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August 13, 2014

AMERICAN COAL COMPANY, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. LAKE 2010-408-R X Order No. 8418503; 1/19/2010 Docket No. LAKE 2010-409-R X Citation No. 8418504; 1/19/2010 Mine: New Era Mine Mine ID: 11-02752
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. AMERICAN COAL COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2010-759 A.C. No. 11-02752-219590-02 Mine: New Era Mine

ORDER DENYING AMERICAN COAL COMPANY'S MOTION TO SUPPLEMENT THE RECORD & DECISION ON SECOND REMAND

Before: Judge Miller

These matters are before me upon remand from the Federal Mine Safety and Health Review Commission. *American Coal Co.*, 36 FMSHRC 882 (Apr. 2014). The cases involve an order and citation issued to the American Coal Company ("American") by the Secretary of Labor, Mine Safety and Health Administration, following an inspection of a coal stockpile at American Coal's New Era Mine. The Commission remanded the cases with the direction that the parties be allowed to file briefs and that further proceedings, as necessary, be conducted. Subsequently, American filed a Motion to Supplement the Record, to which the Secretary filed a response in opposition. The parties then filed simultaneous briefs and a joint stipulation. For reasons that follow, I **DENY** American's Motion to Supplement the Record, and **AFFIRM** my earlier findings regarding the fact of violation in both Order No. 8418503 and Citation No. 8418504.

I. BACKGROUND

On January 19, 2010, MSHA inspectors issued Order No. 8418503 to American pursuant to section 103(k) [1] of the Act after observing what they believed to be a "mine fire" on the coal stockpile. At the same time, MSHA issued Citation No. 8418504 for American's alleged failure to timely notify MSHA of the incident in violation of 30 C.F.R. § 50.10. American contested both issuances.

On July 22, 2010 Judge Avram Weisberger held an expedited hearing to address Order No. 8418503. At the conclusion of the hearing the parties presented oral arguments and Judge Weisberger issued a bench decision vacating the order, which he later reduced to writing and issued on September 28, 2010. *American Coal Co.*, 32 FMSHRC 1387 (Sept. 2010) (ALJ). Subsequently, the Secretary of Labor appealed the matter to the Commission.

On February 28, 2013, the Commission issued a decision concluding that a "mine fire" does not require the presence of a flame. 35 FMSHRC 380, 387 (Feb. 2013). The Commission stated that the Secretary reasonably interpreted the term "mine fire" in section 3(k) to include "both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames." *Id.* As relevant to this proceeding, the Commission noted:

> Indeed, this interpretation is somewhat different from the interpretation the Secretary presented at the hearing. Before the judge, [he] articulated an interpretation that included "both events marked by flaming combustion and events marked by smoking combustion." . . . In other words, the Secretary's interpretation at the hearing did not require that the smoking or smoldering combustion "reasonably [have] the potential to burst into flames."

Id. at 384-385 (citations and footnotes omitted). Accordingly, the Commission vacated the judge's decision and remanded the matter for further proceedings. [2]

On January 16, 2014, I issued a Decision on Remand addressing Order No. 8418503, which is the subject of Docket No. LAKE 2010-408-R. *American Coal Co.*, 36 FMSHRC 176 (Jan. 2014) (ALJ). There, the primary issue was whether the smoldering and smoking coal on the stockpile that the inspectors observed was a "mine fire" as that term is used in the Mine Act and defined by the Commission. I found that the smoking and smoldering stockpile was a fire and, therefore, an accident had occurred and the 103(k) order was properly issued.

On March 3, 2014, I issued a second and related decision addressing Citation No. 8418504. *American Coal Co.,* 36 FMSHRC __, slip op. (Docket Nos. LAKE 2010-409-R and

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[1] Section 103(k) states that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . ." 30 U.S.C. § 813(k).

[2] Judge Weisberger retired while the case was on review before the Commission. The cases were then reassigned to me for a decision after remand.

LAKE 2010-759) (Mar. 3, 2014) (ALJ). In that decision, the issue was whether American violated section 50.10 of the Secretary's regulations, by failing to notify MSHA of the fire on the stockpile. Relying upon my finding in LAKE 2010-408-R that a mine fire had occurred, I found that American had failed to immediately report the incident to MSHA in violation of section 50.10 of the Secretary's regulations. At the request of the parties, the negligence of the citation was reduced to low.

American petitioned for, and was granted, discretionary review of my decisions in the two contest cases and the penalty case that accompanied LAKE 2010-409-R. On review, American argued that it should have been offered the opportunity to file a brief on the issues raised following the Commission's original direction remanding Docket No. LAKE 2010-408-R. The Commission agreed with American and noted that "the issues that were presented to the Judge were somewhat unusual because the Secretary had presented a modified definition of the term "mine fire" to the Commission as compared to the definition that he proffered at the initial hearing. 35 FMSHRC at 384-85. 36 FMSHRC 884 (Apr. 2014). Accordingly, the cases were remanded so that the parties could brief the issues.

Subsequent to the Commission's decision, I asked the parties whether there was any other evidence that the parties wanted to enter into the record by stipulation and sought the parties' opinion about taking further evidence in the case. After speaking to the parties and reviewing the record, however, I determined that a new hearing was not appropriate because both parties had ample time to prepare and to present evidence, including evidence on the meaning of fire and the fair notice issue. The parties informed the court that there was no dispute of fact and a hearing was not needed, but American wished to supplement the record with additional information, and both parties wished to file a brief.[3] I then allowed the parties time to stipulate to any facts or items they wished to include in the record. The parties were not able to reach any stipulations. Thereafter, American filed a Motion to Supplement the current record with testimony from depositions. The Secretary objected to the submissions and I deny the motion herein. Therefore, no other testimony or evidence is included in the original record made before Judge Weisberger but both parties have filed a brief.

II. MOTION TO SUPPLEMENT

On May 29, 2014 American filed a Motion to Supplement the Record with Designated Deposition Testimony. American asks the court to supplement the formal record with designated deposition testimony of MSHA inspector Michael Rennie. It argues that this testimony is "necessary to address issues that were not directly raised at the previous hearing in this matter before Judge Weisberger." American. Mot. to Supp. 2. Specifically, it argues that these deposition designations demonstrate that the Secretary's interpretation of fire that was raised on appeal is unconstitutionally vague as applied to American in this case and therefore American did not receive fair notice.[4] *Id.* 2-3. American asserts that Inspector Rennie's

[3] American, in its Motion to Supplement the Record, states that "it is willing to forego requesting a new evidentiary hearing if these deposition designations are admitted into the formal record." American Mot. to Supp. 2 n. 1.

[4] American points to the difference in the Secretary's interpretation of "mine fire" that he put forth before the Commission, which included "both events marked by flaming combustion *and*

deposition testimony shows that he had seen conditions similar to those he observed on the New Future stockpile, a coal stockpile smoking in spots with no flames, but that he had never before issued a Section 103(k) order for those conditions. A reasonably prudent person familiar with the mining industry and the protective purpose of the standard, as of the date the order was issued, therefore would not recognize that the cited conditions constituted a "fire" or "mine fire" for purposes of the Act and its regulations. *Id.* at 5. Moreover, American asserts that Rennie's deposition testimony indicates that he did not see "smoldering combustion" and therefore, he did not use the Secretary's new interpretation of 'fire' when he and Inspector Crick issued the 103(k) Order and reporting violation on January 19, 2010. Given the arbitrary enforcement of the new interpretation and the inspector's application of a definition broader than what was endorsed by the Commission in the original appeal, American could not know, on January 19, 2010, what was required of it to act accordingly. *Id.* at 5-6. As a result, American requests that it be allowed to supplement the record with the deposition testimony of Inspector Rennie.

On June 6, 2014 the Secretary filed a Response to American's Motion objecting to American's request to supplement the record. The Secretary argues that American stipulated at the initial hearing that the existence of a mine fire was the issue to be decided by the Court and if the Court found that the conditions constituted a fire, then the order would be upheld. The Secretary also asserts that Inspector Rennie's testimony is not relevant to the fair notice issue, given that he did not issue the 103(k) order. In any event, American did have notice of the Secretary's interpretation of the word "fire". The Secretary argues that smoke without flame is the true issue for decision and whether smoldering or smoke have the potential to burst into flames does not change the issue of notice to the mine. While the Secretary acknowledges that there is an "additional requirement that a smoldering location have the reasonable potential to burst into flame," American need only have known that smoldering was sufficient for a fire.

American asserts that the deposition testimony is relevant to the issue of "fair notice" and whether "smoldering combustion" existed on the day the order was issued. The motion to supplement seeks to introduce deposition testimony regarding what Rennie observed on the day the order was issued and his previous treatment of allegedly similar conditions. While the issue of notice is relevant based upon the Commission's direction on remand, American offers no reasonable justification to now address Rennie's deposition testimony. Clearly the question of statutory interpretation, as well as fair notice was at issue in the original proceeding and the record demonstrates that the parties argued those issues before Judge Weisberger. Moreover, American deposed Rennie prior to the hearing and could have elicited similar testimony at hearing. American asked for an expedited hearing on the issues here, made time to depose witnesses, and presumably was prepared to defend its position before the ALJ. While the original hearing focused upon the limited issue of whether there was a fire, American also raised the issue of fair notice in its argument to the Court. American had its opportunity to include this information in the record, and failed to do so. Parties are responsible for developing a complete record at hearing. Given the lack of any reasonable justification for why American failed to address the deposition testimony at hearing, I decline to allow it now. *See e.g., Hansen Truck*

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events marked by smoldering combustion that reasonably has the potential to burst into flames[,]" from the interpretation the Secretary argued before the judge, which included "both events marked by flaming combustion and events marked by smoking combustion." American Mot. to Supp. 2.

Stop, Inc., 26 FMSHRC 293 n. 1 (Mar. 2004) (ALJ). In addition, since both parties had equal opportunity to present evidence and develop a factual record, no matter what legal arguments they chose to raise, there is no reason to reopen the record and allow a new hearing on the matter.[5] Accordingly, I **DENY** American's Motion to Supplement and will not consider the deposition testimony of Inspector Rennie, or the arguments premised upon that testimony.

III. DISCUSSION

On June 23, 2014 the parties filed simultaneous briefs. American, in its brief, argues first that that the Secretary failed to meet his burden of proving that the conditions cited constituted "smoldering combustion that reasonably has the potential to burst into flames," and second, that it lacked fair notice of the Secretary's new interpretation. American Br. 4. The Secretary argues that ample evidence supports a finding of a mine fire as defined by MSHA to include smoldering that has the reasonable potential to burst into flame, and that the mine did receive fair notice of MSHA's interpretation. After careful consideration of all the evidence in the record, finding no conflict in the facts presented at hearing, I find that the condition of the coal stockpile constituted a "mine fire."

Interpretation of mine fire. American contends that, on remand, the court should defer to the Secretary's prior interpretation of what constitutes "smoldering" or "smoldering combustion" as evidenced by articles and treatises submitted by the Secretary. American Br. 4. Those articles and treatises, for the most part, state that smoldering combustion requires the presence of oxygen and is evidenced by heat generation, some form of 'glowing' or 'illumination,' visible smoke, and 'toxic gasses' such as carbon monoxide that give way to complex chemical reactions. American Br. 4-5. Therefore, American argues, the Secretary must show evidence of some glowing or illumination in order to show that there was a fire.

American argues that based upon the same interpretive material, self-heating of coal occurs along a spectrum from low temperature weathering, to non-combustion oxidation, to the point of spontaneous ignition, to smoldering combustion, and then possibly to flaming combustion. With that spectrum in mind, American argues that heat, light colored smoke, and noxious gases can be emitted even in the absence of ignition or combustion. Given the lack of any evidence regarding the observation of a flame, illuminated or glowing material, and the failure of the MSHA inspectors to further examine the smoking areas, analyze the purported white ash, or take any carbon monoxide or temperature readings, the Secretary failed to establish that flaming or smoldering combustion occurred. American contends that the testimonial evidence relied upon by the court on remand to find the existence of a fire: the sulfur-like smell, whitish-brownish smoke, heat waves, and white ash, can all be explained by non-combustion self-heating coal phenomena that do not rise to the level of a "mine fire." *Id.* at 8-10.

In the first decision on remand, I relied upon the facts from the transcript as presented by

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[5] Finally, even if Rennie's testimony were added to the record, it would not change my decision in this case. Rennie testified to what he observed and his deposition testimony does not differ significantly from his testimony at hearing. In addition, a fair notice argument requires much greater evidence than the general testimony of one inspector who may or may not have seen these same conditions and failed to issue a citation.

each of the witnesses who testified, including MSHA supervisor Rennie, mine inspector Crick, and American's witness, Michael Smith. The transcript was short but each party had the opportunity to present its evidence and to cross examine all witnesses. In that previous decision I explained that Rennie, who has been a mine inspector for 20 years, observed the five areas described as smoldering and took photographs, which are included in the file as exhibits. Inspector Crick, while a fairly new inspector, had more than 20 years of mining experience and once owned a safety company where he trained miners in the area of stock pile safety. Crick's testimony included a description of the stockpile and what he observed at the time he issued the order. He explained that he noted a sulfur smell, and that he observed smoking and smoldering material from about 5 feet away. He described the smoke as whitish and brownish with visible heat waves and he observed white ash around the area. American's only witness, Michael Smith, who was a member of its safety department testified on behalf of the mine. He observed the same areas as the inspectors and also did not see any flames. He had fire brigade training once each quarter while at the mine, and he was never called to fight a fire without a flame. (Tr. 106-107). Smith described the workings of the Galacia complex and the reasons for having stockpiles of coal outside the mine. He says he was within 60 to70 feet of the smoking and smoldering but did not see any flame and his carbon monoxide detector did not alarm. When asked if he saw white ash, he said he did not, but saw a grayish rock that comes out with the coal. His opinion was that there was no fire. He did not comment on whether it was windy or that if the smoking and smoldering coal came into contact with oxygen it would ignite.

While I understand American's argument that the conditions observed, the smoldering, white ash, heat waves and sulfur smell could lead to results other than combustion and fire, there is no evidence in the record that is the case. Instead, the mine inspector's unrefuted testimony is that it was windy on the day of the inspection and that the smoldering areas, when exposed to oxygen could reasonably lead to combustion. While the inspectors did not specifically testify that they observed some kind of illumination, the testimony they presented is sufficient to suggest a fire existed at the mine.

American next argues on this second remand that Inspector Crick did not rely upon the Secretary's new interpretation, and instead relied upon his personal definition of 'fire' and determined that when "[y]ou see smoke, there's fire." American Br. 11. Though the inspector claimed to have relied upon his "life experience and on his experience as a volunteer firefighter," American points out that the trial judge did not accord much weight to the inspector's opinions. American argues that, since the trial judge was the only judge to preside over and observe Inspector Crick's testimony, this court should defer to that credibility determination. American Br. 11. I note that in Judge Weisberger's discussion of deference in the first decision, he writes that he is aware of no case in which the position of the Secretary's witness is a basis for deference. In doing so, in a footnote, he mentions that he does not give much weight to the Secretary's witness, who is presumably Crick, because while Crick has extensive experience as a firefighter, there is no evidence that the experience relates to coal fires. Further, he says, Crick was not established as an expert. *American Coal Co.*, 32 FMSHRC 1387 (Sept. 2010) (ALJ), n. 5. I disagree with American's interpretation of Judge Weisberger's footnote and instead I find that the fact that an ALJ gave less weight to Crick's opinion when discussing the issue of deference does not translate into a credibility finding nor does it support a finding that Crick's lay opinion should be disregarded. Crick described in detail what he observed and how he

interpreted it based upon his experience and particularly his experience as a firefighter. While I agree that Crick was not an expert, neither was any other witness at the hearing. Each witness relied upon his experience to translate what he observed into his opinion. For the MSHA supervisor and MSHA inspector, it translated into a fire, but not so for the safety supervisor at the mine. I relied upon the facts presented by each witness in my earlier decision and do so in this one.

American also argues that the Secretary has not offered an interpretation of, nor provided any credible evidence regarding, the "reasonable potential to burst into flames" element endorsed by the Commission. American Br. 12-13. American asserts this element was not raised before or during the hearing, the Secretary did not directly address it, and American was not given the chance to present evidence to rebut it, or cross-examine the Secretary's witnesses regarding their testimony upon it. Moreover, American argues, the only evidence that could be construed to address this element was the inspector's testimony that if oxygen or air hit the cited areas, they could burst into flame at any time. I find this argument also to be without merit. American had an opportunity to call any and all witnesses to discuss combustion and the potential of the coal, as observed, to lead to a fire, or a flame. The Secretary was the only party to produce any evidence of what causes coal to burst into flames and if American failed to cross examine on that testimony, or rebut it, then it did so by choice. The transcript reflects that both parties were focused upon the issue of having a flame to define a fire at hearing. American had an opportunity to present evidence about what constitutes a fire and how the smoking and smoldering material can be defined. The only evidence in the record on that issue, however, is Crick's testimony that it was possible on that windy day for oxygen to mix with the smoldering areas and burst into flame. While the evidence is not overwhelming on either side, and both parties could have done a much more thorough job of presenting evidence in the case, the Secretary did meet his basic burden of proof and American provided no rebuttal.

American, while citing a source relied upon by the Secretary during the initial appeal,[6] also argues that "propagation and spreading of smoldering combustion as well as how smoldering combustion transitions to flaming combustion are complex technical issues involving a number of factors." *Id.* at 14. American argues that the Secretary presented virtually no evidence on these issues. Moreover, the source cited by the Secretary indicates that when smoldering combustion occurs below the surface of a stockpile and it begins migrating toward the surface, it does not have the potential to burst into flames until it reaches the surface, which can be a slow process depending up on the fuel layer above the smoldering material. Here, there is no evidence that the alleged smoldering areas were on the surface and the inspectors took no steps to determine if smoldering occurred on the surface or below the surface. American Br. 16. American is correct that many documents were submitted in this case with little or no explanation and that a number of complex issues regarding combustion are noticeably absent from the record. However, the record reflects that both Crick and Rennie agree that the smoldering, when mixed with oxygen, would burst into flames. Again, American did not refute that finding in its cross examination or in its case in chief.

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[6] American cites T.J. Ohlemiller, National Fire Protection Association, SFPE Handbook of Fire Protection Engineering, §2, Chap. 9, "Smoldering Combustion," at 2-200, 2-201 to 2-207 (3d ed. 2002).

Applying the Secretary's interpretation, I find that the area observed and subsequently cited constitutes a "mine fire" based upon the observation of smoke, ash, and heat as well as the smell of sulfur. Both Crick and Rennie testified that they observed smoking and smoldering areas on the stockpile. Additionally, Crick testified that he observed "heat waves" and white ash in the smoking and smoldering areas. Further, he explained that if oxygen or air hit those areas, they "could burst into flame at any time." (Tr. 59). Smith, the mine's sole witness, did not testify to the existence of smoke or smoldering material, and instead offered that he did not see flames, "hot coals," or white ash. While Smith testified that he was only able to get within 60 to 70 feet of the smoldering areas, Crick indicated that he was able to travel within 5 feet of at least one of the areas. Given the testimony as a whole, I find that smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time; therefore there was a fire on the stockpile, which in turn is an accident as described by the statute. Given the testimony of the witnesses at hearing and accepting all testimony as true, I reaffirm my finding that "smoke, ash, and smoldering areas existed on the New Future Stockpile and those areas had the potential to burst into flame at any time, and therefore there was a fire on the stockpile, which in turn is an accident as described by the statute." *American Coal Co.*, 36 FMSHRC 176, 179 (Jan. 2014) (ALJ).

Fair Notice Argument. American asserts that a reasonably prudent person familiar with the mining industry and the protective purpose of Section 3(k) of the Act would not have recognized that "fire" or "mine fire," as used in Section 3(k), could include "smoldering combustion that reasonably has the potential to burst into flames." American Br. 18-19. American points to the deposition testimony of Inspector Rennie, in which he commented that he previously saw similar conditions as those observed on the stockpile, but never issued a 103(k) order for those conditions. Rennie's testimony is not admitted in this proceeding, but even if it were, I find that American had adequate notice.

American argues that, even in the absence of Rennie's testimony, the Secretary's interpretation was never communicated to American prior to the issuance of the 103(k) order. The order itself mentions smoking and white colored ash, but not the reasonable potential to burst into flames. American is unaware of any prior history of a 103(k) order or any other available guidance from the Secretary that existed as of January 19, 2010 and provided advance notice that the Secretary's inspectors might find smoldering or smoking areas on a surface stockpile devoid of flames or glowing embers to constitute a fire and hence to be an 'accident' under Section 3(k) of the Mine Act. Further, American argues that the Secretary never presented, before or during the hearing of this matter, the altered interpretation that was upheld by the Commission and requiring the Secretary to prove the additional element that smoldering material has the reasonable potential to burst into flames. This interpretation was not raised at trial and American was not given an opportunity to address this additional element. Finally, the Commission's decision in *Phelps Dodge Tyrone*, 30 FMSHRC 646 (Aug. 2008), does not provide fair warning to mine operators that their surface stockpiles are subject to 103(k) orders absent a flaming fire.

The Secretary, in his brief, argues that American had notice of the Secretary's interpretation that a fire included smoldering combustion that reasonably has the potential to burst into flames. Sec'y Br. 2. The Secretary states that (1) American stipulated at hearing that the existence of a fire was the singular issue in the case and that a determination as to whether a fire existed would dispose of the case, (2) the Secretary's interpretation of the standard at hearing gave American notice that MSHA considered smoldering combustion to be 'fire' without the presence of flames, (3) that the issue of whether the smoldering locations had the potential to burst into flames was tried at the original hearing, and (4) that the trial record contains evidence regarding the conditions observed: that is smoke, sulfur odor, white ash, and heat waves, such that the mine operator should reasonably have believed that a mine fire existed on New Future Stockpile.

The Commission has stated that "due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *Lafarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013) (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). Fair notice is provided when a party has "actual notice of MSHA's interpretation . . . prior to enforcement . . . against the party." *Id.* (citing *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996)). In the absence of actual notice, the Commission has applied the "reasonably prudent person" test, in which "the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The Commission has explained that "'the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,' but whether a reasonably prudent person, familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that 'particular factual setting[.]'" *Lafarge North America*, 35 FMSHRC at 3501 (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-416 (Nov. 1990).

There is no evidence in the record that the Secretary articulated his interpretation introduced during review before the Commission directly to American prior to the issuance of the 103(k) order. However, I find that the purpose of the Act, Congress' recognition of the dangers of smoldering flameless fires, and prior Commission case law involving an identical interpretation of the term "fire" are all things that a reasonably prudent person familiar with the mining industry would have been aware of and considered to determine that the conditions on the stockpile amounted to a hazard that warranted corrective action within the purview of the cited provision of the Act.

Section 103(k) of the Act provides, in pertinent part, that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine[.]" 30 U.S.C. § 813(k). The Act defines the word "accident" as "includ[ing] a mine explosion mine ignition, *mine fire*, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k) (emphasis added).

In the Commission's original decision, relying upon the legislative history of the Act, it stated that "Congress understood that 'mine fires' may manifest themselves differently in different environments or scenarios." *American Coal Co.*, 35 FMSHRC 380, 383-384 (Feb. 2013). Further, it stated that "the purpose of the Mine Act is to enhance safety standards 'to prevent death and serious physical harm.'" *Id.* (citing 30 U.S.C. § 801(c)). In upholding the Secretary's interpretation of the term "mine fire," the Commission noted that the "proffered interpretation [was] also aligned with the purposes of the Act" and agreed that "Time is of the essence when dealing with a fire, and requiring an inspector who observes smoldering coal to wait to observe a flame before evacuating an area may cause a delay that is the difference between life and death." 35 FMSHRC at 385.

Mine operators are aware of the broad nature in which safety standards are to be interpreted and the dangers associated with mine fires. Here, the Secretary's interpretation, while broad, is certainly one a reasonably prudent person familiar with the dangers of fire and the Act's purpose of enhancing safety would be aware of and expect. The testimony of the MSHA inspectors and that of the mine safety manager indicate that fire is a serious and ever-present hazard in coal mining. The fact that the stock pile was smoking, smoldering, smelled of sulfur and exhibited waves of heat would all lead a reasonably prudent person to understand that flames were imminent and that the conditions as described met the definition of a mine fire. While the Secretary did not explicitly set forth the fact that the smoldering must have the reasonable potential to burst into flames, I find that a reasonably prudent person would understand the potential for fire and that the smoldering in the manner observed by the inspectors was considered a fire.

American also argues that the Commission's decision in *Phelps Dodge Tyrone, Inc.*, does not provide notice of the Secretary's interpretation. 30 FMSHRC 646 (Aug. 2008). Specifically, American asserts that *Phelps Dodge Tyrone* "involved the term 'fire' as used in 30 C.F.R. § 50.2(h)(6) and as the Commission recently recognized, 'Section 50.2 plainly limits its application to terms 'used in this part,' that is Part 50 of MSHA's regulations (the reporting regulations)." American Br. 21 (citing *Revelation Energy, LLC*, 35 FMSHRC 3339 (Nov. 20, 2013)). For reasons that follow, I disagree and find that *Phelps Dodge Tyrone* did provided notice of the Secretary's interpretation.

In *Phelps Dodge Tyrone* the mine operator petitioned for review of a Commission judge's decision upholding a violation of section 50.10 of the Secretary's regulations.[7] There, the Secretary alleged that an "accident," as defined by the Section 50.2(h)(6),[8] occurred due to an "unplanned fire." *Id.* at 651. A Commission judge, relying upon a dictionary definition of "fire," decided that a flame must be present for there to be a fire, and that once a flame is present, the mine operator is under an obligation to comply with section 50.10 and notify MSHA. *Id.* at 650. There, the Secretary put forth an interpretation of "fire" before the Commission which is

[7] Section 50.10 provides in pertinent part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10.

[8] Section 50.2(h)(6) provides that "Accident means: . . . In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;

identical to that which he advanced in the instant matter.[9] *Id.* at 659.

Here the Secretary has set forth an interpretation of "fire" identical to that which was set forth in *Phelps Dodge Tyrone*. While American asserts that the interpretation in *Phelps Dodge Tyrone* is limited to part 50 of the Secretary's regulations, I disagree. At least one Commission judge addressing a violation of a standard not under part 50 of the Secretary's regulations has interpreted the *Phelps Dodge Tyrone* decision to mean that smoldering coal fines are included in the definition of "fire." *See Powder River Coal*, LLC, 31 FMSHRC 243, 254 (Feb. 2009) (ALJ). Moreover, given the statements of the Commission in the original decision on review and the majority's acknowledgement that the instant matter was "not the first time [the Secretary] has proffered this interpretation to the Commission," I find that *Phelps Dodge Tyrone* provided notice of the Secretary's interpretation.

While American argues that the Secretary did not present his new interpretation before or during the hearing of this matter, I find that notice of that interpretation was provided, as discussed above, by means of the Mine Act, Congress' recognition of the dangers of smoldering flameless fires, and the Commission's decision in *Phelps Dodge Tyrone*. American argues that the additional element that smoldering material has the "reasonable potential to burst into flames" was not raised at trial and American was not given a chance to present rebuttal evidence. However American was given every opportunity to present evidence about smoldering and combustion relevant to the case and the fact the issue was not raised at hearing does not change my view that the mine received fair notice of the meaning of fire prior to being issued the order in this case. The reasonably prudent person test must be based upon conclusions drawn by an objective observer with knowledge of the relevant facts. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based upon the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (citations omitted). Therefore, I find that the Secretary provided American with fair notice of his interpretation.

IV. CITATION 8418504

On June 23, 2014 the parties filed a joint stipulation regarding Citation No. 8418504. The parties stipulate that, if I vacate Order No. 8418503, then Citation No. 8418504 should also be vacated. Jt. Stip. ¶ 7. Conversely, they stipulate that, if I find that a "'fire' or 'mine fire' occurred on the New Future stockpile" then the violation of section 50.10, as alleged in Citation No. 8418504, should be affirmed. *Id.* The parties agree that, if Citation No. 8418504 is

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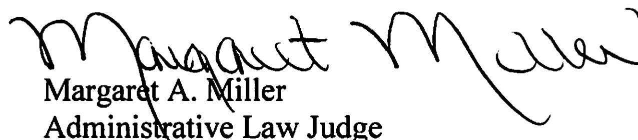
[9] A split Commission did not address the question of whether the mine had notice of the Secretary's interpretation. Commissioners Jordan and Cohen, however, agreed that the Secretary's interpretation was reasonable while Commissioners Duffy and Young declined to address the Secretary's interpretation and instead advocated that the case should be decided on other, narrower grounds. *Id.* at 660, 663. Notably, Commissioners Duffy and Young believed that section 50.2(h)(6)'s use of the term 'fire' is hardly unique in the Mine Act and its regulations. 'Fire' is found in numerous sections of the amended Mine Act and in more than 100 of MSHA's Mine Act Regulations." *Id.* at 664.

affirmed, the negligence of the citation should be reduced from "high" to "moderate" based upon American's claimed good faith belief that it had no reporting obligation because it did not believe there was a mine fire at the time the order and citation were written. The parties also agree that, if Citation No. 8418504 is affirmed, the violation will remain S&S, but that the degree of injury should be modified to "lost workdays or restricted duty" since although the hazard would result in injuries of a reasonably serious nature, those injuries would not be fatal. *Id.* at ¶ 7(f). Further, the parties provide a stipulation as to the remaining penalty factors and agree that $4,000.00 is an appropriate penalty for this violation, which was originally assessed at $8,893.00. *Id.* at ¶ 7(j).

Given my findings with regard to Order No. 8418503, I **AFFIRM** Citation No. 8418504 as modified by the stipulations of the parties. Citation No. 8418504 is modified to "lost workdays or restricted duty" and "moderate" negligence. I assess a penalty of $4,000.00.

V. ORDER

American's Motion to Supplement the Record is **DENIED**. Consistent with the Commission's decision and direction on remand and based upon the record evidence, I find that the Secretary established that Order No. 8418503 was validly issued. Order No. 8418503 is hereby **AFFIRMED** and contest proceeding LAKE 2010-408-R X is **DISMISSED**. Further, Citation No. 8418504 is **MODIFIED** to "lost workdays or restricted duty" and "moderate" negligence. American Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of $4,000.00 within 30 days of the date of this decision. Upon receipt of payment, contest proceeding LAKE 2010-409-R X is **DISMISSED**.



Margaret A. Miller
Administrative Law Judge

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