FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 25, 2000

THE DOE RUN COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. CENT 2000-9-RM
	:	Citation No. 7884481; 9/9/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Viburnum No. 29 Mine
ADMINISTRATION, (MSHA),	:	Mine ID 23-00495
Respondent	:	
	:	CENT 2000-14-RM
	:	Citation No. 7884492; 9/10/99
	:	
	:	Buick Mine/Mill
	:	Mine ID 23-00457
	:	
	:	CENT 2000-22-RM
	:	Citation No. 7884505; 9/13/99
	:	
	:	CENT 2000-23-RM
	:	Citation No. 7884506; 9/14/99
	:	
	:	Brushy Creek Mine/Mill
	:	Mine ID 23-00499

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersol, P.C., Pittsburgh, Pennsylvania, for Contestant;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Zielinski

These cases are before me on notices of contest filed by The Doe Run Company against the Secretary of Labor and her Mine Safety and Health Administration (MSHA) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Act"). The company contests the issuance of four citations alleging violations of a mandatory health and safety standard, 30 C.F.R. § 57.11050(a), which requires that two escapeways be maintained from the "lowest levels" of underground metal and non-metal mines. A hearing was held on May 31,

2000, in St. Louis, Missouri. Following receipt of the transcript, the parties submitted briefs on August 21, 2000. Contestant submitted a reply brief on August 28, 2000. The Secretary elected not to submit a reply brief. For the reasons set forth below I find that the Secretary's interpretation of the standard is entitled to deference, but, due process considerations preclude enforcement of that interpretation against Doe Run here.

The Evidence — Findings of Fact

The relevant facts are not in dispute. Doe Run operates eight underground lead, zinc and copper mines, including the three mines at which the subject citations were issued, Buick, Brushy Creek and Viburnum No. 29. The subject mines extract ore from a deposit known as the viburnum trend, which runs in a north-south direction. While the ore deposit is essentially horizontal, it angles slightly downward as it proceeds south, is somewhat irregular in elevation and varies considerably in thickness. The mines are accessed through shafts. The Buick and Brushy Creek mines have separate production and man shafts and the Viburnum No. 29 Mine has a combined production and man shaft. The Buick and Brushy Creek mines have separate production and haulage levels off of each shaft and the No. 29 mine has only a production level. The production and man shafts, separate escape shafts and connecting mines provide avenues of egress to the surface from the production level of each mine. There is no dispute that, in general, there are at least two separate escapeways from the production level of each of the mines.[1]

The areas at issue here are discreet locations where Doe Run uses what is called "multiple pass mining" to extract ore when the thickness of a deposit substantially exceeds the height of the normal 16-20 foot high drift of the production level. After mining the ore at the production level, Doe Run may make a cut below the production level, an "undercut", or above the production level, an "overcut." An undercut is made by cutting a drift at a downward angle from the production drift and then horizontally into the ore body underneath the production drift. The material between the floor of the production drift and the ceiling of the undercut is called a "sill" and its thickness generally ranges from 15 to 30 feet, occasionally up to 50 or 60 feet. Overcuts are made in the same fashion by angling a drift up from the production drift. Doe Run also accesses other parts of the ore body directly horizontal to the production drifts by cutting a separate drift to such areas, which will be referred to as "side-cuts". When these three types of additional cuts reach the ore body and extraction of the ore begins, they all have one significant characteristic in common. The work areas are accessed only by a single passageway or drift. The distance from the top of the undercut incline to the working face was 250 feet in the Buick Mine and 1,000 feet in the Viburnum No. 29 Mine. No specific distances were specified in the citations of the undercuts at the Brushy Creek Mine. The lengths of single entrances to "side-cuts" ranged up to 2,000 feet, and there appear to be active workings at the southernmost end of the production level of the Brushy Creek Mine that are accessed by a single passageway of a

[1] Doe Run provides other safety measures for miners who may encounter difficulty exiting a work area. Rescue chambers are provided in certain areas and an emergency hoist with an "escape bullet" is available to remove miners through ventilation bore holes.

comparable distance. The map of the Buick Mine also depicts now-inactive areas at the production level that were accessed by a single passageway several thousand feet long.

Multiple pass mining has become prevalent over the past 6-8 years. The previous method involved accessing the ore body near its top and mining downward in benches, eventually creating a void of considerable height, e.g. 50-60 feet. Problems with scaling that high a roof and drilling pillars for removal rendered that method, in the opinion of Doe Run's managers, more dangerous and less efficient than the multiple pass method. That testimony was not contradicted by the Secretary.

The drifts leading to work areas in undercuts, overcuts and side-cuts serve as the sole means of ingress and egress for miners and equipment working in those areas. The work areas are ventilated, at least initially, by use of a fan and vent bag system, essentially a fabric tube through which air is blown from the main production area. Various types of rubber tired, diesel powered equipment access the work area through the drifts to drill, blast and remove the ore. Each piece of diesel equipment is equipped with two fire extinguishers and possibly a fire suppression system. Potential hazards that could render the drifts unusable as an escapeway, and which would also curtail ventilation, were identified as equipment fires or ground falls. There was one known fire in the mines, involving a truck, that occurred around 1987 or 1988. There was no evidence introduced as to the likelihood of a ground fall or any such past occurrences in the working areas of the mines.[2]

Where the secondary cut becomes extensive, the fan and vent bag system of ventilation eventually becomes inadequate and additional ventilation may be provided by cutting a shaft through the sill from the production drift. Such shafts could provide an additional avenue of egress from undercuts and overcuts, if a ladder was installed in the shaft. Doe Run's witnesses testified that it would take two to three days to cut such a shaft through a sill up to 30 feet thick, if no significant problems were encountered, and that a ladder would cost approximately $1,500.00 to $3,000.00. There were no such shafts cut in the cited areas because ventilation through the access drift was then adequate. The cutting of such a shaft and installation of a ladder would have been feasible in the cited areas in the Viburnum and Brushy Creek mines.

However, it was not feasible in the area cited in the Buick mine, the "area 1 pillar undercut." Where high grade ore is encountered, Doe Run typically extracts the pillars at the main production drift. Where the ore body is less than 150 feet wide, the pillars can simply be removed through the production drift. If wider, however, not all of the pillars can be removed in that manner. Additional roof support is provided by backfilling the mined "rooms" adjoining two or more rows of pillars with rock and similar materials mixed with cement. The pillars that are "trapped" in the backfill are then removed by making an "undercut" below them and drilling and blasting them down into the undercut, where the ore is removed by remote controlled loaders.

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[2] There was testimony that there had been roof falls in Doe Run's mines, but the only area specified was where pillars had been removed and no miner was allowed to enter.

Once pillars are removed, miners are prohibited from entering the area and cutting a ventilation/escapeway shaft from the production drift to the undercut is not feasible. Some pillars had been removed, and others entrapped, at the production level above the "area 1 pillar undercut" in the Buick Mine, prohibiting installation of a ventilation/escapeway shaft through the sill.

Doe Run had used this mining method for several years prior to the issuance of the citations. During that time, MSHA had conducted mandated quarterly inspections of the mines and the "undercut" areas currently in question, which have existed for as many as four years and possibly longer. No citations were issued for violating the two escapeway standard and the propriety of the undercuts was not otherwise questioned.

Doyle D. Fink became manager of MSHA's South Central District in 1995. Because of his concerns about important safety requirements he directed a review of escape and evacuation and ventilation plans of the mines in the District.[3] That review brought to his attention that numerous work areas in Doe Run's mines were accessed only by a single drift. As part of this special review project, he directed that inspections be made. MSHA inspector Robert Seelke, an experienced MSHA inspector who had inspected Doe Run's mines during the 13 years he had been assigned to the South Central District, inspected the mines beginning in July of 1999. After reviewing the results of his inspections, the information gathered from the review of the escape and evacuation and ventilation plans and discussions with mine personnel, MSHA determined to issue citations for violations of 30 C.F.R.§ 57.11050(a), the standard requiring two escapeways in these metal, non-metal mines. A total of 17 citations were issued in September of 1999, citing locations at six of the mines for purported violations of the standard, which provides:

> **§ 57.11050 Escapeways and refuges.**
>
> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface ***from the lowest levels*** which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during exploration or development of an ore body. (emphasis supplied)

[3] MSHA either had these documents on file, or could readily obtain them. *See*, 30 C.F.R. §§ 57.8520, 57.11053.

Mr. Fink's interpretation of the standard was that it required two escapeways from each work area in the mines.[4] Consequently, citations were issued for all of the areas entered by a single drift -- undercuts, overcuts and side-cuts. The wording of the citations, however, tracked Mr. Fink's interpretation of the standard, rather than the wording of the standard itself. Citation No. 7884481, issued on September 9, 1999, for the Viburnum mine, was typical. It read:

> The working area known as 78V21 and 78V6 was not provided with at least 2 separate properly maintained escape ways ***from that work area***. This area is accessed by a single entry for approx. 1000' to the working faces. This condition creates the hazard of employees being trapped in the mine should the only provided escapeway become impassable. Rubber tired, diesel powered mobile equipment is used in this area for ground control work, drilling, loading of explosives and to muck ore. Normally 5 or less employees work in this area. (emphasis supplied)

This citation was modified on September 16, 1999, to specify a violation of § 11050(b), which requires refuges in certain situations. Doe Run contested the citations, as modified. After discussions between MSHA and the Secretary's Solicitor's Office, the citation was modified again on December 3, 1999, to specify the applicable standard as § 11050(a), and the highlighted wording was changed to conform to the wording of the standard. The first sentence of Citation No. 7884481 now reads: "The areas known as 78V21 and 78V6 were not provided with at least 2 separate properly maintained escapeways to the surface ***from this lowest level***." Similar modifications were made to the other three citations.[5] The citations of the 13 areas that did not involve undercuts were vacated, apparently in recognition that they could not be considered "lowest levels" of the mines.

The ultimate issue in these cases is whether the "undercut" areas addressed by the citations constitute "lowest levels" of the mines within the meaning of § 57.11050(a). The Secretary's interpretation of the standard, as applied here, has admittedly not been applied in the past at any of Doe Run's mines and was developed during litigation of these and the related

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[4] Contrast the wording of the escapeway standard for metal and non-metal mines with the comparable standards applicable to coal mines which require that separate escapeways be provided "**from each working section**" of the mine. 30 C.F.R. §§ 75.380(b)(1) and 75.381(b).

[5] Citation No. 7884492 cited an undercut at the Buick Mine and read, after modification: "The area known as area 1 pillar undercut was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level." Citation No. 7884505 cited an undercut at the Brushy Creek Mine and read, after modification: "The area known as 76 bottom was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level." Citation No. 7884506 also cited an undercut at the Brushy Creek Mine and read, after modification: "The area known as 9 undercut was not provided with at least 2 separate properly maintained escapeways to the surface from this lowest level."

contest proceedings. While the other areas cited, "overcuts" and "side-cuts", pose virtually the same hazards as these "undercuts", the Secretary has tacitly conceded that there is no viable argument that those areas fall within any reasonable definition of "lowest levels" by vacating the subject citations.[6]

The parties introduced into evidence several definitions of the word "level" and related terms of significance in mining operations. Both parties rely on parts of the definition of the term "level" contained in the U.S. BUREAU OF MINES, A DICTIONARY OF MINING, MINERAL AND RELATED TERMS 638 (1968 ed.) ("Dictionary"), which provides, in pertinent part:

> **level** a. A main underground roadway or passage driven along the level course to afford access to the stopes[7] or workings and to provide ventilation and haulageways for the removal of coal or ore. * * * b. Mines are customarily worked from shafts through horizontal passages or drifts called levels. These are commonly spaced at regular intervals in depth and are either numbered from the surface in regular order or designated by their actual elevation below the top of a shaft. * * * c. In pitch mining, such as anthracite, there may be a number of levels driven from the same shaft, each being known by its depth from the surface or by the name of the bed or seam in which it is driven. * * * e. Applied to seams which run like floors in an office building. Under and above the seam lie the rock strata. * * * j. All openings at each of the different horizons from which the ore body is opened up and mining is started. * * *

Doe Run additionally relies on a definition found in SOCIETY OF MINING ENGINEERS, UNDERGROUND MINING METHODS HANDBOOK 88 (1982 ed.) which provides:

> **Level**: A level is a system of horizontal underground workings that are connected to the shaft. A level forms the basis for excavation of the ore above or below.

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[6] Undercuts could pose an additional hazard in "wet" areas, where water accumulation could drain into the lower elevations. There was one such area involved here, but the additional hazard was minimal and was described as posing a significant flooding problem if a pump would be inoperable for two weeks.

[7] The term "stoping" was defined, in pertinent part, as: "The act of excavating ore, either above or below a level, in a series of steps. In its broadest sense stoping means the act of excavating ore by means of a series of horizontal, vertical, or inclined workings in veins or large, irregular bodies of ore, or by rooms in flat deposits. * * * .

A "Safety Rule Book" developed by ASARCO and used by Doe Run, defined "levels" as "worked or working areas of a mine off the shaft."

Witnesses called by the parties relied on various parts of these definitions in testifying that the undercut areas are — or are not — "levels" or "lowest levels" within the meaning of the standard. The Secretary places particular emphasis on the Dictionary's, subpart j, which reads: "All openings at each of the different horizons from which the ore body is opened up and mining is started." Doe Run emphasizes those portions of the various definitions that purport to require that each level be separately connected to a shaft and the portion of the Dictionary definition that refers to stopes as evidencing that undercuts and overcuts are simply workings accessing the ore deposit below or above the single level of the mines. The Secretary counters that levels do not need to be connected to a shaft, noting that there are levels in "adit" mines, which are mines accessed through a horizontal portal or tunnel and have no shafts. She also points out that the undercuts are indirectly connected to a shaft, albeit not separately from the production level.[8]

The Secretary also relies upon an exhibit that apparently originated somewhere in Doe Run's operations that sets forth an explanation of the color scheme used on various mine maps to show workings at different elevations and refers to them as "levels." I place no significance on that exhibit, however, because its relationship to any of the mines at issue here was never established and because there is no evidence that whoever prepared the document intended to use the terms "level" or "levels" other than as a general reference to elevation or with even the remotest relationship to the use of the term "lowest levels" in the standard.

Doe Run argues that even if the "undercuts" are determined to be levels, that they are not the lowest levels of the mines because portions of the production and/or haulage levels at each of the mines are lower in elevation than the cited areas. For example, the lowest elevation of the floor of the cited area in the Viburnum mine was 482 feet above sea level while the floor elevation of the main level off the shaft was 446 feet above sea level, some 36 feet lower in elevation. Such relative positions can occur because, as noted previously, the ore body is irregular in thickness and is not absolutely horizontal. The Secretary's witnesses testified that the term "lowest levels" is defined primarily in functional terms and has little to do with actual elevation.

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[8] The Secretary also argues that since the incline down to an undercut can be referred to as a "ramp" that the undercut is a separate level because the Dictionary defines "ramp" as an "incline connecting two levels." I reject that argument because there is no indication that the use of the word "levels" in that definition has any relationship to the Dictionary's definition of "level." In fact, the portion of the definition relied upon is the last of a series of definitions which have nothing to do with the term "level" and it appears to be referring to "levels" in the most general sense.

Conclusions of Law

As noted above, the ultimate issue in these cases is whether the cited "undercut" areas are "lowest levels" of the mines within the meaning of the safety and health standard, 30 C.F.R. § 57.11051(a). The legal framework for resolving that issue requires determining whether the regulation is ambiguous, if so, whether the Secretary's interpretation can be afforded deference, and finally, whether Doe Run received fair notice of the interpretation it was cited for violating.

The deference portion of the analysis was described by the Commission in *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998):

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted). *See also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v . FMSHRC*, 40 F.3rd 457, 463 (D.C.Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C.Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Electric Co v. EPA*, 53 F.3d 1324, 1327 (D.C.Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C.Cir. 1989)). *See also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary argues that her interpretation of the regulation is entitled to deference in that it is not plainly erroneous or inconsistent with the regulatory language and furthers the purposes of the Act. Doe Run argues, alternatively, that the regulation is not ambiguous and that the Secretary's interpretation is not reasonable and has not been consistently applied. Doe Run also argues that due process precludes application of the Secretary's interpretation in these cases because it was not fairly warned of the "new" interpretation applied here. The Secretary, as previously noted, elected not to file a reply brief and has not directly addressed Doe Run's due process argument.

Ambiguity

The term "lowest levels" is not defined in either the Act or the regulations. In light of the various definitions introduced into evidence and the parties respective witnesses' opinions as to whether these "undercuts" were a separate "level" of the mines and whether they were "lowest levels" within the meaning of the regulation, I have little trouble concluding that the regulation is ambiguous when applied to these undercuts. "As the Court stated in *Boston & Maine,* [503 U.S. 407 (1992)] '[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context.'" *Island Creek Coal Co., supra,* 20 FMSHRC at 19. Ambiguity exists when a regulation is capable of being understood by reasonably well-informed persons in two or more different senses. *Id.*

The Secretary's and Doe Run's witnesses, each of whom easily qualified as reasonably well-informed persons, advanced diametrically opposed interpretations of the term "lowest levels" as applied to these undercuts. Moreover, as discussed more fully below, I find that those respective interpretations were reasonable and were formed by reasonably prudent persons familiar with the mining industry and the protective purposes of the standard. It appears, both from the respective definitions and the limited litigation history of the provision, that the term "level" in the mining context includes physical and functional components. *See Savage Zinc, Inc.*, 17 FMSHRC 279 (February 1995); *Magma Copper Co.*, 16 FMSHRC 327 (February 1994). Application of the term "lowest levels" to the "real world" of the undercuts cited in these cases demands interpretation of the term which is highly ambiguous in this context. Doe Run's argument that the regulation is not ambiguous in this context because the "reasonably prudent person" could only conclude that the undercuts were not lowest levels within the meaning of the regulation must be rejected.

The Secretary's Interpretation - Deference

It is well-established that the Secretary's interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function. *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), *cert. denied,* 115 S.Ct. 2611 (1995); *Island Creek Coal Co., supra,* and cases cited therein. Doe Run clearly faces an uphill battle in seeking to avoid the Secretary's interpretation of the regulation. As described in *General Electric, supra,* 53 F.3d at 1327:

> In adhering to this policy [of deference], we occasionally defer to "permissible" regulatory interpretations that diverge significantly from what a first-time reader of the regulations might conclude was the "best" interpretation of their language. *Cf. American Fed. Gov't Employees v. FLRA,* 778 F.2d 850, 856 (D.C.Cir. 1985) ("As a court of review . . . we are not positioned to choose from plausible readings the interpretation we think best." (internal punctuation and citation omitted)). We may defer where the agency's reading of the statute would

> not be obvious to "the most astute reader." *Rollins*,[9] 937 F.2d at 652. And even where the petitioner advances a more plausible reading of the regulations than that offered by the agency, it is "the agency's choice [that] receives substantial deference." *Id*.

As noted above, I find the respective interpretations of the term "lowest levels" offered by the parties to be reasonable. Doe Run's reliance on aspects of the various definitions to urge that the undercuts and overcuts are not separate levels but merely in the nature of stopes where excavation of the ore above or below the production level occurred, is a reasonable interpretation of the regulation.[10] However, the Secretary's reliance upon other aspects of the Dictionary's definitions of the term "level" as including "[a]ll openings at each of the different horizons from which the ore body is opened up and mining is started" is also reasonable. The undercuts can certainly be found to reasonably meet the functional aspects of the definitions of the term "level" because they are passages driven along an essentially level course affording access to the workings and providing ventilation and haulageways for the removal of ore. The Secretary's interpretation of the term "lowest levels" as not being strictly related to elevation, but more of a relative concept with respect to other levels, is also reasonable. The ore body being mined here was irregular, both in thickness and in elevation. It also had a general slope, downward from north to south. The floors of the undercuts at issue here were not the lowest points in the working areas of the mines. Depending upon the layout and topography of a particular mine, interpreting the term "lowest levels" as referring only to the level, a portion of which happened to be the lowest in elevation, could completely eviscerate the standard. Although the parties do not address it, the use of the plural rather than the singular form of the word level, lends further support to the Secretary's interpretation of the standard as applied here and undercuts Doe Run's elevation argument.

There is little question but that the Secretary's interpretation of the regulation is more consistent with the safety promoting purposes of the Act. Requiring two separate escapeways from these undercuts would enhance the safety of miners working in those areas, though the degree to which safety would be enhanced is unclear because of the limited evidence presented on the actual hazards experienced in these mines. Doe Run argues that any safety enhancement attributable to the application of the Secretary's interpretation would be outweighed by the safety risks described with respect to the earlier mining method. That argument misses the mark. It is highly unlikely that enforcement of the Secretary's interpretation would prompt an operator to use the previous method. In many instances, compliance could be achieved by cutting ventilation/escapeway shafts through the relatively thin sills. An operator might also continue to use multiple pass mining, driving the production drift into the lower elevation of an ore body and

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9 *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649 (D.C.Cir. 1991).

10 Doe Run's argument that a "level" must be independently connected to a shaft, is unpersuasive. It would appear that all mines have at least one level, including, "adit" mines, which are accessed through a tunnel and do not have shafts. *See Savage Zinc Co., supra*.

mine the ore above by using an overcut, or a series of overcuts. As noted above, the Secretary has at least tacitly conceded that the standard cannot reasonably be interpreted to apply to overcuts.

Doe Run also argues that the Secretary's interpretation is not entitled to deference here because it was "newly minted during this case," was not announced in any policy memorandum or embodied in any agency document, is inconsistent with other interpretations and has not been consistently applied. However, interpretations first put forward in the course of administrative litigation are, nevertheless, entitled to deference if they "reflect the agency's fair and considered judgment on the matter in question." *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C.Cir. 2000) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) and cases cited therein.

The interpretation advanced here appears to reflect the agency's fair and considered judgment on the matter in question. The testimony of the Secretary's witnesses described the process by which the enforcement action proceeded to this point. The original interpretation was applied to all single access areas, and used wording ("from that work area") inconsistent with the applicable standard. For this administrative litigation, however, that position was reexamined in meetings involving MSHA's administrators and members of the Office of the Solicitor. The result was formulation of an agency interpretation, acceded to by the administrators who had developed the original interpretation.[11] That interpretation was consistently applied to the Secretary's enforcement action and thirteen of the seventeen citations were vacated.

The interpretation relied on here is not a rationalization developed on appeal after administrative litigation had concluded. Contrary to Doe Run's argument, I do not find the Secretary's interpretation substantively inconsistent with interpretations urged by the Secretary in other cases. It is also not inconsistent with any other agency regulations, policy directives or other written materials. While there was conflicting evidence as to whether single access areas existed in other mines, some of which appear to be located within the same MSHA district as Doe Run's mines, this appears to be the first instance in which the Secretary has determined to initiate enforcement action with respect to single access undercuts.

Under the circumstances presented here, the Secretary's interpretation is entitled to deference and Doe Run's arguments to the contrary are rejected. *See National Wildlife Federation v. Browner*, 127 F.3rd 1126, 1129-30 (D.C.Cir. 1997).[12] Doe Run also contends that

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[11] Doyle D. Fink, manager of MSHA's South Central District, in which these mines were located, testified that in his opinion the same safety considerations applied to all single access areas and that there should be two escapeways from such areas. He acknowledged, however, that the standard treated such areas differently and under the interpretation advanced by the Secretary it could be applied only to the undercut areas.

[12] While the Secretary's interpretation is entitled to deference, considerations of due process preclude its application here. It is, therefore, unnecessary to address Doe Run's

the considerations discussed above dictate that the Secretary's interpretation is entitled to less deference than a more established or publicly promulgated pronouncement. *See A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3rd 1107 (9th Cir. 1998). While I disagree, even under a reduced deference standard I would sustain the Secretary's interpretation.

Due Process -- Fair Notice

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Electric*, 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

Island Creek Coal Co., supra, 20 FMSHRC at 24.

The issues raised by Doe Run on deference have considerably more force in its due process argument. Doe Run's interpretation of the standard as applied to these undercuts is at least as reasonable as the Secretary's. Doe Run had used this method of mining for several years and its interpretation of the standard had never been called into question by the Secretary's MSHA inspectors. Doe Run was aware of other mines that had used this method, also with the apparent acquiescence of MSHA. The Secretary's formulation of her interpretation included at least two prior iterations and was ultimately developed during the course of these proceedings. I have no trouble concluding that a reasonably prudent person familiar with the mining industry and the protective purposes of the Act would not have recognized the specific prohibition of the

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contention that the area 1 pillar undercut at the Buick Mine was an area of development, for which the standard does not require two escapeways.

regulation embodied in the Secretary's interpretation of the standard as applied to these undercuts. The Secretary's determination not to respond to Doe Run's due process argument may well have been prompted by the weight of the evidence in support of its argument.

Principles of due process preclude application of the Secretary's interpretation to these undercuts.

Order

The two escapeway standard, as applied to the four "undercuts" at issue here, is ambiguous. The Secretary's interpretation of the standard, advanced for the first time in this litigation, reflects the agency's considered judgement, is reasonable and consistent with the protective purposes of the Act and is entitled to deference. Because Doe Run did not have fair warning of the Secretary's interpretation, however, it cannot be enforced in these instances.[13]

Accordingly, Citations numbered 7884481, 7884492, 7884505 and 7884506, are hereby **Vacated**.

Michael E. Zielinski
Administrative Law Judge

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[13] There is little question but that all of the working areas accessible only by a single drift present safety concerns. The Secretary's interpretation of the two escapeway standard permitted her to address only 4 of the 17 cited areas. The precise degree of risk presented, however, remains largely unquantified. Formal rulemaking would appear to be the preferred approach to address those concerns.