FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 30 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CONSOL PENNSYLVANIA COAL CO., LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-244 A.C. No. 36-07416-467981 Mine: Enlow Fork Mine

DECISION AND ORDER

Appearances: Matthew R. Epstein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor

James P. McHugh, Esq., Hardy Pence, Charleston, West Virginia, for the Respondent

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). A hearing was held concerning Citation Nos. 9076658 and 9079183 in Pittsburgh, Pennsylvania wherein the parties presented testimony and documentary evidence.[1]

[1] This Court issued a Partial Decision Approving Settlement on June 10, 2019, that disposed of Citation Nos. 9079153, 9079154, 9079155, 9079157, 9079159, 9079160, 9079163, 9079166, 9079165, 9079171, 9079173, 9079177, 9079176, 9077366, 9079184, 9077226, and 9078990.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

II. JOINT STIPULATIONS

The parties' joint stipulations are as follows:

1. Respondent is an operator as defined in Section 3(d) of the Mine Act at the mine where the citations were issued.

2. Enlow Fork Mine is a mine as defined in Section 3(h) of the Mine Act.

3. The operations of Respondent at Enlow Fork Mine are subject to the jurisdiction of the Mine Act.

4. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Mine Act Sections 105 and 113.

5. Enlow Fork Mine is owned by Respondent.

6. Payment of the proposed penalties will not affect the Respondent's ability to remain in business.

7. The individual whose name appears in Block 22 of each citation in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

8. The citations were properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated in each citation, as required by the Act.

9. Exhibit A to the above-captioned docket contains authentic copies of the citation sat issue.

10. Respondent stipulates to the authenticity and admissibility of the R-17 certified mine history form (GX-8).

Tr. 102-103; SB 1-2.[2]

III. SUMMARY OF TESTIMONY

On May 24, 2018, MSHA Inspector Bernard Caffrey was sent to the Enlow Fork Mine for a quarterly E01 inspection.[3] Tr. 17-18. Inspector Caffrey was also instructed to find several gas wells and see if they had the pillar protection permit for the plan submitted. Tr. 17-18. The gas wells were plotted on 75.1200 mine maps that had been submitted to MSHA since 2015. Tr. 113. Caffrey asked to see the pillar protection plan, but found that the mine did not have one. Tr. 18. Therefore, he issued Citation No. 9076658 for violating 30 C.F.R. § 75.1700.[4] Tr. 17-18. The Condition or Practice section of the citation stated:

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[2] References to the transcript of the hearing in this matter are designated "Tr." followed by the page number. References to joint exhibits are designated as "J" followed by the number. References to the Secretary of Labor's exhibits are designated as "GX." References to Respondent's exhibits are designated "RX." References to the Secretary's Post-Hearing Brief are designated "SB" followed by the number. References to the Secretary's Reply Brief are designated "SRB" followed by the number. References to the Respondent's Post-Hearing Brief are designated "RB" followed by the number. References to Respondent's Reply Brief are designated "RRB" followed by the number.

[3] At the time of hearing, Bernard Caffrey had been an MSHA inspector for six years. Tr. 15. Prior to working for MSHA, Caffrey worked at several mines performing various types of work, including ventilation work, running a scoop, running a continuous miner, running a rib bolter, and others. Tr. 15-16. He had black cap papers as well as machine runner's papers. Tr. 16-17.

[4] The regulation states:

> Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

30 C.F.R. § 75.1700.

> The operator failed to take reasonable measures to locate all oil and gas wells penetrating the coal bed or any underground portion of the mine in that the operator did not submit for a gas well pillar protection permit to establish adequate barriers around the total of 11 CNX Gas NV-34 Marchellus [sic] gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter without prior approval from all agencies. The CNX Gas NV-34 wells have been drilled within 100 feet of the previously mined E-19 Longwall panel of the E Longwall district without an approved gas well pillar protection permit.
>
> In order to terminate this citation, the operator will submit for approval a gas well pillar protection permit for the CNX Gas NV-34 Marchellus [sic] wells for the now sealed E Longwall district to prove that the barrier is sufficient in size.

GX-1.

After Caffrey was shown the number of wells to make sure that they matched his records, he discussed with Consol personnel the distances to determine whether they were within a 150-foot radius required by law. Tr. 19. Caffrey asked for proof that the plan was submitted, but such proof could not be provided. Tr. 20. Caffrey wrote in his notes that the area was mined in 2009, it was sealed in 2014, and the well was drilled in 2013. Tr. 19. The area at issue was a bleeder district when the wells were drilled. Tr. 23. He testified that it was not an active area when the citation was issued, but it was traveled by a certified examiner. Tr. 23, 28.

Caffrey discussed the matter with his supervisor, Tom Bochna, and then notified Steve Apperson at Consol that he was issuing a citation. Tr. 20. Caffrey explained that he had to discuss whether to issue a citation with his supervisor and district manager because the situation was not one he had dealt with before. Tr. 20. To his knowledge, MSHA had not previously issued a 75.1700 citation for Marcellus wells prior to the one that Caffrey issued.[5] Tr. 25-26. MSHA did not issue any 75.1700 citations for these NV-34 wells between January 2015 and May 2018.[6] Tr. 34. Caffrey did not know the reasons why no citations were issued, but testified that it may have been overlooked. Tr. 34. Inspector Caffrey testified that even though the regulation requires conformity with state law, he did not consider state law before he issued the citation. Tr. 27. Caffrey explained, "Honestly, we don't typically go into state laws, because it's state law, and we are federal law. And I cited it as a federal law." Tr. 27.

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[5] Caffrey was not able to determine if Enlow Fork had previous 75.1700 citations at the time he wrote the citation. Tr. 25.

[6] The transcript improperly called the NV-34 well "NC134 wells." Tr. 34.

Caffrey testified that he designated the citation as "no likelihood" because, at the time that the citation was issued, the area was sealed.[7] Tr. 21. He designated it as "moderate" negligence because he believed that the company knew about these wells. Tr. 21-22. Caffrey based this belief on the fact that company representatives worked with the gas companies to plot the areas, and because Consol had the wells on their maps. Tr. 22.

Caffrey gave Consol one week to terminate the violation. Tr. 22. The citation stated that in order to terminate, "the operator will submit for approval a gas well pillar protection permit for the CNX Gas NV-34 Marchellus [sic] wells for the now sealed E Longwall district to prove that the barrier is sufficient in size."[8] Tr. 41. The operator submitted a short letter with an attached map/form in order to terminate the citation. Tr. 41-42; GX-5, p. 3-4. The letter stated in full:

> Enlow Fork Mine is respectfully submitting, for your approval, a safety barrier zone for the NV-34 wells. Mining in the respected area had been completed in 2009 and these wells were drilled after mining in 2013. This submittal is in response to citation #9076658 issued by your department on May 24, 2018. Please find the attached drawing pertaining to this request.

GX-5, p. 3. Attached to the letter was a drawing and form that the operator had submitted to the state of Pennsylvania. Tr. 59. The attached drawing shows the wells, along with a 40,000 square foot Support Area. *Id.*

After the operator filed a plan with the district manager, MSHA Inspector Bryan Yates issued the termination for Citation No. 9076658.[9] Tr. 58; GX-1, p. 2. On July 17, 2018, MSHA sent Consol a short letter stating, "Your plan dated May 30, 2018, and additional information received on July 11, 2018, to protect the Enlow Fork Mine, I.D. 36 07416, from the hazards of the NV-34 Wells, located in the E19 sealed area of the mine, is approved." GX-5, p. 1.

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[7] The bleeder district adjacent to NV-34 wells was sealed on June 28, 2014. Tr. 139.

[8] The operator had not previously submitted a gas well pillar protection permit application to establish adequate barriers around the total of the 11 CNX Gas NV-34 Marcellus gas wells. Tr. 31-32. Caffrey testified that 30 C.F.R. 75.1700 requires such that barriers shall be no less than 300 feet in diameter without prior approval. Tr. 31-32. In the letter attached to the initial drilling plan submitted to MSHA in 2013 for NV-34, it stated that the gas company would maintain a 50-foot barrier of coal between the hole and the mine rib. Tr. 134-135.

[9] Bryan Yates was a MSHA inspector since May 2014. Tr. 55-57. Prior to that, Yates worked as a section foreman, a MET instructor, and a CPR instructor. Tr. 55-56. Yates received CMI training, as well as accident investigator training. Tr. 55. As an MSHA inspector, Yates performs quarterly inspections and reviews plans to ensure that the mines are following plans as required. Tr. 57.

There was general agreement among the witnesses that if the operator wants to get within 150 feet of the wells in the future, it would still need to file paperwork with MSHA and the state of Pennsylvania. Tr. 43, 137. This is because the operator only needs to notify MSHA if, when it is mining, it comes within the 300-foot diameter surrounding the well. Tr. 51-52, 138.

On May 30, 2018, Inspector Yates issued Citation No. 9079183 at the Enlow Fork Mine because the operator's plan only listed six wells, but their 75.1200 map listed nine wells.[10] Tr. 60; GX-2. The Condition or Practice section in the citation stated:

> The operator failed to file a revised plan for the 3 additional wells that were drilled at the NV-60 well cite[sic] located between the E-23 tailgate and the E-23 headgate. the plan that the operator filed for the NV-60 only requested to drill 6 wells. The plan submitted indicated that the holes would measure 80 feet from the rib line. The addition of the 3 wells lessened this distance to 59 feet. The operator did not ensure that an adequate barrier would remain around these new wells. The operator failed to file for an approved gas well pillar protection permit with all agencies.
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> Standard 75.1700 was cited 1 time in two years at mine 3607416 (1 to the operator, 0 to a contractor).

GX-2.

Yates testified that the plan approved on September 24, 2013, for the NV-60 Marcellus wells was only approved for six wells in the area.[11] Tr. 61; GX-3, p. 3. These additional wells were drilled on the same surface pad as the six existing wells. Tr. 83. Casey Saunders, the manager for coal and gas coordination for Consol Energy, testified that Consol was not required to submit the drilling plan, but only did so for the NV-60 wells as a courtesy.[12] Tr. 125. He explained that he met with Pennsylvania officials in 2013 to discuss the novel issue of gas wells

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[10] Yates had not been in the bleeder before the day that he issued the citation. Tr. 81.

[11] These unconventional wells involve horizontal drilling. Tr. 66.

[12] Casey Saunders worked as the manager of coal and gas coordination for Consol Energy since 2017. Tr. 106. Prior to that position, Saunders was a senior project engineer working with gas operators on coordinating surface activities. Tr. 107. Saunders graduated from Virginia Tech in 2009 with a BS in mining and mineral engineering. Tr. 107. Saunders has previously worked for Peabody Energy. Tr. 107. Saunders was responsible for coordinating gas wells since 2012. Tr. 108. Saunders has assistant underground foreman papers in West Virginia, as well as a Pennsylvania engineering license. Tr. 109. Saunders is a member of the PA DEP oil and gas management technical advisory board. Tr. 109.

being drilled behind mining. Tr. 121-122. Consol had gas wells drilled behind mining in West Virginia, but had not done so in Pennsylvania, so Saunders sought guidance from the state concerning the requirements. Tr. 122. The Pennsylvania Department of Environmental Protections officials told Saunders that if the gas wells were being drilled behind mining, and it met with the requirements of the 1957 study guidelines, then no drilling plan was required. Tr. 123. He explained, "At the time, like I said before, this was pretty new. When I say this, drilling behind mining was a new concept at the time in Pennsylvania. And it's better to be safe. And we decided to submit a drilling plan to get everybody on board." Tr. 125.

When the new wells were drilled, it reduced the barrier to approximately 59 feet. Tr. 63. The plan submitted for the six wells stated that the operator would keep an 80-foot barrier in order to ensure a minimum 50-foot barrier of coal between the hold and mine rib. Tr. 82-83; GX-3. Yates indicated that the holes were measured 80 feet from the rib line, measured from the barrier block. Tr. 81-82; GX-2. When the engineer gave Yates the distance reading, it was 59 feet from the wells to the rib line. Tr. 84. The approval letter from MSHA stated that the plan was approved and that "The MSHA field office shall be notified at least 48 hours prior to drilling within 30 feet of the coal seam. This approval is for drilling at the stated site only. Additional sites will require separate approvals."[13] GX-3.

After investigating, Yates concluded that there were no additional pillar permits for these three additional wells.[14] Tr. 61. Yates did not find any other documents, revisions, or changes that showed approval to drill the three additional wells. Tr. 61-62. Yates did not cite the operator for failing to locate the wells, but rather for not filing the plan. Tr. 81. Yates testified that they received a directive from the District to raise awareness and pay more attention to the maps. Tr. 77. He understood that to mean that they "should pay attention to mining around gas wells and make sure maps are correct." Tr. 77. Yates testified that he does not know much about state mining laws. Tr. 90.

Yates testified that he believed the areas were drilled in 2014 and had been used only for bleeder examinations in order to check the fans, water, and ventilation. Tr. 70. In the bleeder district, at the third entry which is closest to the wells, the operator was required to have supplemental support through the entire entry. Tr. 79. They would have to do this by either cans or cribs. Tr. 79. The operator must maintain the integrity of the bleeder entryway using cans until the bleeder district is sealed. Tr. 79. The cans keep the area from being crushed by the pressure. Tr. 79. Once the cans are installed, there is no way to get mining equipment into the area. Tr. 80,

[13] Based on this Court's reading of the plan and approval in evidence at GX-3, the term "site" refers to the "solid barrier of coal left between the Enlow Fork's E-23 Tailgate and the E-22 Headgate sections," which shared a common well pad on the surface. GX-3, p. 1-3.

[14] The three additional wells were on the same pad as the six approved wells. Tr. 83. Yates testified that there were no survey points for the three additional wells, so he did not know if the holes were closer than 50 feet. Tr. 83.

94-96. Electricity is not allowed in the bleeder section. Tr. 80. Yates testified that there would be no future mining in the third entry. Tr. 80.

Yates marked the citation as "no likelihood" because the wells had already been drilled so he treated the matter as a paperwork violation for the plan not being revised for the three additional wells. Tr. 62. Yates marked the citation as "moderate" negligence because the operator showed that they knew about the wells by including them on the maps, but never revised their plan. Tr. 62-63. Yates did not consult with any state laws before writing the citation. Tr. 87. Yates testified that he has no expertise in geology, and indicated that that was why it was important to submit plans that experts could analyze and determine if adequate. Tr. 88. Yates terminated Citation No. 9076658 on May 30, 2018, after the operator submitted a plan. Tr. 67-68.

Casey Saunders testified that state law does not require an operator to apply for a pillar protection permit when wells are drilled behind the coal. Tr. 112. Saunders took issue with the citation's assertion that the operator failed to take reasonable measures to locate the wells because, he explained, they were placed on the mine map in 2015. Tr. 113. Saunders testified that the operator submitted the ventilation maps to MSHA on an annual basis. Tr. 113. Saunders did not believe that the law applied to the instant situation. Tr. 114. He described the process of getting a Pennsylvania coal pillar permit, but explained that the state application was not relevant to the instant situation. Tr. 114-115. The relevant portions of Pennsylvania law are in regard to wells that are drilled out in an area that mining is approaching. Tr. 117.

The Pennsylvania Department of Environmental Protection (DEP) uses the 1957 pillar study as the standard for determining if a gas well being approached has an active pillar. Tr. 118; RX-H. Saunders testified that according to the 1957 study, only a 100-foot pillar would be required for the wells at issue. Tr. 120-121.

Saunders described how in 2013 he approached the state agency about developing a drilling plan for wells drilled behind mining. Tr. 122-123. It was not required under state law, but Saunders felt that it could help to coordinate the complex relationship between coal and gas.[15] Tr. 122-123. The Pennsylvania authorities determined that if the pillar met the 1957 study guidelines, then no drilling plan was required. Tr. 123.

Saunders testified that the state of Pennsylvania would not have required a drilling plan for the wells at issue in Citation Nos. 9076658 and 9079183. Tr. 124-125. Though a drilling plan was not required for wells NV-34 and NV-60, Saunders testified that he provided one for NV-60 because, "it is better to be safe." Tr. 125. At the time, Saunders also sent the information to MSHA and said that the Respondent did not receive a lot of comments back. Tr. 126. He described the process as akin to a "rubber stamp." Tr. 126. Saunders testified that MSHA representatives were present for some of the meeting with the Pennsylvania DEP, but could not

[15] Saunders described the submission of the 2013 plan as a "courtesy." Tr. 137.

remember if they were present in the meetings where Pennsylvania representatives said that a drilling plan was not required. Tr. 125-126.

Saunders testified that he believed that Section 75.1700 only applied when wells were drilled in areas in front of where mining was occurring. Tr. 129. He did not believe that wells NV-34 and NV-60 fell under the law. Tr. 129. Saunders was not aware of any Program Policy Manual or other information from MSHA that stated MSHA would apply Section 75.1700 to mine out areas. Tr. 129-130. According to the Program Policy Manual, a petition for modification is required to mine through a well.[16] Tr. 37; GX-F.

Saunders based his belief that Section 75.1700 only applies to future mining areas on the idea that a pillar would be constructed by remaining coal. Tr. 130. Saunders further testified that the cans would serve as a physical barrier that prevented them from accessing the area. Tr. 131.

Robert Robinson was the director of engineering for three mines, and he testified on behalf of Respondent.[17] Tr. 149. In this capacity, he was responsible for certifying Enlow's maps, as well as the Harvey and Bailey mines if needed. Tr. 149. Robinson testified that in his experience, a pillar protection permit was only required when the mine was going to advance within 150 feet of a well. Tr. 151. He described the procedure as submitting a pillar plan based on the 1957 study to the state of Pennsylvania first. Tr. 151. Then, once the state approved it, the plan was sent to MSHA for approval. Tr. 151.

Robinson understood Section 75.1700 as requiring only that the operator file a permit pillar application with the state if they want to get within the 150-foot radius of the well. Tr. 157. Then, after the state approved, the operator would have to submit the plan for MSHA approval. Tr. 157. He did not interpret this regulation to require pillar permits behind the mining. Tr. 158.

A. CONTENTION OF THE PARTIES

The Secretary argues that the Respondent clearly violated 30 C.F.R. § 75.1700 by not getting approval from the Secretary prior to the drilling of the NV-34 and NV-60 wells. The Secretary further argues that the wells were drilled in active workings and that whether the wells were in front or behind the mining is irrelevant. The Respondent did not maintain barriers as regularly defined, and the Secretary's lack of previous citations does not estopp the Secretary from enforcing the law. Though the Secretary argues that the standard is clear, it uses *Chevron* and *Auer* to argue that should the Court find it ambiguous its interpretation is a reasonable one entitled to deference. Accordingly, the Secretary argues that the citations should be upheld.

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[16] The July 2010 PPM does not mention wells drilled behind mining operations. Tr. 89.

[17] Robinson has a BS in mining engineering from Penn State. Tr. 149. He has worked in the mining industry since 1976, and has been employed by Consol since 1998. Tr. 149-150. He is a licensed professional engineer and a licensed professional land surveyor, and has general mine foreman's papers for Pennsylvania. Tr. 150.

The Respondent argues that no plans or permits were required under state law or MSHA regulations for the NV-34 and NV-60 wells because the wells were drilled in inactive areas where mining had been completed. Furthermore, if barriers were required, the cans served as an effective barrier greater than the required 150 feet. The operator argues that the regulation is clear and unambiguous in not requiring a permit or plan in this sort of case, and if MSHA is starting to interpret the regulation to require such plans it must provide fair notice to operators. Accordingly, the Respondent argues that the citations should be vacated.

B. BURDEN OF PROOF AND STANDARD OF PROOF

The burden of persuasion is upon the Secretary to prove the gravamen of a violation by the preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

Commission precedents have held that "[t]he burden of showing something by a 'preponderance of the evidence' the most common standard in the civil law, simply requires the trier of fact 'to believe that the existence of a fact is more probably than its nonexistence.'" *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *quoting Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California,* 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that "[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California.* 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: "[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates." *Lilienthal's Tobacco v. United States,* 97 U.S. 237, 266 (1877).

While the Secretary must prove the elements of a citation by a preponderance of the evidence, this Court's factual determinations must be supported by substantial evidence.[18]

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[18] When reviewing the finding of fact by a lower court, the Commission will decline to disturb the determination if is supported by substantial evidence. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1687 (Dec. 2010), *U.S. Steel Mining Co.*, 8 FMSHRC 314, 319 (Mar. 1986). This test of factual sufficiency has been a part of Commission jurisprudence since its inception, required by the plain text of the Mine Act itself. 30 U.S.C. § 823(d)(s)(A)(ii)(I). Substantial evidence has been described by the Commission as "such relevant evidence as a reasonable mind might accept

C. ANALYSIS

Both citations in this case center on the proper interpretation of 30 C.F.R. § 75.1700. The regulation, entitled "Oil and Gas Wells," states:

> Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

30 C.F.R. § 75.1700.

Both the Secretary and Respondent argue that the regulation is clear and unambiguous, with divergent positions on what the regulation clearly says. SB at 13-15; SRB at 1-3; RB at 13-16. Under longstanding precedent, when "'the meaning of [a regulation] is in doubt,' the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (citing *Bowles v. Seminole Rock & Sand*, 325 U.S. 410, 414 (1945)). "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Rev. Commn.*, 499 U.S. 144, 149–51 (1991) (citations omitted).

However, the Supreme Court has recently warned that "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it." Kisor, 139 S. Ct. at 2414. The Court warned that a regulation must be "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* "Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia Dissenting). "To make that effort, a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. *Ibid.* Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Kisor,* 139 S. Ct. at 2415.

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as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

In the instant case, both parties are correct that the Section 75.1700 is clear and unambiguous, which means that there is no need to move to step two of the analysis and the Secretary is not entitled to deference. The regulation has two primary requirements:

1) The operator must take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine.
2) When located, the operator shall establish and maintain barriers around the wells in accordance with state laws and regulations. These barriers must be at least 300 feet in diameter (or 150 feet in radius), unless the Secretary authorizes a lesser barrier.[19]

Each of these will be considered in turn for each citation. However, before addressing the requirements of the standard, this Court must first address a primary point of disagreement between the parties.

The Respondent argues that Section 75.1700 does not apply to the wells identified in Citation Nos. 9076658 and 9079183 because the wells were drilled adjacent to inactive bleeder areas in the mine. RB at 6. It points to the text of the regulation, which "refers to locating wells that are 'penetrating' coalbeds and then establishing and maintaining a 'barrier.'" RRB at 7. It argues that this interpretation is both in line with the legislative history of the Act, as well as its purposes. In *Peabody Coal Co.*, the ALJ cited the Senate Report, which stated "numerous inundations of gas into coal mines have been caused by cutting into or approaching too near gas wells...All possible precautions should be exercised to safeguard against penetrating oil and gas wells." 1 FMSHRC 473, 482 (1979) (ALJ). The Respondent argues that the legislative purpose here was to prevent mining from getting too close to gas wells, which would not be a problem if the gas wells are drilled behind the mining. RB at 6. Furthermore, requiring an operator to install a coal barrier in a mined-out area would lead to the absurd result "because an operator cannot re-install coal." RB at 6.

By contrast, the Secretary argues that with regards to Section 75.1700, "the location of mining is not relevant." SB at 10. The text of the regulation makes no mention of the location of the well, the Secretary asserts, and Part 75 defines "active workings" as "any place in a coal mine where miners are normally required to work or travel." SB at 10. It argues that bleeders must be examined, and therefore they are "active workings." SB at 11. Citing the 1979 ALJ decision in *Peabody Coal Co.*, the Secretary states that "Peabody Coal made the same argument 40 years ago and it was rejected then." SB at 10.

The Respondent's reading of the regulation is too narrow and not supported by the clear language of the text. Contrary to what the Respondent asserts, 75.1700 does not only refer to "oil and gas wells penetrating coalbeds," but rather continues, "or any underground area of a coal mine." 30 C.F.R. § 75.1700. Though the Respondent makes a reasonable argument concerning

[19] The Secretary may also require a greater barrier where warranted due to geological conditions or other factors, however this is not at issue in this case.

the decreased level of danger when gas wells are drilled behind mining, the text of the regulation leaves little room to exclude such areas. Accordingly, I find that the NV-34 and NV-60 wells are covered by Section 75.1700.

1) Did the operator take reasonable measures to locate gas wells?

Citation No. 9076658 stated in relevant part that the "operator failed to take reasonable measures to locate all oil and gas wells penetrating the coal bed or any underground portion of the mine in that the operator did not submit for a gas well pillar protection permit to establish adequate barriers around the total of 11 CNX Gas NV-34 Marchellus [sic] gas wells..." GX-1.

Evidence that the operator plotted gas wells on maps submitted to MSHA satisfies this element of the regulation. *See e.g. Dominion Coal Corp. v. MSHA*, 35 FMSHRC 3557, 3592 (Dec. 6, 2013) (ALJ) ("In this case, Respondent had already located the well and had plotted it on its maps from 1994 to 2008. Therefore, it appears that Respondent complied with the first requirement of § 75.1700."). Inspector Caffrey testified that on May 24, 2018, he was sent to the Enlow Fork Mine and instructed to find several gas wells that appeared on the maps that the operator submitted. Tr. 17-18. Caffrey further testified that he asked the operator's agent to show him the wells on their digital map and "they had it on the map, that was fine." Tr. 18. When presented with a map of the area at issue, Inspector Caffrey located the wells in the lower right corner off the E19 panel. Tr. 29-30; RX-L. He testified that the map showed 11 wells at NV-34. Tr. 30. When asked if the operator had located the wells, Caffrey responded, "They had. Correct." Tr. 32. Based on this evidence, I find that the operator took reasonable measures to locate the NV-34 gas wells at issue in Citation No. 9076658.

Inspector Yates testified that he issued Citation No. 9079183 on May 30, 2018, because there was a discrepancy concerning the number of gas wells at NV-60. Specifically Yates stated that the operator listed nine wells on its mine map, but only listed six wells on its drilling plan. Tr. 60. Yates testified, "When I first got to the mine, I found that the operator had listed all nine wells on their mine map, on the 75.1200 map. And the map for the escape way map that is located where the miners congregate." Tr. 60. At hearing, Yates showed where on the operator's map he found the nine NV-60 wells. Tr. 68-70; RX-M. Based on this evidence, I find that the operator took reasonable measures to locate the NV-60 gas wells at issue in Citation No. 9079183.

2) Did the operator establish and maintain barriers in accordance with state laws and regulations that were either 300 feet in diameter or were authorized to be less by MSHA?

With regards to this issue, the Respondent spent much of its time at hearing focusing on the first part concerning the requirement that the barriers be in accordance with state laws and regulations, while the Secretary primarily focused on the second part concerning the required distance. Casey Saunders testified about the process of applying for a pillar permit to the Pennsylvania Department of Environmental Protection. Tr. 115-125. According to Saunders, the state only requires a pillar permit application when an operator is mining in the direction of a gas

well and gets within 500 feet of the well. Tr. 117; RX-I. The state then uses the 1957 study to determine if the pillars are appropriate.[20] Tr. 117; RX-H.

Both inspectors readily conceded that they were not familiar with state laws and regulations concerning gas wells. When questioned about state law, Inspector Caffrey replied, "Honestly, we don't typically go into state laws, because it's state law, and we are federal law. And I cited it as a federal law." Tr. 27. He furthermore stated that with regards to the 1957 study, "I have no recollection of [it], because I never read it." Tr. 27. Similarly, Inspector Yates testified, "I just know federal law. I don't know state law." Tr. 66. Neither the inspectors nor this Court is in a position to review state law and determine whether the operator acted in accordance with such. Because there was no evidence submitted to the contrary, this Court assumes that the operator did not violate state laws or regulations concerning gas wells.

Section 75.1700 not only requires the operator to maintain barriers in accordance with state law, but also to establish those barriers at a specific distance, unless MSHA allows a lesser distance. The Secretary argues that the operator did not maintain a 150-foot barrier between the wells and the active workings. Quoting the *Peabody Coal* case, the Secretary states that a barrier "ordinarily would consist of a coal pillar or a rib of coal." SB at 11. The purpose of the barrier is "to limit the risk from gasses that can move through cracks in coal and endanger miners due to the risks of explosion or displacement of oxygen." SB at 11. The Secretary argues that the operator had no such barriers, and no permission for a lesser barrier.

The Respondent argues that it would be impossible for it to construct a coal barrier in the areas at issue, because doing so would require it to physically extract coal around the well. RB at 8. Instead, the Respondent argues that it had "an effective barrier" because the area around the NV-34 wells was sealed at the time of the citation, and the support cans and cribs in the area around the NV-60 wells made the area unreachable by mining equipment. RB at 11. Furthermore, both areas were adjacent to bleeders, and both federal and state law forbid mining in such areas. RB at 10-11; Tr. 131.

The term "barrier" is not defined in the regulations or in the Program Policy Manual submitted into evidence in this case. While the parties agree that normally such barriers refer to a coal barrier, in cases such as the instant one where a mined-out area is at issue, it would be absurd to require the operator to somehow reconstruct a coal barrier. In *Peabody Coal Co.*, the ALJ examined this issue at length:

> Congress, in requiring the operator to establish and maintain "barriers" around located gas and oil wells, did not indicate the kind of barrier it intended and there is little to suggest the exact purpose of the barrier other than for the brief explanation quoted above.

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[20] The Joint Coal and Gas Committee Gas Well Pillar Study was repeatedly referred to as "the 1957 study" throughout the hearing. It was admitted into evidence as RX-H.

A "barrier," as defined in Webster's Third International Dictionary (1966), is "a material object or set of objects that separates, keeps apart, demarcates, or serves as a unit or barricade." In the mining industry, the term appears to have a more specific meaning. A Dictionary of Mining, Mineral and Related Terms (Department of the Interior, 1968), defines the term as follows:

> barrier. a.) Blocks of coal left between the workings of different mine owners and within those of a particular mine for safety and the reduction of operational costs. It helps to prevent disasters of inundation by water, of explosions, or fire involving an adjacent mine or another part of a mine and to prevent water running from one mine to another or from one section to another of the same mine. Mason, v. 1, p. 312. See also barrier pillar. b.) A low ridge by wave of action near the shore. Fay.

The same dictionary defines a related term thusly:

> barrier pillar. a.) A solid block or rib of coal, etc., left unworked between two collieries or mines for security against accidents arising from an influx of water. Zern. b.) Any large pillar entirely or relatively unbroken by roadways or airways that is left around a property to protect it against water and squeezes from adjacent property, or to protect the latter property in a similar manner. Zern. c.) Incorrectly used for a similar pillar left to protect a roadway or airway, or a group of roadways or airways, or a panel of rooms from a squeeze. Zern.

Based on these definitions, a "barrier" ordinarily would consist of a coal pillar or a rib of coal and the purpose is not only to keep fluids and gases out of the mine, but also to prevent "squeezes," that is, the squeezing down of the top, at least from adjacent property. As a historical matter, it appears that the use of the coal pillar was originally developed by the petroleum and natural gas industry to prevent subsidence due to mining from rupturing or dislocating a well bore. Quarto Mining Company, Docket No. M 77-48 (Initial Decision, Judge Michels) (December 5, 1977), p. 3.

The term "barrier", as used in the statute, would, I believe, generally define a coal pillar, and its principal purpose, as referred to in the legislative history quoted above, would be to safeguard against penetrating oil and gas wells by operators. Nevertheless, there is nothing in the statute or the legislative history limiting the type of barrier to be used or its purpose so long as it relates to protection against hazards from wells. The Act and the regulation require simply that measures are to be taken to locate wells—there being no implication that such must be in existence when the coal is mined—and that appropriate barriers be established and maintained when a well is located...

> As indicated, ordinarily the barrier to be established and maintained would be the coal barrier, but when that no longer exists or only partially exists, other kinds of barriers made from other materials may have to be used. It is significant that the Act and the regulation, when referring to "barriers," or to a "barrier," in no place limits these to coal barriers; thus, they can be made of other substances. The use of barriers may be required to protect against subsidence if there is a risk that such a condition would rupture the wells and release gases or liquids. The regulation is clearly broad enough to protect the miners from hazards of such a rupture as well as ruptures from accidental cutting in the mining process.

1 FMSHRC at 482-483.

I find the ALJ's reasoning persuasive and adopt it here. The purpose of the barrier requirement is to prevent mining into a gas well. *See eg. Dominion Coal*, 35 FMSHRC at 3597 ("the event against which the standard, 30 C.F.R §75.1700, is directed is explosion or methane inundation as a result of the intersection of a gas well. The standard seeks to prevent operators from mining into gas wells by requiring that those wells be located and that barriers be established around them.") If MSHA intended for a barrier to be limited to a coal barrier, it would have said so in the regulation. And though a coal barrier may be preferable, cases such as the instant one illustrate that coal barriers are not always possible. Indeed, when asked how an operator could install a coal barrier in an area where mining had already occurred, Inspector Yates responded, "I know of no process yet that can." Tr. 78.

I find the Respondent's argument that the bleeders' proximity to the wells served as a sort of legal barrier, because mining is prohibited near the bleeders, unavailing. Whereas the term "barriers" has a broader meaning than the Secretary suggests, it is clearly a reference to physical barriers.

However, the Respondent also presented evidence and argument concerning barriers around these wells, which though not constructed of coal, served the purpose of excluding mining equipment that could penetrate the wells. With regards to the NV-34 wells, Inspector Caffrey testified that it was mined out and made so that there was no physical way to get mining equipment into the area. Tr. 45-46. Similarly, numerous witnesses testified that the area around the NV-60 wells had numerous floor and roof support cans and cribs that made it impossible to reach the area with mining equipment. Tr. 46, 79-80, 93,131. Inspector Yates' was asked "Well, as far as you know, there is no technology that would allow you to go in and get a barrier pillar between two long wall--" Tr. 80. He answered, "Not yet. Correct." Tr. 80. Insofar as the barriers contemplated in the regulation are intended to limit the possibility of mining into a gas well, these barriers are effective barriers.

The next issue that must be addressed is the distance of the barriers. Due to the unique circumstances of this case, where it was effectively impossible to install and maintain coal barriers, this Court must determine whether the bleeders acted as a barrier greater than 150 feet

for both the NV-60 and NV-34 wells. Inspector Yates testified to this point exactly in the hearing:

> Q: Would you agree that the can line in a bleeder would be an active barrier to keep any mining from progressing up the No. 3 entry of the long wall panel next to the NV-60 mines?
>
> A: I agree that that protection is put in there to keep that airway open.
>
> Q: And that would act as a physical barrier to keep someone from mining that in the area or anywhere in that entry, the No. 3 entry adjacent to the NV-60 wells, correct?
>
> A: Yes. There would be no more mining in that area.
>
> Q: So there is no way to get within 300 feet -- or 150 feet of the NV-60 wells at the time those wells were drilled. Correct?
>
> A: I don't understand.
>
> Q: There is no way to get any mining equipment within 150 feet of the NV-60 wells when those were drilled in 2014. Correct?
>
> A: Correct.
>
> Q: So that would mean those are a physical barrier, those can lines are a physical barrier to mining in that area. Correct?
>
> A: Correct. There would be no mining...

Tr. 92-93. Inspector Yates testified similarly concerning the NV-34 wells. Tr. 94-98.

While there may very well be requirements in other sections of Part 75 that required the mine operator to file a plan or permit application with MSHA, the inspectors cited the Respondent under 30 C.F.R. § 75.1700. According to both Inspector Caffrey and Inspector Yates, an operator would not have to notify MSHA or file for a permit for a well under Section 75.1700, unless it planned to have a barrier with a radius of less than 150 feet. Tr. 51-52, 94. Though there could have been better communication between the operator and MSHA, and though it might have constituted a best practice to more clearly inform MSHA about the gas wells at issue here, the Secretary has not met his burden of proof that the operator violated 75.1700. All the evidence presented in this case indicated that the operator took reasonable measures to locate the gas wells at NV-34 and NV-60, and installed and maintained an effective barrier of at least 150 feet for all wells.

ORDER

The Respondent complied with the requirements of 30 C.F.R. § 75.1700. Accordingly, it is **ORDERED** that Citation Nos. 9076658 and 9079183 are **VACATED**.

John Kent Lewis
Administrative Law Judge

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