FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 30, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 98-230-RM
	:	CENT 99-242-M
CENTRAL SAND AND GRAVEL COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Verheggen and Beatty, Commissioners

In these consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge David F. Barbour affirmed a citation charging Central Sand and Gravel Company ("Central Sand") with a violation of 30 C.F.R. § 56.12045 for failure to maintain adequate clearance under a high-voltage powerline. 22 FMSHRC 779 (June 2000) (ALJ). The case involved the electrocution of an 11-year old boy playing on a company stockpile after working hours. *Id.* at 779-80, 782. We granted Central Sand's petition for discretionary review, and affirm the judge's decision for the reasons that follow.

I.

Factual and Procedural Background

Central Sand's mining operations include Pit No. 77, a sand and gravel extraction and processing facility encompassing 40 to 50 acres of land in Hall County, Nebraska. *Id*. at 779, 781. The company also owns almost half of the lake abutting the southern edge of the land portion of the mine, from which sand and gravel is dredged. *Id.* at 781. That material is transported by pipeline across the lake to a screening plant, where it is processed and carried by conveyor belt to a radial stacker. *Id.* The stacker deposits the sand and gravel in one of six stockpiles, which reach up to a maximum height of approximately 45 feet. *Id.* A front-end

loader later transfers processed material onto trucks for delivery to Central Sand customers. *Id.*; Tr. 331-32.

The only official access to the mine is through an entrance gate on the western side of the property, from which there is a gravel road to the stockpiles. 22 FMSHRC at 781. Electric powerlines serving the mine run roughly parallel to the road. *Id.* Mine property was posted with "no trespassing" signs before the accident. *Id.* at 782. However, unauthorized entry to the mine property was possible by boaters on the lake and by trespassers from a nearby area of trailer homes, because the mine perimeter fence was down or otherwise in need of repair and certain points in between. *Id.*

During the latter half of June 1998, a stockpile of fine road gravel mixed with sand was constructed where previous stockpiles had been located. Tr. 293, 314-15. The western edge of the stockpile was directly under three electrical lines: two parallel high voltage lines and a static line above those two lines. 22 FMSHRC at 782; Tr. 68; Gov't Ex. 3A-B, E-G. The powerlines, installed in 1978 by the City of Grand Island Utility Department and not modified since, carry 13,800 volts of electricity, which was described by Robert Smith, assistant director of the department, as the utility's "standard primary voltage." 22 FMSHRC at 784; Tr. 67.

The accident occurred after the mine had closed for the day on July 1, 1998. 22 FMSHRC at 782; Tr. 29. The decedent boy, Ryan Pochop, lived in the nearby trailer park. 22 FMSHRC at 782; Tr. 29. Entering mine property where the fence was down, Pochop, accompanied by a friend, crossed a shallow river and traveled through dense brush and vegetation, failing to heed at least one "no trespassing" sign. 22 FMSHRC at 782-83. Footprints indicated that the boys, after unsuccessfully attempting to climb one stockpile, ascended to the top of the stockpile under the power lines from the east. *Id.* at 783; Tr. 42-43. Ryan Pochop then slid down the western side of the stockpile on the sand and gravel. 22 FMSHRC at 783. While trying to pass under the power lines, the boy's hand touched the closest line, electrocuting him. *Id.* He continued to slide down the pile, stopping about 15 feet from the ground. *Id.* Rescue personnel were quickly summoned, but the boy was pronounced dead at the hospital. *Id.*

Deputy Frank Bergmark of the Hall County Sheriff's Office, the lead investigator of the accident, began his investigation that night. *Id.* at 782. After determining that, since the accident, no rescue personnel or other person had been to the top of stockpile or to the point on it where the victim had touched the powerline (Tr. 58, 62), Bergmark ascended the stockpile to measure clearances between the wires and the stockpile. 22 FMSHRC at 784. While doing so, sand and gravel shifted beneath his feet and slid down the pile. *Id.* Bergmark measured a vertical distance of 29 inches and a horizontal distance of 60 inches. *Id.* The next morning, July 2, a utility company employee in a bucket truck measured the height of the stockpile at 35 feet, 7 inches, and the height of the three powerlines at 25 feet, 5 inches, to 29 feet, 10 inches, from ground level. *Id.*; Gov't Ex. 4.

MSHA inspector Lloyd Caldwell arrived the afternoon of July 2 to begin his separate investigation into the accident. 22 FMSHRC at 783; Tr. 107.[1] Because of the instability of the stockpile, Caldwell did not attempt to climb it to measure the vertical and horizontal clearances. 22 FMSHRC at 784 n.3. Instead, he relied on Bergmark's measurements. *Id.* at 784.

In Caldwell's view, the clearances Bergmark measured did not meet the requirements of the National Electric Code ("NEC"). *Id.* at 784. Consequently, on July 15, 1998, Caldwell issued Citation No. 7926022 to Central Sand, charging a violation of section 56.12045.[2] *Id.* at 784-85; Gov't Ex. 9. The citation alleged that the stockpile was built more than 10 feet higher than the powerlines and less than 2 feet from the lines on its west side. 22 FMSHRC at 785; Gov't Ex. 9.[3] The violation was designated significant and substantial ("S&S") and the result of the operator's unwarrantable failure. 22 FMSHRC at 784-85; Gov't Ex. 9. [4] The Secretary proposed a penalty of $25,000. 22 FMSHRC at 780.

In his decision following a hearing, the judge determined whether the powerlines were "installed as specified by the NEC" by looking to the National Electric Safety Code ("NESC"), as it is incorporated by reference in the NEC for clearances applicable to conductors over 600 volts. 22 FMSHRC at 785; Gov't Ex. 6 at 70-57. After determining that section 23 of the NESC was the most appropriate section, by process of elimination the judge found that subsection 234 includes clearances most relevant to stockpiles. 22 FMSHRC at 786-87. Under the category in table 234-1 entitled "signs, chimneys, billboards, radio and television antennas, tanks, and other installations not classified as buildings or bridges," the applicable clearance was determined to be

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[1] Caldwell was a certified electrician who trained other MSHA inspectors as to the meaning and application of MSHA's electrical regulations. 22 FMSHRC at 784.

[2] Section 56.12045 requires that "[o]verhead high-potential powerlines shall be installed as specified by the National Electric Code." Because they carry more than 650 volts, the powerlines here are "high-potential" under section 56.12045. 30 C.F.R. § 56.2; 22 FMSHRC at 785.

[3] The citation was later amended to allege in the alternative a violation of 30 C.F.R. § 56.12030, which requires that "[w]hen a potentially dangerous condition is found it shall be corrected before . . . wiring is energized." 22 FMSHRC at 780 n. 1. Because the judge affirmed the part of the citation alleging a section 56.12045 allegation, he did not address whether section 56.12030 was also violated. *Id.* at 789 n.5.

[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology, taken from the same section of the Act, establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

8 vertical feet and 5-1/2 horizontal feet, because the powerlines exceed 750 volts but no maintenance is required on the stockpiles. *Id.* at 787; Gov't Ex. 7 at 101. The judge, although he described the Secretary's regulatory approach with respect to clearances as not "user-friendly," went on to characterize the NEC and NESC as "not impossible to understand and apply" in this instance. 22 FMSHRC at 787 n.4.

The judge rejected the operator's contention that the stockpile was in compliance with required clearances until the boys' descent pushed material from the top to the area under the powerlines. *Id.* at 788-89. The judge relied on testimony from the investigators and photographs of the stockpile to conclude that the stockpile was not in compliance with the NESC prior to and at the time of the accident. *Id.* The judge also rejected the contention that section 56.12045 applied only to the original installation of the powerlines, stating that the operator's failure to maintain required clearances meant that the lines were not "installed as specified" by the NEC and NESC. *Id.* at 789.

The judge also determined that the violation was S&S, because the hazard contributed to by the failure to maintain clearances between the stockpile and overhead powerlines is electrocution from contact with the lines, which is what occurred in this case. *Id.* The judge further determined that the violation was not the result of Central Sand's unwarrantable failure, a determination not appealed by the Secretary. *Id.* at 790-91. The judge reduced the Secretary's proposed penalty to $6,000. *Id.* at 792.

II.

Disposition

A. Interpretation of Section 56.12045

Central Sand maintains that, by its literal terms, section 56.12045 does not apply because it only requires that overhead power lines "be installed" in accordance with the NEC, language which limits the obligation to comply with the NEC to the act of initially setting up the lines for use. CSG Br. at 9-12. Central Sand contends that, by charging it with a violation of the standard, the Secretary is holding it responsible for maintenance of the lines, which Central Sand argues is beyond the scope of the regulation. *Id.* at 12-15. The Secretary responds that it is counterintuitive to interpret the standard in the way Central Sand suggests. S. Br. at 12-13. The Secretary submits that the standard is ambiguous with respect to whether it applies beyond the initial placement of the lines, and that the Commission should defer to her reasonable interpretation of the standard as requiring that the lines remain in compliance with the NEC after their initial placement. *Id*. at 13-20.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where 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 id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) ("*Consol*").

We cannot agree that the standard should be limited in its application by the dictionary definition of "install" that Central Sand urges upon the Commission: "to set up for use or service." *See* CSG Br. at 11-12. Construing the standard in this manner would mean that it would impose no obligation upon operators beyond the initial "set up" of the power lines. This would lead to the plainly absurd result of permitting mining operations to take place without adherence to many provisions in the NESC intended to safeguard persons from the obvious post-installation hazards of overhead high-potential powerlines.

As the judge correctly recognized, adopting Central Sand's reading of the standard would negate much of its protective intent. *See* 22 FMSHRC at 789. Limiting the coverage of section 56.12045 to only the initial installation of overhead powerlines would turn a blind eye to the fact that clearances can change due to alterations in the surfaces or structures from which clearances were first established. In this case, the surface and structures were under the control of Central Sand, as it was responsible for locating and constructing the stockpile. We can hardly conceive that, in promulgating section 56.12045, the Secretary intended to grant operators license to ignore the extensive safety measures incorporated by reference into the standard from the NESC. Accordingly, we refuse to adopt Central Sand's interpretation of section 56.12045. *See Consol*, 15 FMSHRC at 1557-58 (rejecting literal definition of standard derived from dictionary definition because it would lead to absurd result of defeating clear purpose of standard); *see also Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998) (construing explosives training requirement to avoid absurd result of permitting miners to work with explosive despite not being trained with that particular explosive), *aff'd* 170 F.3d 148 (2d Cir. 1999); *cf. Jim Walter Res., Inc.*, 19 FMSHRC 991, 998 (June 1997) (reversing ALJ's decision that standard requiring that conveyor be equipped with slippage and sequence switches was satisfied even though switches were inoperable).

We conclude that it is logical for the Secretary to interpret section 56.12045 to require that clearances from overhead powerlines mandated by the NESC be adhered to beyond the time of initial installation. The material incorporated by reference in the regulation indicates the Secretary's intention to require operators to adhere to minimum powerline clearances at all times. The purpose of the NEC "is the practical safeguarding of persons and property from hazards arising from the *use* of electricity." Gov't Ex. 6 at 70-17 (emphasis added). Similarly, the objective of the NESC provisions on high-potential powerlines, incorporated by reference in the NEC, "is the practical safeguarding of persons during the installation, *operation*, or maintenance of overhead supply and communication lines and their associated equipment." Gov't Ex. 7 at 59 (emphasis added). Consistent with concern for the safe operation of powerlines, the NESC requires that applicable clearances be "maintained." Gov't Ex. 7 at 71.

Moreover, there is no indication in the regulatory history that the Secretary, in promulgating the standard, intended to limit application of the NEC's provisions to only the original setting up of powerlines.[5] *Cf. Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (finding support for Secretary's interpretation in lack of drafter's intent to exclude that interpretation).

In addition, the Secretary's interpretation is consistent with the primary purpose of the Mine Act, which is to protect the health and safety of the nation's miners. *See id.* There is no dispute that requiring adequate clearances from energized overhead powerlines be maintained at all times furthers the goal of mine safety, through avoidance of the danger posed by live powerlines. The danger posed by high-potential powerlines does not cease after the initial installation of the lines.

In short, because operating overhead powerlines pose a great hazard, the term "installed" in section 56.12045 does not designate a limited, initial period of time during which the NESC applies. Rather, it is short hand for the constant vigilance that the NESC makes clear is appropriate when high-potential powerlines are involved. *See Crown Pacific v. OSHRC*, 197 F.3d 1036, 1040 (9th Cir. 1999) (common sense, regulatory purpose, and practical consequences taken into account in interpreting regulations). Accordingly, we affirm the judge's adoption of the Secretary's interpretation of section 56.12045.

B. Notice

Central Sand contends that it should not be assessed a penalty for violating section 56.12045 because the regulation, by not clearly defining what conduct is prohibited, is unconstitutionally void for vagueness. CSG Br. at 15. Central Sand argues that the terms of the standard would not alert an operator to the obligation to maintain clearances after the initial installation of the lines, nor that the NESC was applicable. *Id.* at 16-17. Central Sand also maintains that the difficulty utility company employee Smith, inspector Caldwell, and the judge all had in determining the required clearances demonstrates that the regulation is unconstitutionally vague. *Id.* at 16-18.

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[5] Comparing section 56.12045 with the Secretary's regulation that specifically imposes a maintenance obligation in addition to an installation obligation as to boiler and pressure vessels (30 C.F.R. § 56.13001), Central Sand argues that the Secretary must have made a conscious choice to exclude "maintenance" in connection with overhead powerlines. CSG Br. at 12-13. As the Secretary explains in her brief, however, she is not interpreting "installed" as including a "maintenance" obligation in the sense that affirmative action must be taken by the operator to "service" the utility department's powerlines, as would be necessary to keep boilers in working order. Rather, the operator merely needs to refrain from certain actions, such as building stockpiles too close to the lines, to ensure that the status quo of clearance is "maintained." *See* S. Br. at 16-18. Moreover, there is no suggestion in this case that "maintenance" of powerlines was necessary to prevent clearances from becoming inadequate.

The Secretary responds that it would have been unreasonable for Central Sand to believe that section 56.12045 only applied to the original installation of the powerlines, as that would provide little protection to miners during ongoing mining operations, and thus be contrary to the purpose of the Mine Act. S. Br. at 21-22. The Secretary also points out that Central Sand received actual notice of the need to maintain clearances between stockpiles and overhead powerlines, when its officials attended a safety conference at which Caldwell spoke about the obligation to do so. *Id.* at 22-23. The Secretary further argues that any attentive operator, exercising due diligence, could readily ascertain the proper clearances required in this case, and that in any event the evidence is that Central Sand was attempting to adhere to even stricter clearances. *Id.* at 24-26.

Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation 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) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

The notice requirement is satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *see also Gen. Elec.*, 53 F.3d at 1329 (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party). Here, the judge found that Central Sand was aware it had to maintain clearances of powerlines from its stockpiles. 22 FMSHRC at 790-91. In so doing, the judge relied on the testimony of Stanley Benke, the safety director of Central Sand's parent, Lyman-Richey Corporation, who attended an MSHA Regional Safety Seminar in 1996, where inspector Caldwell discussed the need to maintain adequate powerline clearances from stockpiles in order to avoid the issuance of an MSHA citation. Tr. 194, 199, 251-52. The notes Benke took of Caldwell's presentation support his testimony, as does a subsequent memo he sent to other corporate personnel, including those at Central Sand, regarding the seminar. Tr. 197-98, 249-51; Gov't Ex. 12 at 1, 3. While the judge's finding was not made in the context of determining whether Central Sand had adequate notice, it is nevertheless supported by substantial evidence.[6] Consequently, we hold that Central Sand had

[6] 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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

actual notice that it was required under MSHA regulation to maintain safe clearances between stockpiles and overhead powerlines.

There is no evidence, however, that Central Sand had actual notice of the precise minimum clearances the judge found to be applicable to the powerlines: 5-1/2 horizontal feet and 8 vertical feet. In the absence of actual notice, the Commission normally applies an objective standard of notice, i.e., the reasonably prudent person test. *E.g., Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Ala. By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). However, to establish that inadequate notice has led to a deprivation of due process rights, a party must show it was materially prejudiced by the allegedly insufficient notice. *See Rapp v. OTS*, 52 F.3d 1510, 1520 (10th Cir. 1995); *see also Gen. Elec.*, 53 F.3d at 1333-34 (inadequate notice found where party relied on reasonable alternative interpretation of unclear regulation); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (same).

Here, no evidence was presented to show that the powerline clearances Central Sand attempted to maintain were derived in any way from section 56.12045. Indeed, Benke testified that he was not familiar with what the NEC mandated in the way of clearances from stockpiles, and that the company policy regarding clearances was set without reference to what the NESC required. Tr. 210, 271. Furthermore, testimony from Benke and other Central Sand employees indicates that it was company policy to maintain clearances of 10 feet, both vertically and horizontally, with respect to overhead lines. Tr. 202, 254-55, 279-80, 289, 328. Thus, Central Sand was apparently trying to maintain clearances even *greater* than those mandated by section 56.12045. Central Sand's failure to consult the applicable regulation and incorporated codes, and its attempt to adhere to greater clearances than those that were applicable, demonstrate that Central Sand was not prejudiced by any failure on the part of section 56.12045 to provide adequate notice of the minimum clearances required. Absent evidence that the complexity of the regulatory scheme contributed to Central Sand's failure to maintain the proper minimum clearances in this instance, we need not reach the issue of whether a reasonably prudent person in Central Sand's position would have recognized that clearances of 5-1/2 horizontal feet and 8 vertical feet applied in the case of the Central Sand stockpile.[7]

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[7] We note, however, that the judge's description of the Secretary's regulatory approach as not "user-friendly," is, if anything, an understatement. Both utility official Smith and MSHA inspector Caldwell initially identified the wrong NESC table as applicable in this instance. Tr. 71-75, 132-35, 155-57; Gov't Ex. 7 at 77. Moreover, in ascertaining the correct clearances, the judge mistakenly relied on NESC Section 23's reference to "temporary installations." 22 FMSHRC 786 (citing Gov't Ex. 7 at 69). That is prefatory material in Section 23 which addresses the temporary installation of powerlines, and not the temporary nature of the objects over which the lines may pass. Gov't Ex. 7 at 69. Given our holding, however, that error is

C. Whether Substantial Evidence Supports the Finding of Violation

Attacking the judge's finding of violation on factual grounds, Central Sand argues that the stockpile was 45 to 47 feet tall, and that by playing on it the boys sloughed 10 feet of material from the top, which resulted in a significant decrease to the previously maintained 7-1/2 to 10-foot horizontal and vertical clearances from the powerlines. CSG Br. at 6-7. The Secretary disagrees, maintaining that substantial evidence — provided by Caldwell's credited testimony and the photographs of the accident scene, as well as by one of the operator's witnesses — supports the judge's decision to reject Central Sand's theory. S. Br. at 29-30.

We conclude that the record contains sufficient evidence to support the judge's finding that the boys' descent of the stockpile was not the cause of the inadequate clearance.[8] The only evidence the company presented that the stockpile was 45 to 47 feet high before the boys began playing on it was the testimony of pit manager John Brezina that the radial stacker used on that stockpile can reach that height, that it is company policy to build stockpiles as high as the stacker could build them, and that the stacker had completed constructing the pile. Tr. 291-93, 325-27, 337-38. However, the judge gave little weight to Brezina's testimony, describing Central Sand's position on the greater height of the stockpile on July 1 versus July 2 as nothing more than a "hypothesi[s]." 22 FMSHRC at 788.[9]

The judge was also not persuaded by Brezina's testimony that he verified clearances of 10 feet or so were being maintained by viewing them each day from a car traveling between 20 and 25 miles per hour, and that on the day of the accident he estimated both the horizontal and the vertical clearances between the stockpile and the powerlines at between 7-1/2 and 8 feet. Tr. 316-22, 329-31, 340. Noting that the clearances were not referenced on company inspection reports,[10] the judge found Brezina's daily inspection "not conducive to accurate measurement" of

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harmless.

[8] Because the Secretary did not make the argument, we do not address whether Central Sand's contention that the boys were the cause of the inadequate clearances is answered by the Mine Act's imposition upon operators of strict liability for violations. *See, e.g., Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (mine operators liable for violations without consideration of fault).

[9] Brezina's testimony contradicted an earlier statement in which he estimated the height of the stockpile at 35 to 37 feet. Gov't Ex. 13 at 4. He explained at trial that he based that earlier estimate on his mistaken understanding that the stacker could only reach that high, only to later learn that the stacker could actually build piles as high as 45 to 47 feet. Tr. 292, 336-38.

[10] The company also submitted no documentary evidence regarding the construction of the stockpile or the capabilities of the stacker.

powerline clearances and concluded that "Central Sand did not offer any reliable evidence regarding the clearances as they existed prior to the accident." 22 FMSHRC at 788.

In contrast, the judge credited Caldwell's testimony on the state of the stockpile at the time the accident occurred. *Id.* On cross examination, Caldwell rejected the notion that the top 10 feet of the stockpile had sloughed off, because photographs taken the day after the accident depict the top of the pile as undisturbed. Tr. 162-63; Gov't Ex. 9 at 6-9. Caldwell pointed out water streaks in the pile from the last wet sand and gravel put on it by the stacker, and testified that these streaks would not have been evident if the top 20 percent of the pile had sloughed down its sides. Tr. 162, 188-89. In addition, Caldwell pointed out that any activity on the stockpile in the area of the powerlines would have resulted in an increase in the clearances, not a decrease, because of the consequential sloughing of material further down the stockpile. Tr. 120-21. In light of the foregoing, the judge agreed with Caldwell that photographs of the immediate area of the stockpile on which the accident occurred do not indicate significant movement of material, thereby accepting the conclusion the Secretary drew from the circumstantial evidence: stockpile clearances were inadequate at the time of the accident. 22 FMSHRC at 788-89.

The judge's conclusion that measurements taken the night of the accident reflect clearances as they existed at the time of the accident was based on credibility determinations. 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 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) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, we see no reason to take the extraordinary step of overturning the judge's decision to credit the testimony of Caldwell over that of Brezina on the state of the stockpile at the time of the accident. The judge had the opportunity to view both witnesses, and explained in detail why he was crediting one over the other. Consequently, we affirm the judge's finding of violation.

D. S&S

Central Sand argues in its brief that, even if the Commission upholds the finding of violation, substantial evidence does not support the S&S determination. CSG Br. at 8. Central Sand contends there was no reasonable likelihood that the failure to maintain clearances between the stockpile and the powerlines would lead to an accident, given that the clearances were checked daily, and that it was a trespasser who was electrocuted. *Id.* at 8-9. The operator also

requests that its limited duty to trespassers under state law be taken into account in determining the duty it had to protect the boy from the powerlines. *Id.* at 9.

In response, the Secretary urges the Commission to uphold the judge's S&S determination on substantial evidence grounds, arguing that the two boys gained access to the mine property with little difficulty, and the judge was correct in viewing Ryan Pochop's electrocution as evidence of the danger posed by the lack of proper clearances. S. Br. at 30 n.30. The Secretary also contends the state trespass law is irrelevant to determining whether a violation is S&S. *Id.* at 31 n.30.

Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70, 29 C.F.R. § 2700.70, require that each issue on which Commission review is sought be separately numbered and plainly and concisely stated. These provisions also limit the Commission's review to the questions raised in a granted petition for discretionary review ("PDR") or by the Commission sua sponte. *See, e.g., Wyo. Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994) (refusing to consider issue), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table). Here, Central Sand's PDR addressed only two issues: whether section 56.12045 was applicable in this instance and whether the regulation was void for vagueness. No mention was made in the PDR of whether the judge correctly determined the violation to be S&S, and the Commission did not issue a sua sponte order to review the S&S issue.

The Commission has recognized that issues implicitly raised by a PDR, or that are closely related to an issue raised in the PDR, may satisfy the requirements of section 113(d) and Rule 70. However, whether a violation is S&S is an entirely separate issue from whether the regulation violated actually applies and whether there was adequate notice of the conduct prohibited by the regulation. Consequently, in these cases the Commission has historically declined to review an S&S determination when it was not listed by counsel in the PDR as an issue on which review was sought. *See Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997) (limiting review to penalty issue raised in PDR). We see no reason to depart from that precedent here, and thus refuse to consider Central Sand's S&S arguments.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Riley, dissenting in part:

While I agree with the majority on the issues relating to the question of violation in this case, I cannot agree that Central Sand, by failing to separately list in its PDR its challenge to the judge's S&S determination, thus failed to properly preserve its right to have the Commission consider the issue during briefing. In my opinion, Central Sand properly preserved its right to challenge the S&S determination when it filed a PDR taking issue with the finding of the underlying violation, and that PDR was granted. This is in keeping with the Commission's past practice of considering issues either implicitly raised by a PDR or related to an issue that was raised in the PDR.[1] As there can be no S&S finding without a predicate finding of violation, I believe it exalts form over substance to require a party to separately list its challenge to an S&S finding when it is already challenging the violation.[2]

Moreover, consistent with section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(c), 29 C.F.R. § 2700.70(c), Central Sand alleged in its PDR that, with respect to the judge's decision, "necessary legal conclusions are erroneous." PDR at 2 (emphasis added).[3] I thus would consider Central Sand's arguments that the judge erred in concluding the section 56.12045 violation was S&S.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on 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. *See Cement Div., Nat'l Gypsum Co.*,

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[1] *See, e.g., Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 717 n.8 (June 2000) (reversing finding of violation of record-keeping violation even though not directly contested in PDR because to do so was "direct and logical outgrowth of" reversal of related primary violation); *Hubb Corp.*, 22 FMSHRC 606, 611 (May 2000) (considering argument regarding judge's failure to consider statutory criterion where PDR raised issue with respect to regulatory criterion that had "virtually identical language"); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1999) (issue of unwarrantable failure considered because it was sufficiently related to negligence issue raised in PDR); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (finding that inclusion of subsidiary issue in PDR common to three Mine Act issues raised those issues by implication).

[2] While my colleagues rely on the Commission's decision in *Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997), that case is easily distinguishable. There, the operator was not challenging the underlying finding of violation, but merely the penalty assessed for the violation.

[3] I also note that the Secretary in her response brief did not object to the Commission's consideration of the issue.

3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Here, we would need only consider the third *Mathies'* element – the reasonable likelihood that the danger from inadequate clearances will result in an injury – because there is no dispute that the failure to maintain required clearances can result in inadequate distances between a stockpile and powerlines, and that the injury resulting from coming into contact with a powerline would be a serious one.

In concluding that there was a reasonable likelihood of injury resulting from the inadequate clearances, the judge implicitly found a reasonable likelihood that a person would come in contact with the powerlines. However, the judge made a number of other findings which contradict that finding. Most importantly, the judge found that "[m]iners *never* worked nor traveled on the stockpile." 22 FMSHRC at 791 (emphasis in original). In my opinion, this finding by itself compels the conclusion that the violation was not S&S. The Mine Act is a workplace safety statute. *See UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364 (Sept. 1985) (Mine "Act's concerns are the health and safety of the nation's miners"). Therefore, if a violation does not pose any risk to a miner, it cannot be S&S. The Commission recognized as much when it decided to limit its evaluation of the third *Mathies* element to "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Because "continued normal mining operations" at the Central Sand stockpile means that

miners would never come near the dangerous condition posed by the powerlines, I would reverse the judge's S&S determination, and remand the case to him for a reassessment of the penalty.[4]

James C. Riley, Commissioner

[4] Even if the danger to trespassers on the stockpile posed by the inadequate clearances were taken into account, the judge's findings made in determining that the violation had not been shown to be due to Central Sand's unwarrantable failure militate against a finding of reasonable likelihood of harm occurring to trespassers. Specifically, the judge found Central Sand had little prior notice that the mine was subject to trespass, and that the boys in this instance had to go to great lengths to place themselves in harm's way. 22 FMSHRC at 791.

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