FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	
Petitioner,	)	
v.	)	Docket No. SE 2003-160
JIM WALTER RESOURCES, INC.,	)	
Respondent.	)	

BRIEF FOR THE SECRETARY OF LABOR

ISSUES PRESENTED

1. Whether the judge erred in dismissing the citation alleging a violation of 30 C.F.R. § 75.1101-23(a) when Jim Walter Resources, Inc.'s Firefighting and Evacuation Plan expressly required that a supervisor or designated person assemble all miners promptly and lead them out of the mine in an evacuation, and the evidence compels the conclusion that JWR undertook an evacuation in response to an explosion but failed to assemble all miners promptly and lead them out.

2. Whether the judge erred in substantially reducing the Secretary's proposed penalty for the violation of 30 C.F.R. § 75.360(b)(3).

3. Whether the judge erred in finding that the violation of 30 C.F.R. § 75.1101-23(c) was not significant and substantial

because he failed to adequately address material record evidence and relied on improper evidence.

4. Whether the judge erred in substantially reducing the Secretary's proposed penalty for the violation of 30 C.F.R. § 75.1101-23(c).

STATEMENT OF THE CASE

A. The Facts

This case arises from an MSHA investigation that followed the September 23, 2001, fatal mine disaster at Jim Walter Resources, Inc.'s ("JWR's") No. 5 Mine. The disaster involved two explosions. The explosions occurred approximately 55 minutes apart. Dec. at 13 n.14. All of the 32 miners who had been working underground at the time of the first explosion were still underground when the second explosion occurred. See Gov't Ex. 12 and 13. The second explosion killed thirteen miners. Gov't Ex. 10 at App. A.

The first explosion occurred at about 5:20 p.m. Four miners -- Mike McIe, Skip Palmer, Foreman Tony Key, and Gaston Junior Adams -- were injured in the first explosion. Adams was immobilized by his injuries. Dec. at 7-8; Gov't Ex. 10 at 8-9.

After the first explosion, Foreman Key looked for a mine telephone to call Harry House in the communications office ("CO") room. House was the supervisor of the CO room, which was

located on the surface of the mine. From the CO room, calls could be made to all of the underground telephones. Miners underground could also be audibly paged. Dec. at 3-4 and n.3; Tr. Vol. 5 at 352. While Foreman Key was looking for a phone, he saw that an overcast was damaged and concluded that ventilation was disrupted. Dec. at 9; Tr. Vol. 6 at 79-80.

At about 5:45 p.m., Key reached CO Supervisor House. Key testified that he told House about the roof fall and the explosion, and told him that ventilation was damaged and that an overcast might be down. Key also told House that there was an injured miner who needed emergency help. Dec. at 9; Tr. Vol. 6 at 85, 149. House had the authority to issue an evacuation order. Tr. Vol. 5 at 354. House testified that the mine was being evacuated between the first and second explosions. Tr. Vol. 5 at 382-83.

After Key's call, CO Supervisor House tried to reach some of the mine supervisors by calling underground. Dec. at 10. House reached Foreman Dave Blevins and told him that there had been an explosion and a roof fall, that there were injured miners, and that there was damage to the ventilation. Dec. at 10; Tr. Vol. 5 at 359-60.

From the CO room, House called Deputy Mine Manager Trent Thrasher at home. Dec. at 10; Tr. Vol. 12 at 223-24. House

told Thrasher that there had been an explosion, that miners were injured, that one injured man was left on the section, and that help was needed to evacuate or get the injured man out. Ibid. Thrasher asked whether all the miners were on the way out of the mine. House answered that he was getting them out. See Dec. at 10, citing Tr. Vol. 12 at 223-25. House and Thrasher both testified that the mine was being evacuated. Tr. Vol. 5 at 382-83; Vol. 12 at 265.

Meanwhile, a number of miners working underground realized that something unusual was happening and went to investigate. Dec. at 11. Rockduster John Knox and Electricians Dennis Mobley and Charlie Nail met injured miners Key, Palmer, and McIe near the No. 4 Section. Knox told McIe and Palmer to leave the mine because they were hurt. Dec. at 10; Tr. Vol. 1 at 218-19. Knox told Key that he and Mobley were going to help Adams. Dec. at 9.

Miners Chris Key, Clarence Boyd, Nelson Banks, Sammy Riggs, Terry Stewart, and Charles Smith learned that there had been an ignition at the No. 4 Section and headed toward it. Dec. at 11; Tr. Vol. 2 at 288, 308-09; Gov't Ex. 10 at 12-13.

Miners Banks, Riggs, Charles Smith, Terry Stewart, Chris Key, and Clarence Boyd reached the E panel, where they saw Foreman Key and miners Palmer and McIe. McIe told Boyd that

Adams was hurt. Riggs and Boyd said that they were going inby the No. 4 Section to help. Tr. Vol. 2 at 290-92; Gov't Ex. 10 at 12-13. Chris Key said that he would take Tony Key, McIe, and Palmer out of the mine for medical help. Dec. at 12.

In trying to page Belt Foreman Robertson, CO Supervisor House placed a call that was answered by miner Wendell Johnson. House testified that he told Johnson that there had been an explosion. Tr. Vol. 5 at 369-70. Miners Stuart Sexton and Ricky Rose, however, testified that after Johnson spoke with House, Johnson said that House told him that there had been a fire or ignition, and that House wanted all miners to go to the area to help. Dec. at 10; Tr. Vol. 2 at 111, 174.

When Robertson was told about House's call, he told the members of his crew -- Raymond Ashworth, Joseph Sorah, Vonnie Riles, and Bill Hallman -- and Sexton, Rose, and Johnson to get on a manbus, and the manbus headed toward the No. 4 Section. Dec. at 11; Tr. Vol. 2 at 113-15.

On their way out of the mine, Foreman Key and the two other injured miners passed Foreman Blevins and Belt Foreman Robertson and members of their crews at Sub Main B. Foreman Key told Blevins that Adams was hurt, that there had been an explosion, that ventilation was damaged, and that there was a possibility of another explosion. Dec. at 12. Blevins told the miners that

they needed to go fight a fire. Blevins asked for three volunteers. Ashworth, Sorah, and Johnson got on Blevins' manbus; Tarvin and Sexton declined. They did not want to go inby to fight a fire. Dec. at 13; Tr. Vol. 1 at 436-49; Vol. 2 at 120.

At about 6:10 p.m., miners Banks, Riggs, Smith, Boyd, and Stewart arrived at the No. 4 Section switch. By that time, or a few minutes later, miners Knox, Mobley, Nail, Johnson, Sorah, and Ashworth and Foreman Blevins arrived at the No. 4 Section, where injured miner Adams had remained since the first explosion. Dec. at 13. At about 6:15 p.m., there was a second and much more powerful explosion, which started in the No. 2 entry of the No. 4 Section. Adams and the twelve miners who had gone into the area were killed. Gov't Ex. 10 at App. A.

During its investigation of the accident, MSHA learned that miners were scheduled to perform maintenance and roof bolting work on the No. 4 Section prior to the day shift on September 21, 2001. Tr. Vol. 9 at 101-02. JWR, however, only conducted a preshift examination of the electrical installations in the track entry. Dec. at 50. Miners nevertheless were sent into the area to work. Dec. at 54; Tr. Vol. 4 at 132-33.

Also during the investigation, JWR gave MSHA investigators fire drill records JWR was required to keep under 30 C.F.R. §

75.1101-23(c) (2000). Gov't Ex. 35. JWR did not have records for 130 of the mine's 163 miners for the period from January 2001 through September 2001. Dec. at 64; Tr. Vol. 8 at 160. Most of the miners for whom JWR did have records did not participate in on-site fire drill simulations as required by the standard. Dec. at 66 and see, e.g., Tr. Vol. 2 at 38-39; Vol. 3 at 212-15, 403; Vol. 5 at 289; Vol. 6 at 14, 269, 287. As a result of the investigation, MSHA issued citations alleging significant and substantial and unwarrantable violations of 30 C.F.R. §§ 75-1101-23(a), 75.360(b)(3), and 75.1101-23(c).[1]

B. The Judge's Decision

1. The Firefighting and Evacuation Plan Violation

Based on the plain meaning of 30 C.F.R. § 75.1101-23(a), the judge held that both explosions and fires are the type of emergency referred to in the standard. As a result, the judge concluded that explosions could be covered in a Firefighting and Evacuation ("FF&E") Plan under the standard. The judge held, however, that although FF&E plans under the standard could apply to explosion-related emergencies, a plan adopted under the standard did not ipso facto apply to explosions. Dec. at 60-61.

[1] The citation alleging a violation of Section 75.360(b)(3) was also based on a failure to detect inadequate rockdusting. The Secretary did not appeal the judge's dismissal of that part of the citation.

The judge then concluded that JWR's FF&E plan did not require miners to be evacuated in the event of an explosion. Dec. at 61. In so doing, the judge found that the only plan provision requiring an evacuation was Section V.a.8, which required an evacuation when there was a fire that "c[ould not] be extinguished or brought under positive control." Dec. at 60. The judge found that nothing in the language of Section V.a.8 or the surrounding text indicated that the word "fire" was intended to have anything but its most common meaning. Ibid. As a result, the judge dismissed the citation alleging a violation of Section C.F.R. § 75.1101-23(a).

2. The Preshift Examination Violation

The judge affirmed the citation alleging a violation of 30 C.F.R. § 75.360(b)(3) insofar as it was based on a failure to conduct a preshift examination of all areas where miners were scheduled to work. The judge found that the violation was both significant and substantial and an unwarrantable failure. Given the gassy nature of the mine, the lack of ventilation prior to the shift, and the presence of electric and diesel equipment in the unexamined area, the judge found that the violation significantly and substantially contributed to the danger of miners being seriously hurt or killed in a methane-related explosion or ignition. The judge also found that the violation

was serious. Dec. at 54-55. In addition, the judge found that JWR was highly negligent and exhibited a serious lack of reasonable care by sending miners underground and into harm's way knowing that the preshift examination had not been completed. Dec. at 55. The judge nevertheless reduced the penalty proposed by the Secretary from $55,000 to $2,500 -- a reduction of more than 95 percent. Dec. at 56.

3. The Fire Drill Violation

The judge found that there was a general failure by JWR to ensure that all miners participated in on-site fire drill simulations at least every 90 days as required by 30 C.F.R. § 75.1101-23(c). Although the judge recognized that the No. 5 Mine is one of the nation's gassiest mines and experiences fires, and that a failure to properly train miners in firefighting would increase the likelihood of miners exhibiting ineptitude, panic, and confusion in the event of a fire, the judge found that it was not reasonably likely that the failure to provide the training specified in the standard would result in an injury. Dec. at 69. As a result, the judge concluded that the violation was not significant and substantial. The judge also found that the violation was only moderately serious. The judge reduced the penalty proposed by the Secretary from $55,000 to $500 -- a reduction of more than 99 percent. Ibid.

ARGUMENT

I.

THE JUDGE ERRED IN DISMISSING THE CITATION ALLEGING A VIOLATION OF C.F.R. § 75.1101-23(a)

A. The Plan Applied to Explosion-Related Emergencies

The judge correctly held that 30 C.F.R. § 75.1101-23(a) applied to both fire-related emergencies and explosion-related emergencies. 26 FMSHRC at 626-27; Dec. at 58-59.[2] The standard stated in pertinent part that the operator was to adopt a program for the instruction of all miners

> in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency.

30 C.F.R. § 75.1101-23(a). The judge, relying on the standard's reference to "an emergency" and on his finding that JWR's

---

[2] Section 75.1101-23(a), which was subsequently amended, stated in relevant part:

> Each operator of an underground coal mine shall adopt a program for the instruction of all miners in the location and use of fire fighting equipment, location of escapeways, exits, and routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. Such program shall be submitted for approval to the District Manager of the Coal Mine Health and Safety District in which the mine is located no later than June 30, 1974.

attempt to differentiate between a fire and an explosion represented "a distinction without a difference," correctly concluded that the standard addressed both fire-related emergencies and explosion-related emergencies. 26 FMSHRC at 627-28. This interpretation reflects the standard's plain meaning: plans must establish evacuation procedures for emergencies arising both from fires and from explosions. The judge correctly held that JWR had notice of the meaning of the standard. Id.

When JWR submitted its plan to the Secretary for approval, it represented that the plan fully complied with the standard. The plan was subsequently approved by the Secretary as consistent with the standard. Any ambiguities as to the scope of the plan's evacuation provisions should therefore be read so as to render them consistent with the standard.

It has long been recognized that government officials are presumed to have performed their official responsibilities properly. National Archives and Records Administration v. Favish, 541 U.S. 157, 174 (2004); Adams v. United States, 350 F.3d 1216, 1228 (Fed. Cir. 2004); American Federation of Government Employees v. Reagan, 870 F.2d 723, 727-28 & n.33 (D.C. Cir. 1989) (collecting cases). That presumption applies in this case, and there is no evidence to overcome it. There is

no evidence to support the notion that the Secretary approved a plan whose evacuation provisions failed to comply with the standard -- i.e., whose evacuation provisions failed to apply to explosion-related emergencies.

In addition, having had notice of the meaning of the standard when it submitted the plan to MSHA for approval, and having represented to MSHA that the plan complied with the standard, JWR should be estopped from now asserting that the plan did not comply with the standard -- i.e., that the plan did not apply to an explosion-related emergency. See Mick's at Pennsylvania Avenue, Inc. v. BOD, Inc., 389 F.3d 1284, 1289 (D.C. Cir. 2004) ("Under the doctrine of equitable estoppel, a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects.") (citations and internal quotation marks omitted); Kaneb Services, Inc. v. FSLIC, 650 F.2d 78, 81 (5th Cir. 1981) (a party that obtained agency approval of transactions based on an agency-imposed condition was estopped from subsequently challenging that condition).

B. The "Assemble and Lead" Requirements of Section II.3 of the Plan Applied to the Evacuation JWR Undertook in This Case

1. The judge dismissed the citation alleging a violation of 30 C.F.R. § 75.1101-23(a) because he found that the FF&E plan did not require an evacuation in the event of an explosion. Dec. at 59-61. In so finding, the judge relied on Section V of the plan, which was entitled "Fire Drills." Gov't Ex. 34 at 4-5. In particular, the judge relied on Section V.a.8 of the plan, which stated, "Miners shall be evacuated if a fire cannot be extinguished or brought under positive control." Id. at 5. The judge, however, effectively ignored Section II.3 of the plan, which appeared in the section of the plan entitled "Location of Escapeways, Exits and Routes of Travel to the Surface and Evacuation Procedures" and which stated, "A supervisor or designated person will assemble all men promptly and lead the way during the evacuation" (the "assemble and lead" provision). Id. at 3.[3] Under established principles of statutory and regulatory interpretation, Section II.3 of the plan required that if the operator undertook an evacuation -- as JWR did in this case in response to the first explosion -- all miners were to be assembled promptly and led out by a supervisor or designated person.

[3] The plan had two sections denominated "II." By its terms, the first Section II addressed evacuations in response to CO monitoring system alarms. Gov't Ex. 34 at 2. The second Section II was the section described above.

2. Under the Mine Act, the provisions of a mine-specific plan are enforceable as if they were mandatory standards. UMWA, Int'l Union v. Dole, 870 F.2d 662, 667 n.7 (D.C. Cir. 1989); Energy West Mining Co., 17 FMSHRC 1313, 1317 (1995). Accordingly, the provisions of a plan should be interpreted under the same principles under which statutory and regulatory provisions are interpreted.

If the meaning of a regulatory provision is plain, the provision should be interpreted so as to give effect to that plain meaning. Exportal Ltda. v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984). In determining whether a statutory or regulatory provision's meaning is plain, courts apply all of the traditional tools of interpretation, including both the language of the particular provision at issue and the language, structure, and purpose of the scheme as a whole. City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003) (statutory provision); Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001) (statutory provision); National Wildlife Federation v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (regulatory provision). And, if the meaning of a regulatory provision is ambiguous, the interpretation of the agency entrusted with

enforcing the provision is entitled to substantial deference as long as it is permissible. Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994).[4]

As the Commission has recognized, the same principles apply where, as here, the agency is interpreting a plan drafted by the mine operator pursuant to a regulatory requirement, and the Secretary approved the plan. Energy West Mining Co., 17 FMSHRC at 1317. The Secretary's interpretation of the FF&E plan's provisions should be accepted because the Secretary is entrusted with enforcing the plan. Excel Mining, 334 F.3d at 6-7. Deference is based primarily on the authority delegated to the agency to administer the provision in the field; it is not based on the role the agency played in drafting the provision. Ibid. Indeed, courts regularly defer to an agency's interpretation where the agency was not the drafter of the provision. Excel Mining, 334 F.3d at 6-7 (granting deference to the Secretary of Labor's interpretation of a finding promulgated in part by the

---

[4] The agency's interpretation of an ambiguous provision should be accepted as long as it is not "plainly erroneous or inconsistent with the regulation" (Excel Mining, 334 F.3d at 5-6 (citation and internal quotation marks omitted)) -- that is, as long as it "fits ... within the terms of the regulation and is compatible with its purpose." Cold Spring Granite Co. v. FMSHRC, 98 F.3d 1376, 1378 (D.C. Cir. 1996). Accord Secretary of Labor v. Spartan Mining Co., 415 F.3d 82, 84 (D.C. Cir. 2005); Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 534-35 (D.C. Cir. 2004).

Secretary of HEW); Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 600-01 (D.C. Cir. 1997) (granting deference to FERC's interpretation of regulatory provisions promulgated by the ICC); Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997) (granting deference to the Justice Department's interpretation of a regulatory provision drafted by the ADA Access Board), cert. denied, 523 U.S. 1003 (1998). See also Hess v. Reg-Ellen Machine Tool Corp., 423 F.3d 653, 662-63 (7th Cir. 2005) (granting deference to the plan administrator's interpretation of an ERISA plan provision, not to the interpretation of the individual who drafted the provision).

Even if the fact that JWR drafted the plan affected the deference due the Secretary, that would not help JWR in this case. Under the principle of contra proferentem, ambiguity in a negotiated document should ordinarily be resolved against the party that drafted the document. Turner Construction Co. v. United States, 367 F.3d 1319, 1321, 1324 (Fed. Cir. 2004); HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327, 1334-35 (Fed. Cir. 2004). Application of that principle is particularly appropriate where, as here, it serves to prevent a party from drafting a provision that is not obviously ambiguous and then subsequently asserting that the provision is ambiguous and should be read to mean something different than it appears to

mean. Restatement (Second) of Contracts § 206 (1981) (applying the principle to contract provisions); Ruttenberg v. United States Life Insurance Co., 413 F.3d 652, 665-66 (7th Cir. 2005) (applying the principle to ERISA plan provisions).

Finally, a regulatory provision should be interpreted so as to effectuate the purpose of the statutory provision it was intended to implement. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984); Alcoa Alumina & Chemicals, L.L.C., 23 FMSHRC 911, 913 (2001). More specifically, a mandatory safety standard under the Mine Act should be interpreted so as to promote miner safety. Daanen & Janssen, Inc., 20 FMSHRC 189, 193 (1998); Dolese Brothers Co., 16 FMSHRC 689, 693 (1994). These same principles of interpretation should by applied to plans. See Energy West, 17 FMSHRC at 1313. The judge, however, relied on an unduly restrictive reading of the FF&E plan, as we explain below.

3. The Secretary's interpretation of Section II.3 of the plan is supported by the plain language of Section II.3. Section II.3 stated, without any limitation, as follows:

> A supervisor or designated person will assemble all men promptly and lead the way during the evacuation.

Gov't Ex. 34 at 3. By its terms, Section II applied generally to escapeways and evacuations, and Section II.3 applied to any

evacuation the operator undertook. An interpretation that Section II.3 applied only to an evacuation undertaken in response to a fire is impermissible because it would "read a limitation into the [provision] that has no basis in the [provision's] language." Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995) (citation and internal quotation marks omitted) (interpreting a statutory provision). Accord Hercules Inc. v. EPA, 938 F.2d 276, 280 (D.C. Cir. 1991) (rejecting an interpretation that "read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose"). The failure to include limiting language in the provision indicates that the intent was not to limit the provision. This is especially true here, where the Secretary approved the plan under a standard that plainly applied to all explosion-related emergencies. And a limiting interpretation here is particularly impermissible because, in contrast to Section II, many other provisions of the plan -- including almost all of the provisions in the sections immediately preceding and immediately following Section II -- were directed to "fire." See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally

and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted); Hercules, 938 F.3d at 280-81 ("Congress clearly knew how to [limit liability under the statute] when it wanted to do so . . . . It did not do so here[.]").[5]

In a similar vein, the titles pertaining to Section II.3 fully support the Secretary's interpretation that its subject matter covered escapes for any reason. Titles within a statute or a regulation, although not dispositive, can aid in interpreting the statutory or regulatory text. INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991) (regulation); American Scholastic TV Programming Foundation v. FCC, 46 F.3d 1173, 1179 (D.C. Cir. 1995) (statute). Section II, and Sections I and V, appeared under a general heading that read:

> PROGRAM OF INSTRUCTION -
> UNDERGROUND EMERGENCIES

Gov't Ex. 34 at 3. Section II itself was entitled:

> Location of Escapeways, Exits and
> Routes of Travel to the Surface and

---

[5] The sections immediately preceding and immediately following Section II were Section I on page 3, which addressed fire fighting equipment, and Section V on page 4, which addressed fire drills. (The plan had no Section III or Section IV between Section II and Section V). Almost all of the provisions in Sections I and V used the word "fire." None of the provisions in Section II, which addressed escapeways and evacuations, used the word "fire." Gov't Ex. 34 at 3-4.

Evacuation Procedures

Ibid. By their terms, the quoted titles encompassed any evacuation undertaken in response to an underground emergency. An interpretation that Section II.3 applied only to an evacuation undertaken in response to a fire should be rejected because it would read into the quoted titles a limitation the wording of the titles did not contain. See Thunder Basin, 56 F.3d at 1280; Hercules, 938 F.2d at 280.

The Secretary's interpretation of Section II.3 is also supported by the purpose of Section II and of the standard the FF&E plan was intended to implement. An interpretation that Section II.3 applied only to an evacuation undertaken in response to a fire should be rejected because it would prevent the plan from effectuating the standard with respect to a category of evacuations to which the standard applied. See Emery Mining, 744 F.2d at 1411, 1414. Such an interpretation should also be rejected because it would produce the anomalous result of treating similar situations differently. See NRDC v. EPA, 907 F.2d 1146, 1156 (D.C. Cir. 1990) (rejecting as an "anomaly" an interpretation that would have treated differently situations that were equally hazardous); UMWA v. FMSHRC, 671 F.2d 615, 625-27 (D.C. Cir.) (rejecting as "paradoxical" an interpretation that would have treated differently mine

inspections that, for purposes of the Mine Act, were similar), cert. denied, 459 U.S. 927 (1982). The absurd and safety-defeating implications of such an interpretation could hardly have a more compelling illustration than the catastrophic events that followed JWR's failure to comply with Section II.3's "assemble and lead" requirements in the evacuation it undertook after the first explosion in this case.

For all of the reasons set forth above, the Commission should accept the Secretary's interpretation that the FF&E plan required an evacuation undertaken in response to an explosion to comply with Section II.3's "assemble and lead" requirements. The Commission should reject an interpretation that Section II.3 applied only to an evacuation undertaken in response to a fire. We show below that JWR undertook an evacuation in response to the first explosion in this case, but failed to comply with Section II.3's "assemble and lead" requirements.

C. JWR Indisputably Undertook An Evacuation but Failed To Comply With the "Assemble and Lead" Provision of the FF&E Plan

1. At the hearing, JWR repeatedly acknowledged that it undertook an evacuation in response to the dangerous conditions created by the first explosion. Deputy Mine Manager Trent Thrasher testified that when CO Supervisor House called him at his home after the first explosion, Thrasher asked whether all of the miners were on the way out of the mine, and House said

that he was getting them out. See Dec. at 10, citing Tr. Vol. 12 at 223-24. Thrasher made clear that all miners underground were being evacuated. Tr. Vol. 12 at 265. House testified that between the first and second explosions, the mine was being evacuated. Tr. Vol. 5 at 382-83.

Because JWR undertook an evacuation after the first explosion, JWR was required to follow the "assemble and lead" requirements of the FF&E plan. It did not.

2. The first explosion occurred at about 5:20 p.m. on the No. 4 Section after the roof fell on a battery. The damaged battery arced, igniting methane liberated in the fall. Four miners -- Mike McIe, Skip Palmer, Foreman Tony Key, and Gaston Junior Adams -- were injured in the first explosion. Adams was immobilized by his injuries; Key, Palmer, and McIe were able to leave the area. Dec. at 7-8; Gov't Ex. 10 at 8-9.

After the first explosion, Foreman Key testified, he went to find a phone to call CO Supervisor House so that House would "call the people that needed to be called to evacuate the mine." Tr. Vol. 6 at 77. Key passed miners Dennis Mobley, Charlie Nail, and John Knox. Tr. Vol. 6 at 74-75, 77-78, 81-82. Mobley and Nail had been working inby the area; Knox wandered into the area to find out about an apparent air reversal. Tr. Vol. 1 at 428-29; Gov't Ex. 10 at App. I. Although Key testified that he

told the miners about the first explosion and said that Adams needed help, Key did not tell any of the miners to evacuate. Tr. Vol. 6 at 77-78, 81-82, 87. Instead, Knox told Key that he and Mobley were going to the No. 4 Section. Key thought that they were going to help Adams, but "didn't know what they were actually going to do." Tr. Vol. 6 at 87. Key told Nail to "knock the power." Tr. Vol. 6 at 76-77, 147. Nail never left the No. 4 Section. Dec. at 13; Gov't Ex. 13.

Foreman Key called CO Supervisor House and told him that there had been a rockfall and an explosion, and that "a man was down on the section." Tr. Vol. 6 at 85. In response to Key's call, CO Supervisor House tried to use the mine-wide paging system to reach some of the supervisors working underground. Dec. at 9-10. Four supervisors were working underground at the time of the explosion -- Foreman Key, Foreman Dave Blevins, Belt Foreman Robertson, and Longwall Foreman Benny Franklin. Gov't Ex. 10 at App. A.

The first supervisor House contacted was Foreman Blevins. Dec. at 10. House told Blevins that there had been an explosion and a roof fall, that miners were injured, and that they needed help. Dec. at 10; Tr. Vol. 5 at 359-60. Blevins told House, "We're on our way," a statement House understood to mean that Blevins and other miners were on their way to help. House

testified that he had no idea how many other miners were with Blevins. Tr. Vol. 5 at 361-62. Although miners were being evacuated (Tr. Vol. 12 at 223-25, 265), House never told Blevins to evacuate any of the miners, and Blevins never suggested that he was doing so. See Tr. Vol. 5 at 360-63.

After talking to Foreman Blevins, CO Supervisor House tried to page Belt Foreman Robertson. Tr. Vol. 5 at 369. Miner Wendell Johnson answered the phone. House, however, believed that he was speaking to Robertson. Dec. at 10; Tr. Vol. 5 at 369-70. House testified that he told Johnson that there had been an explosion and a roof fall, that brattices were destroyed, and that injured men needed help. Tr. Vol. 5 at 369-71. Johnson told House, "We're on our way." House understood that Johnson was traveling inby toward the area of the explosion with however many miners he was with. Tr. Vol. 5 at 373.

Although House testified that he told Johnson that there had been an explosion, Johnson told miners Rick Rose and Stuart Sexton that there had been a fire or ignition on the No. 4 Section and that all available miners were needed to go to the area. Dec. at 10; Tr. Vol. 2 at 111, 174. Regardless of whether House told Johnson that there had been an explosion or that there had been a fire or ignition, by all accounts House did not tell Johnson, who House believed was one of the four

supervisors working underground, that JWR had undertaken an evacuation. Nor did House prevent Johnson from traveling inby toward the area of the explosion. At the time of House's call, Johnson, Rose, and Sexton were only five to six minutes by foot from the bottom of the shaft exiting the mine. Tr. Vol. 2 at 178. They were, however, 30 to 45 minutes by bus from the No. 4 Section. Ibid.

In response to House's call, miners Johnson, Sexton, and Rose went to the No. 2 East belt header, where Belt Foreman Robertson and the members of his crew (Raymond Ashworth, Joseph Sorah, Vonnie Riles, and B. E. Hallman) were working. Sexton told Robertson about House's call to Johnson -- i.e., that there had been a fire and that miners were needed on the No. 4 Section to help. Tr. Vol. 2 at 113. Robertson told everyone to get on the manbus, and they traveled toward the No. 4 Section. Dec. at 11; Tr. Vol. 2 at 115.

Rose testified that while they were traveling on the manbus, Sexton commented that they "need[ed] to be going the other way" and Rose thought to himself, "[I]f you've got a fire on 4 Section, [and] it takes you thirty to forty-five minutes to get up there, and they don't have it under control, you're going to have the biggest fire there ever was when you get there

. . . ." Tr. Vol. 2 at 197. See also Tr. Vol. 2 at 112 (Sexton testified that he didn't feel good about going from one of the furthest places outby to fight a fire inby.)

The fourth supervisor working underground was Benny Franklin. Dec. at 6. Franklin supervised miners George Corbin, Jimmy Dickerson, and Charlie Ogletree. Tr. Vol. 3 at 11. Although the mine was being evacuated (Tr. Vol. 5 at 382-83; Tr. Vol. 12 at 223-25, 265), House did not call Franklin to tell him to assemble and lead his crew out. Because of the unusual dust conditions at the longwall, Franklin eventually called House. Tr. Vol. 3 at 39-42. Franklin testified that House told him to exit the mine with his crew and anyone else he saw. Ibid. Although Franklin testified that he was evacuating the mine with his crew (id. at 43), Ogletree testified that at the 459 switch, Franklin said to his crew, "Let's go on [to the No. 4 Section] and get those [injured guys]." Dec. at 13 n. 13; Tr. Vol. 2 at 349-50. Dickerson also testified that he did not recall Franklin telling the crew to evacuate. Tr. Vol. 3 at 19. Both hourly miners Ricky Rose and Vonnie Riles, who ran into Franklin and his crew at the 459 switch, testified that Franklin did not order them to evacuate. Tr. Vol. 2 at 205; Tr. Vol. 5 at 145-47.

Rockdusters Robert Tarvin and Jerry Short, who were working in Sub Main B, were concerned about the extremely dusty conditions and an air reversal. Tr. Vol. 1 at 427-30. Tarvin and Short went to the 459 switch, where Tarvin called CO Supervisor House to find out what was happening. Tr. Vol. 1 at 431-32. House told Tarvin that men had reported that brattices were blown out and that he should clear the track because injured men were coming through. Tr. Vol. 1 at 433-34. House did not tell Tarvin that there had been an explosion, did not tell Tarvin that there was an evacuation, and did not even tell Tarvin that he should find his supervisor. Ibid.

After talking to House, Short and Tarvin met Foreman Blevins near the 459 switch. Dec. at 11; Tr. Vol. 1 at 435. Unaware that an evacuation had been undertaken, Blevins ordered Tarvin and Short to get fire extinguishers and board his manbus to go and fight a fire. Dec. at 12; Tr. Vol. 1 at 437-38.

Meanwhile, miner Nelson Banks, who had been assigned to work in the No. 2 East Section, arrived at the E panel on his own and continued inby toward the No. 4 Section. Dec. at 12; Tr. Vol. 5 at 158. Miners Sammy Riggs, Charles Smith, Clarence Boyd, Chris Key, and Terry Stewart arrived at the E panel after Banks and saw Tony Key and the injured miners. Dec. at 11; Tr. Vol. 1 at 310; Gov't Ex. 10 at 12-17. Riggs told Chris Key that

there had been an ignition in the No. 4 Section and that he was going to help Adams. Tr. Vol. 2 at 291-92; 318. Boyd told Chris Key and McIe that he too was going to help Adams. Dec. at 11-12; Tr. Vol. 2 at 291-92, 318. Foreman Key did not tell Banks, Riggs, Smith, Boyd, or Stewart to evacuate. Tr. Vol. 1 at 224. Boyd, Riggs, Smith, and Stewart proceeded inby on their own. Tr. Vol. 2 at 313. Chris Key took Tony Key, McIe, and Palmer and proceeded out of the mine on a manbus. Dec. at 12; Tr. Vol. 2 at 292, 313; Gov't Ex. 10 at 13-14.

In Sub Main B, Foreman Blevins met Tony Key and the two injured miners, McIe and Palmer, who were being driven out of the mine by Chris Key. Tr. Vol. 1 at 407-08. Foreman Robertson and belt crew members, including miners Sexton, Rose, Johnson, Ashworth, Sorah, Riles, and Hallman, were also going through the area. Tony Key testified that he told Blevins that there had been a roof fall and an explosion, that ventilation was damaged, and that there was a possibility of another explosion. Dec. at 12; Tr. Vol. 6 at 91, 161-62. Blevins, however, told miners that they needed to go fight a fire and that they would have to put their self-rescuers on when they got to the No. 4 Section. Tr. Vol. 1 at 443-44.

Blevins asked for three volunteers to go with him to the No. 4 Section. Tr. Vol. 1 at 447; Tr. Vol. 2 at 163-64, 183.

Both Sexton and Rose testified that Blevins never mentioned that a miner was injured on the No. 4 Section. Tr. Vol. 2 at 154, 203. Ashworth, Sorah, and Johnson volunteered and got on Blevins' manbus. Dec. at 12; Tr. 1 at 446-49; Tr. Vol. 2 at 183. Tarvin and Short declined to do so because they did not want to go inby to fight a fire. Dec. at 12; Tr. Vol. 1 at 445-46; Vol. 2 at 183-84.

Instead of telling the other miners to evacuate, Blevins told Robertson to go to a phone to call House and tell him that the injured miners were on their way out of the mine. Tr. Vol. 1 at 448. Sexton and Rose testified that Blevins told Robertson to come back and help when he was done. Tr. Vol. 2 at 121, 186. Robertson took the rest of the belt crew that was with him, except for Hallman, to make the call. Tr. Vol. 1 at 448-49. Riles understood that after the call, instead of evacuating, they would come back and help fight the fire. Tr. Vol. 5 at 147. As Blevins requested, instead of leaving the mine, Tarvin, Short, and Hallman waited at the D panel switch for seven to eight minutes for Robertson to return. Dec. at 12; Gov't Ex. 10 at 5; Tr. Vol. 1 at 448-49. The miners were still waiting when the second explosion occurred. Tr. Vol. 1 at 449-50.

Meanwhile, after the first explosion, miners Lonnie Willingham, Tom Connor, and Alvin Bailey were working in the F

panel headgate building seals. Tr. Vol. 2 at 372-76. Their supervisor was Foreman Blevins. Tr. Vol. 2 at 376, 406. Although JWR had undertaken an evacuation, there is no indication that any supervisor tried to contact the three miners after the first explosion. Connor testified that Bailey, who was moving supplies, was working near a phone and would have heard a page. Tr. Vol. 2 at 417-18.[6]

Randy Jarvis, who was also supervised by Blevins, was working by himself in the bleeders near the longwall crew. Tr. Vol. 3 at 178-82; Gov't Ex. 12. Although there were phones in strategic locations in the mine, Jarvis testified that he was never contacted after the first explosion (Tr. Vol. 3 at 178-82, 225), and there is no indication that anyone attempted to contact him.[7]

At about 6:10 p.m., miners Banks, Riggs, Smith, Boyd, and Stewart arrived at the No. 4 Section switch. They started walking the track entry into the section. By that time, or a few minutes later, miners Knox, Mobley, Nail, Johnson, Sorah,

---

[6] After the second explosion, Connor was told to evacuate when he answered a page for Blevins or Robertson. See Tr. Vol. 2 at 373-77.

[7] Jarvis was told to evacuate only when he called House after feeling the effects of the second explosion. See Tr. Vol. 6 at 180-87. Jarvis testified that, even then, House did not tell him that there had been two explosions and only told him that there was a blown overcast. Tr. Vol. 3 at 184.

and Ashworth and Foreman Blevins arrived at the No. 4 Section, where injured miner Adams had remained since the first explosion. At about 6:15 p.m., the second explosion occurred. Dec. at 13.

3. The second explosion, which was much more powerful than the first, started in the No. 2 entry of the No. 4 Section. Almost all of miners who were underground felt the effect of the second explosion. Dec. at 13. Tarvin, Short, and Hallman, who had been told to wait for Robertson at the D panel switch, were knocked into a nearby crosscut by the surge of air. Tr. Vol. 1 at 449-50. Miners from the longwall crew and the crew at the 459 switch also were knocked off their feet. Tr. Vol. 2 at 18-21; Tr. Vol. 5 at 146. Adams and the twelve miners who had gone back into the area of the first explosion were killed. Dec. at 13-14.

4. The foregoing evidence compels the conclusion that JWR failed to comply with the "assemble and lead" provision of the FF&E plan. Although JWR had undertaken an evacuation of the mine (Tr. Vol. 5 at 382-83), not all miners were assembled promptly and led out of the mine. The only efforts to evacuate miners after the first explosion were efforts to evacuate the four injured miners and, possibly, the four miners in the longwall crew. Any efforts to assemble and lead the longwall

crew out of the mine, moreover, were not prompt: they were made only after the longwall supervisor himself had to call the CO room to find out what was causing the dusty conditions on the longwall. No efforts were made to tell the other three supervisors working underground that JWR had undertaken an evacuation.

Many miners, including Banks, Riggs, Smith, Boyd, Stewart, Mobley, Knox, and Nail were allowed to wander on their own into the area of the first explosion. There is no evidence that any attempts were made to even locate many of the hourly miners working underground, including Willingham, Connor, Bailey and Jarvis.

Between the first and second explosions, all but four of the 32 miners working underground remained in the same area of the mine or moved closer to the area of the first explosion. See Gov't Ex. 12 and 13. Thirteen miners died in the second explosion. All of the miners felt the effects of that explosion; if it had been more powerful, even more miners might have been killed. If JWR had complied with its responsibility as the operator of the mine to promptly assemble and lead the miners out of the mine -- instead of effectively abandoning them to an underground chaos of confusion, miscommunication, and non-communication -- it is likely that far fewer miners would have

been killed. The evidence compels the conclusion that JWR failed to evacuate the miners in the manner required by the plan, and thus violated 30 C.F.R. § 75.1101-23(a).

II.

THE JUDGE ERRED IN REDUCING THE SECRETARY'S PROPOSED PENALTY FOR THE VIOLATION OF 30 C.F.R. § 75.360(b)(3) BY MORE THAN 95 PERCENT

Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), requires the Commission and Commission judges to consider six criteria in assessing a civil penalty. The six criteria are as follows: (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 gravity of the violation; (5) the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of a violation; and (6) the effect of the penalty on the operator's ability to continue in business. Although a judge has broad discretion in assessing penalties, such discretion is not without limits and must reflect proper consideration of the penalty criteria set forth in Section 110(i). Fort Scott Fertilizer-Cullor, Inc., 19 FMSHRC 1511, 1517 (1986). A penalty assessment that lacks record support, is "infected by plain error," or otherwise constitutes an abuse of

the judge's discretion should be vacated. U.S. Steel Corp., 6 FMSHRC 1423, 1432 (1984).

A judge who assesses penalties that "substantially diverge" from the Secretary's proposed penalties is required to adequately explain that divergence. Unique Electric, 20 FMSHRC 1119, 1123 n.4 (1998) (citation omitted); Cantera Green, 22 FMSHRC, 616, 621 (2000). See also Virginia Slate, 23 FMSHRC 482, 493 (2001) (failure to explain a reduction of 57 percent); Douglas R. Rushford Trucking, 22 FMSHRC 1127, 598 (2000) (failure to explain a reduction of 88 percent). Such a requirement is necessary to avoid the appearance of arbitrariness and to make meaningful review possible. Cantera Green, 22 FMSHRC at 621-23.

In this case, the judge provided no reasoned explanation of why he reduced the penalty for the violation of 30 C.F.R. § 75.360(b)(3) from the $55,000 proposed by the Secretary to $2,500 -- a reduction of more than 95 percent. The only part of the judge's decision that can possibly be construed as an explanation for the reduction is a statement in a footnote that "the inadequate preshift examination did not contribute to the fatalities that resulted from the explosions and [] other violations of section 75.360 cited pursuant to section 104(d) of the Act have been assessed by the Secretary at similar amounts."

Dec. at 56 n.58. Under Commission case law, neither of the statements is an adequate explanation for the reduction.

Contrary to the judge's suggestion, the notion that the violation may not have contributed to the thirteen fatalities in this case is not a proper explanation for reducing the penalty. The judge found that the violation resulted in miners entering one of the nation's gassiest mines and proceeding inby to a section that had not been completely examined. The judge noted that at the time the miners were sent underground, the fan had been off, ventilation had been disrupted, and ventilation tests required by the preshift examination had not been conducted. The judge also noted that diesel and electric equipment was in place and that the operator was trying to restore power during the shift. Dec. at 54.

Based on these circumstances, the judge found that the failure to conduct a complete preshift examination was significant and substantial -- i.e., that it was reasonably likely to result in miners being seriously injured or killed in a methane-related ignition or explosion. He also found that the violation was serious. Dec. at 54-55. Even if the violation may not have actually resulted in an ignition or explosion -- a point the Secretary does not concede -- that does not detract from the violation's seriousness. See Consolidation Coal Co.,

18 FMSHRC 1541, 1550 (1996) (the focus of the seriousness analysis "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs"). See also Elk Run Coal Co., 27 FMSHRC ___, No. WEVA 2003-149, slip op. at 8-9 (Dec. 12, 2005) (even in the S&S analysis, the fact that the violation did not actually result in an injury-producing event is not dispositive). If the judge's statement that the violation did not contribute to the fatalities in this case was intended to supply an explanation for the reduction in penalty, it was an inadequate explanation.

The judge's statement that the Secretary has assessed other violations of Section 75.360 at the amount he assessed the violation in this case was also an inadequate explanation. The Commission has repeatedly held that the six penalty criteria set forth in Section 110(i) of the Act are exclusive, and that a judge errs by considering other factors. See, e.g., RAG Cumberland Resources LP, 26 FMSHRC 639, 658-59 (2004), aff'd on other grounds, D.C. Cir. No. 04-1427 (Nov. 10, 2005) (unpublished) (the judge erred by considering the breach of a Mine Act purpose); Jim Walter Resources, Inc., 19 FMSHRC 498, 501 (1997) (the judge erred by considering deterrence); Ambrosia Coal & Construction Co., 18 FMSHRC 1552, 1565 (1996) (same).

The amount the Secretary has proposed for violations of the same standard in other cases is not one of the six statutory penalty criteria.

For these reasons, the judge's consideration of that factor cannot be deemed a reasoned explanation of the penalty reduction in this case.

Even if the amount the Secretary proposed in other cases were a legally permissible consideration in principle, it was not a factually meaningful consideration in this case. This is so because the document relied on by the judge did not provide the judge with enough information to make a meaningful comparison between the Section 104(d) violations of Section 75.360 described in the document and the violation in this case.[8] With respect to each violation, the document indicated the type of action (i.e., a Section 104(d) citation or order), the assessment type (i.e., unwarrantable), that the violation was S&S, and whether the violation was associated with an excessive history of violations. The document did not indicate the precise level of negligence, the precise level of gravity, or the precise violation history -- all of which are factors that the Secretary considers in proposing a penalty and that may vary significantly among violations that are all cited as

[8] The document was a report on the assessed violations history of JWR's No. 5 Mine.

unwarrantable and S&S. See 30 C.F.R. § 100.3-5. Indeed, if anything meaningful can be gleaned from the prior assessments listed in the document, it is that JWR should be assessed a greater penalty for the repeated violation here, not that it should be assessed the same penalty. See Coal Employment Project v. Dole, 889 F.2d 1127, 1129 (D.C. Cir. 1989) (under the statutory criteria, repeated violations of the same standard should result in a greater penalty).

The judge had an obligation to provide a well-reasoned and statutorily permissible explanation for reducing the penalty for JWR's failure to conduct a complete preshift examination by more than 95 percent. He did not do so, and his penalty assessment must therefore be vacated.

III.

THE JUDGE ERRED IN FINDING THAT THE VIOLATION OF 30 C.F.R. § 75.1101-23(c) WAS NOT SIGNIFICANT AND SUBSTANTIAL

The legal standard used by the Commission in determining whether a violation is "significant and substantial" within the meaning of Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), was established in Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). In Mathies, the Commission stated that to establish that a violation of a mandatory safety standard is "significant and substantial," the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies, 6 FMSHRC at 3-4 (citing Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981)). The Commission has stressed that an evaluation of the reasonable likelihood of injury should assume continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (1985).

Based on the testimony of numerous miners, the judge correctly found that JWR failed to train its miners in firefighting activities through the type of on-site simulated fire drills required by the plain language of 30 C.F.R. § 75.1101-23(c). Dec. at 70. Significantly, the judge found that JWR's violation of the standard was not limited to isolated instances, and instead represented a "general" failure to provide the required training. Dec. at 70.

Emphasizing that the No. 5 Mine is one of the nation's gassiest mines and that it experiences fires (Dec. at 71), the judge recognized that a failure to train miners in how to fight a fire increases "the likelihood of the miners exhibiting ineptitude in fire suppression techniques when confronted with a

fire, the likelihood of their confusion in how to respond to a fire, and even the likelihood of panic in the event of a fire." Dec. at 52. Nonetheless, the judge found that the Secretary failed to establish that JWR's general failure to provide on-site, hands-on fire drill simulations was reasonably likely to result in an injury because he concluded that JWR had "given [] other types of instruction and training." Dec. at 72.

In so finding, the judge erred by failing to address the testimony of MSHA's Special Assistant to the Administrator for Coal Mine Safety and Health, Kenneth Murray, explaining the critical importance of requiring training through on-site fire drill simulations. Murray testified that the purpose of a fire drill simulation is to prepare miners, in a safe non-threatening environment, "to react in the event that they are ever faced with a real-life disastrous emergency situation." Tr. Vol. 9 at 81. As Murray explained, the reason for requiring repeated fire drills that involve on-site simulations is "the hope that the this training w[ill] sink in and become automatic when faced with the danger." Tr. Vol. 9 at 81-82.

The tragic events of this case dramatically demonstrate Murray's point. For example, as the judge recognized, the standard required training -- both oral and hands-on -- in the use of self-contained self-rescuers ("SCSRs"). Dec. at 66;

Gov't Ex. 34. When, despite the fact that an evacuation had been undertaken, Foreman Blevins asked for volunteers to travel to the No. 4 Section to fight a fire, Blevins informed the miners that the volunteers would need to be willing to wear their SCSRs. Tr. Vol. 1 at 442-47. SCSRs, however, are never to be used to fight fires because they contain only enough oxygen to escape from the mine. Tr. Vol. 8 at 482-83; Tr. Vol. 2 at 482. JWR's fire drill records indicated that Wendell Johnson and Joseph Sorah, two of the three miners to accept Blevins' request for volunteers, had not participated in any fire drill simulations. JWR Ex. 164. In contrast, Robert Tarvin, who recalled from the training he had received that SCSRs were not to be used to fight fires, refused to volunteer and used that knowledge to save Jerry Short's life. Tr. Vol. 1 at 442-46.

The undisputed evidence also establishes that after the first explosion, Tony Key was not able to use his SCSR correctly. Tr. Vol. 6 at 68-9; Vol. 7 at 57. As a supervisor, Key was responsible for providing some of the on-site fire drill simulations required by the standard. There is no evidence that he did. See Tr. Vol. 6 at 102-07.

The judge also erred by relying on evidence that JWR had provided firefighting instruction required by other standards.

Dec. at 72. In finding that miners had received other instruction on firefighting, the judge noted the testimony of "virtually every miner witness" that he had been instructed in many of the topics covered by the fire drill section of the plan. See Dec. at 72 n.73. Many of the miner witnesses, however, testified that they received much of that instruction during training required under 30 C.F.R. Part 48, e.g., during annual refresher training. See e.g., Tr. Vol. 2 at 47-49 (Corbin); Tr. Vol. 2 at 526-27 (Barnes); Tr. Vol. 2 at 297-99 (Chris Key); Tr. Vol. 3 at 25-26 (Dickerson); Tr. Vol. 3 at 410-13 (Dye); Tr. Vol. 2 at 106-07 (Sexton); Tr. Vol. 6 at 286-87 (Parker); Tr. Vol. 2 at 296-97 (Chris Key); Tr. Vol. 2 at 199, 219 (Rose); Tr. Vol. 4 at 300-01 (Clements); Tr. Vol. 4 at 58-61 (Bonner); Tr. Vol. 5 at 33-34 (Terry); Tr. Vol. 5 at 152-74 (Riles). In determining whether a violation is reasonably likely to result in injury, it is improper to consider the existence of measures that are taken because they are required by other standards. Buck Creek Coal Inc. v. FMSHA, 52 F.3d 133, 135 (7th Cir. 1995).

The judge's reliance on other firefighting training provided by JWR was also improper for another reason. In determining whether a violation is reasonably likely to result in injury, it is improper to presume that miners will exercise

caution in addressing the hazard created by the violation. Eagle Nest, Inc., 14 FMSHRC 1119, 1121-22 (1992). The judge's determination that the violation was not reasonably likely to result in injury given the other firefighting training provided by JWR improperly presumed that miners confronting a fire would exercise caution and apply that other training.

The judge's reliance on other training provided by JWR was particularly inappropriate given the facts in this case. In promulgating her regulations on training, the Secretary determined that on-site fire drill simulations are an essential component of that training. As Special Assistant Murray testified, on-site simulations are different from other training and are critical in preparing miners to safely respond in difficult emergency situations where they are likely to panic and be confused.

Again, Murray's point is perfectly illustrated by the tragic events in this case. It is undisputed that all miners received training on SCSRs under Part 48. E.g., Tr. Vol. 5 at 159-60. Indeed, Tony Key testified that one of the main subjects covered in annual refresher training was SCSRs. Tr. Vol. 6 at 99. Nonetheless, during the stressful period between the first and second explosions, neither Key (who could not get his SCSR to work), nor Blevins (who asked for volunteers who

would be willing to wear their SCSRs to fight a fire) applied that training. Nor, apparently, did Ashworth, Johnson, or Sorah, the three miners who accepted Blevins' request for volunteers.

In addition, if the miners had been confronted with other emergencies during which other critical provisions of the FF&E plan should have been applied, the miners likely would have been even less successful in implementing those provisions. This is so because, unlike with respect to SCSR instruction, very few miners testified that JWR provided any specific training on some of those provisions.

For example, as the judge found, the standard and the plan required JWR to provide on-site fire drill simulations that included having miners who were not assigned to specific jobs "physically travel to the posted evacuation map." Dec. at 69, citing Gov't Ex. 34 at V.a.3 & V.a.7. None of the supervisors who testified in detail about the training they provided on firefighting, however, testified that that training included any specific discussion of the assembly requirement for miners who were not assigned specific jobs during a fire. See Tr. Vol. 3 at 72-98 (Franklin); Tr. Vol. 4 at 175-84 (Puckett); Tr. Vol. 6 at 366-404, 457-88, 47-80 (Brown); Tr. Vol. 12 at 492-508, 526-36 (Mabe); Tr. Vol. 5 at 227-33 (Duvall); Tr. Vol. 12 at 234-40,

(Thrasher); Tr. Vol. 6 at 102-07 (Tony Key). The few fire drill records JWR maintained show that only the surface miners received instruction on the assembly requirement. See Gov't Ex. 35. Similarly, few of the miners who testified about the firefighting training they received indicated that that training specifically covered the assembly requirement -- even though many of the miners testified about the topics covered in their training. See e.g., Tr. Vol. 1 at 254-66 (McIe); Vol. 2 at 38-50 (Corbin); Vol. 2 at 106-07, 161 (Sexton); Tr. Vol. 2 at 199-232 (Rose); Vol. 2 at 295-303 (Chris Key); Vol. 2 at 344-45) (Ogletree); Vol. 2 at 473-94, 524-27 (Barnes); Vol. 3 at 197-213 (Jarvis); Vol. 3 at 24-30 (Dickerson); Vol. 3 at 338-63) (Maxwell); Vol. 3 at 403-20 (Dye); Vol. 4 at 33-38 (Terry); Vol. 4 at 55-67 (Bonner); Vol. 4 at 292-304 (Clements); Vol. 5 at 152-74 (Riles); Vol. 5 at 297 (Goggins); Vol. 6 at 269, 285-304 (Parker).

Again, the events in this case underscore the seriousness of JWR's failure to provide the required training on the assembly requirements for miners not assigned a specific firefighting job during a fire. The failure of miners to assemble at a designated spot in an emergency, so that they can be promptly accounted for and led out of the mine if an evacuation becomes necessary, is likely to have catastrophic

consequences -- just as JWR's failure to assemble all men promptly and lead them out of the mine did in this case.[9]

IV.

THE JUDGE ERRED IN REDUCING THE SECRETARY'S PROPOSED PENALTY FOR THE VIOLATION OF 30 C.F.R. § 75.1101-23(c) BY MORE THAN 99 PERCENT

Astonishingly, the judge reduced the penalty for the violation of 30 C.F.R. § 75.1101-23 from the $ 55,000 proposed by the Secretary to $ 500 -- a reduction of more than 99 percent. As mentioned, the judge must provide a reasoned and permissible explanation for the reduction. The only part of the judge's decision that can possibly be construed as an explanation of the reduction is a statement in a footnote that the judge's assessment was "in the range of other assessments proposed by MSHA for moderately serious violations that resulted from the company's moderate negligence." Dec. 70 n.74. For essentially the same reasons as are discussed above at pp. 31-38 with respect to the violation of 30 C.F.R. § 75.360(b)(3), the judge's statement is not a reasonable explanation of the reduction.

---

[9] For the same reasons the judge erred in determining that the violation was not significant and substantial, the judge erred in concluding that the gravity of the violation was only "moderately serious." See Dec. at 69.

If there was a statutorily permissible basis for assessing such an astonishingly reduced penalty for JWR's "general" (Dec. at 70) failure to provide its miners with training that was designed to save their lives in the event of a fire, the judge had an obligation to explain what that basis was. He did not do so, and his assessment must therefore be vacated.[10]

CONCLUSION

For the reasons discussed above, the Commission should reverse the judge's dismissal of the citation alleging a violation of 30 C.F.R. § 75.1101-23(a), and remand for a determination of whether the violation was significant and substantial and an unwarrantable failure and for assessment of a penalty. The Commission should also vacate the penalty assessment for the violation of 30 C.F.R. § 75.360(b)(3) and remand to the judge with instructions for assessing an appropriate penalty. The Commission should likewise vacate the judge's finding that the violation of 30 C.F.R. § 75.1101-23(c) was not significant and substantial and was only moderately serious, and remand for application of the correct legal standard, evaluation of all the material record evidence, and reassessment of a penalty. In the alternative, the Commission

---

[10] The Commission need not reach this issue if it agrees that, as the Secretary asserts, the judge's assessment should be vacated because he erred in finding that the violation was only moderately serious. See p. 46 n.9, above.

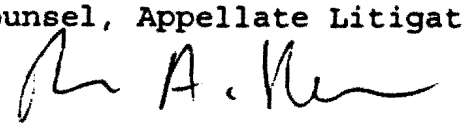
should vacate the penalty assessment for the violation of Section 75.1101-23(c) and remand the case to the judge with instructions for assessing an appropriate penalty.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation



ROBIN A. ROSENBLUTH
Attorney

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

CERTIFICATE OF SERVICE

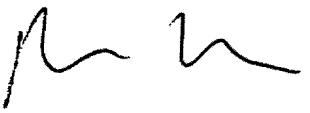
I hereby certify that a copy of the foregoing brief was hand-delivered, this 23rd day of January 2006, to:

Timothy M. Biddle
Thomas Means
Bridget E. Littlefield
Crowell & Moring
1001 Pennsylvania Ave. N.W.
Washington, D.C. 20004

and sent by U.S. mail postage pre-paid to:

Judith Rivlin
United Mine Workers of America
8315 Lee Highway
Fairfax, VA 22031

David M. Smith
Maynard, Cooper, & Gale, P.C.
Suite 2400
1901 Sixth Ave. North
Birmingham, AL 35203



Robin A. Rosenbluth