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.	)	

REPLY BRIEF FOR THE SECRETARY OF LABOR

ARGUMENT

I.

THE JUDGE ERRED IN DISMISSING THE CITATION ALLEGING A VIOLATION OF 30 C.F.R. § 75.1101-23(a)

On September 23, 2001, the roof fell in Jim Walter Resource's Inc.'s ("JWR's") No. 5 Mine, damaging a battery. The battery arced and ignited methane, causing an explosion. When JWR learned of the explosion, it undertook an evacuation of the mine. Tr. Vol. 5 at 382-83. Under the mine's firefighting and evacuation plan (the "FF&E" plan), a supervisor or designated person was required to "assemble all men promptly and lead the way during the evacuation." Gov't Ex. 4 at 3. In violation of that requirement, JWR made no attempt to evacuate the vast majority of the 32 miner working underground. Fifty-five minutes after the explosion, there was a second and more powerful explosion.

The second explosion killed thirteen miners.[1] Nothing in JWR's brief undermines the Secretary's position that JWR violated the FF&E plan and the standard pursuant to which the plan was submitted and approved.[2]

A. 30 C.F.R. § 75.1101-23(a) Applied To Explosion-Related Emergencies

Contrary to JWR's central argument, the judge correctly held that Section 75.1101-23(a), the standard under which the FF&E plan was submitted and approved, applied[3] both to fire-related emergencies and to explosion-related emergencies. 27 FMSHRC at 814. The plain language of the standard, the regulatory scheme as a whole, and the purpose of the standard all indicate that the standard applied to explosion-related emergencies.

1. It is well established that if a regulation's meaning is plain, the regulation cannot be construed to mean something different from 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) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). It is

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[1] The facts are set forth in detail in the Secretary's opening brief at pp. 22-33.

[2] The bases for the Secretary's position are set forth in detail in the Secretary's opening brief at pp. 10-33.

[3] Section 75.1101-23(a) was amended and redesignated as 30 C.F.R. § 75.1502 in 2002.

also well established that if a regulation's meaning is not plain, an adjudicatory body should give great deference to the interpretation of the agency entrusted with enforcing the regulation, and that the agency's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the regulation. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Bigelow v. Department of Defense, 217 F.3d 875, 877 (D.C. Cir. 2000), cert. denied, 532 U.S. 971 (2001).

In addition, it is well established that a statute or regulation that is intended to protect the safety or health of individuals must be interpreted broadly to achieve that goal. Emery Mining Co. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984).

2. Section 75.1101-23(a) stated:

> 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.

(Emphasis added). By its terms, the standard applied to all emergencies. Nothing in the language of the standard limited its application to fire-related emergencies.

Indeed, with the one exception of "fire fighting equipment," all of the elements listed in the standard -- "location of escapeways, exits, routes of travel to the surface, and proper evacuation procedures to be followed" -- were unlimited by any reference to fire and are by their nature elements that would come into play in any underground emergency. JWR's interpretation of the standard as applying only to fire-related emergencies 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). The fact that the Secretary did not include limiting language in the standard indicates that the Secretary did not intend to limit the standard.

The Secretary's decision not to include limiting language in the standard is especially significant because in another standard, 30 C.F.R. § 57.4362 (2001), the Secretary, when referring to evacuations in response to fire emergencies, specifically used the phrase "fire emergency." When the drafter includes a word in one place -- in this instance, the word "fire" -- and omits it in another, it is presumed that the drafter "acted intentionally and purposely

in the disparate inclusion or exclusion." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (citation and internal quotation marks omitted). The Secretary's decision to include the word "fire" in Section 57.4362, and not to include the "fire" in Section 75.1101-23(a), indicates that the Secretary did not intend to limit Section 75.1101-23(a) to fire emergencies.

JWR's interpretation of the standard as applying only to fire-related emergencies is also impermissible because it is inconsistent with the regulatory scheme as a whole. See Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (rejecting an interpretation that read the language of one provision in isolation from that of related provisions). An examination of the regulatory scheme as a whole demonstrates that Section 75.1101-23(a) applied both to fire-related emergencies and to explosion-related emergencies.

The Secretary's standards relating to self-contained self-rescuers ("SCSRs") were set forth in 30 C.F.R. § 75.1714 (2001). The SCSR standards by definition applied to both fire-related emergencies and explosion-related emergencies because, by definition, SCSRs are used in both fire-related evacuations and explosion-related evacuations. See, e.g., Dictionary of Mining, Mineral and Related Terms

("DMMRT"), 492 (2d ed. 1977) (defining a "self contained self-rescuer" as: "A respiratory device used by miners for the purpose of escape during mine fires and explosions . . ." (emphasis added)).

Section 75.1714-2(c) provided[4] that if wearing or carrying an SCSR was hazardous to the miner, the SCSR could be placed in a location no greater than 25 feet from the miner. Section 75.1714-2(e) provided that an operator could apply to the MSHA District Manager under Section 75.1101-23 for permission to place SCSRs more than 25 feet away from miners.[5] Consistent with Section 75.1714-2(e)'s specific cross-reference to Section 75.1101-23, when the District Manager granted a Section 75.1714-2(e) application, the modified requirements for the placement of SCSRs were included in the FF&E plan. See, e.g., Shamrock Coal Co., 14 FMSHRC 1300, 1301 (1992); C.W. Mining Co., 14 FMSHRC 396, 398 (1992). It would be illogical to set forth a procedure for modifying a standard that applied both to fire-related emergencies and to explosion-related emergencies under a standard that applied only to fire-related emergencies.

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[4] Section 75.1714-2(c) was in effect during the relevant period and remains in effect.

[5] Section 75.1714-2(e) was subsequently amended to reflect the redesignation of Section 75.1101-23 as Section 75.1502.

When Section 75.1101-23(a) is read in conjunction with Section 75.1714-2(e), it is plain that Section 75.1101-23(a) applied both to fire related-emergencies and to explosion-related emergencies.

3. The Secretary's interpretation of the standard, unlike JWR's interpretation, is consistent with the purpose of both the Mine Act and the standard -- i.e., the protection of miners during mine emergencies. In the Mine Act, Congress focused on the importance of safely evacuating all underground miners in all emergencies. In Section 317(f)(1) of the Mine Act, which the standard implemented, Congress mandated that the operator maintain "two distinct travelable passageways . . . designated as escapeways." 30 U.S.C. § 877(f)(1). It further provides: "Escape facilities approved by the Secretary . . ., properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency." Id. There is nothing in this provision that is limited or specific to fire emergencies. The legislative history of that provision makes clear that the escapeways were to protect miners in fires and in other emergencies. See S. Rep. No. 91-411, at 83 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Labor and

Public Welfare, 94th Cong., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 209 (1975) (noting that two escapeways are required because "mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface . . .)" (emphasis added). Section itself 317(f)(1) also discusses emergency-causing events other than fires, i.e., fumes and flood water.

Interpreting Section 75.1101.23(a) as applying only to evacuations in fire-related emergencies would leave miners confronting other emergencies unprotected. Such a safety-defeating interpretation would produce the anomalous result of treating similar situations differently, and should be rejected. 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).

Moreover, such an interpretation would tend to increase uncertainty and unpredictability in a fire or explosion-

related emergency because fires often lead to explosions and explosions often lead to fires. In an emergency, once an evacuation is undertaken, miners should not be forced to guess whether a particular evacuation procedure does or does not apply.

4. JWR's primary argument is that the standard should be read as applying only to fire emergencies because of the standard's placement in Subpart L, entitled "Fire Protection." It is well established, however, that if the meaning of a provision is plain, that meaning is controlling and cannot be overridden by the provision's heading. Demore v. Kim, 538 U.S. 510, 535 (2003) ("[T]he title of a statute has no power to give what the text of the statute takes away."); INS v. St. Cyr, 533 U.S. 289, 308 (2001) ("[A] title alone is not controlling.") (citing Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998)); M.A. v. State-Operated School District of the City of Newark, 344 F.3d 335, 348 (3d Cir. 2003) ("'Matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text") (citing and quoting Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519,

528-29 (1947)); National Center for Manufacturing Sciences v. DOD, 199 F.3d 507, 511 (D.C. Cir. 2000). Similarly, JWR's argument is at odds with the well-established principle that if the meaning of a provision is plain, that meaning is controlling and cannot be overridden by the provision's placement in a particular section. National Center for Manufacturing, 199 F.3d at 511.

Indeed, contrary to the central premise of JWR's argument, Subpart L was not "focused exclusively on 'Fire Protection'." Br. at 3. A number of standards in Subpart L were self-evidently aimed at explosion emergencies. For example, Section 75.1106-1, entitled "test for methane," related to the use of permissible flame safety lamps and required that methane detection devices be approved by the Secretary. Section 75.1106-1 was intended to protect against the accidental igniting of methane -- an explosion hazard. See, e.g., DMMT at 341 ("Methane is often referred to as combustible gases because it is the principal gas composing a mixture that, when combined with proper portions of air, will explode when ignited.") Significantly, Section 75.1106-1 implemented one of the provisions of the Mine Act's interim ventilation standards, 30 U.S.C. § 863(d)(1). It did not implement one of the Mine Act's fire protection standards, which are set forth in 30 U.S.C. § 871.

Similarly, Section 75.1101-2(i), entitled "emergency materials," required operators to have readily available brattice board, brattice cloth, and material to construct stoppings. Brattice board and brattice cloth are used in emergencies to construct barricades that are used to protect miners by isolating a sufficient quantity of good air after a fire or an explosion. See DMMT at 40 (defining "barricade"). Temporary ventilation controls may be necessary when an explosion blows out a control; fires generally do not damage ventilation controls. Tr. Vol. 7 at 362-63. The Secretary's inclusion of standards in Subpart L relating to explosion hazards indicates that the title of Subpart L was a "generally accurate but somewhat under-inclusive description" that cannot undo what the text of the standard made plain. United States v. Roemer, 514 F.2d 1377, 1380 (2nd Cir. 1975).

As reflected by the inclusion in Subpart L of the "test for methane" standard and the "emergency material" standard, it was logical for the Secretary to include standards relating to explosion emergencies in Subpart L because, as the judge found, explosions and fires are similar in nature, and because a fire creates an explosion risk and an explosion creates a fire risk. 26 FMSHRC at 627. See also Tr. Vol. 3 at 283-84. Moreover, the by-products of both

fires and explosions include dangerous gases that may have to be addressed in the same manner in an underground emergency, i.e., with SCSRs or barricades.

Contrary to JWR's reasoning (Br. at 5), the Secretary's interpretation of the standard is not undermined by the fact that each of the subsections of the standard referred in some way to "fire." The fact that each of the subsections referred to "fire" merely establishes the obvious -- that the standard addressed what was required with respect to fires. It does not establish that the standard did not also address what was required with respect to emergencies other than fires.

Indeed, subsection (a)(1) of the standard stated that the first requirement for the operator's FF&E plan was that it address "[e]vacuation of all miners not required for fire fighting activities[.]" That statement should be read as meaning that when no miners were required for fire fighting activities because the emergency was not a fire, all miners were to be evacuated. The language of the standard reflects simple common sense. If the emergency was a fire, the operator was to take certain specified steps to fight the fire if appropriate and evacuate those miners not needed to fight the fire; if there was no fire to fight or if it was

not appropriate to fight the fire, the operator was to evacuate all miners.

Finally, if there was any ambiguity in the standard, the Commission should give "particular deference" to the Secretary's interpretation because it is an interpretation of "longstanding duration." Excel Mining, 334 F.3d at 7 (citing and quoting Barnhart v. Walton, 535 U.S. 212, 220 (2002)). Section 75.1714-2(e)'s cross-reference to Section 75.1101-23(a), discussed above, indicates that since 1978, the year Section 75.1714-2(e) was promulgated, the Secretary interpreted Section 75.1101-23(a) as applying to explosion-related emergencies. In 1995, the Secretary again indicated, in a Federal Register notice, that she interpreted Section 75.1101-23 as applying to explosion-related emergencies. 60 Fed. Reg. 23567 (May 8, 1995) (stating that the standard required "each operator of an underground coal mine to adopt a program for mine evacuation in the event of an emergency, such as fire or explosion" (emphasis added)).

5. Because the plain meaning of Section 75.1101-23(a) was that it applied to explosion-related emergencies, the Secretary's promulgation in 2002 of an emergency temporary standard {"ETS"} that became 30 C.F.R. §§ 75.1501 and

75.1502 cannot establish that Section 75.1101-23(a) did not apply to explosion-related emergencies.

In any event, JWR's analysis of the promulgation of the ETS (Br. at 6-11) is inaccurate. Although the ETS broadened miner protection, it did not broaden the scope of the standard to apply to explosions. Instead, it clarified that the standard applied to explosions.

The ETS added a new standard, Section 75.1501, and revised Section 75.1101-23(a) and renumbered it as Section 75.1502. The ETS was promulgated in 2002 in response to the Willow Creek, JWR, and Quecreek disasters. See 67 Fed. Reg. 76658, 76659-60 (Dec. 12, 2002). The ETS became a final standard in 2003.

Section 75.1501 broadened miner protection by, inter alia, requiring operators to designate a responsible person to take charge during an emergency and requiring that all mines be evacuated when there is a mine emergency presenting an imminent danger to miners created by a fire, explosion, or gas or water inundation.

The language of Section 75.1501 clarified that the term "emergency" in Section 75.1101-23(a), now Section 75.1502, included fires, explosions, and gas and water inundations.

Significantly, the revised standard retained essentially the same language that the Secretary used in

Section 75.1101-23(a) requiring operators to adopt a program for the instruction of miners in "proper evacuation procedures to be followed in the event of a [mine] emergency." 30 C.F.R. § 75.1502.[6] If the new standard expanded the term "emergency" to include explosion-related emergencies for the first time, the new standard would not have retained the same language that was used in Section 75.1101-23(a). Indeed, as the preamble to the ETS stated, "Like existing section 75.1101-23, new section 75.1502 of the ETS provides a requirement for training [of] all miners in the proper evacuation procedures to be followed in the event of a mine emergency, the location of escapeways, exits, and routes of travel to the surface." 67 Fed. Reg. at 76661 (emphasis added).

In fact, the preamble language cited by JWR as support for its claim that Section 75.1502 expanded the meaning of the term "emergency" to include explosion-related emergencies shows that explosions, like fires, were covered by Section 75.1101-23(a). The cited preamble language stated:

> Under new paragraph (a), MSHA has expanded the existing program of instruction to include the proper evacuation procedures in the event of a mine emergency. This change reflects MSHA's

[6] The new standard, unlike the old standard, included the word "mine" in front of the word "emergency."

> determination that under the existing standards, miners are exposed to a grave danger caused by a mine emergency due to fire, explosion, or gas or water inundation.

67 Fed. Reg. at 76661 (emphasis added). Fires were undisputedly covered by Section 75.1101-23(a). MSHA's determination that the ETS was necessary to "expand[]" the program of instruction because, under Section 75.1101-23, miners were exposed to a grave danger caused by a mine emergency "due to fire, explosion, or gas or water inundation," could not mean that the expansion was necessary to broaden the coverage to include fires; therefore, it also could not mean that the expansion was necessary to include the other enumerated mine emergencies. Instead, the expansion was necessary to clarify that the evacuation procedures applied to such emergencies and that the plan should include "proper" evacuation procedures applying to such emergencies. Thus, the expansion merely clarified that what is a proper evacuation procedure for one type of covered emergency (e.g., fire) may not be a proper procedure for a different kind (e.g., explosion).

In addition, the ETS preamble contained other statements indicating that the new standard did not broaden the scope of the term "emergency." See 67 Fed. Reg. at 76659 ("MSHA has determined that new safety standards are

necessary to further protect miners when a mine emergency presenting an imminent danger to miners due to fire, explosion, or gas or water inundation occurs which requires an evacuation of miners") (emphasis added); 67 Fed. Reg. at 76661 (the ETS "focuses attention on safe procedures to be followed in the event of a fire, explosion, or gas or water inundation") (emphasis added); 67 Fed. Reg. at 76663 ("MSHA has developed estimates of the safety benefits of this ETS, which ensures that operators and miners have a clear understanding of actions and procedures to be followed in the event of a mine emergency") (emphasis added); 67 Fed. Reg. at 7660 ("Although the MSHA standards have been successful in addressing hazards and reducing risks created by fires, explosion, and gas or water inundations, MSHA has determined that the ETS is necessary") (emphasis added). In view of the Secretary's numerous statements indicating that she was not expanding the meaning of the term "emergency," JWR's contention to the contrary should be rejected. "Great deference" must be given to an agency's expressed intent as to whether its rule changes the existing law or merely clarifies it. Clay v. Johnson, 264 F.3d 744, 748 (7th Cir. 2003), and cases cited therein.

The Secretary's clarification in the ETS of the term "emergency" as including fire, explosion, and water and gas

inundations, the most common types of mine emergencies, was meant "to make assurance double sure" -- i.e., to make crystal clear what should have been adequately clear under Section 75.1101-23(a). Beehive Telephone Co. v. FCC, 180 F.3d 314, 319 (D.C. Cir. 1999) (quoting Macbeth) (agency was merely seeking to "make[] explicit what was already implicit."). See also Shook v. District of Columbia Financial Responsibility & Management Assistance Auth'y, 132 F.3d 775, 782 (D.C. Cir. 1998). "[W]hen an agency changes a regulation's language it does not necessarily follow that the change is legislative," i.e., substantive; "'new language need not imply new substance.'" First National Bank of Chicago v. Standard Bank & Trust, 172 F.3d 472, 479 (7th Cir. 1999) (quoting Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987)).

Certainly, the Secretary should not be penalized because of her understandable desire to focus operators' attention on their obligations during emergencies. In view of the tragic consequences that could result from a misunderstanding or failure to focus on Section 75.1101-23(a)'s requirements -- even if that misunderstanding was not legally justified -- it was eminently reasonable for the Secretary to determine that it was "[f]ar better to eliminate rather than to perpetuate [any] confusion"

(Homeowners North Shore, 832 F.2d at 413), and to promulgate a new standard that, among other things, clarified the scope of the existing standard.

B. JWR Had Notice That the Standard Applied To Explosion-Related Emergencies

JWR's assertion that it did not, as a constitutional matter, have notice that Section 75.1101-23(a) applied to explosions is also unconvincing.

First, and dispositively, JWR had actual notice that the standard applied to the evacuation undertaken in this case. Actual notice is adequate notice. Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1130-32 (D.C. Cir. 2002). After the first explosion, Communications Office Supervisor Harry House received a call from Foreman Tony Key during which Key told House that there had been an explosion. Tr. Vol. 6 at 85-6. House, who was responsible for responding to emergencies at the mine, responded to Key's call by undertaking an evacuation of the mine in accordance with the FF&E. Tr. Vol. 3 at 220; Tr. Vol. 5 at 382-83; Tr. Vol. 12 at 265. Indeed, House testified that, in responding to the emergency, he was implementing JWR's FF&E plan. Tr. Vol. 5 at 388. Although House's supervisor,

Frankie Lee,[7] initially testified that the FF&E plan applied to fires, he ultimately acknowledged that, in the event of an explosion, JWR was required to follow the FF&E plan. Tr. Vol. 3 at 225-6. The testimony of House and Lee indicates that JWR had actual notice that the plan applied to explosions. See Mendez v. Small, 298 F.3d 1154, 1159 (9th Cir. 2002) (on two occasions, individual claiming lack of notice had done what the statute required). If JWR had notice that the plan applied to explosions, it ipso facto had notice that the standard applied to explosions.

In any event, the plain meaning of the standard provided JWR with adequate notice. The courts have held that, to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997). As demonstrated above, a reasonably prudent mine operator could discern from the plain language of the standard, the regulatory scheme as a whole, and the purpose of the standard that it applied to explosion-related emergencies.

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[7] At the time of the hearing, Lee was still employed by JWR. Tr. Vol. 3 at 218.

In addition, MSHA's 1995 Federal Register statement indicating that the standard applied to explosion-related emergencies provided JWR adequate notice. AJP Construction, Inc. v. Secretary of Labor, 357 F.3d 70, 76 (D.C. Cir. 2004) ("If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation").

Even assuming the meaning of the standard was not plain, courts have held that if a safety-related provision is susceptible to two interpretations and it is unclear which interpretation is intended, a regulated party should apply the interpretation that is safer. Fluor Constructors, Inc. v. OSHRC, 861 F.2d 936, 941-42 (6th Cir. 1988). An interpretation of the standard that required operators to have a plan setting forth procedures to be followed in explosion-related emergencies, not just procedures to be followed in a fire-related emergency, is self-evidently the safer interpretation -- as the events in this case show.

C. The Plain Meaning of the Standard Was That Operators Were Required to Follow FF&E Plans During Emergencies

Section 75.1101-23(a) required implementation of evacuation procedures during an emergency, not just training in anticipation of an emergency. It stated:

> 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.

(Emphasis added). The word "follow" means "to act in accordance with." Webster's Third New World Dictionary at 883 (2002). The plain language of the standard thus required that the FF&E plan include, among other things, evacuation procedures "to be acted in accordance with" in the event of an emergency. JWR's truncated reading of the standard as requiring that operators only adopt a training program (Br. at 13-20) is impermissible because it reads the phrase "to be followed in the event of an emergency" out of the standard. See 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000); Murphy Exploration & Production Co. v. U.S. Dept. of the Interior, 252 F.3d 473, 481 (D.C. Cir. 2001).

JWR's interpretation is also impermissible because it is inconsistent with the regulatory scheme as a whole. Under JWR's interpretation, operators would not have been required to follow the modifications to the SCSR standard in

Section 75.1714-2 which, as discussed above, were included as provisions in the FF&E plan.

In addition, JWR's interpretation is nonsensical on its face. As the Commission has recognized, a standard should be interpreted so that it accomplishes its objective -- i.e., so that what it requires to be done is done with effect. RAG Cumberland Resources LP, 26 FMSHRC 639, 647 (2004) (citing cases), aff'd, D.C. Cir. No. 04-1427 (Nov. 10, 2005) (unpublished). An interpretation that required an operator to train miners on evacuation procedures "to be followed" in an emergency, but did not require that those procedures actually be followed in an emergency, would serve little purpose and reduce the standard to "a nullity." Secretary of Labor v. Twentymile Coal Co., 411 F.3d 256, 261 (D.C. Cir. 2005) (emphasis in original).

Indeed, JWR's interpretation would decrease safety. Training miners on procedures to be followed in an emergency when there is no assurance that those procedures are the procedures that will actually be followed would tend to increase chaos and confusion in an emergency -- precisely the opposite of the objective the standard was meant to achieve.[8]

[8] JWR asserts that requiring operators to follow the plan in an emergency would not serve the purpose of

Because the standard required operators to follow the evacuation provisions in the FF&E plan, those provisions were enforceable as mandatory standards. See UMWA Int'l Union v. Dole, 870 F.2d 662, 667 n.7 (D.C. Cir. 1989).[9]

D. The "Assemble and Lead" Provision Applied To the Evacuation Undertaken In this Case, and Was Violated By JWR

JWR's primary basis for asserting that the "assemble and lead" provision did not apply to the evacuation undertaken in this case is that the standard and the plan

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protecting miners in emergencies because "flexibility and common sense are often necessary to respond safely to dangerous circumstances." Br. at 20. JWR ignores the fact that a plan could be drafted to allow the necessary flexibility and common sense; indeed, permitting flexibility is the very purpose of providing for mine-specific mine plans under the Mine Act. The inevitable effect of having no required evacuation procedures is not flexibility and common sense; it is confusion and chaos.

JWR relies on testimony that adherence to Section V.a.7 of the FF&E, which provided that miners not assigned to specific fire fighting duties were to assemble at the posted evacuation map, would have been dangerous on the night of the disaster because the map was inby a damaged overcast. Br. at 20 n.14. The argument is flawed for two reasons -- (1) because Section V.a.7 applied when there was a fire, and there was no fire in this case (see 27 FMSHRC 816), and (2) because JWR had undertaken an evacuation of the mine in response to the explosion and, under Section II.3, miners should have promptly been led out of the mine.

[9] Contrary to JWR's assertion (Br. at 19-20), nothing in the language or the reasoning of Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), militates against treating the provisions in the FF&E plan as enforceable mandatory standards.

did not apply to explosion-related evacuations. Br. at 1-27. As demonstrated above, the plain meaning of the standard was that it applied to explosion-related emergencies. As demonstrated in the Secretary's opening brief, the plain meaning of the "assemble and lead" provision (Section II.3) was that it applied to emergency evacuations in response to fires and in response to explosions. Secy's Opening Br. at pp. 17-21.[10]

1. JWR also argues that the use of the phrase "the evacuation" instead of the phrase "an evacuation" in the "assemble and lead" provision (Section II.3) indicates that

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[10] JWR argues that the plan should not be interpreted as applying to the explosion in this case because, after the explosions, three members of MSHA's investigation team stated in depositions that JWR had violated the standard but not the plan. Br. at 20-22. This argument fails for four reasons. First, even if the witnesses' statements were inconsistent with the Secretary's interpretation, non-formal agency interpretations are not relevant in determining the meaning of a provision. United States v. Lachman, 387 F.3d 42, 58 (1st Cir. 2004). Second, the record does not reflect that in so testifying, the MSHA personnel understood or were focusing on the fact that JWR had undertaken an evacuation after the first explosion, thereby triggering the "assemble and lead" requirement. The witnesses' failure to focus on that fact is understandable given that, apart from the four injured miners, there was no attempt to effectuate that evacuation. Third, as one of the witnesses explained, in a citation, the Secretary cites the regulation and not the plan. Tr. Vol. 7 at 66-7. The witnesses' testimony reflects that practice. Finally, it should be noted that, contrary to JWR's assertion (Br. at 30 n.20), of the three witnesses, the two who testified at the hearing both testified that they believed that the "assemble and lead" provision was violated. Tr. Vol. 7 at 67, Vol. 9 at 28.

the provision was intended to apply only to evacuations required by the plan and not to evacuations otherwise undertaken in response to dangerous emergency conditions. Br. at 28-29. That argument is unavailing. Section II.3 stated that "[a] supervisor or designated person will assemble and lead the way during the evacuation." The word "the" is "used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context of the situation." Webster's Third New World Dictionary at 2368 (emphasis added). When an evacuation is undertaken in response to an emergency, "the context of the situation" indicates that the evacuation in question is the evacuation responding to the emergency.

The courts have recognized that hypertechnically reading meaning into a provision's use of the word "the" instead of the word "a" is "hardly the wisest place to begin [] interpretation." Limited, Inc. v. Commissioner of Internal Revenue, 286 F.3d 324, 333 (6th Cir. 2002) (citing Georgetown University Hospital v. Sullivan, 934 F.2d 1280, 1284 n.4 (D.C. Cir. 1991)).[11] In this case, a contextual and

[11] JWR asserts that because other sections of the plan focused on fires, Section II, the evacuation procedures section, should be interpreted to apply only to fires. Br. at 24. Precisely the opposite is true. The inclusion of

common-sense reading of the phrase "the evacuation" encompasses the evacuation undertaken in response to the explosion in this case.

2. JWR asserts that if the "assemble and lead" provision is found to be ambiguous, the Secretary bears the burden of establishing its meaning. Br. at 25-27 (citing Jim Walter Resources, Inc. 9 FMSHRC 903, 908 (1987)). As demonstrated in the Secretary's opening brief, because JWR submitted the plan representing that it complied with the standard and the Secretary approved the plan based on that representation, any ambiguity as to the scope of the provision should be resolved so as to render it consistent with the standard. Secy's Opening Br. at 10-12. Further, the Secretary's interpretation of the provision, not JWR's interpretation, is entitled to deference because the Secretary is entrusted with enforcing the plan. See Excel Mining, 334 F.3d at 5-7, and Secy's Opening Br. at 14-17.[12]

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the word "fire" in other sections of the plan and the omission of the word "fire" in any provision of Section II is strong evidence that the Secretary did not intend to limit Section II to fire-related evacuations. Barnhart v. Sigmon Coal Co., 534 U.S. at 452. That most of the sections of the plan applied to fires is understandable given that fires, unlike explosions, can be fought, and miners need to be trained in the location and use of firefighting equipment.

[12] To the extent the decision in Jim Walter, 9 FMSHRC at 907, is inconsistent with those principles, the Secretary

It is illogical to assert that the Secretary is entitled to less deference when a plan provision is interpreted than when a standard is being interpreted, because the operator has more involvement in drafting a plan provision and therefore more opportunity to clarify any ambiguity in the plan provision. It is well established that if the meaning of a provision is unclear, a regulated party should avail itself of avenues for clarification and ask the agency what the agency's interpretation is. Village of Hoffman Estates v. Flipside Hoffman Estates, 455 U.S. 489, 498 (1982); Ford Motor Co. v. Texas Department of Transportation, 264 F.3d 493, 509 (5th Cir. 2001). The bilateral negotiation process for producing a mine-specific plan provides an ideal avenue for clarification. If JWR believed that there was an ambiguity in the plan -- a plan which it drafted and submitted -- all it had to do was seek clarification during the ensuing negotiation process.

3. JWR asserts that it did not, as a constitutional matter, have notice that the "assemble and lead" provision applied to the evacuation undertaken in this case. Br. at 31. Because the plain meaning of the standard pursuant to which the plan was adopted indicated that it applied to the

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respectfully disagrees with the decision and submits that the Commission should follow the framework it used in Energy West Mining Co., 17 FMSHRC 1313, 1317 n.6 (1995).

evacuation in this case, the notice argument fails. Freeman United, 108 F.3d at 362.

In any event, JWR cannot rely on prior enforcement history to bolster its notice argument. JWR relies on testimony that, after a 1993 explosion during which JWR rescued miners but did not evacuate, the Secretary did not cite JWR for violating a provision similar to Section II.3. Br. at 31-32. As JWR acknowledges, JWR did not undertake an evacuation in 1993. Br. at 33 n.22. There is no evidence, therefore, that the requirements of Section II.3 applied.[13]

5. JWR makes the remarkable claim that after it undertook the evacuation, it complied with the "assemble and lead" requirement. JWR makes this claim despite the undisputed fact that three of the four supervisors underground were not even told that the mine was being evacuated; that JWR made no attempt to try to contact many of the hourly miners who were working underground; that many of the miners were allowed to wander into the area of the first explosion on their own, unaware that the mine was being evacuated; and that, between the first and the second explosion, all but four of the miners working underground

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[13] For reasons set forth at note 10 above, JWR's reliance on testimony by MSHA witnesses that the plan was not violated is likewise unavailing.

remained in the same area of the mine or moved closer to the area of the first explosion.[14]

Contrary to JWR's suggestion (Br. at 33-34), the Secretary is not faulting JWR for trying to rescue and evacuate the miner injured and immobilized by the first explosion. The Secretary is faulting JWR for failing to warn any of the supervisors or the miners who went into the area of the first explosion, either to fight a fire (which did not exist) or to help the injured miner, that an evacuation of all miners had been undertaken. See Tr. Vol. 3 at 226-27. Without knowledge that there was an evacuation, supervisors could not have promptly assembled and led their men (or designated someone to lead their men) in the evacuation. Without knowledge that there was an evacuation, supervisors also would not have known to focus on the critical need to send only miners necessary for the rescue into the area, and only miners who were trained and properly equipped to effectuate an emergency mine rescue. As Foreman Bennie Franklin, the only supervisor working underground that evening who found out that an evacuation had been undertaken, testified, "We knew better than to go in there because we didn't have the equipment to take care

[14] These facts are detailed in the Secretary's opening brief at pp. 22-33.

of the people." Tr. Vol. 3 at 71. The undisputed and overwhelming evidence compels the conclusion that the "assemble and lead" provision was violated. See Secy's Opening Br. at 21-33.

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

In reducing the Secretary's proposed penalty for the violation of Section 75.360(b)(3) by more than 95 percent, the judge erred by providing no reasoned explanation for the reduction. Under well-established Commission case law, the judge was required to provide such an explanation, and his failure to do so requires that the penalty assessment be vacated. See Secy's Opening Br. at 33-44. Nothing in JWR's brief undercuts that conclusion.

JWR asserts that because the judge vacated the part of the citation alleging a violation based on a failure to detect inadequate rockdusting, no further explanation was necessary. Br. at 37. JWR's argument is unavailing.

First, the argument fails because the judge did not proffer that reason as the basis for the penalty reduction. An action cannot be upheld on review "merely because findings might have been made and considerations disclosed

which would justify [the action]. There must be [] a responsible finding." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Accord Cantera Green, 22 FMSHRC 616, 621 (2000).[15]

In any event, JWR's proffered reason would not have been a proper basis for reducing the penalty. The citation alleged that JWR violated Section 75.360(b)(3)'s preshift examination requirement for the September 23, 2001, day shift (1) because JWR failed to detect inadequate rockdusting and (2) because JWR failed to examine all areas required to be examined.[16] The judge found that JWR violated the standard for the second reason but not for the first reason. The fact that the judge found that JWR did not violate the standard for the first reason is legally irrelevant to the question of the appropriate penalty for the violation based on the second reason. The judge was required to base his analysis of that question solely on the six criteria for assessing a penalty specified in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Contrary to JWR's argument (Br. at 36), the fact that the Secretary proposed a $55,000 penalty for the citation

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[15] JWR's other proffered reasons for reducing the penalty fail for the same reason. The judge did not indicate that those reasons were the reasons he reduced the penalty.

[16] The facts relating to the pre-shift examination are set out in detail in the Secretary's Response Brief, pp. 2-5.

and the judge dismissed the part of the citation based on a failure to detect inadequate rockdusting does not mean that the Secretary did not consider the part of the citation the judge affirmed, i.e., the failure to examine all areas required to be examined, to warrant a $55,000 penalty standing on its own. The maximum penalty that could be assessed for the entire violation alleged in the citation was $55,000; the Secretary could not have proposed more. See 30 C.F.R. § 100.3(a)&(g) (2000).

III.

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

The judge erred in concluding that JWR's long-term and widespread failure to train miners working in one of the nation's gassiest mines in firefighting activities through the type of hands-on training required by the standard was not significant and substantial ("S&S"). The judge erred by relying on testimony that JWR had provided other types of training on firefighting, and by failing to consider undisputed evidence that training through hands-on simulations is qualitatively different from other training. JWR does not and cannot point to anything in the decision suggesting that the judge considered this critical testimony. JWR also does not and cannot point to anything

in the record indicating that the other training miners assertedly received included training on critical provisions in the FF&E plan.[17] See Secy's Opening Br. at 44-45 and Secy's Response Br. at 44-46. Accordingly, the judge's finding that JWR's long-term widespread violation was not S&S cannot stand.[18]

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

As demonstrated in the Secretary's opening brief, the judge in reducing the Secretary's proposed penalty for the violation of Section 75.1101-23(c) by more than 99 percent, erred by providing no reasoned explanation for the reduction. For all the reasons discussed in the Secretary's opening brief and in this brief at pp. 31-33, above, nothing

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[17] JWR suggests that the lack of record evidence that miners received any training on other critical provisions cannot be used against JWR because the Secretary had the burden of proof. Br. at 45 n.36. JWR's affirmative defense in this case, however, was that the failure to provide hands-on training on the firefighting provisions in the plan was at most a technical violation of the standard because JWR diligently provided other training on those provisions. See JWR Post-Hearing Brief at V 8-9, 14, 17-18. It is well-established that an operator has the burden of proving an affirmative defense to a violation. Southern Ohio Coal Co., 14 FMSHRC 1, 10 (1992).

[18] For the same reasons that the judge erred in finding that violation was not S&S, the judge erred in finding that the violation was of only moderate gravity.

in JWR's brief undercuts that conclusion. The judge's action cannot be affirmed on the basis of a finding which he assertedly could have made but which he did not make. Toler v. Eastern Associated Coal Co., 43 F.3d 109, 114 (4th Cir. 1995) (citing SEC v. Chenery Corp., 318 U.S. at 93-95).

CONCLUSION

For the reasons discussed above, and in the Secretary's opening brief, the Commission should grant the relief requested in the Secretary's opening brief.

Respectfully submitted,

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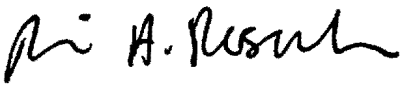

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