

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 19, 1996

AKZO NOBEL SALT, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. LAKE 96-45-RM
: Citation No. 4100787; 11/28/95
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. LAKE 96-65-RM
ADMINISTRATION (MSHA), : Citation No. 4546275; 1/25/96
Respondent :
: Docket No. LAKE 96-66-RM
: Citation No. 4546276; 1/25/96
:
: Docket No. LAKE 96-80-RM
: Citation No. 4546323; 1/30/96
:
: Cleveland Mine
: Mine I.D. No. 33-01994
:
:
SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 96-125-M
Petitioner : A. C. No. 33-01994-05659
v. :
: Cleveland Mine
AKZO NOBEL SALT INCORPORATED :
Respondent :

DECISIONS

Appearances: Edward H. Fitch IV, Esq., Office of the
Solicitor, U.S. Dept. of Labor, Arlington,
Virginia, for the Respondent/Petitioner;
Mark N. Savit, Esq., Ruth L. Ramsey, Esq.,
Patton, Boggs & Blow, Washington, D.C.,
for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the Secretary of Labor (MSHA), against the respondent mine operator Akzo Nobel Salt Inc. (AKZO), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments of \$1,000, for alleged violations of mandatory reporting regulations 30 C.F.R. 50.10 and 50.20(a). (Civil Penalty Docket No. LAKE 96-125-M, and Contest Docket Nos. LAKE 96-65-RM and LAKE 96-80-RM).

Contest Docket Nos. LAKE 96-45-RM and LAKE 96-66-RM concern contests filed by AKZO challenging the legality of two section 104(a) non-"S&S" citations alleging violations of regulatory sections 50.10 and 57.11050(a).

At the request of the parties, a prehearing conference was held on the record to allow the parties to explore and address the issues, proposed stipulations, and the filing of documentary evidence, depositions, and briefs, for submission of these matters for summary decisions. I have considered all of the oral and written arguments presented by the parties in the course of my adjudication of these matters.

Issues

The issues presented in these cases are (1) whether the conditions or practices cited by the MSHA inspectors constitute violations of the cited mandatory safety and reporting standards and (2) the appropriate civil penalties to be assessed for the alleged violations, taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and discussed in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the Act, 30 U.S.C. § 820(i).
3. 30 C.F.R. 50.10, 50.20(a), and 57.11050(a).
4. Commission Rules, 29, C.F.R. § 2700.1 et seq.

Joint Stipulations

The parties stipulated to the following:

1. The Cleveland Mine was opened in 1961, has operated continuously since that time, and it is within the jurisdiction of the Mine Act.
2. The presiding judge has jurisdiction to hear and decide these matters.
3. The citations were properly issued by authorized representatives of MSHA and were properly served on AKZO.
4. The citations were timely contested by AKZO, and no part 100 post-inspection conferences were held.
5. The parties agree that AKZO has sought this litigation to challenge the positions of MSHA with respect to the implementation of 30 C.F.R. § 50.10 and 30 C.F.R. § 57.11050(a).
6. The mine produces approximately 2.5 million tons of salt per year, and the mined product (sodium chloride or rock salt) is used primarily for road salt, animal feed and chemical process additives. Salt is non-flammable and is recommended material for use in extinguishing fires.
7. Underground employment at the mine varies somewhat on a seasonal basis. However, at the time of incidents, total employment was approximately 174 on three production shifts and three maintenance shifts.
8. The mine is currently classified as a Category VI mine under the "gassy mine regulations." 30 C.F.R. § 57.22003(a)(6). That categorization "applies to mines in which the presence of methane has not been established and are not included in another category or subcategory." 30 C.F.R. § 57.22003(a)(6).
9. The production shaft is approximately 1853 feet deep from the shaft collar to the sump, and it is approximately 1763 feet from the shaft collar to the mine level.
10. The service shaft is approximately 1805 feet deep from the shaft collar to the sump, and is approximately 1765 feet from the shaft collar to the mine level.
11. The parties agreed to the technical descriptions of the production and service hoists (not included herein, but a part of the record).

12. Salt is extracted from the mine in a "room and pillar" formation, and a second, lower level is being developed. Three methods of salt extraction are currently being used in the mine.

13. The following type of combustible and flammable materials are used or stored for use in the mine: diesel fuel, hydraulic oil, greases, small quantities of paint, small amount of paper and wood, tires and fire resistant conveyer belting. The quantities of any of these materials underground vary significantly over time. However, the underground diesel fuel storage facility has a maximum capacity of 1,500 gallons. Furthermore, all of the flammable materials listed are stored in storage cabinets.

14. There are also various types of explosives, including ANFO along with boosters caps, detonators and primer cord that are used and stored, in magazines, for use in the mine. The mine has also experienced misfires on occasion. The mine has never been cited for any violation relating to the mishandling of misfires.

15. There have been two fires in the mine that were reported to MSHA pursuant to 30 C.F.R. § 50.10. The first was in 1983 and the second in 1996. The first involved a haulage truck while the second involved a lubrication truck. It appears that both fires apparently were caused by a diesel fuel line leak, and they were extinguished by mine personnel.

16. AKZO maintains that due to the construction of the wire ropes used in the hoisting equipment at the mine, it is necessary that the hoist ropes be "shortened" or adjusted periodically so that they are tight and of equal length. This must be done because, as the ropes are subjected to load, they stretch unequally. Once the variance in length among the ropes exceeds certain tolerances, they must be adjusted so that they are of equal length. Notwithstanding the variance among the lengths of individual ropes, the ropes must also be shortened if any of them exceed a certain maximum length.

17. AKZO maintains that the process of "shortening the ropes" must be undertaken more frequently with regard to the production hoist than with regard to the service hoist, because the ropes on the production hoist are subjected to greater loads and speeds than are the ropes on the service hoist.

18. AKZO maintains that the frequency with which this process must be undertaken decreases with the age of the

ropes, because they stabilize as the construction gaps between the wires are squeezed out with time.

19. MSHA maintains that the aforementioned maintenance work is required as a result of the wear and damage to the hoisting ropes which are caused by their use.

The Planned Hoist Outage of November 9, 1995
(Docket No. LAKE 96-45-RM)

20. A planned outage of the production hoist was conducted in order to "shorten" two of its four hoist ropes, in order, in part, to test AKZO's understanding of MSHA's interpretations of the applicability of the standards. Although AKZO's notification to MSHA and the citation state that the outage occurred at approximately 11:56 p.m. on November 9, 1995, the hoist log indicates that the outage occurred at approximately 12:56 p.m. on November 10, 1995. While no one can explain definitively the disparity, it has been suggested that the hoisting equipment clock had not been changed for daylight saving time. Counsel agree that this disparity is immaterial to the reporting issue because, in either case, the hoist was unavailable for use for more than 30 minutes. According to the hoist computer log, the hoist was put back into service at approximately 1:46 a.m., November 10, 1995.

21. This hoist incident was not immediately reported to MSHA, however a fax was received at the MSHA Newark Office at 8:34 a.m., on November 10, 1995.

22. On November 15, 1995, MSHA inspector Don Foster conducted interviews with both management and labor personnel with knowledge of the planned incident. AKZO management did not believe that the hoist could have been put back into service in less than 1 hour. MSHA also received statements from two miners who worked on the hoist which indicated that they believed that, in an emergency, the hoist could have been put back into service in approximately 40 minutes.

23. During the shift on which these events occurred, there were approximately 25 miners underground performing work unrelated to the maintenance activity at the production hoist. This work consisted entirely of maintenance activities on production equipment other than the hoist. No salt extraction occurred during the shift nor did any welding or cutting occur during the shift.

24. On November 28, 1995, MSHA inspector Okey Reitter issued section 104(a) Citation No. 4100787 in respect to the

event of November 9, 1995, citing a violation of 30 C.F.R. § 50.10.

25. On November 6, 1995, Mark Savit, AKZO Counsel, wrote MSHA seeking guidance regarding the enforcement of 30 C.F.R. § 57.11050 (the "Savit letter"). (Index of Documents, Tab N).

26. On December 8, 1995, MSHA Administrator Vernon Gomez responded to Mr. Savit's letter of November 6, 1995 (the "Gomez Response"). (Index of Document, Tab S).

27. On December 15, 1995, prior to the Government budget shut down, counsel for AKZO informed counsel for the Secretary, that AKZO would plan a hoist outage over the holidays that would provide a test case for this litigation.

The Planned Hoist Outage of December 24, 1995
(Docket Nos. LAKE 96-65-Rm and LAKE 96-66-RM)

28. A planned outage of the production hoist occurred on December 24, 1995. The hoist computer log indicates that it was shut down at approximately 12:53 a.m., in order to "shorten" all four of its hoist ropes. According to the hoist log, the hoist was not put back into service until approximately 3:34 a.m., December 25, 1995.

29. At the time that the ropes were shortened, they had not yet stretched beyond the limit allowed by MSHA's retirement criteria, at 30 C.F.R. § 57.19024, or by the manufacturer for safe operation.

30. It is possible that the hoist could have been put back into operation in less than the time that it was out of service. However, during that time, there was a period during which it would not have been possible to put the hoist back into service in less than one hour and miners were not evacuated from the mine.

31. During the shift on which these events occurred, there were three miners underground performing work unrelated to the work on the production hoist: a mechanic, an electrician, and a foreman. This work consisted of checking pumps and fans and preventive maintenance on the service hoist. No salt extraction occurred during this shift nor did any cutting or welding occur during this shift.

32. This hoist incident was not immediately reported to MSHA, however a fax was received at the MSHA Newark Office on December 26, 1995.

33. Following AKZO's report of these incident, MSHA Inspector Donald Foster traveled to the mine on December 28, 1995, and started his investigation. He was accompanied by MSHA Inspector Jim Strickler during part of his inspection.

34. Inspector Foster conducted interviews of both hourly and management employees at the mine and by telephone on December 28 and 29, 1995, and January 4, 5, 9 and 11, 1996. Management employees were accompanied by AKZO counsel during their interviews. On January 25, 1996, Inspector Foster issued Citation No. 4546275 citing a violation or 30 C.F.R. 50.10, and Citation No. 4546276, citing a violation of 30 C.F.R. 57.11050(a).

Discussion

Docket No. LAKE 96-45-RM

Section 104(a) non-"S&S" Citation No. 4100787, issued at 2:45 p.m., on November 28, 1995, cites an alleged violation of section 103(j) of the Act, and mandatory reporting standard 30 C.F.R. 50.10, and states as follows:

At about 11:56 p.m., on November 9, 1995, the production hoist was disabled for approximately 50 minutes while two of four hoist ropes were shortened. The rope shortening interfered with the use of the hoist equipment for more than thirty minutes while miners were underground. MSHA was not immediately notified of the interruption.

Docket Nos. LAKE 96-125-M, LAKE 96-65-RM and LAKE 96-80-RM

Section 104(a) non-"S&S" Citation No. 4546275, issued at 8:00 a.m., on January 25, 1996, cites an alleged violation of section 103(j) of the Act and mandatory reporting standard 30 C.F.R. 50.10, and states as follows:

On December 24, 1995, at about 12:53 a.m., the production hoist was damaged in that it was unavailable for service due to maintenance to shorten the four stretched hoist ropes. This damage to the hoist interfered with its use for more than 30 minutes and MSHA was not contacted immediately. The requirement to report this type of hoisting accident had been communicated to the mine operator by MSHA inspectorate in the past and to the company's lawyer through an MSHA letter dated December 8, 1995 (LAKE 96-65-RM).

Section 104(a) non-"S&S" Citation No. 4546323, issued at 4:00 p.m., on January 31, 1996, cites an alleged violation of section 103(d) of the Act and mandatory reporting standard 30 C.F.R. 50.20(a), and states as follows:

The mine operator failed to complete and mail to MSHA as required 7000-1 forms, for hoist damage which became immediately reportable when the production hoist was taken out of service for maintenance faults or damage, which exceeded 30 minutes. The outages were reported to MSHA by telephone for the following dates but no completed 7000-1 reports have been received. The operator had been informed in the past about the reporting requirements and has failed to submit the reports.

The dates are as follows: July 21, 1995, August 8, 1995, September 26, 1995, October 16, 1995, October 30, 1995, November 9, 1995, December 17, 1995, December 23, 1995, December 24, 1995 and December 28, 1995 (LAKE 96-80-RM).

Docket No. LAKE 96-66-RM

Section 104(a) non-"S&S" Citation No. 4546276, January 25, 1996, 8:03 a.m., cites an alleged violation of 30 C.F.R. 57.11050(a), and the cited condition or practice states as follows:

On December 24, 1995, at about 12:53 a.m., the production hoist was not available for use for approximately three hours and thirty-seven minutes. Miners continued to work underground performing tasks that were unrelated to the hoist rope shortening operation. The production hoist is part of one of the two escapeways at this mine. The mine operator therefore failed to comply with this standard because the miners who were underground were not provided with two properly maintained escapeways to the surface to use in the event of an emergency for a period in excess of one hour. During part of the time that the production hoist was out of service, the service hoist (the primary escapeway) was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. However, during that time both escapeways were not in service.

This incident was staged to test MSHA's enforcement of this mandatory safety standard. MSHA interpretation of this standard had been

communicated to the mine operator by inspectorate previously and to their lawyer in an MSHA letter dated December 18, 1995.

Deposition Testimony

MSHA Inspector Donald J. Foster, Jr., has served in that capacity since May 1991, and he confirmed that Mr. C. Okey Reitter is his supervisor. Mr. Foster has inspected the Cleveland Mine and is familiar with the hoists that are in use. He has taken a class dealing with ropes and hoists at the mine academy, and has prior mining industry experience (Tr. 4-16).

Mr. Foster stated that he investigated the hoist incident that occurred on November 9, 1995 (Citation No. 4100787), made notes, and reviewed them with Mr. Reitter. He confirmed that Mr. Reitter issued the citation (Tr. 17-22). Although the citation states that the hoist was disabled for approximately 50 minutes, Mr. Foster confirmed that this is not mentioned in his notes and he did not know where this information came from (Tr. 23). Based on statements he received during his investigation, he would say that the hoist was disabled for 40 minutes (Tr. 24). He confirmed that he did not review the citation, but believes that it is consistent with what he found during his investigation, except for the difference between 40 and 50 minutes that the hoist was down (Tr. 26). He believed the citation was justified.

Mr. Foster explained his understanding of section 50.10, as follows at (Tr. 28):

- Q. The 30 minutes that's necessary to trigger the reporting requirement in section 50.10 is computed with regard to the amount of time it takes to put the hoist back in service In other words, I could leave the hoist down all day; but if I can get it back running in 15 minutes, I don't have to report it under section 50.10. Is that right?
- A. Yes. To my understanding of that, Yes.

Mr. Foster stated that it makes no difference why the hoist is disabled for more than 30 minutes, or whether it is planned or unplanned. As long as it is unavailable for over 30 minutes, it is reportable. If power was not available to the hoist due to a power substation problem and the hoist was down for over 30 minutes, it would be immediately reportable (Tr. 29-30). He did not believe that ice in the shaft, which he considered a natural

occurrence, and which may render the hoist inoperable for more than 30 minutes, would be reportable, but he was not sure (Tr. 30).

After reviewing a MSHA Program Circular, "Report on 30 C.F.R. Part 50," December 1986 (Exhibit C-10, Tab F), he stated that according to this circular, ice in the shaft that results in hoist outage for more than 30 minutes would not be reportable (Tr. 32). The circular reference in question was read into the record (Tr. 31-32), and it states as follows:

- Q. What constitutes "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes?"
- A. Damage may be considered to be caused by some accident that involved hoisting equipment, or resulting from hoisting equipment failure. A natural occurrence such as ice in a shaft may cause the shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not itself be reportable.

Mr. Foster confirmed his understanding that ice in the shaft that results in the unavailability of the hoist, regardless of its duration, does not have to be reported, as long as there is no hoist damage, accident, or endangerment to miners (Tr. 33-34).

Mr. Foster stated that the hoist was out on November 9, 1995, because "they had experienced a stretch in the ropes, to the ropes, and they were tightening them up." He did not know if the hoist was malfunctioning at that time (Tr. 34). In response to a question of how the hoist was damaged at that time, Mr. Foster stated as follows at (Tr. 35-37):

* * * * So those ropes at that point were stretched where they needed to take the slack out of them. Those ropes were stretched. Those ropes were damaged.

- Q. Do you know for a fact -- and I think you said you did not know for a fact -- that the ropes were stretched to such a point that they had a skip that already exceeded the location they were supposed to go to?

A. No, I don't.

Q. Let's go back. Let's suppose that the rope-adjusting exercise was undertaken before the ropes had stretched to the point that they exceeded that limit. In other words, they were undertaken as a matter of preventive maintenance. It was done before there was any damage to the rope. Okay?

A. Okay.

Q. Then how is the hoist damaged?

A. If we're looking at a situation where they preventively -- or for preventive maintenance purposes were taking this slack out, in my opinion, if there was enough slack to take out of there, then it had to have exceeded the point where they wanted it to be. Okay? So there was already stretching of the rope in order to take the initiative and to go through this whole process to eliminate it.

Q. Are you willing to say that the work that was undertaken that you investigated in this regard was preventive maintenance? Do you know whether it was or not?

A. No.

* * * *

So in my opinion, preventive maintenance is the troubleshooting, the visual, the looking at it. Once you've started the mechanics on something, in my opinion the damage has started.

Mr. Foster confirmed that the purpose of changing his automobile oil is to prevent engine damage, and he would consider this to be preventive maintenance. He would presume that his engine is not damaged, and he does not check the engine to determine any damage (Tr. 37-40).

Mr. Foster confirmed that he issued Citation No. 4546276 on December 24, 1995, citing a violation of section 57.11050(a), which requires at least two separate functioning escapeways or methods of getting in and out of a mine (Tr. 41). In a mine with

two shafts and two hoists, a violation of section 57.11050(a) would occur "when either one of the hoists go down, and it cannot be put back into service within an hour" (Tr. 41). He conceded that the "one-hour" requirement is not stated in the regulation, and that it is derived from the one-hour oxygen supply of a W65 self rescuer (Tr. 42).

Mr. Foster explained his reasons for issuing the citation as follows at (Tr. 45-64).

A. Through the statements of the people involved, it was determined that the production hoist had exceeded an hour from the furthest point that it could be put back into service. The four ropes had been, all four ropes had been involved; and if they had, at the very furthest point that they had this apart with the eight clamps off, the other ones loose, the chain falls on, to reverse that process exceeded an hour.

Q. And at that point, in your interpretation of the standard, what was the violation?

A. The violation was that, number one, that the occurrence exceeded an hour and was not immediately reported; and that it also exceeded an hour, it was longer than an hour that it could be brought up even in an emergency situation. Okay? And that violated having the two ways out of the mine that had your continuous escapeways to the surface.

Q. In your judgment is there a requirement that everybody be evacuated from the mine except for those people working on the hoisting equipment at that time after an hour?

A. In my understanding, once that hoist has become disabled and is realized it is going to be longer than an hour to get it back in, then those people should be given orders to evacuate at the time that that's determined to be, the damage, the extent, to exceed an hour.

Mr. Foster stated that section 57.11050(a) has no specific language that requires mine evacuation, and he was aware of no standard that requires automatic evacuation of the entire mine within any given time period (Tr. 53-54). However, he would rely

on section 57.11050(a) to accomplish a mine evacuation. He further confirmed that a section 104(a) citation does not require any withdrawal of miners from the area of a violation, or a mine evacuation. However, he then stated that the absence of two escapeways would require a mine evacuation, and in his opinion, the section 104(a) citation he issued "was a withdrawal order" because the standard requires two or more separate and properly maintained escapeways to the surface (Tr. 55). He further believed that a section 104(a) citation would require that the other escapeway be repaired and made available within one hour, even though this is not stated in the regulation (Tr. 56).

Mr. Foster stated that "a reasonable amount of time" to abate a section 104(a) citation for a violation of section 57.11050(a), would be one hour to repair the other escapeway regardless of what is wrong with the hoist, or what the other people underground are doing, and no matter what the likelihood of a fire underground might be (Tr. 57, 60-61).

Mr. Foster confirmed that although the second escapeway service shaft in the instant case was working and nothing would have prevented miners from escaping a fire using that escapeway, he still believed that a one-hour abatement time was reasonable (Tr. 59).

Mr. Foster stated that if he found a situation where the production hoist was down and was told that it would take two hours to repair it and miners have not been withdrawn, he would issue a section 104(a) citation citing a violation of section 57.11050(a), and would require an abatement time of one hour to evacuate the mine to eliminate the hazard (Tr. 63-64). He knew of no other situations where he has issued section 104(a) citations and required the withdrawal of miners to terminate the citation (Tr. 65).

Mr. Foster stated that he has seen a portion of the February 22, 1990, memorandum from District Manager Salois (Exhibit C-8, Tab G), but never received it through MSHA channels or told to use it to enforce section 57.11050(a). (Tr. 70, 73). He confirmed that he has always based his one-hour evacuation interpretation of section 57.11050(a), on the fact that the W65 self rescuer would enable a miner to get out of the mine within an hour using that device (Tr. 74). He confirmed that part of his understanding in this regard came from his experience and interpretation that he learned when he worked at a coal mine, and this was later confirmed from conversations with other MSHA inspectors, including his supervisors (Tr. 75-76).

In response to questions by MSHA's counsel, Mr. Foster stated that if a hoist used as an escapeway is broken, miners are exposed to the hazard of not having two well maintained

escapeways available for their use. Apart from repairing the hoist, evacuating the mine will eliminate the hazard (Tr. 80.).

C. Okey Reitter, Jr., MSHA Supervisory Inspector, Newark, Ohio office, testified that he has never been to AKZO's Cleveland mine (Tr. 16). He confirmed that he issued Citation No. 4100787 on November 28, 1995, because AKZO failed to immediately report a hoist outage which exceeded 30 minutes (Tr. 19). He identified a copy of his notes which reflect that the hoist outage was reported by fax by AKZO's counsel on November 10, 1995, (Tr. 23). He received the information which is stated as the "condition or practice" in the citation from inspector Foster who went to the mine to check out the situation (Tr. 24). Mr. Foster determined that the hoist was down for 50 minutes after speaking with the company and the miners. He believed the 40 to 50 minutes time frame "was probably what we came up with how long it would have taken to put the hoist back into service if an emergency occurred" (Tr. 28). He confirmed that Mr. Foster's notes reflected different down times for the hoist in question (Tr. 29).

Mr. Reitter expressed his understanding of section 50.10, as follows at (Tr. 32):

If there is a hoist outage, accident or incident, that exceeds being able to put the hoist back into service, that exceeds 30 minutes, that incident becomes immediately reportable to MSHA.

He further explained at (Tr. 33-34):

- Q. Okay. That 30 minutes, is that in your interpretation of the standard, is that the actual time the hoist is out?
- A. That is the time that it would take to put it back into service.
- Q. Go ahead
- A. If the hoist were to be out one hour, let's say we had the hoist shut down for one hour, and we were able to, any time during that one hour we were able to put it back into service within 30 minutes, that would not have been immediately reportable.
- Q. So if the hoist were out for all day, if the hoist was shut down all day, but I could put

it back into service in less than 30 minutes,
then that is not a reportable hoist outage?

A. Correct.

Mr. Reitter stated that his interpretation of section 50.10, is referred to in the December 8, 1995, letter from Vernon Gomez to AKZO's counsel where it addresses the 30 minutes loss of service (Tr. 34-35). This is the only written guidance that he was aware of with respect to the 30 minute immediately reporting requirement (Tr. 40).

Mr. Reitter stated that the cited hoist was disabled for use because two of the four tail ropes were being adjusted to equally distribute the rope lifting capacity and he explained the tightening procedure (Tr. 41). He confirmed that prior to this work the hoist was functioning fine and the work was performed to preclude any future problem (Tr. 42).

Mr. Reitter stated that nothing was broken on the hoist when it was taken out of service and put back together again (Tr. 45). In explaining why he believed the hoist was "damaged" within the meaning of the definition of "accident" found in section 50.2(h)(11), Mr. Reitter stated as follows at (Tr. 42-44):

Q. Now I want you to explain to me how the hoist was damaged.

A. Any time that I can't use something, it's damaged.

* * * *

Q. What I want to know is how the hoist was damaged in this case?

A. It interfered with the use of it.

Q. But what was the damage to it? What was wrong with it? You just explained to me your --

A. Once it was taken out service, it's damaged. I mean once it's -- To me, I would consider the hoist damaged because I could no longer use it. It was not a usable thing to me. So there was damage to it.

Q. So any time you can't use the hoist for more than 30 minutes, then it's damaged, right?

A. If I can't put it into service.

Q. So if the power were out to it, say, at the substation level more than 30 minutes and I couldn't get it on for more than 30 minutes, that would be damage, would it?

A. Yes, I believe so.

* * * *

Q. So what you're saying is that any condition that renders the hoist unusable for more than 30 minutes, any condition, is damage to the hoist in your understanding?

A. In my understanding, if I could not use the hoist as needed, if it's down and I can't use it because I can't travel -- It's like a timber beam being broken or ice in it, then if it exceeded 30 minutes, then I would assume it would be immediately reportable.

Mr. Reitter agreed that an automobile oil change is done to prevent engine damage, and even though the car is unavailable for use while the oil was changed he would not consider the car to be "damaged" (Tr. 49).

Mr. Reitter stated that in his experience an "accident" is an "unplanned event" (Tr. 51). He confirmed that he consulted with Mr. Salois before issuing the citation, and "at different times we ran it by different people," including Mr. Narramore in MSHA's Arlington office, Mr. Vernon Gomez, MSHA counsel Fitch, and his assistant district manager (Tr. 52-54).

Mr. Reitter confirmed that he supervised Mr. Foster in the issuance of Citation No. 4546276, on January 25, 1996, for a violation of section 57.11050(a), and that he and several individuals discussed it before it was issued, including Mr. Salois, Mr. Narramore, Mr. Gomez, and counsel Fitch (Tr. 55-57).

Mr. Reitter stated that section 57.11050(a), requires two operative escapeways at all times (Tr. 58). He then stated that one escapeway could be unavailable "for basically one hour," which is the normal time that self rescuers are good for in the event of a mine fire (Tr. 56-60). He confirmed that subsection (b) requires a refuge for miners who cannot reach the surface through at least two escapeways within an hour, and he conceded that its legal to leave people underground for more than an hour from evacuation (Tr. 62).

Mr. Reitter confirmed that the text of section 57.11050(a), does not state that the mine must be evacuated in one hour. Apart from the Gomez letter to AKZO's counsel, he knew of no other written MSHA directive requiring the evacuation of the mine within an hour (Tr. 64). He further stated that as an inspector, he was always told by other inspectors and by "word-of-mouth" that "they needed to be able to evacuate the mine within an hour" (Tr. 65).

Mr. Reitter stated that the one-hour time limit to evacuate a mine starts "from the time I realize that I can't get the hoist back into service within an hour" (Tr. 65). After discussing a number of "case-by-case" scenarios (Tr. 66-70), with respect to when the one-hour evacuation must be made, Mr. Reitter stated as follows at (Tr. 71):

Q. Okay. But now I thought you -- I am very confused. I understand that answer. Once you realize that you cannot evacuate the mine -- Once you realize you can't put the hoist back in service in an hour, then you must begin evacuation procedures at that moment.

A. Yes.

Q. At that moment, okay. If it takes you more than an hour to evacuate the mine to start with, is it or is it not your statement that you must begin evacuation procedures immediately when one hoist - - when you are down to one escape route?

A. I would have to ask for an interpretation of that.

Q. Who would you ask?

A. I would start with Jim Salois.

Mr. Reitter was not aware of any MSHA regulations that require the automatic evacuation of all miners (Tr. 72-730). He confirmed that the issuance of a section 104(a) or (d) citation does not require the withdrawal from the area where the violation has occurred or the evacuation of the mine (Tr. 74). The circumstances under which MSHA can require evacuation are very limited and are based on specific hazard exposure (Tr. 75). He agreed that the rope adjusting activities taking place when the citation was issued was part of hoist maintenance. He confirmed that none of the "hour language" is in the regulation and some of it is from the December 8, 1995, Gomez letter, and "from direction of what other people in the agency that review policies and procedures are interpreting it as" (Tr. 81-82).

Mr. Reitter stated that prior to the Gomez letter, he believed that if there were no escapeway for one hour there would be a violation and he would issue a section 104(a) citation which does not require an automatic evacuation. The citation would be abated by providing a second means of escape or putting the escapeway into service. He would establish an abatement time based on the hazards presented to employees working underground. In that scenario, he would provide a short abatement time to correct the condition, and if it is not corrected, the work area that was directly affected would have to be evacuated. He would use a section 104(b) order, on a case-by-case basis, to evacuate the work area and that order would require the people affected by the hazard to be removed. (Tr. 82-84).

Mr. Reitter stated that he first became aware of the February 22, 1990, Salois memorandum approximately a year and a half ago after he became a supervisor in 1992. He was unaware of the memo for a year while he was a supervisor and became aware of it when AKZO advised him that the memo was being recalled (Tr. 85, 90). He explained that he learned of the Salois policy sometime in 1994 and possibly as early as late 1993, and the inspectors in the office told him that they were following that policy, and had he known of the policy he would have followed it. However, he never had to use the policy because no hoist outages occurred that he was aware of (Tr. 94-95).

Mr. Reitter stated that the high negligence finding associated with the January 25, 1996, citation was based on the fact that the incident was staged to test MSHA's enforcement of the standard and MSHA's interpretation had previously been communicated to AKZO and its attorney by letter dated December 8, 1995. He concluded that AKZO knew that the cited condition would be a violation and intentionally violated the law (Tr. 102-103). He agreed with the non-"S&S" finding (Tr. 106). He also agreed that the service hoist was not unavailable for any period longer than 30 minutes (Tr. 110).

MSHA metal and non-metal Inspector James D. Strickler testified that he accompanied inspector Foster to the mine on January 4 and 5, 1996, to interview company officials with respect to hoist citation No. 4546276, issued on January 25, 1996. Mr. Foster told him that AKZO wanted a citation to issue so it could take it to court and he went with Mr. Foster to take notes of the interviews. He reviewed the citation and agreed with it, including the finding that an injury or illness was unlikely (Tr. 4-12).

Mr. Strickler stated that he has never seen the Salois memorandum but has heard about it from other inspectors in his office who told him that at one time miners were allowed to work underground until the end of the shift. This was not the case in

Illinois where the Sperry U.S. Gypsum Company evacuated miners immediately (Tr. 11, 15-16). He arrived at his field office in 1993, and the Salois memorandum had previously been rescinded and has never been used since he has been there. (Tr. 17-18).

Mr. Strickler stated that section 57.11050, requires two fully functional escapeways at all times. If he were to inspect a mine with two escapeway hoists and one is unavailable or unusable for any reason, the operator would have a 30 minute time period before deciding to bring people out. If the hoist is down for more than 30 minutes it must be reported to MSHA. The operator must then evacuate the mine "unless they are up and running within an hour." Once MSHA is notified after the expiration of the initial 30 minutes, if the operator determines that the hoist cannot be repaired within the next 30 minutes, it must then evacuate people at that time. This understanding on his part is not in writing or part of the standard, and he learned it from other inspectors and his experience. The evacuation must begin within the hour because the miners' breathing apparatus, the P65 and the MSAW65, is only good for an hour (Tr. 20-22).

Mr. Strickler stated that a "reasonable abatement time" for a violation is left to the inspector's discretion after asking the operator how long it will take to correct the condition, and he has used his experience to make this determination. He had no hoist experience, but would ask an operator about any hoist problem and how long it would take to repair it. He did not believe that section 104(a) required the withdrawal of miners while a violation is being abated (Tr. 23-25).

Mr. Strickler agreed that if an accident occurred as a result of the violation it could reasonably be expected to be fatal, and his opinion was based on his underground experience and the fact that a mine fire could cause a fatality. He confirmed that one of the escapeways was functioning and he would reasonably expect that everyone would be able to escape a fire. He agreed that the mine has no history of serious fires, but non-fatal fires have occurred. He confirmed that three people were working underground on the night of the incident in question and they were not exposed to any hazards other than those they are normally exposed to doing their normal job. He agreed they were exposed to less hazards because there was no active mining taking place (Tr. 26-28).

In response to MSHA's counsel's question, Mr. Strickland stated that if a hoist is out in an escapeway, it is unusable and broken, and miners who are underground must be evacuated. He would issue a citation for not evacuating the mine and because there was only one escapeway. A reasonable time to abate this violation would be one hour because "that's all their life

support is in my opinion," and he has found that an hour can be a reasonable time to evacuate at AKZO and other mines that he has been in (Tr. 28-30).

In response to further AKZO questions, Mr. Strickler stated that the word "evacuation" is not part of section 57.11050(a), and he is aware of no Part 57 regulations that require a mine evacuation for non-compliance. He confirmed that he has no authority to withdraw miners under section 104(a) of the Act, but believed that section 57.11050 gives him that authority (Tr. 31-32).

Mr. Strickler stated that a fire burning out of control must be reported to MSHA if it goes on for more than 30 minutes, but an evacuation is not required. However, in the event of such a fire or emergency, an operator is supposed to evacuate miners, but not from the entire mine. If the mine is not evacuated, a separate order would be required to evacuate the mine in the event a fire is out of control. However, based on his "experience," a separate order to evacuate would not be required for a violation of section 57.11050 (Tr. 33).

MSHA metal/non-metal mine Inspector Herbert D. Bilbrey, testified that he conducted a regular inspection of AKZO's mine on November 2, 1995, with Inspector Bill Backland and interviewed people regarding a hoist shutdown which required possible evacuation of the mine. He explained that section 57.11050, requires an operator to maintain two fully functional escapeways at all times, but that the regulation does not state that a mine has to be evacuated if one of the escapeways is not functioning (Tr. 8-9).

Mr. Bilbrey stated his understanding of when a citation pursuant to section 57.11050(a), would have to be issued as follows at (Tr. 11):

- A. The mine has a time limit to evacuate the mine. There could be several different cases. You would have to take each case by case. But if it was determined that the hoist could not be put back on line within the hour, then evacuation had to start.
- Q. If the hoist couldn't be put back on line within an hour, when does the evacuation begin?
- A. If the company had then determined it couldn't be.

- Q. So how long does the company have to determine that the hoist can't be put back in service?
- A. Well, there was a floating time period which would give them an hour to make that determination, and then an hour after that to evacuate the mine.
- Q. So they have one hour to determine if they can get the equipment working again; and then once they make that determination, they have an hour from the time they decide that can't be put back in service to put it back in service.
- A. Right.
- Q. And where is that policy stated?
- A. There's no written policy that I am aware of, that I know of.

Mr. Bilbrey stated that he was unaware of the Salois memorandum of February 22, 1990, and he learned about the unwritten policy to evacuate a mine when a hoist is out from a staff meeting and verbally from his lead supervisor Robert LeMaster, and discussions with Mr. Reitter (Tr. 12). He heard about this policy approximately a year ago, and prior to that the issue never came up in the first three years in his district (Tr. 13).

Mr. Bilbrey stated that it was his understanding that a hoist that is out for 30 minutes or more is considered to be an accident, but he could not explain how a hoist that is taken out of service for preventive maintenance is considered to be an accident. He then stated that he did not believe that a hoist that is taken out of service for preventive maintenance is an accident (Tr. 15).

Referring to the section 50.2(h) definition of an accident, Mr. Bilbrey stated that preventive maintenance is "something that would prevent a breakdown" and something that would be done before the equipment is broken. He defined "damage" as "inoperative" and stated that this would not include equipment that is intentionally taken out of service for maintenance purposes (Tr. 15).

In response to further AKZO questions, Mr. Bilbrey stated that an unplanned outage of a hoist must be reported "if it's 30

minutes." If power is cut off to the hoist for more than 30 minutes, it would be a reportable accident. If ice were on the shaft and the hoist was inoperable for 30 minutes or more, he did not know if this would be reportable and he would have "to look in the books" and "I would run it by my supervisor" (Tr. 22-23).

MSHA Inspector Dale A. Backland, has served in that capacity for over 21 years and Mr. Reitter is his supervisor. He has inspected AKZO's mine on more than 30 occasions. He was at the mine for a regular inspection on November 2, 1995, and spoke to plant manager Higgins who informed him that he wanted him to issue a citation for a hoist outage on the previous evening. Mr. Backland stated that he contacted Mr. Reitter and Inspector Bilbrey explained the situation to him. Mr. Reitter told them that he would contact the district office to determine what further steps would be taken (Tr. 6-11). Mr. Backland agreed with Mr. Bilbrey's conclusion that no violation existed due to the fact that the hoist could be part back on line and the event was planned (Tr. 11).

Mr. Backland stated that section 57.11050(a) requires at least two or more fully functional hoists at all times. A hoist that is taken out of service for planned preventive maintenance is not necessarily a violation of that section, depending on how fast it can be put back into service in the event of an emergency. In a planned event, the hoist needs to be back in service in "a one-hour period" (Tr. 12). If the planned maintenance time is exceeded and it takes more than an hour, he would expect the mine to be evacuated (Tr. 13-14). He confirmed that section 57.11050(a) does not discuss mine evacuation, and his authority to require evacuation if it takes more than an hour to repair a hoist relates back to the self-rescuer which has a life period of one hour when activated. This policy is not in writing, but he believes it is district policy, but did not recall who told him about this policy (Tr. 15).

Mr. Backland reviewed the Salois memorandum and confirmed that he was aware of it in 1990, but did not believe it was the policy in his district. However, when he saw the memo in 1990, it was his understanding that regarding the time element, it should be followed. However, he never had to implement the policy because he never had a situation that required him to do so (Tr. 16).

Mr. Backland stated that a planned hoist outage probably would not be reportable under section 50.10, if the hoist can be activated within a reasonable amount of time, 10 to 15 minutes, for evacuation in the event of an emergency. An unplanned event that causes a hoist to go out in excess of the 30-minute required period would be reportable, and this includes a power outage at a site off mine property (Tr. 17-18). He stated that in fixing a

reasonable abatement time to restore the equipment to service, the circumstances must be evaluated (Tr. 18).

Mr. Backland was of the opinion that pursuant to the reporting requirements of section 50.10, and the definition of "accident" found in section 50.2(h), preventive maintenance that takes more than 30 minutes is not an accident. He believed that preventive maintenance could take place for a full shift. He stated that maintenance that takes a hoist out of service for more than 30 minutes need not be reported if the hoist can be put back in service within a reasonable amount of time to evacuate the mine. There is no set time during which the maintenance has to be completed or in which the hoist has to be put back in service (Tr. 20-21).

Mr. Backland stated that if a hoist is taken out of service in order to shorten or adjust the ropes, and it takes more than 30 minutes, it "is reportable due to the fact that you don't have a secondary escapeway available" (Tr. 22). He stated that the stretching of a hoist rope is normal and does not mean that the hoist is truly damaged or not functioning properly (Tr. 23). In response to a question as to whether the adjustment of an undamaged hoist rope that has been subjected to some stretching is a reportable accident, Mr. Backland responded as follows at (Tr. 24):

- A. Well, you're taking it out of service for more than 30 minutes to conduct this and -- It's a tough question to answer. We're talking about reportable, right? I don't know. I would probably have to converse with my supervisor on that.

Vernon R. Gomez, MSHA Administrator for Metal and Non-Metal, testified that he supervises all of the agency metal and non-metal enforcement operations, and part of his duties are to ensure consistent regulatory enforcement policies. He recently had occasion to consider the enforcement policy with regard to section 57.11050, because of his involvement with the instant litigation (Tr. 7-8).

Mr. Gomez confirmed that "he was in the loop" in the discussions of Citation Nos. 4546276 and 4546275, issued on January 25, 1996, citing violations of sections 57.11050(a) and 50.10, for a hoist incident on December 24, 1995, and Citation No. 4100787, issued on November 28, 1995, citing a violation of section 50.10, for a hoist incident on November 9, 1995. He stated that he reviewed the citation language that describe the conditions and probably saw more than one draft, but did not recall recommending any changes, or reviewing the gravity or negligence findings (Tr. 10).

Mr. Gomez stated that he has never been in AKZO's Cleveland Mine or in any salt mines in that area (Tr. 11). He confirmed that he became aware of the Salois memorandum of February 8, 1990, and the draft of that memorandum approximately a year ago (Tr. 11-13). He was concerned about the memorandum because it was contrary to what he considered the policy to be (Tr. 13). Mr. Gomez stated he was district manager of the Rocky Mountain District in February 1, 1990, and his enforcement policy concerning section 57.11050, was not like the policy stated in the Salois Memorandum (Tr. 14). His policy was to require two properly maintained escapeways to the surface at all times, and if this could not be done, miners had to be evacuated. If one escapeway was lost "and could not be restored where we could get the people out of the mine within an hour" a violation of section 57.11050, would occur (Tr. 15).

Mr. Gomez stated that if he found only one functioning escapeway in a mine, he would issue a citation. If he did not have two escapeways out of the mine within an hour, he would issue an imminent danger order and have the mine evacuated. The imminent danger and hazard are that "I have to be able to get the people out and they have to have two separate escapeways to the surface" (Tr. 16-17).

Mr. Gomez stated that MSHA policy concerning section 57.11050, requires the shutdown of mining operations in the event one of two escapeway hoists is down and miners cannot evacuate within an hour. This would be done through an imminent danger order regardless of the number of people who may be doing some work unrelated to the repairing of the disabled escapeway. He described the nature of the imminent danger as "the possibility of something occurring and not being in compliance with the two escapeways to the surface" (Tr. 19-21). He confirmed that the MSHA policy requiring evacuation if the hoist cannot be made available within an hour is based on section 57.11050, and not the time it might take to abate the violation (Tr. 23).

Mr. Gomez was not sure why Mr. Salois rescinded his memorandum, and he stated that he checked with everyone who may have been a district manager, and the current managers, to determine whether they had a policy such as the one discussed by Mr. Salois, and he found no such policy (Tr. 29).

Mr. Gomez stated that his December 8, 1995, letter to AKZO counsel Savit was drafted and reviewed with his safety division staff and states MSHA's current enforcement policy concerning section 57.11050. He stated that the letter was distributed to all MSHA districts except for the North Central District, and this was due to "a slipup" (Tr. 32). He did not know if the letter was distributed to any mine operators, but copies are available for hand out by the inspectors. The policy interpretation contained in the letter is not in writing anywhere

else, and the contents of the letter was put together by MSHA headquarters personnel, with no input from anyone outside the agency. Except for the Solicitor's office, the letter was not shown to others for comment before it was sent out (Tr. 34-35).

Mr. Gomez stated that he was familiar with Citation No. 4100787, issued on November 28, 1995, and Citation No. 4546275, issued on January 25, 1996, for violations of section 50.10, and he confirmed that MSHA's position is that a hoist that becomes unavailable for a period of more than 30 minutes, that is, for a period of 30 minutes during which it could not become available, must be reported to MSHA no matter the reason for its unavailability (Tr. 36).

With regard to his prior statements concerning the use of an imminent danger order to evacuate miners, Mr. Gomez further explained that an inspector could issue a citation with a short abatement time, and a (b) order, "in other words, repair the condition and get the people out. Then we would write you the order and remove the people" (Tr. 38). He would consider the lack of two properly maintained escapeways to the surface to be an imminent danger, "in and of itself" (Tr. 39).

Mr. Gomez stated that based on his December 8, letter, inspectors do not have the discretion to issue a section 104(a) citation with an abatement time exceeding one hour, and the actual abatement time would be less than an hour because "I have to be able to get people on the surface within an hour," regardless of the number of people underground or the activity they are engaged in (Tr. 39-41). He did not believe that the mining industry is confused about its responsibility if there are two escapeways and one is down for any particular reason (Tr. 45).

With regard to the Salois policy memorandum, Mr. Gomez stated that during the five years he was a district manager, and the six years he was a subdistrict manager, he never heard of the regulatory interpretation stated in that memorandum and he believed it is internally inconsistent. He saw no unique reason for allowing miners to work underground with one escapeway for the rest of a shift but not send the next shift underground with only one available escapeway. He believed that both shifts are entitled to escapeways, and that miners cannot be underground doing work other than fixing a problem if there is only one escapeway in a producing mine (Tr. 50-51).

Mr. Gomez did not believe that AKZO's position in the instant litigation is reasonable, and he confirmed that his December 8, letter articulates his understanding of the regulations as they relate to escapeway maintenance and reporting. Contrary to his earlier statements concerning the policy aspects of his letter, he explained as follows at (Tr. 52):

- Q. Now that letter doesn't state any policy, does it?
- A. No.
- Q. There is a method for instituting agency policy, isn't there?
- A. Yes.
- Q. Do you always issue policy when you address a question that is raised by somebody?
- A. No. There's different ways of handling it, such as that letter.

Mr. Gomez confirmed that the issuance of MSHA's Program Policy Manual in 1987, revoked any policy not included therein, and any prior existing policy would be inoperative by the issuance of the manual (Tr. 54). The Salois memorandum was not existing national policy, but it is possible that such policy may have existed in some form that he was not aware of (Tr. 56). Mr. Gomez further explained why he believed the existence of only one workable escapeway would be an imminent danger (Tr. 56-64).

Rodric M. Breland, Chief, Division of Safety, MSHA, Arlington, Virginia, since August 1994, stated that he serves as the principal advisor to the administrator on safety issues, regulatory policy development, petitions for modifications, and answering inquiries concerning regulatory enforcement and interpretations from interested mining parties (Tr. 8). He stated that he received an inquiry from MSHA's Dallas acting manager, Doyle Fink over a year ago concerning AKZO's mine in Louisiana concerning the unavailability of one of their escapeways. Mr. Fink asked whether there was any change in policy that would not require the evacuation of miners pursuant to section 57.11050 when maintenance was performed on the hoist, and Mr. Breland advised him that he was not aware of any change in policy (Tr. 11). After consulting with Mr. Gomez, Mr. Breland informed Mr. Fink that there was no policy change and that miners would have to be withdrawn "as soon as you don't have two escapeways" and that this would be a violation (Tr. 13).

Mr. Breland stated that in a two-hoist situation, if one goes down a "technical" violation occurs immediately because miners are entitled to two ways out of the mine at all times. However, as a practical matter, an operator needs time to evaluate the situation, and has 30 minutes from the time the hoist is interfered with to report the matter (Tr. 23). He explained the evacuation requirement as follows at (Tr. 24-25):

- Q. Assuming a two hoist, two shafts, no refuge chamber. Let's assume that situation. Assuming that situation. You say they have an hour to escape?
- A. They have an hour to evacuate from the time they've made that decision. You're talking about the evacuation portion of this requirement.
- Q. When must they make that decision? What triggers the decision they must evacuate?
- A. Once they decided they can't repair whatever is wrong within the hour they need to start evacuating.
- Q. And however long that takes them, up to an hour, I guess?
- A. Yeah. Essentially, you know, it's -- I think there's allowance for a reasonable amount of time to make the determination, what problem you're dealing with, how long is it going to take you to repair it. Once that decision is made, if it is going to take you longer than an hour you should start.

Mr. Breland stated that his interpretation of section 57.11050, with respect to the "evacuation within an hour" is found in subsection (b), and the self rescuer and fire evacuation standards, and he believed it is based on the limits of the self rescuer (Tr. 27).

Mr. Breland confirmed that he was aware of Citations Nos. 4100787 and 4546275, citing violations of section 50.10, and Citation No. 4546276 citing a violation of section 57.11050(a). He believed that the lack of a second escapeway would be an "S&S" violation if normal production activities were taking place, and further explained how he would evaluate "S&S" under several scenarios (Tr. 36-40).

Mr. Breland was of the opinion that "one hour for the abatement for this standard is reasonable because that is what we expect in the evacuation" without regard to the length of time it takes to fix the hoist or the number of people underground (Tr. 45-46, 49).

Mr. Breland stated that he first saw the February 22, 1990, Salois memorandum sometime in the fall of 1995, when a draft was brought to a meeting with AKZO representatives and MSHA officials

where the matter of doing maintenance work and having a hoist unavailable while people were still working was discussed (Tr. 52). He was never aware of any policy change such as that discussed in the Salois memorandum and he always followed the "instant violation and an hour to abate" policy as stated as follows at (Tr. 53).

Q. You always thought of it, this kind of instant violation and an hour to abate?

A. Yes, and that people would -- if your hoist became unavailable you would evacuate and your planned kind of maintenance activities were going to be done on off shifts, weekends, things like that. That's standard for most of the industry.

Q. That's standard for most of the industry, in your experience?

A. Yes.

Mr. Breland stated that he told Mr. Salois that he did not agree with his policy statement because it did not comply with his understanding of how section 57.11050(a), should be applied, but he did not know who may have directed Mr. Salois to rescind his memorandum. He confirmed that he may have had something to do with this because he informed Mr. Gomez of his opinion that Mr. Salois' policy was not correct (Tr. 56).

Mr. Breland stated that he and his staff initially drafted the December 8, 1995, Gomez letter to AKZO counsel Savit, and Mr. Breland believed the letter "is a well-written explanation of our policy and philosophy" regarding the enforcement of section 57.11050, and he does not disagree with anything in the letter. He was not aware that the policy stated in the letter was in any other written form other than the present program policy manual. He has never shown the letter to other mine operators and did not know whether any district managers have done this (Tr. 59-60).

Mr. Breland stated that the two citations citing violations of reporting section 50.10, were issued because a hoisting accident occurred and interfered with the use of a hoist for longer than 30 minutes and this was not reported. It was his understanding that the "accident" as defined by section 50.2 concerned "working on repairing damage to hoisting equipment" (Tr. 61). He was not aware of any other reason for shutting down the hoist other than to do the "maintenance" in question. He further explained as follows at (Tr. 62):

Q. Well, do you know -- do you know whether or not the ropes on the hoist were so out of balance in terms of length that the hoist was incapable of being run safely at the time these operations were undertaken?

A. At the time they were done it would be my assumption they were trying to prevent the damage from being such they would have been a danger to continue running.

Q. So what was the damage you're talking about?

A. Well, once you start using equipment it's going to be exposed to damage almost immediately once you start using it, but they were, I understand, cutting slack rope.

And, at (Tr. 64-65):

Q. So it's your experience as soon as something starts running it starts to be damaged?

A. Yeah. It starts to wear. Machinery wears from the time you start it.

Q. Is it damaged? The standard says damaged, right?

A. Correct.

Q. Is it damaged the moment you start it?

A. Yes, actually, instantly. It is damaged to some degree.

Q. It is an accident when that happens?

A. For our purpose, if the damage gets to the point it requires interference with the hoisting for more than 30 minutes.

Mr. Breland stated that any hoist that is interfered with for more than 30 minutes is always reportable even if it is one of seven escapeways, and this would include power outages that occur off mine property. In short, any hoist that is interfered with for more than 30 minutes, regardless of the reason, is reportable under section 50.10 (Tr. 66). If a diesel generator that is used to run a hoist is shut off to lubricate it, and it takes more than a half-hour to do this work, he would

consider this to be "damage" because "you're treating the damage. You're trying to prevent progressive damage" (Tr. 69). He would consider ice in a shaft that prevented the use of the hoist to be a "natural occurrence" that would not be reportable. However, if there were people in the mine "and you can't get them out, you've lost your second way out," it would be reportable (Tr. 67).

James M. Salois, MSHA Metal/Non-metal North Central District Manager since September 1989, testified that he was familiar with citation Nos. 4100787 and 4546276, citing violations of section 50.10 and 57.11050(a), and he confirmed that he was involved in the decision to issue citation No. 4546276, and discussed it with Mr. Reitter, Mr. Foster, Mr. Gomez, and Mr. Narramore. He was somewhat familiar with the cited conditions as reported by the inspector and he reviewed the citation and findings before it was issued (Tr. 15-16).

Mr. Salois stated that his memorandum of February 22, 1990, dealt with planned and unplanned shutdowns of hoists that were designated as escapeways and it provided examples for the inspector to use when determining a mine evacuation when hoist repairs were made. Pursuant to that memorandum, when planned maintenance was being carried out, and one hoist was disabled as a result of this work, as long as the other hoist was available to transport persons, then it was permissible to work through the end of the shift (Tr. 18).

Mr. Salois explained that he issued the memorandum after Mr. Frank Delimba, Chief of Safety, advised him to do so because he (Salois) was enforcing the regulation different than the other districts. Mr. Delimba's instruction was the result of the issue raised by the Morton Salt Company who claimed that he (Salois) was enforcing the regulation differently from the other districts. Mr. Salois stated that he was a new district manager at that time and he did not speak with any other district managers about their policy. Mr. Salois stated that he was not sure that he agreed with his policy memorandum at that time but issued it because he was asked to do it. He felt that the policy provided less protection than the regulation. Prior to the issuance of the memorandum, miners were required to be out of the mine when hoist maintenance was performed, and it was always his understanding when he was an inspector "that you always had to have two ways out of the mine." Since Mr. Delimba informed him the other districts were doing otherwise, Mr. Salois stated "I didn't argue with him, but I didn't necessarily agree with it, either" (Tr. 22).

Mr. Salois stated that his understanding that miners had to be evacuated when hoist work was performed came from what he "learned on the job." He never issued a citation concerning this issue, and he did not recall any citations that came to his attention while serving as district manager (Tr. 23).

Mr. Salois confirmed that his 1990 memorandum was the policy in his district for five years, but that it was withdrawn in February, 1995, because he did not have the authority to establish enforcement policy for his district that was contrary or inconsistent with national policy. He stated that he was naive when he was asked to issue his original memorandum and he withdrew it after learning through discussions with other district managers that it was inconsistent with their policy (Tr. 25).

Mr. Salois stated that he is not aware of any written national policy interpretation concerning section 57.11050. His interpretation was stated as follows at (Tr. 27-30):

A. Is, as I would interpret it, okay, is that you have to have two escapeways -- in talking about 1150(a) you have to have two escapeways out of the mine when you have people working underground, okay. And they have to be able to get out through those escapeways within one hour or they have to have a refuge chamber if they cannot.

* * * *

A. I would say the violation could start at the point the hoist went down, depending on what was wrong with the hoist and the time necessary to fix it.

* * * *

A. Let's say a guide breaks and the hoist -- the cage hangs in the shaft and nobody has any knowledge of how severe the damage is, okay, or how long it's going to take to fix it, okay.

What I'm saying, at that point the clock starts ticking. They only have one way out of the mine, okay. And if they know they can't fix it right away then they should pull their people out of the mine, based on this standard.

Q. Under Section 11050(a) they automatically have to begin evacuating at that moment.

A. Well, I would say that under the standard, but in (b) where it says they have to be able to get out of the mine through two separate escapeways within one hour, and they only have one escapeway, they would have to pull their people

out. To me this standard clearly says they have to have two separate ways out of the mine.

Q. Right.

A. Okay. All the time, all right. So if they only have one they're not in compliance with the standard.

Mr. Salois stated that if no one is in the mine "they can have all the time they need" to abate the violation. If miners other than those necessary to repair the hoist are underground they must evacuate the mine, and the time for abatement would be "the hour that it would be necessary to withdraw them and not put anybody at risk" (Tr. 31). If a manager recognizes that the repair is a major problem that will take a great deal of time, "I would say the clock starts ticking there and you should have your people out as soon as you can get them out." Mr. Salois stated that assuming a section 104(a) citation is issued, and the hoist problem cannot be fixed in one hour, he would fix one hour as a reasonable abatement time to evacuate people from the mine (Tr. 36-37).

Mr. Salois confirmed that he reviewed and agreed with Citation Nos. 4100787 and 4546275 that were issued for violations of reporting section 50.10. He stated that both citations involved a planned shutdown of the production hoist to shorten two ropes in one case, and four ropes in the other case. He did not know why the ropes were being shortened, and did not know whether the ropes had already stretched to a point where they were beyond the allowable tolerances for good hoisting operations. He was aware that ropes are sometimes changed or shortened before reaching that point, and that this would be a form of preventive maintenance (Tr. 61-64).

In response to questions asking him to explain how a hoist has sustained damage when it is taken out of service for routine preventive maintenance before the ropes affected the hoisting operation, Mr. Salois stated as follows at (Tr. 67-69):

A. Well, it's my feeling that the company felt there was a need to shorten those ropes and to accomplish whatever they intended to accomplish, whether that was balancing the weight or to equally distribute the weight so the hoist performed the way it was supposed to so that -- so that one hoist rope would not wear faster and be damaged more rapidly than the others.

When you put hoist ropes on and you begin to use them, in my opinion the wear and damage begins

and they have a life that they will last. And based on maintenance and a host of things you do you do that to extend the life. But the damage begins the day you put those ropes on, they begin to wear.

Q. So the day you buy a brand new car, as soon as you drive it off the lot you would consider it damaged, wouldn't you?

A. In effect, yes.

Q. Ever sold a used car Mr. Salois?

A. I never got the value of what it was as new.

Q. Did you ever advertise it as damaged?

A. No, advertised it as used.

Q. In your judgment, used, necessarily means damaged?

A. Yes.

Q. In your view that's well understood by an average person, an average miner, as soon as you put a brand new piece of equipment into use it is considered damaged at the moment?

A. I'm not sure everybody would look at it that way. I'm saying that everything has a life, and once you begin to use it you shorten that life. And because of wear, which is damage, because of use, which is damage, everything leads up to the final -- when you throw it away, okay. And ropes all have a life, they're all changed.

Mr. Salois conceded that he did not know for a fact that the ropes were changed because they were damaged and could no longer be used (Tr. 69-70). He believes that even though the shortening of the ropes was done as a matter of preventive maintenance, this still constitutes damage to the ropes because he considered rope wearing and stretching that occurs as soon as the ropes are used to be damage, notwithstanding the fact that the ropes were being changed before they affected the safe or productive use of the hoist (Tr. 72-74).

Mr. Salois believed that any event that is specific to the hoisting equipment and takes it out of service for more than thirty minutes is reportable damage. He would not consider ice in the shaft to be reportable because "it's not damage directly

to the hoist equipment." However, "if the ice caused the damage then I would certainly consider it reportable" (Tr. 76). If a decision were made not to run the hoist because of concern that the ice would cause some damage, he did not believe it would be reportable "if you were going to wait for it to melt." However, taking the hoist out of service to shorten the ropes because of concern that damage may occur would be different because the ropes are a direct part of the hoist system (Tr. 78).

Mr. Salois believed that any event that impairs or interferes with the use of a hoist for more than thirty minutes would be considered damage (Tr. 80-81). He would consider a loss of power off mine property that interferes with the use of a hoist as damage, but would not consider ice in the shaft that interferes with the use of the hoist to be damage (Tr. 82-84).

In response to MSHA counsel's questions, Mr. Salois stated that in order to achieve evacuation of the mine for a violation of section 57.11050(a), he would issue a section 104(a) or 104(d) citation if the hazard was not imminent, and would fix the abatement time at one hour. If an underground rescue chamber is not provided, the regulation requires mine evacuation through both escapeways within an hour (Tr. 88). He believes that an hour is a reasonable time to evacuate the mine and once it is evacuated the escapeway would be available for use. He would not terminate the citation after the hour by the evacuation of personnel only, and would extend the abatement time to focus on other problems (Tr. 89).

Mr. Salois stated that the December 8, 1995, letter from Mr. Gomez to AKZO counsel Savit accurately reflects his understanding of the proper interpretation of sections 50.10 and 57.11050, as they relate to reporting hoist outages and evacuating the mine, and is consistent with what might have been a verbal understanding of the regulations prior to the issuance of the letter (Tr. 104).

Mr. Salois stated that a violation of section 57.11050, occurs when one of two escapeways is down, and that depending on the circumstances, it is reasonable and appropriate to allow the operator a few minutes to determine if the hoist is immediately fixable before evacuating the mine (Tr. 105). He further explained as follows at (Tr. 106, 108):

A. If it's -- if it's damage that takes more than 30 minutes to correct they would have to report it to us. If they can repair it and evacuate the mine within an hour they would not have to evacuate the mine, in my opinion, they would just fix the problem in 35 minutes. They would not have to evacuate the mine.

* * * *

Q. If they thought they could fix it in 20 minutes you would not expect them to evacuate the mine, would you?

A. Yes. We would not expect them to evacuate.

Q. But if yo -- if they knew it was going to take them an hour and 10 minutes to fix it you would?

A. Yes.

Mr. Salois was of the opinion that in the event of preventive maintenance work on a perfectly working hoist that cannot be put back into use within an hour or half-hour, he would consider the hoist to be damaged by the maintenance work itself (Tr. 111). He explained as follows at (Tr. 112-114):

Q. So complying with the standard damages the equipment?

A. In effect, yes.

Q. And that creates an accident, doesn't it, because it's reportable as an accident. It's part of the definition of accident, isn't it?

A. Yes.

Q. And it also creates a violation of the standard, doesn't it?

A. Yes.

Q. Which requires the issuance of a citation or evacuation from the mine?

A. Yes.

Q. So complying with the terms of the standard requires that you violate it?

A. If there are people underground.

Q. Okay. So you're required to evacuate the mine in order to comply with the terms of the standard?

A. Yes.

Mr. Salois stated that if a hoist is down for more than an hour, and people cannot be evacuated in an hour or more, and repairs cannot be made within an hour, a section 104(a) citation will be issued, and the reasonable time for abatement would be one hour regardless of the circumstances. Based on the standard, he did not believe that an inspector has discretion to grant more than an hour to abate because two properly maintained escapeways would not be available (Tr. 119-121).

Peter M. Tiley, Chief, Tiley and Associates, has been in the mine hoisting consulting business since 1972, and his work includes the engineering and installation of hoisting systems. His first involvement with the AKZO hoist was in 1977 or 1978, and he is very familiar with the mine production hoists, having studied them for years, but not so familiar with the service hoist (Tr. 3-10). He explained the problems and solutions associated with the production hoists in the mine working environment (Tr. 10-16).

Mr. Tiley stated that the atmosphere in the AKZO mine shaft is a moist and salty corrosive atmosphere, and he would expect the hoist ropes to endure this corrosive impact during their life. Corrosion is a part of the deterioration process until the ropes are retired and he would consider this to be "possibly" damage. He would consider a wire that breaks due to corrosion to be damaged, and that "it's just degree, how fast is corrodes . . . ongoing deterioration. I don't know if you call it damage or not" (Tr. 18).

Mr. Tiley explained what occurs during the hoisting cycles, including rope fatigue and stress (Tr. 22-26). He confirmed that he has monitored the retirement of the mine ropes over the last several cycles and had an idea as to how long the hoist ropes last. He stated that the ropes appear to be wearing out from corrosion rather than metal fatigue, and that lubrication is necessary to enhance the useful duration of the ropes (Tr. 28).

Mr. Tiley stated that he was aware of the citations, and the cited regulations, and has reviewed the December 8, 1995, Gomez letter to AKZO counsel Savit (Tr. 31). Based on his experience, Mr. Tiley stated his understanding as to how the term "damage" in connection with hoisting operations is generally understood and used in the industry as follows at (Tr. 31-34):

A. Sure. Damage, in my experience, is something that happens to a hoisting system that is unusual and is cause for stopping the hoisting system and reviewing what has happened and then deciding whether the damage -- what has been termed damage will impinge upon safe -- further safe operation of the hoist.

Q. Well, is maintenance ever required to fix damage?

A. No. I say repair is for fixing damage. Maintenance is carried on to avoid this unusual occurrence, which -- which I consider to be what damage is.

Q. So you read the word "damage" in very narrow sense as to being something which actually stops it from working?

A. Not necessarily stops it from working, but you must pause when you have discovered something that's caused damage and decide whether or not it is severe enough that you should stop the hoist or not.

Typically, when I get phone calls, it's through damage and they want to know, do we have to change the oil in this bearing now, for example, and do we have to get somebody in to look at this thing that's happened. So it's an unusual occurrence that requires some stopping in the hoisting activity to decide whether this reported damage is serious or not.

Mr. Tiley was of the opinion that metal fatigue is not damage because "that's the physics of the material responding to stress." Broken wires in a lay of rope may or may not be considered damage, as opposed to metal fatigue, depending on how many wires are broken. He believed that damage begins when rope retirement is required, and that prior to this time "it's just useful life" (Tr. 33). He explained that ropes arriving from the manufacturer have broken wires "as part of the way they are made," and this does not mean that the rope is damaged. However, failure of the mechanical structure that falls because of metal fatigue would be damage (Tr. 34).

Mr. Tiley was of the opinion, based on his experience, that changing hoist ropes with miners underground where there is only one additional way out of the mine is a good mining practice and fairly normal process in the worldwide mining community (Tr. 35). He is aware that MSHA has required a mine evacuation by its application of the one hour rule, and stated "I understand they want to make sure that they can get men out of the mine in an hour period, at least through one way" when one of the two ways out is not available for use (Tr. 36-37). He further explained his understanding as follows at (Tr. 37):

Q. Now, is it your understanding that that is the practice in American mines, that you are aware of?

A. Yes.

Q. That they will evacuate the mine if the hoist is down, within an hour once it goes down?

A. Yes. My experience with them has been that if they -- they can foresee an outage of longer than an hour, then they evacuate the mine.

Mr. Tiley stated that if a hoist goes down halfway through a shift and it appears that it will take an hour and a half to repair it, the standard practice would be to initiate a mine evacuation, and if it were fixed in that time frame, the evacuation would be rescinded and those people who had already been evacuated would go back underground. If the hoist is still down at the beginning of another shift, it is not customary to lower men in the other hoist while one of the two hoists is out of commission. This is because if you know that one of the hoists will be down for a long time, you do not have two escapeways (Tr. 41).

Mr. Tiley stated that he considered "damage" to be some out of the ordinary occurrence that has resulted from a failure of a part or due to either external forces or a manufacturing defect that wasn't apparent (Tr. 4). As a general rule, hoist failures that tend to occur frequently and need to be dealt with fall into five major areas - namely, ropes, a skip stuck in the dump, problems with the dumping mechanism, failed electrical relays and limit switches, and defective electrical rotating equipment. He would consider some of these items to be damaged, including brake linkage pin breaks, a kink in a wire rope, or a broken or bent skip wheel that causes skip jamming (Tr. 44).

Mr. Tiley believed that on a good hoist installation, a hoist should be available 80% of the time, and the rest of the time spent on maintenance, but he has not tracked AKZO to determine the production/maintenance timing (Tr. 46). He did not believe that much meaningful hoist maintenance work can be done in less than an hour, and that changing all bearing lubricants, cleaning and testing electrical rotating equipment, including 20 safety devices, would each require three to five hours on scheduled maintenance days which are not necessarily on weekends. Further, each of these items cannot be completed efficiently if they are done piecemeal, and it takes time to prepare and finish the work (Tr. 47).

Mr. Tiley stated that his prior statements concerning the practice of allowing miners to remain in a two shaft mine where one of the hoists is down, and provided the second hoist is still available, did not apply to United States miners, but to Canadian miners where the mine is not shut down for hoist maintenance or changes. This practice complies with Canadian mining laws requiring two escapeways, but this varies from province to province (Tr. 51).

Mr. Tiley stated that based on his probability analysis, the chances of both hoists being inoperative at the same time for a period exceeding one hour is "once every hundred years" (Tr. 52). He confirmed that corrosion in the wire rope constitutes damage and that when a rope exceeds 10 percent strength loss it must be retired from service. The last production ropes were retired after approximately 18 months because tests indicated they were damaged and exceeded the 10 percent retirement criteria (Tr. 56).

Mr. Tiley stated that it was his understanding and experience in the United States that the law requires mine evacuation if the hoist is going to be down for more than an hour (Tr. 56-60). He agreed that major, unplanned accidents have occurred in metal/non-metal mines in the last 15 years, and that miners were possibly at greater risk if there was only one escapeway rather than two (Tr. 62). He believed that maintenance and repair of shaft equipment is a necessary and ongoing task and that its purpose is to obtain maximum life and productivity of the equipment and to maintain it in safe condition for use (Tr. 63).

Mr. Tiley stated that based on his review of the mine maintenance records at the Cleveland Mine and other mines he believed that AKZO's preventive maintenance program was above average, and he described what transpires on an average maintenance day (Tr. 68-69). He explained the reasons for shortening the hoist ropes as follows at (Tr. 73-74).

A. There's two reasons why -- well, the ropes have to be shortened in order to make them equal length; and the reason they're not equal length is ropes stretch from the time they're put in the shaft. They stretch for two reasons.

The original rope that goes in there has spaces between the various wires, because when you form the rope, you must have spaces between the wires. You can't put wires together with zero clearance. So as the tension is put on the rope, it contracts and, therefore, stretches. Now, this stretch occurs -- a large amount of the stretch occurs in the first month or so of operation of

the hoist rope, and then it settles down; and the rest of the stretch is a result of fatigue of the wires.

Q. So the initial stretch of the rope is expected to occur; is that correct?

A. Yes.

Q. Is it damage to the rope?

A. No. It's -- nothing's changed in the rope excepting it's shrunk to the point where the clearances in it have more or less disappeared.

Q. So as the rope stretches initially, it has to be shortened so that the ropes will be of equal lengths?

A. Of equal length, yes.

Mr. Tiley stated the rope will eventually stretch to the point where it is no longer suitable and when there is significant fatiguing of the wires it is time to change the rope. When asked about the rope shortening in question, he replied as follows at (Tr. 75):

Q. So to the best of your knowledge and in your expert opinion, were any of the rope shortening occurrences that you observed in your review of the records at the AKZO Cleveland Mine based on damage to the rope?

A. It depends whether you consider fatigue of the wire as damage or not. I don't consider it damage, but it could be interpreted as damage on a microscopic scale.

Q. Were the ropes that you know of stretched to a point where they were no longer fit for their intended purpose?

A. No. They weren't retired because of stretch.

H. John Head holds an MBA degree in management and an undergraduate degree in mining engineering. He is employed as the director of the technical services division of Archibald Mining and Minerals, a mining engineering consulting services company. He was previously employed with other consulting companies, and also worked for the Morton Salt Company from 1982 to 1990, as mining engineering manager (Tr. 5-11, 17).

Based on his knowledge of the industry, Mr. Head believed that the present evacuation procedure for mines with two shafts is that if one hoist is out of service for more than an hour the mine is evacuated, and this is standard practice among several MSHA districts. He stated that during his contacts with a number of mine operators concerning their current practices, all of them confirmed that their practice was to evacuate the mine. Further, they all appeared to recognize that there was a change in MSHA enforcement policy in the past two or three years. He identified the prior policy as the one followed by Mr. Salois and his inspectors in MSHA's North Central District. That policy recognized that if hoists were down, it did not pose an evacuation problem until the end of the shift, but if the outage extended beyond the end of the shift, the subsequent shift was not sent down and the shift that was in the mine should be brought out at the end of their shift (Tr. 24-25).

Mr. Head identified several other mines where this policy was followed, and his general understanding was that at mines with two shafts, "if one hoist went down, you could work in the mine until the end of the shift." This was his understanding while working at Morton Salt when he was in daily contact with several mine operators, and the "Cleveland issue made me aware that the situation had changed." He confirmed that he never spoke to MSHA about the practice of not withdrawing miners, but he was reasonably sure that MSHA inspectors were at mines with hoist outages, but made no comments (Tr. 30-32).

Mr. Head stated that in mines with numerous shafts, the present two shaft evacuation issue would not apply. He identified other mine operations that followed the prior practice followed at Morton Salt (Tr. 34-35).

Mr. Head defined "damage" as follows at (Tr. 37-39):

A. Unexpected faulty condition.

Q. How about fixing something that's broken? Would that be -- if you're fixing something that's broken, would that be fixing damage?

A. I think damage implies a degree of uncertainty. Simply fixing something that's broken doesn't necessarily imply whether it was damaged or whether the damage occurred over a period of time. So I think damage has a time sense to it. Simply saying something was broken doesn't necessarily imply time.

Q. So if the power is out, the hoist isn't damaged, it's just not usable?

A. That's correct.

Q. And before a wire rope gets retired because it's worn out, too damaged, it's just wearing out?

A. It's just wearing out. That, to my mind -- damage implies the reverse of preventive maintenance, damage implies an accidental situation, sudden occurrence. Clearly, a rope that is seriously corroded is also damaged, but it's not -- it's not broken because of damage, it's broken because of gradual corrosion.

* * * *

Q. If a guide in a shaft gets bent, is that damage to the guide?

A. If it happens suddenly. If there is -- you know, a problem with the guides, and a shoe on the skip catches a guide and pulls it out of line, that's clearly damage. If there's a gradual creeping, for example, of the salt and, therefore, the guides start to impinge on the skips, I don't consider that damage.

Q. But both might have to be replaced in order to make it function right, correct?

A. Correct.

Q. And you would be replacing a piece of metal that was damaged with one that was not, wouldn't you?

A. Correct.

Mr. Head stated that the probability of two hoists being down at the same time is low and he discussed these probabilities (Tr. 40-45). He agreed that unplanned accidents occur in mining, and in his experience hoist preventive maintenance is taken very seriously (Tr. 45, 48).

In response to AKZO questions, Mr. Head confirmed that when he managed the Morton Salt Weeks Island mine from 1984 through 1985, the standard practice he followed was to allow people to work to the end of the shift when a hoist was unavailable and not to lower the next shift into a situation where one hoist was shut down (Tr. 50). He believed that an acceptable hoist planned shut down period would be more than an hour and less than six hours,

based on different maintenance and production circumstances, including the number of miners underground at any given time, and their hazard exposure (Tr. 52-54). Based on his calculations, the probability of two hoists being out at the same time would be "once every 20-odd years" or "something like every 450 years" based on the two different ways that he calculated these failure probabilities (Tr. 55-56).

Thomas D. Barkand, MSHA Hoist Safety Specialist, testified that he has a B.S. degree in electrical engineering and an M.S. degree in industrial engineering from the University of Pittsburgh, and has worked for MSHA since 1980. He serves as a consultant on safety issues regarding mine hoists and elevator safety, and conducts testing of hoists and elevators. He has never supervised the day-to-day operations of a hoist (Tr. 6-8).

Mr. Barkand stated that he visited the Cleveland mine on November 28 and 29, 1995, and April 2, 1996, and made notes of his visit (Tr. 9). He disagreed with Mr. Head's calculations of the probability of failure of hoists, and he explained his reasons (Tr. 13-17). He explained his experience with frictional hoists and stated that the regulations do not explicitly require preventive maintenance on hoists. He defined preventive maintenance as "maintenance performed to keep a hoist functioning" and to prevent "failures of the operation of the hoist" (Tr. 19-21).

Mr. Barkand defined "damage" as follows at (Tr. 21-22):

A. Yes, I can. My -- I think the confusion surrounding damage has been that some people consider damage to be a short-term effect, a sudden impact or collision. And in my broader view of damage it also includes effects from long-term exposure to corrosive elements causing corrosion, as well as short-term effects.

Q. Is there a difference in your judgment between damage and what we would call normal wear and tear?

A. No. Normal wear and tear does, in fact, cause damage to the device.

Mr. Barkand was of the opinion that damage to equipment on a car engine begins from the day one owns it and as soon as it is placed in operation. He confirmed that when he sold a used car he did advertise it as "use for parts" because it was damaged and not just used (Tr. 24). He confirmed that his belief that wear and tear and damage are the same is from a dictionary and not from any written MSHA definitions (Tr. 24).

Mr. Barkand agreed that preventive maintenance prevents failures and can lessen the onset of damage, but believed that a piece of equipment that has been disabled is damaged because it's unable to do its intended function (Tr. 25). He also considered a locked out piece of equipment to be damaged "in its broadest sense" (Tr. 26).

Mr. Barkand stated that rope "construction stretch" is a term that applies to the initial stretching of the rope in which the wires are brought into closer proximity to each other, and that this is expected (Tr. 32). Apart from wire wear and nicking, which are the primary causes of damage and wear, the fact that the rope gains length and loses diameter through the process of "construction stretching," is not, of self, damage.

Mr. Barkand did not know whether any of the rope shortenings at the mine were undertaken because of rope construction stretch. He did not believe that the rope shortening on December 24, 1995, was due to construction stretch because he recalled that the records reflected that the ropes were put in service five months or more prior to that time (Tr. 35). He confirmed that as a rule, a rope must be retired when it loses 10 percent of its baseline diameter as measured after the rope has stretched (Tr. 36).

Mr. Barkand stated that he has had experience with problems associated with new hoists placed in service for a period of a month and has spent several weeks on site addressing those problems. He identified the problems as safety devices that require calibration, deceleration cams that need to be physically ground on a brass, and needed adjustments to the current protection set points (Tr. 38-39). In response to a question as to whether he believed these items constituted damage, he responded as follows at (Tr. 39-40):

Q. All right. So are those things damaged?

A. The devices are not functioning as intended.

Q. Yes or no. Is it damaged?

A. In the instance -- in the examples I just cited they are calibration problems.

Q. Do you understand the phrase yes or no?

A. In that example, no, they were not damaged.

Q. So if I were to miss one in my otherwise rigorous testing process, and find out after it had been placed in service that it was not

calibrated correctly, and I had to stop the hoist and recalibrate that control, that wouldn't be damage either, would it?

A. It's repair.

Q. But it's not damage, is it?

A. Something was calibrated wrong.

Q. I tried to do a rigorous analysis to find it. I missed it. I put in into service and it is still recalibrated wrong, the same way I got if from the factory, the same way I installed it. Then I discover it's calibrated wrong. Is it damaged or not?

A. In the broadest sense of damage it would be.

Mr. Barkand stated that he did not review any records concerning hoist outages at the mine and did not know the frequency of hoist unexpected unavailability (Tr. 41). He confirmed that he did not closely examine the hoist ropes, but observed that they appeared bare and moist with some fine salt particles (Tr. 43). He stated that the regulations require nondestructive rope testing at intervals not to exceed six months, and based on his review of the records these tests were being performed (Tr. 46).

Mr. Barkand stated that a rope could have a broken internal wire with no surface indication on the rope itself and that this occurs even during the manufacturing of the rope (Tr. 48). He did not believe that the maintenance of 100 percent availability of two independent hoisting systems is achievable. The mine production plan calls for people underground 24 hours a day, seven days a week, engaged in production activities unrelated to hoist maintenance. With this plan, it is difficult to comply with the minimum two escapeway requirement because system failures are bound to occur (Tr. 52).

Mr. Barkand stated that the regulation requires two properly maintained escapeways at all times, and if one is not operable, this would constitute non-compliance (Tr. 55). He confirmed that he has recommended the development of a comprehensive preventive maintenance program for implementation during the maintenance shift to increase the reliability and availability of escape routes (Tr. 61).

Mr. Barkand stated that a hoist switch that sometimes malfunctions would be considered damage and that his review of Part 50 accident and injury abstracts for a ten-year period from

1978-1988, reflects that mine operators have reported hoist outages exceeding 30 minutes due to power failures. He concluded from this that operators understand the "damage" reporting requirements when a hoist is unavailable (Tr. 63-64).

In reply to further AKZO questions, Mr. Barkand stated that approximately 600 Part 50 accident reports were submitted during the aforementioned 10-year period and that 40 or 50, or less than 10 percent, concern hoisting. The summarized incidents listed appear to be "normal wear" items (Tr. 67-68), with regard to the listed eleven "power outages," he presumed they were possibly nonscheduled (Tr. 71). He was not aware of any official MSHA guidance as to whether ice in a shaft has to be reported (Tr. 72-73).

Arguments Concerning the Interpretation and Application of
30 C.F.R. 50.10

The two alleged violations of reporting standard 30 C.F.R. 50.10, as noted in section 104(a) non-"S&S" citation numbers 4100787 and 4546275, concern a November 9, 1995, production hoist outage of approximately 50 minutes while two of the four hoist ropes were shortened, and a December 24, 1995, production hoist outage due to maintenance service to shorten four stretched ropes. Citation No. 4100787, states that the hoist was "disabled" while the rope shortening work was performed, and that this interfered with the use of the hoist for more than thirty minutes. Citation No. 4546275, states that the hoist was "damaged" in that it was unavailable due to the maintenance work being performed, and that the "damage" interfered with the use of the hoist for more than 30 minutes. AKZO allegedly violated section 50.10, by failing to immediately report these hoist outages. MSHA takes the position that the cited hoist outages were the result of reportable accidents under section 50.10, in that both hoists were "damaged" within the "accident" definition found in section 50.2(h)(11).

AKZO argues that MSHA has adopted a bizarre view that the maintenance work conducted on the cited hoists constitutes "accidents" within the meaning of section 50.2, and that MSHA's interpretation not only defies reason and common sense, but also impermissibly expands the reporting requirements of section 50.10. AKZO maintains that the hoists were not "damaged" within the meaning of § 50.2(h)(11), but were undergoing routine, preventive maintenance. AKZO asserts that in order to arrive at its current position, MSHA has given the operative words in the applicable regulations meanings which directly contradict their ordinary use and meaning.

Citing several supporting cases, AKZO asserts that canons of statutory construction require that statutes and regulations be applied so as to give effect to the plain meaning of words. AKZO

points out that the applicable definition of "accident" found in section 50.2(h)(11) involves damage to hoisting equipment. Since the regulations do not provide a definition for "damage," AKZO asserts that its common and ordinary meaning should apply. Citing Merriam Webster's Collegiate Dictionary 291 (5th Ed. 1993), AKZO states that in its ordinary usage, "damage" means "loss or harm resulting from injury to person, property . . . "

AKZO maintains that MSHA has taken a view which contorts the word "damage" beyond its ordinary meaning. AKZO cites the conflicting testimony interpretations of the word "damage" by MSHA officials, and characterizes it as "tortured and far-fetched." As examples, AKZO cites the following testimony by MSHA officials with respect to their understanding of the term "damage":

Anytime that I can't use something, it's damaged; If I have brakes on my car that are worn out or need adjusted, there's damage that needs maintenance to it." (C. Okey Reitter).

Statement of Rodric Breland that damage occurs instantly from the moment equipment is put into use.

" . . . damage begins the day you put those ropes on, they begin to wear"

" . . . used necessarily means damaged," and both wear and use constitute damage (James E. Salois).

Statement by Herbert D. Bilbrey who defined damage as "inoperative," but did not believe equipment which is intentionally taken out of service was "damaged."

AKZO argues that these proffered definitions of "damage" reflect a confused understanding of that term and are clearly beyond the meaning found in Potash Company of America, 4 FMSHRC 56 (January 1982)(ALJ Stewart). In that case, a fire in the power plant control room caused a power failure that affected the use of two underground mine hoists for more than 30 minutes. The power outage lasted for approximately two hours. The man hoist normally used to hoist men was not energized until two or three hours after power was restored because of circuit modifications that were necessary to utilize outside power.

Potash was charged with a violation of section 50.10, for not immediately reporting the "accident" to MSHA. The inspector who issued the citation believed that an "accident" under 30 C.F.R. 50.2(h)(11) occurs any time a hoist is "down" for more

than 30 minutes for any reason, without regard to damages, and that a hoist is "damaged" within the meaning of 30 C.F.R. 50.2(h)(11), whenever there is an unplanned hoist outage for any reason.

Potash took the position that when a hoist is not damaged, but simply disabled by a loss of electrical power that affects the mine in general, no "accident" within the meaning of section 50.2(h)(11) occurs, and there is no obligation to immediately report the loss of power pursuant to section 50.10. MSHA's belief that the issue presented was whether an unexpected fire causing disruption of power to a hoist for more than 30 minutes is an "accident" requiring immediate notification pursuant to section 50.10, was rejected as too broad by Judge Stewart, and he limited his decision to the specific facts of the case.

MSHA argued that in a lay sense the fire and loss of power to the hoists were "accidental," and that the hoisting equipment was "damaged" because its usefulness was impaired. As support for this argument, MSHA relied on The American Heritage Dictionary of the English Language (1976), which defines "accident" as: "1. An unexpected and undesirable event; a mishap. 2. Anything that occurs unexpectedly or unintentionally." The dictionary defines "damage" as "Impairment of the usefulness or value of person or property; loss; harm."

Aside from the "lay definition" of "accident," MSHA asserted that the triggering alternative element for the definition of "accident" as defined in section 50.2(h)(11) "or which interferes with use of the equipment for more than thirty minutes" existed because there was no power to the hoists from 9:40 p.m. to 11:35 p.m., and the hoists were not energized until 2:00 p.m. Although MSHA conceded that the hoists were not physically damaged as a result of the powerhouse fire and loss of power, it contended that the loss of electrical power to the hoists, without more, was a reportable accident within the meaning of sections 50.10 and 50.2(h)(11), because of the loss of power interfered with the use of the hoists for more than 30 minutes.

Judge Stewart found that it was clear that section 50.10, was not intended to require the reporting of every unexpected and undesirable event or mishap, and that when read in context with the regulatory definition of "accident," the kinds of accidents required to be reported are limited to the 12 types listed in section 50.2(h). Judge Stewart concluded that the pivotal question was whether the hoist interference was due to physical damage to the hoisting equipment.

Judge Stewart found no basis to support the inspector's belief that a power outage for any reason constitutes damage to the hoisting equipment when no physical damage to the equipment

occurs as a result of the outage. Under the circumstances, he concluded that the power outage was clearly not reportable under the requirements of section 50.10, and vacated the citation.

AKZO contends that the Potash case limits the reporting requirements of section 50.10 to the specific events listed in section 50.2(h), and it points out that the judge relied on an MSHA publication (Information Report on 30 C.F.R. Part 50) which provided the following "Question and Answer" guidance as to what constituted damage to hoisting equipment under section 50.2(h)(11):

41. Q. What constitutes "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes"?
- A. Damage may be considered to be caused by some accident that involved hoisting equipment, or resulting from hoisting equipment failure. A natural occurrence such as ice in a shaft may cause the shaft and hoist to be shut down for more than 30 minutes. However, where no accident occurs, equipment is not damaged, and no individuals were endangered, the natural occurrence would not itself be reportable.

AKZO further argues that even if the plain meaning rule or applicable precedent were not controlling, "damage," within the meaning of § 50.2(h)(11), should be considered " . . . in light of what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." Savage Zinc, Inc. v. MSHA, 17 FMSHRC 279, 283 (February 1995), quoting Diamond Roofing v. OSHRC, 528 F2d 643 (5th Cir. 1976). Since it believes that the regulations give no indication that the work "damage," as used therein, has any meaning other than that in ordinary usage, AKZO concludes that a reasonably prudent miner would operate on the belief that damage means "loss or harm resulting from injury" rather than "used" or "worn." In support of this conclusion, AKZO cites the testimony of Peter Tiley, who defined damage as " . . . an unusual occurrence that requires some stopping in the hoisting activity to decide whether this reported damage is serious or not."

Applying the common or ordinary meaning of the word "damage," AKZO further concludes that it is evident that there

was no damage to hoisting equipment in this case as there was no loss or harm to the property. AKZO points out that it did not experience any problems with the use of the hoisting equipment, nor had it received any complaints about the operation of the hoists. It takes the position that the equipment was simply taken out of service as a preventive care measure, and that such routine maintenance does not constitute damage within the ordinary meaning of that word. Further, based upon the Potash analysis, AKZO maintains that the closure of the production shaft hoist for routine maintenance purposes does not constitute an accident under § 50.2(h)(11), and, therefore, is not reportable under § 50.10. As in Potash, AKZO points out that there was no hoist malfunction or physical damage to the hoisting equipment as a result of the closure for maintenance.

AKZO maintains that MSHA's guidelines indicate that if no accident occurred and no equipment is damaged, the incident is not reportable. AKZO asserts that both closures of the production shaft hoist fully meet MSHA's own criteria in this regard, and that not only did the outages last no longer than three and one-half hours, the outages did not involve any of the circumstances, incidents or occurrences enumerated in § 50.2(h). Although the production shaft was not available for more than 30 minutes, there was no physical damage as contemplated by Potash and the MSHA guidelines. Under all of these circumstances, AKZO believes that no violation of section 50.10 occurred.

AKZO concludes that MSHA's interpretation fails to give operators fair notice of which conditions would trigger the reporting requirements under section 50.10. AKZO points out that while MSHA contends that the regulation applies whenever there is interference with hoisting equipment for thirty minutes, it also appears from the Gomez letter of December 8, 1995, to AKZO's counsel, that MSHA has taken the broader view that section 50.10 is violated anytime hoisting equipment is interfered with. AKZO maintains that this interpretation would render practically any and all maintenance activities at a mine "damage," which potentially could require notification to MSHA each and every time maintenance activities are undertaken.

AKZO concludes that it did not violate regulation § 50.10 because the production shaft hoist was not damaged within the meaning of § 50.2(h)(11), and thus there was not an accident within the meaning of § 50.2(h). The regulations very specifically detail, in § 50.2(h), the circumstances, incidents, and occurrences to which the term "accident" applies. The subsection under which MSHA cited the Cleveland mine states explicitly that there must be damage to the hoisting equipment which interferes with its operation for 30 minutes or longer. Further, since the regulations do not define "damage," the ordinary meaning of that word should be applied in determining

whether preventive maintenance activities which take more than 30 minutes to accomplish constitute a violation of § 50.2(h). As there was no loss or injury which resulted from the maintenance activities, there was no damage at the mine, and therefore no violation of § 50.2(h).

MSHA argues that a hoist outage that prohibits its use for more than thirty minutes is a damaged hoist that is required to be immediately reported pursuant to section 50.10. Relying on the Gomez letter, MSHA takes the position that the relevant issue in a hoist outage is its availability for use, and if the hoist can be activated quickly in the event that it is needed, it is not damaged and does not have to be reported. However, if because of maintenance, the hoist is unavailable to be used and cannot be placed back in use within 30 minutes, MSHA concludes that it is clearly damaged, and while it may be intentionally disabled, it is damaged and unavailable nonetheless.

MSHA asserts that there is no requirement that the damage, loss, harm, or injury occur unexpectedly, and concludes that it would be entirely inconsistent with the purpose of the regulation to allow an operator to intentionally disable a hoist that is being used as an escapeway but to prohibit such actions when the disabling of the hoist was unintentional. MSHA contends that any intentional and planned actions which render the hoist unavailable for use are the equivalent damage, loss, harm, or injury to the hoist which have the effect of damaging it for some period of time. MSHA further concludes that when a hoist is shut down for repairs and it is removed from a usable status for a period of over thirty minutes, it has clearly suffered harm or loss of use during that time period. MSHA believes that it is the period of time that it is unavailable for use, not whether the repair was planned or unplanned, that is the relevant issue with respect to the reportability of the damaged hoist.

MSHA submits that AKZO's interpretation would allow a hoist to be unavailable for extensive periods of time without being reportable to MSHA, so long as AKZO could say the repair activity was not caused by an immediate, unintentional, or unexpected "injury" to the hoist. MSHA submits that AKZO's reading of the regulation would allow the repairs and maintenance to go on for days or weeks, and that its position is not reasonable because it places far too much emphasis on the immediacy of the need for repair, and on the surprise nature of the cause of the hoist outage, and not on the fundamental focus of the unavailability of the hoist for use in an emergency.

MSHA concludes that there is no basis in logic that only unintentional, unexpected harm constitutes "damage" as that word is used in 30 C.F.R. 50.2(h)(11), and points out that AKZO's position does not acknowledge the obvious damage that occurs when

a hoist is taken apart in order to repair a damaged aspect of the system, during which time the system cannot function when needed. MSHA further concludes that if the hoist cannot be used because of unintentional preplanned dismantling of part of its system, the hoist is damaged under either scenario and that such damage or unavailability for use must be reported if it lasts for 30 minutes or longer.

MSHA maintains that the regulatory reporting requirement in section 50.10 in this case is clear, and that a reasonably prudent person familiar with the mining industry understands the requirement to be consistent with MSHA's position. Even if the regulation were to be construed as unclear, MSHA asserts that its reasonable interpretation is entitled to deference by the Commission.

Citing a number of precedent cases, MSHA argues that when a statute is ambiguous, an adjudicatory body should give deference to the interpretation of the statute adopted by the agency entrusted with its enforcement, and that the agency's interpretation must be accepted as long as it is not unreasonable or inconsistent with the language or the purpose of the statute. MSHA asserts that a statute or regulation that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal, and that the issue on review is not whether the agency's interpretation represents the most desirable choice in the view of the adjudicatory body, but whether the agency's interpretation represents a permissible choice in view of the language and the purpose of the statute or regulation.

MSHA maintains that requiring the reporting of any incident that makes the hoist unavailable for more than 30 minutes is the only interpretation that enhances safety, and that AKZO's position to the contrary would thwart the objectives of the Mine Act and the regulation. Citing the American College Dictionary definition of "damage" as injury or harm that impairs value or usefulness, MSHA concludes that whenever a hoist (being used as an escapeway) is unavailable for use for more than 30 minutes, with miners underground, it is damaged, because it is useless as a means of escape and therefore it is required to be immediately reported.

Arguments Concerning the Interpretation and
Application of 30 C.F.R. 57.11050(a)

The alleged violation of mandatory safety standard 30 C.F.R. 57.11050(a), as noted in section 104(a) non-"S&S" Citation No. 4546276, concerns the unavailability of the mine production hoist for approximately three-hours and thirty-seven minutes on December 24, 1995, while the hoist ropes were being shortened.

The incident was staged to test MSHA's enforcement interpretation of the regulation, and it would appear that MSHA was on notice and cooperated and participated in the staging.

AKZO asserts that section 57.11050 requires only that each mine be equipped with "two escapeways to the surface," and that its purpose is to ensure that, in the event one of the ways out of the mine cannot be used, there is an alternative means of escape available. AKZO maintains that the standard contemplates that there will be occasions when that purpose is not fulfilled; that is, that one means of egress from the mine will be unavailable, but the second means, as required by the regulation, will be fully functional. AKZO believes that the fact that only one of two escapeways is functional for some period of time does not mean that the operator has failed to comply with section 57.11050, but rather, that it has complied with it. AKZO concludes that to hold otherwise would mean that the moment that the standard accomplished its intended purpose, it would be out of compliance. AKZO believes that such a result would be absurd, and it concludes that the regulation cannot be read to mean that two escapeways must already be functioning. If this were the intended meaning, AKZO believes the regulation would have required that there be at least three escapeways so that, in the event one was unavailable, there would be at least two operating.

AKZO maintains that the mine had two separate, properly maintained escapeways to the surface in full compliance with section 57.11050. AKZO asserts that MSHA's contention that a violation of section 57.11050 occurs the moment hoisting equipment has been shut down for maintenance purposes for a period of over one hour, requiring immediate evacuation of the entire mine, is not supported by the statute, the regulation, or the relevant decisions.

AKZO cites several court decisions in support of its assertion that the regulation in question should be interpreted as a whole to avoid conflicting inconsistent, and meaningless interpretations. It points out that under section 57.11050, AKZO must not only provide two escapeways from the mine, but it must also ensure that the escapeways are "properly maintained." Considered in this light, AKZO concludes that issuing a citation for taking an escapeway out of service for maintenance clearly violates the spirit and intent of the regulation.

AKZO asserts that at the time of the violations, the production hoist was out of service for routine upkeep and maintenance rather than repair to broken or damaged equipment. AKZO points out that this maintenance work generally takes the hoist out of service for periods no longer than a few hours, is done relatively infrequently, and that during this time the service shaft remains an available, operable escapeway in the

event of an accident or emergency. Simply put, AKZO points out that it was conducting work which was necessary in order to comply with the regulatory mandate that escapeways be properly maintained. AKZO concludes that it would defy logic to hold that maintenance activities which are necessary in order to comply with the regulation are, when undertaken, a violation of the very rule which requires their undertaking in the first place.

AKZO argues that while section 57.11050, requires that at least two escapeways exist, it does not require that both be functional at all times, but only requires that they are positioned so that damage to one shall not lessen the effectiveness of the other. Accordingly, AKZO concludes that this clearly indicates that the drafters of this regulation anticipated there may be occasions when not all escapeways are in use. In support of this conclusion, AKZO cites the MSHA policy regarding former standard section 57.11-50, as noted in the Potash Company of America case, 4 FMSHRC 56.70 N.8 (January 1982). That policy allowed miners to remain underground the remainder of the shift provided all personnel were notified and were in agreement, but not to allow the next shift to go underground until the hoist was repaired. Recognizing the regulatory language "damage to one," AKZO does not believe that this exception would not apply when an escapeway is temporarily closed so that maintenance work can be performed. In this case, the second escapeway was out of use for only three and one-half hours while undergoing preventive maintenance.

AKZO maintains that the issue is not whether it failed to have two escapeways from the mine to the surface, but whether it is required to evacuate the entire mine while performing routine required preventive maintenance which renders one of the two hoists unavailable for more than one hour. Since the regulation contains no such requirement and, in order to adopt such a new, substantive requirement, AKZO maintains that MSHA is required to comply with the notice and comment requirements of both the Mine Act and the Administrative Procedure Act ("APA").

AKZO states that prior to MSHA's newly articulated compliance policy, it engaged in the practice widely accepted in the mining industry, and sanctioned in Potash, 4 FMSHRC 56, allowing a mine to continue operation until the end of the shift when only one escapeway was available, provided the miners underground were aware of the situation. If, however, at the beginning of the next shift only one escapeway remained available for use, the next shift was not allowed to be lowered underground.

AKZO asserts that there is virtually no guidance as to how to interpret section 57.1105(a) during the course of required, routine maintenance, and that in a situation where one of the

hoists is not operable for a period of time, analysis of the standard must utilize the "reasonably prudent person" test applied for general or vague regulations. In this regard, AKZO points out that over the years, the standard has been subject to several changes in interpretation and implementation, including the uncertainty as to the existence of a national policy, the "end of shift" rule noted in Potash, the absence of any national policy as expressed in the Gomez, Bilbrey, Salois, and Breland depositions, the February 1990 Salois Memorandum adopting the "end of shift" rule in MSHA's North Central District, and the February 1995 rescision of the Salois 1990 memo which replaced the "end of shift" rule with the one hour policy in the North Central District.

AKZO cites the testimony of its expert witness John Head, who has worked in the mining industry for 20 years, who stated that the "end of shift" rule appeared to be standard practice in two shaft mines until two or three years ago. AKZO further cites a Morton Salt Company March 1980 Memorandum (Exhibit Tab D) indicating that the "end of shift" rule has in practice been recognized in MSHA's North and South Central Districts.

AKZO states that following the rescision of the 1990 Salois memorandum in February 1995, after the instant dispute had begun, no written material was issued by MSHA to replace it. However, AKZO asserts that notwithstanding MSHA's conflicting evidence as to how section 57.11050 should be implemented, it has attempted to comply by following the policy most widely published as proper policy -- the "end of shift" rule. AKZO contends that the fact that MSHA itself has interpreted the regulation to allow significant time periods to elapse while work is being done on the shift makes clear the fact that AKZO acted as a reasonable prudent person in complying with § 57.11050.

AKZO argues that the automatic evacuation requirement engrafted by MSHA onto section 57.11050(a), is a substantive, not interpretative rule that is subject to the notice and comment requirement of both the Mine Act and the APA. In support of its argument, AKZO points out that MSHA's new automatic evacuation requirement whenever a hoist may be inoperative is simply not expressed in section 57.11050(a). Had MSHA intended that the standard contain such a requirement, AKZO believes MSHA could have (and should have) included it as part of the regulation. Since MSHA has for almost 20 years consistently interpreted the standard not to require any such action, AKZO maintains that to now engraft such a new substantive requirement onto the regulation is tantamount to the promulgation of an additional rule, subject to the "notice and comment" requirements of section 101 of the Act, 30 U.S.C. § 811, and section 553 of the APA, 5 U.S.C. § 553.

AKZO states that the automatic evacuation requirement has never been subjected to notice and comment rulemaking proceedings, and has never been published for general circulation in the mining industry. AKZO maintains that such a significant new requirement should have been subject to review and comment by the mining industry, and since it was not, the requirement must be struck down and the citations vacated.

AKZO takes note of the following rulemaking exceptions applicable to substantive rules found in section 553(d) of the APA:

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

AKZO argues that the APA interpretative rule exception should be construed narrowly, and that any deference accorded MSHA's interpretation of section 57.11050, should take into account the consistency and reasonableness of its interpretation. On the facts of this case, AKZO concludes that MSHA's interpretation should not be given deference because the new compliance requirements are unreasonable and inconsistent with past interpretations over the years.

AKZO takes the position that MSHA's newly formed interpretation of section 57.11050, is a substantive rule rather than an interpretative one because it "set[s] forth a course of conduct or behavior to which employers will be held under penalty of law and has sufficient impact to justify the notice and comment procedure." Matter of Chicago Aluminum Castings Co., Inc., 535 F.Supp. 392,397 (N.D.Ill. 1981); Carter v. Cleland, 643 F.2d 1, 8(D.C. Cir. 1980)(substantive or legislative rule is one that has the force of law and narrowly limits administrative discretion.) Additional cases are cited holding that a substantive rule is one that imposes obligations, creates additional conditions, or has a substantial impact on a regulated industry or an important class of members.

AKZO argues that while the existing regulation merely requires that a mine have two properly maintained escapeways to the surface, MSHA personnel seek to interpret the regulation to require the evacuation of the entire mine whenever one of the two hoists is "down" for more than one hour (Reitter, Breland, Salois, and Strickler depositions). AKZO asserts that this interpretation stands in stark contrast to the previously

accepted and endorsed "end of shift" rule that interrupted mine operations only if the hoist was not back in service at the start of the next shift, in which case the next shift could not be lowered into the mine. AKZO concludes that such a vastly different implementation of a regulation is clearly more than an interpretative rule, and as such is subject to the notice requirements of the APA. AKZO further points out that MSHA's top officials indicated that MSHA's interpretation allows its inspectors no discretion in allowing a mine operator a reasonable time for abatement, and they agreed that regardless of the circumstances, an operator was allowed only one hour to evacuate the mine if one of the two escapeways was not available for use. (Gomez, Reitter, Breland, and Salois depositions).

AKZO maintains that beyond requiring an operator to evacuate the mine when one of two escapeways is not available, MSHA's interpretation of § 57.11050(a) has a tremendous economic and operational impact on underground mine operators because of increased costs of operating an underground mine by unnecessarily interrupting workflow and productivity. Conceding that financial costs are clearly not an operator's sole consideration, AKZO nonetheless believes that MSHA's evacuation requirement is too broad-sweeping in that it establishes a definitive rule or course of action in the event of a hoist outage without granting any consideration to the actual hazard or risk posed by the situation. AKZO asserts that this goes against the Mine Act's policy of giving consideration to several factors, including, the risk or danger presented by the alleged violation, in determining a reasonable period of time to abate a violation.

AKZO maintains that MSHA's one hour automatic evacuation requirement represents a significant departure from its past position and therefore requires APA notice, comment, and publication. Notwithstanding the status of the end of shift rule, AKZO asserts that MSHA cannot deny that it was followed in a large portion of the country for a substantial number of years and that the new automatic evacuation requirement substantially departs from it.

Reviewing the limited circumstances under which the Mine Act authorizes the withdrawal of miners, AKZO points out that the violations issued in this case were issued as section 104(a) non-"S&S" citations which do not grant MSHA authority to effect an evacuation of the mine. AKZO contends that MSHA's action amounts to a de facto order of withdrawal, issued without statutory or regulatory authority, citing Aluminum Company of America v. MSHA, 14 FMSHRC 1721 (October 1992).

AKZO points out that section 104(a) of the Act requires that MSHA fix a reasonable time for the abatement of a violation, and it cites the relevant Commission precedent cases establishing the

factors to be considered by an inspector in fixing a reasonable abatement time. In the instant case, AKZO maintains that none of the factors were followed by MSHA in requiring a one hour abatement time.

On the facts of this case, AKZO maintains that there is no dispute that there was no imminent danger at the mine while the production hoist was out of service, and it points out that the violation was issued as a non-"S&S" citation with "unlikely" injury or illness findings, and that MSHA inspector Foster and supervisory inspector Reitter testified that the danger was minimal and that the normal hazards to which miners were exposed were not affected by the hoist outages. Further, AKZO states that the equipment was only out of service for a period of three hours, another escapeway to the mine surface was available in case of an accident or emergency, there were only three miners underground, and no mineral extraction was taking place. Under the circumstances, AKZO maintains that the inspector should not have required an immediate abatement of the alleged violation, but rather should have given it a reasonable period of time to return the hoist to service.

AKZO concludes that it did not violate section 57.11050 because it provided two escapeways to the mine surface and was, at the time of the alleged violation, in fact, ensuring compliance with a provision contained in that standard by performing preventive maintenance to ensure that the hoist was properly maintained. While the production hoist was unavailable, miners still had access to the service hoist in the event of an accident or emergency. AKZO disputes MSHA's view that the requirement of at least two escapeways means that both of them must be functional at all times, and notes that section 57.11050(a) does not state such a requirement, and if this had been the drafters' intent, the standard would read otherwise.

AKZO believes that MSHA's insistence on automatic evacuation of the entire mine within one hour if only one of two hoists is available is contrary to prior agency acceptable policy and not supported by the language of the standard. AKZO concludes that failure to subject this substantive requirement to notice, comment, and publication unfairly allows MSHA to promulgate a new rule with no benefit of participation from those in the affected industry, and fails to provide industry fair and adequate notice of the substantive requirements of § 57.11050(a). AKZO further concludes that MSHA's automatic evacuation policy also constitutes a de facto order of withdrawal, although under § 104(a) of the Act, MSHA does not have such authority, and that the new requirement is an improper interpretation of § 57.11050(a) which clearly exceeds MSHA's authority. Finally, AKZO concludes that MSHA's one hour abatement period in the event

of a hoist outage, regardless of the circumstances, is unreasonable and ignores consideration of several factors, including the risk of danger presented, in determining a reasonable abatement period.

MSHA's position is that AKZO violated the provisions of 30 C.F.R. 57.11050(a) by intentionally taking one of the mine's two escapeways out of service for a period of more than one hour while allowing normal mining operations to continue. MSHA asserts that any event, whether planned or unplanned, that makes the escapeway unavailable for more than one hour constitutes a failure to properly maintain at least two escapeways and that miners must be evacuated until both escapeways are available for use. MSHA asserts that the regulation requires "at least two" separate "properly maintained" escapeways in order for miners to be allowed underground unless they are developing the second escapeway or are working to make the unavailable escapeway "properly maintained" and available for use.

MSHA maintains that the requirement for two separate escapeways is a fundamental cornerstone of a miner's safety net in the event of an emergency and that AKZO's operation of its mine with only one "properly maintained" available escapeway while it fixes its unavailable escapeway is not allowed by the regulation. MSHA asserts that an escapeway that is not available for any reason is not "properly maintained," and that the regulations require the evacuation of the mine when only one escapeway is available until both have been "properly maintained" and are again available. In support of its evacuation argument, MSHA asserts that section 104(c) of the Mine Act allows only the miners needed to correct the deficiency in escapeways to be present in the affected areas of the mine.

MSHA asserts that the regulation does not allow AKZO to maintain normal mining operations until the end of the shift with only one properly maintained and available escapeway for the miners to use in the event of an emergency. MSHA believes that in order to stay in compliance, AKZO must schedule its maintenance for time periods when miners are not scheduled to work, or in the alternative, construct a third escapeway.

In response to AKZO's assertion that the obligation to evacuate miners facially violates the requirement in section 104(a) of the Act that each operator be given a "reasonable time to abate" a violation, MSHA takes the position that when a violation can be avoided and is intentionally created, no time for abatement is reasonable, because an operator does not have a right to operate in knowing noncompliance with a mandatory safety standard. However, to the extent that an operator is unaware of the existence of a violation, MSHA concludes that the operator is obligated under the Mine Act to abate the violation as soon as

reasonably possible. If only one escapeway is available for use, and the second one cannot be made available for use within one hour, MSHA insists that miners must be evacuated since only one escapeway does not achieve the level of safety mandated by the regulation. MSHA further concludes that the one hour requirement is a reasonable length of time for achieving compliance, based on the language of 30 C.F.R. 57.11050(b), which provides that escapeways shall be positioned so that miners may exit the mine within one hour.

MSHA rejects AKZO's contention that its current escapeway enforcement position and application of section 57.11050(a) is inconsistent with its past enforcement practices as evidenced by an MSHA memorandum mentioned in footnote 8, pg. 69, of former commission Judge Stewart's decision in Secretary v. Potash Corporation of America, 4 FMSHRC 56, 69 (January 1982), and the 1990 memorandum from MSHA District Manager James Salois. AKZO concludes from those documents that it "was widely understood in the industry" that a violation of section 57.11050(a) would be cited pursuant to the "policy" set forth in Potash, allowing operators to continue to work until the end of the shift whenever an escapeway is damaged or unavailable for use.

MSHA takes the position that pursuant to Commission Rule 72, 29 C.F.R. 2700.72, an unreviewed Judge's decision (Potash), is not a precedent binding on the Commission. MSHA asserts that it is evident from both of AKZO's expert witnesses that there is currently a clear understanding in the industry that whenever a mine only has two escapeways, it is now industry practice to evacuate the mine immediately whenever one of the escapeways is unavailable for any reason. MSHA concludes that this establishes that at some point after the Potash decision was issued fourteen years ago, it became clear to the industry that the guidelines noted in Potash had not been adopted and were in fact not applicable. MSHA concludes that AKZO must concede that MSHA's interpretation, as asserted in this case, is the very position understood and relied upon throughout most of the mining industry.

MSHA maintains that equitable estoppel does not apply in Mine Act proceedings and that all of AKZO's assertions of conflicting prior enforcement practices that were arguably inconsistent with the requirements of the regulation and the footnote in the Potash decision do not provide a defense to the fact of violation of 30 C.F.R. 57.11050(a). MSHA concludes that it is clear that AKZO and other mine operators have been aware of MSHA's interpretation that the unavailability of an escapeway requires evacuation of the mine until the escapeway is returned to normal use. In this regard, MSHA cites the Gomez letter of December 1995, as evidence that any prior misunderstandings or conflicts were resolved and that the letter clearly sets forth reasonable applications of the requirements of section

57.11050(a), as it relates to maintenance activities that make the hoist, and thereby one of the escapeways in a two-shaft mine, unavailable for use for various periods of time. MSHA points out that AKZO was aware of the position incorporated in the Gomez letter when it took the actions it took to challenge the interpretations of the regulation in this case.

Finally, as argued in support of the asserted violations of section 50.10, MSHA maintains that section 57.11050, is clear and that a reasonably prudent person familiar with the mining industry understands that what is required is consistent with MSHA's position. Assuming the regulation may be construed to be unclear or ambiguous, MSHA nonetheless concludes that its reasonable interpretation is entitled to deference and must be broadly interpreted to achieve the statutory goal of protecting the health and safety of miners.

Findings And Conclusions
Fact of Violation, Citation Nos. 4100787 and 4546275

The respondent is charged with two alleged violations of 30 C.F.R. 50.10, for failing to immediately notify MSHA of two production hoist interferences that occurred on November 9, and December 24, 1995. MSHA's position is that the two incidents were reportable as "accidents" because the unavailability of the hoists was the result of maintenance work to shorten several stretched hoist ropes, and that these interferences with the use of the hoists constituted hoist "damage" and a reportable "accident" pursuant to definition of those terms found in 30 C.F.R. 50.2(h)(11). MSHA has the burden of proving the alleged violations by a preponderance of the evidence.

30 C.F.R. 50.10, provides as follows:

§ 50.10 Immediate notification.

If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.

The applicable definition of "accident" found in 30 C.F.R. 50.2(h)(11), is as follows:

Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes.

Webster's New Collegiate Dictionary, defines "accident" in part as: "1a: an event occurring by chance or arising from unknown causes, b: lack of intention or necessity; an unexpected happening * * * ."

Black's Law Dictionary, Revised Fourth Edition, 1968, defines "accident" as follows:

- S an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence;
- S some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops;
- S an uncommon occurrence;
- S an unusual or unexpected result attending the operation or performance of a usual or necessary act or event;

Webster's New Collegiate Dictionary defines "damage" as "loss or harm resulting from injury to person, property, or reputation."

The Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, 1968, does not define "damage." However, the definition of "damaging stress" found at page 300, is stated as follows:

The least unit stress, of a given kind and for a given material and condition of service, that will render a member unfit for service before the end of its normal life. It may do this by producing excessive set, or by causing creeping fatigue cracking, excessive strain hardening, or rupture. (Emphasis Added)

Inspector Foster's understanding of section 50.10, as applied to hoists, is that the thirty minute time period referred to in the section 50.2(h)(11), definition of accident, does not apply if the idled hoist can be put back in service within fifteen minutes. He confirmed that a hoist can be idled for an entire shift, as long as it can be re-activated within fifteen minutes (Tr. 28).

Inspector Foster believed that a hoist that is unavailable for use because of ice in the shaft, a condition that he characterized as "a natural occurrence," need not be reported,

regardless of the downtime duration as long as there is no hoist damage, accident, or miner hazard exposure (Tr. 34). This comports with MSHA's Part 50 Program Circular interpretation (Exhibit C-10, Tab F), but is contrary to MSHA's interpretation that does not exempt "natural occurrences," and requires all hoist outages longer than thirty minutes to be immediately reported.

Inspector Foster's supervisor, C. Okey Reitter, confirmed that he issued the citation, and it was his understanding that the thirty-minute regulatory reference in question refers to the time that it would take to put an idled hoist back into service. As an example, he stated that if a hoist was out of service for an hour, as long as it could be put back in service within thirty minutes, there is no reportable hoist outage. Mr. Reitter identified the source of his interpretation as the Gomez letter of December 8, 1995, and confirmed that this was the only written guidance that he was aware of (Tr. 33-34).

Inspector Strickler believed that a hoist that is down for more than 30 minutes must be reported to MSHA, and he believed that an idled hoist "is unusable and broken" (Tr. 28-30).

Inspector Bilbrey's understanding is that a hoist that is out of service for more than thirty minutes would be considered a reportable accident. He believed that an idled hoist that can be restored to service in fifteen minutes and was not unavailable for more than an hour would not be a reportable accident (Tr. 20). However, Mr. Bilbrey did not believe that a hoist that is taken out of service for preventive maintenance constituted an "accident" (Tr. 15). In his opinion, preventive maintenance is "something that would prevent a breakdown and something that would be done before the equipment is broken." He defined "damage" as "inoperative" but stated that this would not include equipment that is intentionally taken out of service for maintenance purposes (Tr. 15). Mr. Bilbrey did not know if an inoperable hoist that is idled for more than thirty minutes by ice in the shaft would be considered a reportable accident, and stated that he would have to consult with his supervisor in this regard (Tr. 23).

Inspector Backland testified that a planned hoist outage is "probably" not reportable if the hoist can be activated within ten to fifteen minutes, but if the outage is in excess of thirty minutes, it is reportable. He further testified that preventive maintenance in excess of thirty minutes is not an "accident" pursuant to section 50.2(h), and that such maintenance could be on-going for a full shift. He then stated that preventive maintenance that takes a hoist out of service for more than thirty minutes need not be reported as long as the hoist can be

put back in service within a reasonable amount of time, but there is no fixed time for completing maintenance or reactivating the hoist (Tr. 20-21).

In response to a question as to whether or not a hoist that is taken out of service to adjust an undamaged rope needs to be reported, Mr. Backland responded that "It's a tough question to answer . . . I don't know. I would probably have to converse with my supervisor on that" (Tr. 24).

Inspector Breland believed that any hoist that is interfered with for more than 30 minutes is reportable regardless of the number of hoists in operation and regardless of the reason for the outage (Tr. 66). However, he would consider a "natural occurrence," such as ice in the shaft, not to be reportable unless there is no other way out of the mine (Tr. 67).

MSHA's District Manager Salois testified that any event specifically related to a hoist that takes it out of service for more than thirty minutes is reportable damage. He would not consider ice in the shaft that idles a hoist to be reportable, unless the ice actually damaged the hoist (Tr. 75-76).

In Jim Walter Resources, Inc., 17 FMSHRC 209 (February 1995), Commission Judge Barbour affirmed a violation of section 50.10, for a failure by the operator to immediately notify MSHA of a hoist accident that resulted in the hoist being out of service for over 30 minutes. The facts reflected that a skip hoist stopped after losing its source of power. Upon investigation by management at the hoist house containing the hoist motor and drum, it was discovered that there was damage to the hoist drum neoprene wearing strips which help to maintain proper tension on the hoist ropes which are seated into grooves on the drum as the ropes wind and unwind. The ropes were slipping on the wearing strips and the resulting friction heated the strips to the point where they had begun to melt and smoke. The condition of the hoist was not reported until many hours after the damage occurred.

The principal issue in Jim Walter was the application of sections 50.2(h)(11) and 50.10 to a hoist that transported coal and/or materials rather than miners. Judge Barbour found that the accident reporting requirement in section 50.10, applied equally to a hoist used to transport coal and materials and a hoist used to transport miners. However, I take note of the decision, at 17 FMSHRC 215, summarizing the testimony of the MSHA inspector who had 13 years of service. Judge Barbour noted as follows:

Tuggle stated that the regulations require the reporting of all hoisting accidents which result in a hoist being out of service for over

thirty minutes, unless the hoist it out of service for routine maintenance (Tr. 70-71). He stated, "[if] it's mechanical failure, which damages the hoisting system for more than 30 minutes . . . it needs to be investigated . . . [I]f the mechanical damage it due to an accidental breakdown of the components . . . it needs to be investigated. But if it's due to normal wear then, no, I don't think it needs to be investigated" (Tr. 93). (Emphasis Added)

It would appear to me that the experienced inspector in Jim Walter did not believe that hoist outages for over thirty minutes caused by routine maintenance or normal wear were required to be immediately reported to MSHA pursuant to section 50.10. It would further appear that the inspector would only require the reporting and investigating of hoist incidents involving mechanical failure resulting in damage to the hoisting system or mechanical damage due to a breakdown of the hoist components.

In the instant proceedings, the common thread binding the opinions of the inspectors with respect to the interpretation and application of section 50.10, and the meaning of the terms "damage" and "accident" is their inconsistent and contradictory testimony offered in support of the violations. Under the circumstances, I cannot conclude that a reasonably prudent person familiar with the mining industry would understand that any interruption to the use of a hoist renders it damaged and reportable pursuant to section 50.10. If the experienced inspectors charged with the enforcement of this regulation are uncertain as to its meaning and application, I would not expect a reasonably prudent mining person to be clear as to what is required to be reported. Indeed, district manager Salois conceded as much when he said he was unsure as to whether everyone understood the reporting requirements as he did.

With respect to the use of the word "damage," the testimony of record reflects a variety of opinions. Mr. Foster testified that the hoist was idled on November 9, 1995, because the ropes that experienced some stretching were being tightened. Although he was of the opinion that the stretching of the ropes constituted damage, he conceded that he had no knowledge of any hoist malfunctions, and he admitted that he had no factual basis to support any conclusion that the ropes had stretched to a point that would cause them to skip (Tr. 35-37).

Mr. Reitter confirmed that prior to the idling of the hoist, it was not broken and was functioning fine. The work that was performed was done to preclude future rope problems (Tr. 42-44). He believed the hoist was "damaged" because it was out of service and unavailable for use for more than thirty minutes and could

not be used. In his opinion, a hoist that cannot be used for more than thirty minutes is "damaged" per se. (Tr. 44).

I find Mr. Reitter's explanations with respect to the meaning of the term "damage" to be contradictory and confusing. On the one hand, he believed that a hoist that is idled for more than thirty minutes is damaged, but a hoist that is idled for one hour is not damaged, as long as it can be put back into service within thirty minutes. Further, Mr. Reitter's explanations contradict Mr. Foster's opinion based on a 15 minute window of opportunity for putting an idled hoist back into service.

Unlike Inspector Foster, Inspector Backland believed that the stretching of a hoist rope is normal and does not indicate that the hoist is damaged or not functioning properly (Tr. 23). I find Mr. Backland's testimony to be the more credible.

Inspector Breland assumed that the maintenance performed on the cited hoists was done to prevent damage. He also testified that damage occurs when a hoist is placed in service, but then stated that it becomes an "accident" when the "damage" interferes with hoisting for more than thirty minutes (Tr. 62). I find his testimony to be contradictory and incredible, and he obviously had no evidence that the hoists were physically damaged other than his speculative assumptions that the maintenance was somehow connected with some unexplained damage.

District Manager Salois did not know whether the cited hoist ropes had stretched to a point beyond the allowable tolerances (Tr. 61-64). He also had no factual knowledge that the ropes were changed out because they were damaged and could no longer be used (Tr. 69-70). Further, I find his testimony that a hoist rope is damaged when it is placed in service and subjected to stretching to be incredible and lacking any evidentiary support. His testimony contradicts Inspector Backland's belief that rope stretching is normal. Further, when asked if his opinion regarding rope damage is understood by the average miner, Mr. Salois responded "I'm not sure everybody would look at it that way" (Tr. 68-69).

Hoisting consultant Tiley distinguished rope deterioration, fatigue, and damage. He believed that damage begins when rope retirement is required, and that prior to this time "it's just useful life" (Tr. 33). Contrary to the opinion of Mr. Salois, Mr. Tiley did not believe that a newly manufactured hoist rope with broken wires was damaged, and he agreed with Inspector Backland's belief that rope stretching is expected and does not constitute damage (Tr. 74). He also confirmed that the hoist ropes in questions were not retired because of stretching or were no longer fit for use (Tr. 75). I find Mr. Tiley's testimony in this regard to be credible. Although he alluded to a "corrosive"

mine atmosphere, I find no credible evidence that the cited ropes were damaged by corrosion when they were cited, and the citations do not state that they were.

Mining engineering consultant Head defined "damage" as an "unexpected faulty condition" that implies "an accidental sudden occurrence" that is the opposite of preventive maintenance performed to prevent such unexpected events (Tr. 37-39). He further indicated that damage is akin to the physical breakdown of a hoist part, and I find his testimony to be credible.

MSHA's hoist specialist Barkand was of the opinion that damage and normal wear and tear are no different and that normal wear and tear causes damage. However, he offered no credible testimony that the cited hoists were damaged due to normal wear and tear, and he conceded that he did not examine the ropes closely (Tr. 22, 41). He cited rope wire wear and nicking as the primary causes of damage, but offered no evidence that these hoist conditions were present in the instant cases. Indeed, he confirmed that the "constructive stretching," of a hoist rope, which results in the loss of rope diameter and increased lengthening is not damage (Tr. 32-33).

The parties stipulated that when the cited ropes were shortened they had not stretched beyond the limits allowed by MSHA's retirement criteria. MSHA has presented no credible evidence that the cited hoists were physically damaged or inoperable, or that the hoist ropes exceeded their normal life expectancy or were not installed or maintained within the applicable hoist rope specifications or tolerances. Further, the citations were issued as non-"S&S" violations, and I find no credible evidence to support any reasonable conclusion that any miners were exposed to a hazard.

It would appear to me that the purpose and intent of the Part 50 reporting requirements, as stated in section 50.1, is to provide MSHA with information in connection with mine accidents, injuries, and illnesses in order to enable MSHA to respond to those events by investigating and developing facts to ascertain the causes of such incidents, and to enable MSHA, in cooperation with the mine operator, to find the ways and means for preventing recurrences. A secondary purpose appears to be the establishment of a system of reporting that will enable MSHA to compile accident, injury, and illness statistics as a means of "tracking" such events for publication and dissemination to the mining community as a means of identifying problems associated with these events.

Insofar as the definition of "accident" associated with hoisting equipment as stated in section 50.2(h)(11) is concerned, I have difficulty in understanding how a planned routine

preventive maintenance procedure that is performed to prevent damage and insure continued compliance with sections 57.11050(a), in the absence of any actual hoist damage or hazard exposure to miners, can reasonably be construed to constitute a reportable accident pursuant to section 50.10. I cannot conclude that requiring the reporting of such incidents is reasonably related to the intent and purpose of sections 50.10 and 50.20.

MSHA's position that any interference with the use of a hoist for more than thirty minutes, regardless of the reason, and notwithstanding the absence of any physical damage, nonetheless constitutes damage that is immediately reportable as an accident pursuant to section 50.10, IS REJECTED as an unreasonable and rather strained interpretation of the common use of the word "damage."

As noted earlier in the Potash Company of America case, 4 FMSHRC 56 (January 1982), former Commission Judge Stewart concluded that in the absence of any evidence of physical damage to a hoist which interferes with its use, it is not "damaged" within the common understanding of that word or the meaning of section 50.2(h)(11), and the interference does not constitute an "accident" under the immediate notification requirement found in section 50.10.

I conclude and find that the common and ordinary meaning of "damage" in connection with the cited hoists connotes some readily recognizable physical damage that renders the hoist inoperable and requiring some repair to place it back in service. In this regard, I agree with Judge Stewart's decision in the Potash case, and I conclude and find that absent any evidence of some physical damage to the cited hoists, taking them out of service for reasons unrelated to any such damage, such as routine preventive maintenance where no damage repairs are made, does not amount to a reportable accident within the scope and intent of section 50.10.

In my view, if MSHA desires the definition of a reportable "accident" to include hoisting equipment that is idled for more than thirty minutes for any reason, it should take the appropriate procedural steps to re-draft and amend the regulatory definition found in section 50.2(h)(11).

In view of the foregoing, I conclude and find that MSHA has failed to establish any violations of section 50.10, by a preponderance of the credible evidence adduced in these proceedings. ACCORDINGLY, the contested citations ARE VACATED.

The parties agreed to hold the disposition of Citation No. 4546323 (Docket No. LAKE 96-80-RM) in abeyance pending my decisions concerning section 50.10. The citation concerns an

alleged violation of section 50.20(a), because of AKZO's failure to submit MSHA Mine Accident, Injury, and Illness Report Form 7000-1, for hoist maintenance outages of more than thirty minutes. In view of my findings that such hoist outages are not reportable accidents, I conclude and find that AKZO was not obliged to submit the form in question. ACCORDINGLY, the contested citation IS VACATED.

Fact of violation. Citation No. 4546276

The respondent is charged with a violation of 30 C.F.R. 57.11050(a), for allegedly failing to provide underground miners with two properly maintained escapeways on December 24, 1995. The cited production hoist, which was one of the escapeways, was not available for use for approximately three hours and thirty-seven minutes while the hoist rope was being shortened. Section 57.11050(a), provides as follows:

(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 the exploration or development of an ore body.

The parties stipulated that a planned shut down of the cited hoist escapeway occurred on December 24, 1995, in order to shorten all of the hoist ropes and to afford AKZO an opportunity to challenge the application of section 57.11050(a). The duration of the shut down was over three hours, no miners were evacuated, and three miners (a mechanic, an electrician, and a foreman) remained underground checking fans and pumps, and performing maintenance on the service hoist. No salt extraction occurred during the shut down and no cutting or welding was taking place.

The Evolution of MSHA's Asserted "One-hour" Evacuation "Policy"
Past "Policy"

I find no credible evidence of the existence of any written MSHA National policy statements prior to the institution of the instant litigation, concerning mandatory evacuation of the entire mine for a violation of section 57.11050(a), if compliance is not achieved within one hour, the fixing of an "automatic" one-hour abatement time to achieve compliance, or the uniform enforcement methods to be followed by MSHA inspectors when citing a mine operator for a violation of section 57.11050(a).

The evidence establishes that on February 22, 1990, MSHA's Metal/Non-metal North Central District Manager Salois issued a memorandum concerning the interpretation and application of section 57.11050(a), to be followed by his district inspectors when citing mine operators in that district, including AKZO's Cleveland Mine (Index of Exhibits, Tab G).

The Salois memorandum guidelines did not require the immediate evacuation of miners if a hoist was unavailable for use for more than one hour. In a planned hoist maintenance/repair situation, if one of the hoists was disabled as a result of this work, it was permissible to continue the work through the end of the shift, with miners underground, as long as the second hoist was available. The same rule essentially applied to unplanned hoist repair shutdowns.

I take note of the fact that the Salois memorandum, at page 3, specifically noted the absence if any MSHA national policy for "Mine Evacuation Related to Hoist Repairs/Maintenance Affecting Two Escapeways," the subject of the memorandum. The memorandum further noted, on the first page, that when compared to five other MSHA district practices, the practices in Mr. Salois' district were "substantially different." Since Mr. Salois states that his district should follow the other district practices and since his memorandum was apparently issued to accomplish this, I believe it is reasonable to assume that the other districts followed a similar practice of allowing hoist repairs to be made during a production shift, and through the end of the shift, without requiring the immediate evacuation of the mine within an hour of discovering that a hoist was in need of repair.

Mr. Salois testified that he withdraw his memorandum in February, 1995, because he lacked the authority to establish enforcement policy for his district and his policy was inconsistent with MSHA's national policy. Although Mr. Salois indicated that prior to the issuance of his memorandum, miners were required to be out of the mine when hoist maintenance was performed, no evidence was produced to establish the existence of any written MSHA policy requiring the evacuation of miners. Indeed, Mr. Salois stated that his understanding that mine evacuation was required when hoist work was performed came from what he "learned on the job." Further, although Mr. Salois stated that other district managers informed him that his memorandum was inconsistent with the policy they were following, no credible evidence was produced to establish the factual existence of any written policy in these other districts.

Supervisory Inspector Reitter, who never visited the AKZO mine, testified that he first became aware of the Salois memorandum after he became a supervisor in MSHA's Newark, Ohio district, and he was unaware of the memorandum for the following

year until it was called to his attention by AKZO at the time it was rescinded. He confirmed that his inspectors were following the policy, and that if he were aware of it, he too would have followed it.

Inspector Strickler, who inspected AKZO's mine, never saw the Salois memorandum but heard about it from other inspectors in his office who informed him that at one time miners were allowed to work underground until the end of the shift. He stated that this was contrary to the policy in Illinois where a mine operator evacuated miners immediately. However, I find no evidence of the actual existence of any such written policy.

Inspector Bilbrey testified that he never saw the Salois memorandum, and learned about the unwritten policy for mine evacuation when a hoist was out at a staff meeting and verbally from his supervisors, including Mr. Reitter.

Inspector Backland, who also inspected AKZO's mine, testified that he was aware of the Salois memorandum in 1990, but did not believe it was the policy in his district. He did, however, believe the stated "time element" should be followed.

Mr. Gomez testified that he became aware of the Salois memorandum a year ago. He was concerned because it was contrary to what he considered to be MSHA's policy. He explained that when he served as manager of MSHA's Rocky Mountain District in February 1990, his policy was to require mine evacuation if there were no properly maintained escapeways. If one escapeway was down and could not be restored in one hour, a violation of section 57.11050(a), would occur. Mr. Gomez stated that he contacted every past and present district managers to determine if they had a policy such as the one stated in the Salois memorandum, and he found no such policy. He further stated that during the eleven years he served as a district and subdistrict manager, he was not aware of the regulatory interpretation stated in that memorandum and he believed it was "internally inconsistent."

Mr. Breland stated that he first saw the Salois memorandum in the fall of 1995, during a meeting with AKZO representatives and MSHA officials. He was never aware of any policy change as stated in the Salois memorandum, and he always followed the "instant violation and hour to abate" policy.

Mr. Breland alluded to an inquiry from MSHA's Dallas acting manager over a year ago regarding any change in policy that would not require the evacuation of miners under section 57.11050(a) at one of AKZO's mines in Louisiana when maintenance was performed on a hoist. After consulting with Mr. Gomez, Mr. Breland advised the manager that there was no policy change and miners would have

to be evacuated. It would appear to me that Mr. Breland's advice to the manager was based on the Gomez letter of December 8, 1995.

The record includes a copy of a Morton Salt Company memorandum dated March 10, 1980, stating an interpretation by MSHA's Dallas District office with respect to the intent of section 57.11-50. That interpretation is the same as the Salois policy memorandum of February 22, 1990, allowing production to continue until the end of the shift while the unavailable hoist is again made available. (Index of Exhibits, Exhibit D).

Mine Consultant Tiley initially testified that changing hoist ropes with miners underground when there is only one additional way out of the mine is a good mining practice and a normal process in the worldwide mining community. He later corrected himself and indicated that the practice of allowing miners to remain in a two shaft mine when one of the hoists is down applied to Canadian miners and not to U.S. miners. He was aware of MSHA's "one-hour" rule requiring mine evacuation if a hoist is down for more than an hour and he believed that this was the practice in American mines.

Mine consultant Head testified that the evacuation of miners from a two-hoist mine if one of the hoists is out of service for more than an hour is standard practice among several MSHA districts. He confirmed that many mine operators recognized that this was a policy change that occurred in the past two or three years, and that the prior policy followed in Mr. Salois' North Central District, did not pose an evacuation problem until the end of the shift. Mr. Head further confirmed that the prior practice in a two-hoist mine allowed work to continue until the end of the shift if one hoist was unavailable, and immediate evacuation was not required.

Present "Policy"

MSHA's position is that the Gomez letter of December 8, 1995, to AKZO's counsel constitutes the prevailing definitive interpretations of section 57.11050. Notwithstanding the absence of any regulatory language requiring the evacuation of miners within one hour for non-compliance, MSHA relies on the Gomez interpretation to support the cited violation of section 57.11050(a). The relevant portion of the letter states as follows:

With respect to the escapeway issue, 30 C.F.R. 57.11050 requires that producing mines have two or more escapeways from the lowest level of the mine to the surface. The standard also requires that a method of refuge be provided for

all underground miners who can not reach the surface within 1 hours using both of the escapeways.

During the March meeting we discussed the need for evacuating miners from the Cleveland Mine, or any other mine, during hoist outages when the minimum requirements for escapeways could not be met because the hoist was unavailable for use in one of the two escapeways.

We believe that the standard does not authorize maintenance to interfere with a mine operator's ability to use the hoist in the event of an emergency if it is part of, or one of, the two required escapeways.

We also informed AKZO officials at the March meeting that, as a practical application of this standard, if a hoist could be returned to service within 1 hour of the need to be used then evacuation of the mine would not be required. This action would comply with the 1-hour time provided for in 30 C.F.R. 57.11050(b) and the requirement to have two escapeways available.

* * * *

* * * * Put another way, we believe that the language and clear intent of the standard indicates that routine maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within 1 hour. Your second conclusion that the mine need not be evacuated, regardless of the length of a hoist outage so long as it could be placed back into service and miners withdrawn from the mine within 1 hour, is correct.

The Gomez letter is a private communication to AKZO's counsel Savit in response to his request of November 6, for an explanation of MSHA's interpretation of section 57.110509 (Index of Exhibits, Tab N). The record reflects that the Gomez response was prepared unilaterally and was not shared with other members of the mining community, and its contents have apparently never been reduced to other written form or included as part of MSHA's enforcement guidelines or policy manuals. Indeed, MSHA's policy with respect to section 57.11050, as stated in the manual, has apparently not been revised or updated since 1988.

The record further reflects that prior to the November/December 1995, exchange of the aforementioned correspondence, a legal assistant in Mr. Savit's firm, in a letter dated September 11, 1995, to the Secretary's solicitor's office in Arlington, Virginia, requested a copy of the proposed section 57.11050, program directive referred to in the Potash decision of January 19, 1982, as well as other explanatory memorandums dealing with that regulation (Index of Exhibits, Exhibit L). The letter was referred to Mr. Gomez's office, and it was answered on October 20, 1995, by letter from Mr. C. Narramore, who signed it for Mr. Gomez. The response included a page from MSHA's July 1, 1988, Program Policy Manual regarding section 57.11050, and statements that copies of the requested memorandum could not be located, and that they were superceded by the program policy.

Apart from the Gomez letter, there is no evidence that the interpretation stated by Mr. Gomez is in fact reduced to any other written form as a means of notifying mine operators about MSHA's mine evacuation and abatement requirements, or providing guidelines or procedures for MSHA's inspectors to follow when inspecting and citing mine operators for violations of section 57.11050(a).

Inspectors Foster, Reitter, Strickler, Bilbrey, and Backland all confirmed that section 57.11050(a), contains no language requiring mine evacuation in the event a disabled hoist escapeway could not be put back in service within one hour, and they were unaware of any regulation that required automatic mine evacuation within any particular time frame. With regard to their understanding of what is required pursuant to section 57.11050(a), there appears to be inconsistent, uncertain, and confusing enforcement practices among MSHA's inspectors as to the interpretation and application of this regulation, examples of which follow below.

Inspector Reitter, who has never been in the mine, but who nonetheless "supervised" Mr. Foster in issuing the citation, was unaware of any written MSHA directive (except the Gomez letter) requiring mine evacuation. His belief that one of two hoist escapeways could be unavailable for one hour was based on the one-hour normal life of a self rescue device, and "word of mouth" discussions with other inspectors.

Inspector Bilbrey believed that when section 57.11050(a), is cited because a hoist is unavailable and cannot be returned to service within one hour, evacuation must begin. However, he further believed that a mine operator had a "floating time" frame to determine that the hoist cannot be restored to service. He explained that one hour would be allowed to make the initial unavailability determination, and that evacuation could begin

during the next hour. He confirmed that there is no written policy supporting his interpretation.

Inspector Backland believed that in the event of a "planned maintenance situation," if it takes more than one hour to repair a hoist evacuation must begin. His belief in this regard "relates" to the one-hour life of a self rescue device, and he confirmed that there is no MSHA written policy in this regard. However, he believed it is district policy, but could not recall who advised him of this.

MSHA's Safety Division Chief Breland's interpretation that section 57.11050(a), requires the evacuation of the mine within one hour after non-compliance is based on his understanding of subsection (b), the one-hour life of a self rescuer, and MSHA's fire evacuation standards. However, Inspector Strickler testified that a fire that is out of control for more than 30 minutes must be reported, but no evacuation of the entire mine is required, and a separate order would be required to achieve a mine evacuation.

Inspector Foster's "one-hour" evacuation interpretation is based on the one-hour oxygen supply of a self rescue device, his "experience" in coal mines, and conversations with fellow inspectors and supervisors.

Inspector Strickland believed that if a hoist were down for 30 minutes, and could not be restored within the next 30 minutes, evacuation must begin. He was not aware of any MSHA "one-hour evacuation" policy, and he based his belief in this regard on the one-hour self rescue device, and his "experience" and conversations with other inspectors.

Mr. Salois testified that he was not aware of any written MSHA National policy determination concerning section 57.11050, but that based on what he "learned on the job, miners have to be evacuated when hoist work is performed." He believed that the regulation required two separate escapeways at all times, and if only one was available, this would constitute non-compliance.

Although Mr. Salois claimed ignorance of any section 57.11050(a) national policy, Mr. Gomez stated that his December 8, 1995, letter states the current enforcement mine evacuation policy for non-compliance. However, contrary to his earlier testimony concerning the policy aspects of his letter, Mr. Gomez later testified that his letter does not state any policy and that he does not always issue policy when answering letters of inquiry. In explaining further, Mr. Gomez stated there are different methods and ways of handling and instituting agency policy, and he cited his letter as one of these methods. I find his explanation to be confusing and contradictory.

The record further reflects a variety of methods that inspectors would follow in citing violations of section 57.11050(a), and requiring abatement. Inspector Strickland did not believe that section 104(a) required the withdrawal of miners while abatement is ongoing, and he confirmed he had no authority under section 104(a) to order mine evacuation. However, based on his "experience," he believed that section 57.11050(a), authorized him to evacuate a mine and that a separate order was not required. He also believed that a one-hour abatement time is reasonable based on the one-hour useful life of a self rescuer.

Inspector Bilbrey questioned his authority to require mine evacuation. Inspector Reitter believed that a section 104(a) or (d) citation does not require withdrawal from a cited area. However, if a hoist were unavailable for one hour, he would issue a section 104(a) citation, with a short abatement time, and would require mine evacuation by issuing a section 104(b) order if the hoist could not be restored to use within the hour.

Mr. Salois would achieve compliance with section 57.11050(a), by issuing a section 104(a) or (d) citation if there were no imminent danger, and he would fix the abatement time at one hour.

Inspector Foster confirmed that a section 104(a) citation does not require the withdrawal of miners, and he conceded that there is no language in section 57.11050(a), requiring mine evacuation in the event of non-compliance. However, in the instant case, he considered the section 104(a) citation that he issued to be a withdrawal order with a one-hour abatement time regardless of the condition of the hoist, and without regard to the other work being performed underground, or the likelihood of a fire. I note from the pleadings however, that the citation be issued was issued at 8:03 a.m., on January 25, 1996, and he fixed the abatement at 5:00 p.m., the next day, January 26, 1996.

Inspector Strickler initially indicated that the fixing of a reasonable abatement time is left to the inspector's discretion after consultation with the mine operator as to the time it would take to correct the condition. He later indicated that a reasonable time for abatement would be one hour based on the useful life of a self rescuer.

Mr. Salois indicated that he would fix the abatement time at one hour, and would extend the time to focus on other problems, but only after the mine was evacuated. He further stated that a one-hour abatement time is reasonable regardless of the circumstances, and that based on section 57.11050(a), an inspector has no discretion to grant more than an hour for

abatement because two properly maintained escapeways would not be available.

Mr. Breland believed that one-hour is a reasonable abatement time because "that is what we expect in the evacuation," without regard to how long it might take to reapiir a hoist or the number of people underground.

Mr. Backland believed that all of the circumstances presented must be evaluated in fixing a reasonable time to abate a violation.

Mr. Gomez suggested that an inspector could issue a citation with a "short" abatement time of less than one hour, followed by a section 104(b) withdrawal order. He was of the opinion that the absence of two functional escapeways constituted a per se imminent danger, and he would achieve compliance by initially issuing a section 104(a) citation, followed by an imminent danger order if a cited unavailable hoist was not restored to use within one hour.

The Gomez letter, at page 4, quotes a passage from Judge Hodgdon's decision in Savage Zinc, Inc., 17 FMSHRC 279,290 (March 1995), addressing the "S&S" hazard in failing to have two escapeways. In that case, Judge Hodgdon affirmed a violation of section 57.11050(a), after concluding that the mine had only one escapeway. I take note of the fact that contrary to MSHA's asserted policy of requiring mine evacuation within one hour in the absence of at least two escapeways, and the automatic one-hour abatement rule, the inspector in the Savage Zinc case issued a citation, did not require the immediate evacuation of miners, and fixed the abatement time at one month, not one hour. I further note that the citation was issued on October 14, 1994, prior to the January 8, 1995, Gomez letter. In any event, the failure to immediately evacuate the mine, and allowing 30 days to abate appears to be contrary to Mr. Gomez' avowed "long-standing" policy of immediate mine evacuation and short, one-hour abatement in the absence of two available escapeways.

MSHA's reliance on subsection (b) of section 57.11050, as its authority for requiring evacuation of the entire mine if one of the two escapeway hoists is unavailable for more than one hour is rejected. Subsection (b), on its face, does not provide for any mine evacuation. Indeed, the plain language of subsection (b) provides for refuges, not evacuation, if miners cannot reach the surface within an hour by using the escapeways provided by subsection (a). AKZO is not charged with a violation of subsection (b). In any event, it is my view that if the rule makers had intended to require the evacuation of the entire mine, they would have clearly included this as part of the regulation.

MSHA's assertion that section 104(c) of the Act supports its belief that all miners are required to be evacuated from the mine when one of the two escapeways is unavailable for use because that section allows only the miners needed to correct the escapeway deficiency to be present in the affected mine areas is not well taken, and is rejected. In my view, section 104(c) of the Mine Act provides no independent evacuation or withdrawal authority or requirement. That section must be read in conjunction with the citation/order scheme found in section 104, and comes into play when a citation or withdrawal order requiring abatement is issued. In the instant case, the violation was issued as a section 104(a) non-"S&S" citation.

MSHA's suggestion, at page 8 of its initial responsive brief, that no time for abatement is reasonable because AKZO "intentionally" created the violation in order to test the application of section 57.11050(a), and "knowingly" violated the law is not well taken and is rejected. AKZO specifically informed MSHA of its intentions, and MSHA willingly accommodated AKZO. In short, I conclude and find that MSHA was a cooperative and knowing participant, and cannot now complain and seek additional punishment against AKZO. I find nothing to suggest that MSHA ever initiated any section 110(c) proceedings against AKZO officials for any "knowing" violations. Further, the alleged violation was issued as a section 104(a) non-"S&S" citation, and AKZO was never charged with any aggravated or unjustifiable or inexcusable conduct for any unwarrantable failure noncompliance.

I disagree with MSHA's assertions that its requirements pursuant to section 57.11050(a) are clear and unambiguous, and that a reasonably prudent person familiar with the mining industry understands them. Apart from the Gomez letter of December 8, 1995, which admittedly was not shared with other mine operators, there is no evidence that MSHA has ever published its contents as part of its policy manual, inspector guidelines, or in any communications to the mining community at large. It seems obvious to me from the testimony in this case that the inspectors themselves do not have a clearly defined and consistent understanding with respect to the interpretation, application, and enforcement of section 57.11050(a). Except for ad hoc interpretations, "word-of-mouth" advice, and possibly a copy of the Gomez letter, it does not appear that MSHA's districts and inspectors have at their disposal a clearly defined written official agency enforcement policy to follow, particularly with respect to the issuance of citations and orders, and the fixing of abatement times.

I find nothing in section 57.11050(a), that supports MSHA's position that mine evacuation must begin immediately if one of

the two designated hoist escapeways is unavailable for more than one hour, nor do I find support for MSHA's position that the cited hoist was not properly maintained because it was unavailable for more than one hour.

I conclude and find that the regulatory language requiring the positioning of escapeways so that damage to one shall not lessen the effectiveness of the others recognizes the fact that one escapeway in a two escapeway mine may not always be available at all times because of damage. I believe that this would also apply to a situation where a hoist is taken out of service for maintenance to insure that it is kept in a properly maintained condition.

In the instant case, the cited condition or practice includes a finding that during part of the time the cited production hoist was out of the service, the primary service hoist was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. Since there is no evidence that the service hoist was damaged, or that its use was interfered with for more than thirty minutes pursuant to section 50.2(h)(11), I cannot conclude that the fact the production hoist was out of service lessened the effectiveness of the service hoist within the meaning of section 57.11050(a).

I conclude and find from the record in this case, that prior to the December 8, 1995, Gomez letter, MSHA's inspectors in the North-Central District, and probably other districts, followed an apparent long standing practice of not requiring the evacuation of miners working underground when only a single escapeway was available during a shift. This practice allowed production to continue until the end of the shift, provided miners were notified that only one escapeway was available and they agreed to continue working until the end of the shift, and provided the next shift was not permitted to go underground until the second escapeway was repaired.

In the instant case, the cited production hoist was out of service for maintenance, and I find credible AKZO's assertion that the rope shortening work was being done to insure continued compliance with the regulatory requirement that the hoist be properly maintained. I find it reasonable to conclude that if MSHA were following its pre-Gomez letter policy, a citation would not have been issued and work would have been allowed to continue until the end of the shift until the unavailable hoist was restored to service.

After further careful review and consideration of the arguments presented by the parties, I agree with AKZO's position

that MSHA's automatic one-hour mine evacuation requirement, a requirement clearly not contained in cited section 57.11050(a), is a significant departure from MSHA's apparent prior practice that has a substantial adverse impact on AKZO's mining rights and compliance obligations. The same can be said for MSHA's automatic one-hour abatement practices that appear to be contrary to Commission precedents. MSHA's requirement pursuant to section 57.11050(a), creates and imposes new compliance obligations on AKZO, under pain and penalty of immediate mine closure, with little or no discretion left to the inspector not to require mine evacuation in the event a hoist that is undergoing routine preventive maintenance in order insure its "properly maintained" condition is not returned to service within an hour. Under these circumstances, I conclude and find that the Gomez letter is more than a general explanatory or interpretative statement regarding the application of section 57.11050(a). I conclude and find that the letter constitutes a substantive rule subject to APA notice, comment, and publication requirements. See: Drummond Company, Inc., 17 FMSHRC 661 (May 1992).

Based on the entire record before me in this case, I conclude that MSHA's interpretation and application of section 57.11050(a), goes well beyond the regulatory languages found in that section, and constitutes an unreasonable and impermissive enforcement reach that is not entitled to deference.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 57.11050(a), by a preponderance of the credible and probative evidence adduced in this proceedings. Accordingly, the contested citation IS VACATED.

ORDER

In view of the foregoing, IT IS ORDERED as follows:

- 1). Section 104(a) non-"S&S" Citation Nos. 4100787, November 28, 1995, and 4546275, January 25, 1996, citing alleged violations of 30 C.F.R. 50.10, ARE VACATED.
- 2). Section 104(a) non-"S&S" Citation No. 4546323, January 25, 1996, citing an alleged violation of 30 C.F.R. 50.20(a), IS VACATED.
- 3). Section 104(a) non-"S&S" Citation No. 4546276, January 25, 1996, citing an alleged violation of 30 C.F.R. 57.11050(a), IS VACATED.

4). MSHA's proposed civil penalty assessments of \$600, for citation No. 4546275, and \$400 for Citation No. 4546323 in Docket No. LAKE 96-125-M, ARE DENIED and DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203
(Certified Mail)

Mark N. Savit, Esq., Ruth L. Ramsey, Esq., Patton Boggs, L.L.P., 2550 M Street, N.W., Washington, D.C. 20037-1350 (Certified Mail)

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