

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 31 2015

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. SE 2007-203-R
	:	SE 2007-294
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY: Nakamura, Acting Chairman; Althen, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve a citation issued to Jim Walter Resources, Inc. (“JWR”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), after a fatal roof fall at JWR’s No. 7 coal mine. The citation alleges a violation of the safety standard in 30 C.F.R. § 75.202(a), which requires that the roof of areas where persons work or travel be supported to protect persons from roof falls.<sup>1</sup>

The Administrative Law Judge held that the Secretary failed to prove a violation of the cited standard and therefore dismissed the citation. *Jim Walter Res., Inc.*, 34 FMSHRC 1386 (June 2012) (ALJ). The Judge held that the Secretary failed to establish that, prior to the roof fall at issue, the roof conditions would have alerted a reasonably prudent person of the need for additional support. The Secretary filed a petition for discretionary review of the Judge’s decision, which we granted.

We reverse the Judge with respect to his dismissal of the citation, and conclude that 30 C.F.R. § 75.202(a) was violated.

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<sup>1</sup> 30 C.F.R. § 75.202(a) provides that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.”

## I.

### **Factual and Procedural Background**

On October 12, 2006, Jerry McKinney, a miner and special projects manager, was seeking to improve ventilation in the underground portion of JWR's No. 7 coal mine near Tuscaloosa, Alabama. As part of this work, McKinney was examining the permanent stopping just north of survey station, or spad, 3575. McKinney observed a large roof fall just south of spad 3575, which measured 62 feet long, 11 to 16 feet wide, and 1 to 4 feet thick. It is undisputed that the roof between the location of this roof fall, just south of spad 3575, and the permanent stopping, located just north of spad 3575, was supported by bolts, straps, timbers and t-boards.

While McKinney was performing this examination, he was fatally injured by the fall of a piece of roof rock 83 inches long, 43 inches wide and 7 inches thick. There were no eyewitnesses to the fatal accident. The Secretary contends that McKinney was standing under the unsupported brow of the prior roof fall at the time of the accident, while the operator contends that McKinney was standing 6 to 10 feet north of the prior roof fall at the time of the accident.

A few hours after McKinney's body was found, MSHA Inspector Harry Wilcox inspected the accident site. On February 15, 2007, MSHA issued Citation No. 7689677, alleging a violation of 30 C.F.R. § 75.202(a) because "[t]he mine operator failed to support or otherwise control the mine roof to protect persons from hazards related to falls." Gov't Ex. 15. The citation also alleged that the violation was "significant and substantial," and was a result of moderate negligence by the operator. The proposed penalty for the citation was \$35,500.

The Judge dismissed the citation because he concluded that the Secretary had failed to prove a violation of section 75.202(a) under the "reasonably prudent person test"<sup>2</sup> previously adopted by the Commission in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), and *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998).<sup>3</sup> The Judge held that the Secretary had failed to prove that there were objective indicia prior to the roof fall that would have alerted a reasonably prudent person that additional roof support was necessary. 34 FMSHRC at 1392-95.

On appeal, the Secretary asserts that the Judge erred by applying the reasonably prudent person test. The Secretary argues that operators are strictly liable for Mine Act violations and that, as a result, if a roof falls, the roof was not supported or otherwise controlled to protect

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<sup>2</sup> The Judge stated that the Secretary had "the burden of establishing the existence of 'objective signs [that] existed prior to the roof fall' . . . and that these objective signs would have alerted a reasonably prudent person to install additional roof support beyond that which had been actually provided at the time." 34 FMSHRC at 1393.

<sup>3</sup> The standard at issue in *Canon* was the former version of 30 C.F.R. § 75.200, the predecessor to section 75.202(a). 9 FMSHRC at 668.

persons from hazards related to roof falls. Thus, the Secretary essentially claims that under the plain meaning of section 75.202(a), a roof fall demonstrates a per se violation of the standard.<sup>4</sup> Alternatively, the Secretary argues that if the standard is found to be ambiguous, his interpretation of the standard as requiring a finding of a per se violation when a roof fall occurs is reasonable and entitled to deference.

JWR contends that the Judge correctly applied the reasonably prudent person test for roof fall violations of section 75.202(a). JWR claims that under the plain meaning of the standard, an operator is liable for a roof fall only if, prior to the roof fall, a reasonably prudent person would have recognized that additional roof support was necessary. Alternatively, JWR argues that even if the Commission finds the standard to be ambiguous, the Secretary's interpretation is unreasonable and thus not entitled to deference.

## II.

### Disposition

The operator urges us to apply the reasonably prudent person test to the requirements of section 75.202(a). On the other hand, the Secretary asks us to interpret the standard to mean that, in all cases, if a roof falls, the roof was not supported or otherwise controlled to protect persons from hazards related to falls of the roof, in violation of section 75.202(a). Under the stark and tragic facts of this case, however, we need not decide whether to adopt one or the other of these tests in all roof fall cases involving allegations of unsupported roof. Such tests "are not presented by the [facts] now before us." *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 275 (2009).

The language of the standard states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). Thus, under the plain language of the standard<sup>5</sup> and the strict liability approach governing Mine Act violations, the Secretary, to prevail here, need only show (1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls.

With regard to the first question, the Judge concluded that the accident site was not an area where persons "work or travel." 34 FMSHRC at 1394 n.10. We disagree.

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<sup>4</sup> In the absence of a roof fall, the Secretary would retain the reasonably prudent person test to determine whether the cited standard had been violated.

<sup>5</sup> When the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

The Commission has interpreted the phrase “work or travel” as used in section 75.202(a) to be circumstance specific. *Cyprus Empire Corp.*, 12 FMSHRC 911, 917-18 (May 1990). In *Cyprus*, the Commission held that whether miners normally “work or travel” in a particular area is irrelevant if the specific circumstances at issue do not reflect normal circumstances. *Id.* In the instant case, the Judge stated that the accident site was not an area where persons “work or travel” due to the rocks on the floor of the green path.<sup>6</sup> 34 FMSHRC at 1394 n.10. However, the Judge ignored the fact that at the time of the fatal accident, McKinney was at the accident site, performing a work-related function — seeking to improve ventilation in the mine. Therefore, the specific circumstances demonstrate that the accident site was an area where a miner worked and traveled.

This leaves the issue of whether the operator failed to support the roof “to protect persons from hazards related to falls.” When Inspector Wilcox arrived on the scene, Jerry McKinney was lying fatally injured beneath a large roof fall. Accordingly, the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall. As previously mentioned, the Mine Act is a strict liability statute, and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a). The roof fall that pinned McKinney under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls.

In light of the record in this case, we need not go further and choose between the reasonably prudent person test and the approach suggested by the Secretary. It is unnecessary under the facts here to choose between application of the reasonably prudent person test and the adoption of a different test applicable across the board to the host of conditions that might arise, especially in the absence of a record bearing upon a broader range of circumstances. It is sufficient here to find that the roof in this case, located in an area where persons work or travel, was not supported. Accordingly, we hold that the operator violated the standard.<sup>7</sup>

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<sup>6</sup> In his decision, the Judge stated that “[t]he various possible paths to the areas at issue from the main track entry, via various crosscuts are indicated by different colored lines in the *Report of Investigation* (Government Exhibit 10, p. 12 [Appendix B]) (“Gx”) and referred to in the text as green, red, or blue route, path or pathway, respectively.” 34 FMSHRC 1391 n.3. The accident site was part of the rarely travelled green path, while the red path was used as the primary travelway.

<sup>7</sup> We recognize that the decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), was reached in a factual context similar to that in the present case. However, in light of the determination set forth immediately above, we decline to follow the *Canon* decision.

III.

Conclusion

We reverse the Judge's finding that no violation occurred, and remand the case to the Chief Administrative Law Judge<sup>8</sup> for further proceedings, including whether the violation was "significant and substantial," and what penalty assessment is appropriate.

  
Patrick K. Nakamura, Acting Chairman

  
William I. Althen, Commissioner

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<sup>8</sup> The Judge who originally decided this case has since retired.

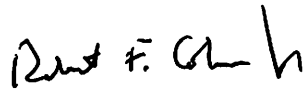
Commissioner Cohen, concurring:

I agree with the result reached by my colleagues, as well as their reasoning. I write separately in order to address footnote 7 of their opinion. Essentially, I conclude that the disposition in this proceeding effectively overrules the Commission's decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987).

In *Canon Coal*, the Commission reviewed a Judge's decision to vacate an order alleging a violation of the safety standard in 30 C.F.R. § 75.200 (the predecessor to 30 C.F.R. § 75.202(a)) that was issued by the Secretary to the operator after a fatal roof fall accident. In order to prove a violation in this instance, the Judge had required the Secretary to demonstrate, in essence, "that objective signs existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond the support that actually had been provided by the operator." *Id.* at 668. The Commission affirmed the Judge's decision to vacate the order.

The analysis in *Canon Coal* does not reflect an appropriate interpretation of the requirements of the safety standard considering the standard's specific directive to protect miners and the strict liability nature of the Mine Act. A roof that falls and kills a miner was obviously not supported "to protect persons from hazards related to falls of the roof" as required by the safety standard. 30 C.F.R. § 75.202(a); *see also* 30 C.F.R. § 75.200 (1987). Because the Commission's holding in *Canon Coal* conflicts with both the language of the safety standard and the Mine Act, I have to conclude that it was wrongly decided.

The overruling of *Canon Coal* does not necessarily affect subsequent Commission decisions which cited it, one of which, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), was also relied on by the Judge in the present case. In *Harlan Cumberland*, the Commission, citing *Canon Coal*, applied the reasonably prudent person standard to a violation of 30 C.F.R. § 75.202(a) in a situation where a roof fall had not actually occurred. The Commission's decision today does not disturb *Harlan Cumberland*.



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Robert F. Cohen Jr., Commissioner

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