to be calculated starting from the termination of the inspection or investigation.

In this case, the Secretary submits, the termination of the investigation occurred when the accident investigation report was issued. The investigation report was issued on January 4, 2001, and the Secretary proposed a penalty on November 9, 2001 -- ten months later. The investigation report was not issued, and the investigation thus was not terminated, until January 4, 2001, because the primary reviewer of the report at the MSHA district office was unable to begin working on the report until

October 2000, after which he sought additional information about the accident in November 2000 and then forwarded the report to two assistant district managers and the district manager for review. Tr. 75-78 (J.A. 96-97).

The Commission majority found that the Secretary took 17 months to propose a penalty because it calculated the Section 105(a) "reasonable time" starting from the issuance of the underlying order on June 16, 2000. 26 FMSHRC at 685 (J.A. 191). In effect, the majority found that the termination of the investigation occurred when the order was issued. The decision as to when MSHA's investigation is complete, however, is committed to MSHA's unreviewable discretion. See Heckler v. Chaney, 470 U.S. 821, 835 (1985) (the Food, Drug, and Cosmetic Act's investigation and enforcement provisions "commit complete discretion to the Secretary [of HHS] to decide how and when they should be exercised"); North Carolina Utilities Comm'n v. FERC, 653 F.2d 655, 669 (D.C. Cir. 1981) (FERC's decision "to accept or reject an investigatory report * * * is a necessary adjunct to the agency's unreviewable discretion to recommend or decline enforcement or rulemaking proceedings"). Even if MSHA's decision is reviewable, it is entitled to special deference because it "pertains to an agency's exercise of its enforcement discretion -- an area in which the courts have traditionally

been most reluctant to interfere." Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (citing, inter alia, Heckler v. Chaney). In evaluating "why it took seven months to finalize the accident report" and determining that the accident investigation was complete seven months before the accident report was issued (26 FMSHRC at 683 (J.A. 189)), the Commission majority impermissibly intruded on the Secretary's enforcement discretion and disregarded the terms of Section 105(a).

F. In Substituting Its View of the Facts for the Judge's View, the Commission Exceeded Its Authority Under Section 113(d)(2)(A)(ii) of the Mine Act

Finally, in reversing the judge's finding that the time it took the Secretary to propose a penalty in this case was reasonable, the Commission majority impermissibly applied a de novo standard of review and substituted its view of the facts for the judge's. The Commission may not substitute its own view of the facts "for the view the judge reasonably reached." Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 90-91 (D.C. Cir. 1983). Instead, under Section 113(d)(2)(A)(ii) of the Mine Act, the Commission is required to affirm a judge's findings of fact if they are supported by "substantial evidence." Ibid.

In this case, the Commission attempted to circumvent Section 113(d)(2)(A)(ii)'s restriction on its review authority by suggesting that the "reasonable time" issue was "a matter of law." 26 FMSHRC at 684 (J.A. 190). It is apparent, however,

that the issue was a question of fact. In analogous cases involving findings of "excusable neglect" under Federal Rule of Appellate Procedure 4(b) and Federal Rule of Civil Procedure 60(b), courts have applied a deferential "abuse of discretion" standard (see, e.g., Brown, 133 F.3d at 996, and Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988)) and have emphasized that the trial judge "is in the best position to discern and assess all the facts, is vested with a large measure of discretion" (Twelve John Does, 841 F.2d at 1138), and must balance "'all relevant circumstances surrounding the party's omission.'" Brown, 133 F.3d at 996 (quoting Pioneer Investment Services, 507 U.S. at 395). The majority's own highly factual review of the "reasonable time" issue (26 FMSHRC at 683-85 (J.A. 189-91)), and the majority's finding that the time was unreasonable "under the circumstances" (26 FMSHRC at 684 (J.A. 190)), demonstrate that the "reasonable time" issue was a question of fact. As the dissenters recognized, the majority "cannot have it both ways": it cannot rely on the specific "circumstances" of this case and at the same time pretend that the issue presented is "a matter of law" subject to de novo review. 26 FMSHRC at 693-94 (J.A. 199-200).

CONCLUSION

For the reasons stated above in Argument Section C, the Secretary requests that the Court reverse that portion of the decision of the Commission vacating the civil penalty for Twentymile's violation of 30 C.F.R. § 48.7(c) and remand the

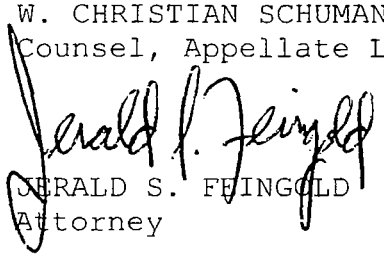
case for the Commission to reinstate the penalty assessed by the judge.[18] If the Court rejects that approach, for the reasons stated above in Argument Sections D through F, the Secretary requests that it vacate that portion of the Commission's decision and remand the case for the Commission to decide the "reasonable time" issue in accordance with the governing statutory provisions and case law principles set forth above.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation



GERALD S. FEINGOLD
Attorney

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

[18] Assuming that the Court affirms Twentymile's violation of the training standard as a "significant and substantial" violation, the parties have not contested that the amount of the penalty assessed by the judge is appropriate for such a violation.

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 Brief for the Secretary of Labor contains 11,262 words as determined by Word, the processing system used to prepare the brief.

Gerald S. Feingold
Attorney

CERTIFICATE OF SERVICE

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

Jerald S. Feingold
Attorney

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Note 17

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

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.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

(f) False statements, representations, or certifications

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(g) Violation by miners of safety standards relating to smoking

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

(h) Equipment falsely represented as complying with statute, specification, or regulations

Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (f) of this section.

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

§ 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

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 42383, June 21, 2002; 67 FR 42366, 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 47459, 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 53759, 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; 53 FR 10335, Mar. 30, 1988; 53 FR 12415, Apr. 14, 1988; 63 FR 53760, 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; on

(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 1980, Jan. 9, 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.