

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 1, 1995

SAVAGE ZINC, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. SE 95-11-RM
	:	Citation No. 3882702; 10/14/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 95-57-RM
ADMINISTRATION (MSHA),	:	Order No. 4357221; 11/18/94
Respondent	:	
	:	Elmwood-Gordonsville Mine
UNITED STEELWORKERS OF	:	Mine ID 40-00864
AMERICA (USWA),	:	
Intervenor	:	

DECISION

Appearances: Henry Chajet, Esq., and James G. Zissler, Esq., Robert A. Cohen, Esq., Office of the Solicitor, Henry Tuggle, Safety and Health Specialist, United Steelworkers of America, Pittsburgh, Pennsylvania for Intervenor.

Before: Judge Hodgdon

These cases are before me on notices of contest filed by Savage Zinc, Inc. against the Secretary of Labor and his Mine Safety and Health Administration (MSHA) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

' 815. The company contests the issuance of Citation No. 3882702 to it on October 14, 1994, and the issuance of Order No. 4357221 to it on November 18, 1994. For the reasons set forth below, both the citation and the order are affirmed.

A hearing in the cases was held on December 7 - 9, 1994, in Nashville, Tennessee.¹ Randy G. Helm, Kenny G. Hensley, David Park, James B. Daugherty and Randy W. Dennis testified for the Secretary. In addition, the Secretary called Roy L. Bernard as an adverse witness. Charles E. Hays and H. John Head testified on behalf of Savage Zinc and Allan Cole, Richard E. Pulse and Martin Rosta² were called as adverse witnesses by the company.

¹ The transcript incorrectly states that the hearing was held on "September 7 - 9, 1994."

² Mr. Rosta, who had been *subpoenaed*, did not appear at the

The parties have also filed briefs which I have considered in my disposition of these cases.³

BACKGROUND

The essential facts in this case are undisputed. The Elmwood-Gordonsville Mine is a random room and pillar zinc mine operated by Savage Zinc, Inc. near Franklin, Tennessee. The mine can be entered by a portal onto a roadway which continues from the portal to the Stonewall production area. The mine can also be exited through six shafts, the No. 5 Shaft in the OMZ area, the Nos. 1 and 2 Shafts in the Elmwood area, the No. 4 Shaft in the South Carthage area, and the Nos. 3 and 7 Shafts in the Gordonsville area. Some of these shafts, e.g. No. 3, are also used as entrances to the mine.

The roadway is approximately five miles long and, after an initial decline from the portal which levels off some five hundred feet below the portal, goes up hills (inclines), down hills (declines) and is level in places as it traverses through the mine. The roadway begins in the Gordonsville area of the mine, goes along the West B Drift and through the Elmwood area of the mine. From the Elmwood area of the mine, the roadway becomes known as the Stonewall Drive and terminates in the Stonewall

hearing. His testimony was taken by deposition in Washington, D.C., on December 16, 1994. The deposition is admitted into evidence as Contestant's Exhibit K.

³ The Contestant has also filed a Reply Brief. The Secretary has filed a motion to strike the reply brief and his motion has been joined in by the Intervenor. Reply briefs were not contemplated in our discussion of a briefing schedule at the hearing, (Tr. 820, 834), nor provided for in my December 21, 1994, order scheduling briefs. Consequently, while I deny the motion to strike, I have given no weight to the Contestant's Reply Brief in this decision.

production area. The Stonewall Drive is a decline which is about a mile long and descends, on a 15 percent grade, in elevation about 500 feet.

Development of the Stonewall Drive and the Stonewall production area was begun in 1987, and completed in 1988. Construction of the No. 6 Shaft, which goes to the Stonewall production area, was initiated in 1987 and completed in 1988. A hoist was installed in the shaft in November 1988. "Stonewall is the lowest elevation of the [mine] complex" (Tr.698.)

From 1988 until sometime in the spring of 1993, the Stonewall Drive and the No. 6 Shaft were designated in the mine's evacuation plan as the two escapeways from the Stonewall production area. In the spring of 1993, the mine operators concluded that the No. 6 Shaft was no longer safe, due to deteriorating ground conditions, to use as an escapeway and took it out of use.

On August 25, 1993, Savage Zinc was issued Citation No. 4092045 for failing to maintain an escape route, the No. 6 Shaft, in a travelable condition in violation of Section 57.11051 of the Secretary's Regulations, 30 C.F.R. ' 57.11051. (Resp. Ex. 10.) In September 1993, the company inquired of Mr. Daugherty, the local MSHA metal and nonmetal mine supervisor, whether a refuge chamber could be used instead of a second escapeway. He advised them that he could not authorize it.

In December 1993, Savage Zinc filed a petition for modification with MSHA seeking modification of the application of Section 57.11050(a), 30 C.F.R. ' 57.11050(a), to the mine by replacing a second escapeway with a refuge chamber. The petition was denied on June 23, 1994. The company then requested a hearing on the petition before an Administrative Law Judge assigned to the Department of Labor. The hearing was scheduled for November 1, 1994. At Savage Zinc's request the hearing was stayed until January 23, 1995. Savage Zinc filed an amended petition for modification on October 17, 1994.

On October 14, 1994, Inspector Daugherty issued Citation No. 3882702 to Savage Zinc for a violation of Section 57.11050(a). The citation stated that:

The mining and production area of Stonewall, the lowest level of the mine, does not have two separate properly maintained escapeways to the surface as required by 30 CFR 57.11050(a). The No. 6 shaft which was formerly designated as one of the two separate escapeways to the surface from the lowest level of the

mine, is not travelable in the event of an emergency, nor is it presently designated on the mine evacuation plan as an escapeway.

(Resp. Ex. 5.) The company was given until November 14, 1994, to abate the violation.

On November 18, 1994, Inspector Daugherty issued Order No. 4357221 pursuant to Section 104(b) of the Act, 30 U.S.C. ' 814(b).⁴ The order stated:

No apparent effort was made by the company to provide a second escapeway from the lowest level of the mine.

⁴ Section 104(b) provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons . . . to be withdrawn from, and to be prohibited from entering, such an area until an authorized representative of the Secretary determines that such violation has been abated.

All miners shall be immediately withdrawn from the Stonewall mining and production area until a second escapeway is provided.

(Resp. Ex. 6.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Violation

Section 57.11050(a) requires that:

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

It is Savage Zinc's position that this regulation was not violated because the Elmwood-Gordonsville mine is a one level mine with seven escapeways (the six shafts and the portal), thus meeting the two escapeway requirements. The company further argues that if it is determined that the mine has more than one level, it cannot be found to have violated the regulation because: (1) The Secretary's application of the regulation denied Savage Zinc adequate notice and due process of law; (2) The Secretary's application of the regulation in this case is inconsistent, arbitrary, entitled to no deference, and denied Savage Zinc due process of law; (3) The Secretary's application of the regulation is not consistent with the requirements of other sections of Section 57.11050, 30 U.S.C. ' 57.11050; (4) The Secretary's interpretation of "level" in applying the regulation constitutes improper rulemaking; and (5) The Secretary's application of the regulation diminishes safety.

I conclude that there is more than one level in the mine and that failure to provide two escapeways from the Stonewall production area violates Section 57.11050(a). I further conclude that even if it were accepted that the mine has only one level, the regulation was violated. Finally, I reject Savage Zinc's additional arguments as unpersuasive.

Whether the Stonewall area of the mine is required by Section 57.11050(a) to have two escapeways must be evaluated

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." See, e.g., *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1617-18 (September 1987).

Ideal Cement Co., 12 FMSHRC 2409, 2415 (November 1990).

As Judge Weisberger noted in *Magma Copper*, neither "level" nor "levels" are defined in the Regulations. *Magma Copper Co.*, 16 FMSHRC 327, 331 (February 1994). However, it is clear that "[a] regulation should be construed to give effect to the natural and plain meaning of its words." *Diamond Roofing v. OSHRC*, 528 F.2d 643 (5th Cir. 1976) (citations omitted).

"Level" is a common word and most people would agree with this definition from *Webster's Third New International Dictionary* 1300 (1986) that level is a "horizontal state or condition : uniform altitude." On the other hand, the dictionary also indicates that the term has a more particular meaning in mining as "**a** : a horizontal passage in a mine intended for regular working and transportation" or "**b** : the horizontal plane containing a main level and other workings." *Id.*

The Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 638 (1968), defines "level," as pertinent to this case, as:

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

As can be seen, all of these definitions have a common element that goes back to the basic definition, that is that a "level" is essentially on the "horizontal."⁵ On the other hand,

⁵ The other definition of "level" mentioned in this case, "[t]he horizon at which an ore body is opened up and from which

the Contestant's argument that this is a single level mine is based on a distorted definition of "level" which leaves out all references to the horizontal.

Thus, Mr. Bernard, an expert testifying for Savage Zinc, defined "level" as "a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of ore from the mine." (Tr. 19.) Mr. Hays, the company's Safety Supervisor, defined "level" as "an underground passage or opening providing access to stopes or workings. It also provides ventilation and haulage ways for the extraction of ore." (Tr. 646-47.) Mr. Head, another expert witness for the Contestant, said that "level" "is defined as a main underground road or passageway that leads to production areas, stopes that may be above or below that level, and the main road is used for ventilation, for access, and for haulage of ore from working places." (Tr. 763-64.)

Finally, in its brief, the Contestant argues that:

[t]he primary definition for "level" provided in the BOM Dictionary and discussed by Bernard and Head is related to function rather than distance or elevation.

According to that definition, a "level" is:

a main underground passageway that connects stopes and working places and provides ventilation and haulage for the removal of the ore from the mine.

(Cont. Br. at 26.)

All of these definitions purport to be a paraphrase of the first definition in the *Dictionary of Mining, Mineral, and Related Terms*. All of them leave out the phrase "driven along a level course" from the definition. By leaving out these words, the most significant characteristic of "level" is removed from the definition. Followed to its logical conclusion, a mine with a continuous roadway which declined into the earth at a 15 percent grade for 5 miles and off of which were working areas at various elevations would still, by this definition, be a one level mine.

mining proceeds. The term is often used in the same sense as a drift or to cover all horizontal workings on one horizon" found in Peele's *Mining Engineer's Handbook* ' 10, 3 (3d Ed. 1941), also conforms to this central element.

Contrary to Savage Zinc's assertions, I find that it is Savage Zinc's definition of "level" and what it means in this regulation that is irrational and inconsistent with MSHA enforcement actions, not MSHA's definition. Based on any, or all, of the definitions of level from the *Dictionary of Mining, Mineral, and Related Terms*, set out above, I conclude that the Elmwood-Gordonsville Mine has more than one level.⁶ I further conclude that the production levels found in the Stonewall area are the lowest levels of the mine.⁷

The obvious purpose of the regulation is to insure that miners have two separate ways to get out of the mine in the event of an emergency. I conclude that a reasonably prudent person familiar with the mining industry and the purpose of this standard would find that there is only one escapeway from the Stonewall area, the Stonewall Drive, that the Stonewall area is the lowest level of the mine, both in elevation and in location, and that the regulation requires two escapeways from the Stonewall area.⁸

⁶ Unlike *Magma Copper*, which turned on whether an area was a level based on the type of activity performed in the area, 16 FMSHRC at 332-33, there is no dispute that mining is performed in the Stonewall area.

⁷ I also conclude that the Stonewall Drive is not part of the Stonewall area of the mine, although whether it is or not makes no difference to my conclusion that the Stonewall area has the lowest levels of the mine.

⁸ An examination of the mine map makes it obvious to anyone, let alone a reasonably prudent person familiar with the mining industry, that the Stonewall area needs a second escapeway.

It is also clear that Savage Zinc originally agreed with these conclusions. If it did not, the company's request of Inspector Daugherty in August 1993 to be allowed to substitute a refuge chamber for a second escapeway would make no sense.⁹ Nor would it's December 1993 petition for modification for a variance of the application of Section 57.11050(a) to it by having a refuge chamber instead of a second escapeway. This petition is particularly telling in that it requested relief from the two escapeway requirement, even though at that time Savage Zinc had not been cited for not having two escapeways. Additionally, there is no evidence that anyone connected with Savage Zinc ever expressed the opinion to MSHA, prior to the institution of this case, that they already complied with the two escapeway requirement. Even when the citation was issued, no such claim was made. (Tr. 498, 500.)

I further conclude that even if this were a one level mine, the standard would still be violated. Section 57.11050(a) requires that the two escapeways be "so positioned that damage to one shall not lessen the effectiveness of the others" (emphasis added). As Mr Hays testified, the Stonewall Drive is "part of the primary escapeway out of Stonewall." (Tr. 744.) Even a cursory glance at the mine map, (Resp. Ex. 1 or Cont. Ex. E), makes it clear that if the mile long Stonewall Drive is blocked or damaged, the effectiveness of any escapeways at the top of the drive is considerably lessened.

Savage Zinc's Due Process Arguments

The Contestant argues that the Secretary's witnesses were unable to agree upon a consistent application of the regulation, that this demonstrates that the Secretary's interpretation of the regulation "fails to provide legally adequate notice to operators of the standard's requirements" and that, therefore, Savage Zinc has been denied due process of law. (Cont. Br. 18.) This argument is not supported by the evidence.

It is true that the most consistent definition of "level" was provided by Contestant's witnesses. However, as noted above, this definition consistently left out the crucial element that

⁹ The establishment of a refuge chamber itself indicates that Savage Zinc believed that they needed a second escape way since the regulation requires that "[a] a method of refuge shall be provided while a second opening to the surface is being developed."

distinguishes a level from something that is not a level. On the other hand, the Secretary's witnesses, i.e. those employed by the Secretary even if called by Savage Zinc, were unanimous in agreeing that the Stonewall area required two escapeways. While, obviously, none of them had memorized a definition of level, they all conveyed the sense of what Section 57.11050(a) requires even if they were not able to articulate it to Contestant's satisfaction.

What the MSHA employees imparted is what a reasonably prudent person familiar with the mining industry would understand from the regulation, probably without even having to look up a definition of "level." Consequently, Savage had adequate notice of what the regulation requires and was not denied due process.

Savage Zinc next argues that the Secretary has applied the regulation inconsistently and arbitrarily in this case and that it was denied due process. This argument is based on the claim that "level" and "lowest levels" are not defined in the regulation or MSHA's *Program Policy Manual*, that in the past MSHA has not issued citations in other mines or to this mine for failing to have two escapeways from areas similar to the Stonewall area, and that for a period of time MSHA did not apply the standard to the Stonewall area.

Once again, the evidence does not support these assertions. The fact that "level" and "lowest levels" are not defined makes no difference since, as noted above, the regulation satisfies the "reasonably prudent person" test.

With regard to the disparate treatment argument, there is no evidence of disparate treatment. The general testimony given by Contestant's witnesses that the witness is familiar with areas in other mines similar to the Stonewall area and that they have not been cited for not having two escapeways provides no basis for concluding that Savage Zinc is being treated disparately or that the regulation is being applied arbitrarily. There is no way to determine how similar these other areas in other mines are to the case at hand. This is also true concerning the "229 area" in this mine, which just from looking at the mine map, the only evidence available, appears to have as many differences as similarities.

Finally, the Contestant contends that MSHA's failure to cite Savage Zinc during two periods when the Stonewall area did not have two escapeways establishes that MSHA applied the regulation arbitrarily. This claim is disingenuous. In the first place, there is absolutely no evidence to show how long, if at all, a period of time elapsed between the completion of development of Stonewall and the installation of the hoist in No. 6 Shaft. The only evidence is that Stonewall was completed in 1988, and that

the hoist was installed in November 1988. In the second place, there is no evidence to show whether or not Savage Zinc complied with the portion of the regulation set out in note 9, *supra*, while the No. 6 Shaft was being developed. Obviously, there cannot be two escapeways while the second escapeway is being developed.

The second period that Savage Zinc relies on is the time between the August 1993 citation and the issuance of the citation in this case. In effect, what the company is claiming is that the fact that MSHA gave them a break and did not seek further enforcement action while Savage Zinc pursued its petition for modification is evidence that MSHA applied the regulation inconsistently and arbitrarily. This attempt to turn MSHA's good faith forbearance against it does not merit further comment.

Savage Zinc's Whole Act Argument

The Contestant argues that MSHA's interpretation of Section 57.11050(a) makes Sections 57.11050(b) and 57.11055, 30 C.F.R. ' ' 57.11050(b) and 57.11055, superfluous since they specifically deal with time and distance. Citing 2A *Sutherland Stat. Const.*, ' 46.06, at 119 (5th Ed. 1992), the company asserts that this violates the "whole act rule" which requires "that an instrument is to be construed as a whole so that all of its provisions are harmonized and interpreted so as not to derogate from the force of other provisions." (Cont. Br. 23-24.) I see nothing in MSHA's interpretation of the two escapeway requirement that in any way annuls or lessens the requirement that a refuge be provided for miners who cannot exit the mine through the escapeways within one hour or the requirement that escapeways not be inclined more than 30 degrees. Consequently, I find this argument unconvincing.

Savage Zinc's Diminution of Safety Argument

The Contestant argues that the Secretary's application of Section 57.11050(a) is hazardous to the health and safety of miners and results in a diminution safety. This argument fails for two reasons. First, as the Secretary correctly notes in his brief, the Commission has held that "diminution of safety may not be raised as a defense to a violation in an enforcement proceeding unless the Secretary has first entered a finding of such diminution in a modification proceeding." *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (November 1989); *Otis Elevator Co.*, 11 FMSHRC 1918, 1923 (October 1989); *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (December 1983); *Penn Allegh Coal Co.*, 3 FMSHRC 1392, 1398 (June 1981). That has not occurred in this case.

Secondly, Savage Zinc's diminution of safety argument is a misapplication of the concept. Essentially, the company argues

that putting in a second escapeway, either by rehabilitating the No.6 Shaft, sinking a new shaft or excavating a new drive parallel to the Stonewall Drive, involves work that is more hazardous than normal mining and, therefore, a diminution of safety results. In other words, it is the construction of the second escapeway that diminishes safety, not the end result of having two escapeways. Acceptance of this argument would mean no mine would ever have to put in a second escapeway, since constructing it would diminish safety.

Obviously, for the Contestant's argument to have validity, it would have to show that safety is diminished by having two escapeways. The record is devoid of any evidence to support such a theory and it would be surprising if such evidence could be found. Accordingly, this argument is rejected.¹⁰

Significant and Substantial

The inspector concluded that this violation was "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of

¹⁰ I have also considered and rejected the Contestant's argument that MSHA's application of Section 57.11050(a) constitutes improper rulemaking in view of my conclusion that a reasonably prudent person familiar with the mining industry would interpret the regulation as MSHA has.

Labor must prove: (1) the underlying violation of mandatory safety standard; . . . (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

By their very nature, escapeways only become important in the event of an emergency. Therefore, continued normal mining operations, in evaluating this violation, must assume the existence of an emergency. The evidence indicates that there are several types of emergencies that might require the use of an escapeway which could occur in this mine. Among these are roof falls, fire, explosions and inundation. Further, it is not the likelihood of one or more of these disasters occurring which determines whether this violation is S&S, but the likelihood of serious injury occurring during an emergency situation when there is not a second escapeway available.

Viewing the violation in this light, I have already concluded that the violation occurred. I also conclude that the failure to have two escapeways results in a discrete safety hazard in that blockage of the primary escapeway means that the miners are trapped in the mine. I further conclude that there is a reasonable likelihood that the failure to have a second escapeway in an emergency will result in an injury and that the injury will be reasonably serious. Accordingly, I conclude that the violation was "significant and substantial."¹¹

Reasonableness of the Abatement Period

Savage Zinc argues that it is unreasonable to have expected them to abate the violation in this case in 30 days. Consequently, the company asserts that the 104(b) order issued to it for failing to abate the violation should be vacated. Since it is uncontroverted that it would take anywhere from nine to 18 months to install a second escapeway, this claim has superficial appeal. However, the testimony of Inspector Daugherty makes it clear that MSHA did not expect the company to perform the impossible and complete construction in 30 days, but only that Savage Zinc begin taking steps to abate the violation. (Tr. 509-10.)

In fact, at the time the 104(b) order was issued, Savage Zinc had taken no action on the citation other than to contest it. Nor is there evidence that the company had communicated to MSHA any intention of abating the citation. Under these circumstances, I conclude that the 30 day abatement period was reasonable and that the 104(b) order was appropriate.

¹¹ In reaching this conclusion, I have considered whether the presence of the refuge chamber reduces the gravity of the violation and have concluded that it does not. As everyone agrees, the best place to be in a mine emergency is on the surface. I find that it is reasonably likely that a mine emergency can be so devastating, e.g. an explosion, massive cave-in, or wide ranging fire, that a serious injury could occur to miners in the refuge chamber.

ORDER

I conclude that Savage Zinc, Inc. violated Section 57.11050(a) of the regulations by not having two escapeways from the Stonewall area of its Elmwood-Gordonsville Mine, and that this violation was "significant and substantial" and the result of, at least, moderate negligence. I further conclude that the time given for abatement of this violation was reasonable. Accordingly, it is **ORDERED** that Citation No. 3882702 and Order No. 4357231 are **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Henry Chajet, Esq., James Zissler, Esq., Jackson & Kelly,
2401 Pennsylvania Ave., N.W., Suite 400, Washington, D.C. 20037

Robert Cohen, Esq., Office of the Solicitor, U.S. Department of
Labor, 4015 Wilson Blvd., Arlington, VA 22203

Mr. Henry Tuggle, United Steelworkers of America, Five Gateway
Center, Pittsburgh, PA 15222

/lbk