CCASE:
MSHA V. CONSOLIDATION COAL
DDATE:
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June 9, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. WEVA 90-3
WEVA 90-8
v. WEVA 89-234-R through
WEVA 89-245-R
CONSOLIDATION COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY: Ford, Chairman; Backley, Doyle, and Nelson, Commissioners
This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (the "Mine Act" or "Act") and involves the validity of 24 citations issued to Consolidation Coal Company ("Consol") alleging violations of 30 C.F.R. 50.30-1(g)(3).(Footnote 1) The citations allege that Consol violated th cited

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1 30 C.F.R. • 50.30 provides, in pertinent part:
50.30. Preparation and submission of MSHA Form 7000-2--Quarterly Employment and Coal Production Report.
(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in •50.30-1 and submit the original to the MSHA Health and Safety Analysis Center.... Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.
* * * * *
50.30-1 General instructions for completing MSHA Form 7000-2.
* * * * *
(g) Employment, Employee Hours, and Coal Production
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regulation by significantly over-reporting to the Secretary of Labor's Mine Safety and Health Administration ("MSHA") the number of hours that its employees worked at its Robinson Run No. 95 Mine and its Blackstone No. 1 Mine in each quarterly report for 1986, 1987 and 1988. Commission Chief Administrative Law Judge Paul Merlin upheld each of the citations. 12 FMSHRC

167 (January 1990)(ALJ); 12 FMSHRC 1129 (May 1990)(ALJ). Consol petitioned for review of the judge's decision, asserting that the judge erred in (A) concluding that the cited regulation was validly promulgated in accordance with the Mine Act; (B) concluding that the Secretary of Labor is authorized under the Act to assess civil penalties for violations of the cited regulation; (C) finding that Consol violated the regulation; and (D) finding that the violations were the result of Consol's high negligence. We granted Consol's petition and heard oral argument. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The citations were issued in 1989 following an MSHA audit of the records that Consol is required to maintain under 30 C.F.R. Part 50. Section 50.30 requires coal mine operators to submit information concerning employment and coal production to MSHA, on Form 7000-2, on a quarterly basis. One column of the form requires operators to report the total number of "employee-hours worked" during the quarter. From 1986 through 1988, Consol reported to MSHA the total number of hours that it estimated employees were present at its mines rather than the number of hours that employees worked. Consol obtained this estimate by adding additional time to the number of employee-hours reflected in its payroll or other time records. It added 45 minutes per employee per day for hourly employees, and 90 minutes per employee per day for salaried employees. The citations charge that Consol "significantly over reported employee hours" on Form 7000-2 by adding 45 minutes each day for hourly employees to cover "time spent on mine property before and after work

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(3) Total employee-hours worked during the quarter: Show the total hours worked by all employees during the quarter covered. Include all time where the employee was actually on duty, but exclude vacation, holiday, sick leave, and all other offduty time, even though paid for. Make certain that each overtime hour is reported as one hour, and not as the overtime pay multiple for an hour of work. The hours reported should be obtained from payroll or other time records. If actual hours are not available, they may be estimated on the basis of scheduled hours. Make certain not to include hours paid but not worked.

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hours," in violation of 30 C.F.R. • 50.30-1(g)(3).

At the outset of this proceeding before the judge, Consol filed a motion to dismiss on the grounds that (1) Part 50 of the Secretary's regulations is unenforceable because it was improperly promulgated by the Secretary of the Interior; and (2) civil penalties cannot be imposed under section 110(a) of the Mine Act for the alleged violations. Consol argued that, because the

regulation in question was promulgated after the Mine Act was enacted by Congress but before the Act's effective date, the regulation was invalid. In the alternative, it argued that the civil penalties assessed by the Secretary were not authorized because, under the Mine Act, penalties may be assessed only for violations of the Act and for violations of mandatory safety or health standards. In an order dated January 24, 1990, Chief Administrative Law Judge Paul Merlin denied Consol's motion. 12 FMSHRC 167 (January 1990)(ALJ). The judge held that the Secretary of the Interior was authorized to issue the reporting regulations at the time of their promulgation and that civil penalties can be imposed by the Secretary of Labor for violations of these regulations. Consol then filed a petition seeking interlocutory review of the judge's order, which was denied by the Commission on March 8, 1990.

The parties next filed with the judge "Joint Stipulations of Law and Facts" and they each filed separate motions for summary judgment. In a decision dated May 24, 1990, the Judge granted the Secretary's motion for summary judgment, upheld each of the citations and assessed civil penalties. 12 FMSHRC 1129 (May 1990)(ALJ). The judge determined that Consol violated section 50.30-1(g)(3) because MSHA has consistently required the reporting of hours worked as recorded on payroll records or other time records.

The stipulated facts are set out in full in the judge's decision. 12 FMSHRC at 1133-42. Consol requires that miners report to work prior to the beginning of their shift in order to prepare for work and requires that they remain on mine property after their shift to return equipment and supplies prior to departing. Stips. 24 & 25. Because miners are not paid for such time, it is not reflected on Consol's payroll records. Stip. 28. Consol is required by section 50.20 to report occupational injuries and accidents to MSHA. Stip. 11. Some of the injuries reported by Consol to MSHA during 1986-88 occurred before and after the miners' shifts. Stips. 20 & 21. As a consequence, Consol considered that all time that employees were on mine property was "exposure time." Stip. 23.

No accurate record is kept by Consol of the amount of pre- and postshift time employees are on mine property. Stip. 27. Consol estimates that each hourly employee spends 45 minutes more per day on mine property than is reflected on its payroll records. Stip. 37. Consol believes that if the 45 minute estimate is added to the time shown in the payroll records, the sum reflects the number of hours each hourly employee spends at the mine site on a daily basis, i.e., the exposure hours. Stip. 38. For purposes of this proceeding, the Secretary agreed that Consol's practice of adding 45 minutes to the time shown in the payroll records "reflect[s] the actual time spent by hourly employees at [Consol's mines] on the days when they are at the mine site." Stip. 46. The parties further stipulated that payroll records reflecting time worked are not kept for salaried employees and that Consol

estimates that salaried employees spend an additional 90 minutes per day on mine property. Stips. 30 & 31. The Secretary did not cite Consol for reporting the estimated exposure hours of salaried employees. Stip. 33.

Section 50.20(a) requires mine operators to report to MSHA any accident, occupational injury or occupational illness. See Stip. 10. The Commission has interpreted section 50.20(a) to require the reporting of an occupational

injury, as defined at section 50.2(e), if it occurs on mine property, whether or not such injury occurred during the miner's shift. Freeman United Coal Mining Co., 6 FMSHRC 1577, 1578-79 (July 1984); See Stip. 11. In Freeman, the Commission held that there need not be a causal nexus between the miner's work and the injury sustained. 6 FMSHRC at 1578-79. The injury in that case occurred when a miner experienced back pain while putting on his work boots in the mine's wash house about one hour before the beginning of his shift. 6 FMSHRC at 1578. The Commission affirmed the judge's finding that the operator violated section 50.20(a) by not reporting the injury to MSHA.

Prior to the Commission's decision in Freeman, Consol reported to MSHA as "hours worked" the number of employee hours set forth in its payroll records, but not pre- and post-shift exposure time. Stip. 42. Likewise, Consol did not report, under section 50.20(a), injuries that occurred to miners before and after their shifts. Id. After the Freeman decision, Consol began to report such pre- and post-shift incidents and also exposure time on mine property. Stip. 43. Consol did not inform MSHA that it had changed its method of calculating reportable hours. Stip. 45. The Secretary did not issue any policy memoranda or otherwise provide any guidance to operators regarding the effect of the Freeman decision. Stip. 44. The Secretary did not discover that Consol was including pre- and post-shift hours on its Form 7000-2 until MSHA audited Consol's records. Stip. 45.

MSHA uses the data gathered from sections 50.20 and 50.30 to calculate rates of injury occurrence ("incident rates") for each mine, operator, state, MSHA District and Subdistrict, and for the nation. Stip. 13; 30 C.F.R. 50.1. The incident rate for a given mine, for example, is calculated b dividing the total number of occupational injuries, occupational illnesses and accidents reported in a quarter (multiplied by a constant: 200,000) by the total employee-hours worked during such quarter. 30 C.F.R. • 50.1; Gov. Exh. 1, p. 17. Incident rates are used by MSHA to analyze injury and illness trends and to allocate inspection resources. Stip. 16.

In his order of January 24, 1990, the judge determined that 30 C.F.R. Part 50 was validly promulgated by the Secretary of the Interior under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976)(amended 1977)(the "Coal Act") and was properly transferred to the Secretary of Labor by the Mine Act. The Secretary of the Interior promulgated Part 50 on December 30, 1977, after the enactment date of the Mine Act, November 9, 1977, but before its effective date, March 9, 1978. The judge determined that Part 50, adopted under the Coal Act, remained in effect as a result of section 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977, ~960
30 U.S.C. • 961(c)(2)("Amendments Act").(Footnote 2) 12 FMSHRC at 170. He rejected Consol's argument that the Secretary of the Interior lacked authority to issue the reporting regulations after the Mine Act was enacted, and that only regulations in effect on its enactment date were validly transferred from the Department of the Interior to the Department of Labor. 12 FMSHRC at 170-71.

The judge also rejected Consol's argument that, because Part 50 is a regulation, not a mandatory safety or health standard, penalties cannot be assessed for the alleged violations. 12 FMSHRC at 172. He held that a

violation of Part 50 is also a violation of the Mine Act. 12 FMSHRC at 173. He reasoned that sections 110(a), 104(a) and 105(a) of the Mine Act, which authorize the Secretary of Labor to issue citations for violations of regulations and to notify the operator of penalty assessments for such citations, must be read in concert. Id. The judge concluded that the Secretary is authorized to assess penalties for violations of Part 50.

In his decision of May 24, 1990, the judge determined that the subject regulation requires each operator to report the total hours worked by all employees, and that for hourly employees the total hours worked for reporting purposes are the hours recorded on payroll or other similar time records. 12 FMSHRC at 1142. He determined that the Secretary has consistently interpreted the language of the regulation to require operators to obtain "hours worked" from such records and that her interpretation of the regulation is dispositive of the case. Id. He granted the Secretary's Motion for Summary Judgment and found that Consol had violated the subject regulation.

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2 Section 301(c) of the Amendments Act provides in part:

(c) Unexpended appropriations; personnel; property; records; obligations; commitments; savings provisions; pending proceedings and suits

* * * * *

(2) All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

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The judge determined, however, that the violations were non-serious and technical in nature because the method the Secretary uses to calculate incident rates produces "flawed data." 12 FMSHRC at 1144-46. He determined that the time frame for injuries that must be reported to MSHA for use in the numerator of the formula is not consistent with the time frame for hours worked that must be reported to MSHA for use in the denominator of the formula. 12 FMSHRC at 1144. The judge held that the formula of 30 C.F.R. □ 50.1 produces "an inherently flawed injury incidence rate" because "th numerator and denominator [of the formula] are mismatched with the former premised upon place but the latter predicated upon time and place." Id.

The judge concluded that the violations were the result of Consol's high negligence. 12 FMSHRC at 1146. He found that Consol intentionally changed its method of reporting hours worked and took "the law into its own hands by

deciding for itself what the law means and how it can best be applied." Id.

II.

Disposition of Issues

A. Whether the Regulations in 30 C.F.R. Part 50 are Enforceable.

The judge concluded that section 301(c)(2) of the Amendments Act (n. 2, supra) is a broad savings clause that carried over to the Mine Act the Part 50 regulations promulgated by the Secretary of the Interior under the Coal Act. 12 FMSHRC at 170. In relevant part, section 301(c)(2) provides that all "regulations ... which have been issued ... or allowed to become effective in the exercise of functions which are transferred under this section ... which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked or repealed by the Secretary of Labor...." Section 301(a) of the Amendments Act, 30 U.S.C. • 961(a), transferred to the Secretary of Labor the enforcement functions of the Secretary of the Interior under the Coal Act and the Federal Metal and Nonmetallic Safety Act, 30 U.S.C. 721 et seq. (1976)(repealed)(the "Metal Act"). Section 307 of th Amendments Act, 30 U.S.C. • 801 note, provides that "this Act and the amendments made by this Act ... shall take effect 120 days after the date of enactment of this Act." The Act was enacted on November 9, 1977, and became effective March 9, 1978.

Within the meaning of section 301(c)(2) of the Amendments Act, the regulation in question was "issued" and "allowed to become effective" by Interior in the exercise of its mine safety and health functions and the regulation was "in effect" on the date the Mine Act became effective. Consol(Footnote 3) argues that the pivotal date is the Mine Act's enactment date rather than its effective date. Consol contends that passage of the Mine Act prohibited the Department of the Interior's promulgation of Part 50 because

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3 The Commission permitted amicus curiae briefing by the National Coal Association ("NCA"), a mining industry trade association. Reference in this decision to arguments advanced by Consol includes the arguments of the NCA.

Congress intended to place mine safety and health rulemaking authority in the hands of the Secretary of Labor immediately upon its enactment. Consol maintains that, because Congress did not trust the Department of the Interior to protect the safety and health of miners, Congress curtailed Interior's rulemaking authority so that only those standards and regulations already in effect on the enactment date of the Mine Act would be transferred from Interior to Labor.

In making its arguments, Consol relies upon section 301(b)(1) of the Amendments Act, 30 U.S.C. • 961(b)(1).(Footnote 4) It contends that this provision states that only regulations that were "in effect on November 9, 1977" were to be transferred to the Secretary. Consol concludes that "Interior's attempted promulgation of Part 50 (on December 30, 1977) after enactment of the Mine Act, and prior to its effective date (March 9, 1978) was an ultra vires attempt to transfer to Labor regulations that did not exist when the Mine Act was passed." Consol Br. 10.

We agree with the judge that Consol's reliance on section 301(b)(1) of the Amendments Act is misplaced. The section is ambiguous in that one phrase refers to "standards and regulations" under the Coal Act while the section's title is "Existing mandatory standards; ..." and elsewhere it refers to "mandatory standards" or "mandatory health or safety standards." Section 301(c)(2) by its express terms, clearly governs "regulations," such as the regulation at issue in this case. The judge concluded that section 301(b)(1), when read in its entirety, governs mandatory standards, not the regulation at issue. 12 FMSHRC at 169. The legislative history does not clarify section 301(b)(1). The Senate Conference Report for the Mine Act, however, discusses the "carry over" of existing safety and health standards separately from its discussion of the continuation of existing regulations, thereby providing

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4 Section 301(b) of the Amendments Act provides in part:

(b) Existing mandatory standards; review by advisory committee; recommendations

(1) The mandatory standards relating to mines, issued by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act [30 U.S.C. 721 et seq.] and standards and regulations under the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. 801 et seq.] which are in effect on November 9, 1977, shall remain in effect as mandatory health or safety standards applicable to metal and nonmetallic mines and to coal mines respectively under the Federal Mine Safety and Health Act of 1977 [30 U.S.C. 801 et seq.] until such time as the Secretary of Labor shall issue new or revised mandatory health or safety standards applicable to metal and nonmetallic mines and new or revised mandatory health or safety standards applicable to coal mines.

support for the judge's construction. S. Rep. No. 461, 95th Cong. 1st Sess. 64-65 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, 1342-43 (1977) ("Legis. Hist."); See also Sec. Br. 7, n. 5. We conclude that the more logical interpretation of section 301(b)(1) is to limit its application to mandatory standards.

The language of section 301(b)(1), moreover, does not support Consol's position that the Secretary of the Interior was required to maintain the status quo with respect to regulation during the period between enactment of the Mine Act and its effective date. Even assuming that section 301(b)(1) applies to regulations, it simply provides that standards and regulations in effect on November 9, 1977, were to remain in effect until modified by the Secretary of Labor. It does not reference standards and regulations that were not yet in effect on that date or that were modified by the Secretary of the Interior after that date.

Finally, we agree with the Secretary's argument that Consol's

interpretation of the transfer provisions leads to illogical results that are at odds with the statute's underlying purposes. See, 2A Sutherland Statutory Construction, • 45.12, at 61 (Singer 5th ed. 1992 rev.). Consol's interpretation would create a four-month gap during which no agency had the authority to issue standards or regulations. Given its concern with the safety of the nation's miners, it seems highly unlikely that Congress intended to prohibit regulatory action during that period. Thus, we affirm the judge's conclusion that the regulations at Part 50 are valid and enforceable.

B. Whether Civil Penalties may be Assessed for Violations of 30 C.F.R. • 50.30-1(g)(3).

Consol argues that even if Part 50 is deemed enforceable, the Secretary is without authority to propose civil penalties for violations of Part 50 regulations because they are not mandatory health or safety standards promulgated in accordance with the procedural requirements of section 101 of the Coal Act or the Mine Act.(Footnote 5) Consol contends that section 110(a) of the Mine Act authorizes the assessment of civil penalties only for violations of mandatory health or safety standards and violations of the Mine Act. Consol asserts that Congress, when considering the legislation that became the Mine Act, expressly rejected the civil penalty provisions contained in the Senate

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5 It is undisputed that the Part 50 regulations are not mandatory safety or health standards. They were promulgated under section 508 of the Coal Act, 30 U.S.C. • 957, while mandatory standards would have been promulgated under section 101 of the Coal Act. Mandatory health and safety standards consist of the interim standards established by titles II and III of the Coal Act and standards promulgated pursuant to section 101 of the Coal Act and section 101 of the Mine Act. The interim standards were carried over to titles II and III of the Mine Act. See, e.g. section 3(l) of the Coal Act, 30 U.S.C. • 802(l) (definition of mandatory health or safety standard carried over without change in the Mine Act). See also, UMWA v. Dole, 870 F.2d 662, 668 (D.C. Cir. 1989).

and House bills as introduced. Those bills authorized the assessment of a civil penalty for a violation of the Act, safety and health standards or "any rule, order or regulation promulgated pursuant to this Act." Consol Br. 19, quoting S. 717 and H.R. 4287, as introduced.

The Secretary contends that if the Mine Act, including sections 104(a), 105(a) and 110(a), is read as a whole, civil penalties must be assessed for violations of regulations as well as safety and health standards. She contends that this interpretation is particularly apt in cases such as this where the regulation in issue, Part 50, implements a specific provision of the Mine Act, section 103(d). That section provides that operators shall keep records of "man-hours worked" and report such information "at a frequency determined by the Secretary, but at least annually." 30 U.S.C. • 813(d). Section 110(a), if read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards. It is significant, however, that section 104(a) of the Mine Act authorizes MSHA inspectors to issue a citation to an operator not only for a violation of the Act, but also for a violation of a health or safety standard,

rule, order, or regulation promulgated pursuant to the Act. 30 U.S.C. • 814(a). Section 105(a), 30 U.S.C.• 815(a), requires the Secretary to notify the operator of the proposed civil penalty to be assessed for the violation cited.

The legislative history of the Mine Act does not corroborate Consol's position. The Senate bill (S. 717), as introduced, provided for the assessment of a civil penalty for a "violation of a provision of this Act or a safety or health standard prescribed by or under this Act, or any rule, order, or regulation promulgated pursuant to this Act...." Legis. Hist. at 157. The original House bill (H.R. 4287) contained identical language. Legis. Hist. at 235.

When the House bill was reported by the Committee on Education and Labor, the language from section 109(a) of the Coal Act was substituted for the language quoted above but the Senate bill kept its original language. The bills were then passed by their respective houses of Congress with their civil penalty language unchanged. Thus, the Senate bill contained language specifically referencing "regulations," while the House bill did not.

The Conference Committee subsequently adopted the House bill for other reasons. The Conference Report states:

> The Senate bill and the House amendment provided for a civil penalty of not more than $10,000 for each violation of the Act or a standard promulgated thereunder. The House amendment provided that each occurrence of a violation of a standard constitute a separate offense. The Senate bill did not so provide. The conference substitute conforms to the House amendment.
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S. Rep. No. 461 at 57, Legis. Hist. at 1335. This Report indicates that the Conference Committee focused on whether each occurrence of a violation should be treated as a separate offense. Thus, it does not appear that Congress intentionally dropped the Senate's language as to regulatory violations, as claimed by Consol.

In sum, we agree with the Secretary's interpretation of the Mine Act, which seeks to harmonize sections 104(a), 105(a) and 110(a). Each part of a statute should be construed in connection with the other parts "so as to produce a harmonious whole." Sutherland, • 46.05 at 103. Such an interpretation advances the goals of the Act and maintains the importance of civil penalties as a deterrence. Further, nothing in the Act or its legislative history indicates that Congress rejected civil penalties for regulatory violations.

Finally, we agree that Part 50 implements the responsibilities of the Secretary set forth in section 103 of the Act. These regulations constitute implementation of section 103 pursuant to rulemaking authority under section 508 of the Mine Act, 30 U.S.C. • 957. Accordingly, we affirm the judge's conclusion that a civil penalty may be assessed for a violation of section 50.30-1(g)(3).

C. Violation of the Regulation

Consol argues that the judge's decision upholding the Secretary's

interpretation of 30 C.F.R. • 50.30-1(g)(3) ignores the plain language of the regulation and fundamental rules of statutory construction. Consol notes that "the regulation clearly differentiates between on-duty (on mine property) time and off-duty (off mine property) time," and that off-duty time is to be excluded from the calculation of the number of employee hours worked. Consol Br. 26. It asserts that the examples of off-duty work listed in the regulation ("vacation, holiday, sick leave and all other off-duty time") occur off mine property. From this it reasons that off-duty time equates with time spent off mine property and that on-duty time equates with time spent on mine property. Consol maintains that the judge's interpretation of the term "hours worked" to equate with hours paid while on mine property has no support in the language of the regulation. It contends that the time spent by miners, before and after shift, performing miscellaneous tasks, such as picking up and returning equipment and supplies, is to be included in hours worked under the regulation, even though employees are not compensated for such time, because they are exposed to the hazards of mining during that time. It points out that MSHA considers on-duty, remunerated time to include time when no labor is being performed, such as meal breaks, because employees are "on duty" at the work site. Consol argues that it is inconsistent to exclude time when work is being performed while including paid work breaks.

Consol also points to the fact that under section 50.1, incident rates are to be calculated using the "hours of employee exposure" rather than the hours of remunerated work. The reporting of hours worked requires the reporting of those hours "that are consistent with the possible occurrence of reportable incidents used to calculate the intended accurate incidence rate." Consol Br. 28. Consol maintains that it cannot be penalized for logically

interpreting Part 50 in a manner that is consistent with the express terms of section 50.30-1(g)(3).

Consol also argues that, because its payroll records do not accurately reflect time worked, it is authorized under the regulation to estimate the total number of hours worked. The parties stipulated that Consol's estimate as reported to MSHA "reflect the actual time spent by hourly employees [at its mines]." Stip. 46. Consol contends that it was justified in reporting these estimated hours since actual hours were not available from its "payroll or other time records."

We disagree with Consol's view that the language of the regulation is plain and we conclude that the Secretary's interpretation is reasonable. Section 50.30 (n. 1 supra) requires mine operators to complete MSHA Form 7000-2 in accordance with the instructions found in section 50.30-1, and to submit the completed form to MSHA. Section 50.30-1(g)(3) requires operators to show the "total hours worked by all employees during the quarter covered." "[H]ours worked" is not defined here or in section 50.2. The regulation further instructs operators to "[i]nclude all time where the employee was actually on duty...." The term "on duty" is likewise not defined. The regulation provides that "hours reported should be obtained from payroll or other time records" but indicates that these figures may require modification to exclude "vacation, holiday, sick leave, and all other off-duty time, even though paid for." Overtime hours are to be reported as straight time rather

than as a multiple. Thus, although the language of the regulation is not plain, it would appear that an operator is required to use its payroll or other time records to calculate gross employee hours worked; to subtract any time included in this calculation that represents time not worked, such as sick leave, and any multiple hours used to calculate overtime pay; and to report the resulting figures to MSHA. This reported figure would include all time reflected in the payroll records "where the employee was actually on duty."

Payroll or other time records for hourly employees typically represent all hours worked, and the regulation instructs operators to use such records as a starting point for the calculation required. The regulation does not instruct operators to add to those figures any unpaid hours worked that are not included in the payroll or other time records. The only modifications authorized are for the purpose of deleting hours paid and not worked rather than for adding hours worked and not paid. We discern no legal justification for reading into this regulation the right of an operator to include all time that miners are on mine property.

The only provision of the regulation that provides an exception from the use of payroll or other time records states that "[i]f actual hours are not available, they may be estimated on the basis of scheduled hours." 30 C.F.R. § 50.30-1(g)(3). MSHA has consistently interpreted this sentence to authoriz mine operators to submit estimated hours as hours worked only if payroll or

other time records do not reflect actual hours worked.(Footnote 6) Stip. 39; Sec. Br. 17. This exception cannot be reasonably read to allow an operator to augment the hours worked as reflected in the payroll records with additional unpaid hours, during which employees are on mine property.

MSHA's interpretation of the Part 50 regulations was further clarified in informational guidelines. Although these guidelines are not binding on MSHA or the Commission, they do provide "an accurate guide to current MSHA policies and practices." Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n. 5 (D.C. Cir. 1989). The guideline in effect between March 1978 and December 1986 paraphrased the regulation and stressed that hours paid but not worked were not to be reported. Gov. Exh. 6, p. 16. When the guideline was revised in December 1986, it included a new sentence indicating that operators are "not [to] include time spent on mine property outside of regularly scheduled shifts, i.e., bathhouse, parking lot, etc." Gov. Exh. 1, p. 15; Stip. 41. We agree with the judge that this added language did not signal a change in MSHA's interpretation of the regulation. The added language made it explicit that operators are to submit figures for employee hours worked based upon their payroll records rather than on information or estimates that reflect the time employees are present at the mine.

Consol focuses on the term "hours worked" and contends that, because its employees "work" before and after each shift, the time spent performing such "work" should fall within the concept of "hours worked." Consol asserts that it is inconsistent for the Secretary to exclude such unremunerated time worked while including time that miners are paid while not working, such as paid meal breaks. We do not dispute the logic behind Consol's argument that miners perform "work" before and after their regular shifts and agree that this time

could or even should have been incorporated by the Secretary into the concept of "hours worked." The Secretary, however, chose not to include these unpaid hours in the description of "hours worked" in the regulation or guidelines. Consol also argues that the incident rates calculated by the Secretary under the Mine Act should be comparable to incident rates calculated by the Secretary for employers covered by the Occupational Safety and Health Act of 1970, 29 U.S.C. • 651 et seq. ("OSHAct"). It asserts that MSHA's Part 50 regulations should be interpreted in pari materia with the Secretary's requirements under the OSHAct, which do not require that reportable time equate with compensated time. While we agree with Consol that, as a matter of policy, the incident rates calculated by the Secretary for the mining industry should be comparable with the incident rates of other industries, the Mine Act does not explicitly require that the method of calculating incident rates under the Mine Act be consistent with that used under the OSHAct. As a consequence, Consol's assertion that, as a matter of law, the Secretary's Part 50 regulations must be interpreted consistently with the reporting requirements under the OSHAct is rejected.

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6 In contrast, MSHA allows the reporting of estimated hours of work for salaried employees totalling 9 1/2 hours per day at Consol's mines. Stips. 32 & 33.

Finally, Consol argues that "a regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required." Consol Br. 36-37, quoting Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). Consol maintains that the Secretary's guidelines interpreting Part 50 are internally inconsistent and have changed significantly since the regulation was adopted. In fact, Consol had actual notice of the Secretary's December 1986 interpretation of the regulation to the effect that mine operators should "not include time spent on mine property outside of regularly scheduled shifts, i.e., bathhouse, parking lot, etc." Gov. Exh. 1, p. 15; Stip. 41. The revised guideline containing this specific language was issued two and one half years before the contested citations were issued. We conclude that Consol was given fair notice of the requirements of the regulation.

Based on the above, we affirm the judge's finding that Consol violated section 50.30-1(g)(3). Notwithstanding the preceding determinations, however, we also agree with the judge that the incident rates calculated by MSHA are flawed because the injury and accident information that mine operators are required to submit does not correlate with the data that mine operators must report for employee hours worked.(Footnote 7) See 12 FMSHRC 1144-46. As stated above, the injury and accident information gathered by MSHA from section 50.20 and the employee hours worked information gathered by MSHA from section 50.30 are used by MSHA to calculate rates of injury occurrence pursuant to section 50.1. Under section 50.1 incident rates are to be calculated by dividing the number of accidents and injuries by the number of employee exposure hours. The Secretary, however, calculates incident rates by dividing the number of accidents and injuries during total exposure hours by the number of employee hours worked. The mismatch of numerator and

denominator yields distorted incident rates. The Secretary argues that, since all mine operators are required to report only actual paid hours worked, any skewing, if it occurs, would be similar across operators. Sec. Br. 21. This assumption, however, is not correct. Employees at some mines may perform preand post- shift tasks for varying periods of time before and after the start of their paid shifts, and employees at other mines may work longer shifts and perform such tasks during their paid shifts. The reported incident rates of these operators may not be comparable.

Another source of lack of comparability in reported incident rates across operators arises from inconsistent treatment of salaried employees. MSHA admits that it allows Consol to include an additional 90 minutes of exposure time for salaried employees, but has not disseminated its acceptance of this allowance to other operators similarly situated. Oral Arg. Tr. 29-30. This policy may seriously skew the data since counsel for Consol indicated that at large mines as much as 30% of the work force may be categorized as salaried employees. Oral Arg. Tr. 44-45.

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7 The citations charged Consol with nonserious, non-S&S violations. In upholding the citations, the judge concluded that the violations were "nonserious and technical in nature" because, as applied by MSHA, the incident rate formula produces flawed data. 12 FMSHRC at 1146. The Secretary did not appeal this finding.

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Nevertheless, because section 50.30-1(g)(3) requires mine operators to report to MSHA the number of employee hours worked as recorded in the operator's payroll or other time records, we conclude, as did Judge Merlin, that Consol violated the regulation. Prior to the Commission's decision in Freeman United Coal Mining Co., 6 FMSHRC 1577 (July 1984), Consol reported as hours worked the number of paid hours that miners worked as reflected in its payroll records. Stip. 42. Consol was not free to reinterpret the reporting regulation merely because it believed that the incident rates calculated by MSHA were flawed, because of the Commission's decision in Freeman or because of its belief that MSHA's use of the data is misguided. As noted by the Secretary, Consol's method is also flawed in that it dilutes Consol's incident rate as compared to other operators. Sec. Br. 19-21. If each operator could report to MSHA whatever data it believed would lead to the most accurate incident rate at its own mines, operator reports would not be comparable and the incident rates calculated by the Secretary would be inaccurate. Finally, it is not clear from the record in this case whether the flaw caused by MSHA's use of mismatched data resulted in significantly skewed incident rates for Consol because few injuries at Consol's mines occurred before or after the miners' regular shifts. See Sec. Br. 20-21 n. 13.

We conclude that any flaws in MSHA's calculations of incident rates do not excuse Consol's violation of the regulation. Incident rates provide a general picture of the safety record of a mine operator. The assertion that MSHA's method of calculating incident rates is less than perfect or that there may be better methods does not excuse mine operators from complying with the data submission requirements of Part 50. The Commission's task is not to determine the best method of calculating incident rates, but to determine

whether the Secretary's interpretation of the reporting regulation is reasonable and whether the operator was given fair notice of its requirements. See e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988); Lanham Coal Co., 13 FMSHRC 1341, 1343-44 (September 1991).(Footnote 8)

D. Whether Consol was highly negligent

We conclude that substantial evidence supports the judge's finding that Consol's "negligence was high." 12 FMSHRC at 1146. The express language of section 50.30-1(g)(3) is ambiguous and, in general, the reporting requirements of the regulation should be harmonized with the other sections in Part 50 to effectuate the Mine Act's goal of promoting the safety and health of miners. Cf. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984)(citation omitted).

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8 At the time of oral argument, the Secretary had issued an advance notice of proposed rulemaking to amend her Part 50 regulations. 53 Fed. Reg. 45,878 (November 14, 1988). Consol moved the Commission, on May 8, 1992, to take judicial notice of the Secretary's announcement that she had withdrawn Part 50 from her regulatory agenda. See 57 Fed. Reg. 16, 983 (April 27, 1992). The Secretary has not filed an opposition to this motion. We hereby grant Consol's motion. See Fed. R. App. P. 28(j). We find the Secretary's action in removing Part 50 from her regulatory agenda disturbing in light of our conclusions that injury incident rates are distorted and subject to inconsistencies as between operators.

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1984) (citation omitted).

Nevertheless, as the judge concluded, "after the Freeman decision the operator intentionally changed its reporting of hours worked under • 50.30-1(g)(3)." 12 FMSHRC at 1146. As the judge explained:

Whatever difficulties may be presented by the Secretary's interpretation of the Act and regulations, no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied.

Id.

We conclude that the judge's decision is supported by substantial evidence. Accordingly, we affirm his finding that Consol's negligence was high.

III.

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Conclusion

For the foregoing reasons, we affirm the judge's finding that Consol violated 30 C.F.R. • 50.30-1(g)(3) in each instance cited, and also affirm the judge's finding of high negligence.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Holen, concurring:

I fully agree with this decision. I add my concern that the goal of

improving mine safety can be unnecessarily compromised by the use of inaccurate data as a basis for allocating inspection resources, calculating national mine safety statistics, and making regulatory policy.
Arlene Holen, Commissioner