FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-218-M
DACOTAH CEMENT	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Beatty, Jordan, and Young, Commissioners

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Administrative Law Judge Irwin Schroeder vacated Citation No. 791963 charging Dacotah Cement with a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 46.7 (2001).[2] 24 FMSHRC 782, 786 (July 2002) (ALJ). We granted the

[1] The S&S terminology is taken from section 104(d)(1) of the 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."

[2] At the time of the incident giving rise to the citation at issue in this proceeding, section 46.7 provided in pertinent part:

> (a) You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects and safe work procedures specific to that new task. This training must be provided before the miner performs the new task.
>
> (b) If a change occurs in a miner's assigned task that affects the health and safety risks encountered by the miner, you must provide

Secretary of Labor's petition for discretionary review challenging the judge's decision. For the reasons set forth below, we vacate the judge's decision and remand this case for further proceedings.

I.

Factual and Procedural Background

Dacotah Cement operates a large portland cement production facility in Rapid City, South Dakota. 24 FMSHRC at 783. In cement production, limestone, shale, and iron ore are crushed, mixed together, and sent to a losche mill, which consists of two rolling cylinders that press down against a rotating turntable. *Id.* The ground material is mixed with water and sent through a kiln to become clinker. *Id.* In the losche mill, the downward grinding pressure of the two rolls is controlled by a hydraulic system. *Id.* When this system is energized, the oil in the system is pressurized to approximately 1000 pounds per square inch ("psi"). *Id.* The mill control panel contains valves to reduce and relieve this pressure in the event work is required on the system. *Id.*

The hydraulic pressure is transmitted from a pump to the mill through heavy duty hoses. *Id.* Several Dacotah Cement employees are responsible for servicing and maintaining the equipment, including replacement of the hoses. *Id.* at 783-84. On January 11, 2001, service and maintenance crew employee Robert Rohrbach noticed a pool of oil below one of the two-inch-

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> the miner with training under paragraph (a) of this section that addresses the change.
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> (c) You are not required to provide new task training under paragraphs (a) and (b) of this section to miners who have received training in a similar task or who have previous work experience in the task, and who can demonstrate the necessary skills to perform the task in a safe and healthful manner. To determine whether task training under this section is required, you must observe that the miner can perform the task in a safe and healthful manner.
>
> (d) Practice under the close observation of a competent person may be used to fulfill the requirement for task training under this section, if hazard recognition training specific to the assigned task is given before the miner performs the task.
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> ***

30 C.F.R. § 46.7 (2001) (revised 67 Fed. Reg. 42382 (June 20, 2002), effective September 23, 2002).

diameter hydraulic hoses and concluded that the hose was leaking hydraulic oil. Tr. 43. On January 12, 2001, he and fellow service and maintenance crew employee Fred Juopperi were assigned to replace one of the hydraulic hoses on the losche mill. 24 FMSHRC at 784.

As of January 12, 2001, Rohrbach had worked as a maintenance employee for Dacotah Cement for more than ten years. *Id.* at 784. Juopperi had been employed by Dacotah since June 1991 and had worked as a mechanical repair person, second class, for about one and one half years. Tr. 163. Before January 12, 2001, Juopperi had never performed significant maintenance work on the losche mill. 24 FMSHRC at 784. John Harris, Dacotah's Safety Director, testified that all miners received training in Spring 2000 covering the company's safety and health manual, which instructed miners on the lockout/tagout procedures of various systems, including bleeding off stored energy. Tr. 213, 233-34; R. Ex. D at 21-24. Both Rohrbach and Juopperi testified that they were familiar with the company's lockout/tagout policy contained in its manual. Tr. 140-41, 178-79.

Rohrbach and Juopperi worked under the direction of several supervisors. 24 FMSHRC at 784. On January 12, 2001, Melvin Wooley was the supervisor responsible for Rohrbach and Juopperi. *Id.* At the hearing, Wooley testified about Rohrbach's and Juopperi's work history and training. *Id.* He testified that neither Rohrbach nor Juopperi had received specific training in heavy hydraulic hose replacement, but that he had observed Rohrbach perform a great number of procedures on the losche mill which required use of the pressure relief valves. *Id.*

On January 12, 2001, Rohrbach began the work of replacing the hoses by assembling the necessary tools and cleaning the work area. *Id.* He turned off the pump which pressurizes the system, turned off and locked the breaker switch which supplies power, and read the pressure indicator at 1,024 psi. Tr. 33-34. He had almost completed these preparations when Juopperi joined him. 24 FMSHRC at 784. The two men removed the guards around the hose area and finished gathering the necessary tools to complete the job. Tr. 150, 153-54. They then left the losche mill for approximately 30 minutes to join the rest of the maintenance crew for the mid-morning break. 24 FMSHRC at 784. When they returned to the losche mill they resumed the process of replacing the hose. *Id.*

Working together, Rohrbach and Juopperi attempted to uncouple the hose from the hydraulic system manifold. Tr. 130, 157-58, 161-62. Using a piece of pipe or "cheater bar" over the end of his wrench to provide more leverage, Juopperi was able to loosen the coupling. Tr. 17-18, 142. After the coupling was broken loose and turning, Rohrbach noticed fluid oozing from the threaded joint. 24 FMSHRC at 784. Before he could act on his suspicions that the system was still pressurized, the coupling parted and the hose began to thrash about releasing fluid on both men. *Id.* Juopperi got fluid in his eyes and Rohrbach was struck by the metal end of the hose and doused with fluid. *Id.* at 784-85. Both men moved away from the immediate danger area and called for help. *Id.* at 785. As the fluid escaped, the system pressure rapidly decreased and the danger abated. *Id.*

Both Rohrbach and Juopperi were taken to a hospital for medical attention. *Id.* Rohrbach suffered a fractured elbow; Juopperi had less significant injuries. *Id.* Dacotah notified the local MSHA office of this accident. *Id.* MSHA Investigator Joseph Steichen went to the site to investigate. *Id.*

Steichen testified that he interviewed Juopperi and Rohrbach after their release from the hospital, asked Rohrbach if he had opened the pressure relief valves prior to disconnecting the hose, and that Rohrbach replied that he did not know where the pressure relief valves were located. *Id.* Steichen further testified that based on this response and Rohrbach's and Juopperi's actions, he concluded that Rohrbach and Juopperi had not been sufficiently trained in the task they were assigned to perform. *Id.*; Tr. 36-38.

The judge found that the Secretary failed to meet her burden of proof that both Rohrbach and Juopperi were inadequately trained in violation of 30 C.F.R. § 46.7. 24 FMSHRC at 786. In reaching this conclusion, the judge gave more weight to evidence of Rohrbach's training history and the corroborating testimony of his supervisors than to the inspector's testimony. *Id.* at 785. The judge found that the inspector made an improper presumption based on the conclusion that the accident would not have happened had the employees been properly trained. *Id.* at 785-86. He noted that the inspector took what amounted to a "*res ipsa loquitor*"[3] attitude toward the training requirement when he based his conclusion on his interview of Rohrbach and Juopperi, and an examination of the accident scene. *Id.* Concluding that "the record in this case does not demonstrate that the . . . accident was the result of inadequate training rather than carelessness or inattention," the judge found that the record supported the conclusion that "Rohrbac[h] had been adequately trained in the task assigned to him . . . and he was able to provide sufficient supervision to Mr. Juopperi." *Id.* at 786. The judge dismissed the Secretary's penalty petition. *Id.*

II.

Disposition

Section 46.7 of 30 C.F.R. implements section 115(a)(4) of the Mine Act, 30 U.S.C. § 825(a)(4),[4] requiring operators to provide miners with training for new tasks and to supply any new health and safety information related to assigned tasks before miners perform those tasks.

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[3] Literally, "the thing speaks for itself." *Black's Law Dictionary* 1173 (5th ed. 1979). "Res ipsa loquitur is [a] rule of evidence whereby negligence of alleged wrongdoer may be inferred from mere fact that accident happened. . . ." *Id.*

[4] Section 115(a)(4) of the Mine Act provides in pertinent part that "any miner who is reassigned to a new task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary . . . in the safety and health aspects specific to that task prior to performing that task." 30 U.S.C. § 825(a)(4).

See 64 Fed. Reg. 53080, 53115 (Sept. 30, 1999). Sections 46.7(a) and (b) set forth the conditions when task training is required, specifically when a miner is reassigned to a new task with which he or she does not have prior work experience or training, 30 C.F.R. § 46.7(a), or where a change occurs in the miner's assigned task that affects the health or safety risks associated with the task, 30 C.F.R. § 46.7(b). There are various means of providing task training, two of which are specifically set forth in sections 46.7(c) and (d). 64 Fed. Reg. at 53116.

The Secretary has petitioned for review of the judge's apparent conclusion that Juopperi was adequately trained under the regulations before Dacotah assigned him to replace the hydraulic hose on the losche mill with Rohrbach. PDR at 9; S. Br. at 9. In particular, the Secretary alleges that the operator failed to satisfy any of the requirements for task training as to Juopperi under section 46.7, including subsection (d). PDR at 9, 12-14; S. Br. at 9, 13-16. Dacotah responds that it was providing task training to Juopperi pursuant to subsection (d) by having Juopperi practice under the close observation of Rohrbach, "a competent person." D. Br. at 10-11.

Section 46.7(d) permits an operator to satisfy the new task training requirements by allowing a miner to "[p]ractice [the new assigned task] under the close observation of a competent person," if the miner has received "hazard recognition training *specific to the assigned task . . . before* the miner performs the task." 30 C.F.R. § 46.7(d) (emphasis added). Although the judge did not explicitly frame his analysis within the terms of section 46.7, it appears that he may have implicitly considered the terms of subsection (d) when he concluded that "Rohrbac[h] had been adequately trained in the task assigned to him . . . and he was able to provide sufficient supervision to Mr. Juopperi."[5] 24 FMSHRC at 786.

The Secretary cites record evidence which tends to support her claim that Dacotah failed to provide adequate task training to Juopperi pursuant to section 46.7(d), and which fairly detracts from the judge's conclusion. S. Br. at 10-16. There is no indication in the judge's decision that he considered this evidence. To the extent that the judge ignored record evidence, he erred. As the Commission explained in *Mid-Continent Resources, Inc.*, the judge must

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[5] Contrary to our concurring colleagues' concerns, the Secretary explicitly raised the argument below that the operator did not satisfy the task training requirements as to Juopperi under subsection (d). She amended her citation prior to trial to allege a violation of section 46.7 in its entirety, putting the operator on notice that the entire standard was at issue. 24 FMSHRC at 782; Tr. 4-7. Notwithstanding our colleagues' contention that she was late in raising the argument (slip op. at 15), the record is clear that she expressly addressed the issue in her response to the judge's pre-hearing order (S. Resp. to Pre-Hearing Order at 2) and raised the issue at trial (Tr. 86-87). She then explicitly argued it in her post-hearing brief to the judge (S. Post-Hearing Br. at 7-9). Even Dacotah acknowledges in its brief to the Commission that "[t]he Secretary attempted to convince the Administrative Law Judge that Dacotah Cement had violated the regulation with respect to both Mr. Rohrbach and Mr. Juopperi." D. Br. at 3.

analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his decision. 16 FMSHRC 1218, 1222 (June 1994).

We now turn to the question of the appropriate interpretation of section 46.7(d). 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 Dyer*, 832 F.2d at 1066; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

While the parties disagree on the meaning of certain terms in the first portion of subsection (d), the language of the second portion pertaining to hazard recognition training is clear and unambiguous. Subsection (d) clearly requires that a miner be trained in recognizing hazards *specific* to the assigned task *before* performing the task. 30 C.F.R. § 46.7(d). The hazard recognition training must be *specific* to the assigned task – in this instance, repairing and replacing the hydraulic hose on the losche mill – and "must cover the health and safety aspects and safe work procedures specific to the task." 64 Fed. Reg. at 53087. In the preamble to the final rule, the Secretary explained that hazard recognition training would encompass "an explanation of the potential health or safety hazards associated with the task and ways of minimizing or avoiding exposure to these hazards." *Id.* The language of the regulation also clearly requires that such training be given *before* the miner performs the assigned task.

The Secretary contends that Dacotah did not provide hazard recognition training to Juopperi before permitting him and Rohrbach to replace the hydraulic hose. The judge made no finding regarding what training, if any, Juopperi received. The judge's legal analysis is thus incomplete. *See Mid-Continent*, 16 FMSHRC at 1222.

Our review of the record suggests there is evidence on both sides of the issue. Dacotah points to evidence that Juopperi understood that he was to take instructions from Rohrbach as they performed the assigned tasks. Tr. 181. While the Secretary contends that there is no evidence that Juopperi received any relevant training, the record indicates that Juopperi may have received annual refresher training approximately nine months prior to the accident, which may have covered aspects of hydraulics and high-pressure hazards. Tr. 138-41, 177-79, 233-34. Dacotah also points to its safety and health manual which includes instructions to bleed off stored energy in various systems before performing maintenance and service on such systems under its lockout/tagout procedures. Tr. 233-34; R. Ex. D at 21. However, when making a finding as to whether Juopperi received hazard recognition training specific to the task of replacing a hydraulic hose, the judge must take into account whether such training was provided sufficiently close in time to the assigned task. He should also consider whether the training included not only general familiarization with hydraulic systems and principles, but also

sufficient guidance in safely releasing stored energy from the type of hydraulic system used on the losche mill.

_____If the judge finds that Juopperi did not receive hazard recognition training specific to the task of replacing a hydraulic hose, he must affirm the citation. If he finds Juopperi did receive such training, he must address the other requirement of subsection (d), and determine whether Juopperi "practice[d] under the close observation of a competent person," 30 C.F.R. § 46.7(d), as he did not fully address this aspect of the regulation in his original decision.[6]

Although the judge did not make an explicit finding as to whether Rohrbach qualified as a "competent person," he did find that Rohrbach was adequately trained and able to supervise Juopperi. 24 FMSHRC at 786. To the extent that the judge took into account, when making his finding, the standard's "competent person" requirement, we conclude that substantial evidence supports the judge's finding.[7]

Under the Secretary's regulations, a "competent person" is defined in pertinent part as "a person designated by the []operator . . . who has the ability, training, knowledge, or experience to provide training to miners in his or her area of expertise [and the ability] both to effectively communicate the training subject to miners and to evaluate whether the training given to miners is effective." 30 C.F.R. § 46.2(b).

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[6] Our colleagues misconstrue our reading of the regulation by claiming that we are finding a violation based on only one component of subsection (d) – the lack of adequate hazard recognition training. Slip op. at 18 n.7. First, there is no question that section 46.7 applies because the record clearly establishes that Juopperi was assigned to a new task in which he had no prior experience or training. 24 FMSHRC at 784; Tr. 163-65, 167, 170-71. *See* discussion *infra*, slip op. at 10-11. In addition, an operator who relies on subsection (d) when providing task training must satisfy *all* the components of the subsection. Thus, if an operator fails to fulfill one component of subsection (d), it cannot rely on subsection (d) as a means of providing task training, even if it can show that it fulfilled the other components. For example, even if an operator allows a miner requiring new task training to practice a task under the close observation of a competent person, if the operator has not given that miner hazard recognition training specific to the assigned task *before* the miner practices the task, then the operator has failed to satisfy the requirements of subsection (d). *Id.*

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

The record evidence indicates that Rohrbach had extensive work experience at Dacotah, and more particularly, as a mechanical repair person, first class, he was responsible for directing mechanical repair employees in the second and third classes. Tr. 102-06; D. Ex. B. The record evidence also indicates that Rohrbach received some training specific to hydraulics and previously worked on the hydraulic spring system, which included locking down and de-pressurizing the system. Tr. 106-10, 198-99. Rohrbach testified that he knew how to de-pressurize the system and that in all past instances, he had successfully performed work on the system. Tr. 109-13. Contrary to the judge's finding that Rohrbach had never replaced a hose before the January 12 accident (24 FMSHRC at 784), the record clearly establishes that he had performed such work before the accident (Tr. 111-12). We also note that although Investigator Steichen testified that Rohrbach admitted he did not know the location of the pressure release valves (Tr. 34-35; G. Ex. 2 at 9, 11), the judge credited Rohrbach's conflicting testimony that he was familiar with the valves (24 FMSHRC at 785; Tr. 116-18).[8] Accordingly, we conclude that substantial evidence supports that Rohrbach was a competent person under section 46.7(d).

As to the remaining issues – whether Juopperi was "practicing" the assigned task of replacing a hose under the "close observation" of Rohrbach – the judge did not sufficiently address them. Consequently, if he reaches the issues on remand, we are leaving it to him to make the necessary findings in the first instance. *See Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

We do note the following about section 46.7(d). The term "practice" is not defined in the regulations, the Mine Act, or in the preamble. In the absence of a statutory or regulatory definition, the Commission applies the ordinary meaning of the word. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table). The definition of the verb "practice" is "to make use of . . . to carry on or engage in . . . to do or perform often, customarily or habitually . . . to perform an act often or customarily in order to acquire proficiency or skill." *Webster's Third New Int'l Dictionary (Unabridged)* 1780 (1993).

Consequently, we reject the Secretary's argument that under subsection (d), "practice" should be narrowly defined as only permitting a test or trial performance. Defining "practice" in the limited manner the Secretary suggests is inconsistent with the language and general framework of section 46.7, which permits an operator to satisfy task training in a number of different ways, including traditional classroom instruction as contemplated in subsection (a) or alternatively, with hands-on training as described in subsection (d). Moreover, the preamble to the final rule generally encourages hands-on training to assist miners in learning "how to avoid the hazards presented by the performance of the task in the surrounding environment." 64 Fed. Reg. at 53117. In the preamble, the Secretary stated that the intent of the regulation is to allow

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[8] To the extent that the Secretary now challenges the judge's credibility determinations, we defer to the judge. 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).

"greater flexibility in the implementation of new task training to fit [an operator's] specific mining operation and workforce." *Id.* at 53116. Thus, we conclude that construing the word "practice" broadly, to include repeated performances of an assigned task, is consistent with both the dictionary definition of the term and the language and purpose of the regulation. By remaining under the close observation of a competent person, a miner is permitted to actually perform the task, while minimizing the risk of accident or injury, and gain hands-on experience, which is consistent with the underlying purpose of task training. *See id.* at 53116 (stating that the purpose of task training is "to reduce the likelihood of accidents resulting from a miner's lack of knowledge about the potential hazards of a task"). If the Secretary intended a more restrictive reading of the word "practice," she could have explicitly stated that intent in her preamble.

Likewise, the regulatory framework of section 46.7 encourages an expansive reading of the term "practice." Under subsections (a) and (b), it appears that the Secretary clearly intended that new task training would be provided by traditional classroom instruction. *See* 30 C.F.R. § 46.7(a) and (b). Subsection (d) is an alternative training method to classroom instruction under subsections (a) and (b). *See* 30 C.F.R. § 46.7(d). In the preamble, the Secretary explained that "effective task training includes a combination of different types of training, such as classroom instruction, demonstration by the competent person, practical hands-on training, and evaluation of the miner's ability to apply the training in the workplace." 64 Fed. Reg. at 53116. Given the dictionary definition of the term and the regulatory framework of section 46.7, interpreting "practice" in the restrictive manner as the Secretary suggests would defeat the purpose of the alternative approaches to task training permitted under section 46.7. Of course, we also note that any "practice" contemplated by the regulation must be carried out in a safe manner.

As for the requirement that a miner practice under the "close observation" of a competent person, in the preamble to the final rule, the Secretary explained:

> "Close observation" means that the competent person is in the immediate vicinity of the miner and is watching the actions of the miner being trained to make sure that the miner is performing the task in a safe and healthful manner. The nature of the task will determine the degree of attention that is needed, and the level of observation should be commensurate with the risks inherent in the task being performed. The competent person who is observing the miner should also be assessing the miner's proficiency in performing the task, as part of the training itself as well as the competent person's evaluation of whether the training is effective.

64 Fed. Reg. at 53117.

While the judge found that Rohrbach "was able to provide sufficient supervision" to Juopperi, 24 FMSHRC at 786, he made no finding whether Rohrbach indeed provided such supervision. On appeal, the parties disagree as to whether Rohrbach provided "close

observation" of Juopperi while performing the assigned task. The Secretary points to evidence in the record suggesting that Rohrbach provided little direction to and supervision of Juopperi, who was inexperienced with high pressure systems, while changing the hydraulic hose. PDR at 9-10; S. Br. at 9-11. Although Juopperi testified that he understood that he was to take instructions from Rohrbach as they performed the assigned task (Tr. 181), both Rohrbach and Juopperi testified that Rohrbach did not provide explicit instruction to Juopperi (Tr. 149-51, 183-84, 187). Dacotah contends that Rohrbach did provide "close observation" of Juopperi, arguing that the two miners worked side-by-side as they attempted to replace the hose. D. Br. at 9.

Despite Dacotah's reliance on the close physical proximity of the two miners while performing the task, the preamble clearly indicates that the Secretary intended the term "close observation" to mean more than merely working side-by-side. The regulation imposes a duty to supervise, evaluate performance, and ensure the trainee is able to safely perform the procedure. The preamble envisions that a competent person be in the "*immediate* vicinity" and watching the miner-in-training to assure that he is performing the task safely. 64 Fed. Reg. at 53117. The record evidence suggests that at times, Rohrbach was not carefully watching Juopperi during the hose change. Rohrbach testified that while he and Juopperi were trying to loosen the nut on the hose, he "scooted around the corner still holding the wrench while [Juopperi] was loosening the nut." Tr. 130. The judge must consider the evidence and make a finding as to whether Rohrbach in fact "closely observed" Juopperi while he performed the assigned task.

Despite the contention of our concurring colleagues (slip op. at 15-17), the facts of this case clearly support the conclusion that Juopperi was assigned to change the hose on the losche mill, and thus subject to the task training requirements of section 46.7. It is undisputed that changing hoses was within Juopperi's assigned duties. Tr. 164. In addition, the evidence clearly indicates, and the judge found, that as a part of Juopperi's duties as a maintenance repair person, on January 12, he was assigned with Rohrbach to replace the hydraulic hose on the losche mill. Tr. 170-71; 24 FMSHRC at 783-84. This occurred at a 7 a.m. meeting held that day. Tr. 170-71. The concurrence fails to point to evidence to the contrary. Thus, notwithstanding our colleagues' concurring opinion, we see no need for the judge to revisit his finding on remand.[9]

In the regulations, a "task" is defined as "a work assignment or component of a job that requires specific job knowledge or experience." 30 C.F.R. § 46.2(n). The Secretary explained in the preamble to the final rule that "a task may or may not be performed on a regular basis" and rejected that "instances where a miner is assigned to perform a task on a one-time basis" would preclude the requirement for task training. 64 Fed. Reg. at 53097. Clearly, changing a hydraulic

[9] We acknowledge that there may be circumstances that call into question the application of section 46.7, such as where a miner coming across another miner in the midst of performing a routine task, for which general mining experience would provide sufficient grounding in the health and safety aspects of the task, provides assistance to the other miner without his or her supervisor's explicit instruction to do so. *See infra*, slip op. at 17. However, this was not the case here.

hose on the losche mill requires specific knowledge of hydraulic systems and losche mill operations. Thus, the job Juopperi was assigned to perform is certainly a "task" within the meaning of the regulations. As explained above, that task was also clearly within the scope of Juopperi's job duties. Tr. 164.

We also note that the preamble to the final rule requires training "if a change occurs in a miner's task that affects the health and safety risks encountered by the miner. . . . This means that task training is required whenever any change could impact the health and safety conditions under which the miner works." 64 Fed. Reg. at 53116. This was clearly the case when Juopperi changed the hose. In any event, because the parties have not had a chance to be heard on the issue, it would be unwise for the Commission to address in this case the application of section 46.7 to "commonplace" assignments.[10]

Based on the foregoing, we vacate the judge's decision. Because the judge vacated the citation below, he did not reach the issue of whether the violation was S&S. If the judge concludes on remand that Dacotah violated the standard, he must then determine whether the violation was S&S and assess a penalty.

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[10] We also note that because the operator never raised the issue of the non-applicability of section 46.7 to Juopperi either to the judge below or before the Commission on review, and the Commission did not *sua sponte* direct review of the issue, there is some question as to whether this issue is properly before the Commission. Our decision need not focus on this question, for we conclude, in any event, that the regulation is clearly applicable to Juopperi. *See supra*, slip op. at 10 n.9. Moreover, the operator has implicitly conceded that section 46.7 applies to Juopperi by arguing in its rebuttal to the Secretary's post-hearing brief that the regulation did not apply to Rohrbach. R. Rebuttal at 1. The operator did not repeat this contention vis-a-vis Juopperi, arguing instead that Mr. Juopperi had received the necessary training because he "was performing the task under the close observation of Mr. Rohrbach, 'a competent person'." *Id.* Moreover, the operator explicitly cited section 46.7(d) when it also supplied this rationale in both its pre-hearing and post-hearing submissions to the judge. *See* R. Pre-Hearing Submissions at 1 (citing section 46.7(d) in support of its contention that "Juopperi was performing the task under the close observation of Mr. Rohrbach, a 'competent person'"), R. Post-Hearing Br. at 3, 7 (same); *see also* R. Answer to Pet. for Assessment of Penalty at 1 (stating, in the alternative, that the employees "were in the process of being trained at the time of the incident").

III.

Conclusion

Accordingly, we vacate the judge's decision and remand for further proceedings consistent with the Commission's decision.

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Chairman Duffy and Commissioner Suboleski, concurring:

We concur with our colleagues' conclusion that this case should be remanded to the Administrative Law Judge so that he can make additional findings concerning whether a violation of section 46.7 occurred with regard to Fred Juopperi. While the judge's opinion contains all necessary findings with regard to the need for new task training for Robert Rohrbach, we do not believe that his opinion contains all necessary findings with regard to the need for new task training for Juopperi.

Although we concur with the need for a remand, we write separately for two principal reasons. First, unlike our colleagues, we believe that on remand the judge's findings and legal conclusions must further address the following matters: (1) the ambiguity of the evidence regarding whether on January 12 the supervisor specifically assigned Juopperi, in addition to Rohrbach, to perform the task of changing the hydraulic hose at the losche mill; and (2) what training requirements applied, if any, when Juopperi began assisting Rohrbach in changing the hose after Rohrbach, who clearly had been assigned to perform the task, had already undertaken several steps of the task. Second, we are concerned about certain aspects of the approach taken by our colleagues in their opinion. In particular, we believe that they have gone too far in retroactively supplying a rationale for the issuance of a citation when the Secretary has apparently been unable to do so.

The Regulatory Background

The Secretary's "new task" training regulations for sand, stone, and gravel mining operations are set forth in 30 C.F.R. § 46.7. Section 46.7(a) requires that a miner "who is reassigned to a new task in which he or she has *no* previous work experience" must be provided "training in the health and safety aspects of the task to be assigned . . . before the miner performs the new task." 30 C.F.R. § 46.7(a) (emphasis added). In lieu of the formal task training required under this subsection, section 46.7(c) provides that an operator need not provide training to miners who have received training in similar tasks or who have previous work experience in the task and can demonstrate the necessary skills to perform the task in a safe manner. 30 C.F.R. § 46.7(c). Similarly, section 46.7(d) provides an alternative to the formal training in section 46.7(a) by allowing a miner to "practice under the close observation of a competent person, . . . if hazard recognition training specific to the assigned task is given before the miner performs the task." 30 C.F.R. § 46.7(d).

Presentation of Evidence Before the Administrative Law Judge

In discussing the evidence before the judge and the manner in which he addressed it in his opinion, we believe that it is important to recognize that the judge's disposition of the citation in this proceeding has been complicated by the Secretary's varying and confusing bases for citing Dacotah. The Secretary's litigation strategy at trial focused on her allegation that both Rohrbach and Juopperi had not been trained in compliance with section 46.7(c). Following the accident

involving both miners, MSHA had issued a single citation alleging, in relevant part, "The two employees demonstrated that they were not properly tasked [sic] trained in safe work practices." Citation No. 7919763. In her pretrial statement, the Secretary stated that Rohrbach and Juopperi were not properly trained under section 46.7(c). S. Resp. to Prehearing Order at 1. In addition, the Secretary alleged that Rohrbach did not know how to perform the task in a safe manner and that he was not a "competent person." *Id.* at 2. Just prior to trial, counsel for the Secretary moved to amend the citation to allege a violation of section 46.7, in general, stating "Reading section 46.7 as a whole, it is clear that subsections (a), (b), and (c) must be construed and applied together." S. Mot. to Amend Cit. at 2 (Jan. 10, 2001). *See also* Tr. 5 (Secretary's counsel stating, "I don't believe this is changing the theory or the scope of the evidence or anything. I mean, the heart of the allegation is in Subsection (c) . . .").

The central factual underpinning of the Secretary's case at trial was MSHA investigator Steichen's testimony that Rohrbach had not been adequately trained to change the hydraulic hose because he did not know where the pressure relief valves were located. 24 FMSHRC at 785. This testimony was based on a post-accident interview that Steichen had with Rohrbach. *Id.* Steichen testified that this statement was the basis for his belief that Rohrbach had not been properly trained. Tr. 76. Steichen, the Secretary's sole witness, further testified that he was not concerned with whether Rohrbach was a "competent person" under section 46.7(d). Tr. 83. Indeed, during the cross-examination of Steichen, the Secretary's counsel objected to a question concerning whether Rohrbach was a "competent person" under section 46.7(d). Counsel noted that there were other requirements of the subsection of the regulation, even assuming it could be established that Rohrbach was "competent," and the judge sustained the Secretary's objection that the question was "hypothetical." Tr. 84-87. At the conclusion of the testimony of Steichen, the Secretary's only witness, the Secretary rested her case and did not present any further witnesses or evidence concerning section 46.7(d).

During Dacotah's presentation of its case, Rohrbach testified that he had indeed been trained to perform the hydraulic hose repair and had successfully performed the same repair job just four days prior to the accident. Tr. 110-12, 123. The judge credited Rohrbach's trial testimony over Steichen's interview statement. 24 FMSHRC at 785.[1] Based on this and other factual findings, the judge determined that the record supported a conclusion "that Mr. Rohrback [sic] had been adequately trained in the task assigned to him on January 12, 2001, and he was able to provide sufficient supervision to Mr. Juopperi." 24 FMSHRC at 786.

Once the Secretary failed to prove that the operator had not complied with section 46.7(c) with regard to either Rohrbach or Juopperi, there was little left of her case in light of the citation, pre-trial statements, and the limited evidence that she presented at trial. This is because the

[1] In light of Rohrbach's unequivocal testimony as to his own training and experience in changing the hose, we conclude that the judge did not merely "[give] more weight to evidence of Rohrbach's training and the corroborating testimony of his supervisors than to the inspector's testimony." Slip op. at 4.

Secretary's case as presented to the judge was premised on noncompliance with section 46.7(c). Indeed, even in her brief to the Commission, the Secretary continues to argue that Juopperi was not adequately trained under section 46.7(c). S. Br. at 9-13. In her post-hearing statement, the Secretary directly argued *for the first time* that Juopperi had not been properly trained under section 46.7(d) because he had not been trained by a "competent" person and because he had not received hazard recognition training. S. Post-Hearing Statement of Position at 8-9.

Because the Secretary tried the case as a section 46.7(c) violation, the evidence presented by the parties addressing section 46.7(d) was confused and arguably incomplete. Accordingly, it is understandable, given the state of the record, that the judge's opinion focussed on compliance with subsection (c) with regard to Rohrbach and did not address compliance with subsection (d) with regard to Juopperi. The opinion states that Rohrbach "was adequately trained in the task assigned to him on January 12, 2001, and he was able to provide sufficient supervision to Mr. Juopperi" (24 FMSHRC at 786), but it is unclear precisely how that statement applies to subsection (d) and its language allowing a miner to "practice under the close supervision of a competent person." Because the Secretary eventually did raise the issue of the operator's compliance with subsection (d) with regard to Juopperi, albeit at the eleventh hour, we believe that the judge should have made more specific findings regarding the operator's compliance with subsection (d) or explained why it was not possible to do so based on the record before him.

The Need for Additional Specific Findings on Remand

Because we conclude that the case should be remanded for additional findings, we believe that the judge should also reexamine the question of whether Juopperi's actions on January 12 triggered the training requirements of section 46.7(a) as a threshold matter. Subsection (a) provides that the new task training requirements apply to a miner "who is reassigned to a new task in which he or she has no previous work experience." Thus, for a violation to have occurred in this case, the operator must have actually "reassigned" Juopperi to perform a new task.[2] However, the record in this case is ambiguous, at best, with regard to whether the maintenance crew supervisor had assigned Juopperi the task of changing the hydraulic hose so as to trigger section 46.7(a). Rather, as discussed below, the evidence appears to indicate that the supervisor had assigned Rohrbach the task and that Juopperi was merely assisting Rohrbach with part of the task on the day of the accident.

Rohrbach's testimony indicates that he observed a leak in the hydraulic hose and reported it to his supervisor, and that the supervisor assigned Rohrbach to make the repair the next day –

[2] Our colleagues state at one point that the task of changing the hose "was also clearly within the scope of Juopperi's job duties" (slip op. at 11) and imply that this is determinative in concluding whether Juopperi was assigned to perform the task. However, section 46.7(a) provides that the new task training regulations are triggered only when a miner is "reassigned" to carry out the new task in question. It is not enough to trigger the regulations that a particular task falls within the scope of the miner's general job duties.

January 12. Tr. 126. Rohrbach did not testify that the supervisor also assigned Juopperi to make the repair. After Rohrbach had already begun the repair on January 12, Juopperi happened to appear after completing his routine maintenance tasks and offered to assist Rohrbach. 24 FMSHRC at 784; Tr. 126, 170-71. Rohrbach further testified that he had failed to release the pressure from the hose, when he was doing preparatory work, before Juopperi's appearance.[3] 24 FMSHRC at 784; Tr. 126, 144.

Juopperi's testimony likewise seems to indicate that it was Rohrbach who was specifically assigned to change the hydraulic hose. Juopperi testified that, at the morning meeting on January 12, the supervisor "mentioned to [Rohrbach] – how I remember that there is a hose needs to be changed on the losche mill." Tr. 170-71. Juopperi's description of how he became involved with assisting Rohrbach on January 12, when the accident occurred, is nearly identical to his description of his involvement with Rohrbach on January 8, when he saw Rohrbach changing another hydraulic hose and offered to help. Tr. 165. Juopperi never stated that the supervisor assigned him – Juopperi – to change the hose.

In this regard, it is highly significant that the Secretary did not attempt to elicit testimony from any witness indicating that Juopperi had been assigned the task of changing the hose. Counsel for the Secretary's cross-examination of the maintenance crew supervisor dealt *entirely* with Rohrbach, and counsel made no attempt to establish that Juopperi had been assigned the task of changing the hose.[4] Instead, the Secretary focussed throughout the trial on Rohrbach's alleged lack of training and apparently assumed, without a clear basis in the record, that Juopperi had also been assigned the task of changing the hose.

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[3] In light of these factual circumstances, the judge was clearly correct in concluding that the accident was not "the result of inadequate training rather than carelessness or inattention." 24 FMSHRC at 786.

[4] Indeed, in describing Juopperi's participation in changing the hose on January 12 during cross-examination, the Secretary's counsel characterized it as follows: " . . . you came in and offered to help or said, do you need some help . . . ." Tr. 186. Similarly, during the cross-examination of Rohrbach, the Secretary's counsel acknowledged that Juopperi was merely assisting Rohrbach in performing the task (Tr. 151):

> Q. Okay. What exactly – what did you think [Juopperi's] role was in this process? Was he basically there just to assist you or what?
>
> A. Yes.
>
> Q. Okay. And is that the same for the January 8th incident?
>
> A. Yes.

In light of the foregoing, the judge's statement that both Rohrbach and Juopperi "were assigned" to replace the hydraulic hose, 24 FMSHRC at 784, should be revisited on remand. Moreover, the judge should reconcile the statement with his statement that Juopperi was "occupied" with other maintenance jobs before joining Rohrbach, who was in the process of changing the hose. *Id*. On remand, the judge should determine whether Juopperi, in addition to Rohrbach, had been assigned the task of replacing the hydraulic hose.

Moreover, on remand, the judge should address the issue of how the new task training regulations should be applied under the specific circumstances of this case. The Secretary's Part 46 regulations do not address situations where, as in this case, a miner who is not assigned to perform a particular task enters the scene and provides assistance to the miner assigned to and in the process of performing a task. Such assistance could be as commonplace as steadying a ladder or (as here) loosening a nut. Moreover, neither the preamble to the final rule nor any subsequent guidance document appears to provide any relevant guidance concerning how the regulations should be applied in such a situation. Indeed, the Secretary has not explained what constitutes the "assignment of a task." Even assuming arguendo that a miner providing assistance to the miner assigned to perform a task should receive some hazard recognition training, it is unclear whether that training must address the entire task or only the discrete portion for which the miner is providing assistance.[5]

Finally, we disagree with our colleagues regarding the Commission's role in this proceeding. While Congress established the Commission to "develop a uniform and comprehensive interpretation of the law . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]," *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res.*, 95th Cong., 1 (1978), the Mine Act imposes on the Secretary the burden of proving the violation alleged and imposes a substantial evidence test for Commission review. *Consolidation Coal* Co., 11 FMSHRC 966, 973 (June 1989). *See* 30 U.S.C. § 823(d)(2). It is not the role of the Commission to retroactively supply a rationale for the issuance of a citation when the Secretary has been unable to do so – particularly in a case such as this where the circumstances giving rise to the citation are not addressed under the explicit terms of the regulation, the preamble, or in other guidance to the mining community.

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[5] The only example of miner training pursuant to this regulation that has been provided by the Secretary, S. Br. at 14-15 (quoting 64 Fed. Reg. at 53117-18), is the task training of a miner newly assigned the job of loader operator. That circumstance is in no way analogous to the present case involving a general repairman in a production facility who is primarily responsible for a variety of general maintenance functions and who assists with more complex repair jobs. *See* Tr. 163-64. Since the issuance of this regulation under Part 46, MSHA has provided no guidance as to its meaning and application that we have been able to find. As explained above, clarification by MSHA is particularly needed regarding the level of training needed when a miner assists with only a portion of a job, such as steadying a ladder or loosening a bolt.

The Secretary's briefs in this case have not addressed the Secretary's interpretation of key terms in any meaningful detail. For example, the Secretary's brief before the Commission argues that there was no evidence that Juopperi was "practicing" the task in question, that Rohrbach was providing "close observation" of what Juopperi was doing, or that Rohrbach was a "competent person" *without providing an interpretation of those terms, prior guidance concerning their application, or a meaningful discussion of the policy concerns and practical considerations involved*. S. Br. at 15-16.[6] Similarly, the Secretary's brief makes no effort to explain what constitutes a "task" or "change in task" in the context of this case.

Despite the Secretary's failure to explain her interpretation and application of key terms or to have provided adequate guidance to the mining community, our colleagues have attempted to fill the void by discussing the terms in their opinion. We believe that the better course of action would be to remand the case to the judge for further findings as explained above and let the burden of proving her case rest with the Secretary.[7]

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Michael F. Duffy, Chairman

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Stanley C. Suboleski, Commissioner

[6] We note that, although Dacotah's brief challenged the legal and factual bases for these assertions in its brief (D. Br. at 8-10), the Secretary chose not to file a reply brief and therefore provided the Commission no additional assistance in addressing these issues.

[7] We are not inclined to engage in an extensive analysis of section 46.7(d) in responding to our colleagues for the reasons noted above. However, we note the lack of case authority or principles of regulatory interpretation that would lead to the conclusion of a violation on the basis of inadequate hazard recognition training (slip op. at 7) in the absence of showing the factual predicate for application of sections 46.7(a) (assignment of a new task) and (d) (practice under the close observation of a competent person). Simply put, a violation of section 46.7(d) cannot be established by applying the hazard training requirement in isolation.

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