DECEMBER 1999

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 1999

Review was granted in the following cases during the month of December:

Louis W. Dykhoff, Jr. v. U.S. Borax Incorporated, Docket No. WEST 99-26-DM. (Judge Feldman, July 7, 1999) This is a reconsideration of a September 30, 1999 denial of a previous petition.

Secretary of Labor, MSHA v. Eagle Energy Incorporated, Docket No. WEVA 98-39. (Judge Feldman, November 16, 1999) Petition filed by Secretary granted.

Excel Mining, LLC v. Secretary of Labor, MSHA, Docket Nos. KENT 99-171-R, etc. (Judge Melick, November 19, 1999)

Review was denied in the following case during the month of December:

Secretary of Labor, MSHA v. Eagle Energy Incorporated, Docket No. WEVA 98-39. (Judge Feldman, November 16, 1999) Petition filed by Eagle Energy denied.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 6, 1999

LOUIS W. DYKHOFF, JR.,	:	
	:	
v.	:	Docket No. WEST 99-26-DM
	:	
U.S. BORAX INCORPORATED	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Verheggen and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 16, 1999, the Commission's Office of Administrative Law Judges received from Louis W. Dykhoff, Jr. a petition for discretionary review of a decision issued by Administrative Law Judge Jerold Feldman on July 7, 1999. In his decision, Judge Feldman dismissed a discrimination complaint brought by Dykhoff under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 21 FMSHRC 791 (July 1999) (ALJ). Dykhoff's petition was forwarded and received by the Commission's Docket Office on August 17.

The judge's jurisdiction over these cases terminated when his decision was issued on July 7, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Dykhoff's petition was received by the Commission's Office of Administrative Law Judge's on the fortieth day, August 16, ten days past the 30-day deadline. Because the Commission did not sua sponte direct review of the case, Judge Feldman's decision became a final order of the Commission.

On September 30, 1999, the Commission issued an order denying Dykhoff's petition as untimely filed. 21 FMSHRC 976, 978 (Sept. 1999). The Commission explained that Dykhoff had availed himself of the opportunity to bring his case before a judge, and had offered no explanation for his failure to timely submit a petition for discretionary review. *Id.* at 977.

On October 12, 1999, the Commission received Dykhoff's Motion for Relief from Default and/or Reconsideration. In the motion, Dykhoff declares "under penalty of perjury" that he did not offer an explanation for his late filing because he mistakenly believed that he had 40 days following issuance of the judge's decision, rather than 30, to file his petition. Mot. at 1. He further states that he has been unrepresented since the time that Judge Feldman issued his decision because he can no longer afford counsel. *Id.* In the memorandum attached to his motion, Dykhoff states that U.S. Borax, which was represented by counsel throughout the proceedings, failed to comply with procedural time limits on at least three occasions, without negative repercussions. Memo. Dykhoff stated that, as an "unschooled miner," he should receive as much "leeway" as U.S. Borax with respect to timeliness issues. *Id.* Dykhoff also attached to his motion various orders documenting in part his allegations that U.S. Borax failed to timely file pleadings.

On November 12, 1999, the Commission received from U.S. Borax an opposition to Dykhoff's motion for reconsideration. In its opposition, U.S. Borax states that the Commission should deny Dykhoff's motion because, in its September 30 order, the Commission stated that it need not invite Dykhoff to provide an explanation for the late filing. Opp'n at 2. Second, it notes that denial of Dykhoff's motion will not result in a default because Dykhoff has availed himself of the opportunity to have his case heard before a judge. *Id.* at 3. Third, U.S. Borax sets forth reasons for denying Dykhoff's petition for discretionary review on the merits. *Id.* at 3-4. Finally, U.S. Borax asserts that the motion was untimely filed. *Id.* at 4.

Relief from a final Commission judgment or order is available to a party in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Dykhoff, on his own initiative, has adhered to the Commission's procedural rules for filing a motion for reconsideration, offering an explanation in the form of an affidavit that, as an unrepresented miner, he mistakenly believed that he had 40 rather than 30 days to file his petition for discretionary review.[1] The Commission has previously reopened final Commission orders under Fed. R. Civ. P. 60(b)(1) when parties' counsel misunderstood the Commission's filing requirements for petitions for discretionary review. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (finding sufficient allegation that counsel misinterpreted deadline for filing petition); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982) (finding sufficient allegation that operator's counsel failed to adhere to instructions to file petition). In addition, the Commission has recognized that it has held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 & n.2 (Oct. 1999).

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[1] Contrary to U.S. Borax's assertions, Dykhoff timely filed his motion for reconsideration. Although the Commission received the motion on October 12, Dykhoff filed the motion by registered mail on October 8, within 10 days of the Commission's September 30 order. *See* 29 C.F.R. §§ 2700.78(a) ("A petition for reconsideration must be filed with the Commission within 10 days after a decision or order of the Commission."); 2700.5(d) ("When filing is by mail, filing is effective upon mailing.").

Under these circumstances, we reopen the proceedings for consideration by the Commission of whether to grant Dykhoff's petition for discretionary review.

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Riley, dissenting:

We would deny Dykhoff's motion for reconsideration. It is significant that the Commission's September 30 order did not result in placing Dykhoff in default, since he had already availed himself of the opportunity to bring his case before a judge. In addition, as we noted in the September 30 order, Dykhoff attached to his petition for discretionary review a copy of section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), which sets forth the deadline for filing a petition for discretionary review. 21 FMSHRC at 977 n.1. Accordingly, we find his assertion that he believed he had 40 days following issuance of the judge's decision to file his petition unpersuasive, and not a sound basis on which to grant this motion.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 16, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 94-574-R through KENT 94-797-R and KENT 94-862-R
BERWIND NATURAL RESOURCES CORP., KENTUCKY BERWIND LAND COMPANY, KYBER COAL COMPANY, and JESSE BRANCH COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

These consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involve 225 citations and orders issued for alleged violations of mandatory standards at the Elmo No. 5 Mine in Pike County, Kentucky, in connection with an explosion that occurred on November 30, 1993, killing one miner. 18 FMSHRC 202, 205 (Feb. 1996) (ALJ). The citations and orders were issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to AA&W Coals, Inc. ("AA&W"), the company that contracted to operate the mine, as well as Berwind Natural Resources Corporation ("Berwind"), Jesse Branch Coal Company ("Jesse Branch"), Kentucky Berwind Land Company ("Kentucky Berwind"), and Kyber Coal Company ("Kyber"). *Id.* On February 23, 1996, Administrative Law Judge David Barbour issued a decision in which he concluded that Berwind, Kentucky Berwind and Jesse Branch were not operators of the Elmo No. 5 Mine within the meaning of the Mine Act. *Id.* at 233-34, 235-36, 241-43. The judge also rejected the Secretary's theory that Berwind and its subsidiary corporations constituted a "unitary operator" under the Mine Act. *Id.* at 233. Finally, the judge concluded that Kyber was an operator because of its active participation in mine operations and

its authority to participate in the decision-making process regarding the daily development of the mine through projections. *Id.* at 240.

The Commission granted cross-petitions for discretionary review filed by the Secretary and Kyber. The Commission also granted motions permitting amicus curiae participation by the National Mining Association ("NMA"), the National Council of Coal Lessors, Inc. ("NCCL"), and Coal Operators and Associates, Inc. ("COA"), in support of Berwind, Jesse Branch, Kentucky Berwind, and Kyber (collectively referred to as "Contestants"); and by the United Mine Workers of America ("UMWA") and the United Steelworkers of America ("USWA") in support of the Secretary. In addition, the Commission heard oral argument in the case. For the reasons that follow, we affirm in part, vacate in part, and remand.

I.

Factual and Procedural Background

A. Contestants' Activities and Scope of Authority

Berwind is a holding company incorporated in Delaware and located in Philadelphia. 18 FMSHRC at 208. Kyber, Jesse Branch, and Kentucky Berwind are all wholly-owned subsidiaries of Berwind. *Id.* at 205, 208. Berwind's primary business as a holding company is to oversee the operations of its subsidiaries. *Id.* at 208-09. Berwind is also involved in decisions that affect the general direction of the business of its subsidiaries and, as sole shareholder, has the power to unilaterally replace the officers of its subsidiaries. *Id.* at 209. Berwind received periodic production reports and financial statements from its subsidiaries, which were used to project cash flow and monitor their economic performance as well as the production and quality of coal mined at leased mining property. *Id.* at 209-10. Berwind reviewed and approved the budgets submitted by its subsidiaries, and allocated capital to each as necessary to meet their budget. *Id.* at 212. Expenditures by subsidiaries in excess of budgetary limits were subject to approval by Berwind. *Id.* Berwind provided funds to Jesse Branch and Kyber for their operating expenses and capital expenditures, since neither subsidiary was profitable. *Id.* Significant capital expenditures of these companies, such as the purchase of coal preparation plants and the costs of opening new mines, were approved by Berwind. *Id.* Berwind had no direct relationship with AA&W with respect to the operation of the Elmo No. 5 Mine. *Id.* at 211. It never provided funding, loans or advances to AA&W; did not provide any supplies, materials, machinery, or tools to AA&W for use at the mine; and did not receive any production or financial reports from AA&W. *Id.*

Kentucky Berwind is a Kentucky corporation with its principal place of business in Charleston, West Virginia, and an office in Kentucky. *Id.* at 208. It owns approximately 90,000 acres of coal reserves in Pike County, Kentucky. *Id.* Kentucky Berwind leased coal reserves to 21 different lessees in Pike County, including Kyber. *Id.* at 212. Kentucky Berwind never funded any of AA&W's mining operations, and it did not provide or sell supplies, machinery or tools to

the Elmo No. 5 Mine. *Id.* at 210, 236. It did not require AA&W to obtain its approval for the purchase or lease of mining machinery or equipment, and did not own any of the equipment used by AA&W at the mine. *Id.* at 210.

Kyber and Jesse Branch are both Kentucky corporations that lease land and coal reserves from Kentucky Berwind and contract out the actual mining of the coal. *Id.* at 206-07. Neither Kyber nor Jesse Branch are regularly engaged in the extraction of coal. *Id.* at 207, 228. Kyber and Jesse Branch both own and operate separate preparation plants at which almost all coal mined by their contractors is blended, sized, and washed. *Id.* at 207. Kyber used Jesse Branch exclusively to provide surveying services, including preparation of mine maps and setting spads, at mines that it leased. *Id.* at 228.

In 1984, Kyber entered into an oral lease with Kentucky Berwind for the right to mine coal at the Elmo No. 5 Mine in return for the payment of rent and royalties to Kentucky Berwind. 17 FMSHRC 684, 689 (Apr. 1995) (ALJ). In April 1991, Kentucky Berwind and Kyber entered into a written lease for the mine. *Id.* Meanwhile, during the spring of 1990, Kyber entered into a contract with AA&W for the mining of coal at that location by AA&W. *Id.* at 689-90. Jimmy Walker, the president of Kyber and Jesse Branch, and Steve Looney, vice president of operations for the two companies, selected AA&W to operate the mine. *Id.* at 689.

The contract between Kyber and AA&W with respect to mining coal at the Elmo No. 5 Mine was similar to that entered into by Kyber with other contract operators.[1] *Id.* at 690; Joint Stipulations of Fact ("JSF") 100. The contract provided for the payment of a variable price to AA&W for each ton of coal mined and deposited in a stockpile outside the mine. 17 FMSHRC at 690. The contract required AA&W to obtain all necessary mining permits that were not obtained by Kyber, and to post all required bonds. *Id.* The contract also specified that mining was to be conducted in accordance with mining projections established by Kyber's engineers. *Id.* at 694.

To prepare for mining, Kyber determined the location of portals to the mine and contracted with a third party to prepare the area for the development of portals and to establish a stockpile area. *Id.* at 691. Kyber also contracted for the construction of a haulage road to serve the mine and developed drainage ponds for mine runoff. *Id.* Coal production began at the Elmo No. 5 Mine in May 1990. *Id.* at 689. Before the mine opened, Kyber obtained some of the state and federal environmental permits necessary to conduct mining and paid some of the permit fees. *Id.* at 690. AA&W obtained and paid for the state mining license and posted the state bond. *Id.* Using a coal reserve study prepared for Kentucky Berwind several years earlier, Kyber developed

[1] This contract was first developed and used by Jesse Branch, and was based upon contracts in general use throughout the mining industry. *Id.* at 690.

a coal reserve map that indicated the location of coal reserves that Kyber expected AA&W to recover. *Id.* at 694.

AA&W employed about 20 miners at the mine, who produced between 180,000 and 200,000 tons of coal per year. 18 FMSHRC at 206. Mining was conducted by cutting machines, drilling machines, and explosives. 17 FMSHRC at 689. Most of the mining conducted was advance mining, under which the main entries were usually driven on 60 foot centers, and rooms off the entries were driven on 40 foot centers. *Id.* AA&W and Kyber jointly agreed that mining could be conducted on 40 foot centers in certain areas. *Id.* at 695. AA&W provided the equipment, machinery, and tools necessary to extract coal from the mine and transport it to the stockpile outside. *Id.* Once outside, the coal was loaded onto trucks by drivers for independent trucking companies for transportation to the Kyber preparation plant, using a front-end loader supplied by AA&W. *Id.*

Jesse Branch provided map drafting and surveying services at the Elmo No. 5 Mine, and set spads upon request by AA&W. 18 FMSHRC at 207; 17 FMSHRC at 692. Kyber paid Jesse Branch a fee for these services that was based upon the volume of coal produced by AA&W. 18 FMSHRC at 207. Jesse Branch employees generally surveyed and set spads at the mine on a weekly basis. 17 FMSHRC at 692-93. Jesse Branch also prepared all the mine maps used at the mine, which showed the areas of the mine from which coal had been extracted and the areas in which future mining was projected. *Id.* at 692; 18 FMSHRC at 241. In addition, Jesse Branch employees recorded the height of coal seams and entryways, and noted the locations of pillars and centers on which mining was conducted, stopping lines, conveyor belt lines, roof falls, and gas wells that would intersect the mine. 17 FMSHRC at 693. This information was recorded in a "field book" for the mine that was kept in Jesse Branch's offices. *Id.* Jesse Branch's engineers also notified AA&W when the cover — the thickness of rock between the mine workings and the surface — would not sustain the number of entries projected by AA&W, or when the cover would allow more or wider entries. 18 FMSHRC at 241-42.

The projections for the mine were developed jointly by Kyber and AA&W, but were subject to final approval by Kyber. *Id.* at 237. The mining projections showed the direction of mine development, the number of entries to be developed, the centering to be used for the entries, the position of cross-cuts, and, in some instances, the overall distance to be mined. *Id.* Once approved by Kyber, the projections were incorporated by Jesse Branch into mine maps. 17 FMSHRC at 694. Once the projections were established and approved by Kyber, they could not be unilaterally modified by AA&W; instead AA&W was contractually obligated to follow them. 18 FMSHRC at 237. If AA&W and Kyber agreed to changes in the projections, they were incorporated by Jesse Branch in a revised mine map that was then submitted by AA&W to federal and state regulatory authorities. 17 FMSHRC at 694. Kentucky Berwind had no input into the formulation of projections for the mine, and had nothing to do with the roof control and

ventilation plans under which the mine operated or mining sequence decisions. 18 FMSHRC at 236.

When AA&W believed that it could not mine to the full extent of the projections, for safety reasons or because the coal seam became too thin, it notified Kyber. 17 FMSHRC at 694; JSF 184. Kyber had the right under the contract to reject any proposal by AA&W to deviate from the projections if it would not lead to the efficient extraction of coal. 18 FMSHRC at 237-38. Kyber never challenged AA&W's opinion that mining should be discontinued because of safety considerations, such as poor roof conditions. *Id.* at 238. It did, however, occasionally deny requests by AA&W to discontinue mining for other reasons. *Id.* When Kyber agreed with a proposal by AA&W to deviate from the mining projections, Kyber notified Kentucky Berwind and requested it to inspect the area in order to protect Kyber from liability for wasting coal reserves. 17 FMSHRC at 694, 713-14. Kyber also notified Kentucky Berwind when an area slated to be mined was removed from the projection. *Id.* at 714. Kentucky Berwind employees never disagreed with Kyber and AA&W about the propriety of discontinuing mining in specified areas of the mine. 18 FMSHRC at 235. Kentucky Berwind could contact Kyber if it believed that coal was not being mined effectively, but it never did so at this mine. 17 FMSHRC at 696.

Kyber's employees visited the mine occasionally to check on the height and quality of the coal seam, to carry out its obligation to insure that coal reserves were mined to the greatest extent possible. *Id.* Kyber's employees also occasionally visited the site at the request of AA&W. *Id.* Although Kyber's employees had the right to go onto the mine property at will, they generally first notified AA&W before entering the mine. *Id.*

Kentucky Berwind employees visited the mine quarterly, or upon request, to examine the workings, ensure that coal was being properly recovered, and check seam heights and tonnages to confirm royalties. 18 FMSHRC at 210-11. After conducting their inspections, these employees prepared reports on their visits that were used by Kentucky Berwind to track mining operations. 17 FMSHRC at 696. These reports contained information on the percentage of coal projected for extraction, the average coal production per shift and per month, and the ash content of the coal mined. *Id.* at 713. The reports were used to calculate the tonnage of coal mined, the tonnage remaining to be mined, and the areas to be mined. *Id.* at 696. Kentucky Berwind inspectors conducted inspections at the mine twice in 1990, seven times in 1991, twice in 1992, and five times in 1993. *Id.* at 697.

Kyber occasionally contacted AA&W when it felt that the amount of rock in the coal was excessive. *Id.* at 697. AA&W sometimes requested a waiver of contractual penalties for low quality coal when it was mining in an area where the ash content of the coal was unusually high. *Id.* at 695. In such situations, Kyber sent a representative to the mine to determine the cause of the poor coal quality. *Id.* In some cases, Kyber consulted with Kentucky Berwind regarding

whether mining should continue in that area. *Id.* Kyber and AA&W would then jointly determine the best course of action. *Id.*

Pursuant to its contract with Kyber, AA&W paid all state and federal income taxes, social security taxes, and unemployment compensation payments for its employees. *Id.* at 691. Kyber paid state severance taxes, federal black lung excise taxes, and state and federal reclamation taxes with funds owed to, and withheld from, AA&W. *Id.* Kyber paid for electricity supplied to the mine, and deducted the amount paid from the payments it made to AA&W. *Id.* at 692. Kyber also deducted from its payments to AA&W the cost of an electrical substation it had purchased and installed at the mine. Id.

B. Proceedings Below

On November 30, 1993, an explosion occurred at the Elmo No. 5 Mine that resulted in the death of one miner. 18 FMSHRC at 205. Following an investigation of the accident, MSHA issued 225 citations and orders jointly to AA&W, Berwind, Jesse Branch, Kentucky Berwind,[2] and Kyber. *Id.*

The contest proceedings were bifurcated so that the jurisdictional status of Berwind, Jesse Branch, Kentucky Berwind, and Kyber could be resolved before the merits of the individual cases were addressed. *Id.* at 206. Following extensive discovery, the parties filed 302 joint stipulations of fact, as well as cross-motions for summary decision on the status of the Contestants as operators under the Mine Act. *Id.*

On April 24, 1995, Judge Barbour issued an order and notice of hearing in which he denied the Secretary's motion for summary decision and granted the Contestants' motion regarding the status of Berwind and Jesse Branch, concluding that the undisputed facts established that these two companies were not operators within the meaning of the Mine Act. 17 FMSHRC at 710-12, 715-16, 717. The judge also denied the Contestants' motion for summary decision as to Kyber and Kentucky Berwind, concluding that the stipulated facts did not conclusively establish whether these two entities exercised day-to-day control over the operations of the Elmo No. 5 Mine, or had the authority to do so. *Id.* at 706-10, 712-15, 716-17. The judge concluded that additional evidence was necessary to resolve issues relating to these two companies, and therefore directed a hearing for the purpose of eliciting additional evidence regarding whether Kyber and Kentucky Berwind were operators of the mine. *Id.* at 716-17.

The hearing was conducted on June 27 and 28, 1995, in Pikeville, Kentucky. 18 FMSHRC at 213. On February 23, 1996, Judge Barbour issued a decision in which he

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[2] MSHA originally issued citations and orders to Berwind Land Company, but later substituted Kentucky Berwind in its place in the contest proceedings. *Id.* at 205 n.1.

reconsidered his earlier decision based upon the additional evidence elicited at the hearing. Addressing the appropriate standard for determining whether Berwind and its subsidiaries were "operators" of the Elmo No. 5 Mine, the judge concluded that the purpose of the statutory definition of "operator" in section 3(d) of the Mine Act is "to place responsibility for health and safety upon those entities that create the conditions at the mine or that have actual authority over the conditions on the theory that such responsibility will further compliance." *Id.* at 231. The judge explained: "Control may be either direct or indirect, but it must be actual. In other words, an operator must 'call the shots' at a mine regarding its day-to-day operation, or have the authority to do so." *Id.* (citations omitted). The judge thus concluded that "in order to establish an entity as an 'operator' subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control, or supervision of the day-to-day operations of the mine, or had the authority to do so." *Id.* (citations omitted).

The judge rejected the Secretary's argument that Berwind and its subsidiary corporations constituted a "unitary operator" under the Mine Act on the grounds that this theory represented a significant deviation from the Secretary's past enforcement policy with respect to interrelated corporate entities, that it would interfere with the rights of the entities to be treated as separate corporate entities, and that it could be used to extend jurisdiction without logical limit. *Id.* at 233.

The judge affirmed his prior holdings that Berwind and Jesse Branch were not operators of the Elmo No. 5 Mine within the meaning of the Mine Act. *Id.* at 233-34, 241-43. He found that the record "contains no suggestion that those who acted for Berwind actually were controlling and supervising the Elmo No. 5 Mine, or were attempting to do so." *Id.* at 234. Instead, the judge found that the record established that Berwind "had virtually nothing to do with the day-to-day operations of the mine." *Id.* He concluded that Berwind's financial involvement with the mine was "too far removed" from the mine's daily operation to warrant a conclusion that Berwind played "a substantial role in controlling and supervising the day-to-day operation of the mine, or [had] the authority to do so." *Id.* The judge also specifically rejected the Secretary's position that "Berwind is liable solely because it is part of a group that worked together to make possible the operation of the [mine]." *Id.* In addition, the judge concluded that the engineering services which Jesse Branch provided to AA&W at the Elmo No. 5 Mine, "did not place Jesse Branch in the position of controlling the day-to-day operation of the mine." *Id.* at 242.

Based on the evidence adduced at the hearing, the judge also concluded that Kentucky Berwind was not an operator of the mine. *Id.* at 235-36. He reaffirmed his prior findings that, while Kentucky Berwind owned the minerals rights at the mine and leased those rights to Kyber, neither the lease provisions nor the report forms prepared by Kentucky Berwind indicated that it reserved to itself the right to substantial participation in the operation of the mine. *Id.* at 234-35; 17 FMSHRC at 713-15. The judge found that, based on the record evidence and the stipulations, Kentucky Berwind employees who inspected the mine did so to insure that coal was being recovered properly and to check seam heights and tonnage in order to confirm royalties, and that

Kentucky Berwind never disagreed with Kyber and AA&W about the propriety of discontinuing mining along particular projections. 18 FMSHRC at 235. He found that Kentucky Berwind's authority to impose lost coal penalties was not indicative of control or authority to control day-to-day mining operations, but rather was designed to insure that the coal was mined to the maximum extent possible, consistent with the protection of its proprietary interest in its mineral rights. *Id.* at 236.

Finally, the judge concluded that Kyber was an operator because of its active participation in the day-to-day operation of the mine and its authority to participate in the decision-making process regarding the daily development of the mine through the projections. *Id.* at 240. The judge found that Kyber possessed "bottom line authority" for determining the direction of mining, and that it did not give AA&W sufficient authority to act independently to change the direction of mining within the overall constraints of the projections. *Id.* at 238-39. He found that, except for conditions relating to safety, AA&W could not change the direction of mining without the approval of Kyber. *Id.* at 239.

II.

Disposition

A. The Standard for Determining Operator Status[3]

The Secretary contends that the judge erred in holding that, to be an operator under the Mine Act, an entity must exercise or have the authority to exercise "day-to-day" control over the overall operations of a mine. S. Br. at 29-37. The Secretary argues that the judge's imposition of a requirement of substantial "day-to-day" control is inconsistent with the language of the Mine Act, its legislative history, the statutory purpose, and the relevant case law. *Id.* The Secretary submits, in the alternative, that to qualify as an operator under section 3(d) of the Act, 30 U.S.C. § 802(d), "an entity must exercise or have the authority to exercise substantial control over the *overall* operation of the mine." *Id.* at 29 (emphasis in original). Amici UMWA and USWA agree with the Secretary that the judge applied an incorrect standard to determine operator status. UMWA Br. at 2-4; USWA Br. at 1-3, 5. The UMWA also asserts that the economic control that an owner or lessee exerts over a mine may suffice to render it an operator under the Mine Act. UMWA Br. at 5-7.

Contestants and amici NMA and NCCL argue that the "substantial day-to-day control" standard applied by the judge to resolve the operator status of Berwind and its subsidiary corporations is consistent with, and supported by, the statutory language, applicable legislative

[3] Chairman Jordan and Commissioners Marks, Riley, and Beatty join in Part II.A of this opinion.

history, case law and purposes of the Mine Act. B. Resp. Br. at 11-36; NMA/NCCL Br. at 3-14. Contestants and amici NMA, NCCL and COA further contend that the Secretary's alternative formulation of the standard for determining operator status is not entitled to deference since it is unreasonable and contrary to the clear intent of Congress. B. Resp. Br. at 36-38; NMA/NCCL Br. at 14-17; COA Br. at 16-19. Amicus COA further asserts that the Secretary's attempt to impose liability on owners and lessees of mineral rights through the adoption of a new standard for determining operator status would amount to a fundamental shift in the Secretary's enforcement policy that would threaten the future use of contract mining, and thus can only be implemented prospectively through legislation or notice-and-comment rulemaking. COA Br. at 4-16, 19-25.

An operator is defined in section 3(d) as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]" 30 U.S.C. § 802(d).[4] This language, without the independent contractor clause, originated with the Federal Coal Mine Health and Safety Act of

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[4] Two circuits have issued differing interpretations of the clause in section 3(d) of the Mine Act "who operates, controls, or supervises a coal or other mine." In *Association of Bituminous Contractors v. Andrus*, 581 F.2d 853, 861-62 (D.C. Cir. 1978), the D.C. Circuit held that the clause "who operates, controls, or supervises a coal or other mine" only modifies the preceding noun "other person," thereby rendering any "owner" or "lessee" liable as an operator regardless of its level of involvement in or control over the mine's activities. *Accord Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1432 n.9 (D.C. Cir. 1989); *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 82 n.8 (D.C. Cir. 1988). On the other hand, the Third Circuit has construed the clause "who operates, controls, or supervises a coal or other mine" to describe and qualify each noun in the preceding phrase "any owner, lessee, or other person." *Elliot Coal Mining Co. v. Director, Office of Workers' Compensation Programs,* 17 F.3d 616, 629-32 (3d Cir. 1994). *Elliot*, which arose under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("BLBA"), expressly distinguished *Andrus*, on the grounds that *Andrus* was a Coal Act case. 17 F.3d at 631 (citing *Bituminous Coal Operators' Ass'n, Inc. v. Hathaway*, 406 F.Supp. 371, 375 (D.C. Va.) (in light of different remedial purposes of the subchapters of this chapter, construction placed on particular definitions in one subchapter cannot be mechanically applied to all subchapters), *aff'd*, 547 F.2d 240 (4th Cir. 1975)). *See also Bituminous Coal Operators' Ass'n v. Secretary of the Interior*, 547 F.2d 240, 245 (4th Cir. 1977) (BLBA case, because of difference in statutes, does not furnish persuasive authority for resolution of issues in Coal Act case). In this case, the Secretary does not argue that *any* owner or lessee is an operator under section 3(d). *See* S. Br. at 33 n.13. Rather, as indicated above, the Secretary argues that, to be an "operator," an entity must "exercise or have the authority to exercise substantial authority over the *overall* operation of the mine." *Id.* at 29 (emphasis in original).

1969, 30 U.S.C. § 801 et. seq. (1976) (amended 1977) ("Coal Act"). The Senate Report to the Coal Act states that the operation, control, or supervision may be either direct or indirect. S. Rep. No. 91-411, at 44 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., Part 1, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 170 (1975) ("*Coal Act Legis. Hist.*"). Because the forms of participation and authority vary from entity to entity, the question of whether an entity meets the statutory definition of "operator" must be resolved on a case-by-case basis. When reviewing the Secretary's decision to designate an entity as an operator under the Act, the Commission will examine whether the entity has substantial involvement with the mine. In answering this question, we will not be constrained by the Secretary's requirement of "overall control" or the judge's test of "day-to-day control." Instead, we will evaluate the participation and involvement of the entity in the mine's engineering, financial, production, personnel, and health and safety matters to determine whether that entity qualified as an operator under the Act. *See W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994).[5] In determining operator status, however, the Commission will review and evaluate all of these forms of participation and involvement in the operation of the mine, and no particular factor will be considered controlling. Instead, the Commission will weigh the totality of the circumstances in determining whether the Secretary could designate the entity as an operator under the Mine Act.[6]

B. The Status of the Individual Contestants as Operators[7]

1. Kyber

Kyber asserts that the judge's finding that it is liable as an operator of the mine is not supported by substantial evidence, and contends that the record demonstrates that it lacked the requisite control over operations at the mine or the authority to direct the work force employed there. K. Br. 16-19, 20-25. Kyber argues that its authority to approve changes in the direction of

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[5] The Commission in *W-P Coal* expressly declined to address the issue of whether a passive operator could be properly cited for violations at a mine and left that open for another day. 16 FMSHRC at 1411 n.5.

[6] Commissioner Marks notes that the Secretary has submitted that, in this case, the Commission need not reach the issue of whether the entities qualified as operators under the D.C. Circuit's approach. S. Br. at 33 n.13. Commissioner Marks agrees and would therefore leave the issue for another time when it has been properly briefed. He urges that the Secretary bring the issue before the Commission at her earliest opportunity.

[7] Chairman Jordan and Commissioners Riley and Beatty join in Parts II.B.1, II.B.2, II.B.3, and II.B.4 of this opinion. Commissioner Marks concurs in result in Part II.B.1 of this opinion.

mining or deviations from mining projections was not indicative of substantial control over operations at the mine sufficient to render it an operator under the Mine Act. *Id.* at 21-25. Kyber asserts that the Secretary relies upon isolated portions of the record and deposition testimony not in evidence to support the judge's finding that it was an operator of the mine, and ignores other evidence and facts found by the judge which indicate that it did not exercise or possess sufficient authority to qualify as an operator. K. Reply Br. at 20-31. In addition, Kyber contends that the judge's finding of operator status is at odds with Mine Act precedent, which has never held a lessee of mineral rights liable as an operator merely because it had the contractual authority to ensure that the production operator extracted all minable coal. K. Br. at 25-30.

The Secretary argues that, although the judge erred by failing to apply the correct legal standard for determining Kyber's status as an operator, even under the "day-to-day" control test applied by the judge substantial evidence compels the conclusion that Kyber was the operator of the mine since it exercised, or had the authority to exercise, substantial control over the mine plan which governed the overall mining operation, the mining projections which governed the direction of mining, and production-related decisions relating to the areas and the manner in which mining would be conducted. S. Resp. Br. at 2-3, 32-34. The Secretary discounts Kyber's argument that an owner or lessee of mineral rights can never be an operator under the Mine Act when it has contracted with an independent contractor to mine the mineral reserve and given the production-operator broad control over its activities. *Id.* at 4-14. Amicus UMWA contends that the judge correctly concluded that Kyber is an operator because of the substantial control it exercised over operations at the mine. UMWA Br. at 7-9.

Although we have held that it was error for the judge to apply the day-to-day control standard to determine whether Kyber was an operator of the Elmo No. 5 Mine, we affirm the judge's conclusion that Kyber qualified as an operator. We think that implicit in the judge's finding that Kyber exercised day-to-day control at the mine is a finding that Kyber was substantially involved in the mine's operation. In our view, substantial evidence[8] supports this finding and that Kyber had "bottom line authority" for determining the direction of mining, as well as that it "denied AA&W autonomy of action within the overall constraints of the projections." 18 FMSHRC at 238-39. Although the mining projections were jointly agreed to by AA&W and Kyber, the record indicates that Kyber had final authority to approve the projections and "to insist upon the projections it wanted[.]" *Id.* at 237. Moreover, the judge found it "clear that Kyber had the authority to insist upon the projections it wanted, and that once the projections were approved

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

by Kyber, AA&W could not unilaterally modify them." *Id.* Kyber retained ultimate authority to reject any proposal by AA&W that it believed would not lead to the efficient extraction of coal. *Id.* at 237-38. Based upon the foregoing evidence, the judge reasonably concluded that "Kyber, not AA&W, had the bottom line authority for determining mining direction, and . . . AA&W implemented Kyber's directional decisions." *Id.* at 238.

This evidence supports the judge's finding that Kyber retained more control over the direction of mining than the typical mine owner or lessee. *Id.* at 239. As the judge explained:

> [T]he owner or lessee of mineral rights has the right to protect its asset and to try to insure the asset is developed to the maximum extent possible consistent with sound safety and environmental practices. Consistent with this right, when the owner or lessee contracts the mining of its mineral, it is permissible for the entity, in conjunction with its contract operator, to project an overall course of mine development. *However, once overall projections have been agreed to, the owner or lessee must give leeway to the contractor to act independently within the general constraints of the projections. If it does not afford the contract operator such autonomy, the lessee or mineral right owner may retain control sufficient to make it an operator for Mine Act purposes.*
>
> *In my view, Kyber's relationship with AA&W illustrates such a situation.* Except for conditions relating to safety, AA&W could not change the direction of mining without Kyber's approval. . . . When it exercised its authority, the choice faced by AA&W was either to mine as Kyber wished or to cease mining – period (Tr. 402). *In dictating the course mining had to take and in having the authority to dictate that course Kyber denied AA&W the autonomy of action within the overall constraints of the projections.* The owner or lessee of mineral rights can not deny its responsibility for the actions of its contract operator, when the contract operator is not free to choose the course of mining it believes best in this regard.

Id. (emphasis added). We agree with the judge's conclusion that Kyber's active participation and its authority to actively participate in the decision-making process regarding the daily development of the mine through the projections were sufficient to render it an operator within the meaning of the Act. *Id.* at 239-40.

The judge's conclusion that Kyber was an operator is further supported by other evidence of Kyber's substantial involvement in decisions concerning the ways in which mining was conducted and the quality and quantity of coal produced at the mine. Its contract with AA&W gave Kyber the authority to approve and enforce the mine plan for the Elmo No. 5 Mine, which governed matters as wide-ranging as the applicable ventilation and roof control plans, and the number of employees and the types of equipment to be used. 18 FMSHRC at 237 n.5; JSF Ex. C ¶ 4.c; Tr. 308-09, 478-79. These considerations, in turn, affected the safety and health of miners. Although Kyber did not regularly exercise its authority with respect to the mine plan (18 FMSHRC at 237 n.5), its contractual authority over the mine plan may be considered by the Commission as evidence of the actual relationship between Kyber and AA&W with respect to the operation of the mine. *See Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991).[9] In addition, the involvement of Kyber officials in taking steps to prevent future roof falls as the result of blasting at the neighboring Corvette mine[10] provides further evidence that Kyber functioned as an operator of the Elmo No. 5 Mine. The record indicates that Kyber officials were instrumental in providing notice of the roof fall caused by Corvette's blasting activities and in developing the ultimate solution for this problem. 17 FMSHRC at 699-700; JSF 301 & Ex. E.[11]

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[9] We do not find the terms of the contract relating to Kyber's authority over the mine plan to be determinative of its operator status. Rather, the contract is additional evidence of the relationship between Kyber and AA&W with respect to the operation of the mine. *See* slip op. at 77 n.11. This is entirely consistent with *Bulk Transportation*. Interestingly, our dissenting colleague violates his own restrictive reading of *Bulk Transportation* when he attempts to rely on the agreement between Kyber and AA&W to rebut the judge's finding that Kyber retained more control over the direction of mining than the typical lessee. *See* slip op. at 77 nn.9 & 11.

[10] Kentucky Berwind leased separate coal reserves in a coal seam located above the Elmo No. 5 Mine to an unrelated company, which then contracted with Corvette Mining Company ("Corvette") for the operation of a surface mine to extract the coal. 17 FMSHRC at 699. On April 8, 1993, a roof fall occurred at the Elmo No. 5 Mine, which was apparently caused by blasting at the Corvette mine. *Id.* at 700.

[11] Randolph Scott, vice president of engineering for both Kyber and Jesse Branch (JSF 23, 34), notified Kentucky Berwind of the roof fall, after receiving notification from AA&W that Corvette was "shooting their mine in." 17 FMSHRC at 700; JSF 294 & Ex. E at 3. Following additional roof fall problems caused by blasting at the Corvette mine, Kentucky Berwind officials visited the Elmo No. 5 Mine to examine affected areas of the roof. 17 FMSHRC at 700. On April 12, 1993, Steve Dale, the chief mine inspector and land manager of Kentucky Berwind, and two other Kentucky Berwind mine inspectors visited the Corvette mine and the Elmo No. 5 Mine, where they met with a Corvette official, AA&W vice president Jim Akers, and a representative of the Kentucky Division of Surface Mine Reclamation Enforcement. *Id*; JSF 297. Akers was extremely angry about the April 8 blasting incident, stating that AA&W "almost had four men

Commissioner Verheggen rejects our conclusion that substantial evidence supports the judge's finding that Kyber was an operator of the Elmo No. 5 Mine, asserting that, "Kyber's involvement in the mine, which did not include any involvement in the mine's health and safety affairs, is simply too remote" to render Kyber an operator. Slip op. at 80. Under the substantial evidence test, however, the Commission is limited to searching for "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" (*supra*, at n.8), and it may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *see also Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) ("This sensibly deferential standard of review does not allow [a reviewing body] to reverse reasonable findings and conclusions, even if [it] would have weighed the evidence differently."). In reaching his conclusion that Kyber does not qualify as an operator, Commissioner Verheggen appears to violate these precepts by proceeding to reweigh the evidence on an issue on which the judge's determination is well supported by the record.

Commissioner Verheggen's competing view of the record evidence is based in large part on his assertion that Kyber "played no role in health and safety affairs at the mine." Slip op. at 75. In our view, however, there can be little question that Kyber's ultimate control over the direction of mining at the Elmo No. 5 Mine, through its final authority over the mining projections and any deviations from those projections, had a direct and significant bearing on the conditions encountered by miners engaged in operations at the mine. The mining projections determine the direction of mine development, which significantly impacts on such things as roof and rib conditions and ventilation projections. These factors directly involve mine safety and the conditions experienced by miners in the course of their duties. This significant element of control, as well as the other forms of authority exercised by Kyber at the mine,[12] had a direct effect on the health and safety of those miners, and could be reasonably relied upon by the judge as indicative of Kyber's status as an operator. *Cf. Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989) (finding independent contractor to be an operator under section 3(d) of the Mine Act where its

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killed" as a result. JSF Ex. E at 3. When Dale suggested that Corvette limit the frequency of its blasting activity and the strength of explosives used, Kyber President Jimmy Walker responded by insisting that Corvette move its blasting operations 500 feet away from the operations of the Elmo No. 5 mine. 17 FMSHRC at 700; JSF 301 & Ex. E at 4. Corvette was notified of Kyber's position, and agreed to move its blasting operations the requested 500 feet. JSF Ex. E at 4.

[12] The record also indicates that, in initially selecting AA&W as the contract mine operator for the Elmo No. 5 Mine, Kyber was requested by Berwind to assure itself that AA&W was capable of operating the mine in a safe manner, in order to conform to corporate policy. JSF 97-99.

employees "had a direct effect on the safety of the mine elevators because of their exclusive control over the safety of the mine elevators"), *aff'd*, 921 F.2d 1285 (D.C. Cir. 1990).

Despite ample record evidence that Kyber had "bottom line authority for determining mining direction" at the Elmo No. 5 mine and approving any deviations from the established mining projections (18 FMSHRC at 238), Commissioner Verheggen focuses on a relatively narrow exception to this authority, involving deviations based upon safety concerns, to support his view that Kyber does not qualify as an operator. In our view, however, analyzing only one element of Kyber's control over operation of the mine does not provide a convincing rationale for rejecting the judge's determination that Kyber qualified as an operator because safety considerations are only one of several potential categories of factors that could provide a basis for a proposed deviation from the mining projections. It is undisputed that, with respect to all other potential grounds for deviations, Kyber had the ultimate approval authority. JSF 187. In addition, we conclude that the significance of this single limitation on Kyber's authority to approve deviations from the projections is not nearly as great as our dissenting colleague suggests.[13] Significantly, there is no evidence of any limitation on Kyber's authority to question whether AA&W has in fact raised a valid health or safety concern. Further, once a valid health or safety concern was raised by AA&W as a basis for a proposed deviation, it would appear that, even absent the "no-veto" limitation, Kyber's discretion to cancel the proposed change would be essentially illusory, since it would amount to suggesting that miners should work under unsafe or unhealthy conditions. We are not prepared to accept any suggestion that Kyber can only qualify as an operator if it possessed authority to insist on adherence to the projections in the face of legitimate countervailing safety or health concerns.

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[13] We think Commissioner Verheggen overstates the nature of this limitation on Kyber's authority to review and approve any deviation from the mining projections. While Commissioner Verheggen asserts that "Kyber could not overrule AA&W's deviations from the mine plan when they involved matters of safety and health" (slip. op. at 76) , the record indicates that any such restriction was not express, but implied. Indeed, the very stipulation that Commissioner Verheggen relies upon states only that "[Kyber] *interpreted* the mining contract to allow [Kyber] to reject AA&W Coals' requests to mine less than the full extent of the mine projections, unless mining conditions made it unsafe to mine those areas." JSF 187 (emphasis added). In fact, the provision of the coal mining contract between Kyber and AA&W relating to this issue expressly obligated AA&W to "[c]onduct all mining operations . . . *in accordance with mining plans and projections prepared by [Kyber's] engineers*[.]" JSF Ex. C ¶ 4.c. (emphasis added). This fully supports the judge's finding that, under the express terms of the contract, AA&W was required to adhere to the mining projections established by Kyber, and that Kyber had the consequent right to reject any deviation to the projections proposed by AA&W that would not lead to the efficient extraction of coal. 18 FMSHRC at 237-38.

Commissioner Verheggen's assertion that Kyber had "virtually no involvement" in financial, production, personnel, or safety and health matters at the mine (slip op. at 80) is contradicted by the record evidence. Kyber had significant involvement in safety and health at the mine through its ultimate control over the mining projections and any subsequent deviations from those projections, which determined the direction and manner in which coal was mined. Kyber also had the authority to approve and enforce the mining plan, which encompassed matters including the applicable ventilation and roof control plans. In addition, Kyber paid many of the initial costs associated with development of the mine, including those incurred for the development of portals to the mine, the establishment of a stockpile area, the construction of a haulage road to serve the mine, the development of drainage ponds for mine runoff, the acquisition of many of the required federal and state environmental permits, and the preparation of a coal reserve map. Kyber also paid its sister corporation, Jesse Branch, to perform map drafting and surveying services at the mine. Indeed, the record indicates that Kyber engaged in many of the same activities at the mine that the Commission found dispositive in its decision in *W-P Coal*: it "calculated mining projections, prepared and updated mine maps [through its sister corporation, Jesse Branch], contacted and visited the mine frequently to discuss production and other matters, . . . [and] participated in an inspection of the mine." *W-P Coal*, 16 FMSHRC at 1411.[14] Thus, there is clearly substantial evidence in this record to support the judge's finding that Kyber was an operator. In reweighing the evidence to reach a different result, Commissioner Verheggen focuses on individual elements of Kyber's control over operation of the Elmo No. 5 Mine, arguing that each is, in itself, insufficient to support an finding that Kyber is an operator. He errs, however, in focusing on separate elements of Kyber's control at the mine without considering the totality of the circumstances, that is, Kyber's overall relationship with the mine, which we find provides substantial evidence to support the judge's finding.[15]

2. Jesse Branch

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[14] Like Kyber, W-P Coal was a lessee which "entered into a contract with [independent contract operator] Top Kat, under which Top Kat extracted the coal in return for royalty payments from W-P based upon the number of tons of clean coal produced." *Id.* at 1407. Significantly, the contract between W-P Coal and Top Kat identified Top Kat, not W-P Coal, as the entity "responsible for *controlling the mine*, hiring miners and *complying with mine safety and health laws*." *Id.* at 1408 (emphasis added).

[15] Because we do not adopt the Secretary's interpretation of the word "operator," we need not address Kyber's assertion that it lacked notice of the Secretary's definition of the term. Moreover, because we hold that Kyber is an operator by simply applying a test that is well-developed in Commission case law (*see W-P Coal*, 16 FMSHRC at 1411), Kyber has no claim that it was not provided notice of its potential liability as an operator.

The Secretary contends that, even under the "day-to-day" control test applied by the judge, the evidence establishes that Jesse Branch qualifies as an operator of the Elmo No. 5 Mine based upon the engineering services and activities it performed there on behalf of, and in conjunction with, Kyber. S. Br. at 50-56. Amicus UMWA contends that Jesse Branch qualifies as an operator of the mine because of the engineering services it performed there. UMWA Br. at 8-9. Amicus USWA contends that the judge erred in finding that Jesse Branch did not have day-to-day control over the mine, and therefore was not an operator. USWA Br. at 4-5. Contestants argue that the engineering services performed by Jesse Branch at the mine did not give it sufficient control over mine operations to warrant finding it to be an operator. B. Resp. Br. at 49-50.[16]

In determining whether Jesse Branch as a separate entity qualifies as an operator of the Elmo No. 5 Mine, we note that the services provided by Jesse Branch were relatively limited in scope, consisting primarily of engineering services including surveying, spad setting and the preparation of mine maps. The record also discloses, however, that these services played an important role in determining the direction of mining at the mine, and that Jesse Branch also provided technical advice to AA&W in connection with the engineering services it provided.

The parties stipulated that the surveying and spad services that Jesse Branch performed at the mine were necessary so that AA&W could mine in accordance with the mine projections and the requirements of the Mine Act. JSF 160, 161. In addition, it is undisputed that the mine maps prepared by Jesse Branch established the projections that AA&W was required to follow when driving entries in the mine, and also designated the areas in the mine from which coal could not safely be extracted because of the presence of natural gas wells. 17 FMSHRC at 693; JSF 166, 167, 178, 179. These mine maps prepared by Jesse Branch were required under federal law, and were submitted to MSHA on a semi-annual basis to show the direction of mining, as part of the ventilation plan, to facilitate regular ventilation examinations. 17 FMSHRC at 692-93; JSF 158, 169. Thus, the engineering services provided by Jesse Branch played a key role in determining the areas to be mined, and the direction of mining conducted, by AA&W at the mine.

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[16] The Secretary also argues that Jesse Branch could be found to be an operator of the mine on the alternative ground that it was an "independent contractor performing services . . . at [a] mine," within the meaning of section 3(d) of the Mine Act. S. Br. at 55 n.21. We decline to address this argument, however, since the Secretary failed to properly preserve it on appeal. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition for discretionary review. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f). *See Wyoming Fuel Co. n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd mem.*, 81 F.3d 173 (10th Cir. 1996); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d at 91 & n.6. The Secretary's petition did not mention this alternative theory for finding Jesse Branch to be an operator, and instead focused solely on the relationship between Jesse Branch and Kyber, which is discussed below in Part II.C.3.b. *See* S. Pet. at 16-17.

In addition, the judge found that Jesse Branch provided AA&W with technical expertise that AA&W lacked regarding on-site implementation of the projections, the mine cover, and the number of entries it would sustain. 18 FMSHRC at 241-42. While conducting surveys at the mine, Jesse Branch employees also collected information concerning the dimensions of the coal seam, entryways, and coal pillars, and the locations of coal pillars, the centers on which mining was conducted, stopping lines, conveyor belt lines, and roof falls. This information was recorded in a field book kept at Jesse Branch's offices, and was used to draft subsequent mine maps. 17 FMSHRC at 693; JSF 156. Jesse Branch also inspected the drainage ponds on the surface of the mine on a quarterly basis, and prepared inspection results that were submitted in an annual certification report to the Kentucky Office of Surface Mining Reclamation and Enforcement ("OSM"). JSF 209. Employees of Jesse Branch, not AA&W, accompanied OSM inspectors on inspections of the surface area of the mine, and either Jesse Branch or Kyber corrected any violations cited as the result of OSM inspections, and paid any associated penalties. JSF 210, 211.

We conclude that while this evidence shows that Jesse Branch played an important role in the operation of the Elmo No. 5 Mine, it does not establish substantial involvement in the operation of the mine sufficient to support a conclusion that Jesse Branch, considered by itself, was an operator of the mine. As the judge observed, the type of surveying and engineering work performed by Jesse Branch is frequently contracted out because many on-site operators lack the capacity to perform such work, and is not typically regarded as indicative of substantial control over the operations of a mine. 18 FMSHRC at 241. The judge also noted that there was no indication in the record that Jesse Branch denied AA&W the autonomy of decision-making within the confines of the projections established by Kyber and AA&W, or reserved for itself the authority for such decision-making. *Id.* at 242. In addition, the record indicates that when Jesse Branch provided AA&W with advice regarding the direction of mining or geological conditions, it was merely supplying information and related opinions that were beyond the technical expertise of AA&W. *Id.* Accordingly, we affirm the judge's conclusion that Jesse Branch, considered by itself, was not an operator of the mine.[17]

3. Kentucky Berwind

The Secretary argues that Kentucky Berwind was an operator because, as the owner of mineral rights at the mine, it retained control and supervision over the manner in which coal was mined through its lease agreement with Kyber, even if it chose not to continually exercise that control. S. Br. at 38-45. In particular, the Secretary relies on periodic inspections conducted by Kentucky Berwind employees at the Elmo No. 5 Mine, and its involvement in resolving problems caused by blasting operations at the neighboring Corvette mine, to support its position that

[17] In Part II.C.3.b, *infra*, we consider whether Kyber and Jesse Branch together constitute a single operator under the Mine Act.

Kentucky Berwind was an operator. *Id.* at 40-45. Amicus UMWA argues that Kentucky Berwind maintained and exercised economic control over the mine sufficient to render it an operator under the Mine Act. UMWA Br. at 6-7. Amicus USWA contends that the judge erred in concluding that Kentucky Berwind was not an operator. USWA Br. at 3-5.

Contestants argue that the inherent authority retained by Kentucky Berwind in connection with operations at the mine was comparable to that generally retained by coal lessors in order to protect their economic interests, and did not suffice to render it an operator under the Mine Act. B. Resp. Br. at 38-46. Contestants also contend that the quarterly inspections conducted by employees of Kentucky Berwind, and its involvement in the Corvette incident, are not indicative of the type of control or authority over mining operations sufficient to render Kentucky Berwind an operator of the mine. *Id.* at 42-45.

We affirm the judge's conclusion that Kentucky Berwind was not an operator of the mine. The Secretary's argument that Kentucky Berwind is an operator appears to be based primarily on the authority it possessed as an owner of mineral rights at the Elmo No. 5 Mine, despite the Secretary's contention (S. Br. at 33 n.13) that it has not relied on mere status as an owner to establish operator status and that an entity must exercise or at least possess the authority to exercise substantial control over the operation of the mine. In our view, the rights retained by Kentucky Berwind pursuant to the terms of its lease with Kyber, including the right to impose lost coal penalties, do not indicate that Kentucky Berwind reserved to itself the authority to have substantial involvement in the operation of the mine. The record indicates that Kentucky Berwind's authority to impose lost coal penalties was rarely, if ever, exercised at the Elmo No. 5 Mine, and was not used by Kentucky Berwind as a means of exerting control over the operation of the mine. Rather, these provisions were merely used to protect the interests of Kentucky Berwind, as owner of the mine, by insuring that the coal was mined to the maximum extent possible.

To support her argument that Kentucky Berwind is an operator because of the authority it possessed as an owner and lessor, the Secretary cites (S. Br. at 33) language from the Third Circuit's *Elliot* decision that "where the lessor and lessee are closely affiliated companies, . . . existence of a power to control the lessee should be presumed." 17 F.3d at 620. This statement, in dicta, was made in the context of determining whether the lessor in that case was a "responsible operator" liable for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("BLBA"), and its implementing regulations, which were specifically directed towards preventing operators from manipulating their corporate form to avoid liability for benefits to employees employed on or after June 30, 1973. As the *Elliot* court noted, the legislative history of the 1977 amendments to the BLBA indicates that "Congress intended to prevent businesses from escaping liability for black lung benefits by a change of corporate form or identity that had no substantial economic effect on the power to control the exploitation of the mineral resources." 17 F.3d at 631. Thus, the quoted language from *Elliot* was based upon Congress' express intent

to impose continuing liability on a former mine operator for BLBA benefits to that operator's former employees even though it may have attempted to evade those responsibilities by a corporate restructuring in which it substituted an affiliated company as its lessee to continue the actual operation of the mine, while continuing to profit from mine operations. This reasoning is not applicable to the pertinent lease arrangement between Kentucky Berwind and Kyber, who, as shown above, dealt with each other at "arm's length." Unlike the lessor involved in *Elliot*, neither Kentucky Berwind nor any of its affiliates ever previously operated the mine or employed AA&W's employees, and there was no allegation that any of those entities sought, through the lease agreement, to avoid any legal obligations.

In any event, the quoted language from *Elliot* speaks only of a "presumption" of a lessor's power to control the lessee. In determining whether Kentucky Berwind is an operator, the key issue is the extent of its involvement in the operation of the mine, and not the activities of Kyber, its affiliated lessee. Moreover, any presumption of control over the lessee could be overcome by evidence, of the type elicited in this case, that the lessor did not possess actual authority to control the lessee or the operations of the mine.

In addition, it does not appear that Kentucky Berwind engaged in the type of activities that are indicative of substantial involvement in the operation, supervision or control of the mine. Rather, the record supports the judge's findings that the inspections of the mine by Kentucky Berwind personnel, the only regular contact by Kentucky Berwind with the mine, were essentially pro forma operations designed to insure that the coal was being recovered properly and to check seam heights and tonnages and confirm royalties; that Kentucky Berwind never disagreed with Kyber and AA&W about the propriety of discontinuing mining in certain areas; and that Kentucky Berwind had little or no input into the formulation of projections or other decisions regarding mining operations. 18 FMSHRC at 235-36. As the judge noted, there was no showing that the report forms prepared by Kentucky Berwind employees who visited the mine were linked to any substantial participation in the operation of the mine. *Id.* at 235. In addition, based upon the lack of supporting evidence of financial control and the stipulation of the parties that Kentucky Berwind had no financial dealings with AA&W, the judge's conclusion that Kentucky Berwind did not exert sufficient financial control over operations at the mine to qualify as an operator is supported by substantial evidence.

Nor do the actions of Kentucky Berwind in response to a roof fall at the Elmo No. 5 Mine that resulted from blasting at the neighboring Corvette mine (*see* discussion *supra*, at 13 & n.11) warrant a finding that it was an operator. While the undisputed evidence establishes that Kentucky Berwind intervened to insure that operations at the Corvette mine did not interfere with the operation of the Elmo No. 5 Mine, there is no evidence that it directed AA&W to make any changes with respect to its operation of the mine. As the judge concluded, "it was only natural that Kentucky Berwind, as the owner of the coal reserves mined by both AA&W and Corvette, would have an interest in trying to assist both operators so that they did not interfere with one

anothers' operations." 17 FMSHRC at 715. While we rely on the involvement of Kyber officials in the Corvette incident as additional evidence of Kyber's operator status (*supra*, at 12-13), we do not believe that the involvement of Kentucky Berwind in these limited circumstances, in itself, required the judge to conclude that Kentucky Berwind was an operator, in absence of other evidence of its substantial involvement in the operations of the mine.

4. Berwind

The Secretary argues that Berwind qualifies as an operator because it had the power to control and supervise operations at the mine as the result of the control it exercised over its three subsidiary corporations — Kentucky Berwind, Kyber, and Jesse Branch. S. Br. at 45-49. Amicus UMWA argues that Berwind qualifies as an operator on the basis of the economic control it exercised over operations at the mine. UMWA at 6-7. Amicus USWA asserts that the judge erred in concluding that Berwind was not an operator of the mine because of the business and economic control it exercised over operations at the mine, through Kyber. USWA Br. at 3-4.

Contestants argue the judge correctly held that Berwind was not an operator of the Elmo No. 5 Mine based on his finding that Berwind had virtually nothing to do with the day-to-day operations of the mine. B. Resp. Br. at 46. They argue that the Secretary erroneously attempts to rely on the control Berwind exerted over its subsidiary corporations as indicative of operator status, since she has failed to establish any of the necessary prerequisites for piercing the corporate veil and disregarding Berwind's status as a separate corporation. *Id.* at 46-49.

We affirm the judge's determination that Berwind was not an operator of the mine. We conclude that substantial evidence supports the judge's finding that Berwind "had virtually nothing to do with the . . . operations of the mine." 18 FMSHRC at 234. The Secretary does not dispute this finding, but argues that Berwind should be found to be an operator because of the control it exercised over its three wholly-owned subsidiaries — Jesse Branch, Kentucky Berwind and Kyber — which, in turn, controlled various aspects of operations at the mine. This same argument could be applied to virtually any parent corporation, however, and, in our view, amounts to an attempt to "bootstrap" Berwind's operator status based on the finding that Kyber is an operator.

The stipulated evidence does indicate that Berwind allocated funds to its subsidiaries to meet their budgets, retained the authority to approve expenditures by the subsidiaries in excess of their budgets, and approved the expenditure of funds by Kyber to do face-up work prior to the opening of the Elmo No. 5 Mine. *Id.* at 212, 234. In our view, however, the judge correctly concluded that Berwind's financial involvement with the mine was "too far removed" from the actual operation of the mine to warrant a finding that Berwind is an operator. *Id.* at 234. Likewise, the overlap between the officers of Berwind and those of its subsidiaries, and the authority that Berwind had to approve the election and appointment of top level officers and

management officials of its subsidiaries, does not in itself constitute substantial involvement in the operation of the mine. We agree with the judge that the record contains "no suggestion that those who acted for Berwind actually were controlling and supervising the Elmo No. 5 Mine, or were attempting to do so." *Id.* Nor is there any evidence that Berwind used the common officers it shared with its subsidiaries, or its authority to name officials of the subsidiaries, as a means by which to exert control over the operations of the mine.

In our view, the judge also correctly concluded that the Secretary failed to establish that any of the subsidiaries did not operate independently of Berwind, or the existence of any other grounds for disregarding the corporate distinctions between Berwind and its subsidiaries. *Id.*; 17 FMSHRC at 715. In the absence of any such evidence, or any showing that Berwind had substantial involvement in the operation of the mine, we find no basis for disturbing the judge's finding that Berwind was not an operator.

C. The Secretary's Unitary Operator Theory[18]

Having determined that not all of the individual entities named by the Secretary are operators within the meaning of section 3(d) of the Mine Act, we address the Secretary's alternative argument that Berwind and its three subsidiary corporations constituted a "unitary operator" under the Mine Act because together they allegedly controlled all aspects of mining at the Elmo No. 5 Mine.[19]

1. The Secretary's Interpretation of the Mine Act

Section 3(d) of the Mine Act defines "operator" as including "any . . . person who operates, controls, or supervises a coal or other mine." 30 U.S.C. § 802(d). Section 3(f) defines a "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization[.]" 30 U.S.C. § 802(f). The Secretary contends that the judge erred by not considering the operator status of Berwind and its three subsidiary corporations under a unitary operator theory because that theory is consistent with the language and underlying purposes of the Mine Act. S. Br. at 12-22. In particular, the Secretary relies on the definition of

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[18] Chairman Jordan and Commissioners Marks and Beatty join in Parts II.C.1, II.C.2, and II.C.3.b of this opinion.

[19] The Secretary's "unitary operator" interpretation focuses only on whether two or more entities should be treated as one, and thus might be more appropriately described as the "single entity" theory. Whether a particular entity, unitary or otherwise, qualifies as an operator under section 3(d) of the Mine Act is a separate question that is resolved by applying the control test discussed in Part II.A.

"person" in section 3(f) of the Act, which appears in the definition of the term "operator" in section 3(d), and expressly includes the terms "association" and "other organization." She asserts that these two provisions, taken together, indicate that Congress envisioned holding multiple entities liable as a unitary operator if together they constitute an "association" or "other organization" that "operates, controls, or supervises a coal or other mine." *Id.* at 12-13. The Secretary also contends that the grounds offered by the judge for rejecting the unitary operator interpretation in this case are irrelevant and inconsistent with the purposes of the Mine Act. *Id.* at 22-26.

Contestants and amici NMA and NCCL argue that the Secretary's assertion of a unitary operator theory is inconsistent with, and unprecedented under, the Mine Act, and would undermine legitimate business structures and commercial relationships that have developed with respect to the mining of coal. B. Resp. Br. at 52-59; NMA/NCCL Br. at 2-3, 17.

The Secretary's unitary operator theory is based upon her construction of the definition of the statutory terms "operator" and "person" in sections 3(d) and 3(f) of the Mine Act, respectively. The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal* Co., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).[20] If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied,* 520 U.S. 1209 (1997). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Mine Act does not define the terms "association" and "organization." The use of the terms "association" and "organization" in the statutory definition of "person," and thus, indirectly, in the definition of "operator," therefore, sheds little light on whether Congress intended that multiple related entities could be held liable as a unitary operator. In the absence of an express

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[20] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Thunder Basin,* 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd mem.*, 111 F.3d 963 (D.C. Cir. 1997). *See also Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1976, 1081 (10th Cir. 1998) ("the Commission appropriately considered the plain meaning of [the] words as indicated by their dictionary definitions."). The Secretary relies on the definitions of these terms in the *American Heritage Dictionary of the English Language* 80, 926 (New College ed. 1976). S. Br. at 13. That source defines the term "association" as "an organized body of people who have some interest, activity, or purpose in common." *Id.* at 80. An "organization" is defined as "[a] number of persons or groups having specific responsibilities and united for some purpose or work." *Id.* at 926.

These definitions of the terms "association" and "organization" all use the terms "persons" or "people." While the term "people" is more commonly understood to refer to human beings, i.e., natural persons, the term "person" is usually defined broadly to also include other types of legal entities. For instance, *Webster's Third New International Dictionary* defines "person" as "a human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties." *Webster's Third New Int'l Dictionary (Unabridged)* 1686 (1986). The term is also defined, for legal purposes, as "a human being (**natural person**) or a group of human beings, a corporation, a partnership, an estate, or other legal entity (**artificial person** or **juristic person**) recognized by law as having rights and duties." *Random House Dictionary of the English Language (Unabridged)* 1445 (2d. ed. 1987) (emphasis in original). *See also Black's Law Dictionary* 1162 (7th ed. 1999).

These definitions indicate that the terms "association" and "organization," as well as "person" and "people," are open to various interpretations that may or may not include Berwind and its three subsidiaries. Those companies would appear to qualify as "persons" if that term is interpreted broadly to include entities that are not human beings. It could be argued, however, that they do not fall within the commonly understood meaning of the term "people," as used in certain definitions of the terms "association" and "organization." Moreover, resolution of the issue whether Berwind and its three subsidiaries otherwise qualify as an "association" or "organization" depends largely on which definition of those terms is applied and how it is interpreted. For instance, utilizing the *American Heritage* and *Webster's Third* definitions of the term "association," it could be argued that the companies have some "interest, activity, or purpose in common" or "common interest" based on their financial ties and their common involvement in the mining industry. On the other hand, if the quoted language is interpreted more narrowly, it could be argued that they do not satisfy this definition of the term "association" since they are all separate corporate entities that operate within different sectors of the mining industry. The same holds true in analyzing whether the four companies can be said to be "united for some purpose or work" or "organized for some end or work" within the meaning of the *American Heritage* and *Random House* definitions of the term "organization." Thus, Berwind and its three subsidiaries could be considered "united" for the purpose of conducting business at various levels of the

mining industry and thereby generating profits for Berwind, the parent corporation. Conversely, applying a more restrictive interpretation to this language, it is possible to conclude that these are four independent corporate entities that are not "united" in any formal legal sense or "organized" to achieve the same end. The other definitions of the terms "association" and "organization" are likewise open to different, conflicting interpretations.

Because the meaning of the terms "association" and "organization" as used in the statutory definitions of the term "person" and "operator" is open to alternative interpretations, as reflected in the dictionary definitions, we conclude that they are ambiguous. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses."); *Ehlert v. United States*, 402 U.S. 99, 105 (1971). In *Walker Stone*, the Tenth Circuit found a regulatory safety standard to be inherently ambiguous where neither of two conflicting interpretations adopted by the Commission and its administrative law judge was "either clearly required or clearly prohibited by the language of the . . . standard." 156 F.3d at 1081. Similarly, in this case, the pertinent statutory terms must be regarded as ambiguous because the dictionary definitions do not conclusively establish that the Secretary's interpretation of these statutory terms is either required or prohibited.

Moreover, the legislative history of the Coal Act of 1969, in which these definitional sections were originally adopted, is silent regarding Congress' intention in including the terms "association" and "organization." These terms were subsequently carried over into the Mine Act in 1977, without any further explanation from Congress as to their intended meaning.

Accordingly, we conclude that the statutory language on the question whether more than one entity may constitute a single operator is far from clear, and that Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. We therefore examine whether the Secretary's unitary operator interpretation is a permissible construction of the Mine Act that is entitled to deference.

The Secretary elicits support for her unitary operator interpretation of the Mine Act by relying on cases that have held multiple entities liable as a "single employer" or "single enterprise" under other statutes, including the National Labor Relations Act "("NLRA"), 29 U.S.C. § 141 et seq., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. S. Br. at 13-16, 24. Although these two statutes are more directly concerned with the employment relationship itself, and forms of discrimination that can occur thereunder, the

key statutory provisions defining the terms "employer" and "person" are very similar to those contained in the Mine Act.[21]

In a number of cases, we have looked for guidance to case law interpreting similar provisions of the NLRA, as well as Title VII and other employment statutes, in resolving questions concerning the proper construction of provisions of the Mine Act. *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206 (Feb. 1994) (standard for showing facial discrimination); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (legality of operator's policy of paying employees who testify as witnesses on its behalf, but not paying employee for time spent testifying as another party's witness); *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1501 n.6, 1504-05 (Nov. 1988) (appropriate rate of interest on backpay awards), *aff'd sub nom. Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990); *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-33 (Feb. 1984) (mitigation defense to backpay award), *aff'd*, 766 F.2d 469 (11th Cir. 1985). In *Delisio*, the Commission noted that it "has recognized in several contexts that . . . cases decided under the NLRA — upon which much of the Mine Act's antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act." 12 FMSHRC at 2542-43 (citing *Metric Constructors*, 6 FMSHRC at 231). Applying a similar rationale, we believe that cases applying the "single employer" doctrine under the NLRA and Title VII may be properly considered in

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[21] Section 2 of the NLRA contains the following definitional provisions:

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, [or] corporations . . . .
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

29 U.S.C. § 152. Section 701 of Title VII provides:

> (a) The term "person" includes one or more individuals, governments, . . . labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, [or] unincorporated organizations . . . .
>
> (b) The term "employer" means a person engaged in any industry affecting commerce who has fifteen or more employees . ., and any agent of such a person . . . .

42 U.S.C. § 2000e.

determining whether the unitary operator theory now advanced by the Secretary constitutes a reasonable interpretation of comparable provisions of the Mine Act.[22]

A "single employer" doctrine has been developed to determine when separate entities should be treated as a single employer by the National Labor Relations Board ("NLRB") for purposes of enforcing the provisions of the NLRA. This doctrine, which has been approved by the Supreme Court, provides:

> [I]n determining the relevant employer, the [NLRB] considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The controlling criteria, set out and elaborated in [NLRB] decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.

Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam) (citations omitted). *See also Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996); *Esmark, Inc. v. NLRB*, 887 F.2d 739, 753 (7th Cir. 1989); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550-53 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24-26 (1st Cir.) ("the fundamental inquiry is whether there exists overall control of critical matters at the policy level"), *cert. denied*, 464 U.S. 892 (1983). To demonstrate single employer status, not every factor need be present, and no particular factor is controlling. *Lihli Fashions Corp.*, 80 F.3d at 747. "[I]nstead, the [NLRB] must weigh the totality of the circumstances and determine whether the parent exercised such pervasive control of the subsidiary at the policymaking level that the purposes of the labor laws are served by treating the two entities as one." *Esmark*, 887 F.2d at 753. *See also Al Bryant*, 711 F.2d at 551 ("single employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies'") (quoting *Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom. South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976)). Proof of subterfuge, or an

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[22] We reject Contestants' suggestion that the single employer doctrine developed under the NLRA and Title VII is inapplicable in a Mine Act context because none of the cases relied upon by the Secretary applied that doctrine to hold liable, as a single employer, a group of companies that did not employ any of the employees in question. B. Resp. Br. at 56. This can be readily explained by the fact that the NLRA and Title VII are statutes concerned with regulation of employment relations, as opposed to the Mine Act, which is primarily concerned with protection of the health and safety of miners. As discussed *infra*, at 33, our test for determining a "unitary operator" under the Mine Act takes account of this difference in the orientation of the respective statutory schemes.

intent to avoid legal obligations, is not necessary to establish single employer status. *Al Bryant*, 711 F.2d at 552.[23]

The four-part single employer test developed under the NLRA has also been applied to determine whether two or more companies should be treated as one entity for purposes of assessing liability for Title VII violations. *See, e.g., Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987); *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983). *But see Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940-42 (7th Cir. 1999) (questioning continued applicability of four-part test in Title VII context), *cert. denied*, 68 U.S.L.W. 3137 (U.S. Nov. 29, 1999) (No. 99-284). "The showing required to warrant a finding of single employer status for Title VII purposes has been described as 'highly integrated with respect to ownership and operations.'" *McKenzie*, 834 F.2d at 933 (quoting *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 726 (N.D. Ala.), *aff'd mem.*, 664 F.2d 295 (11th Cir. 1981)).

The single employer doctrine has been applied to hold a parent corporation liable for the statutory obligations of its subsidiary[24] and to hold a sister corporation liable for the obligations of an affiliate.[25] The doctrine represents an exception to the general principle of "[t]he insulation of a stockholder from the debts and obligations of his corporation . . . ." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). *See also Watson v. Gulf & Western Indus.*, 650 F.2d 990,

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[23] We find it noteworthy that at least one commentator has concluded that the single employer test developed under the NLRA may be appropriately applied to employers in the coal mining industry, for purposes of regulating labor relations. *See* Forrest H. Roles, *Unique Nature of the Coal Mining Industry — Are the Labor Law Rules Determining When Two Employers Should be Treated as One Different for the Coal Industry?*, 97 W. Va. L. Rev. 985, 993-96 (1995).

[24] *See, e.g., Package Serv. Co. v. NLRB*, 113 F.3d 845, 847-48 (8th Cir. 1997) (corporate parent liable for unfair labor practices committed by subsidiary); *NLRB v. International Measurement & Control Co.*, 978 F.2d 334, 340 (7th Cir. 1992) (parent corporation liable for obligations to employees under collective bargaining agreement between subsidiary and union); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1042-43 (8th Cir. 1976) (derivative unfair labor practice liability imposed on corporate parent).

[25] *See, e.g., Lihli Fashions Corp.*, 80 F.3d at 748 (affiliate is responsible for obligations of related entity under collective bargaining agreement); *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169, 174 (3d Cir. 1991) (mine operator, corporate parent, and another related corporation found to be a single employer were bound by terms of collective bargaining agreement executed by operator); *Al Bryant*, 711 F.2d at 553 (affiliated companies found to be single employer are bound to each others' collective bargaining agreements).

993 (9th Cir. 1981) (absent special circumstances, parent is not responsible for subsidiary's Title VII violation). As the Supreme Court also noted in *Deena Artware*, 361 U.S. at 403-04, however, there may be variety of situations in which it is appropriate to hold a corporation liable for the sins of its subsidiary or affiliate.

We believe that this well-developed body of case law interpreting similar statutory language to create a single employer doctrine under the NLRA and Title VII provides support for the Secretary's interpretation of the Mine Act as permitting the application of a similar unitary operator theory. The terms "association" and "organization" in section 3(f) of the Mine Act are not so inherently restrictive as to preclude the interpretation applied to them by the Secretary, and there is nothing in the legislative history that detracts from this construction of the statutory language. Indeed, the legislative history of the Coal Act indicates that Congress intended that "[t]he definition of an 'operator' . . . be as broad as possible,"[26] consistent with the established principle that provisions of the Mine Act pertaining to statutory coverage are entitled to a very expansive interpretation. *See United Energy Servs., Inc. v. MSHA*, 35 F.3d 971, 975 (4th Cir. 1994); *Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1503 (3d Cir. 1992); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-55 (D.C. Cir. 1984) (all interpreting the term "mine" in section 3(h)(1), 30 U.S.C. § 802(h)(1)). This is comparable to the liberal construction that courts have applied in interpreting the NLRA, Title VII, and the provisions relating to the scope of their coverage. *See, e.g., Armbruster*, 711 F.2d at 1336 ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction. The impact of this construction is the broad interpretation given to the employer and employee provisions.") (citations omitted). Viewed in this context, we consider the Secretary's unitary operator theory to be a gap-filling measure designed to flesh out the definition of an "operator" under the Mine Act. It is entitled to deference because it is consistent with the purposes and policies of the Act.[27]

The support that these NLRA and Title VII cases provide for the Secretary's interpretation of the Mine Act is enhanced by their similar definitions of the term "person," which is incorporated in other key definitions ("operator" in the Mine Act, "employer" in the NLRA and

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[26] S. Rep. No. 91-411, at 44 (1969), *reprinted in* 1 *Coal Act Legis. Hist.* at 170.

[27] We are not persuaded by the Contestants' argument that application of the unitary operator theory to hold Berwind and its three subsidiaries liable as a single operator would lead to each of those entities being held separately responsible for complying with the requirements applicable to operators, such as taking dust samples, conducting a training program, and preparing a ventilation plan. B. Resp. Br. at 20-23. The Secretary's interpretation of the Act would not obligate *each* of the entities that constitute a single operator to comply with these requirements, but rather would only require compliance by *one* of the entities. *See* S. Reply Br. at 4-6.

Title VII). The following observation by the Sixth Circuit in *Armbruster,* in approving the application of the single employer test developed under the NLRA in Title VII cases, is also applicable in a Mine Act context:

> Since it is clear that the framers of Title VII used the NLRA as a model, we find the similarity in language of the Acts indicative of a willingness to allow the broad construction of the NLRA to provide guidance in the determination of whether, under Title VII, two companies shall be deemed to have substantial identity and treated as a single employer.

711 F.2d at 1336 (citations omitted).

We find the reasons offered by the judge for rejecting the Secretary's unitary operator theory inconsistent with a *Chevron II* analysis. The judge stated that "[p]arts of the industry have functioned in this way for years and . . . the Secretary has *never* had a policy of citing all corporate entities involved in the operation of a mine for the production operator's violations." 18 FMSHRC at 233 (emphasis in original). The judge further found that the absence of such a policy "raises questions about the validity and wisdom of a 'unitary' approach to enforcement." *Id.* As the judge himself recognized, however, the mere fact that the Secretary has not previously cited operators based on this theory does not estop her from relying on the unitary operator theory here. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 267-68 (Feb. 1997) (equitable estoppel does not generally operate against the Secretary) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981)). The issue before the Commission, in evaluating an agency's interpretation of the statute it is charged with administering, is whether that interpretation is a permissible reading of the statute. The D.C. Circuit has observed: "As a court of review . . . we are not positioned to choose from plausible readings the interpretation we think best. Rather, our task is to inquire whether the [agency's] reading is sufficiently plausible and reasonable to stand as the governing law, absent alteration by Congress." *American Fed'n of Gov't Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985) (alteration in original).

The judge also reasoned that a "unitary entity" theory of operator status could "fly in the face of the entities' corporate rights to be treated separately and . . . be used to extend jurisdiction without a logical limit." 18 FMSHRC at 233. But while we must not ignore the corporate forms adopted by the entities before us, neither are we required to exalt these forms over the substance of interrelated and integrated operations. As the Commission has previously observed, in resolving the issue of whether a facility was a "mine" within the meaning of section 3(h) of the Mine Act, 30 U.S.C. § 802(h): "the operations taking place at a single site must be viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in

reality, is one operation." *Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 621 (May 1985).[28] Courts applying the single employer doctrine have likewise recognized that "the separation of parent and subsidiary is not absolute. . . . There may be a variety of situations in which it is appropriate to hold a parent corporation liable for the sins of its subsidiary." *Esmark*, 887 F.2d at 753; *see also Armbruster*, 711 F.2d at 1337 (high degree of interrelatedness sufficient to support single employer finding justifies "departure from the 'normal' separate existence between entities").

Despite Commissioner Verheggen's assertions to the contrary, the single employer test we adopt today, which applies only to entities that have in fact ceased functioning as separate operations, is not a departure from the "common law of corporations" (slip op. at 85), but rather is entirely consistent with well established principles of corporation law.[29] *See Package Serv. Co.*, 113 F.3d at 847 ("Corporate law recognizes situations in which it is appropriate to 'pierce the veil' of separate affiliates"). For instance, it is well recognized that under the "alter ego" theory of corporation law,[30] a parent corporation may be held liable for the obligations of its subsidiary

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[28] The Commission found this approach "particularly appropriate" in *Mineral Coal Sales* in view of evidence of "pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities." *Id.*

[29] Commissioner Verheggen's reliance (slip. op. at 82-83) on the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998) to suggest that our adoption of a unitary operator theory represents a departure from fundamental principles of corporate law is misplaced. First that case addressed issues of liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"), a far different statutory scheme whose primary statutory goal is not the protection of the health and safety of miners or other employees, but the cleanup of hazardous waste sites and the allocation of related costs. Second, the language quoted by Commissioner Verheggen (slip op. at 83) relates to the issue of whether a parent may be held liable as an operator under CERCLA for the actions of its subsidiary, referred to as "indirect" or "derivative" liability by the Court in *Bestfoods*, without piercing the corporate veil. By contrast, our unitary operator theory, and the single operator doctrine developed under the NLRA and Title VII, addresses the separate question of when it is appropriate, and consistent with settled principles of corporation law, to disregard the separate corporate existence of two or more entities whose operations are so interrelated that they function as a single entity.

[30] A separate alter ego doctrine developed under the NLRA is distinguishable from both the alter ego theory of corporation law and the single employer doctrine. It is generally applied when a new legal entity replaces a predecessor company, and focuses on "the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations." *Carpenters Local Union 1846 v.*

where "there is such unity of interest and ownership that the individuality or separateness of the two corporations has ceased." 18 Am. Jur. 2d, *Corporations* § 56, at 861-62 (1985). Similarly, "the so-called 'identity rule'" provides:

> if there is such a unity of interest and ownership that the independence of the corporation has in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.

Id. at 862 (citations omitted); *accord* 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 43, 1999 Cum. Supp. at 20 (rev. perm. ed. 1999). *See also* 1 Fletcher, *Cyclopedia Corporations* § 43, at 719 ("Many cases disregard the corporate entity where it is so organized and controlled, and its affairs are so conducted, that it is merely an instrumentality, agency, conduit, or adjunct of another corporation.").[31] There is no requirement

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Pratt-Farnsworth, Inc., 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983). *See also Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942); *Lihli Fashions Corp.*, 80 F.3d at 748; *Al Bryant*, 711 F.2d at 553. As a result, "the alter ego test is notably different than the 'four-factor' single employer test." *Lihli Fashions Corp.*, 80 F.3d at 748-49, and cases cited. It focuses on factors including substantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership between the old and new corporation. *Al Bryant*, 711 F.2d at 553-54; *Pratt-Farnsworth*, 690 F.2d at 508. There is disagreement among the courts of appeals as to whether an "intent to evade" statutory obligations is a necessary element of an alter ego finding. *See Stardyne, Inc. v. NLRB*, 41 F.3d 141, 146-47 & n.4 (3d Cir. 1994) (collecting cases). *See also* Gary MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations*, 86 Mich. L. Rev. 1024, 1039-52 (1988) (surveying positions taken by the courts of appeals).

[31] The law of the state of Kentucky, the jurisdiction in which the Elmo No. 5 Mine is located and the events at issue herein arose, likewise recognizes that:

> The legal fiction of distinct corporate existence may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, conduit or adjunct of another corporation. It is not enough, however, that shareholders in the corporation are identical. Nor is it enough that one corporation owns shares in the other and that they have interrelated dealings. In order to warrant treating

for a showing of fraud in determining whether two separate corporations may be treated as a single entity under traditional corporation law alter ego analysis. 1 Fletcher, *Cyclopedia Corporations* § 43.60, at 737. *See also* authorities cited *supra*.

In sum, we conclude that the Secretary's interpretation of the Mine Act as permitting multiple entities to be considered an operator is a reasonable reading of the statute and therefore entitled to deference.

2. The Test for Determining Unitary Operator Status

Having upheld as reasonable the Secretary's interpretation of the Mine Act as permitting the designation of two or more related entities as a single operator, we must also define the elements of an appropriate test to determine when related entities may be found to constitute a single operator. The Secretary appears to propose an approach based on the single employer doctrine developed under the NLRA and Title VII and the common enterprise standard developed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. *See* S. Br. at 15-16. We believe that the most appropriate standard for determining whether two or more related entities constitute a unitary operator under the Mine Act is that applied in determining whether two or more entities constitute a single employer under the similar statutory language of the NLRA and Title VII,[32] with one modification.

As indicated above, the factors evaluated to determine whether entities are considered a single employer for purposes of the NLRA and Title VII are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership.

> them as one, it must further appear that they are the business conduits and the alter ego of one another.

Louisville Gas & Elec. Co. v. Moore, 284 S.W. 1082, 1083-84 (Ky. 1926) (quoting 1 Fletcher, *Cyclopedia Corporations* § 45, at 63). *See also United States v. WRW Corp.*, 778 F.Supp. 919, 924 (E.D. Ky. 1991) (discussing elements of alter ego theory under Kentucky law, which include "such unity of interest and ownership that the separate personalities of the corporation[s] . . . no longer exist"), *aff'd*, 986 F.2d 138 (6th Cir. 1993); *Hermitage Land & Timber Co. v. Scott's Ex'rs*, 93 S.W.2d 1, 4 (Ky. 1936) ("we have not hesitated to look beyond the form or shadow when the corporation is the mere dummy or alter ego or conduit of individuals or of another corporation").

[32] We find unconvincing the Secretary's argument for application of the "common enterprise" standard developed under the FLSA to determine whether related entities constitute a unitary operator under the Mine Act, given that the term "enterprise" in that statute has no analogue in the Mine Act. *See* FLSA § 3(r), 29 U.S.C. § 203(r).

In our view, this well-established test, which has been universally upheld and approved by the federal courts, should be used as a model for determining whether two or more entities should be considered a single operator under the Mine Act. We adopt one modification to this test, however, based on the Mine Act's primary concern with the protection of health and safety, rather than labor relations.[33] Based on this focus of the Mine Act, we conclude that centralized control over mine health and safety, rather than "centralized control of labor relations," should be the third element of the Mine Act unitary operator test.

Accordingly, we will consider the following factors in determining whether entities will be treated as a unitary operator for purposes of the Mine Act: (1) interrelation of operations, (2) common management, (3) centralized control over mine health and safety, and (4) common ownership. To demonstrate unitary operator status, not every factor need be present, and no particular factor is controlling. Instead, we will weigh the totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one. *See Lihli Fashions*, 80 F.3d at 747 (applying single employer test developed under NLRA); *Esmark*, 887 F.2d at 753 (same); *Al Bryant*, 711 F.2d at 551 (single employer status depends on all the circumstances of the case).

We find no merit in Commissioner Riley's suggestion (slip op. at 65-66) that it is somehow inappropriate for a Commission majority to fashion its own unitary operator test, derived largely from principles set forth by the Secretary in her briefs. *See* S. Br. at 15-16. Having concluded, through application of *Chevron II* analysis, that the Secretary's interpretation of the Mine Act to support a unitary operator theory of liability was reasonable, and therefore entitled to our deference, we are not bound to defer to any specific test proposed by the Secretary for determining unitary operator status. It is hardly open to question that this Commission has the authority to interpret the Mine Act and adopt a specific test or standards for adjudicating charges arising thereunder. *See, e.g., Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (adopting four-part test for determining whether a violation is "significant and substantial" under section 104(d) of the Mine Act); *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981) (adopting standard for determining liability under section 110(c)), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

We are also not persuaded by our dissenting colleague's criticisms of the unitary operator standard we adopt today. Despite Commissioner Riley's characterization of this test (slip op. at 68-69), it is apparent that the essence of the test we adopt has been universally accepted and consistently applied by federal courts for over 20 years to determine whether one or more related

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[33] The Commission has long recognized that "the Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners." *UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364 (Sept. 1985), *aff'd sub nom. Brock on behalf of Williams v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987).

entities should be treated as a single employer under the NLRA and Title VII. Nor do we find any merit to Commissioner Riley's suggestion that our test is overly broad because it could render liable as an operator a labor organization that represents miners employed at a mine, such as, in this case, the UMWA. Slip op. at 68. Although, applying a liberal interpretation, a labor organization that represents miners at a particular mine might be found, in some sense, to have a certain degree of control over health and safety at that location, we seriously question whether such an organization would meet any of the other three elements of the unitary operator test we adopt today.[34]

In dissenting from our application of a unitary operator test in this case to determine when two or more related entities may be treated as a single operator for purposes of the Mine Act, Commissioner Riley applies an explicitly result-oriented approach and accuses the Secretary of doing the same. He argues that because the Commission has not concluded in this case that Berwind and its three subsidiaries qualify as a single operator (*see* discussion *infra*, at 35), as the Secretary had urged, it follows that the test we have adopted for resolving that issue is unnecessary and unwarranted under the circumstances presented in this case. Slip op. at 66, 68. We note, however, that in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission's seminal case on unwarrantable failure, we adopted the identical approach: we announced a new test pursuant to our interpretation of the Mine Act, and in applying it found no unwarrantable failure. *Id.* at 2004.

Commissioner Riley's argument blurs the distinction between three independent issues with which we must come to grips, namely: whether a unitary operator theory is a reasonable construction of the Mine Act; if so, identifying the elements of an appropriate test to determine when related entities may be found to constitute a single operator under the Mine Act; and, finally, applying such a test to the four entities involved in this proceeding. We fail to perceive how our disagreement with the Secretary on the ultimate results of applying our unitary operator test to these four related entities undermines the validity of our position on the first two issues.[35]

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[34] We disagree with Commissioner Riley's interpretation (slip op. at 67) of certain statements made by the Secretary's counsel at oral argument as an attempt to amend or refine her proposed unitary operator test to add an element of "economic involvement" or "economic control." *See* Oral Arg. Tr. 10-11. In response to a question from Commissioner Verheggen, counsel merely alluded to economic considerations to further explain why a labor organization, such as the UMWA, could not qualify as an operator under the test proposed by the Secretary, as suggested by Contestants.

[35] We do not agree with Commissioner Riley's assertion that "nothing is gained" through application of our unitary operator test since Kyber and Jesse Branch, the two entities that we find to constitute a unitary operator under this test, "could . . . have been cited under conventional notions of operator status." Slip op. at 62 & n.1. The unitary operator theory must also be

3. Application of the Unitary Operator Test

a. Berwind and Its Three Subsidiaries

The Secretary argues that pursuant to her unitary operator theory, the record evidence compels the conclusion that Berwind and its wholly-owned subsidiaries together constituted a single business enterprise that controlled and operated the mine and therefore qualifies as a unitary operator under the Mine Act. S. Br. at 26-29. Amicus USWA contends that the judge erred in declining to hold that Berwind and its three subsidiary corporations together constituted a unitary operator of the mine. USWA Br. at 4. Contestants dispute the Secretary's argument that Berwind and its three subsidiaries qualify as a unitary operator on that ground that it is not supported by the evidence concerning the operations of the four entities. B. Resp. Br. at 52-59.

A majority of the Commission concludes that Berwind and its three subsidiaries do not qualify as a unitary operator. Chairman Jordan and Commissioner Beatty conclude that Berwind and its three subsidiaries — Kentucky Berwind, Kyber, and Jesse Branch — did not function as a unitary or single operator of the Elmo No. 5 Mine under the criteria of the unitary operator test adopted by the Commission today. Slip op. at 42-44, 50 n.2. Commissioners Riley and Verheggen disagree with the unitary operator test adopted by the Commission majority and its application in this case, and thus would not hold any of the entities liable pursuant to this theory. *Id.* at 62-69, 82-86. Commissioner Marks concludes that Berwind and its three subsidiaries satisfy the Commission's unitary operator test. *Id.* at 58-60. The separate opinions of Commissioners are set forth in Part IV.

b. Kyber and Jesse Branch[36]

The Secretary and the UMWA contend that the close relationship between Kyber and Jesse Branch, including their shared facilities and common ownership and officers, establishes that they essentially functioned as alter egos and therefore must be considered joint operators of the mine. S. Br. at 51-56; UMWA Br. at 8-9.[37] Contestants argue that the Secretary's alter ego

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applied to resolve the potential liability of Kentucky Berwind and Berwind, given our prior conclusions that these two entities do not by themselves qualify as operators under the control test we apply.

[36] A majority of Commissioners, Chairman Jordan, and Commissioners Marks and Beatty, conclude that Kyber and Jesse Branch qualify as a unitary operator.

[37] The Secretary argues that because of their interrelationship Kyber and Jesse Branch should be considered "alter egos." *See* S. Br. at 55-56. In using the term "alter ego," the Secretary may have instead been referring to the separate theory of corporation law, which

argument is not supported by substantial evidence and is based on inapplicable precedent. B. Resp. Br. at 50-51.

In our view, the judge should have considered the compelling record evidence concerning the high degree of interrelationship between Kyber and Jesse Branch, particularly with respect to operations at the mine, and determined whether these two entities qualified as a unitary operator under the theory espoused by the Secretary.[38] We reach the issue, and conclude that the record compels the conclusion that Jesse Branch and Kyber meet our unitary operator test.

The record establishes that Kyber and Jesse Branch both lease land and coal reserves from Kentucky Berwind and contract out the mining of the coal. 18 FMSHRC at 205-07. At times relevant herein, Kyber and Jesse Branch shared a president (Jimmy Walker), a vice president of operations (Steve Looney), a vice president of engineering (Randolph Scott), a controller (Bob Bond), a treasurer (Bryan Ronck), and an assistant treasurer (B. McKenney).[39] *Id.* at 207; JSF 23, 34. The two companies also used the same person to handle personnel matters (Shelia Sullivan, a Jesse Branch employee), and employed the same individual to manage their coal preparation plants (A.J. Thacker). JSF 43, 44. Each of these individuals performed duties on behalf of both companies, as agreed to by Kyber and Jesse Branch, but were compensated only by Jesse Branch for their services. 18 FMSHRC at 207; JSF 39.

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focuses on whether two or more separate corporate entities are so interrelated that their corporate separateness may be disregarded. *See* discussion *supra*, at 30-32. In any event, there can be no question that the Secretary argues in essence that Kyber and Jesse Branch functioned as a unitary operator of the Elmo No. 5 Mine, and therefore we apply our newly-adopted unitary operator test in evaluating the legal relationship between these two entities. Contrary to the arguments of our dissenting colleagues (slip op. at 66 n.5, 86), we also find that this theory of liability was raised by the Secretary to the judge. *See* S. Mot. For Partial Sum. J. at 27-29 ("Although legally [Jesse Branch] and [Kyber] are separate corporate entities, in practice the companies did not function as sovereign, independent entities"); *id.* at 33-34 ("Since [Jesse Branch] undertook these activities [at the Elmo mine] in conjunction with, and on behalf of [Kyber], . . . [Jesse Branch] and [Kyber] were acting as 'alter egos' at the Elmo mine and both must be considered an [sic] 'operators' of the mine."). Indeed, in his initial order and notice of hearing, the judge acknowledged the Secretary's arguments that Jesse Branch and Kyber were interrelated and served each other's interests, but declined to accept or consider them. 17 FMSHRC at 710-11, 712.

[38] The judge implicitly rejected the argument that Jesse Branch and Kyber should together be considered a unitary operator of the Elmo No. 5 Mine, and analyzed the status of the two companies only as a separate entities. *See* 18 FMSHRC at 236-43.

[39] In the past, the two companies also shared the same treasurer and assistant treasurer. *Id.* at 207.

Kyber and Jesse Branch shared an office at a facility owned by Jesse Branch in Kimper, Kentucky. 18 FMSHRC at 207; JSF 40; Tr. 495. On occasion, Kyber and Jesse Branch used each others' equipment and machinery, without any written agreement between them governing the use of such equipment and machinery. 18 FMSHRC at 208; JSF 48. Kyber's secretarial work was also sometimes performed by Jesse Branch employees. 18 FMSHRC at 208. Occasionally, coal produced at Kyber contract mines was processed at the Jesse Branch preparation plant. *Id.* The parties stipulated that there was no written agreement between the two companies concerning the manner in which such coal was processed or how Jesse Branch was compensated for the use of its plant to process Kyber's coal. JSF 42. It is also undisputed that a Jesse Branch employee monitored the amount of coal received by both companies from contract mines, and arranged for transportation of the coal to the companies' preparation plants. 18 FMSHRC at 208; JSF 47. In addition, Kyber used Jesse Branch exclusively to provide surveying services, including preparation of mine maps and setting spads, at mines that it leased. 18 FMSHRC at 228.

Turning to the four elements of our unitary operator test, there is little question that Kyber and Jesse Branch meet the "common ownership" criterion, since they are both wholly owned subsidiaries of Berwind. In addition, these two subsidiaries also clearly shared common management because, at relevant times, their officers and board members were essentially identical.

The record also establishes that, even though Kyber and Jesse Branch were nominally separate corporations, they did not function as completely independent entities. Instead, their operations were highly integrated and interrelated, particularly in connection with the operation of the Elmo No. 5 Mine. In addition to sharing the same officers, who were paid by Jesse Branch, the companies used the same office facility and shared each others' machinery and equipment. Moreover, as noted above, Kyber sometimes used employees of Jesse Branch to perform its own secretarial services and used Jesse Branch's preparation plant to process coal from Kyber contract mines, without any written agreement providing compensation to Jesse Branch for such services. *Id.* at 207-08; JSF 42. Similar factors have been relied upon to demonstrate the functional integration of related entities, and support a finding that they were a single employer under the NLRA. *See, e.g., Lihli Fashions Corp.*, 80 F.3d at 747 (common office facilities and equipment); *Al Bryant*, 711 F.2d at 551-52 (two entities shared office building, equipment, and personnel, and had frequent interchange of employees). In *Al Bryant*, the court found that the lack of any written agreements between the two entities governing the use of one company's equipment and administrative support by the other supported a finding that the two entities were a single employer. *Id.* at 551.

In addition to the high degree of interrelationship and functional integration between Kyber and Jesse Branch, the record demonstrates that the two companies were viewed as interchangeable in the eyes of officials at AA&W who worked with them on a regular basis. For

instance, Norman Stump, AA&W's mine foreman, testified that he considered Kyber and Jesse Branch to be "associated with each other" and different parts of the same company, and was therefore unable to specify which company set spads at the mine or determined the number of entries that could be mined by AA&W in certain areas. Tr. 40, 70-72, 100-01. Jim Akers, the vice president of AA&W, testified that he was unaware of any distinctions between Kyber and Jesse Branch, since they were "run by the same people" and had the "same officers." Tr. 226, 278. Akers also testified that AA&W had seven contracts to operate mines for Kyber or Jesse Branch, and that there was no significant difference in the way it operated a mine for either of the two companies. Tr. 278-80. Perhaps because of this blurred distinction between the two companies, Akers testified that it was Jesse Branch, not Kyber, that made final decisions regarding mining projections and the direction of mining at the Elmo No. 5 Mine and set the contract price to be paid to AA&W for the coal it mined. Tr. 244-45, 253, 276, 282-83. Akers also testified that the mining contract between AA&W and Kyber with respect to the operation of the mine was developed by "Jesse Branch/Kyber." Tr. 273.

Finally, the control exercised by Kyber and Jesse Branch over health and safety at the Elmo No. 5 Mine was centralized within the two companies. The projections established by Kyber, which determined the direction and nature of mining conducted at the mine, as well as any agreed upon changes in the projections, were incorporated by Jesse Branch into mine maps submitted to federal and state regulatory authorities. 17 FMSHRC at 694. Pursuant to its agreement with Kyber, Jesse Branch prepared maps showing the ventilation system at the mine that were submitted to MSHA every six months, and prepared diagrams used in the roof control plan to illustrate the pillaring methods used during retreat mining, based upon information provided by AA&W. *Id.* at 693. The record also indicates that all surveying and map preparation work performed by Jesse Branch was supervised by Randolph Scott, the vice president of engineering for both companies. Tr. 461-62. It is also undisputed that, even though the mine maps were prepared and certified by employees of Jesse Branch, they stated that they were "engineered by Kyber." JSF 155.

The foregoing evidence compels a finding that Jesse Branch and Kyber functioned as a single entity, particularly with respect to their control over the operation of the Elmo No. 5 Mine. Kyber and Jesse Branch shared common ownership and also had the same management and officers. In addition, they were engaged in the same business, their operations were highly interrelated, and they functioned as essentially one entity. Moreover, the two companies exercised centralized input with respect to health and safety matters — including the preparation of maps and diagrams used in required roof control and ventilation plans. Therefore, we conclude that on this issue the record can only support one conclusion — that Kyber and Jesse Branch constituted a single entity under the unitary operator test we adopt.[40] Accordingly, remand of this

[40] Given our prior conclusion that Kyber's supervision and control over the operation of the mine were sufficient to render it an operator within the meaning of the Mine Act (*supra*, at

issue to the judge is unnecessary. *See Walker Stone*, 156 F.3d at 1085 n.6 (remand not necessary where Commission properly determined that record as a whole allowed only one conclusion); *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (finding remand would serve no purpose where all evidence bearing upon issue was contained in record and would only support one conclusion); *REB Enterprises, Inc.*, 20 FMSHRC 203, 216 (Mar. 1998) (remand not necessary where evidence could justify only one conclusion); *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (same).

4. Liability

Contestants argue that even if the Secretary's unitary operator theory is viable, principles of administrative law and due process preclude her from applying that theory to hold Berwind and its subsidiaries liable in this case because it amounted to a novel interpretation of the Mine Act that was asserted without fair notice, and the Secretary failed to cite the four entities as a unitary operator in the contested citations and orders or in her answer to the notices of contest. B. Resp. Br. at 59-61.[41] The Secretary disputes Contestants' argument that she failed to provide fair notice of her unitary operator theory in this case on the grounds that the theory is derived from the plain language of the Mine Act, that she had never previously advanced an inconsistent interpretation of the Act, and that she asserted the theory at an early (summary decision) stage of this proceeding, well before the hearing was held in this case. S. Reply Br. at 14-16.

11-16), it follows that the combined Kyber/Jesse Branch entity also qualifies as an operator. Indeed, this combined entity possesses many of the same indicia of authority and control as the non-production operator that the Commission held was properly subject to prosecution by the Secretary in *W-P Coal*, 16 FMSHRC at 1411.

[41] The Commission finds no merit in Contestants' argument that, because the Secretary never cited the four entities collectively as a single operator either in the underlying citations and orders, or in her answers to Contestants' notices of contest, the Secretary's unitary operator theory is not properly before it. *See* B. Resp. Br. at 60-61 & n.50. Even though the Secretary, in her answers, may have alleged only that the Contestants were each individually liable as an operator, without explicitly asserting that the four entities were collectively liable as a unitary operator, we are not precluded from considering the unitary operator theory if it was knowingly and fairly litigated by the parties before the judge. This result is mandated by Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies. *See Faith Coal Co.*, 19 FMSHRC 1357, 1362 & n.10 (Aug. 1997). In this case, the record indicates that the Secretary's unitary operator theory was fully litigated by the parties and explicitly addressed by the judge. *See* 18 FMSHRC at 233.

Notwithstanding our conclusion that under the test we adopt today, Jesse Branch and Kyber constitute a unitary operator which would qualify as an operator under the Mine Act, a majority of the Commission also declines to hold that combined entity liable for any violations that may ultimately be found in this case. Commissioner Beatty concludes that it would violate principles of due process to hold Jesse Branch liable in this case as part of the joint entity Kyber/Jesse Branch because these entities did not receive fair notice that they could be subject to liability under the unitary operator theory first espoused by the Secretary in this case. Slip op. at 44-47. Commissioner Riley concurs in Commissioner Beatty's position on this issue (*id.* at 70), while Commissioner Verheggen has indicated that he agrees with Commissioner Beatty "in principle." *Id.* at 87. Chairman Jordan and Commissioner Marks would reject the Contestants' notice argument based on their conclusion that Berwind and its subsidiaries had adequate notice that two or more of those entities could be held liable for violations at the Elmo No. 5 Mine pursuant to a unitary operator theory. Slip op. at 48-50, 60-61 The separate opinions of Commissioners are set forth in Part IV of this opinion.

III.

Conclusion

For the foregoing reasons, we vacate the judge's conclusion that, in order to establish an entity as an operator under the Mine Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control, or supervision of the day-to-day operations of the mine, or had the authority to do so. Instead, we evaluate the participation and involvement of the entity in the mine's engineering, financial, production, personnel, and health and safety matters to determine whether that entity had substantial involvement with the mine, and therefore qualified as an operator under the Act. We affirm the judge's findings that Kyber is an operator of the Elmo No. 5 Mine, and that Jesse Branch, Kentucky Berwind, and Berwind are not individual operators. We remand these cases for further proceedings as to Kyber.

We vacate the judge's rejection of the Secretary's unitary operator theory, and hold that two or more entities may be considered a unitary operator for purposes of the Mine Act based upon consideration of their: (1) interrelation of operations, (2) common management, (3) centralized control of mine health and safety, and (4) common ownership. We hold that, under this standard, Berwind and its three subsidiaries do not qualify as a unitary operator for purposes of the Mine Act, but that Kyber and Jesse Branch do constitute a single entity, which would qualify as an operator of the mine. We further conclude, however, that the joint entity Kyber/Jesse Branch may not be held liable for any Mine Act violations in this case.

IV.

Separate Opinions of the Commissioners

Commissioner Beatty, concluding that Berwind and its three subsidiaries do not qualify as a unitary operator under the Commission's unitary operator test; and holding that Kyber and Jesse Branch did not receive fair notice that they could be subject to liability under the unitary operator theory first espoused by the Secretary in this case, and that therefore the combined Kyber/Jesse Branch entity may not be held liable for any violations found in these cases.

A. Berwind and Its Three Subsidiaries Do Not Qualify as a Unitary Operator

The record in this case compels the conclusion that Berwind and its three subsidiaries do not qualify as a unitary operator. There is little question that these four entities satisfy the "common ownership" criterion, since Kentucky Berwind, Kyber, and Jesse Branch are all wholly-owned subsidiaries of Berwind. In addition, the record indicates that the four companies shared common officers and management.[1] There is also some interrelationship in the operations of the four companies, due to their vertical integration with respect to the ownership and leasing of mine property.[2] However, the record establishes that, with one exception discussed below, the Contestants otherwise functioned as independent entities. Although Berwind, as the parent holding company, was responsible for overseeing the operations of its subsidiaries and making

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[1] Thomas Falkie, the president of Berwind, was the chairman of the board of Jesse Branch, Kentucky Berwind, and Kyber. 18 FMSHRC at 209. Berwind's vice president, Richard Rivers, was also the vice president of the three subsidiaries. *Id.* In addition, Berwind's chief financial officers acted in the same capacity for Jesse Branch, Kentucky Berwind, and Kyber; its assistant secretary also acted as secretary for the three subsidiaries; and its controller was also the controller of Kentucky Berwind. *Id.* The treasurer and assistant treasurer of Kentucky Berwind also held the same positions with Kyber and Jesse Branch. *Id.* at 208. Berwind's board of directors approved the election of Jimmy Walker as president of Jesse Branch and Kyber. *Id.* at 209. Walker hired Steve Looney as vice president of operations, and Bob Bond as controller, of both of these subsidiaries. *Id.* Walker and the president of Kentucky Berwind both reported to Berwind's president, Falkie. *Id.*

[2] Although Berwind has never received a dividend as a shareholder of Kyber, it has received dividends from Kentucky Berwind, which are in part attributable to royalties received by Kentucky Berwind on its coal leases. 18 FMSHRC at 212. Berwind is also paid a management fee by its subsidiaries for legal, financial, and administrative services. *Id.* In addition, Kyber paid Berwind for services provided by Berwind Coal Sales, Inc., another Berwind subsidiary, in locating customers and negotiating contracts for the sales of coal mined for Kyber. 17 FMSHRC at 697.

decisions concerning the general direction of their business (18 FMSHRC at 208-09), it was not directly involved in the operations of Kentucky Berwind, the owner of coal reserves, or of Kyber and Jesse Branch, which both lease coal reserves and contract for the mining of the coal they lease. Berwind had no direct involvement with the operation of the Elmo No. 5 Mine, and no relationship with AA&W, the contract operator. *Id.* at 211, 234.

The record also indicates that Kentucky Berwind and Kyber dealt with each other at "arm's length" with respect to coal reserves leased by Kentucky Berwind to Kyber, including those at the Elmo No. 5 Mine. The written lease agreement between the two subsidiaries involving the mine required Kyber to, inter alia, submit coal samples from the mine to Kentucky Berwind for quality analysis, allow Kentucky Berwind's inspectors on the premises to ascertain the condition of the mine and the amount of coal removed, and assure that coal reserves at the mine were mined to the greatest extent possible, consistent with mining conditions, relevant laws, and regulations. 17 FMSHRC at 694, 713. The lease also gave Kentucky Berwind the right to terminate the lease if it determined that Kyber was not complying with its terms, to penalize Kyber for lost coal reserves, and to order an immediate cessation of mining if the reserves were being damaged or if mining was conducted in violation of law. *Id.* at 714. Pursuant to the lease, Kentucky Berwind received monthly royalties from Kyber for coal mined at that location. 18 FMSHRC at 210. Kentucky Berwind had no relationship with AA&W and no direct involvement in the operation of the Elmo No. 5 Mine. *Id.* The only Kentucky Berwind employees who entered the mine were those who visited on a quarterly basis, or upon request, to examine the workings and check seam heights and tonnages to confirm royalties and insure that coal was being recovered properly. *Id.* at 210-11.

Finally, it does not appear that there was any centralized control by these companies over health and safety matters at mine property owned by Kentucky Berwind and leased to Kyber or Jesse Branch. Rather, the record indicates that health and safety issues were largely the responsibility of the contract operator of the mine, in this case AA&W. AA&W was responsible for the preparation and submission to MSHA of the mine's roof control plan, ventilation plan and system, and other plans required for health and safety purposes, including the fire fighting plan, miner training plan, smoking articles search plan, self-contained self rescuer plan, and fan stoppage plan. 17 FMSHRC at 690; 18 FMSHRC at 221, 226. AA&W also developed and implemented the respirable dust and noise sampling programs required under the Mine Act and provided required training for its miners. 17 FMSHRC at 690-91. In addition, AA&W was responsible for maintaining preshift and onshift examination books at the mine. 18 FMSHRC at 221. AA&W representatives participated in MSHA inspections and subsequent conferences, and decided whether to challenge the validity of citations issued by MSHA inspectors. 17 FMSHRC at 695-96. AA&W also decided the manner in which violations should be abated and paid all penalties assessed under the Mine Act. *Id.* at 696. There is no evidence that Berwind or Kentucky Berwind had any involvement at all with respect to health and safety issues at the Elmo No. 5 Mine.

In sum, although these four entities satisfy the common ownership criterion and shared common management to a significant extent, in our view these factors are outweighed by the evidence that these entities operated essentially independently of each other and (with the exception of Kyber and Jesse Branch, discussed below) dealt with each other at "arm's length." In addition, there is little or no evidence that these entities exercised any significant degree of centralized control over health and safety matters at the mine. Chairman Jordan and I believe that the foregoing evidence compels the conclusion that Berwind and its three subsidiaries — Kentucky Berwind, Kyber, and Jesse Branch — did not function as a unitary or single operator of the Elmo No. 5 Mine under the criteria set forth above. Accordingly, we conclude that a remand to the judge to determine whether these four entities collectively constitute a unitary operator is not necessary. *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993); *see also* cases cited *supra*, slip op. at 38-39.

B. Liability/Fair Notice of the Unitary Operator Theory

It is well established that in cases involving imposition of civil penalties, considerations of due process "prevent[] . . . deference [to an agency's interpretation] . . . that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). For, "'elementary fairness compels clarity' in the statements and regulations setting forth the actions with which the agency expects the public to comply." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)). For an agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *General Electric*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). An agency will be deemed to have provided fair notice of its interpretation, "[i]f, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards which the agency expects parties to conform." *General Electric*, 53 F.3d at 1329 (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

In resolving the notice issue raised with respect to the Secretary's unitary operator theory, it is fundamental to first determine whether the Contestants, in particular Kyber and Jesse Branch, had fair notice that they were subject to liability pursuant to that theory.[3] Despite our conclusion

[3] Of course, this issue is largely academic with respect with Kyber, which we have already found to be an operator of the mine within the meaning of the Mine Act. *See* Part II.B.1. With respect to Jesse Branch, however, the question becomes far more significant, since we have previously concluded in Part II.B.2 that Jesse Branch, on its own, does not qualify as an operator. Therefore, our resolution of the notice issue is dispositive of whether Jesse Branch may be held liable for any Mine Act violations, pursuant to the unitary operator theory, as part of the Kyber/Jesse Branch joint entity.

that the Secretary's unitary operator theory is a reasonable statutory interpretation that merits our deference, I conclude that, under the standards set forth above, neither the Secretary's actions nor the language of the Mine Act were sufficient to put Kyber and Jesse Branch on notice that they were potentially subject to liability as a joint entity in this case.

First, it is undisputed that the unitary operator theory was not previously advanced by the Secretary in any prior civil penalty case brought pursuant to the Mine Act. *Cf. General Electric*, 53 F.3d at 1331 (finding of lack of fair notice of agency interpretation was reinforced where "[a]lthough th[e] reading [wa]s certainly permissible, the agency present[ed] it for the first time [on] appeal"). In addition, although we have concluded that the unitary operator theory is consistent with, and supported by, the meaning of certain definitional terms used in the Mine Act – specifically, the terms "person," "association," and "organization" – as reflected in everyday dictionary definitions of those terms, it is also fair to state that this interpretation "would not exactly leap out at even the most astute reader" of these provisions. *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991).

It is also clear that the Secretary provided no notice to the Contestants, through preenforcement efforts designed to achieve compliance with the Mine Act, that they might be subject to liability pursuant to a unitary operator theory. *See General Electric*, 53 F.3d at 1329. Rather, she "effectively decid[ed] 'to use a citation . . . as the initial means for announcing [this] particular interpretation'" of the Mine Act. *Id.* (quoting *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)). It has been previously recognized that "such a decision may raise a question about 'the adequacy of notice to regulated parties.'" *Id.*

We have also concluded in this case that the Secretary's unitary operator theory was presaged, and is further supported, by the single employer doctrine that has developed through application and interpretation of similar provisions of the NLRA and Title VII. I do not believe, however, that given the facts presented here Kyber and Jesse Branch can fairly be charged with knowledge of these doctrines, particularly since the doctrines have developed under statutory schemes unrelated to mine health and safety.[4]

Based on the foregoing, I conclude that the Contestants did not have adequate notice of the Secretary's "unitary operator" theory of liability in this case, and therefore Jesse Branch, as part of the Kyber/Jesse Branch joint entity, should not be held liable for any Mine Act violations ultimately found to have been committed in these cases pursuant to that theory.[5]

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[4] In addition, Title VII has a jurisdictional prerequisite that limits its application to small companies. *See* 42 U.S.C. § 2000e(b).

[5] This is consistent with the result in *General Electric*, where the D.C. Circuit deferred to the agency's interpretation because it was "'logically consistent with the language of the

I disagree with the suggestion made by Chairman Jordan, in her separate opinion, that the above-described requirement of fair notice has no applicability here because we are concerned not with the requirements of a particular regulation, but rather with whether Jesse Branch was on notice of its potential liability as a unitary operator. Slip op. at 48. In my view, the notice requirement takes on even greater importance where, as here, the relevant agency interpretation relates to the threshold issue of the coverage of an entirely new class of entities under the Mine Act, as opposed to the requirements of a specific regulation. If a party has no idea of its potential liability under a new interpretation of an existing statute or regulation, such as the unitary operator theory, I believe that it is profoundly unfair, and inconsistent with the teachings of *General Electric* and its progeny, to impose liability for civil penalties pursuant to such a theory without fair notice.

I also find *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066 (4th Cir. 1982), and the other cases cited by Chairman Jordan, to be unpersuasive. As noted by Judge Widener in his dissent in *Sewell*, neither *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), nor *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), "involved the imposition of a fine without notice." 686 F.2d at 1073. In *Bell Aerospace*, the Supreme Court explicitly acknowledged this distinction, stating: "[T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. *Nor are fines or damages involved here.*" *Id.* at 295 (emphasis added). Neither *Molina v. INS*, 981 F.2d 14 (1st Cir. 1992), nor *General American Transportation Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), also cited by Chairman Jordan, dealt with the imposition of liability without prior notice; indeed, in *Molina* the court expressly notes that no due process claim is involved. 981 F.2d at 19. *See also Energy West Mining Co.*, 17 FMSHRC 1313, 1317 n.7 (Aug. 1995) (distinguishing cases on similar grounds).

Nor am I persuaded by the arguments of Chairman Jordan and Commissioner Marks that Jesse Branch should have been on notice that it was potentially liable as an operator pursuant to the "independent contractor" provision of section 3(d). Slip op. at 50, 55. The unitary operator theory is a totally separate and distinct legal construct that provides a basis for finding entities such as Kyber and Jesse Branch to be "unitary operators," based on the interrelationship between

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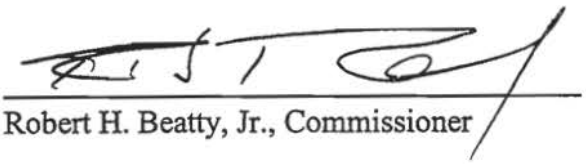
regulation[s],'" but found that the interpretation was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the regulated party] of the agency's perspective." 53 F.3d at 1330 (quoting *Rollins*, 937 F.2d at 652) (alteration in original). Although the agency could require future compliance with its interpretation, the lack of fair notice led the court to reverse the enforcement action taken in that particular instance. *Id.* at 1328, 1330. *See also United States v. Hoechst Celanese Corp.*, 964 F. Supp. 967, 985 (D.S.C. 1996) (concluding that "due process precludes a finding of liability" where plant owner was not afforded fair notice of U.S. Environmental Protection Agency's interpretation of regulatory exemption from benzene regulation).

the entities. Therefore, any arguments by my colleagues in the majority that Jesse Branch was alternatively liable as an independent contractor fail to recognize the distinctions between these two theories and therefore have no bearing whatsoever on the question of whether Jesse Branch had adequate notice of its potential liability as a unitary operator.[6]

Accordingly, I conclude that because Jesse Branch did not have adequate notice of the Secretary's "unitary operator" theory of liability in this case, and that it was thus subject to liability as part of the Kyber/Jesse Branch joint entity, it should not be held liable for civil penalties assessed for any Mine Act violations that are ultimately found in this case.



Robert H. Beatty, Jr., Commissioner

[6] I also note that the Commission majority has agreed that the Secretary has failed to preserve on appeal the issue of the potential liability of Jesse Branch as an independent contractor. *See* slip op. at 16 n.16.

Separate opinion of Chairman Jordan, holding that Jesse Branch received fair notice that it could be held liable as an operator:

I write separately to express my view that Jesse Branch was provided with sufficient notice regarding its potential liability as an operator.[1] At the outset, it is essential to understand what this inquiry does *not* involve: it is not concerned with the question more frequently posed in Mine Act cases as to whether an operator had notice about the requirements of a particular regulation. *See, e.g., Ideal Cement Co.*, 12 FMSHRC 2409 (Nov. 1990). Consequently, a discussion of whether a regulation provided "fair warning of the conduct it prohibits or requires," (separate opinion of Commissioner Beatty, slip op. at 44, citing *Gates & Fox*, 790 F.2d at 156), or whether an operator could know "with 'ascertainable certainty,' the standards which the agency expects parties to conform" (*id.*), is not helpful here. This case is simply not about whether a reasonably prudent person would have been put on notice of a specific standard requiring, for example, that signs needed to be posted (*Bluestone Coal Corp.*, 19 FMSHRC 1025 (June 1997)) or a circuit breaker set at a certain level. *BHP Minerals Int'l, Inc.*, 18 FMSHRC 1342 (Aug. 1996). Rather, it is simply about whether Jesse Branch was on notice of its potential liability as an operator. This question hinges on the language of the Mine Act and its interpretation.

In this case we adopt the unitary operator theory, and, as is the common practice, apply the rule we are announcing to the relevant parties in this proceeding. This is consistent with the widely recognized concept that "retroactive application of new principles in adjudicatory proceedings is the rule, not the exception." *Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992). In *Molina*, the First Circuit explicitly addressed the question of whether the INS had improperly utilized a retroactive interpretation in a proceeding in which it ordered an individual deported despite his amnesty request. *Id.* at 20-23. The Court held that in so doing, INS acted within its legal authority. *Id.* at 23.

Similarly, in *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1070 (4th Cir. 1982), in which the Fourth Circuit affirmed a Commission judge's decision imposing a penalty on an operator, the court held that, "retroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause." In fact, the D.C. Circuit has noted that "it seems clear that the circumstances in which a rule may be announced but not applied in an adjudication are few." *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (upholding the retroactive application of the reversal of a 40 year old Interstate Commerce Commission policy that had prevented railroads from charging the owners of railcars

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[1] I do not address the issue of whether or not Kyber had notice of the unitary operator theory, as the Commission has already found that Kyber is an operator, based on its status as a single entity (slip op. at 11-16) and was on notice of its potential liability as an operator (slip op. at 16 n.15).

for transportation costs in certain circumstances). *See also Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1194-95 (D.C. Cir. 1984) (upholding retroactive application that resulted in imposition of money damages).

This doctrine was carefully articulated by the Supreme Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). In *Chenery* the Court reviewed a decision of the Securities and Exchange Commission ("SEC") applying new standards of conduct to management trading during a stock reorganization. The SEC ruled that the trading at issue violated federal law. The corporations argued that the SEC was free to announce its new rule but that it had to remain prospective and could have no retroactive effect upon the parties to the case.

The Supreme Court soundly rejected this approach, stating:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> . . . .
>
> There is thus a very definite place for the case-by-case evolution of statutory standards. . . .
>
> . . . [W]e refuse to say that the Commission, which had not previously been confronted with [the question at issue], was forbidden from utilizing this particular proceeding for announcing *and applying* a new standard of conduct. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.

Id. at 202-03 (emphasis added) (citation omitted).

As Justice Scalia has noted, "*Chenery* involved that form of administrative action where retroactivity is not only permissible but standard. Adjudication *deals* with what the law was; rulemaking deals with what the law will be." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (emphasis in original).

Moreover, Jesse Branch should have been on notice in any event that it was potentially liable as an operator. The Secretary argued before both the judge and the Commission that Jesse Branch should be considered an operator of the Elmo Mine pursuant to section 3(d) of the Mine Act because it was an independent contractor performing services at a mine. S. Mot. Part. Sum. J. at 33, n. 27, S. Br. at 55 n. 21. Although I agree with the Commission's holding that the Secretary failed to preserve this question on review to prove liability (slip op. at 16 n.16), I conclude that, for purposes of ascertaining whether proper notice existed, the record would compel the conclusion that Jesse Branch was an independent contractor. This is due to the mine mapping, surveying, and spad services it performed at the mine. 17 FMSHRC at 711-12. The case law is clear that such an independent contractor may be held liable as an operator. *Williams Natural Gas Co.*, 19 FMSHRC 1863 (Dec. 1997). Accordingly, Jesse Branch should always have been aware of its duty to comply with the Mine Act and its regulations. It should not be permitted to escape liability in this case by claiming that it lacked adequate notice of its legal responsibilities.[2]

Mary Lu Jordan, Chairman

[2] In addition, I agree with Commissioner Beatty that, applying the unitary operator test that we adopt today, the record in this case compels the conclusion that Berwind and its three subsidiaries do not qualify as a unitary operator. *See* slip op. at 42-44.

Separate opinion of Commissioner Marks, concurring in part and dissenting in part:

I join with the majority in concluding that Kyber qualifies as an operator under the Mine Act. I dissent from the majority in their conclusion that neither Berwind, Kentucky Berwind, or Jesse Branch are operators because I find that all three of these entities qualify as operators. I join with the majority in adopting a unitary operator test, and in concluding that under such test, Jesse Branch and Kyber compose a unitary operator. However, I conclude that all four entities — Berwind, Kentucky Berwind, Kyber, and Jesse Branch — constitute a unitary operator and therefore dissent on that ground.

A. Kyber

As discussed in the majority opinion, Kyber had substantial involvement with the mine. Kyber was the lessee of Elmo No. 5 Mine and possessed the right to mine coal at that mine. 17 FMSHRC at 689. Kyber contracted with AA&W for the mining of the coal. *Id.* at 689-90. As part of the arrangement with AA&W, Kyber had "bottom line authority" for determining the direction of mining; it had final authority to approve mining projections and "to insist upon the projections it wanted." Slip op. at 11 (citing 18 FMSHRC at 237-39). Kyber also had some involvement in the decisions concerning the manner of mining and the quality and quantity of coal produced at the mine. Slip op. at 12-13. The contract with AA&W gave Kyber the authority to approve and enforce Elmo No. 5's mine plan, which governed matters such as the applicable ventilation and roof control plans, the number of employees, and the type of equipment to be used. *Id.* at 12. As the majority correctly points out, the authority to control operations is a relevant consideration in determining whether an entity qualifies as an operator. *Id.* Based on these facts, Kyber's participation more than exceeds the substantial involvement test applied by the Commission in this case. After all, in an analogous context, "substantial" has been described by the Supreme Court and courts of appeals as amounting to "more than a mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401(1971) (quoting *Consolidated Edison Co. v. NLRB*, 365 U.S. 197, 229 (1938))[1]; *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998); *Kajaria Iron Castings PVT. Ltd v. United States*, 156 F.3d 1163, 1173 (Fed. Cir. 1998). *Webster's II New Riverside University Dictionary* at 1045 (1988) defines a "scintilla" as "a tiny amount: trace." Kyber certainly exhibited more than a scintilla of involvement in the Elmo No. 5 Mine.

My conclusion that Kyber is an operator is buttressed by the cases of *Association of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853, 861-62 (D.C. Cir. 1978); *Chaney Creek Coal Corp v. FMSHRC*, 866 F.2d 1424, 1432 n.9 (D.C. Cir. 1989); and *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 82 n.8 (D.C. Cir. 1988). In those cases, the D.C. Circuit

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[1] The concept of substantial evidence has been defined as "more than a mere scintilla." *Richardson*, 402 U.S. at 401.

explained that regardless of an owner's or lessee's level of activity at a mine, an owner or a lessee qualify as an operator under section 3(d) of the Mine Act. *Id.* By virtue of the fact that Kyber was the lessee of the Elmo No. 5 Mine, Kyber qualifies as an operator under the Mine Act. 17 FMSHRC at 689.

The plain language of the Mine Act also supports that view. Under section 3(d), "operator" means "*any* owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d) (emphasis added). The Mine Act does not attach conditions to the type of owner or lessee who may be an operator but states that "any owner, lessee . . ." qualifies as an operator. Use of the term "any" in the provision indicates that "any" owner or lessee is an operator under the Act. As stated in my concurring opinion in *Joy Technologies Inc.*, 17 FMSHRC 1303 (Aug. 1995), with respect to the independent contractor clause of the operator definition, "any" means "any" and there is no warrant in the plain language of the Act or in the legislative history for diluting the term "any." *Id.* at 1311 (citing *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990)). The D.C. Circuit in *Andrus* likewise reasoned that, if one assumes a contrary view and interprets the clause "who operates, controls, or supervises a coal mine" to attach to "owner," "lessee," as well as "other person," the "specification of owner and lessee would then be superfluous" and the statute could merely have read "'operator' means any person who operates, controls or supervises a coal mine." 581 F.2d at 862. The Mine Act specifically named "any owner, lessee, or person who operates . . . [a] mine" as operators. Adhering to that plain language, I conclude that Kyber, as "any lessee," qualifies as an operator.

B. Kentucky Berwind

Kentucky Berwind was the owner of the mineral rights at the Elmo No. 5 Mine. JSF 52. As the legal owner, Kentucky Berwind had the right to extract coal from the mine itself or could lease that right to others. JSF 88. In contracting the right to extract coal to Kyber, Kentucky Berwind maintained substantial involvement with the workings of the Elmo No. 5 Mine. In the lease agreement, Kentucky Berwind retained the right to approve long-term contracts for the sale of coal to any third party; required Kyber to submit samples and analyses of coal; required Kyber to maintain records of coal produced and sold; required Kyber to regularly furnish it with mine maps; permitted Kentucky Berwind's inspectors to enter on to the premises for coal sampling, inspections, surveying, measuring, and ascertaining the conditions of the mine; required Kyber to adhere to the laws and regulations promulgated under the Mine Act; required Kyber to secure the written permission of Kentucky Berwind to sublease or assign any part of the leasehold. JSF Ex. B at 13, 15, 18-20, 21, 22-23 (Lease Agreement). The lease agreement indicates that Kentucky Berwind had the authority to oversee many of the operations of Elmo No. 5, including whether health and safety regulations were being followed at the mine. As discussed in section A, *supra*, it is the authority to control operations, and not the actual exercise of that authority, that is relevant in determining whether an entity qualifies as an operator.

Kentucky Berwind's substantial involvement in the workings of Elmo No. 5 Mine is particularly illustrated in three instances. First, Kentucky Berwind regularly inspected Elmo No. 5 pursuant to the lease agreement with Kyber. JSF Ex. B at 19-20. Kentucky Berwind's inspectors conducted inspections of the mine on at least 16 occasions between June 19, 1990, and September 24, 1993. JSF 224-26. Kentucky Berwind's inspectors had the right to enter the mine and mine property and inspect at will. JSF 228. As part of these inspections, Kentucky Berwind's inspectors developed inspection reports detailing their observations. JSF Ex. D. The reports noted the general conditions of the surface and underground areas, including whether the roof control plan was being followed, whether ventilation was adequate, and the type and condition of the mine floor and roof. JSF Ex. D-2.

Second, Kentucky Berwind's oversight is shown by its reaction to the April 1993 roof fall at the Elmo No. 5 Mine caused by blasting at the neighboring Corvette mine. JSF Ex. E. Kentucky Berwind was notified of the incident and sent its head inspector, Steve Dale, to the mine to determine the cause of the problem. JSF 295-302, Ex. E (Memo to Hunt from Dale, dated April 20, 1993).[2] In particular on April 12, 1993, Dale obtained mine maps from Jesse Branch and went to the Elmo No. 5 Mine. JSF Ex. E. He accompanied an MSHA inspector and an AA&W representative underground and examined the cause of the roof fall. JSF 298, Ex. E. One citation was issued to the mine for the fall. JSF 300, Ex. E. Dale worked with Jimmy Walker, President of Kyber and Jesse Branch, to come up with an acceptable solution for blasting at the Corvette Mine so as not to endanger the safety of miners at the Elmo No. 5 Mine. JSF 301, Ex. E. Dale also ensured that the violation was abated. JSF Ex. E. This sequence of events, which was stipulated to by the parties (JSF 302), unquestionably shows Kentucky Berwind's substantial involvement with the Elmo No. 5 Mine. Even the judge, following the incorrect test of day-to-day control, stated that "this may show that Kentucky Berwind was 'involved' with the operation at the mine." 17 FMSHRC at 715.[3] Unlike the majority and the judge, I do not dismiss this as an isolated instance of Kentucky Berwind's taking control in order to protect its property rights. Slip op. at 20; 17 FMSHRC at 714-15. I agree with the Secretary that the level of control that Kentucky Berwind exhibited with regard to this roof fall plainly demonstrates that Kentucky Berwind had the authority to actively oversee operations at the mine and would exercise that authority when a specific need arose for it to do so. S. Br at 43.

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[2] According to Dale's April 20, 1993 memo, Dale notified the president of Kentucky Berwind, Raymond Brainard, about the roof fall, who, in turn, directed Dale to investigate. JSF Ex. E.

[3] Although the majority today espouses an operator test that focuses on substantial involvement rather than the judge's day-to-day approach, my colleagues, in actuality, seem to be applying a more stringent test calling for day-to-day control. Certainly, the facts here indicate that Kentucky Berwind's involvement with Elmo No. 5 was far greater than a scintilla and should be considered substantial.

The third indicium of Kentucky Berwind's substantial involvement is that Kentucky Berwind participated in decisions concerning changes in mining direction. JSF 188, 189, 191, 192. In particular, Kyber notified Kentucky Berwind before decisions were made to not mine an area that had been projected to contain recoverable coal. JSF 191. Kyber sought guidance from Kentucky Berwind as to whether mining should continue in certain areas where the coal contained an unusually high level of inherent ash. JSF 193. During the process of waiting for a decision from Kentucky Berwind as to the direction of future mining, AA&W mined an area of the mine that had prior approval. JSF 190. Accordingly, Kentucky Berwind's authority to approve or disapprove mining changes had a significant effect on the actual working of the mine.

The case of *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994) is instructive. There, the Commission found the level of involvement of W-P Coal Company, which is comparable to that of Kentucky Berwind, sufficient to support the Secretary's decision to proceed against W-P as an operator. *Id.* at 1411. Like Kentucky Berwind, W-P held the mining rights to the mine but contracted with Top Kat to extract the coal in return for royalty payments paid to W-P. *Id.* at 1407. The Commission found significant that W-P personnel visited the mine frequently, had met with MSHA personnel regarding mine conditions, and had involvement in the mine's engineering, financial, production, personnel, and safety affairs. *Id.* at 1411. Similarly, Kentucky Berwind inspectors were on mine premises regularly and had contact with MSHA following the roof fall incident. JSF 224-26, 302, Ex. E. Under the lease agreement with Kyber, Kentucky Berwind retained authority to oversee financial, production, engineering, and safety affairs. JSF Ex. B at 13-15, 18-20, 21, 22-23. In *W-P Coal*, the Commission recognized that the Secretary did not have to show that the owner and the contract operator were co-equals in order for the Secretary to proceed against the owner of the mine. 16 FMSHRC at 1411. The Commission expressly did not reach the argument that an entity only passively involved with a mine was also properly cited for a contractor's violation, but found W-P's involvement more than a sufficient basis for MSHA to proceed against it. *Id.* at 1411 n.5. Applying a similar substantial involvement test, Kentucky Berwind had sufficient participation with the workings of the Elmo No. 5 Mine for the Secretary to proceed against it as an operator.

Finally, and perhaps most importantly, Kentucky Berwind was the "owner of the premises." Lease Agreement, JSF Ex. B at 18. Pursuant to *Andrus,* 581 F.2d at 861-62, and the plain terms of the Mine Act section 3(d), which the majority seems quite willing to disregard, Kentucky Berwind is an operator by virtue of the fact that it is "any owner." Accordingly, I would reverse the judge's determination that Kentucky Berwind was not an operator under the Act.

C. Jesse Branch

I join with the majority in concluding that Jesse Branch and Kyber functioned as a single entity with respect to their control over the operation of the Elmo No. 5 Mine. Slip op. at 38-39. Having concluded that Kyber was an operator having substantial involvement with Elmo No. 5 Mine, I am led to the conclusion that Jesse Branch also qualifies as an operator.

Additionally, I also believe that Jesse Branch, standing alone, qualifies as an operator. Under Mine Act section 3(d), an operator is defined as "any independent contractor performing services at a mine." 30 U.S.C. § 802(d). The evidence unquestionably reveals that Jesse Branch was an independent contractor performing services at the mine.[4] Jesse Branch performed the engineering services of surveying, spad setting and preparation of mine maps. Slip op. at 17. The mine maps prepared by Jesse Branch established the projections that AA&W was required to follow when driving entries in the mine, and also designated the areas in the mine from which coal could not safely be extracted because of the presence of natural gas wells. 17 FMSHRC at 693; JSF 166, 167, 178, 179. Jesse Branch employees generally surveyed and set spads at the mine on a weekly basis. 17 FMSHRC at 692-93. Jesse Branch provided AA&W with technical expertise that AA&W lacked regarding on-site implementation of the projections, the mine cover, and the number of entries it would sustain. 18 FMSHRC at 241-42. While conducting surveys at the mine, Jesse Branch employees also collected information concerning the dimensions of the coal seam, entry ways, and coal pillars, the centers on which mining was conducted, stopping lines, conveyor beltlines and roof falls. 17 FMSHRC at 693. Jesse Branch also inspected the drainage ponds on the surface of the mine. JSF 209. The majority concludes that "Jesse Branch played an important role in the operation of the Elmo No. 5 Mine." Slip op. at 17. On the additional ground that Jesse Branch was, at the very least, an independent contractor performing services at the mine, I would reverse the judge and conclude that Jesse Branch constituted a separate operator under the Act.

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[4] The Secretary argued to the judge that Jesse Branch was as an independent contractor performing services at the mine and as such "[fell] squarely into the Mine Act's definition of an 'operator.'" S. Mot. Part. Sum. J. at 33 n.27. The judge failed to address the Secretary's independent contractor argument. In her brief to the Commission, the Secretary also asserted that Jesse Branch is an operator under the Act because it was an independent contractor performing services at the Elmo mine. S. Br. at 55 n.21. While the majority does not entertain the Secretary's independent contractor argument (slip op. at 16 n.16), I believe the Secretary's petition for review, which generally disputed the judge's holding that Jesse Branch was not an operator under the Act (S. PDR at 1-2, 17), more than adequately encompasses the Secretary's argument. This Commission is generally willing to broadly construe the petition for review to preserve parties' argument. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) (construing petition to implicitly request reversal of judge's unwarrantable failure, negligence and section 110(c) conclusions when petition merely requested that Commission "reverse the judge's decision"); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998) (Commission addressed unwarrantability determinations when petitioner only generally raised negligence issue in PDR), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999). Thus, I believe the issue is properly before the Commission and should be addressed.

D. Berwind

In determining that Berwind was not an operator, the judge applied the incorrect day-to-day control test and failed to inquire into whether Berwind was involved in the Elmo No. 5 Mine. The majority, although rejecting the judge's day-to-day test, does not stray far from it. What the majority overlooks is that when the term "operator" was first defined in the Coal Act, Congress specifically explained that *indirect* operation, control or supervision of a mine may render a person an operator. S. Rep. No. 91-411, at 44; *Coal Act Legis. Hist.* at 170. Berwind provides a perfect example of an entity that exercised substantial indirect control and supervision such that it qualifies as an operator under the Act.

Berwind is the parent company of Kentucky Berwind, Kyber and Jesse Branch. JSF 58. It is a holding corporation whose business it is to oversee its subsidiaries. JSF 63. Berwind had the power to direct its subsidiaries as well as to approve and remove the officers of the subsidiaries. JSF 64-66. The parties stipulated that three individuals were the primary officers that acted on behalf of Berwind. JSF 62. Those individuals were Thomas Falkie, president of Berwind, and vice presidents Richard Rivers and Bryan Ronck. JSF 60, 62.[5] All three of those individuals were also board members or officers for Kentucky Berwind, Kyber, and Jesse Branch. 17 FMSHRC at 688. The president of Kyber and Jesse Branch, Jimmy Walker, reported directly to the president of Berwind, Thomas Falkie, regarding the operation of the two companies. JSF 69. Similarly, the president of Kentucky Berwind, Ray Brainard, reported to Falkie. JSF 69.[6] Berwind had the power to approve, reject, or replace the officers of Kyber, Jessie Branch, and Kentucky Berwind. 17 FMSHRC at 688; JSF 66, 67. By virtue of the fact that Berwind unilaterally selected and/or approved the officers of Kentucky Berwind, Kyber, and Jesse Branch, Berwind exerted substantial indirect control over the Elmo No. 5 Mine.

When the President of Jesse Branch and Kyber, Jimmy Walker, selected AA&W to contract mine the Elmo mine, Walker advised the president of Berwind, Falkie, of the selection. JSF 97. Berwind maintained a policy that its subsidiaries must only engage mining contractors to perform mining operation on land owned by Berwind subsidiary companies that were capable of operating the mines in a safe manner, including operation in conformity with MSHA's regulations and state mining regulations. JSF 98. In order to conform to corporate policy, Berwind requested Kyber to assure itself that AA&W was capable of operating the Elmo mine in a safe manner. JSF 99. Accordingly, Berwind had indirect substantial involvement in the safety of the Elmo No. 5 Mine.

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[5] On at least two occasions, Thomas Falkie visited the Elmo mine. JSF 229. Bryan Ronck visited AA&W's corporate office. JSF 229.

[6] Bryan Ronck, Berwind's vice president and chief financial officer, oversees the controller for Kyber and Jesse Branch, Bob Bond. JSF 34, 60, 74.

Berwind performed substantial oversight of Kyber, Jesse Branch, Kentucky Berwind, and the workings of the Elmo mine. The judge found that Berwind is involved in decisions that affect the general direction of business of its subsidiaries. 17 FMSHRC at 688. Berwind reviews financial statements and coal production reports of Kentucky Berwind, Kyber, and Jesse Branch. *Id.* at 688-689. In particular, Falkie and Rivers, Berwind's vice president, who is also vice president of Kyber, Jesse Branch, and Kentucky Berwind, monitor Kentucky Berwind's lease-holding activities and are aware of the economic performance, personnel, coal sales, and coal quality of Kyber and Jesse Branch. *Id.* at 689. Falkie receives monthly reports from Kyber and Jesse Branch regarding coal production at each mine in which contract mining is conducted. *Id.* Kyber submits reports to Berwind listing the projected tonnage for the Elmo No. 5 Mine, and the amount of coal actually mined, along with small mine maps of areas that have been mined. JSF 281. Kyber also submits financial reports documenting monies generated in mining operations. JSF 282. After the explosion, from which these citations stem, Falkie began receiving internal daily reports on the amount of coal processed at Kyber and Jesse Branch preparation plants. JSF 77.

Berwind had the ultimate responsibility to resolve disputes between its subsidiaries, including disputes over the feasibility of mining certain resources owned by Kentucky Berwind. JSF 68. This power of final resolution is very significant in that, if Kyber and Kentucky Berwind were to disagree over the mining projections at Elmo No. 5, whether or not they ever did so, it was up to Berwind to make the final binding determination. *Id.* As set forth above, the authority to control is a relevant consideration in the operator inquiry.

Berwind's control is best illustrated in its economic dealings with Kyber and Jesse Branch. The parties stipulated that neither Jesse Branch nor Kyber are profitable companies. JSF 284. Berwind as the shareholder of those companies provides some funds to them for their operating expenses and capital expenditures. *Id.* All significant expenditures are approved by Berwind. *Id.* Berwind provided the capital expenditure required to conduct the preparatory and face-up work necessary to begin mining at the Elmo mine. 18 FMSHRC at 234; JSF 286. In its economic dealings, Berwind had direct substantial involvement with the mine.

Berwind's direct and indirect participation in the workings of Elmo No. 5 Mine more than qualifies as substantial involvement. For this reason, I would reverse the judge's finding that Berwind is not an operator.

E. Unitary Operator

Although I join in the majority's adoption of the unitary operator test, I conclude that all four Berwind entities in question satisfy the Commission's test. Therefore I dissent on that ground.

Under the Commission's test, four general factors are considered, but not every factor need be present and no particular factor is controlling. Slip op. at 33. Those factors are (1) interrelation of operations, (2) common management, (3) centralized control over mine health and safety, and (4) common ownership. *Id.* Without question, the record conclusively establishes the two factors of "common ownership" and "common management." *Id.* at 2, 56. As to the factor of "interrelation of operations," the high level of common management causes a substantial degree of interrelation in this case. I agree with the Secretary that there is no way to separate the actions Falkie, Rivers, and Ronck took as members of the boards of Berwind's subsidiaries from their actions as members of the board for Berwind. S. Br. at 46 n.17. Indeed, both Rivers, General Counsel of Berwind (as well as vice president of Kentucky Berwind, Kyber, and Jesse Branch) and Ronck, Chief Financial Officer of Berwind (as well as treasurer of Kentucky Berwind, Kyber, and Jesse Branch) provided legal and financial oversight to the subsidiaries. JSF 73-74, 102-103.

Interrelation of operations is also illustrated in the financial arrangements among the companies. Berwind provided Kyber and Jesse Branch with necessary capital for expenses and capital expenditures and never received a dividend as a shareholder of Kyber. 18 FMSHRC at 212; JSF 284. Berwind was involved in the financial analysis aspects of some equipment purchases made by Jesse Branch and Kyber. JSF 285. A high degree of interrelation is further shown in the arrangement between Berwind, Kyber/Jesse Branch, and Kentucky Berwind as to the power to approve or disapprove mining changes at the Elmo No. 5 Mine. JSF 188-193. Kyber had the bottom-line authority to approve mining projections in its relationship with AA&W; Kentucky Berwind in turn had the authority to approve or disapprove any changes in mining projections in its relationship with Kyber; and in case of any disputes between them, Berwind had the ultimate responsibility to resolve disputes among its subsidiaries. 18 FMSHRC at 237-39; JSF 68, 188-93. These arrangements show a high degree of interrelation between the entities with Berwind having the final and dispositive authority in disputed matters among the entities.

The Berwind entities also had a high degree of interrelation with respect to health and safety matters. This interrelation of operations is particularly illustrated by the April 1993 roof fall at the Elmo Mine. The memo of Kentucky Berwind head inspector Steve Dale, dated April 20, 1993, that the parties stipulated was an accurate account of the activities of personnel of Berwind and its subsidiaries, is on the parent company Berwind's stationery. JSF 302, Ex. E. According to the memo, Randy Scott, the vice president of engineering for both Jesse Branch and Kyber contacted Dale about the roof fall. JSF 302 Ex. E. Dale contacted the president of Kentucky Berwind, Ray Brainard. *Id.* Brainard reports to Falkie, president of Berwind and

Chairman of the Board for Kentucky Berwind, Kyber, and Jesse Branch. JSF 34, 55, 60, 69. Dale was sent to investigate. JSF Ex. E. He met with Randy Scott and Jim Akers of AA&W and discussed the effect the blasting had on the Elmo No. 5 Mine. *Id.* He reported his findings to the president of Kentucky Berwind. *Id.* Dale and other Kentucky Berwind inspectors investigated the roof fall. *Id.* As part of his investigation, Dale went to Jesse Branch to pick up maps of the Elmo No. 5 Mine. *Id.* Dale then accompanied MSHA in its inspection of the Elmo mine, and ensured that all citations were properly abated. *Id.* Dale was involved in working out a plan between Walker, president of Kyber and Jesse Branch, and the neighboring Corvette mine. *Id.*

As to the fourth factor, centralized control over health and safety matters, it may be true that AA&W handled the day-to-day health and safety matters. But this is not dispositive. As the court stated in *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), with respect to centralized labor relations, upon which the majority draws for its test: "Although [the company's] day-to-day labor matters were apparently handled at the local level, this fact is not dispositive. 'A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters. . . by its divisions or subsidiaries.'" *Id.* at 26 (quoting *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981). As set forth previously in my opinion, both Kentucky Berwind and Berwind required compliance with health and safety regulations at the Elmo No. 5 Mine. Berwind had the authority to replace any of its subsidiaries' officers and to resolve disputes among subsidiaries. Berwind also had significant funding control over Kyber/Jesse Branch who, in turn, held the bottom line authority for determining mining projections at Elmo No. 5 Mine as well as approving the mine plan, which governed many health and safety matters at the mine. *See* slip op. at 11-12. Berwind may not have had local control of the safety of the mine, but the record compels the conclusion that Berwind possessed the clout in any matters of dispute between its subsidiaries and had the authority, by its control of management and funding, to direct and oversee the four entities at issue.

The evidence in this case reveals that, although ostensibly separate corporations, the Berwind respondents acted as an integrated mining operation[7] together with the contract operator AA&W to perform the functions that were necessary to the mining operation at the Elmo No. 5 Mine. Each of the respondents had a specialized function in which they engaged for the benefit of the overall mining operation. Berwind was established to oversee the subsidiaries and, as such, it provided its subsidiaries with the capital necessary for their operations. JSF 283, 285, 286. Berwind specifically provided the capital for the face-up work necessary to begin operation of the Elmo No. 5 Mine. JSF 286. The officers of the subsidiaries reported to Falkie, who was the president of Berwind, as well as the Chairman of the Board for Kyber, Kentucky Berwind, and

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[7] Senior MSHA official Jack Tisdale explained the integrated mining operation ("IMO") as a mining operation in which a business entity that owns the right to extract the coal, markets the coal, and capitalizes the operations. Tr. 330-33. The specialized functions of the IMO are divided into departments including sales, operations, operations support, finance, purchasing, legal, human resources, and corporate development. Tr. 330.

Jesse Branch. JSF 23, 34, 55, 60, 69. Members of Berwind's Board of Directors sat on the boards of directors for each of its subsidiaries. JSF 23, 34, 55, 60. Kyber and Jesse Branch contracted out the actual extraction of coal, supervised the extraction, and provided engineering support necessary to run the mine. 18 FMSHRC at 207; JSF 22, 33, 149. Coal consumers paid Kyber for coal extracted. JSF 236. Kyber paid royalties to the Berwind subsidiary, Kentucky Berwind, who was the owner of the premises, and who also performed a supervisory role over the mining. JSF 52, 188-89, 191-93. In turn, Kentucky Berwind paid dividends to Berwind. JSF 287.

The four entities acted in concert to start up the mine, to finance its operation, and to keep the mine running. The fact that these four entities have been separately incorporated should not bar their treatment as an operator, when if one entity was performing all these functions that entity would clearly be held to be an operator. In determining that Berwind exercised "such pervasive control" over the entities that the entities should be treated as one (slip op. at 33), I find relevant that Kyber and Jesse Branch were not profitable, self-supporting companies. JSF 284. Berwind provided them with funds for operating expenses and capital expenditures. *Id.* Effectuation of the Mine Act's purpose is clearly enhanced by requiring large and well-funded entities that oversee subsidiary coal production companies, which are not so well funded, to be involved in safety aspects of the mine. *Cf. Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981) ("A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted") (citing *Republic Steel Corp.*, 1 FMSHRC 5, 11 (April 1979)).

Under the test announced by the majority, I conclude that Berwind, Kentucky Berwind, Kyber, and Jesse Branch constitute a unitary operator.

F. Notice

I join with Chairman Jordan in concluding that, because we adopt the unitary operator theory as part of an adjudicative proceeding, it is appropriate to apply the theory to the relevant parties in the proceeding. Because I conclude that all four entities constitute a unitary operator, neither Kyber nor Jesse Branch nor Kentucky Berwind nor Berwind may claim lack of notice of the Secretary's theory as a bar to their potential liability as operators.

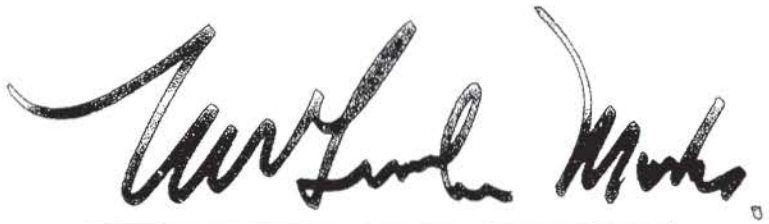
Moreover, there was sufficient court and Commission precedent to put Kyber, the lessee of the mine, on notice that it was subject to potential liability as an operator as a result of the D.C. Circuit's interpretation of section 3(d) of the Mine Act in *Andrus*, 581 F.2d at 861-62. There the court opined that the clause, "who operates, controls, or supervises a coal or other mine" in section 3(d) only modified the preceding noun "other person," thereby rendering *any* "owner" or "*lessee*" liable as an operator regardless of its level of involvement in or control over the mine's activities. *Id.* (emphasis added). This interpretation of the language of section 3(d) was approved by the D.C. Circuit in *Chaney Creek*, 866 F.2d at 1432 n.9 and *International Union, UMWA v.*

FMSHRC, 840 F.2d at 82 n.8. *See also Bituminous Coal Operators Ass'n, Inc. v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977) ("But the [1969 Coal] Act does not limit the term operator to owners and lessees. It expressly mentions any 'other person who . . . controls or supervises a coal mine.'") In addition, the Commission case of *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994), held that a lessee was properly subject to suit as an operator of the subject mine.

Likewise, Jesse Branch should have been on notice that it was potentially liable as an operator because the record compels the conclusion that it was an independent contractor performing services at the mine. So too, Kentucky Berwind, as the owner of the mine, should have been on notice that it was potentially liable as an operator. *Andrus*, 581 F.2d at 861-62. Similarly, Berwind, by virtue of its involvement with the Elmo mine, as well as because it provided supervision and control over the owner and lessee of the mine, should have been on notice that it potentially could be held liable as an entity "who operates, controls, or supervises a coal or other mine." 30 U.S.C. § 802(d). Accordingly, I conclude that all four Berwind entities had sufficient notice that they were potentially subject to liability as operators under the Mine Act.

G. Conclusion

When introducing the term "operator" in the Coal Act, Congress intended that the term "be as broad as possible." S. Rep. No. 91-411 at 44; *Coal Act Legis. Hist.* at 170. In keeping with that Congressional mandate, I conclude that all four entities at issue — Berwind, Kentucky Berwind, Kyber, and Jesse Branch — qualify as operators. I also conclude that they constitute a unitary operator. Accordingly, I would reverse the judge's incorrect determinations that Berwind, Kentucky Berwind, and Jesse Branch were not operators under the Mine Act.



Marc Lincoln Marks, Commissioner

Commissioner Riley, concurring in part and dissenting in part:

I concur in the majority opinion with respect to Parts II.A and II.B, regarding the revised "operator test." However, I respectfully dissent with respect to Part II.C, regarding the "unitary operator" theory.

I do not believe it is necessary to reach the Secretary's alternative theory that Berwind and its three subsidiaries constitute a "unitary operator" in order to resolve this case. Indeed, nothing is gained by application of the new interpretation offered by the Secretary.[1] Even the majority declines to apply it, either as originally briefed or as argued before the Commission. Instead, the majority applies the legal equivalent of CPR and attempts to resuscitate the unitary operator concept with a reworked theory of their own. The majority then argues collectively, and in individual separate opinions, that the Commission is bound to defer to what each of them presumes the Secretary meant to say but did not. For the following reasons, I decline to join my colleagues in their novel approach to statutory interpretation.

As a specialized tribunal, created by Congress to "develop a uniform interpretation of the [Mine Act] law" (*Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission Before the Senate Comm. on Human Resources*, 95th Cong. 1 (1978) ("*Nomination Hearing*")), the Commission receives cases such as this in a far different posture than courts of general jurisdiction. Nonetheless, the Commission has frequently reviewed the Secretary's interpretations of the Mine Act under the two-step formulation in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). First, the Commission, must "try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). If the intent of Congress is indeed clear, the Commission must give effect to that intent. *See Chevron*, 467 U.S. at 842-43. The Commission and the courts call this initial inquiry "*Chevron I*" analysis. *See, e.g., Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (1989). If, however, legislation is "silent or ambiguous with respect to the specific issue" (*Chevron*, 467 U.S. at 843), the Commission or a court reviews the agency's interpretation as "'entitled to respect if based upon a reasonably

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[1] The two corporations found by the majority to constitute a unitary operator, could more efficiently have been cited under conventional notions of operator status. With respect to Kyber, while we rejected both the Secretary's proffered "overall control" standard as well as the judge's "day-to-day-control" interpretation, a substantial majority of the Commission nonetheless found Kyber liable under our revised "operator test." Thus, we agree with the Secretary that Kyber is already covered under the Act's more traditional definition of operator. Similarly, Jesse Branch could simply have been cited as a contractor performing services at a mine, without having to tie up the resources of the Commission and the courts attempting to pioneer a new, complicated, and, in view of the majority's modifications, apparently incomplete interpretation of the Act.

defensible construction of the Act.'" *Kenrich Petrochemical, Inc. v. NLRB*, 893 F.2d 1468, 1476 (3rd Cir. 1990), *quoting NLRB v. Local 54, Hotel Employees & Restaurant Employees Int'l Union*, 887 F.2d 28, 29 (3d Cir. 1989). *See also United Food*, 484 U.S. at 123 ("where 'the statute is silent or ambiguous,'" the Board's statutory interpretation should be sustained if it is "rational and consistent") (citations omitted). This same analysis, known as *Chevron II*, is applied to Commission decisions by the court, where they "generally need ask only whether the [Commission's] interpretation is rational and consistent with the statute, according deference to reasonably defensible constructions of the Mine Act by the Commission." *Simpson v. FMSHRC*, 842 F.2d 453, 458 (1988) (internal quotations and citations omitted).

The majority asserts that the meaning of the terms "association" and "organization" as used in the statutory definitions of the terms "person" and "operator" is open to alternative interpretations, as reflected in dictionary definitions. Slip op. at 23. The statutory language is not clear as to whether more than one entity may constitute a single operator. It also appears that Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Thus, in the instant case, the Secretary has met her *Chevron I* burden, in raising questions about who is ultimately responsible for safety violations at a mine. Her complex unitary operator theory, however, only complicates and protracts a case that can be more efficiently resolved on much simpler grounds.

In any event, I must break from my colleagues in the majority because I do not agree with their *Chevron II* analysis, asserting that the Secretary's proffered interpretation must be accorded deference by this Commission. It is my belief that, notwithstanding voluminous pleadings and the unprecedented amount of rehabilitation massaged into the Secretary's unitary operator theory by the majority, it is neither a rational and consistent nor a reasonably defensible construction meriting deference under the *Chevron* model.

To support their *Chevron II* analysis, the Secretary and the majority rely on cases holding multiple entities liable as a "single employer" or "single enterprise" under at least three other statutes, including the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq.,[2] Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.,[3] and the Fair Labor

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[2] Section 2 of the NLRA contains the following definitions:

> (1) The term "person" includes one or more individuals labor organizations, partnerships, associations, [or] corporations . . . .
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

29 U.S.C. § 152.

[3] Section 701 of Title VII provides:

Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.[4] S. Br. at 13-16; slip op. at 25-29, 32. *Chevron* deference is warranted in this instance, the Secretary argues, because she is doing exactly what Congress left her the discretion to do under the Mine Act. S. Br. at 10-11.

Reviewing the Secretary's various submissions in support of the unitary operator theory, one absolute goal obviously drives her position — that *the combination of Berwind and its three subsidiaries, operating in concert, are a single entity, a "unitary operator" under the Mine Act.* She frequently and unequivocally reiterates this objective which underlies her statutory interpretation: "[T]hat Berwind operated the Elmo Mine through Kentucky Berwind, Kyber, and Jesse Branch, i.e., that Berwind and its subsidiary corporations together constituted one unitary operator under Section 3(d) of the Act . . . ." S. PDR at 9. "The Secretary contends in this case that Berwind and its three subsidiary corporations constituted a unitary 'operator' under the Mine Act . . . ." S. Br. at 12. "[W]e would submit that all of them must nonetheless be determined to be operators . . . under this unitary operator theory which we derive from Section 3(f) of the Act." Oral Arg. Tr. 55. After pouring through every submission of the Secretary, I have been unable to find any equivocation compromising her position that all four entities must be held accountable as a single entity known as a unitary operator. The majority concedes this point on page 36 of their opinion.

The language of *Chevron* provides direction that is helpful in deciding the case at hand. "[T]he meaning of a word must be ascertained in the context of achieving particular objectives." *Chevron*, 467 U.S. at 861. If, as the majority asserts, the Commission is obligated to follow

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> (a) The term "person" includes one or more individuals, governments, . . . labor unions, partnerships, associations, corporations legal representatives, mutual companies, joint-stock companies, trusts, [or] unincorporated organizations . . . .
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> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees . . ., and any agent of such a person . . . .

42 U.S.C. § 2000e.

[4] The cases cited by the Secretary apply and interpret section 3(r) of the FLSA which provides:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . . .

29 U.S.C. § 203(r).

Chevron here, and the Secretary's stated objective is to find Berwind and its three subsidiary corporations to be a unitary "operator," we must examine, under this *Chevron* language, whether the Secretary's interpretation achieves that goal.

The Commission must determine whether to defer to the Secretary's interpretation in the factual context of this case according to the Secretary's stated reasons for seeking deference. In this regard, I believe that the majority's declaration, "we consider the Secretary's unitary operator theory to be a gap-filling measure designed to flesh out the definition of an 'operator' . . . entitled to deference because it is consistent with the purposes and policies of the [Mine] Act" (slip op. at 28) to be not only premature but, in the final analysis — wrong.

As everyone involved with this proceeding is aware, hundreds of pages of pleadings and evidentiary material from the various parties have accumulated in the voluminous record before us. The majority apparently believes that the Secretary has satisfied the *Chevron II* threshold. The Secretary's briefs, however, provide no comprehensive strategy to apply the unitary operator approach under the Mine Act to the legal and economic realities of the industry today. Unfortunately, the sheer volume of the record, including the Secretary's various arguments and many filings, taken as a whole, have a tendency, not to clarify her position, but to obscure it.

The majority wastes little time and even less space trying to explain the Secretary's interpretation. They apparently prefer the NLRA and Title VII models, and do not like the FLSA blueprint. Slip op. at 25-29, 32. Particularly troubling is the lack of analysis of language added from *Lihli Fashions Corp. v. NLRB*, a case not mentioned in any submission to the Commission. Later, we learn that *Lihli's* contribution is to turn what is represented as a simple four-part test into as little as a one-part test if expedience demands it because the record comes up short on facts in a particular case: "To demonstrate unitary operator status, not every factor need be present, and no particular factor is controlling." Slip op. at 33.

Clearly, if the majority had spent more time examining and explaining its test for determining operator status (three paragraphs and a footnote) (slip op. at 8-9 & n.4) as they did defending the Secretary's deference arguments (more than seven pages) (slip op. at 25-32), the additional scrutiny would have forced the majority to come to grips with the dichotomy presented by two sentences in consecutive paragraphs of their opinion: "The Secretary argues that pursuant to her unitary operator theory, the record evidence compels the conclusion that Berwind and its wholly owned subsidiaries together constituted a single business enterprise . . . and therefore qualifies as a unitary operator under the Mine Act." Slip op. at 35. Followed by: "A majority of the Commission concludes that Berwind and its three subsidiaries do not qualify as a unitary operator." *Id.* What is the import of these two juxtaposed sentences? The Secretary asserts that something is true and the majority responds that the Secretary is mistaken. Unfortunately, the point upon which the majority says the Secretary is in error happens to be the underpinning for the Secretary's request for deference.

When the test was finally applied by the majority (slip op. at 35-39), my colleagues should have recognized that something was seriously amiss. The best they could accomplish with their ad hoc theory was to find that only two of the four entities cited by the Secretary qualify as a single unitary operator, far short of the objective the Secretary argued warranted such a determination.[5] The test, even in its most charitable application to this case by the majority, fails to achieve the Secretary's stated statutory purpose.

The majority seems to be trying to graft a new prong onto the *Chevron* test. Their new prong, or *Chevron III*, should be called "Deference to Expediency." It is apparently of no consequence to them that the agency asserting expertise entitling it to deference from the Commission and by the courts, even with the majority's assistance, has not articulated an interpretation that accomplishes the objectives the agency set out as its rationale for seeking deference. They would defer anyway, whether or not the Secretary has presented a reasonable construction of the Mine Act.

Contrary to the majority's perspective, the purposes and goals of the Mine Act are not furthered by sympathetically deferring when the Secretary comes before this Commission. The Secretary has a duty to deliver a workable theory. The majority's inability to find Berwind and its three subsidiaries to be an integrated unitary operator under the Mine Act as the Secretary argues, does not advance the Secretary's statutory goals in this case and therefore should doom her request for deference. As it now stands, the majority decision depresses the jurisprudential bar so far that 50% has become a passing grade. This outcome represents neither a rational and consistent, nor a reasonably defensible, construction worthy of deference under the *Chevron* model.

C. Deficiencies in the Unitary Operator Test

The Secretary cites the standard basis for broad agency authority: "In cases arising under the Mine Act, it is important to remember that Congress intended the Mine Act to be liberally interpreted. [As we are certainly aware,] the primary purpose of the Mine Act [is] to protect mining's most valuable resource — the miner, and [the Secretary reminds us that] Congress intended that the Act be expansively interpreted to achieve that purpose. It is also important[, we are told,] to remember that Congress specifically designed the definition of an operator . . . to be as broad as possible . . . ." S. Br. at 11-12 (citations and internal quotations omitted). The use of this boilerplate would become problematic at the oral argument.

On October 29, 1996, the Secretary filed with the Commission a statement opposing the motion of amici curiae to participate in oral argument. So certain was the Secretary that amici participation would serve no useful purpose that she asserted, "[i]t should be noted that under

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[5] The Secretary never raised the issue before the judge or argued to the Commission that the Kyber/Jesse Branch relationship alone was a unitary operator, irrespective of the status of the other cited parties.

Commission Rule 73, 29 C.F.R. § 2700.73, an entity seeking intervention must demonstrate [t]he reasons why [its] interest is not adequately represented by parties involved in the proceeding. The moving amici curiae have failed to allege, much less demonstrate, why the captioned respondents are unable fully and adequately to represent their interests at oral argument. Indeed, as is apparent from their brief, the moving amici curiae have not even cast the arguments made to the Commission from a perspective significantly different than that of the captioned respondents. . . ." S. Statement in Opp'n to Mot. of Amici Curiae to Participate in Oral Argument at 2 (internal quotations omitted). While it is clear that the Secretary was referring in this instance to amici for the Contestants, it is apparent that something offered to this Commission by amici regarding the unitary operator theory touched a raw nerve.

The comment that provoked that reaction pertained to the judge's second rationale for rejecting the unitary operator test, that it could "be used to extend jurisdiction without a logical limit." 18 FMSHRC at 233. This was rather forcefully rejected by the Secretary and glossed over by the majority, yet at some point the Secretary began to search for some definable limits for the application of her new theory.

In their brief, the United Mine Workers of America ("UMWA") attempted to "gap-fill" the Secretary's awkward unitary operator test by adding the qualification of "economic control." UMWA Br. at 5-9. Their approach would proscribe limits on the test by requiring that something other than the economic relationships of the parties be examined to address "the practical realities of trying to further safety and health in the mine industry." *Id.* at 5. Something in the Secretary's approach apparently troubled the UMWA and this concern was acknowledged by the Secretary when she too offered up her variation on this theme of "economic control" at oral argument. Oral Arg. Tr. 8, 10-15.

Although the Secretary conceded under questioning that "economic involvement" was not directly mentioned in the statute (Oral Arg. Tr. 10-11), her defense must be read as an attempt to put some stricture into this fledgling theory. It is interesting that while rejecting the judge's contention of "jurisdiction without a logical limit" (18 FMSHRC at 233), the Secretary nevertheless saw a need to more specifically refine the test.

Since the majority only cryptically mentions either "economic control" or "economic involvement" (slip op. at 34 n.34), it is difficult to fully appreciate their reasons for rejecting this issue. What is apparent is that the majority has created the most dangerous kind of test imaginable – a test that is, simultaneously, too narrow to accomplish the Secretary's stated goals and too broad, so as to cause concern even to those who would, at first glance, be the most likely beneficiaries of the test.

Before we can uphold the Secretary's interpretation of the Act as permitting the designation of two or more related entities as a "unitary operator," we must define precisely the elements of an appropriate test to determine if related entities constitute a single operator. According to the Secretary's brief, her approach appears to be based upon the single employer

doctrine developed under the NLRA and Title VII and the common enterprise standard developed under the FLSA. *See* S. Br. at 12-16. The Secretary's position in Berwind is that when an association or other organization functions in an interrelated manner for the purpose of extracting or processing coal or other mineral and controls or supervises a mine through an entity, which is a component part of such association or organization, the entire association or organization and each participating part of the association or organization is liable for safety and health violations that occur at the mine. *See id.* at 9-10.

Why would that position alarm a labor union? What did they perceive that the majority does not? Perhaps it is that while the test fails to meet the Secretary's goals of finding Berwind and her three subsidiaries to be a unitary operator, it is so imprecisely drawn that they fear, not without some basis, of being tagged as a unitary operator in a future case. Nonsense? Not if one carefully reads the definitions of "person" contained in the two statutes on which the majority models its unitary operator test – the NLRA and Title VII. Slip op. at 25 n.21. Both statutes include in their definitions of person the terms *labor organizations* and *labor unions*. What guarantee can the majority or the Secretary give any labor organization that they too will not eventually be swept up in a jurisdictional blanket and be cited as a unitary operator? The answer is simple — none. Thus, the unitary operator theory, articulated by the majority, is not only ill-conceived, but it represents a step backward in enforcing the Mine Act.

I regret that my colleagues have not rejected the current request for us to rule on a theory that is still a work in progress, opting instead to wait for a more appropriate vehicle through which to reexamine the need for a unitary operator theory. Building upon the preliminary steps taken here, the Secretary could bring a revised and improved theory before the Commission in another case. Someday the Secretary may come before us with a case where all of the cited entities actually fit her own construction of the unitary operator theory. Such a development would bring the Secretary's agency expertise (the linchpin of *Chevron* deference) in alignment with her statutory authority. This, however, is not that case.

Much more appropriate would be to consider such a far reaching proposal through rulemaking under the Administrative Procedure Act, 5 U.S.C. § 55 et. seq. The advent of a unitary operator rule is a virtual sea change in the Secretary's approach to enforcement of the Mine Act, vastly expanding the circle of liability for violations.[6] So expansive is the potential impact of

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[6] The majority summarily dismisses the judge's observations that "'[p]arts of the industry have functioned in this way for years and . . . the Secretary has *never* had a policy of citing all corporate entities involved in the operation of a mine for the production operator's violations.'" Slip op. at 29 (quoting 18 FMSHRC at 233) (emphasis in original). To support their derision of the judge's accurate appraisal of the posture of this case, the majority cites *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 267 (Feb.1997), for the principle that the Secretary is always free to change her mind without notice or warning. Slip op. at 29. Unlike *Sunny Ridge*, however, this is not a fact-specific question about whether an inspector's allowing mining to continue in an area cited for a violation estopped the Secretary from later characterizing the violation as significant

this proposal that it will likely engender widespread reorganization of corporate relationships throughout the industry. Without a more comprehensive regulatory review by the Secretary to better delineate the length and breadth of her unitary operator theory as well as give notice to landowners, holders of mineral rights, operators, contract miners, labor unions, and other organizations, or interested parties, it is inappropriate and unwise for the Commission to cobble together an imprecise substitute merely to save face for the Secretary.[7]

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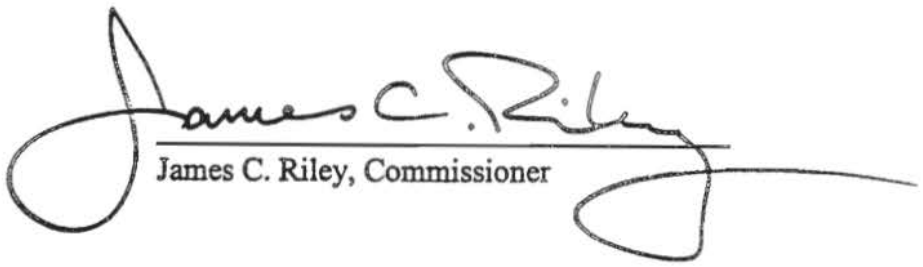
and substantial due to a likelihood of serious injury.

[7] The majority acknowledges "that this Commission has the authority to interpret the Mine Act" (slip op. at 33), citing examples of where that authority was exercised rather than how it is that the Commission has authority to "develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the [A]ct and to the mining industry and miners in appreciating their responsibilities under the law." *Nomination Hearing* at 1. The Supreme Court reiterated this legislative history in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), observing that the Commission "was established as in independent-review body" for the purpose stated in the previous sentence. *Id.* at 214. The Court took note of the Commission's authority under 30 U.S.C. § 823(d)(2) to review "novel question[s] of policy," and "substantial question[s] of law, policy or discretion." *Id.* at 208 n.9. Merely because the Commission has such authority, however, does not require, or even make it advisable, for the Commission to backstop the Secretary's incomplete proposal with its own attempt to resolve such a complicated issue. Especially where, as here, the majority opinion is accompanied by five individual opinions, for a total of six confusing and contradictory impressions as to what a unitary operator is, might be, or isn't. In this case, the Secretary is in the best position to consult with miners, operators, state regulators and others through rulemaking, for the purpose of developing a complete, fair and workable theory that will survive judicial review.

D. Due Process

In addition, I also concur in Commissioner Beatty's observations with respect to due process issues arising from holding any party liable as a "unitary operator" without Constitutionally-required notice. Slip op. at 44-47.



James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

The sole issue in this case is whether the Contestants, either individually or collectively, qualify as "operators" under the Mine Act. I find that none of the Contestants in these cases can be considered operators of the Elmo No. 5 Mine and, therefore, I respectfully dissent.[1]

A. Operator Status

The term "operator" is defined under section 3(d) of the Mine Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). To be an operator, a given entity must exhibit a substantial degree of involvement or participation in the operation of the mine. *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701 (3d Cir. 1979) ("*NISA*") (designation of persons as operators "requires substantial participation in the running of the mine"); *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 97 (4th Cir. 1985) (adopting "substantial participation" analysis of *NISA*).[2] In accord with these cases, in *W-P Coal Co.*, the Commission found that a lessee who hired a contractor to mine coal could be subject to liability under the Mine Act as an operator because of its "substantial . . . involvement" in the operation of the mine. 16 FMSHRC 1407, 1411 (July 1994).

In this case, the judge held that to establish that an entity is an operator under the Mine Act, the Secretary must prove that the entity, "either directly or indirectly, substantially participated in the operation, control, or supervision of the day-to-day operations of the mine, or had the authority to do so." 18 FMSHRC at 231. Contestants, in essence, agree with this approach. K. Br. at 12-16; B. Resp. Br. at 9-11. The Secretary, on the other hand, argues that the judge's requirement of "day-to-day" participation in the mine has no basis in the Mine Act or its legislative history. Instead, the Secretary claims that to qualify as an operator under section 3(d), "an entity must exercise or have the authority to exercise substantial control over the *overall* operation of the mine." S. Br. at 29-37 (emphasis in original).[3]

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[1] While I agree in result with my colleagues in the majority that Berwind, Kentucky Berwind, and Jesse Branch are not "operators" under the Mine Act, I write separately because I reach my conclusions as to these entities using a different analytical approach, as discussed *infra*.

[2] *See also* 44 Fed. Reg. 47,746, 47,748 (1979) (MSHA's proposed independent contractor rule citing "substantial participation" language).

[3] During oral argument, the Secretary amended her "overall control" test to include an additional requirement that the entity have "an economic involvement at the mine" in order to qualify as an operator. Oral Arg. Tr. 9. The ostensible purpose for this change was to ensure that labor organizations do not fall within the definition of "operator" (*id.* at 10-11), although Contestants point to a number of ways in which labor organizations can be economically involved in the operation of a mine. B. Resp. to UMWA/USWA Brs. at 12-13.

Both the judge's and the Secretary's tests fall wide of the mark, as neither have any basis in the Mine Act.[4] The correct approach, in my view, is not whether there is "overall" or "day-to-day" control, but rather whether a given entity's participation or involvement in the operation of the mine is substantial enough to establish that entity as an operator. The proper inquiry is whether the facts and circumstances of a particular case indicate that an entity is engaged in the supervision, control, and operation of a mine to a substantial degree so as to render it an operator under the Mine Act. This requires a fact-specific examination of the record for all indicia of supervision, control, and operation exercised by a given entity, followed by a careful weighing of the indicia to determine whether they are sufficiently substantial to establish operator status.

My colleagues adopt a similar approach in which they examine the "totality of the circumstances," including an entity's involvement in the mine's engineering, financial, production, personnel, and safety matters. Slip op. at 9-10. I agree that an evaluation of an entity's involvement in all of these areas is important. Such an evaluation, however, cannot be conducted in a vacuum — as my colleagues attempt to do — outside the context of the Mine Act and without reference to the Act's purpose and intent. Congress had a clear and specific reason for defining "operator" in the Mine Act in terms of supervision and control. It is only through supervision and control that an operator will be able to create safe and healthful working conditions at a mine, a responsibility the Mine Act places squarely on the shoulders of the operator.

Section 2(e) of the Act states that operators "have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in [the Nation's] mines." 30 U.S.C. § 801(e). This responsibility is further described in the Act's legislative history:

> Operators have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility for developing and enforcing through appropriate disciplinary measures, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

S. Rep. No. 95-181, at 18 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* ("*Mine Act Legis. Hist.*"), at 606 (1978). Congress intended that operators bear the ultimate responsibility under the Mine Act, creating, in essence, a duty on the part of operators to provide

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[4] It is unclear whether the majority rejects the Secretary's "overall" control requirement, even though the requirement has no legal basis. First, my colleagues decline to be "constrained" by the Secretary's test. Slip op. at 9. Later in their opinion, however, they state that it is error not to consider a party's "*overall* relationship with the mine." *Id.* at 16 (emphasis added).

a safe and healthful working environment in compliance with the Act. In fact, so great is this duty that operators are held strictly liable for violations of the Mine Act. As the Fifth Circuit held:

> [I]t is a common regulatory practice to impose a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers' safety, the idea being that the employer is in a better position to make specific rules and to enforce them than the agency is.

Allied Prods. Co. v. FMSHRC, 666 F.2d 890, 893 (5th Cir. 1982). This assumes, of course, that the employer is in a position to take measures to ensure safety, and to ensure that those measures are enforced.[5] It necessarily follows that designating an entity as an operator, and hence subjecting that entity to strict liability for violations under the Mine Act, presupposes that such an entity is in a position to secure a safe and healthful working environment within the mine and to prevent potential violations from occurring.

Thus, in determining whether a given entity is an operator, those facts in the record which serve as indications that the entity is operating, controlling, or supervising the mine must be evaluated in the context of the Mine Act's inextricable link between operating a mine and the ability to affect health and safety. There must be some nexus between indications of an entity's control and supervision and that entity's ability to affect health and safety.

Of course, countless entities and individuals can have some effect on health and safety at a mine including, as Contestants point out, "the miner's spouse who packs too large a lunch causing the miner to doze off at the controls of his truck." B. Resp. Br. at 28 n.26. However, simply because an individual or entity may have an effect, however remote, on safety conditions at a mine does not render it an operator. Rather, as the Secretary acknowledges, "only entities that have the *ability* to substantially affect safety and health at a mine" should be considered operators, S. Reply Br. at 2 (emphasis added) — i.e., only those who exercise some *control* over health and safety. This approach is consistent with the underlying purpose and intent of the Mine Act. In sum, the appropriate inquiry as to whether or not a given entity is an operator depends upon whether that entity is substantially involved in the operation of the mine, which is a question not only of the degree of involvement, but also of the extent to which such involvement allows the entity "to prevent the existence of [unsafe and unhealthful] conditions and practices" at the mine. 30 U.S.C. § 801(e).

The Commission's decision in *W-P Coal Co.* is illustrative. In that case, the lessee of the mineral rights, W-P Coal Company ("W-P"), contracted out the operation of the mine to Top Kat

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[5] *See* S. Rep No. 95-181, at 18, *Mine Act Legis. Hist.* at 606 ("this duty places the primary responsibility for providing a safe and healthful working environment on the operator, who, of course, ultimately has the authority to operate the mine").

Mining, Inc. ("Top Kat"). 16 FMSHRC at 1407-08. The Commission found that W-P was substantially involved in the mine's engineering, financial, production, personnel, and safety affairs. *Id.* at 1411. As the financial condition of Top Kat, as well as safety conditions at the mine, began to deteriorate, W-P, which had previously operated the mine, became increasingly involved in the mine's operations. *See Top Kat Mining, Inc.*, 15 FMSHRC 682, 685-86 (Apr. 1993) (ALJ). The Commission found:

> W-P prepared the mine plan, calculated mining projections, prepared and updated mine maps, contacted and visited the mine frequently to discuss production and other matters, waived certain fees owed by Top Kat, advanced funds to Top Kat, met with MSHA personnel regarding mine conditions and enforcement activity, participated in an inspection of the mine, and even arranged and attended a meeting of MSHA and Top Kat to discuss the increasing number of citations, inspections, and orders.

16 FMSHRC at 1411; *see also id.* at 1408. In addition, W-P leased equipment to the contractor and involved itself in the contractor's personnel matters. 15 FMSHRC at 685. W-P's increasing and, ultimately, substantial involvement in the operation of the mine — particularly substantial involvement in the safety affairs of the mine, such as their direct dealings with MSHA — provides a clear illustration of when an owner of mineral rights crosses the line to become a full-fledged operator under the Mine Act.

1. Kyber Coal Company

I agree with my colleagues that implicit in the judge's finding that Kyber exercised day-to-day control at the mine is a finding that Kyber was substantially involved in the mine's operation. Slip op. at 11. I find, however, that this finding is not supported by substantial evidence.[6] To the contrary, Kyber's involvement in the operation of the mine can only be described as minimal, beginning with the judge's finding that "AA&W exercised most of the aspects of control and supervision at the mine." Specifically, the judge found:

> AA&W hired, fired, disciplined, trained, supervised, directed and paid its employees. AA&W developed and submitted all of the plans required under the Act and instituted all of the measures necessary to comply with dust and noise sampling programs. For

[6] When the Commission reviews factual determinations made by its judges, it applies the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

> all practical purposes, AA&W furnished and maintained all of the equipment, machinery, tools and materials used in the mine, as well as all of the machinery, equipment and structures for stockpiling coal on the surface. AA&W participated in all MSHA inspections and conferences. AA&W decided to contest violations. AA&W decided how to abate violations. AA&W paid the civil penalties assessed for violations. Finally, although Kyber could request that AA&W increase production, AA&W ultimately determined whether it would comply with such a request. The debate . . . is whether the Contestants' involvement in what was left was sufficient to make them operators.

18 FMSHRC at 212-213 (citations omitted).

Thus, in stark contrast to the lessee in *W-P Coal*, Kyber had no involvement in AA&W's personnel matters, leased no equipment to AA&W, provided no financing to AA&W, and played no role in health and safety affairs at the mine. With respect to three of the five areas the majority claims to be relevant in determining operator status — personnel, financial, and health and safety matters — Kyber had no involvement whatsoever. Moreover, the judge found that AA&W retained sufficient autonomy over production such that Kyber's involvement did not amount to an indication that Kyber was an operator. *Id.* at 240. Finally, engineering services, map drafting, spad setting, and surveying were all provided by Jesse Branch. *Id.* at 241. The judge's remaining and sole basis for finding that Kyber was an operator, a basis affirmed by the majority, was the fact that Kyber retained "bottom line" authority for determining the direction of mining. *Id.* at 238.

Control over the direction of mining may be *one* indication of an entity's involvement in the operation of a mine. However, Kyber's control of the direction of mining, by means of exercising its contractual right to reject AA&W's request to deviate from the mining projections, was in fact limited. The judge found that:

> The Kyber-AA&W relationship was such that AA&W had considerable discretion to deviate from the projections for reasons of safety. Stump testified that he could depart from the projections if he encountered "an emergency." Akers essentially agreed that although AA&W had an obligation to consult with Kyber, Kyber never challenged AA&W's opinion that mining should be discontinued because of safety concerns such as poor roof. Akers' testimony in this regard was supported by Looney.

18 FMSHRC at 238 (citations omitted). Kyber could not reject AA&W's request to mine less than the full extent of the mine projections if "*it [was] unsafe to mine those areas*." JSF 187

(emphasis added).[7] While there is ample evidence in the record on this limitation to Kyber's control, both the judge and my colleagues fail to consider its relevance in the context of determining the degree of Kyber's involvement in the health and safety affairs of the mine, and whether any such involvement could have enabled Kyber "to prevent the existence of [unsafe and unhealthful] conditions and practices" at the mine. 30 U.S.C. § 801(e).

The majority asserts that "Kyber's ultimate control over the direction of mining[8] . . . had a direct and significant bearing on the conditions encountered by miners," and that, consequently, the company's actions "had a direct effect on the health and safety of those miners." Slip op. at 14. Any number of factors, however, can have an *effect* on the health and safety of miners, such as barometric pressure or whether the seam being mined is gassy. The quality of parts used in mine machinery can have an enormous effect on mine safety. Even "the miner's spouse who packs too large a lunch causing the miner to doze off at the controls of his truck" (B. Resp. Br. at 28 n.26) has an effect on safety. But an entity's *effect* on safety is not necessarily relevant to determining whether the entity is an operator under the Mine Act. The manufacturer of parts for a mine's machinery certainly would not be considered an operator, despite the potentially enormous effect of the quality of its work on mine safety. Instead, as *W-P Coal* clearly demonstrates, what is relevant is an entity's involvement in health and safety affairs of a mine. Here, it is undisputed that Kyber played no role in such matters as pre-shift examinations, MSHA inspections, decisions to contest Mine Act violations, health and safety training, and Mine Act record keeping. *Cf. W-P Coal*, 16 FMSHRC at 1411 (meeting with MSHA personnel and participation in an inspection considered involvement in the mine's safety affairs). The majority fails to grasp the significance of this important distinction between effect on health and safety and substantial involvement in the management of health and safety affairs.

Because Kyber could not overrule AA&W's deviations from the mine plan when they involved matters of safety and health, Kyber's control over the direction of mining can not rise to the level of substantial involvement for the purpose of determining whether Kyber is an operator

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[7] As the judge's finding and the stipulations indicate, Kyber did not have exclusive control over the direction of mining, unlike the independent contractor in *Otis Elevator Co.*, which did have "'exclusive control over the safety of the mine elevators.'" *See* slip op. at 14 (citing 11 FMSHRC at 1902).

[8] The majority overstates the extent of Kyber's authority because, as a practical matter, control of the direction of mining was jointly exercised by Kyber and AA&W. As the parties stipulated, "[p]rior to initiating mining operations, *[AA&W] and [Kyber]* developed initial mining projections for mining at the Elmo mine. *[AA&W] and [Kyber] jointly developed* subsequent mining projections on an 'as needed' basis during the course of mining." JSF 181 (emphasis added). The parties also stipulated that "[o]nce projections were established and *agreed upon by both [AA&W] and [Kyber]*, any modifications to those projections we made only upon *joint consultation and determination of both [AA&W] and [Kyber]*." JSF 179 (emphasis added).

under the Mine Act. The nexus between Kyber's control in this regard and the company's ability to affect health and safety conditions at the mine through its control is too remote to support the judge's finding of liability. 18 FMSHRC at 238. In the absence of additional indications of Kyber's involvement in the operation of the mine, I find that the judge's determination that Kyber was an operator on this basis alone (*see id.* at 238-40) is not supported by substantial evidence. Accordingly, I would reverse his finding.[9]

In an effort to salvage the judge's finding of Kyber's substantial involvement in the operation of the mine, my colleagues rely on additional evidence rejected by the judge in his decision.[10] First, they adopt the Secretary's argument, rejected by the judge, that Kyber's contract with AA&W gave Kyber at least the *authority* to approve and enforce the mine plan for the Elmo No. 5 mine, which included, among other things, the ventilation and roof control plans which affect the safety and health of miners. Slip op. at 12; S. Resp. Br. 22-23, 33. Even though Kyber never exercised its authority with respect to any mine plan, the majority appears to believe that it is the mere authority to control operations, and not the actual exercise of the authority, that is dispositive.

The Commission, however, looks to the *actual* relationship between entities, rather than a contract between them, in order to determine operator status. *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1358 n.2 (Sept. 1991) ("Our focus is on the actual relationships between the parties, and is not confined by the terms of their contracts. . . . Moreover, the determination of whether a party is properly designated to be within the scope of section 3(d) of the Act is not based upon the existence of a contract, *nor the terms of such a contract*," emphasis added).[11] The

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[9] My colleagues agree with the judge that "Kyber retained more control over the direction of mining than the typical mine owner or lessee" (slip op. at 11), but neither they nor the judge cite any evidence in the record to support this finding. If anything, the record indicates that the agreement between Kyber and AA&W was typical for the industry. Tr. 573, 579; 18 FMSHRC at 230. In fact, the contract was based on contracts in general use throughout the industry. 17 FMSHRC at 690; slip op. at 3 n.1. Even assuming *arguendo* that Kyber's control of the direction of mining was absolute, it is unlikely Kyber could be considered an operator on this basis alone since, as the majority puts it, "no particular factor will be controlling" in determining whether an entity is an operator. Slip op. at 10.

[10] In so doing, my colleagues abandon the substantial evidence test, rejecting specific findings of the judge without pointing to a single fact the "fairly detracts" from the weight of evidence that supports the judge's finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997).

[11] In a bizarre twist, the majority cites *Bulk Transportation* in support of its assertion that the mere terms of Kyber's contract is indicative of the company's status. Slip op. at 12-13 (stating that Kyber's "contractual authority over the mine plan may be considered by the Commission as evidence of the actual relationship between Kyber and AA&W"). *Bulk*

Secretary's assertion that Kyber's contract with AA&W gave Kyber, through its never-exercised authority over mine plans, the authority to select and approve the ventilation and roof control plans (S. Resp. Br. at 22-23) seems disingenuous in light of the fact that the Secretary specifically stipulated that AA&W was responsible for developing, implementing, and submitting both the ventilation and roof control plans. JSF 168, 175. Indeed, AA&W developed, implemented, and submitted all plans that are required under the Mine Act. JSF 115. Because "[t]here is no basis for finding Kyber . . . had anything to do with mining plans at the Elmo No. 5 Mine" (18 FMSHRC at 237 n.5), my colleagues err in finding Kyber's contract with AA&W to be an indication of Kyber's operator status.

My colleagues also assert that Kyber's status as an operator "is further supported by other evidence of Kyber's substantial involvement in decisions concerning the ways in which mining was conducted and the quality and quantity of coal produced at the mine." Slip op. at 12. Yet, the judge rejected any claim that Kyber was substantially involved in production at the Elmo No. 5 Mine. 18 FMSHRC at 240. Among other things, the judge rejected the argument that AA&W's responses to Kyber's requests for additional hours of operation were an indication of Kyber's operator status, crediting the testimony of AA&W employees that AA&W did not always comply with those requests. *Id.* According to the judge, "[c]omplying with Kyber's requests was clearly in AA&W's self interest (Tr. 291-292), and AA&W retained its autonomy to decide whether or not to accede." *Id.* In addition, it is undisputed that if Kyber requested additional coal production to meet demand, "AA&W ultimately determined whether it would comply with [Kyber's] request." JSF 105. Although the contract did contain a minimum production requirement, it had no effect on daily production because AA&W produced coal far in excess of the required amount. 18 FMSHRC at 240. Thus, to the extent Kyber had any influence over production at the mine, it never rose to the level of control, since AA&W ultimately decided when and how much coal to produce.[12]

Transportation, however, directly contradicts the majority's position.

[12] As for the manner of mining — or the "ways in which mining was conducted," to use the majority's phrase — the Secretary argues that a single instance involving Kyber's objection to AA&W's proposal to use a continuous mining machine is evidence of Kyber's control over the manner of mining (S. Resp. Br. at 31-32), notwithstanding the parties' stipulation that, except on very limited occasions, AA&W furnished and maintained all equipment, machinery, and materials at the mine. JSF 136. The judge properly rejected the incident as evidence of Kyber's substantial control of the mine. 17 FMSHRC at 710. The majority also claims Kyber was substantially involved in the "ways in which mining was conducted" (slip op. at 12), yet they cite no evidence in the record to support this assertion. Indeed, the judge specifically found that "AA&W determined the manner in which coal was mined." 17 FMSHRC at 695.

Oddly, the only evidence cited by the majority of Kyber's *actual* involvement in production is an incident involving blasting at the neighboring Corvette mine. Slip op. at 12-13 & n.11. When blasting at the nearby Corvette mine apparently caused a roof fall at the Elmo No. 5 Mine, Kentucky Berwind intervened to resolve the problem.[13] I find it peculiar that the majority would cite this incident as an example of Kyber's involvement in production since it was Kentucky Berwind, not Kyber, that intervened between AA&W and the operator of the Corvette mine. 17 FMSHRC at 700. The extent of Kyber's involvement was notifying Kentucky Berwind of the problem and suggesting the solution that Corvette should move its blasting operations. *Id.* In fact, not even the Secretary has argued in this case that this incident is evidence of *Kyber's* control of the mine. Rather, the Secretary only argued this incident demonstrated *Kentucky Berwind's* involvement, an argument rejected by the judge.[14]

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[13] Kentucky Berwind leased separate coal reserves in a coal seam located above the Elmo No. 5 Mine to an unrelated company, which then contracted with Corvette Mining Company for the operation of a surface mine to extract the coal. 17 FMSHRC at 699. On April 8, 1993, a roof fall occurred at the Elmo No. 5 Mine, which was apparently caused by blasting at the Corvette mine. *Id.* at 700. AA&W notified Kyber of the roof fall, which in turn notified Kentucky Berwind. *Id.* Following additional roof fall problems caused by blasting at the Corvette mine, Kentucky Berwind officials visited the Elmo No. 5 Mine to examine affected areas of the roof. *Id.* On April 12, 1993, Steve Dale, the chief mine inspector and land manager of Kentucky Berwind, and two other Kentucky Berwind mine inspectors visited the two mines and met with a Corvette official, AA&W vice president Jim Akers, and a representative of the Kentucky Division of Surface Mine Reclamation Enforcement. *Id.* Kyber president Jimmy Walker suggested that, in order to alleviate the problem, Corvette should move its blasting operations 500 feet away from the location it had been using. *Id.*; JSF 23, 301. Dale endorsed this solution and showed Corvette where its operations should be moved. 17 FMSHRC at 700; JSF 301.

[14] The judge found:

> There is no indication that Kentucky Berwind ordered AA&W to change anything with regard to its daily operations as a result of the Corvette incident. Moreover, it was only natural that Kentucky Berwind, as owner of the coal reserves mined by both AA&W and Corvette, would have an interest in trying to assist both operators so that they did not interfere with one anothers' operations. That interest and Kentucky Berwind's resulting role in the incident do not equate to statutory control and supervision.

17 FMSHRC at 715. The same findings hold true for Kyber as well.

The majority's reliance on this incident as evidence of operator status is even more peculiar given the fact that my colleagues, elsewhere in their opinion, find that Kentucky Berwind's involvement in the incident — which was far more significant than Kyber's — was insufficient to establish operator status. Slip op. at 20. Indeed, it defies my comprehension how this incident suggests Kyber was "substantial[ly] involv[ed] in decisions concerning the ways in which mining was conducted and the quality and quantity of coal produced at the mine." *Id.* at 12.

My colleagues also rely on Kyber's payment of the initial mine development costs as evidence of Kyber's substantial involvement in the mine. *Id.* at 15. Again, the judge properly rejected Kyber's involvement in the development of the mine as a basis for finding the company an operator, citing it as "irrelevant" to the question of Kyber's operator status since development of the mine occurred before the mine opened and AA&W became the on-site operator. 17 FMSHRC at 708. As the judge correctly stated, "[t]he question is whether the Contestants actually were operators of the mine on November 30, 1993," the date the citations were issued. *Id.* My colleagues also cite as evidence of Kyber's involvement in the mine the fact that Kyber paid Jesse Branch for map drafting and surveying services. Slip op. at 15. What they neglect to mention, however, is that AA&W first paid Kyber ten cents for each ton of coal mined for those very services. JSF 151.[15]

In short, the evidence of Kyber's involvement in the mine amounts to, at most, limited control over the direction of mining, consistent with Kyber's status as lessee, and its never-used authority to approve the mine plan. This hardly makes Kyber an operator. Taken as a whole, Kyber's control or supervision of the Elmo No. 5 mine, limited as it was, certainly did not rise to the level of involvement of the lessee in *W-P Coal*, which had extensive involvement in financial, production, personnel, and safety and health matters at the mine. With virtually no involvement in any of these areas, it can hardly be said that Kyber's involvement in the mine was substantial, let alone that it was substantially involved in safety and health affairs at the mine. Kyber's involvement in the mine, which did not include any involvement in the mine's safety and health affairs, is simply too remote to support a finding that would impose strict liability upon the company under the Mine Act. Accordingly, I would reverse the judge's finding that Kyber was an operator of the Elmo No. 5 Mine.

2. Jesse Branch

I find that substantial evidence supports the judge's conclusion that Jesse Branch was not an operator. 18 FMSHRC at 242-43. The company's involvement in the operation of the mine was limited to engineering services, which consisted primarily of drafting maps, surveying, setting

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[15] My colleagues also suggest that Kyber's role in selecting a safe operator for the mine is somehow indicative of Kyber's status as an operator. Slip op at 14 n.12. It is difficult to conceive that a lessee's judicious selection of a safe operator — as opposed to, say, picking a name out of a hat — thereby imbues the lessee with yet another indicia of ownership status.

spads, and inspecting surface drainage ponds. 17 FMSHRC at 711-712. Unlike the lessee in *W-P Coal*, Jesse Branch had no additional involvement whatsoever in the mine's financial, production, personnel, or safety matters. *Cf. W-P Coal*, 16 FMSHRC at 1407.

Simply because Jesse Branch's role may have been "critical" (S. Br. at 53) or "important" (slip op. at 17) to the operation of the mine does not mean its role was substantial for purposes of determining whether the company was an operator in these proceedings. As the judge correctly noted, most on-site operators like AA&W lack the capacity to perform such engineering functions as surveying and spad setting, and frequently contract for such services. 17 FMSHRC at 710-12. By agreeing to provide these services, Jesse Branch did not thereby assume any control over the operation of the mine. Indeed, the judge found that while Jesse Branch participated in drafting and mapping the mine projections, there was no indication that Jesse Branch "denied AA&W autonomy of decision-making within the confines of the projections or reserved for itself the authority for such decision-making." 18 FMSHRC at 242.[16] As such, I would affirm the judge's conclusion that Jesse Branch was not an operator of the mine.[17]

3. Kentucky Berwind

I find that the judge's conclusion that Kentucky Berwind was not an operator because its level of involvement in the mine did not rise to the level of statutory control is supported by substantial evidence. 17 FMSHRC at 715. Kentucky Berwind had no involvement in the mine's engineering, personnel, or safety matters, nor did it have any financial dealings with AA&W. 18 FMSHRC at 236. To the extent Kentucky Berwind retained the authority to control production at the mine through its lease agreement, either by means of imposing lost coal penalties, participating in decisions concerning mining direction, or otherwise, there is little or no evidence such authority was ever exercised. Again, the proper focus is upon the *actual* relationship between Kentucky Berwind and AA&W, rather than the terms of the contract between Kentucky Berwind and Kyber, in determining operator status. *See Bulk Transp.*, 13 FMSHRC at 1358 n.2. In that regard, the judge found that Kentucky Berwind's actions with respect to the mine were consistent with, and nothing more than, the conduct one would expect of an owner of the mineral rights protecting its interests. 18 FMSHRC at 235-36.

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[16] The judge properly declined to draw any inference of operator status from the relationship between Kyber and Jesse Branch. 17 FMSHRC at 712. Any such relationship, whether through interlocking officers or shared office space, has no bearing as to whether Jesse Branch, standing alone, was an operator of the mine.

[17] I agree with my colleagues in the majority that the Secretary failed to preserve on appeal her argument that Jesse Branch could still be found to be an operator of the mine on the alternative ground that it was an independent contractor. Slip op. at 16 n.16. I note, however, that the Commission has never held that an independent contractor is liable for violations that arise from conduct unrelated to its activities at the mine.

I agree with my colleagues' assessment that "[t]he Secretary's argument that Kentucky Berwind is an operator appears to be based primarily on the authority it possessed as an owner of mineral rights at the Elmo No. 5 Mine." Slip. op at 18. Yet during oral argument, the Secretary asserted that mere ownership of a mineral right was not sufficient to establish operator status. Oral Arg. Tr. 11. Unless the Secretary is prepared to declare all owners or lessors of mineral rights as operators — which she apparently is not — Kentucky Berwind cannot be considered an operator of the mine. Accordingly, I would affirm the judge's decision.

4. Berwind

The judge held that Berwind was not an operator, based on his finding that Berwind had "virtually nothing" to do with the operation of the mine. 18 FMSHRC at 234. I find this conclusion amply supported by substantial evidence. There is no evidence that Berwind was involved in the mine's engineering, financial, production, personnel, or health and safety affairs. *Cf. W-P Coal*, 16 FMSHRC at 1407. While Berwind provided the capital necessary for its subsidiaries to operate (18 FMSHRC at 234), there is no evidence that this financing extended to the operator of the mine, AA&W. Moreover, the judge found that contacts between Berwind and AA&W, such as they were, were "a long way" from substantial participation in the operation of the mine. 17 FMSHRC at 715-16. Indeed, the Secretary concedes that Berwind did not have any direct control of the mine, but that its control was derived from its relationship with its subsidiaries, which in turn controlled the operation of the mine. S. Br. at 6. Because I find that none of those subsidiaries were substantially involved in the operation of the mine, it necessarily follows that neither was Berwind. I would therefore affirm the judge's finding that Berwind was not an operator of the Elmo No. 5 Mine.

B. Unitary Operator Theory

In *W-P Coal*, the Secretary attempted to hold the operator liable under a "co-operator" theory of liability. 16 FMSHRC at 1409. After finding that "W-P was sufficiently involved with the mine to support the Secretary's decision to proceed against [the company]," the Commission wisely rejected the Secretary's alternative theory. *Id.* at 1411. First, the Commission noted that the term "co-operator" "does not appear in the statute." *Id.* The Commission also stated: "existing case law adequately addresses liability issues where owner-operators and independent contractors are involved." *Id.*

I find both of these statements still true today with respect to the majority's effort to use this case to create a new form of liability under the Mine Act, unitary operator liability. I begin my analysis of this question by noting the Supreme Court's recent reaffirmation of the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)

(citations omitted).[18] The Court stated that "it is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary.'" *Id.* at 61-62 (citations omitted). The "hornbook law" to which the Court was referring is, of course, *state* law: "corporations being creatures of state law, that law generally governs their affairs." 18 Am. Jur. 2d *Corporations* § 17, at 812 (1985).

The majority's new unitary theory is an exception to the general rule of the separate existence of corporate entities, and is thus an attempt to modify the general principles of state corporate law so forcefully reiterated in *Bestfoods*. In their rush to rewrite corporate law, however, the majority has lost sight of the fundamental principle that "in deciding if federal law pre-empts state law," federal courts "'start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981). Similarly, in *Bestfoods*, the Court stated that "nothing in CERCLA purports to reject this bedrock principle [of the separate existence of corporate entities], and against this venerable common-law backdrop, the congressional silence is audible." 524 U.S. at 62. The Court went on to observe:

> CERCLA is thus like many another congressional enactment in giving no indication "that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," and *the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.*"

Id. at 63 (citations omitted, emphasis added).[19] Similarly, in *United States v. Texas*, the Court noted the "longstanding . . . principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except

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[18] At issue in *Bestfoods* was the potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq. ("CERCLA") of a parent corporation as an operator for the clean-up of a hazardous waste site owned or operated by one of its subsidiaries. 524 U.S. at 60.

[19] The majority attempts to distinguish *Bestfoods* on the grounds that the case arose under CERCLA. Slip op. at 30 n.29. The rule reiterated by the Court in *Bestfoods* is, however, one of general applicability, as the Supreme Court cases I cite demonstrate. *See also Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 979 (6th Cir. 1999) (citing *Bestfoods* on this point in holding that a company's eligibility for an award of fees under the Equal Access to Justice Act, 5 U.S.C. § 504, must not be determined on the basis of aggregating the company's net worth with that of its parent corporation).

when a statutory purpose to the contrary is evident.'" 507 U.S. 529, 534 (1993) (citations omitted).

The majority asserts that its new unitary operator theory is "consistent with well established" and "settled" "principles of corporation law." Slip op. at 30 and n.29. Yet I find that in their opinion, all they do is mention a few principles — piercing the corporate veil (*id.* at 30-31 & n.29), the "identity rule" (*id.* at 31), and alter ego theory (*id.* at 31-32) — without any explanation of why these principles apply to or support their theory. In fact, I am unable to divine what, if any, basis their theory has in traditional corporate law. The cryptic nature of the majority's opinion on this point may be due to the fact that the principles they mention simply do not apply to this case in which the meaning of a federal statute is at issue.

For example, the majority mentions piercing the corporate veil. In fact, they appear to embrace this particular principle when they state that their theory is "consistent with well established principles of corporate law," then quote the following passage from an Eighth Circuit case in support of this statement: "Corporate law recognizes situations in which it is appropriate to 'pierce the veil' of separate affiliates." *Id.* at 30-31 (quoting *Package Serv. Co. v. NLRB*, 113 F.3d at 847). Yet the Secretary has expressly disclaimed any intent to pierce the corporate veil in this case. S. Br. at 26 n.12. Moreover, piercing the corporate veil has traditionally been used where recognizing the boundaries around corporate entities "would work fraud or injustice." *Taylor v. Standard Gas & Elec. Co.*, 306 U.S. 307, 322 (1939). As the Supreme Court stated in *Bestfoods*, "the corporate veil may be pierced . . . when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud." 524 U.S. at 62; *see also* 18 Am. Jur. 2d *Corporations* § 58, at 868-69 ("It has been said that any court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception; these circumstances arise where the corporation is used principally as an intermediary to perpetrate fraud or promote injustice."). Here, the record contains not even a hint that Berwind or any of its subsidiaries organized themselves the way they did for fraudulent or improper purposes.[20]

The majority also mentions alter ego theory and the identity rule. These theories, however, are premised on a degree of "unity of interest and ownership" so great "that the individuality or separateness of the two corporations has ceased," or "that the independence of the corporation has in effect ceased or had never begun." 18 Am. Jur. 2d *Corporations* § 56, at 861-62. I do not find that the facts of this case can be twisted into any such scenario. Indeed, if the

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[20] For similar reasons, I find several cases cited by the majority irrelevant to this proceeding. *NLRB v. Deena Artware*, for example, involved a corporate actor guilty of "evading . . . back pay obligation[s]." 361 U.S. at 401 (*see* slip op. at 28). Similarly, the corporate actor in *Package Service Co. v. NLRB* was guilty of buying another company, Allegheny Graphics, Inc., with the intent of "making Graphics a non-union employer." 113 F.3d at 848. The court also noted that "key executives of PSC personally implemented that strategy, committing in the process the unfair labor practices" at issue in the case. *Id.* (*see* slip op. at 30-31).

affairs of Berwind and its subsidiaries had been so intertwined, and particularly if the safety affairs of the Elmo No. 5 Mine had been managed at all levels of the Berwind corporate structure, then the majority would not have to resort to their ill-advised theory to find the companies liable. More to the point, however, is that despite the great emphasis the majority places on alter ego theory, their four-part test hardly can be said to bear any resemblance to that theory. *See* slip op. at 33.

What I see the majority doing is trying to camouflage the weaknesses of their rationale behind the talismanic invocation of a few principles of corporate law, and cases construing those principles, with no explanation of how the principles or cases apply to their new theory. Incantation, however, is no substitute for reasoned analysis.

Regarding whether the Mine Act can be interpreted to allow the Secretary to cite many operators as one "unitary operator," the majority concludes "that the statutory language on the question whether more than one entity may constitute a single operator is far from clear, and that Congress has not 'directly spoken to the precise question at issue.'" *Id.* at 25 (quoting *Chevron*, 467 U.S. at 842).[21] My colleagues then defer to the Secretary's interpretation of the Mine Act that boldly circumvents the common law of corporations by creating out of whole cloth "operators" under the Mine Act that exist only for the purpose of broadening the Secretary's prosecutorial power.

I reject the majority's decision to defer to the Secretary on this question. The unitary operator liability created by the majority is in direct conflict with the common law of corporations by grafting onto that body of law a new form of corporate organization: a super-corporation consisting of any number of separate entities joined to create a larger whole. Nowhere in the common law of corporations is there such an entity. In the absence of any provision in the Mine Act that directly and unequivocally abrogates the common law principles of corporate structure, the majority's ill-advised attempt to rewrite the common law must fail. Their new theory must have a clear and unequivocal statutory basis — which it most clearly does not have. *Bestfoods*, 524 U.S. at 62-63.

Indeed, the Secretary's attempts to justify her new theory are unavailing. No matter how plausible or reasonable her arguments might seem at first blush (and I do not believe they are the least bit plausible), under *Bestfoods*, deference does not even arise because of the even more fundamental principle that any statutory abrogation of a common law principle must be explicitly, directly, and unequivocally set forth on the statute's face. *Id.* Yet here, as the majority concedes, all we have is an interpretive gloss. The majority has formulated a rule of liability, in concert with the Secretary, that is at odds with the common law of corporations — and controlling Supreme Court precedent under which only *Congress* can create such liability.

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[21] For the reasons stated in my dissent in *Cyprus Cumberland Resources Corp.*, 21 FMSHRC 722, 737-38 (July 1999), I find my colleagues' reliance on *Chevron* inappropriate and misplaced.

I would hasten to add that I am not in favor of blind fealty to corporate forms. In the event a corporation attempts to shield itself behind a sham corporate structure, the Secretary could pierce the corporate veil. Indeed, I am at a loss as to why the Secretary has sought to establish unitary operator liability under the Mine Act. She has advanced few, if any, reasons why this Commission should take the extraordinary step of casting aside the common law in favor of her interpretation of section 3 of the Act — notwithstanding the fact that any such arguments would probably either be unavailing because at odds with *Bestfoods* or better addressed under the existing law of operator status and piercing the corporate veil.

But even assuming arguendo that the majority's acceptance of unitary theory was not at odds with the bedrock principles reaffirmed in *Bestfoods*, their decision is still a house of cards that fails to hold up to any degree of scrutiny. Although the majority concedes that the statutes on which it relies — the NLRA and Title VII — are "concerned with regulation of employment relations" (slip op. at 26 n.22),[22] they nevertheless forge ahead. But at issue here is a term — "operator" — that has nothing to do with employment relations. The majority confuses apples with oranges, despite the fact that other more analogous statutes include the term "operator" rather than "employer," including CERCLA, and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. The majority cites several Mine Act cases in which the Commission has turned to the NLRA and Title VII for guidance (slip op. at 26), yet all the cases they cite involve employment relations, either in the context of Mine Act discrimination or compensation. These cases are thus singularly irrelevant to the questions posed in this case.

I am also concerned that, in applying unitary theory, the majority has essentially passed upon a question that was never before the Administrative Law Judge. In this case, the Secretary sought to hold liable a unitary operator consisting of Berwind, Kentucky Berwind, Kyber, and Jesse Branch. The judge rejected this attempt. He never considered whether any other permutations of these four entities might be a unitary operator. Yet the majority nevertheless does just that when it finds that Kyber and Jesse Branch are a unitary operator. They do so without offering any justification whatsoever for passing on a question on which the judge had no opportunity to pass. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992).

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[22] The majority also acknowledges that "[t]he Commission has long recognized that 'the Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners.'" Slip op. at 33 n.33 (quoting *UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC at 1364).

C. Conclusion

My greatest concern in dissent is that I see the majority's decision as a setback to the orderly administration of the Mine Act. First, I find their treatment of operator liability full of confusion and contradiction. They arrive at a rule which appears almost metaphysical under which we must not focus on "separate elements" of an operator's control of a mine, but must consider "the totality of circumstances, that is, [an operator's] *overall relationship* with [a] mine" (slip op. at 16, emphasis added) — which is something presumably greater than the sum of various indicia of control which may be contained in a particular record. I find this rule unworkable, if not fanciful.

Second, the majority's new unitary operator theory sprung from a Secretarial position that appeared to change at every juncture. Indeed, the Secretary was offering substantive refinements to her theory even as late as the oral argument before the Commission. Oral Arg. Tr. 9; see *supra* note 3 of my opinion. The majority nevertheless has deferred to the Secretary's moving target of a theory in principle, and has proceeded to fill in the various gaps on an ad hoc basis. Yet even then, they stumble. They have set forth their new unitary theory in the most fractured opinion I have encountered in my tenure as a Commissioner, and are then unable to come to an effective application of the theory, not only because of the notice problems recognized by Commissioner Beatty (with which I agree in principle), but also because no majority of Commissioners is able to decide which permutation of defendants to hold liable under the theory.[23] Far from contributing to the development of "a uniform and comprehensive interpretation of the [Mine Act] . . . [to] provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law," *Nomination Hearing Before the Senate Committee on Human Resources*, 95th Cong. at 1 (1978), I believe that the majority's decision sows the seeds of confusion. I believe that in this case, the wheels of justice have now, after six years of litigation, become hopelessly mired in a morass of legal mumbo jumbo.

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[23] The Chairman and Commissioner Beatty see Kyber/Jesse Branch as a unitary operator, while Commissioner Marks sees Berwind/Kentucky Berwind/Kyber/Jesse Branch as a unitary operator. Ultimately, a majority finds Kyber/Jesse Branch a "unitary operator" in part because "the control exercised by [the two companies] over health and safety at the Elmo No. 5 Mine was centralized." Slip op. at 38. Yet none of the evidence they cite in support of this statement has anything to do with health and safety, but rather all relates to the direction and nature of mining, preparation of mine maps, and surveying. *Id.* Moreover, none of these activities were "centralized within the two companies." *Id.* As the majority acknowledges, Kyber made all decisions with respect to the direction and nature of mining (*id.*), while Jesse Branch performed all engineering services (*id.* at 17, 38). Indeed, Kyber paid Jesse Branch for these services. *Id.* at 15.

For the foregoing reasons, I would thus reverse the judge's finding that Kyber is an operator, and affirm in result his rejection of the Secretary's unitary operator theory.

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 21, 1999

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 99-73
ROSTOSKY COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 5, 1999, the Commission's Office of Administrative Law Judges received a petition for discretionary review from Joseph Rostosky challenging a decision issued by Administrative Law Judge Jacqueline Bulluck against Rostosky Coal Company ("Rostosky") on September 3, 1999. 21 FMSHRC 1017 (Sept. 1999) (ALJ). In her decision, Judge Bulluck affirmed a citation and an order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), ordered Rostosky to pay a civil penalty of $2,000, and directed that the case be dismissed upon receipt of payment. *Id.* at 1023.

The Commission received Rostosky's petition for filing on October 5, 1999, one day past the 30-day deadline. *See* 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). His petition also failed to meet the requirements of Rule 70(d) of the Commission's Procedural Rules.[1] However, since Rostosky was not represented by counsel, the Commission ruled that the petition should not be dismissed because it was one day late. 21 FMSHRC 1071, 1072 (Oct. 1999).

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[1] Rule 70(d) of the Commission's Procedural Rules requires that in a petition for discretionary review, "[e]ach issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon." 29 C.F.R. § 2700.70(d); *see also* 30 U.S.C. § 823(d)(2)(A)(iii).

In addition, the Commission concluded that Rostosky should be afforded the opportunity to conform his petition to the requirements of the Mine Act and the Commission's Procedural Rules. *Id.* The petition was granted for the limited purpose of affording Rostosky an opportunity to amend his petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823 (d)(2)(A)(iii), and Rule 70(d), 29 C.F.R. § 2700.70(d). *Id.*

The Commission ordered Rostosky to file any amended petition within 20 days, making it due on or before November 2, 1999. *Id.* at 1073. The Commission did not receive any further submissions from Rostosky.

Rostosky did not comply with the Commission's order. Accordingly the direction for review is vacated.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 22, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 2000-37
	:	A.C. No. 15-17741-03542
KENAMERICAN RESOURCES, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 18, 1999, the Commission received from Kenamerican Resources, Inc. ("Kenamerican") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Kenamerican.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Kenamerican asserts that its failure to file a hearing request to contest the proposed penalty for Citation No. 7640047 was due to a processing error made by its accounting department. Mot. at 2. The penalty assessment in question was issued to Kenamerican, along with 10 other penalty assessments for other violations. *Id.* at 1. Kenamerican alleges that while it intended to pay the penalty assessments for the 10 other violations, it intended to contest the penalty assessment for Citation No. 7640047. *Id.* Kenamerican states that its accounting department apparently sent a check in the amount of $550 for payment of the 10 single penalty assessments, along with a hearing request to contest the penalty assessment for Citation No. 7640047, rather than separately filing the request. *Id.* Kenamerican maintains that, upon learning of this misfiling, it sent a letter dated October 28, 1999, to MSHA's Civil Penalty Compliance

Office explaining the misfiling and requesting MSHA to accept the letter as its hearing request. Ex. B. It claims that MSHA responded by letter dated November 17, 1999, stating that it received Kenamerican's payment and hearing request on October 29, 1999, but denying the request because the penalty assessment had become a final order of the Commission on October 13.[1] Ex. C. Finally, Kenamerican states, without elaborating, that the misfiling also was due to a computer error. Mot. at 3. Kenamerican attached to its request copies of the proposed penalty assessments, the certified mail receipt, and correspondence with MSHA. Exs. A-C. Kenamerican requests that the Commission reopen the final order and allow the contest to proceed to hearing.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Jim Walters Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co., Inc.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence, mistake, or excusable neglect. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

---

[1] Kenamerican claims that MSHA received its hearing request on October 21, 1999. Mot. at 1. However, consistent with statements in MSHA's November 17 letter, the return receipt indicates that its hearing request was delivered to MSHA and signed for on October 29, 1999. Exs. A, C.

On the basis of the present record, we are unable to evaluate the merits of Kenamerican's position.[2] In the interest of justice, we remand the matter for assignment to a judge to determine whether Kenamerican has met the criteria for relief under Rule 60(b). *See Benton County Stone, Inc.*, 21 FMSHRC 5, 5-6 (Jan. 1999) (remanding operator's request to reopen final order where the operator's secretary internally misfiled the proposed penalties); *Del Rio, Inc.*, 19 FMSHRC 467, 467-68 (Mar. 1997) (remanding for judge's consideration operator's request to reopen penalty assessment after green card was misfiled in accounts payable file). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Commissioner

[2] In view of the fact that the Secretary does not oppose Kenamerican's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 23, 1999

GARY D. MORGAN	:	
	:	
v.	:	Docket No. LAKE 98-17-D
	:	
ARCH OF ILLINOIS	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Miner Gary Morgan seeks review of the decision by Administrative Law Judge Avram Weisberger dismissing a discrimination complaint against Arch of Illinois ("Arch") brought pursuant to section 105(c) of the Act, 30 U.S.C. § 815(c).[1]

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[1] Section 105(c) of the Act provides, in pertinent part:

> (1) No person shall discharge or in any manner discriminate against or . . . otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.
>
> (2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.
>
> (3) . . . If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the

20 FMSHRC 571 (June 1998) (ALJ). For the reasons that follow, we vacate the judge's decision and remand for further consideration consistent with this decision.

I.

Factual and Procedural Background

Arch operates a number of underground coal mines, including the Kathleen Mine and Conant Mine in southern Illinois. *Id.* at 571. Gary Morgan, a miner with more than 25 years experience in various jobs, worked at the Kathleen Mine from 1989 until being laid off in July 1995, when the mine closed. *Id.* Morgan's primary jobs were operating the scoop and driving a ram car, and he filled in for other miners at lunch break or during overtime on the roof bolter and continuous miner. *Id.*

During Morgan's tenure at the Kathleen Mine, he made frequent complaints to his immediate foreman, Ben Williams, about dust conditions in the mine. *Id.* According to Morgan, Williams often ignored his complaints because he was busy loading coal. *Id.* at 571-72. In addition to complaining to Williams, Morgan also spoke to the manager of the Kathleen Mine, Harry Riddle, about dust conditions in the mine. *Id.* at 572. In 1990, Morgan complained to Riddle about dust conditions in the mine, and the following day there was some improvement, but dusty conditions later returned. *Id.*

In 1994, Morgan observed dust pumps being turned off and dust intake hoses being placed under miners' lapels during periods of high dust at the mine. *Id.* Morgan complained to his supervisor Williams and then to his union safety committeeman, Jasper Stirsman, about the way dust sampling was done at the Kathleen mine. *Id.* Stirsman eventually reported the problem to the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* Around August 1994, mine manager Riddle met with Williams' crew, and during the meeting Morgan indicated that he was the one who had reported the violation. *Id.* at 572, 579. At the meeting, a confrontation occurred between Morgan and the miner who had reportedly turned off the dust pump. *Id.* at 572. Riddle ordered the miners to take proper dust samples and sent them back to work. *Id.* Sometime after the meeting, Riddle told miners Gerald Selby and Dan Helmer that Morgan would never work for Arch again. *Id.* at 575; Tr. at 147-48, 153-54.

Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

According to Stirsman, at a meeting to resolve dust complaints, Gene Sharp, superintendent of the Kathleen Mine, stated that he knew that it was Morgan who was causing the complaints, even though Stirsman had not mentioned Morgan by name. 20 FMSHRC at 572. On several occasions, Stirsman heard Sharp make derogatory remarks about Morgan. *Id.*

In July 1995, Morgan was laid off from the Kathleen Mine when it closed for economic reasons. *Id.* at 572. By agreement between Arch and United Mine Workers of America ("the Union"), Morgan's name was placed on a panel list from which Arch selected miners by seniority for job vacancies. *Id.* at 572, 576. In September 1996, Arch contacted Morgan to take the tests to qualify for an inby job at the Conant Mine. *Id.* at 572. Riddle, Williams, and a number of Kathleen supervisors had previously transferred to the Conant Mine. Tr. 157-58, 186-88, 296. Morgan's foreman at the Kathleen Mine, Williams, remarked at a meeting at the Conant mine held in September that he did not want Morgan on his crew. 20 FMSHRC at 575. Pete Wyckoff, manager of the Conant Mine, heard Williams say that he did not want Morgan on his crew, but testified that he did not know why. *Id.* at 577. Wyckoff supervised both Bob Blaylock, supervisor of safety, and John Cotter, a shift foreman at Conant, who were involved in testing applicants at the mine. *Id.*; Tr. 218, 245, 293.

Pursuant to the union agreement, miners were required to pass a written test before being given a hands-on test to qualify for available jobs. 20 FMSHRC at 576. Miners had to pass a hands-on test on three out of four pieces of equipment in order to qualify for an inby job. *Id.* Nearly every miner chose to be tested on the coal hauler, or ram car, and scoop because each of those pieces of equipment required minimal levels of skill. *Id.* About 75 to 80 percent of miners chose to be tested on the roof bolter, which required a higher skill level, while only 20 percent chose to be tested on the continuous miner, which required the greatest level of skill. *Id.* As a miner completed the test on each piece of equipment, a form was completed by the supervisor administering the test. Tr. 250; Pet. Ex. G.

Morgan took and passed the written test, which was administered by Cotter. *Id.* at 572. Cotter also administered the hands-on test to Morgan. *Id.* This included tests to operate the ram car and scoop, which Morgan passed. *Id.* Prior to the hands-on test on this machinery, Cotter allowed Morgan time to familiarize himself with the controls and practice with the equipment. *Id.* For the next part of the hands-on exam, Morgan tested on the roof bolter. *Id.* Morgan testified that Cotter did not allow him time to become familiar with the controls or practice. *Id.* As Morgan began bolting, Cotter told Kenny Anheuser, who was assisting Morgan by preparing the roof bolts and handing them to Morgan as he drilled the holes, to stop helping Morgan because he was being tested. *Id.* Morgan completed the test and asked Cotter how he did. *Id.* Cotter responded that he did not evaluate the tests but merely recorded information.[2] *Id.* at 572-73. Cotter stated that he generally does not time miners on drilling and bolting because of the varying roof conditions in the mine. Tr. 253-54. For the final component of the hands-on test, Cotter

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[2] At trial, Cotter stated that, in fact, he did determine who passed or failed the test but that he would not be the one who notified Morgan of the test results. Tr. 263.

asked Morgan if he wished to be tested on the continuous miner, and Morgan agreed to it. 20 FMSHRC at 573. As with the roof bolter, Morgan was not given time to familiarize himself with the equipment. *Id.* Morgan admittedly performed badly on the test when he miscalculated on the position of the miner and cut too close to the roof. *Id.*

Several days later, Morgan contacted Blaylock, supervisor of safety at the Conant Mine who was also in charge of testing. *Id.* at 573; Tr. 209. Blaylock told Morgan that he had failed the hands-on test on the roof bolter. *Id.* Blaylock stated that Morgan did not change bits, that he had bent a "roof bolt steel," and that he had taken too much time. *Id.*[3] Blaylock further told Morgan that, because he failed the test on the roof bolter, he could not be considered for an outby position, which required passing tests on two of three pieces of equipment, including the roof bolter. *Id.* Blaylock concluded by telling him that, if Morgan could enhance his skill on the roof bolter, he could be retested. *Id.* Subsequently, a miner with less seniority than Morgan was awarded an outby position. *Id.*

After Morgan was notified that he failed the test, he filed a grievance with the Union that was ultimately withdrawn. Tr. 66, 84-85. Thereafter, in July 1997, Morgan filed a discrimination complaint with MSHA. Following an administrative investigation, MSHA dismissed Morgan's complaint. Subsequently, he filed a discrimination action under section 105(c)(3) of the Mine Act with the Commission, and a hearing was held.

In a pretrial order, the judge rejected a motion to dismiss filed by Arch on the grounds that Morgan's discrimination complaint filed with MSHA in July 1997 was untimely. Order at 2 (Feb. 26, 1998).

On the merits, the judge found that Morgan had clearly engaged in protected activities in reporting dust conditions to his immediate foreman, Williams, the mine superintendent, Riddle, and the Union safety committeeman, Stirsman. 20 FMSHRC at 578. The judge also found that the record was clear in showing that Morgan had suffered an adverse employment action when he failed the hands-on test and was not recalled at the Conant Mine. *Id.* In the judge's view, the main issue was whether the adverse action was motivated in any part by Morgan's protected activities. *Id.*

The judge found that Morgan had "many confrontations" with his foreman, Williams, including arguments over dust sampling. *Id.* at 579. The judge concluded that Williams bore animus towards Morgan, at least in part, because of dust complaints. *Id.* However, the judge also credited Williams' testimony that he did not tell Cotter, or anyone else, to fail Morgan on the hands-on testing. *Id.* The judge also found that superintendent Riddle was aware of Morgan's protected activities and had stated that Morgan would never work at Arch Minerals again. *Id.*

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[3] Cotter testified at trial that he failed Morgan because he was not "smooth" in operating the bolter. Tr. at 262.

The judge concluded however, that it had not been established that Cotter had any animus toward Morgan relating to his protected activities, or that he even knew about them before October 1996, when the adverse actions were taken. 20 FMSHRC at 581. The judge credited Cotter's testimony that no one told or suggested to him to fail Morgan, that no one told him to test Morgan any differently, and that he was not aware that Morgan had made dust complaints to MSHA or to Arch. *Id.* The judge determined that Morgan had failed to prove that the adverse action taken by Arch, acting through Cotter, was in any part motivated by Morgan's protected activities. *Id.* Accordingly, he concluded that Morgan failed to prove that he had been discriminated against in violation of section 105(c) of the Act. *Id.*

II.

Disposition

Morgan's primary argument on appeal is that substantial evidence does not support the judge's findings and conclusions. PDR at 1.[4] Morgan notes that the primary issues the judge had to resolve were the weight to be given to the circumstantial evidence of discrimination and the credibility accorded to the testimony of Arch's witnesses. *Id.* at 3. In support of his position, Morgan cites several examples of disparate treatment whereby other miners who were tested were given time to warm up, assisted by a helper, or allowed a retest. *Id.* at 3-4. Morgan cites to testimony indicating that the superintendent at the Conant Mine knew of Morgan's dust complaints and the animus of his foreman. *Id.* at 5-7. Morgan notes inconsistencies in roof bolting testing procedures, particularly as to timing and retesting. *Id.* at 7-8. Further, Morgan contends that inconsistencies in Cotter's testimony as to why he rated Morgan unsatisfactory on the roof bolter are a basis for discrediting Cotter. *Id.* at 11-12. Finally, Morgan argues that Arch improperly withheld during document production the original of the hands-on test that has white-out over a check mark in a box indicating that Cotter had failed Morgan in running a coal scoop. *Id.* at 16-17. Morgan argues that he was prejudiced by Arch's failure to release the document prior to trial, and that, more significantly, the document raises questions about Cotter's truthfulness and demonstrates that Arch officials at Conant conspired to ensure that Morgan would fail the hands-on test. *Id.* at 15-22.

In response, Arch argues that substantial evidence supports the judge's decision. Arch Resp. Br. at 5. Arch emphasizes that the judge based his decision on credibility determinations, and in particular crediting of Cotter, who administered the test to Morgan, including his denial that he knew anything about Morgan's dust complaints. *Id.* at 5-6. Arch argues that, while the judge found that Kathleen foreman Williams and superintendent Riddle harbored animus towards Morgan as a result of his dust complaints, the judge credited Cotter, who administered the test, and Blaylock, who was in charge of testing at Conant, that they did not know of Morgan's complaints and no one told them to fail Morgan. *Id.* at 5-7. Thus, Arch concludes that Morgan failed to prove a causal connection between his protected activity and his failure to be recalled as

[4] Morgan requested that his PDR be accepted as his opening brief.

a result of the test. Arch Resp. Br. at 8. Finally, Arch contends that the judge erred in not dismissing Morgan's complaint as untimely. *Id.* at 11-12.

A. Timeliness of Morgan's Complaint

The judge denied Arch's motion to dismiss Morgan's complaint on timeliness grounds, even though it was filed over 10 months after the adverse employment action. He found that Morgan had shown justifiable circumstances—lack of counsel and pursuit of a grievance over the failure to be recalled—that excused the late filing and that Arch had not shown that it was prejudiced as a result. Order at 2 (Feb. 26, 1998).

Morgan was notified that he failed the test on September 21, 1996. M. Resp. to Mot. to Dismiss at 3. During that conversation, he informed Blaylock that he would file a grievance through the Union. Pet. Ex. C at 38. According to Morgan, Blaylock told him to consider that this was the first step of the grievance process and his grievance was denied. *Id.* Thereafter, he raised a complaint with his Union that apparently led to a grievance that was later withdrawn. *Id.*; Tr. 84-85. Subsequently, he filed a grievance dated February 9, 1997, in which he grieved Arch's recall of a miner with less seniority to an outby job. Pet. Ex.C at 115. That grievance was eventually withdrawn. M. Resp. to Mot. to Dismiss at 3. Morgan stated that even when his second grievance was dropped, he continued to pursue his complaint through other communications with union officials. Pet. Ex. C at 38. He maintains that he was told by a union official on July 15, 1997 that his appeals were of no avail. *Id.* Morgan filed his discrimination complaint on July 29, 1997.

Morgan argued to the judge that he felt that his rights had been violated, but that he had initially pursued his complaint through the Union's grievance procedure. M. Resp. to Mot. to Dismiss at 4. Morgan further noted that he did not obtain an attorney until sometime later in pursuing his claims against Arch. *Id.* (He filed the discrimination complaint against Arch apparently without the assistance of counsel.) Arch argues that Morgan must have been well aware of his rights under the Mine Act because he filed his complaint without the assistance of counsel. A. Mot. to Dismiss at 4.

Commission case law is clear that the 60-day period for filing a discrimination complaint under section 105(c)(2), 30 U.S.C. § 815(c)(2), is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984). A judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" in order to determine whether a miner's late filing should be excused. *Id.* Finally, "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

We believe that the judge correctly denied Arch's motion to dismiss. The delay in filing was significant, but not out of line with delays in other cases in which the Commission excused the Secretary from complying with a filing deadline. *See Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 905-06 (June 1986) (two year delay); *Secretary of Labor on*

behalf of Nantz v. Nally & Hamilton Enters., 16 FMSHRC 2208, 2214-15 (Nov. 1994), *overruled on other grounds, Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996) (four month delay). In *Hale*, the Secretary delayed filing a discrimination complaint for two years after the miner contacted MSHA, while it was investigating the complaint. 8 FMSHRC at 905-06. However the Commission noted in that case that there was no evidence of prejudice to the operator as a result of the late filing. This, the Commission found, was a primary consideration in cases involving late filing. *Id.* at 908-09; *Nantz*, 16 FMSHRC at 2214-15 (failure to meet time limits in sections 105(c)(2) and (3) should not result in dismissal, absent a showing of "material legal prejudice").

In the instant proceeding, there is no evidence that this delay by Morgan in filing his complaint resulted in prejudice to Arch.[5] *See Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (Feb. 1992) (filing a complaint 12 days late was de minimis and excused where the operator showed no prejudice in connection to the brief delay); *Lizza Indus.*, 6 FMSHRC at 13 (31-day delay in filing excused where the operator showed no prejudice). In addition, Morgan proceeded without benefit of counsel. Morgan's pursuit of related complaints through the Union indicates that he was not sleeping on his rights. Accordingly, we affirm the judge's denial of the motion to dismiss for failure to timely file a complaint.

B. Morgan's Claim of Discrimination

The linchpin of the ALJ's decision in this case is his decision to credit the testimony of John Cotter, the Conant foreman who was responsible for testing and failing Morgan. The judge concluded that the decision to fail Morgan was made by Cotter alone (20 FMSHRC at 580) and that it had not been established that Cotter, "the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to his protected activities, or even knew of Morgan's protected activity . . . when the adverse actions were taken." *Id.* at 581.

We have carefully reviewed this record, which is replete with evidence of Arch management's hostility towards Morgan and his safety complaints. The evidence portrays a mine where seemingly everyone — except, according to Arch witnesses, Cotter and Blaylock — knew about Morgan's protected activity and the hostility it engendered among his supervisors. However, when he made his credibility determination regarding Cotter's testimony, there is no indication that the judge took into account this evidence of hostility.

We note at the outset that we are hesitant to disturb a judge's credibility determinations on appeal. We are reluctant, however, to affirm a credibility determination that is undermined by record evidence to the contrary that was not examined by the judge. As explained in detail below, the cumulative force of this evidence leads us to the conclusion that the judge's credibility findings must be reexamined.

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[5] Arch argued in its post-hearing brief to the judge that "general prejudice . . . should be inferred." A. Post-Hearing Br. at 13.

We begin with the well-established principles of analysis of a discrimination case under the Mine Act. A complainant alleging discrimination establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

With regard to Morgan's prima facie case of discrimination, the record clearly shows that he engaged in the protected activity of reporting dust conditions at the Kathleen Mine, and the judge so found. 20 FMSHRC at 578. Further, he was the victim of adverse employment action when Arch refused to recall him. *Id.* The pivotal issue, then, was whether a nexus existed between Morgan's protected activity and Arch's refusal to rehire him.

As the Commission has long noted, "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). Some of the more common circumstantial indicia of discriminatory intent include knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510. Although the judge acknowledged these principles (20 FMSHRC at 578-79) when he accepted Cotter, Riddle and Williams' testimony that neither told Cotter to fail Morgan, he emphasized, in crediting each of their statements, that there was no *direct* evidence impeaching or contradicting their testimony. *Id.* at 579-80. What he failed to consider, however, was that the record contains abundant *circumstantial* evidence that calls their assertions into question.[6]

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[6] Although the absence of direct contradictory evidence is relevant, it is not dispositive. In fact, "[t]he Commission has made clear that such direct evidence is rare and that discriminatory intent may be established by the kind of indirect evidence involved here." *Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992) (rejecting contention that discrimination must be established by direct evidence.) It is not clear from the judge's emphasis on "direct" evidence in his decision whether he recognized this

We do not lightly question the judge's credibility determinations in this case. We recognize the principle that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) ("*Dust Cases*") (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, we have recognized that there are exceptions to this general rule. *Id.* at 1881 n. 80. "Credibility involves more than a witness' demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner which it hangs together with other evidence." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2586, at 578-79 (2d ed. 1995). Accordingly, we have determined that one such exceptional circumstance occurs when a credibility finding is contradicted by the record evidence. *Dust Cases*, 17 FMSHRC at 1881 n.80.

In *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989), for example, the Commission credited the testimony of a witness which the judge had summarily dismissed as "not conclusive." *Id.* We noted in that case that "[w]hile we have previously stated that we do not lightly overturn a judge's credibility findings and credibility resolutions, neither will we affirm such findings if there is no evidence or dubious evidence to support them." *Id.*

Here, Cotter's assertion that mine management never talked to him about Morgan is suspect in light of other compelling record evidence. The record shows, and the judge found, that Morgan made numerous dust complaints and that Arch management, including his foreman, Williams, and the superintendent at the Kathleen Mine, Riddle, were well aware of his role. 20 FMSHRC at 579. Further, the record shows that Arch reacted in a hostile manner to Morgan's protected activity. Hostility towards protected activity — sometimes referred to as 'animus' — is another circumstantial factor pointing to discriminatory motivation. *Chacon*, 3 FMSHRC at 2511 (citing *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 233 (8th Cir. 1966)). In this case, there is no question that Arch supervisors at the Kathleen Mine were angry at Morgan for his vigorous pursuit of dust complaints. [7]

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principle.

[7] The possibility that Arch management was capable of retaliatory action is supported by the testimony of three Arch miners who testified under subpoena. Testimony of Dennis Harrison, Tr. 109 ("I'd like to stay out of this, just repercussions possibly down the road."); testimony of Stanley Warden, Tr. 128-29 ("I feel that being here today would jeopardize my chances of passing the test for employment."); testimony of Gerald Selby, Tr. 139-40 ("I'm just afraid for . . . me standing up for my rights, that — that they might classify me as a troublemaker, also."). *See also* testimony of Harrison, Tr. 123-24 ("[Morgan's failing the test] [d]idn't surprise me. I-I felt that

Perhaps the most compelling testimony on this point is that of miners Selby and Helmer. Selby testified that a few days after the August 1994 meeting with mine manager Riddle, he asked Riddle about Morgan and the dust samples and Riddle stated "Gary Morgan will never work in an other Arch Minerals mines again (sic)." 20 FMSHRC at 579. Helmer corroborated this testimony. *Id.* at 579-80. Riddle, not surprisingly, denied this remarkable statement of hostility at trial. *Id.* at 580.[8]

The judge appears to have credited Selby and Helmer on this point. *Id.* at 580. However, he failed to factor this finding into his analysis of whether Cotter was truly oblivious to the mine manager's hostility towards Morgan. Specifically, since he credited the miners' testimony that Riddle made this remark, the judge should have considered this in assessing the credibility of Riddle's testimony that he did not ask or tell Cotter, or Wyckoff, his boss, to fail Morgan. *See Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984) (finding ALJ credibility determination unreasonable when witness testimony was not consistent with his affidavit nor with testimony of other witnesses); *NLRB v. Mt. Vernon Tel. Corp.*, 352 F.2d 977, 980 (6th Cir. 1965) (questioning trial examiner's credibility determination, in part, because he had not credited the witness on other aspects of his testimony). Additionally, the judge discredited both Williams' and Riddle's testimony that Riddle was not aware of Morgan's complaints about dust violations. 20 FMSHRC at 579. Although knowledge of protected activity is an accepted indicia of discriminatory intent (*Chacon*, 3 FMSHRC at 2510), the judge failed to factor management's discredited testimony regarding knowledge into his subsequent definitive credibility determinations.

The judge also credited the testimony of Williams, the section foreman, that he did not tell Cotter to fail Morgan. 20 FMSHRC at 579. Although he acknowledged Williams' statement that he did not want Morgan in his unit and found that Williams had some animus towards Morgan, due in part to his protected activity, he nonetheless accepted Williams' testimony because it was not directly contradicted or impeached. *Id.* As with the Riddle credibility determination, in crediting Williams' testimony on this point the judge appears to have failed to look at the entire body of evidence regarding his hostility towards Morgan. Williams' dislike of Morgan was so well known that it became the subject of jokes by several miners, who kidded Williams about the possibility that Morgan would be rehired onto Williams' section. Tr. 120-21, 170.

The credibility of the operator's witnesses' testimony that none of them alerted Cotter about Morgan is further drawn into question by the testimony of the superintendent at the Conant

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[Morgan] was gonna flunk before he even took the test . . . [A]fter the report of the violations over at Kathleen Mine, I stated to Gary that he'd never work for another Arch mine.")

[8] He also denied it in his interview with the MSHA investigator. Pet. Ex. C at 10.

Mine, Wyckoff. Wyckoff testified that when he was presented with a list of panel applicants for employment at the Conant Mine, he usually tried to talk to their ex-supervisors, and that there were several ex-Kathleen supervisors at his mine. Tr. 295-96.[9] He also admitted that he attended a meeting at which Williams stated he did not want Morgan on his crew. Tr. at 296. Wyckoff stated, however, that he did not recall making any response or follow-up to Williams' criticism. Tr. 296-97.

Management witnesses insisted that they barely communicated to each other about this admittedly assertive miner. However, the record reflects that many of these individuals were working the same shift at this relatively small mine. Pet. Ex. C at 5 (mine has approximately 127 underground and 8 surface employees split into three shifts); Tr. 187 (Riddle worked on A crew); Tr. 243 (Cotter worked on A crew). The Commission has previously held that the small size of a mine supports an inference that an operator knew of a miner's protected activity. *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 130-31 (Feb. 1999). *See also Chauffeurs, Teamsters & Help., Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974); *Famet Inc. v. NLRB*, 490 F.2d 293, 295 (9th Cir. 1973).

We are unable to determine whether this backdrop of knowledge of, and hostility towards, Morgan's protected Mine Act activities was taken into account when the judge credited Cotter's testimony that not one of these management officials ever approached him about Morgan. Before a judge credits any testimony, he must reconcile all record evidence that is inconsistent with that conclusion. In reviewing a judge's credibility determination, we may "'refuse to follow [it] where it conflicts with well supported and obvious inferences from the rest of the record. Such refusal is particularly justified where the testimony in question is given by an interested witness and relates to his own motives.'" *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421, 425-26 (6th Cir. 1964) (quoting *NLRB v. Pyne Molding Corp.*, 226 F.2d 818, 819 (2nd Cir. 1955)).

As the Fourth Circuit has noted, "administrative findings based on oral testimony are not sacrosanct." *Breeden v. Weinberger*, 493 F. 2d 1002, 1010 (4th Cir. 1974). The record evidence in this case portrays a mine where managers did not hesitate to express their hostility towards Morgan and his safety complaints. We simply cannot affirm a credibility determination that ignores extensive record evidence that tends to call that finding into question. In addition, we have rejected the contention that a discharging supervisor's non-discriminatory intent shielded the operator from a finding of discrimination, when other involved supervisors demonstrated animosity towards the protected activities of the affected miners. *Price v. Vacha*, 14 FMSHRC at 1557. Although we will overturn a judge's credibility determination only in rare circumstances,

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[9] The record reveals that hostility towards Morgan's safety complaints reached Gene Sharp, the Kathleen superintendent who stated that "[d]amn Morgan is the one that's causing the complaint," and that Sharp made derogatory remarks about Morgan at a safety committee meeting and in the bathhouse. Tr. 17, 19. The record also revealed that Wyckoff was acquainted with Sharp. Tr. 300. Although the judge mentioned these incidents, he did not address their significance.

we will not rubberstamp them. *See NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993). We agree with the approach of the Seventh Circuit, which has stated:

> there are certain times when a court must overrule [an ALJ credibility] determination by examining evidence in the record that detracts from the ALJ's findings. [citation omitted]. Otherwise an ALJ would have to be upheld whenever there was the slightest support in the record, and our standard of review would be transformed from substantial evidence to scintilla evidence.

Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1263 (7th Cir. 1980).

We dispute our dissenting colleagues' accusation that we are "drawing inferences in the absence of evidence." Slip. op. at 17. First, we have deliberately avoided drawing any inferences from the evidence ourselves. Instead, we are remanding this case to the judge. As the trier of fact, he will examine the evidence we have highlighted in this opinion. He will then decide whether to draw any inferences concerning Cotter's knowledge of Morgan's protected activity and the hostility of other members of Arch's hierarchy towards Morgan. Nor are we by any means suggesting that inferences may be properly drawn in the absence of supporting evidence. To the contrary, we have identified a wide array of evidence that we are simply asking the judge to consider in revisiting his credibility determinations. Accordingly, we remand this matter to the judge, for consideration of the additional evidence cited above in making his credibility determinations.

The judge's decision is flawed in another respect. Absent from his decision is any analysis of the hands-on test as a possible pretext for refusing to reinstate Morgan or whether Morgan was the victim of disparate treatment in application of the test. The judge did not address Morgan's testimony that he was not given time to warm up on the bolter, that he was denied the assistance of a helper, and that he did not bend a steel. *See* 20 FMSHRC at 572-73. In contrast, Dennis Harrison, a former pit committeeman at the Kathleen Mine, testified that when he took the test for an inby position he was given 25 minutes to familiarize himself with the equipment. *Id.* at 573. When the test began, a helper prepared the roof bolts and handed them to him. *Id.* The roof bolter lost power during the test, thereby preventing him from completing the test. *Id.* After testing Harrison on the scoop and hauler, Blaylock told him that he did not have time to further test him on the roof bolter but that he had passed and should report to work. *Id.* Similarly, when Lester Furlow tested successfully for an inby position in 1993, he was given 30 to 45 minutes to warm up. *Id.* at 574. During the test, he broke the steel and the clip holding the bit on the steel which a helper showed him how to change. *Id.* In addition, Stanley Warden testified that he helped several individuals when they were tested on the roof bolter. Tr. 130. Blaylock also testified that applicants are given a warm up period. Tr. 215.

The judge also failed to acknowledge or address inconsistencies in the record as to whether Cotter timed miners when they were tested on the roof bolter (*compare* Tr. at 272-74 *with* Pet. Ex. G at 6-7, and *compare* 20 FMSHRC at 573 *with id.* at 577), or Cotter's inability to explain why he gave Morgan "nonsatisfactory" ratings on aspects of the roof bolter test (Tr. 273-75). He also failed to resolve the conflicting testimony of Morgan (who claimed he had no warm-up time or helper, 20 FMSHRC at 572) and Cotter (who stated that he always allowed a warm up period, and that he always permitted a roof bolt helper to help applicants assemble bolts, Tr. 247, 254[10]). If the judge had resolved this conflict in Morgan's favor, he should have considered this when assessing the credibility of Cotter's testimony that nobody told him to fail Morgan.

The judge could have relied on Morgan's testimony as evidence of disparate treatment (*see, e.g.*, *Chacon*, 3 FMSHRC at 2512-13), or inconsistent treatment of Morgan versus other similarly laid-off miners who were tested. Accommodations given to other miners but not afforded to Morgan may be evidence of discriminatory treatment. *Price and Vacha*, 14 FMSHRC at 1559. Morgan's pretextual claim is bolstered by the fact that only 3 out of 20 Kathleen mine applicants failed the test at Conant (Pet. Ex. C at 15), and that Morgan had two to three years of roof bolting experience at the time he was tested. Tr. 81-84. The judge's apparent failure to consider this evidence also constitutes grounds for a remand. *See Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 18 FMSHRC 2096, 2102 (Dec. 1996).[11]

Based on the foregoing, we vacate the judge's decision and remand the case to enable the judge to more fully consider the record evidence that he did not address. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (vacating and remanding when judge failed to adequately analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision); Commission Rule 69(a), 29 C.F.R. § 2700.69(a) (requiring a judge's decision to "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record").

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[10] Morgan testified that when he started installing bolts, the helper began to pick them up and hand them to him, until Cotter explicitly informed him that he was not permitted to help Morgan. Tr. 56.

[11] Commissioner Marks believes that, in addition, the judge should have at least considered the use of white-out on the original of the test document (Pet. Ex. G at 12), which was not produced during discovery and appeared for the first time late at trial. Morgan argues (PDR at 17-18) that the white-out indicates that the test results were altered after he completed the test. The judge does not address this assertion. Moreover, the white-out must be evaluated with respect to Cotter's overall credibility. *See* Cotter's testimony at Tr. 260, 275-76, 285-90. On remand, the white-out issue should be fully examined. In addition to the white-out, the hands-on test results also reflects the handwriting of two different persons and the ink of three different pens. *See* Pet. Ex. G at 4, 10. The record is silent as to any explanation regarding those occurrences.

III.

For the foregoing reasons, we vacate the decision of the administrative law judge and remand the case for further consideration.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Commissioner

Commissioners Riley and Verheggen, dissenting:

We are not willing to follow the lead of our colleagues and take the extraordinary step of vacating the judge's credibility findings in this case. To the contrary, we see no basis for vacating the judge's decision on the merits.[1] Accordingly, we would affirm the judge's determination that Cotter failed Morgan on the hands-on test for nondiscriminatory reasons. We therefore dissent from Part II.B of our colleagues' opinion.

We agree with the majority that the "pivotal issue" in this case is "whether a nexus existed between Morgan's protected activity and Arch's refusal to rehire him" after he failed the hands-on test. Slip op. at 8. In resolving this issue, the judge credited Cotter's testimony on the basis of his demeanor and the lack of contradictory record evidence:

> The decision to fail Morgan on the bolter test was made by Cotter. I observed Cotter's demeanor and found his testimony credible. Also, I note that the record does not contain any direct evidence impeaching or contradicting his testimony that he was not told by anyone to fail Morgan, that no one suggested that he fail Morgan, that no one had told him to test Morgan any differently than any other candidate, and that at the time of the test he did not know that Morgan had made complaints to MSHA and Arch. I thus accept his testimony.

20 FMSHRC at 580. Although Morgan testified that he was the victim of disparate treatment because he was not given time to warm up and was denied the help of an assistant, the judge

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[1] We disagree with Part II.A of the majority's decision, which states: "the judge correctly denied Arch's motion to dismiss" Morgan's complaint on timeliness grounds. Slip op. at 6-7. The Commission has held that it "expects a showing of good cause to explain any . . . delay" in filing a complaint for discrimination or compensation. *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1230 (May 1991). The judge, however, denied Arch's motion to dismiss Morgan's complaint solely because Morgan "apparently did not have the benefit of counsel until his present attorney filed a Notice of Appearance." Order at 2 (Feb. 26, 1998). We find this rationale legally insufficient, and on this question, would have remanded the case to him for further analysis consistent with Commission precedent.

We also disagree with the majority's blanket statement that "Morgan's pursuit of related complaints through the Union indicates that he was not sleeping on his rights." Slip op. at 7. We do not believe that the record clearly establishes that Morgan's grievance had anything to do with his rights under the Mine Act. This question, too, we would have remanded to the judge to determine whether Morgan's grievance was sufficiently related to his later complaint to the Secretary so as to constitute, in whole or part, good cause for his delay in filing his discrimination complaint. In light of our decision to affirm the judge on the merits, however, any such remand would be unnecessary.

credited Cotter's denial that anyone told him to fail Morgan or treat him differently from any other applicant.[2] *Id.*

The Commission must exercise a considerable degree of deference when reviewing a judge's credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *Id.* at 1881 n.80. Exceptional circumstances that would warrant overturning a judge's credibility findings include where such findings are self-contradictory, based on irrational criteria, or contradict the evidence. *Id.* As the Eleventh Circuit has explained, "[s]ince the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination." *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984). In light of this, the *Ona* court concluded that "as a general rule courts are bound by the credibility choices of the ALJ, even if they 'might have made different findings had the matter been before [them] . . . de novo.'" *Id.* at 719 (quoting *Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1329 (5th Cir. 1978)).[3]

We find no exceptional circumstances or any other basis for overturning the judge's credibility resolutions here. The judge's findings are not self-contradictory or based on irrational criteria. Furthermore, none of the record evidence contradicts the judge's credibility findings. Indeed, in vacating these findings, the majority can point to no single piece of evidence that contradicts the findings. Instead, the majority bases its ruling on what it sees as a "backdrop of knowledge of, and hostility towards, Morgan's protected . . . activities" (slip op. at 11), and the inferences it is willing to draw from this "backdrop."

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[2] We also note that Morgan's experience on the roof bolter, as that on the continuous miner, was limited to relieving other miners when on lunch breaks or on overtime. 20 FMSHRC at 571. Morgan admittedly failed the hands-on test on the miner. *Id.* at 573. We further note that Morgan believed that he was entitled to a job at the Conant Mine, without regard to his job skills. Tr. 102.

[3] *Cf. Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) ("Final assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided."). *See also Secretary of Labor v. Consolidation Coal Co.*, No. 98-1613, 1999 WL 335777, at *3 (4th Cir. May 27, 1999) ("'[w]e must defer to the ALJ's credibility determinations . . . despite our perception of other, more reasonable conclusions from the evidence,'" (citations omitted)) (affirming separate opinion of Commissioners Riley and Verheggen in *Consolidation Coal Co.*, 20 FMSHRC 227, 238-42 (Mar. 1998)); *Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984) (when judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd*, 766 F.2d 469 (11th Cir. 1985).

In considering the evidentiary effect of inferences, the Commission has held that judges *may* draw inferences from record facts so long as those inferences are "inherently reasonable and there [exists] a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). While it is possible that inferences could have been drawn from the record, it is for the trier of fact to decide between reasonable inferences. *See generally* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2528 (2d ed. 1995). In addition, the effective use of inferences encompasses the right not to draw them, as well as to draw them, in the appropriate circumstances.

Here, in light of direct credited testimony from Cotter (and other Conant officials), the judge did not credit some of Morgan's testimony and refused to draw certain inferences from the record. The judge's rejection of inferences that are contravened by direct, credited (in several instances, uncontradicted) testimony is not a basis for vacating his decision. We reject the majority's insistence on drawing inferences in the absence of evidence,[4] and suggesting to the judge that he draw similar inferences that are contrary to testimony that he has seen, heard, and credited. It is for the judge in the first instance, not the Commission on review, to make inferences and findings based on record evidence. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1139 (May 1984).

In sum, we are not willing to vacate the judge's explicit credibility rulings. To us, the majority's decision appears to be premised upon an assumption that Cotter was not telling the truth and that the judge was too myopic to see through his deceptive testimony in order to comprehend what really happened at the Conant Mine. Taking a speculative approach and acting on little more than a sympathetic hunch, our colleagues sweep away the judge's thorough review of the evidence and his credibility findings, a move that lacks support in the record. Instead, the majority relies on "the cumulative force of [the] evidence" (slip op. at 7-8) without reference to a single specific piece of evidence that contradicts the judge's dispositive credibility findings.

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[4] Although our colleagues "dispute" this point (slip op. at 12), their opinion speaks for itself. For example, they characterize as "suspect" Cotter's testimony that no Arch management official ever approached him about Morgan. Slip op. at 9. The inference they appear to believe and seek to have the judge consider is that Cotter somehow knew about Morgan's protected activity, notwithstanding the ample and direct evidence to the contrary.

The Commission cannot, and reviewing courts will not, ignore the fact that the trial judge alone was able to observe the demeanor of Cotter and others on the stand, and is thus uniquely situated to evaluate the credibility of witnesses. We fear that under the majority's emotional approach, the Commission will be all too ready to second guess its judges in future cases, substituting its judgment for that of a judge. To avoid such confusion and disorder, we would affirm the judge's decision here because it is supported by substantial, credible evidence.[5]

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[5] In light of our decision, we need not reach the questions raised by the majority regarding whether the hands-on test was "a possible pretext for refusing to reinstate Morgan or whether Morgan was the victim of disparate treatment in application of the test." Slip op. at 12.

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ADMINISTRATIVE LAW JUDGE DECISIONS

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November 19, 1999

EXCEL MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 99-171-R
	:	Citation No. 7348723; 3/16/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 99-172-R
ADMINISTRATION (MSHA),	:	Citation No. 7348724; 3/19/99
Respondent	:	
	:	Docket No. KENT 99-173-R
	:	Citation No. 7348725; 3/19/99
	:	
	:	No. 2 Mine
	:	Mine ID No. 15-09571

DECISION

Before: Judge Melick

These cases are before me upon Contests filed by Excel Mining, LLC (Excel) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge three citations issued by the Secretary of Labor for alleged violations of her respirable dust regulation at 30 C.F.R. § 70.100(a). On September 7, 1999, Excel filed a motion for summary decision pursuant to Commission Rule 67, 20 C.F.R. § 2700.67, to vacate the three citations arguing that they involved a single dispositive issue of law. Under Commission Rule 67 "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." For the reasons that follow, I conclude that the motion should be granted.

The cited standard, 30 C.F.R. § 70.100(a), repeats the statutory language of section 202(b)(2) of the Act and governs miner exposure to respirable coal dust in underground coal mines. It provides in relevant part that:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . ." (emphasis added).

Section 202(f) defines "average concentration" as:

> "[a] determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 months period following December 30. 1969, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health and Human Services, and (2) as measured thereafter, over a single shift only, unless the Secretary and Secretary of Health and Human Services find, in accordance with the provisions of section 101 of this Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift."

30 U.S.C. § 842(f). Section 202(f) of the Mine Act was carried over without significant change from section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976) (amended 1977) ("Coal Act").

On July 17, 1971, the Secretary of the Interior and the Secretary of Health, Education, and Welfare published in the Federal Register, pursuant to section 202(f) of the Coal Act, a finding that the sampling of mine atmosphere during a single shift would not accurately measure the average concentration of respirable dust. This notice states in part:

> Notice is hereby given that, in accordance with section 101 of the Act, and based on the data summarized . . ., the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.
>
> In April 1971, a statistical analysis was conducted by the Bureau of Mines, using as a basis the current basic samples for the 2,179 working sections in compliance with the dust standard on the date of the analysis . . . . [R]esults of the comparisons . . [s]how that a single shift measurement would not, after applying valid statistical techniques, accurately represent the atmospheric conditions to which the miner is continuously exposed.

36 Fed. Reg. 13286 (July 17, 1971).

Following a period of public comment, the Secretaries affirmed this finding in another Federal Register notice published on February 23, 1972. 37 Fed. Reg. 3833. Under the 1971 Finding, then, it was established that single shift sampling is not an accurate method for determining average respirable dust concentrations for enforcement purposes. Since it is undisputed that the citations herein were issued on the basis of respirable dust samples taken over a single shift (Joint Stipulation No. 5) they cannot be used to assess compliance with the Secretary's respirable dust regulations and the citations accordingly must be vacated.

In *Secretary of Labor, Mine Safety and Health Administration v. Keystone Coal Mining Corp.*, 16 FMSHRC 6 (1994), the Secretary had also tried to use single shift sampling for enforcement purposes. Keystone contested citations the Secretary had issued based upon respirable dust samples taken over a single shift. The Commission held that, in deciding to use single shift samples for compliance determinations, MSHA had improperly attempted to rescind the 1971 Finding without employing notice and comment rulemaking procedures, and thus compliance determinations based on single shift samples were invalid. For this reason, the citations were vacated. The Commission also specifically rejected in that case the Secretary's argument that the 1971 Finding applied only to samples taken by operators but not to samples taken by MSHA inspectors.

In reaching my conclusion herein I have not disregarded the Secretary's argument that the instant cases are nevertheless outside the ambit of the 1971 Finding and the *Keystone* decision because they involve the averaging of multiple samples taken over a single shift. I find no basis for such an exception in the 1971 Finding. That finding clearly and unambiguously prohibits single shift sampling whether such sampling takes the form of a single full-shift sample or an average of multiple samples taken over a single shift. The *Keystone* decision reaffirms this interpretation. Under the circumstances there is no need to resort to any consideration of interpretational deference under the *Chevron* case, i.e., *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

ORDER

Contestant's Motion for Summary Decision is granted and Citation Nos. 7348723, 7348724 and 7348725 are vacated.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 7, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 99-79
Petitioner	:	A. C. No. 46-01453-04249
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Humphrey No. 7 Mine

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Elizabeth S. Chamberlin, Esq., 1800 Washington Road, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging two violations of mandatory standards and seeking civil penalties of $10,500.00 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Order No. 7102307, issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:[1]

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[1] Section 104(d)(2) of the Act provides as follows:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

On the 2 north panel, from crosscuts 4 to 3, 3 to 2 and 2 to 1 entries, coal spillage has not been cleaned during the normal mining cycle. The spillage measures from 6 inches to 24 inches deep. This spillage is along the ribs and in the center of the crosscuts. From the 6 to 7 entries and down the No. 7 entry for 90 feet and down the No. 6 entry for 90 feet, loose coal spillage measuring up to 36 inches deep along the ribs and in the center of said entries. The operator's clean-up program is not being followed on the 2 north panel.

The cited standard, 30 C.F.R. § 75.400, provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered electric equipment therein."

Timothy Reseter has been an inspector for the Mine Safety and Health Administration (MSHA) since 1992. He has an additional 20-years experience as an underground miner with the last ten years as a foreman. On October 27, 1998, he reported to the Humphrey No. 7 Mine to conduct an inspection.[2] He examined the preshift examination records for the 2 Mains North Section between 6:45 a.m. and 7:30 a.m. and found that no spillage had been reported. Reseter thereupon proceeded to inspect the 2 Mains North Section.

This was a continuous miner section with seven entries and three working shifts. The day and afternoon shifts were producing shifts, and the midnight shift was a maintenance shift in which no coal was mined. The left side of the section consisted of entries one through four, and the right side of the section consisted of entries five through seven. As of the morning of October 27, 1998, the section had been roof bolted except for a small area in the crosscut between the No. 2 entry and the No. 1 entry, and part of the No. 7 entry inby the last open crosscut .

According to Inspector Reseter there were coal accumulations on the left side of the section in the last open crosscuts from the No. 4 to No. 3 entry, No. 3 to No. 2 entry, and No. 2 to No. 1 entry, from rib to rib. The accumulations on the left side of the section were measured at 3 to 24 inches deep. In addition, two places on the left side had 36 inches of coal spillage where the corners had been bulldozed. Acting mine foreman Charlie Harper confirmed that five corners had been bumped on the left side of the section resulting in spillage up to two feet deep. According to Reseter, the spillage on the left side of the section was mostly dry with little rock dust on top.

On the right side of the section, Reseter found coal spillage from rib to rib in the last open

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[2] It has been stipulated that the Humphrey No. 138 Mine referenced by other witnesses corresponds to the same area as the Humphrey No. 7 Mine described herein.

crosscuts from the No. 5 to the No. 6 entry, and from the No. 6 entry to the No. 7 entry. Reseter also found accumulations of up to 36 inches in the No. 6 and No. 7 entries for a distance of 90 feet outby the last open crosscuts. Reseter testified that these accumulations on the right side were dry except for the area 90 feet outby the last open crosscuts. There seems to be no dispute that the coal accumulations found by Reseter had been created by mining done on the afternoon shift and the day shift of the previous day.

I find inspector Reseter's testimony concerning the size and consistency of the cited accumulations to be completely credible and sufficient to sustain the violation as charged. In reaching this conclusion I have not disregarded the testimony of Consol's witnesses that much of the cited coal spillage was wet. I also note however that Jimmy Brock, then assistant mine superintendent, testified that although much of the the cited coal was mixed with mud and was wet in certain areas, there was another layer of apparently dry coal 3 to 6 inches deep on top of that in some areas. Brock also acknowledged that not all the entries were wet. However even assuming, *arguendo*, that the cited coal accumulations were at least partially wet, the Commission has held that that does not render it incombustible. *See Utah Power & Light Company,* 12 FMSHRC 905 at 969 (May 1990) and *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117 (August 1985).

The Secretary also alleges that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on 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 must prove: (1) the underlying violation of a 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* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway,*

Inc., 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In arguing that the violation herein was "significant and substantial" the Secretary relies upon the opinion of Inspector Reseter, that it was reasonably likely for injuries to occur as result of shuttle car movement through the cited area damaging electrical cables lying along the rib line. According to Reseter, a damaged electrical cable could result in a short circuit and ignite pulverized coal. He added that if a fire should occur then smoke inhalation could result in fatalities. The Secretary argues that it is reasonable to infer that, if normal mining operations continued, electrical cables would be damaged. I agree with the Secretary's position which is supported by credible testimony and find that the violation was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of the Respondent's "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

In this regard, I have considered the large amount of accumulations and the significant history of the same type of violation on September 4, 1998, June 10, 1998, and July 29, 1998. These circumstances clearly warrant a finding of an aggravated omission constituting more than ordinary negligence and a serious lack of reasonable care. In reaching this conclusion I have not disregarded the testimony of the Respondent's witnesses that they had been unable to clean up the cited material because of equipment breakdowns and that they were in fact performing manual clean up when the inspector arrived. However, in light of the time during which the accumulations had existed, *i.e.*, since the previous afternoon shift on October 26th and since no coal had been produced on the midnight shift nor on the day shift on October 27th up to the time the inspector saw the violative conditions, I find the alleged mitigating factors insufficient. Since there is no dispute that there was no intervening clean inspection prior to the issuance of Order No. 7102307, it must be affirmed as a "Section 104(d)(2)" order.

Order No. 7102308, also issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.360 and charges as follows:

> The preshift exam conducted on 10/27/98, from the midnight shift to the day shift was not complete in that the severe coal spillage at the face area on 2 north panel was not entered in the book. This coal spillage occurred from the mining cycle from the afternoon shift on 10/26/98. Order No. 7102307 was
>
> issued for said spillage. Also no dates, times or initials were found for the midnight shift at the face area.[3]

The cited standard, 30 C.F.R. § 75.360, provides in subsection (f), as relevant hereto, that "a record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine."

I find that the failure of preshift examiner Ronnie Jarrell to have reported the accumulations in the preshift examiner's book constituted a violation of 30 C.F.R. § 75.360 as charged in Order No. 7102308. It is undisputed that the accumulations of coal at issue were created by mining that occurred before the midnight shift of October 27, 1999, and before Ronnie Jarrell would have conducted his preshift examination. Indeed, Jarrell himself admitted that he observed accumulations of coal spillage when he performed his preshift examination. He maintained only that he did not record the accumulations of coal because he believed they were not hazardous. As previously noted, I accept the credible expert testimony of Inspector Reseter as a "reasonably prudent person" regarding the hazardous nature of these particular accumulations.

This violation was also "significant and substantial" and of high gravity. The preshift examination and the reporting thereafter is intended, *inter alia*, to prevent hazardous accumulations from developing and to warn the miners on the oncoming shift about potentially hazardous conditions. By not reporting the hazardous accumulations of coal in the preshift book, the miners on the day shift were not placed on notice of these hazardous conditions and management could have overlooked or have been less inclined to clean up such unreported accumulations. It is reasonably likely for these consequences to lead to the serious injuries or fatalities previously described.

I also find that this violation was the result of "unwarrantable failure" and high negligence. Because of the massive size of the cited accumulations it cannot be inferred that the preshift examiner could have reasonably and in good faith concluded that these conditions were not hazardous. His failure to have reported these conditions was therefore the result of a serious lack of reasonable care and "unwarrantable failure." Since there is no dispute that there was no

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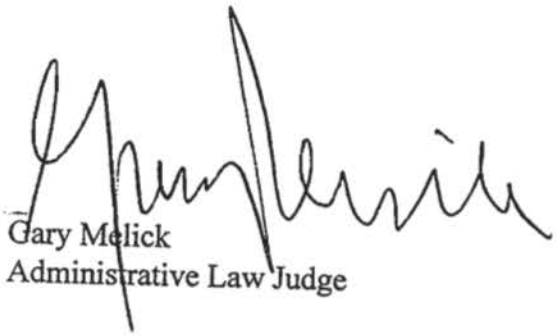
[3] At hearing the Secretary represented that she is not charging as a separate violation the failure of the mine examiner to have noted the date, time and his initials at the face area for the midnight shift.

intervening clean inspection prior to the issuance of this order, it must likewise be affirmed as a "Section 104(d)(2)" order.

Considering Consol's large size, its history of violations in evidence, its undisputed good faith abatement as well as the previous high gravity and negligence findings I conclude that the Secretary's proposed penalties are appropriate.

ORDER

Order Nos. 7102307 and 7102308 are affirmed. Consolidation Coal Company is hereby directed to pay civil penalties of $5,500.00 and $5,000.00, respectively for the violations charged in Order No. 7102307 and Order No. 7102308, within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 1999

BLACK DIAMOND CONSTRUCTION INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	:	Docket No. EAJ 98-1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Formerly WEVA 98-1

DECISION ON REMAND

Before: Judge Barbour

On November 3, 1999, the Commission affirmed the administrative law judge's decision in *Black Diamond Construction, Inc.*, 20 FMSHRC 1169 (October 1998) (ALJ) and remanded the case to provide the Applicant the opportunity to amend its Equal Access to Justice Act (EAJA) application to include the reasonable fees and expenses it incurred in defending successfully its EAJA award before the Commission (21 FMSHRC _____, Docket No. EAJ 98-01 (November 3, 1999, slip op. at 12)). (In the underlying decision the judge awarded the Applicant fees and expenses of $14,390.25.)

Pursuant to the remand, the judge ordered the parties to confer and to attempt to reach an agreement upon the amount of the fees and expenses to which the Applicant was entitled. If the parties were unable to agree, the judge requested that the Applicant amend its application specifying its claims and that it support the amended application with full documentation as required by Commission Rule 205 (29 C.F.R. § 2704.205).

Counsels have conferred as ordered, and counsel for the Applicant reports the parties have agreed that a total amount of $29,624.29 in fees and expenses will be paid by the Respondent to the Applicant. Thus, in addition to the original award of $14,390.25, the parties have agreed the Applicant is entitled to $15,234.04 in fees and expenses incurred defending its EAJA award.

ACCORDINGLY, the Secretary is **ORDERED** to pay Black Diamond a total award of $29,624.29 within 30 days of the date of this decision. Upon receipt of full payment, this proceeding is DISMISSED.

David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 15, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-136-M
Petitioner	:	A. C. No. 35-03308-05511
v.	:	
	:	Applegate Aggregates
APPLEGATE AGGREGATES, INC.	:	
Respondent	:	

DECISION

Appearances: Paul A. Belanger, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Vacaville, California, for Petitioner;
E. W. Mignot, President, Applegate Aggregates, Inc., Grants Pass, Oregon, *Pro Se*.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Applegate Aggregates, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $312.00. A hearing was held in Medford, Oregon. For the reasons set forth below, I affirm the citations and assess a penalty of $312.00.

Background

Applegate operates a shale crushing plant in Josephine County, near Grants Pass, Oregon. It generally consists of a crusher with associated conveyor belts, screens and stockpiles. Most of the time, there are no more than four employees at the site.

MSHA Inspector Larry Orton conducted an inspection of the crushing plant on February 3, 1998. As a result of this inspection, he issued five citations, all of which are contested by the Respondent. The citations will be discussed *seriatim*.

Findings of Fact and Conclusions of Law

Citation No. 4374008

This citation alleges a violation of section 56.12028 of the Secretary's Regulations, 30 C.F.R. § 56.12028, because: "The continuity and resistance tests of the grounding system at the plant has [*sic*] not been done or documented in the last year." (Govt. Ex. 1.) Section 56.12028 requires that: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative."

Inspector Orton testified that he asked Dan Huff, the employee accompanying him on the inspection, if there was a record of the most recent resistance measurements. He said that Huff looked around and could not find anything. E. W. Mignot, President of Applegate, stated that he had no idea whether the testing had been performed. The citation was abated on the inspector's return trip when documentation that the testing had been performed was shown to him.

Based on this evidence, I conclude that the Operator violated the regulation as alleged.

Citation No. 4374010

This citation charges a violation of section 56.14103(b), 30 C.F.R. § 56.14103(b), because:

> The windshields on the 980 Cat Front-end loader were cracked in several areas obscuring the operator's visibility. The unit is used to feed the plant, load trucks and stock pile materials. The area is exposed to outside conditions and is congested. The unit is used on a daily basis when the plant operates. Employees are in and out of the plant area when the plant operates.

(Govt. Ex. 2.) Section 56.14103(b) provides that:

> If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

Inspector Orton testified that it appeared that a rock had struck the bottom of the center front window of the loader, causing cracks to radiate up the window. He said that visibility for the loader operator is restricted by the bucket in the front of the loader and the size of the loader and that with the distortion caused by the cracks he considered it unsafe to operate the loader. He related that he terminated the citation on his next visit. Dan Sinclair, a mechanic for the operator, advised him that the window had been replaced. After visually verifying this, Orton terminated the citation.

Mr. Mignot claimed that the window had not been replaced. He presented three pictures of a front-end loader, (Resp. Exs. A, B and C), that he maintained was the loader in question and which did not appear to show a crack in the front window. The inspector testified that the loader in the pictures "look[ed] to be the same" one as the one he had cited. (Tr. 82.)

I conclude that the Respondent violated the regulation. In reaching this conclusion, I accept the testimony of the inspector over that of the operator. Mr. Mignot was not present during the inspection. Therefore, he did not observe the loader when it was inspected, nor was he in a position to say that the pictures he offered into evidence were of the loader that was inspected. No one from the company, who was present during the inspection or during the citation's termination, testified. It was further apparent at the hearing that Mr. Mignot resented having his operation inspected and bore some animus toward the inspector. (*See, e.g.* Tr. 33, 77, 98, 138.)

Significant and Substantial

The Inspector found this violation to be "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 set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *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). Evaluation of the criteria 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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature.

The inspector testified that he considered the violation to be S&S because the loader was operating in a congested area, with people and haulage trucks going in and out of the area. He opined that combining that with obscured visibility made a serious injury a likely event. The Respondent presented no evidence on this issue. I agree with the inspector and conclude that the violation was "significant and substantial."

Citation No. 434011

This citation alleges a violation of section 56.14132(a), 30 C.F.R. § 56.14132(a), in that:

> The back-up alarm on the 980 Cat Front-end loader did not function. To warn employees in the area that the unit is backing up. [*Sic*] The unit is used around the plant area to load trucks, feed the plant, and stock pile materials. The area is exposed to outside condition [*sic*] and the area is congested. There are employees in and out of the area. The unit is used on a daily basis when plant [*sic*] operates.

(Govt. Ex. 3.) Section 56.14132(a) requires that: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The inspector testified that he first saw the loader in operation and could not hear any back-up alarm. To be sure he went over to the machine, had the operator put it in reverse and back up several times. There was no alarm. Mr. Mignot testified that the alarm had worked "periodically" prior to the citation and that it worked fine after the dirt was washed off of it. (Tr. 102.)

Obviously, the alarm was not maintained in functional condition. Accordingly, I conclude that the company violation section 56.14132(a) as alleged.

Significant and Substantial

The inspector found this violation to be "significant and substantial" for the same reasons he found the previous violation to be S&S. I concur and conclude that the violation was "significant and substantial."

Citation No. 4374014

This citation charges a violation of section 56.12032, 30 C.F.R. § 56.12032, since: "The junction box on the 480 V. drive motor for the $1^1/_2$ inch conveyor was not provided with a cover to protect the splice wires and prevent water from entering the motor. These condition [*sic*] create a shock and electrocution hazard. The motor is exposed to outside condition [*sic*]. It is about 15 feet above ground level." (Govt. Ex. 4.) Section 56.12032 requires that: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Orton testified that the cover was not on the junction box on the drive motor for the conveyor and that neither testing nor repairs were being performed. Mr. Mignot testified that his electrician told him that the cover had vibrated off of the box. Based on this evidence, I conclude that the section was violated.

Citation No. 4374018

This citation alleges a violation of section 56.18010, 30 C.F.R. § 56.18010, because: "No one at the mine had a current First Aid card." (Govt. Ex. 5.) Section 56.18010 requires, in pertinent part, that: "An individual capable of providing first aid shall be available on all shifts. The individual shall be currently trained and have the skills to perform patient assessment and artificial respiration; control bleeding; and treat shock, wounds, burns, and musculo-skeletal injuries."

Inspector Orton testified that none of the employees at the mine had first aid cards. He further stated that he inquired of all of them if they were currently trained in first aid and that none of them was. Mr. Mignot testified that he might have one or two people trained as required by the regulation, but that they were located at another site, six to eight miles away from the crushing plant.

I find that the company did not have an individual capable of providing first aid available at the mine. Assuming that there were one or two individuals with the required training, their location six to eight miles from mine would not meet the regulation's requirement of availability. The local rescue squad could be summoned in the same time that these individuals could. That clearly does not provide the type of "first aid" required by the regulation. Accordingly, I conclude that the Respondent violated section 56.18010 as alleged.

Civil Penalty Assessment

The Secretary has proposed penalties of $312.00 for these violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg*

Stone Co. v. FMSHRC, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalty will not adversely affect the Respondent's ability to remain in business, that the operator demonstrated good faith in rapidly abating the violations and that Applegate Aggregates is a small operation. (Tr. 23-27.) The Assessed Violation History Report, (Govt. Ex. 6), shows that in the two years prior to the inspection in this case, the Respondent had not been cited for any violations of the regulations. Therefore, I conclude the its history of violations is very good.

The gravity of Citation Nos. 4374010 and 4374011 is fairly serious since a serious injury could have resulted from either violation. The gravity of the other three violations is relatively minor as the inspector found that there was little or no likelihood of an injury occurring from them. I find, as did the inspector, that the company was moderately negligent in all of the violations, since they were rather obvious.

Taking all of these factors into consideration, I conclude that the penalty proposed by the Secretary is appropriate. Accordingly, I impose the following penalties:

Citation No. 4374008		$ 50.00
Citation No. 4374010		$ 81.00
Citation No. 4374011		$ 81.00
Citation No. 4374014		$ 50.00
Citation No. 4371018		$ 50.00
	Total	$312.00

Order

The five citations in this case are **AFFIRMED**. Applegate Aggregates, Inc., is **ORDERED TO PAY** a civil penalty of **$312.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 17, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-19-M
Petitioner	:	A.C. No. 44-05172-05531
v.	:	
	:	Lynnwood Farm Plant - VA
WEST SAND & GRAVEL CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barrish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Jerry W. Kilgore, Esq., Sands, Anderson, Marks & Miller, PC, Richmond, Virginia, for Respondent.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against West Sand & Gravel Company ("WS&G"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("the Act").

A hearing was held in Harrisonburg, Virginia. The post-hearing briefs are of record. For the reasons set forth below, the citation shall be **AFFIRMED**.

I. Stipulations

The parties stipulated to the following facts:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. West Sand & Gravel Company, Incorporated, is the owner and operator of the Lynwood Farm Plant, Virginia.

3. Operations of the Lynwood Farm Plant, Virginia, are subject to the jurisdiction of the Act.

4. The maximum penalty which could be assessed for this violation, pursuant to 30 U.S.C. § 820(a), will not affect the ability of West Sand & Gravel Company, Incorporated, to remain in business.

5. MSHA Inspector Joseph Beasley was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7712465.

6. A true copy of Citation No. 7712465, along with all appropriate continuation forms and modifications, was served on West Sand & Gravel Company, Incorporated, or its agent, as required by the Act.

7. Citation No. 7712465 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

8. Citation No. 7712465 has not been the subject of previous review proceedings.

9. West Sand & Gravel violated § 56.14100(b), although West Sand & Gravel challenges the gravity of Citation No. 7712465 and the "unwarrantable" classification by MSHA.

II. Factual Background

On June 30, 1998, while conducting a Triple A inspection of WS&G's Lynwood Farm Plant, MSHA Inspector Joseph Bosley observed the Chevrolet Scotesdale Unit 326 welding truck being driven around front-end loaders and pedestrians, with the left front (driver's side) tire leaning in toward the engine compartment (Tr. 17-21, 27, 43; Exs. P-1A, P-1C). Inspector Bosley took tape measurements of both front tires, from the inside fender well to the outside top of each tire, finding the distance on the left to be 3.5 inches greater than on the right, and also observed that the left front tire had been rubbing the inside of the fender well (Tr. 20-26; Exs. P-1B, P-2). The inspector also raised the hood of the truck and, upon examination from above, observed that the left side upper control arm bolts, connecting the control arm hinge pin to the frame, were loose and backing away from the frame (Tr. 30, 32-34, 73-74; Ex. P-2).

As a result of his observations, Inspector Bosley had a conversation with the primary driver of the truck, welder Charles Holloway, who told Bosley that he had been reporting the condition of the tire in daily pre-shift examination records since mid-May (Tr. 27-28, 253; Ex. P-2, P-13). While still on site, Inspector Bosley also had a telephone discussion with the foreman, Aggie Selmon, who admitted having known of the truck's condition for six weeks (Tr. 32, 40, 212, 222-23, 239-40; Ex. P-2). Furthermore, according to his field notes, the inspector was told

that the welding truck also had bad springs and shocks, although he was unable to recall the source of that information when he testified (Tr. 32-33, 41-42; Ex. P-2). Consequently, Inspector Bosley issued 104(d)(1) Citation No. 7712465, charging a violation of 30 C.F.R. §56.14100(b), describing the violation as follows:

> The Chevrolet Scotesdale welding truck Unit 326 Serial #1GBHC34J5DV105564 the left front wheel was leaning in rubbing the inside of the fender well. This condition could result in loss of steering if not corrected. When checked the control arm had the bolts backing out. When the inspector ask [sic] the welder he stated this condition had existed since the middle of May, he was reporting it on his pre-shift inspection. When the foreman Aggie Selmon was asked he stated he knew this had existed for six weeks. This truck is used throughout the plant and mine site around heavy equipment and travels the pit roads. This violation is an unwarrantable failure to comply with a mandatory standard

(Ex. P-4). Later that same day, independent contractor David Weade repaired the welding truck by replacing a broken coil spring, and by replacing existing shims with nuts welded to the bracket (Tr. 63-65, 236; Ex. P-5A).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. §56.14100(b) provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

In discussing the broad applicability of the generally worded predecessor standard,[1] the Commission has emphasized that the standard must be construed in consonance with the fundamental protective ends of the Act, so that the "integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety." *Ideal cement Co.*, 12 FMSHRC 2409, 2414-15 (November 1990) (*Ideal I*).

In order to establish a violation of this standard, the Secretary must establish that 1) there was a defect in the Chevrolet Scotesdale Unit 326 welding truck; 2) the defect affected safety; and 3) the defect was not corrected in a timely manner to prevent the creation of a hazard.

Respecting the first element of this analysis, the Commission has previously adhered to the ordinary and mining industry usage of the term "defect" as a "fault, a deficiency, or a condition

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[1]30 C.F.R. § 56.9002 (1987) provided that: "Equipment defects affecting safety shall be corrected before the equipment is used."

impairing the usefulness of an object or a part. *Webster's Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 307 (1968)." *Allied Chemical Corporation*, 6 FMSHRC 1854, 1857 (August 1984). Moreover, the Commission has held that a missing, as well as a defective component, may constitute an equipment defect, and the defect or missing component need not affect the operation of the equipment. 12 FMSHRC 2415; 6 FMSHRC 1857.

Respecting the second element, the Commission has repeatedly stated that the "phrase 'affecting safety' in the standard has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (*Ideal II), citing Ideal I*, 12 FMSHRC 2415, *citing Allied Chemical Corp.*, 6 FMSHRC 1854, 1858. Recognizing that adequate notice of the conduct prohibited by the standard must be accorded to the operator, the Commission has required that the evidence 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." 12 FMSHRC 2415, 2416, *citing Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (September 1987). The Commission has provided further guidance on application of this objective test by recognizing "that the various factors that bear upon what a reasonable person would do include safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine." *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1996), *citing U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983).

It is clear from the evidence that the condition of the welding truck's left front tire constituted a defect that affected safety, and having existed for at least six weeks, a defect that was not corrected in a timely manner. Indeed, WS&G has conceded the violation, but disputes that it was "significant and substantial," or the result of its "unwarrantable failure" to comply with the standard.

B. Significant and Substantial

Section 104(d) of the Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the 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 set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a 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 Buck Creek Coal, Inc. v. FMSHRC,* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F. 2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Bosley determined that the violation was S&S. He testified that continued use of the welding truck in its defective condition could result in the tire blowing out or acutely flopping to the outside, either of which condition would result in loss of the driver's ability to steer and stop the vehicle (Tr. 49-56). The driver's loss of control, he opined, was reasonably likely to result in serious injury to himself or others, because the welding truck could be thrown into the path of, and run over by a larger haul truck or loader, or could strike a nearby pedestrian miner (Tr. 43-44, 48, 51-52, 56-60). The inspector acknowledged that he did not test drive the truck, that he was unable to estimate how long it would have taken the tire assembly to completely fail, and that the left front tire was not in bad condition (Tr. 60, 75-76, 196-200).

Ronald Medina, a mechanical engineer in MSHA's Approval and Certification Center, Mine Equipment Branch, appeared as an expert for the Secretary. Medina testified that, in forming his conclusion that operating the truck in its defective condition posed a hazard to safety, he did not inspect the welding truck, but examined the citation, the inspector's field notes and photographs, the shop manual for the truck, and the letter of the mechanic who made the repairs (Tr. 102-03, 181, 271-73). He identified shims missing from the bolts and a broken spring as the cause of the left tire leaning into and rubbing the fender well (Tr. 125-26).[2] This condition, he testified, would tend to pull the truck significantly out of alignment, toward the direction of the lean, and would diminish the tire's traction in bumpy or muddy conditions on the dirt and gravel haul road upon which it traveled, which has the effect of decreasing the driver's steering ability (Tr. 129-130, 134-35, 138-41). Consistent with Inspector Bosley's testimony, Medina opined that continued operation of the truck, as cited, could reasonably be expected to result in tire blow-out, caused by intermittent rubbing between the tire and the fender well or, tire flop-out, should the upper control arm completely detach from the frame -- either of which condition amounts to diminished ability to steer and control the vehicle (Tr. 125-26, 128-32, 145-46, 177-80, 273-80). Medina also asserted that he was unable to estimate how long it would have taken the nuts to work loose from the bolts, thereby freeing the upper control arm from the frame (Tr. 175-76).

Maintenance mechanic Charles Holloway, daily driver of the welding truck, testified that the truck was operated six days a week, that he drove it twice daily on the haul road to the pit,

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[2]A shim is a spacer between two surfaces that is added or subtracted to align a vehicle (Tr. 118).

and that he would normally pass two or three larger trucks while enroute (Tr. 264, 267). He maintained that the leaning left tire did not seem to affect steering, although he acknowledged that, when he turned sharply on occasion, or hit a rock or "chuck hole, " the tire would bounce up against the fender (Tr. 251-52, 265).

Foreman Aggie Selmon testified that he usually drove the welding truck once a month, on Holloway's off-duty Saturday, and although he opined that the truck was safe to operate with the leaning tire, he acknowledged that it was driven on bumpy dirt and gravel roads, along with Mack trucks and front-end loaders, that it's condition did "look bad," and that the tire would rub the fender well when the truck was on a slant or hit a pothole (Tr. 207, 210-11, 213, 227-28, 237-38).

The evidence, evaluated in terms of continued mining experience, indicates that the left front tire was in good condition and, therefore, unlikely to blow-out, and that there is no way of pinpointing how long the bolts would continue to hold the hinge pin to the frame. It has also been established that the welding truck was heavily used on uneven, sometimes muddy, dirt and gravel surfaces, and that the tire would bounce up and hit the fender well. WS&G's position that the leaning tire had no effect on the ability to steer and stop the truck is not convincing, in light of all the evidence. Therefore, having found that the welding truck, with diminished steering and braking capacity, operated around much heavier equipment and pedestrians, on uneven and muddy gravel surfaces, I find it reasonably likely that the truck driver could suffer serious injury from being struck by another vehicle, or could hit and seriously injure a pedestrian in his path. Therefore, I find that the violation was S&S.

C. Unwarrantable Failure

"Unwarrantable failure" is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission has provided a practical framework in which to analyze whether a violation resulted from unwarrantable failure. Among the factors to be considered are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

Charles Holloway testified that he first became aware of the leaning tire in April, during

his pre-shift examinations of the truck, and that he continued to examine and report the condition daily, until the issuance of the citation on June 30th (Tr. 250, 256). The pre-shift examination reports in evidence begin on May 1, 1998 (Ex. P-13). Holloway and Aggie Selmon both testified that they were unaware of the broken coil spring, until the truck was repaired by David Weade on June 30th, although Selmon admitted knowledge that the springs were weak (Tr. 216, 229, 252, 258, 263). Holloway and Selmon also testified, with some variation, that, upon discovery that the upper A-frame bolts had worked loose, they aligned the wheel by adding another shim, re-tightening the bolts, and tack-welding the nuts onto the bolts to keep them in place (Tr. 208, 218-21, 232, 250, 258-59, 263). They conceded that no record was made of such repair, and that WS&G never advised Inspector Bosley or any other MSHA official of such repair (Tr. 213, 221, 225, 238, 254, 266). They also conceded that the repairs to which they attested did not straighten the tire (Tr. 221, 255-58).

Inspector Bosley testified that he had seen no evidence of tack-welding when he inspected under the hood of the welding truck, nor was he ever advised by WS&G of any efforts to repair the defective condition (Tr. 61, 63-69, 74-75, 85-86). Referring to David Weade's July 5, 1998, letter, respecting repair of the left front tire assembly, his report of the truck's pre-repair condition contained no observation of tack-welding, or that nuts had been substituted for shims (Ex. P-5A; See Tr. 232-33). Consequently, I credit Inspector Bosley's testimony, find WS&G's allegation of having made repairs unworthy of credence, and conclude that the operator took no action to repair the leaning tire, at least during the months of May and June. Furthermore, a contrary finding, that efforts to repair the tire were made in April or May, does not advance WS&G's position, since the company concedes that the problem persisted. WS&G should have dissembled the tire, discovered the cause of the lean (missing shims and broken spring), and fixed the problem in a timely fashion. Thus, the same conclusion is reached--that the defective tire assembly was visible to WS&G for two months, that it was not corrected, and that WS&G was aware that greater efforts were necessary for compliance. WS&G argues that it is being penalized for diligently reporting the defect, rather than ignoring it (Resp. Br. at 5). In this case, however, since no correction took place, the value of reporting is minimal. Indeed, the truck was repaired the same evening that the citation was issued. It is my finding, therefore, that WS&G's conduct demonstrated a serious lack of reasonable care that was more than ordinary negligence. Accordingly, I find that the Secretary has proven that the violation was the result of WS&G's unwarrantable failure to comply with the standard.

D. Penalty

While the Secretary has proposed a civil penalty of $2,500.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd,* 763 F. 2d 1147 (7th Cir. 1984).

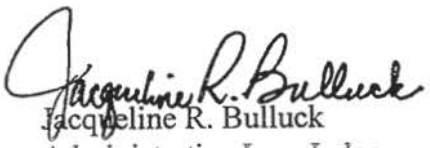
WS&G is a small operator, with a history of no prior violations of the standard at issue

and an overall record that is not an aggravating factor in assessing an appropriate penalty (Exs. P-11, P-12). As stipulated, the proposed civil penalty will not affect WS&G's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of WS&G in causing it. I find the gravity of the violation to be serious, since diminished control of the welding truck subjected the driver and other miners to a potentially hazardous situation, which could have resulted in very serious injury. Furthermore, consistent with my finding that the violation resulted from WS&G's unwarrantable failure, I ascribe high negligence to the operator. Therefore, having considered WS&G's small size, insignificant history of prior violations, seriousness of violation, high degree of negligence, good faith abatement and no other mitigating factors, I find that the $2,500.00 penalty, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation No. 7712465 is **AFFIRMED**, and West Sand & Gravel Company is **ORDERED TO PAY** a civil penalty of **$2,500.00** within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.



Jacqueline R. Bulluck
Administrative Law Judge

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