

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 29, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. KENT 99-171-R
ADMINISTRATION (MSHA)	:	KENT 99-172-R
	:	KENT 99-173-R
	:	
v.	:	
	:	
EXCEL MINING, LLC	:	

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

DECISION

BY: Riley and Verheggen, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Excel Mining, LLC (“Excel”) contested three citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), which alleged violations of the Secretary of Labor’s respirable dust regulation, 30 C.F.R. § 70.100(a). Administrative Law Judge Gary Melick granted Excel’s motion for summary decision and vacated the citations. 21 FMSHRC 1401 (Dec. 1999) (ALJ).

The Secretary filed a petition for discretionary review challenging the judge’s decision, which the Commission granted. Subsequently, the Commission granted motions to participate as amicus curiae from the International Chemical Workers Union Council (“CWU”); United Mine Workers of America, International Union (“UMWA”); National Mining Association, Alabama Coal Association, Coal Operators & Associates, Illinois Coal Association, Indiana Coal Council, Inc., Kentucky Coal Association, Ohio Mining and Reclamation Association, Pennsylvania Coal Association, The Virginia Coal Association, West Virginia Coal Association, and West Virginia Mining and Reclamation Association (collectively referred to as the “Associations”); and Bledsoe Coal Corp., Genwal Resources, Inc., and ANDALEX Resources, Inc. (collectively referred to as the “Operators”). For the reasons that follow, we affirm the judge’s decision to vacate the citations.

I.

Factual and Procedural Background

On March 1, 1999, MSHA issued a citation to Excel based on an average dust concentration of 2.4858 milligrams per cubic meter of air (“mg/m<sup>3</sup>”), which was calculated by averaging the air samples from five different occupations on a mechanized mining unit (“MMU”) during a single shift. Jt. Stip. 5(a). On March 10, MSHA issued a second citation based on an average dust concentration of 2.885 mg/m<sup>3</sup>, which was calculated by averaging the air samples from four different occupations on an MMU during a single shift. Jt. Stip. 5(b). Also on March 10, MSHA issued a third citation based on an average dust concentration of 3.1505 mg/m<sup>3</sup>, which was calculated by averaging the air samples from four different occupations on an MMU during a single shift. Jt. Stip. 5(c). In each citation, Excel was charged with violating 30 C.F.R. § 70.100(a) because the average level of coal dust exceeded 2 mg/m<sup>3</sup>.<sup>1</sup> 21 FMSHRC 1401.

The cited standard, which follows the language of section 202(b)(2) of the Act, 30 U.S.C. § 842(b)(2), provides in relevant part:

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

30 C.F.R. § 70.100(a) (emphasis added).

Section 202(f) of the Act, in turn, defines “average concentration” as follows:

For the purpose of this [title], the term “average concentration” means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following [the date of enactment of this Act], over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section [101] of this [Act], that such single shift measurement will not, after applying valid

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<sup>1</sup> With regard to the average sample taken on March 1, pursuant to 30 C.F.R. § 70.101, an adjustment was made to the permissible coal dust level because the atmosphere contained more than 5 percent quartz. Statement of Uncontested Facts 5.

statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. § 842(f). Section 202(f) of the Mine Act is identical to section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 842(f) (1976) (“Coal Act”).<sup>2</sup>

Pursuant to section 202(f) of the Coal Act, the Secretaries of the Interior and Health, Education, and Welfare jointly published in the Federal Register the proposed Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift (hereafter “1971 Finding”). 36 Fed. Reg. 13286 (July 17, 1971). The 1971 Finding provided, in pertinent part:

Notice is hereby given that, in accordance with section 101 of the [Coal] Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

*Id.* at 13286. On February 23, 1972, the Secretaries of Interior and Health, Education, and Welfare jointly published a final notice in the Federal Register in which they adopted the proposed notice without change. 37 Fed. Reg. 3833, 3834.

Beginning in 1975, MSHA adopted a sampling procedure to collect respirable dust during one full shift from miners assigned to specified occupations on the same MMU. Statement of Uncontested Facts 2. MSHA determines whether an operator is in compliance with the dust standard based on an average of measurements from up to five occupations on an MMU during the same shift. *Id.*

In this proceeding, Excel filed notices of contest in which it challenged the three citations issued by MSHA. 21 FMSHRC at 1401. In lieu of a hearing, the parties submitted Joint Stipulations and Statement of Uncontested Facts. Then the Secretary and Excel each submitted a motion for summary decision. *Id.* The judge concluded that summary decision was warranted because there was no genuine issue as to any material fact and Excel was entitled to summary decision as a matter of law. *Id.*

The judge held that the regulations and statute require that the average concentration of respirable dust be at or below 2.0 mg/m<sup>3</sup>. *Id.* The judge further noted that section 202(f) of the Mine Act, 30 U.S.C. § 842(f), defined “average concentration” as that determination which

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<sup>2</sup> Under the Coal Act, “Secretary” referred to the Secretary of the Interior. 30 U.S.C. § 802(a) (1976).

accurately represents respirable dust levels. *Id.* at 1402. The judge observed that, under section 202(f), the average concentration was initially to be measured over continuous shifts, but subsequently was to be measured over a single shift unless a finding was made that single shift measurement would not accurately reflect atmospheric conditions. *Id.* The judge noted that the Secretaries of Interior and Health, Education, and Welfare had made the finding that single shift sampling would not accurately represent the atmospheric conditions to which the miner was continuously exposed. *Id.* Because the citations were based on respirable dust samples taken over a single shift, the judge concluded that the citations must be vacated. *Id.* at 1402-03.

The judge further reviewed the Commission's holding in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), and noted that the Commission had rejected the use of single shift samples by MSHA for enforcement purposes because MSHA had attempted to rescind the 1971 Finding without employing notice and comment rulemaking. 21 FMSHRC at 1403. The judge rejected the Secretary's argument that, because the citations issued to Excel involved multiple samples averaged over a single shift, they were outside the ambit of the 1971 Finding and the *Keystone* decision. *Id.* The judge concluded that the 1971 Finding "clearly and unambiguously prohibits single shift sampling whether such sampling takes the form of a single full-shift sample or an average of multiple samples taken over a single shift," and that *Keystone* reaffirmed that interpretation. *Id.* Therefore, the judge concluded that there was no need to consider deference to the Secretary's interpretation of the 1971 Finding. *Id.*

## II.

### Disposition

The issue in this proceeding is whether the Secretary can issue a citation for violation of the respirable dust standard in an underground coal mine based on an average of multiple samples taken during a single shift. The Secretary and Excel agree that disposition of that issue is determined by the meaning and application of the Secretary's 1971 Finding.

The Secretary argues that the 1971 Finding is ambiguous and that her interpretation is entitled to deference. S. Br. at 6-8 & n.4. The Secretary asserts that, if the 1971 Finding applied to multiple samples on a single shift, the term "measurement" would have been in the plural, rather than in the singular. *Id.* at 9-10, 15-16. The Secretary further argues that she has consistently interpreted the 1971 Finding to allow multiple samples over a single shift for compliance purposes. *Id.* at 12-13. The Secretary asserts that the use of multiple samples over a single shift is consistent with the purpose of section 202(f) of the Mine Act and the legislative history of the predecessor provision of the Coal Act. *Id.* at 14-20 & n.6. The Secretary contends that, because section 202(f) applies only to a single full-shift sample, the 1971 Finding necessarily referred only to compliance determinations based on a single full-shift sample. *Id.* at 20. Finally, the Secretary asserts that the *Keystone* decision, upon which the judge relied, is not determinative of the citations in this proceeding because that case did not involve multiple

samples taken over a single shift. *Id.* at 20-23. The Secretary requests that the Commission not reach arguments in the amici briefs that went beyond those raised by Excel. S. Resp. Br. at 2-4.

Excel responds that the 1971 Finding prohibits single shift sampling regardless of whether it involves a single full-shift sample or multiple samples taken over a single shift. Ex. Br. at 1, 3-5. Excel argues that the use of the singular form, rather than the plural, in referring to “measurement” in section 202(f) and the 1971 Finding does not limit those provisions to a single full-shift sample and therefore the 1971 Finding excludes multiple samples taken over a single shift. *Id.* at 5-7. Excel asserts that the 1971 Finding does not distinguish between types of single shift sampling, and that the legislative history of the Coal Act distinguishes only between single and multiple-shift sampling. *Id.* at 8-9; E. Resp. Br. at 4-5. Further, Excel contends that the *Keystone* decision applies to both single shift sampling and to the average of multiple samples taken over a single shift. Ex. Br. at 11-12. Finally, Excel argues that the Secretary is not entitled to deference because the 1971 Finding is clear in prohibiting all single shift sampling. *Id.* at 13-16. In response to the CWU, Excel disputes its position that the passage of the Mine Act invalidated the 1971 Finding. E. Resp. Br. at 2-4.

Amicus CWU argues that the Commission should overturn its decision in *Keystone*. CWU Br. at 2, 7. The CWU contends that section 202(f) of the Mine Act has been misapplied and misinterpreted since the passage of the Act in 1977 and that the Act required the Secretary to use single shift sampling unless the Secretary of Labor and the Secretary of Health, Education, and Welfare issue a notice that single shift sampling will not accurately represent atmospheric conditions. The CWU asserts that the Secretaries failed to issue a new notice following the passage of the Mine Act; therefore, the statutory preference for single shift sampling continues in effect and has never been reversed by a new notice. *Id.* at 3-5. The CWU further asserts that the 1971 Finding became void upon enactment of the Mine Act. *Id.* at 6-7.

Amicus UMWA contends that the Joint Finding did not address the accuracy of multiple samples taken over a single shift. UMWA Br. at 3, 5. The UMWA further argues that the Commission’s *Keystone* decision is not dispositive of this proceeding because the citations in *Keystone* only dealt with a single sample taken during a single shift. *Id.* at 4-5. The UMWA also argues that the legislative history of the Mine Act is silent as to whether Congress intended the 1971 Finding to continue after the passage of the Act. *Id.* at 5-6. The UMWA asserts that Excel errs when it argues that the averaging of several samples from a single shift is not permissible in the absence of a revised joint notice from the Secretaries. *Id.* at 6. Therefore, the UMWA concludes that the judge’s decision should be reversed. *Id.*

Amicus Associations assert that the citations at issue were based on single shift samples and that the 1971 Finding is still in effect. A. Br. at 2-3. The Associations note that in the Coal Act, Congress distinguished between two categories of sampling, single shift samples and multiple shift samples, and that, therefore, the Secretary’s argument that the 1971 Finding applies to a single shift sample but not to multiple samples taken on the same shift and averaged together is unavailing. *Id.* at 3-4. The Associations contend that the Secretary’s argument that MSHA’s

single shift sampling has continued since 1975 is not dispositive because *Keystone* effectively invalidated sampling similar to that here. *Id.* at 5-6, 9. Further, the Associations argue that the Secretary's attempt to equate multiple shift samples taken over a single shift with "true" multiple shift samples is contrary to caselaw. *Id.* at 8. The Associations continue that the legislative history of the Coal Act and more recent regulations and court and Commission cases support multiple shift sampling as the only means of compliance with the dust standard. *Id.* at 10-15.

Amicus Operators argue that the practice of issuing a citation based on averaging multiple samples over a single shift is prohibited by the 1971 Finding. O. Br. at 2-3. The Operators further argue that single shift sampling falls far short of accurately representing the mine atmosphere to which a miner is exposed. *Id.* at 4. The Operators note that the 1971 Finding indicated that a major concern with single shift sampling was that it did not accurately represent the atmospheric conditions to which a miner was continuously exposed. *Id.* at 5. The Operators assert that single shift averaging ignores measuring dust samples by designated occupations, as required under the Secretary's regulations. *Id.* at 6. Finally, the Operators contend that, under the Secretary's interpretation, operators would be required to perform multiple shift sampling, in compliance with the regulations, while the Secretary would be allowed to use single shift averaging. *Id.* at 6-7.

Section 70.100(a), which tracks the language of section 202(b)(2) of the Mine Act, requires mine operators to continuously maintain the average concentration of respirable dust at or below 2 mg/m<sup>3</sup>. Pursuant to section 202(f) of the Mine Act, which is identical to Section 202(f) of the Coal Act, average concentration was to be measured initially for 18 months (after the passage of the Coal Act) by multiple shift sampling, and thereafter by single shift sampling unless the Secretaries of Interior and Health, Education, and Welfare issued a notice stating that single shift sampling would not accurately represent the level of dust during that shift. Pursuant to section 202(f) of the Coal Act, the Secretaries issued the 1971 Finding, in which they concluded that a single shift measurement "will not . . . accurately represent the atmospheric conditions to which the miner is continuously exposed."<sup>3</sup> Under section 202(f), the only permissible alternative to single shift sampling is multiple shift sampling.

The judge concluded that the 1971 Finding prohibited single shift sampling without regard to whether sampling takes the form of a single full-shift sample or an average of multiple samples taken over a single shift. We agree. There is no basis for the Secretary's argument that the 1971 Finding does not reach single shift sampling that is based on averaging multiple samples over that shift. Section 202(f) envisions but two methods of respirable dust sampling — single shift measurements and measurements derived from samples taken over a number of continuous production shifts. Moreover, section 202(f) makes no distinction between types of

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<sup>3</sup> CWU's argument that the 1971 Finding became void with the enactment of section 202(f) of the Mine Act is at odds with the position of the Secretary and was not raised before the judge below. Therefore, we do not consider it.

single shift sampling. The 1971 Finding implementing section 202(f) similarly makes no such distinction, and thus, on its face, reaches *all* single shift sampling.<sup>4</sup>

The Secretary vigorously argues that, because section 202(f) is written in the singular, rather than in the plural form, the section cannot apply to averaging multiple measurements during a single shift. However, the Commission has recognized that, under rules of statutory construction, terms written in the singular generally include the plural. *Cleveland Cliffs Iron Co.*, 3 FMSHRC 291, 293-94 (Feb. 1981). Moreover, because averaging several measurements over a single shift yields but one result, it does not logically follow that the drafters of section 202(f) would have referred to “measurements” (in the plural), if they had contemplated the use of averaging samples over a single shift.

In addition to the clear language of the 1971 Finding, it is apparent from the legislative history of section 202(f) of the Coal Act that the concern was not the number of samples taken during a shift, but rather the number of shifts during which samples were taken. The Senate version of the Coal Act did not allow multiple shift averaging of respirable dust levels. S. Rep. No. 91-411, at 20 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 146 (1975) (hereafter “*Legis. Hist.*”). On the other hand, the House of Representatives version of the Coal Act mandated multi-shift sampling. H.R. Rep. No. 91-563, at 40-41 (1969), *Legis. Hist.* at 1070-71. The final version of the Coal Act, which contained section 202(f), included compromise language allowing multi-shift sampling for the 18-month period following the passage of the legislation, and thereafter by single shift sampling unless the Secretaries concluded that a single shift measurement would not accurately represent the atmospheric levels to which miners were exposed. *See* Jt. Conf. Rep. No. 91-761, at 75 (1969), *reprinted in Legis. Hist.* at 1519.

The Commission’s decision in *Keystone* also supports vacating the citations in this proceeding. At issue in *Keystone* was the validity of citations that were issued pursuant to the Secretary’s “spot inspection program,” in which a citation was based on a single shift sample rather than on multiple-shift sampling. 16 FMSHRC at 6-9. As the judge in this proceeding noted (21 FMSHRC at 1403), the Commission rejected the Secretary’s argument that the 1971 Finding applied only to samples taken by operators but not to samples taken by MSHA inspectors. 16 FMSHRC at 10-11. The Secretary’s argument that *Keystone* does not reach the use of multiple samples taken during a single shift is not well taken. While the Secretary is

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<sup>4</sup> 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.*; *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

correct that the single shift sample at issue in *Keystone* did not involve averaging multiple samples, that does not appear to be a ground upon which the Commission's holding can be distinguished. Rather, the Commission's concern was that the 1971 Finding and its requirement that "average concentration" of respirable dust be based on multiple shift samples was never properly rescinded. *Id.* at 10-16. That holding appears to apply with equal force to all single shift sampling, whether based on a single sample or an average derived from multiple samples.

The dissent argues in essence that the 1971 Finding is invalid and "does not permit the Secretary to deviate from the statutory requirement that respirable dust concentrations be determined on the basis of a miner's average exposure as measured over a single shift." Slip op. at 16. As a threshold matter, we find that the issue raised by the dissent — whether the 1971 Finding is valid — is simply not before the Commission. The Secretary did not attack the underlying validity of the 1971 Finding in her petition for discretionary review. 30 U.S.C. § 823(d)(2)(iii) ("If granted, review shall be limited to the questions raised by the petition."). This comes as no surprise since she would be hard pressed to justify within the parameters of this litigation such a radical departure from the 30 year enforcement history that has always involved multiple sampling. *See* 65 Fed. Reg. 42068, 42072-73 (July 7, 2000). Indeed, the dissent charts out a position *contrary* to that taken by the Secretary. *See* S. Br. at 9-10.

If the validity of the 1971 Finding were before us, we would disagree with the dissent's efforts to interpret it. The dissent states that the 1971 Finding "concerns the accuracy of assessing a miner's continuous exposure over *numerous shifts*." Slip op. at 17 (emphasis in original). The dissent goes on to argue that the 1971 Finding "did not even address, much less discredit, the reliability of the single shift sample as a means of making [the] determination" of "the average exposure of the miner during [a] particular shift." Slip op. at 18 n.4.

The dissent is simply mistaken on this point. The focus of the 1971 Finding is on the *reliability* of discrete single shift measurements. By comparing the results of many such single shift samples, the Secretaries determined the statistical reliability of any given sample, and found that, statistically speaking, any given single shift sample was *not reliable*.<sup>5</sup> In other words, in 1971, the Secretaries determined that any sample from a single shift was not statistically reliable, and that more data were needed to establish the reliability of respirable dust sampling. It is, after all, a fundamental and axiomatic principle of scientific investigation that a conclusion based on a single datum is not as reliable as a conclusion based on the average of multiple data. As one author has noted: "If your sample is large enough and selected properly, it will represent the whole well enough for most purposes. If it is not, it may be less accurate than an intelligent

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<sup>5</sup> That the 1971 Finding applied this determination more broadly to "the atmospheric conditions to which the miner is continuously exposed" (36 Fed. Reg. at 13286), we find consistent with section 202(b)(2) of the Mine Act, which requires operators to "*continuously* maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air." 30 U.S.C. § 842(b)(2) (emphasis added).



guess and have nothing to recommend it but a spurious air of scientific precision.” D. Huff, *How to Lie with Statistics* 13 (1954).

We have other problems with the dissent’s approach. Even the dissent acknowledges that the Secretary’s single shift sampling in this case was very problematic, and could potentially mask a high dust level received by an individual on a particular shift. Slip op. at 20-21. Regardless of how one interprets the 1971 Finding or section 202(f) of the Mine Act, no such interpretation can be sanctioned when it leads to as absurd and potentially unsafe a result as this. *Consolidation Coal Co.*, 15 FMSHRC at 1557 (rejecting construction of standard that led to absurd, unsafe result). Notably, in another context, even the Secretary has questioned the type of sampling used in this case. 65 Fed. Reg. at 42073 (“The process of averaging [several samples taken during a single shift] dilutes a high measurement made at one location with lower measurements made elsewhere.”).

Yet the dissent upholds the Secretary’s approach. Assuming *arguendo* that the 1971 Finding is, as the dissent maintains, invalid, it is clear to us that the Secretary’s sampling in this case would not comply with the alternative requirement of section 202(f) of the Mine Act that the average concentration of respirable dust to which “*each miner*” is exposed be measured “over a single shift only.” 30 U.S.C. § 842(f) (emphasis added). The problem with the Secretary’s sampling, as the dissent recognizes, is that it focuses not on “*each miner*” as the Act requires, but on an average of many miners at many different positions with potentially varying levels of respirable dust exposure, including some miners whose high exposure could be masked by other, lower respirable dust levels used in computing the sampling results. In a tortured twist of illogic, the dissent thus upholds enforcement actions that are at odds with the very statutory scheme for which it argues.

The dissent turns a blind eye to the Secretary’s ill-advised sampling method and finds new violations, stating “it is undisputed that in this proceeding 11 miners each recorded an exposure level, over a single shift, that was greater than the 2.0 mg/m<sup>3</sup> Congress deemed permissible on each shift.” Slip op. 21. In other words, the dissent finds as violative each of the eleven single shift sample results greater than the 2.0 mg/m<sup>3</sup> and not the averaged results on which the Secretary based her charges. The dissent most certainly does not, as it asserts, “uphold the citations as they were issued.” Slip op. at 21 n.8.<sup>6</sup> The dissent is not free, however, to depart from the Secretary’s charges, which were based on averaged sample results, and invent its own charges based on the individual samples that served as the basis for the Secretary’s averaged results. The Commission must not usurp the Secretary’s enforcement role under the Mine Act and prosecute a violation on a basis independent from the Secretary’s charges — which is precisely what the dissent would do. The power to enforce the provisions of the Mine Act is explicitly reserved to the Secretary in section 104 of the Act. 30 U.S.C. § 814; *Mechanicsville*

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<sup>6</sup> Notably, a finding of eleven separate violations based on this record would be consistent with the dissent’s position that the 1971 Finding is not valid and that respirable dust sampling must be done using single shift sampling.

*Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996); *see also Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991) (Commission judges do not have authority to charge an operator with violations of section 104 of the Mine Act). Congress charged the Commission, on the other hand, “with the responsibility . . . for reviewing the enforcement activities of the Secretary.” *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 dissent’s radical departure from the Mine Act’s enforcement scheme would also pose a serious problem because, if the dissent’s view prevailed, the operator would have had no notice that it was to be held liable for respirable dust violations on the basis of individual single shift samples, contrary to the mandate of the 1971 Finding.

Finally, we also are troubled that the dissent would have us ignore the Commission’s *Keystone* decision because its holding is based on the 1971 Finding. The dissent would resurrect the Secretary’s single shift sampling program that was at issue in that case — and thrown out by the Commission. 16 FMSHRC at 10-16. Even had we not concluded that the 1971 Finding prohibited the averaging of single shift samples at issue here, we would not so blithely ignore Commission precedent. We also note that the Secretary has announced a proposed rule that would rescind the 1971 Finding and mandate single shift sampling. 65 Fed. Reg. 42068. We find it clearly inappropriate for the Commission to potentially short circuit this process.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision to vacate the citations.<sup>7</sup>

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Theodore F. Verheggen, Commissioner

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James C. Riley, Commissioner

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<sup>7</sup> The Secretary moved to strike references in the Associations's brief to letters from Congressman Erlenborn and Director of Mines O'Leary because their letters were not part of the record in this proceeding. S. Resp. Br. at 7. In light of our disposition, we need not consider the letters and therefore do not reach to the Secretary's motion to strike, since the motion is moot as a result of the disposition. *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1193 (Nov. 1999).

Commissioner Beatty, concurring:

While I concur in the decision of Commissioners Riley and Verheggen to affirm the judge's determination to vacate the citations in this case, I reach that result in a slightly different fashion. I write separately to state why I believe the Secretary's interpretation of the Proposed Notice of Finding published in the Federal Register at 36 Fed. Reg. 13286 (July 7, 1971) ("1971 Finding") cannot form the basis upon which a violation of the respirable dust standard can be upheld.

As a threshold matter, I respectfully disagree with the judge in this case, and Commissioners Riley's and Verheggen's position, that the language of the 1971 Finding is clear and unambiguous. To the contrary, on this limited issue, I agree with the Secretary inasmuch as I find the language of the 1971 Finding ambiguous concerning whether or not the Secretary has the ability to base an enforcement action for violation of the respirable dust standard on multiple dust samples collected during a single shift. As I explain more fully below, however, I disagree with the Secretary that her interpretation of the 1971 Finding is reasonable and thus entitled to deference.

To begin with, as the Secretary notes, the 1971 Finding expressly states that "[a] single shift *measurement* of respirable dust will not . . . accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. at 13286 (emphasis added). The singular term "measurement" was also used in the text of the final finding issued by the Secretaries of Interior and of Health, Education, and Welfare in February 1972. 37 Fed. Reg. 3833, 3834 (1972).<sup>1</sup> It is important to note, however, that the title of the 1971 notice is couched in the plural form, stating it is a "Notice of Finding That Single Shift *Measurements* of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift." 36 Fed. Reg. at 13286 (emphasis added). Clearly, an inconsistency does exist between the singular use of the word *measurement* in the text of the 1971 Finding and the final Finding issued in February 1972, and its plural form in the title of the 1971 Finding. This inconsistency, in my view, creates enough of an ambiguity to call into question the validity of reviewing the

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<sup>1</sup> The February 1972 final notice stated:

The proposed finding, as set forth at 36 FR 13286, that a *measurement* of respirable dust over a single shift only, will not . . . accurately represent the atmospheric conditions to which the miner under consideration is continuously exposed, is hereby adopted without change.

*Id.* (emphasis added).

applicability of the Finding under the microscope of a plain meaning analysis as advocated by the judge and Commissioners Riley and Verheggen.

A plain meaning interpretation of the 1971 Finding becomes more problematic in light of an additional inconsistency in its language identified by Chairman Jordan. In her dissenting opinion, Chairman Jordan notes (slip op. at 17-19) that section 202(f) of the Mine Act, and its legislative history, states that, to be operative, the finding must be based on a determination that a single shift measurement will not provide an accurate representation of atmospheric conditions during that particular shift. The 1971 Finding, however, makes a completely different determination — that “single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is *continuously exposed*.” 36 Fed. Reg. at 13,286 (emphasis added).

While I disagree with Chairman Jordan that this inconsistency somehow invalidates the 1971 Finding, I do believe that this disconnect between the language of 202(f) of the Mine Act and the 1971 Finding casts further doubt on the Secretary’s position that the 1971 Finding can be properly interpreted to allow compliance with the respirable dust standard based on the averaging of multiple respirable dust samples taken over a single shift.

I therefore conclude that the language of the 1971 Finding is ambiguous on this question. The next step in regulatory interpretation is to determine whether the Secretary’s interpretation of the 1971 Finding, permitting the use of multiple dust samples taken over a single shift to determine compliance, is reasonable. It is well established that deference is owed to the Secretary’s reasonable interpretation of her regulation. *See Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (citations omitted).

In the instant case, the Secretary asked that we grant deference to an interpretation of the 1971 Finding that permits MSHA to make compliance determinations based on the average of multiple respirable dust samples taken over a single shift. In support of her position, the Secretary argues that her interpretation is reasonable. To the contrary, I find the Secretary’s interpretation to be both unreasonable and inconsistent with the protective intent of section 202(f) of the Mine Act.

I begin by noting that the parties to this litigation, and the courts,<sup>2</sup> have spoken on the validity of the Secretary's current method of respirable dust collection and its effect on the health of the nation's underground miners. Most notable, however, is the Secretary's admission that average dust concentrations obtained from several full-shift samples (eight hours or less in duration) can "mask significant single-shift overexposures by diluting a measurement of high dust exposure with one of lower dust concentrations." *'Cornerstone' of Changes Designed to End Black Lung, FEDERAL AGENCY ISSUES PROPOSALS ON COAL MINE DUST MONITORING*, MSHA News Release USDL 2000-0706 (July 6, 2000).

The reasonableness of the Secretary's interpretation of the 1971 Finding can best be gauged by examining the overall effectiveness of her sampling program over the past 26 years<sup>3</sup> in measuring the underground miners' prolonged exposure to respirable dust as a means of reducing the effects of such prolonged exposure on miners. On this point, a review of the Secretary's own literature calls into question both the reliability and accuracy of her time-honored respirable dust sampling scheme. In October of 1999, MSHA implemented a pilot program entitled "Miners' Choice Health Screening" whereby both underground and surface coal miners would receive confidential chest x-rays designed to provide early detection of pneumoconiosis. *First Year Results of MSHA's "Miners' Choice Health Screening,"* MSHA (Dec. 18, 2000), available at <http://www.msha.gov/S&HINFO/BLUNG/XRAY/2000results.HTM>. The results of the agency's first year of screening are troubling, and in my opinion calls into question the reasonableness of the Secretary's interpretation of the 1971 Finding and the effectiveness of the sampling program derived from that interpretation.

The program summary indicates that of the 11,970 miners who completed the health screening process, 300 miners showed evidence of pneumoconiosis from breathing excessive amounts of coal dust. *Id.* Of particular significance is the fact that 11 percent of the miners affected were 30 to 40 years of age. *Id.* This is particularly important information that must be factored into the deference analysis because this group of miners began working in the mining industry *after* the enactment of the Mine Act in 1977. Therefore, these individuals, who have worked their entire careers in the industry regulated under the Secretary's current respirable dust sampling scheme, continue to show significant levels of black lung disease. Commenting on the results of this screening program, Davitt McAteer, former Assistant Secretary of Labor for Mine Health and Safety, stated: "What the numbers suggest is that there continues to be a problem of black lung among active miners. While the number of people contracting the disease has

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<sup>2</sup> See *Am. Mining Congress v. Marshall*, 671 F.2d 1251, 1259 (10th Cir. 1982) (recognizing the variability associated with the result of several samples taken on a single shift); *cf. Nat'l Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) (noting that "accuracy of single-shift sampling is hotly debated by the parties").

<sup>3</sup> The Secretary states that the current method of respirable dust collection began in 1975, two years before the enactment of the Mine Act. S. Br. at 13 n.5.

diminished over the years, it continues to be a problem.” *MSHA Study: One in 50 Coal Miners Show Evidence of Black Lung Disease*, 8 Mine Safety & Health News, Jan. 5, 2001, at 4.

An argument can be made that the effectiveness of the Secretary’s 30-year enforcement scheme based upon respirable dust sampling is only one factor to consider in the continuing trend of miners contracting pneumoconiosis. The mining industry, particularly in recent years, has been deluged by accusations of operator fraud in the collection of respirable dust samples. In fact, these allegations appear to be the driving force behind MSHA’s recent movement to propose a new rule that scraps the current dust sampling scheme in favor of a single shift/single sample system administered by MSHA itself.<sup>4</sup> See 65 Fed. Reg. 42,068 (July 7, 2000).

It is certainly not necessary, in the context of the instant case, to evaluate the effectiveness of the operators’ respirable dust sampling techniques over the past 30 years. But the position taken by MSHA in response to the allegations of fraud in the sampling process does beg an important question. If operator fraud in the collection of respirable dust samples is a key factor in miners continuing to contract pneumoconiosis, why has MSHA decided to go beyond simply taking over the future administration of the sampling process, and taken the further step of replacing the preexisting sampling procedure? Clearly, MSHA’s decision to re-construct the process of respirable dust sampling that has been in effect for over 25 years is another indication of the unreasonableness of its interpretation of the 1971 Finding.

The practical effect of deferring to MSHA’s interpretation of the 1971 Finding, or upholding the citations under a plain meaning approach, would be to grant the Secretary unfettered authority to continue administering a respirable dust sampling program that has failed to provide miners’ protection from the harmful effects of respirable dust. Accordingly, I concur in the decision of Commissioners Riley and Verheggen to affirm the judge’s determination to vacate the citations in this case.

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Robert H. Beatty, Jr., Commissioner

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<sup>4</sup> Former Assistant Secretary of Labor for Mine Health and Safety Davitt McAteer has stated that the results of the first year of MSHA’s Miners’ Choice Health Screening initiative show that the longstanding procedure of allowing mine operators to take dust samples in mines is not adequate. *MSHA Study: One in 50 Coal Miners Show Evidence of Black Lung Disease*, 8 Mine Safety & Health News, Jan. 5, 2001, at 4.

Chairman Jordan, dissenting:

I would reverse the judge and uphold the citations at issue, based on the plain language of the Mine Act and the proposed Notice of Finding regarding single shift measurements of respirable dust published in the Federal Register at 36 Fed. Reg. 13286 (July 17, 1971) (hereafter “1971 Finding”).<sup>1</sup> Congress has directly addressed the question of single shift sampling, and the 1971 Finding does not permit the Secretary to deviate from the statutory requirement that respirable dust concentrations be determined on the basis of a miner’s average exposure as measured over a single shift.

An underground coal miner’s exposure to respirable dust is governed by section 202(b)(2) of the Mine Act, which provides that “each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere *during each shift* to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.” 30 U.S.C. § 842 (b)(2) (emphasis added). The Congressional mandate contained in this statutory provision could not be clearer: *any* miner should be able to safely assume that the average concentration of respirable dust that he or she will inhale during *any* shift will not exceed 2.0 milligrams per cubic meter of air (“mg/m<sup>3</sup>”).

Although section 202(b)(2) explicitly requires that the average concentration of respirable dust be maintained at or below 2.0 mg/m<sup>3</sup> “during each shift,” section 202(f) provided an 18-month period of time in which an operator would not be penalized for exceeding the statutory ceiling on respirable dust during any particular shift as long as the average concentration, as measured over several shifts, remained at or below the 2.0 mg/m<sup>3</sup> limit.<sup>2</sup> Section 202(f) goes on

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<sup>1</sup> As the majority has noted, the Secretaries of Interior and Health, Education, and Welfare jointly published on February 23, 1972, a final notice in the Federal Register adopting the proposed notice without change or comment. Slip op. at 3, citing 37 Fed. Reg. 3833, 3834 (Feb. 23, 1972).

<sup>2</sup> Section 202(f) states:

For the purpose of this title, the term ‘average concentration’ means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary of the Interior and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift



to provide, however, that after 18 months the average concentration of respirable dust will be determined by measurements taken “over a single shift only, unless the Secretar[ies] find . . . that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions *during such shift.*” 30 U.S.C. § 842(f) (emphasis added).

My colleagues Commissioners Riley and Verheggen consider the 1971 Finding to constitute the requisite determination, referred to in section 202(f). Consequently, they have concluded that, having found single shift samples inaccurate, the Secretary cannot rely on them to support enforcement actions. Therefore, they reason, enforcement decisions can only be based on multi-shift averaging of dust levels. Slip op. at 6-7.

I disagree with their view that the 1971 Finding contained the conclusion that was necessary to permit the Secretary’s continued use of multi-shift averaging after the 18-month grace period. The 1971 Finding concerns the accuracy of assessing a miner’s continuous exposure over *numerous shifts*. As discussed below, however, according to the plain meaning of section 202(f) and its legislative history, to be operative, the finding had to ascertain the ability to accurately assess a miner’s continuous exposure *over a single shift*.

The plain language of section 202(f) of the Mine Act prohibited multi-shift averaging after 18 months unless the Secretary found that sampling respirable dust over only a single shift does not accurately represent atmospheric conditions “*during such shift.*”<sup>3</sup> In other words, a necessary predicate for the Secretary’s continued enforcement of the respirable dust standard using multi-shift averaging, rather than single shift sampling, is a finding that a measurement taken over a single shift is not an accurate indication of the atmospheric conditions during the shift that is being measured.

The 1971 Finding fails to make this determination. It concludes, instead, that “single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is *continuously exposed.*” 36 Fed. Reg. at 13286 (emphasis added). Thus, the 1971 Finding determined that measuring respirable dust over a single shift is not an accurate indication of a miner’s average exposure over numerous continuous shifts. This is a very different conclusion from the one

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measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. § 842(f).

<sup>3</sup> If a statute is clear and unambiguous, effect must be given to its language. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Congress required in order to justify continued departure from the statutory mandate that the 2.0 mg/m<sup>3</sup> standard be “continuously maintain[ed] . . . during each shift.” 30 U.S.C. § 842(b)(2).<sup>4</sup>

That the 1971 Finding is about the variation in dust levels from shift to shift rather than the ability to accurately measure exposure during a single shift is underscored by the methodology the Secretary used to reach her conclusion. The 1971 Finding informs us that the Secretary relied on the basic dust samples that operators had submitted in accordance with the procedures set forth in the version of Title 30, Part 70, Subchapter O, Chapter I in effect at that time. 36 Fed. Reg. at 13286. These samples were taken from designated occupations over ten consecutive shifts. The Secretary explains that an average was obtained for the ten shifts. This number was then compared to the average of the two most recent samples, then to the average of the three most recent samples, etc. The 1971 Finding notes that the average of the two most recent samples was statistically equivalent to the average concentration of all ten basic samples for each working section in only 9.6 percent of the comparisons. *Id.* Thus, the Secretaries concluded that single shift sampling would not “accurately represent the atmospheric conditions to which the miner is continuously exposed.” *Id.*<sup>5</sup>

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<sup>4</sup> My colleagues urge a broader reading of the 1971 Finding, one that indicates that single shift sampling is “statistically speaking . . . not reliable.” Slip op. at 8. However, to support this position they direct us, not to any language in the 1971 Finding, but to a general treatise on statistics and the author’s observation that “[i]f your sample is large enough and selected properly, it will represent the whole well enough for most purposes.” *Id.* (quoting *D. Huff, How to Lie with Statistics* 13 (1954)).

Paraphrasing section 202(b), my colleagues imply that the “whole” which samples in this case are supposed to represent, is a miner’s exposure to respirable dust “during all shifts,” *id.*, instead of “during each shift” as the statute states. 30 U.S.C. § 842 (b)(2). If enforcement of the 2.0 mg/m<sup>3</sup> standard had to be based on a miner’s average exposure over several shifts, my colleagues would be on more solid ground in asserting that sampling the atmosphere for a single shift does not provide reliable support for a citation. Indeed this is what the 1971 Finding concluded. However, if as I maintain, section 202(b) requires the Secretary to take enforcement action on the basis of a miner’s exposure during even one shift, then the single shift sampling need only represent the average exposure of the miner during that particular shift. The 1971 Finding did not even address, much less discredit, the reliability of the single shift sample as a means of making that determination.

<sup>5</sup> Commissioners Verheggen and Riley suggest my opinion raises issues “simply not before the Commission.” Slip op. at 8. This dissent, however, addresses the scope of the Secretary’s 1971 Finding, which is the issue the parties and my colleagues concede is central to the resolution of this case. Slip op. at 4.

The legislative history of section 202(f) also supports the position that the 1971 Finding does not provide the necessary basis for allowing compliance to be based on multi-shift averaging of respirable dust measurements. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 & n.12 (1987) (legislative history provides “compelling support” for court’s analysis based on plain language of statute); *Ohio v. U.S. Dept. of Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989) (reviewing court must use traditional tools of statutory construction, including, when appropriate, legislative history, to determine Congressional intent). As my colleagues have noted, section 202(f) of the Mine Act is identical to section 202(f) of the Coal Act. Slip op. at 6. During enactment of the Coal Act, the House version required multiple-shift sampling. See H. R. Rep. No. 91-563, at 41 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1031 (1975) (hereafter “Legis. Hist.”). The Senate version prohibited it. See S. Rep. No. 91-411, at 20 (1969), reprinted in *Legis. Hist.* at 146. The conference report referred to this discrepancy and then explained that the final version required multiple-shift averaging of respirable dust levels for 18 months and thereafter requires dust concentration to be determined on the basis of single shift sampling unless the Secretary makes a finding “that single shift measurements will not accurately represent the atmospheric conditions during the measured shift to which the miner is continuously exposed.” See Jt. Conf. Rep. No 91-761, at 75 (1969), reprinted in *Legis. Hist.* at 1519 (emphasis added).

My colleagues rely on *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), wherein the Commission held that the 1971 Finding precluded the Secretary from citing an operator on the basis of a single shift sample. Seeking to distinguish the Commission’s decision in *Keystone*, the Secretary and amicus UMWA contend that that decision involved enforcement actions based on a single sample taken over a single shift. S. Br. at 22; UMWA Br. at 4. Because the instant case involves citations based on the average of multiple samples taken over a single shift, they claim that *Keystone* is not controlling precedent in this enforcement proceeding. S. Br. at 22-23, UMWA Br. at 5. Regardless of whether it can be distinguished on the basis of the facts before us, the Commission’s *Keystone* decision flows from the assumption that the 1971 Finding actually contained the determination regarding single shift sampling that was specified in section 202(f). 16 FMSHRC at 7. Since I disagree with this underlying premise, upon which the *Keystone* ruling was based, I decline to follow it.

In upholding the citations in this case, I do not mean to imply agreement with the enforcement policy that resulted in their issuance. The Secretary maintains that since 1975, she has issued citations based on single shift samples when the average respirable dust exposure of the 4 or 5 miners in a particular working section exceeds the 2.0 mg/m<sup>3</sup> standard.<sup>6</sup> S. Br. at 2-3. As I indicated earlier, however, section 202(b)(2) of the Act requires that the average

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<sup>6</sup> For a period of time, the Secretary took enforcement actions on the basis of an individual miner’s exposure during a single shift. 16 FMSHRC at 8. This spot inspection program was rejected by the Commission in *Keystone*. *Id.* at 16.

concentration of respirable dust in the mine atmosphere to which “*each miner* in the active workings is exposed” not exceed the 2.0 mg/m<sup>3</sup> standard (emphasis added).

In light of this statutory mandate, it is difficult to see how the Secretary could justify permitting one miner to work for a shift in an atmosphere containing an average concentration of respirable dust greater than 2.0 mg/m<sup>3</sup> simply because that miner’s co-worker was exposed to a significantly lower concentration of respirable dust during the same shift. An enforcement policy which is based on the average exposure of a group of workers means that there will be occasions when one or two miners in a working section are exposed to concentrations that exceed the 2.0 mg/m<sup>3</sup> limit on a particular shift, but no citation is issued because the exposure of the other workers on the section results in an average below the 2.0 mg/m<sup>3</sup> limit. It also appears to mean that, even when the average exposure for the group exceeds 2.0 mg/m<sup>3</sup>, only one citation is issued, regardless of the number of miners in the section that were exposed to the impermissible level of respirable dust. The instant case, involving three citations, illustrates this aspect of the policy. Citation No. 7348723 is based on five samples taken over a single shift on March 1, 1999. Jt. Stip. 2. Three of the five occupations sampled show dust concentrations in excess of 2.0 mg/m<sup>3</sup>:

Continuous Miner Operator	2.764 mg/m <sup>3</sup>
Bolter, Intake	2.854 mg/m <sup>3</sup>
Bolter, Return	3.154 mg/m <sup>3</sup>

*Id.*

Citation No. 7348724 is based on four samples taken over a single shift on March 10, 1999. All four reveal dust concentrations in excess of the statutory limit:

Continuous Miner Operator	2.730 mg/m <sup>3</sup>
Shuttle Car Operator (right)	2.968 mg/m <sup>3</sup>
Scoop Operator	2.495 mg/m <sup>3</sup>
Shuttle Car Operator (left)	2.347 mg/m <sup>3</sup>

*Id.*

Citation No. 7348725 is based on four samples taken over a single shift in March 10, 1999. All four reveal dust concentrations in excess of the statutory limit:

Continuous Miner Operator	2.435 mg/m <sup>3</sup>
Repairman	2.582.0 mg/m <sup>3</sup>
Shuttle Car Operator	3.748 mg/m <sup>3</sup>
Shuttle Car Operator	3.837 mg/m <sup>3</sup>

*Id.*

As a result of the Secretary's averaging approach, these eleven impermissibly high samples resulted in only 3 citations, one for each working section. Moreover, as my colleagues point out, the averaging approach under review has recently been questioned by the Secretary herself since it "dilutes a high measurement made at one location with lower measurements made elsewhere." Slip op. at 9 (quoting Determination of Concentration of Respirable Coal Mine Dust, 65 Fed. Reg. 42068, 42073 (July 7, 2000)).<sup>7</sup> Whatever questions might be raised about the underlying enforcement policy, however, it is undisputed that in this proceeding 11 miners each recorded an exposure level, over a single shift, that was greater than the 2.0 mg/m<sup>3</sup> Congress deemed permissible on each shift. Consequently, I would uphold the three citations that were issued, despite my disagreement with the Secretary's rationale for issuing them, and would remand this proceeding for assessment of an appropriate penalty.<sup>8</sup>

For the foregoing reasons, I would reverse the judge's decision, uphold these citations, and remand this proceeding for assessment of an appropriate penalty.

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Mary Lu Jordan, Chairman

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<sup>7</sup> The Secretary also stated her belief, therein, that "the statistical analysis referenced in the 1971/1972 proposed and final findings simply did not address the accuracy of a single, full-shift measurement in representing atmospheric conditions during the shift on which it was taken." 65 Fed. Reg. at 42071.

<sup>8</sup> I fail to see how a decision that would uphold the citations as they were issued, without additional findings or modifications, on the basis of the plain language of the cited regulation, either deprives the operator of notice or "finds new violations." Slip op. at 9. The cases relied on by my colleagues are inapposite. In *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the judge modified the citation to include a finding that the violation was "significant and substantial." In *Mettiki Coal Corp.*, 13 FMSHRC 760, 764-65 (May 1991), the judge modified the section 107(a) imminent danger order to a withdrawal order under section 104(b). More relevant, perhaps, is the Commission's comment in *Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 716 (June 2000) that "there are cases where it would be appropriate to find a violation based on the plain meaning of a standard even if such a rationale was not a part of the Secretary's theory of violation."

Distribution

Timothy M. Biddle, Esq.  
Crowell & Moring  
1101 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Robin A. Rosenbluth, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Michael F. Duffy, Esq.  
National Mining Association  
1130 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Melanie J. Kilpatrick, Esq.  
Wyatt, Tarrant & Combs  
1700 Lexington Financial Center  
Lexington, KY 40507

Randall Vehar, Esq.  
International Chemical Workers Union  
1655 West Market St.  
Akron, OH 44313

Judith Rivlin, Esq.  
United Mine Workers of America  
8315 Lee Highway  
Fairfax, VA 22031

Administrative Law Judge Gary Melick  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
5203 Leesburg Pike, Suite 1000  
Falls Church, VA 22041