FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

August 6, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 96-45-RM
	:	LAKE 96-65-RM
AKZO NOBEL SALT, INC.	:	LAKE 96-66-RM
	:	LAKE 96-80-RM

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

DECISION

BY: Jordan, Chairman; Riley, Commissioner

This consolidated civil penalty and contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is the decision of Administrative Law Judge George A. Koutras to vacate a citation issued to Akzo Nobel Salt, Inc. ("Akzo"), charging a violation of the two-escapeway requirement of 30 C.F.R. § 57.11050(a).[1] 18 FMSHRC 1950, 2016-27 (Nov. 1996) (ALJ). The Commission granted the

[1] Section 57.11050 provides:

> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.
>
> (b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways

Secretary of Labor's petition for discretionary review ("PDR") in Docket No. LAKE 96-66-RM challenging that decision. For the following reasons, we reverse the judge's decision.

I.

Factual and Procedural Background

Most of the relevant facts were stipulated before the judge and are not in dispute. 18 FMSHRC at 1952-56. Akzo operates an underground salt mine called the Cleveland mine in Cleveland, Ohio. *Id*. at 1952. At the time of the alleged violation, underground employment at the mine was approximately 174 on two production shifts and three maintenance shifts. *Id*.; Jt. Stip. No. 11. Akzo's Cleveland mine has two hoists: one in the 1853-foot production shaft and one in the 1805-foot service shaft. 18 FMSHRC at 1952. In the event of an emergency, the hoist in the service shaft is to serve as the primary escapeway for miners, while the hoist in the production shaft provides an emergency escapeway. *See* Vol. I, Doc. Tab U at 1.

On November 6, 1995, counsel for Akzo wrote Vernon Gomez, the Administrator for Metal and Nonmetal Mines with the Department of Labor's Mine Safety and Health Administration ("MSHA"), regarding MSHA's enforcement position with respect to section 57.11050(a) when an escapeway is taken out of service for maintenance at a mine with only one other escapeway. 18 FMSHRC at 1955; *see* Vol. I, Doc. Tab N. According to Akzo, due to the construction of the wire ropes used with its escapeway hoists, it had to periodically take the hoists out of service to shorten or otherwise adjust the ropes so they were tight and of equal length. 18 FMSHRC at 2053. On December 8, 1995, Gomez responded to that letter. 18 FMSHRC at 1955; *see* Vol. I, Doc. Tab S ("Gomez Response"). The Gomez Response sets forth MSHA's interpretation of section 57.11050(a) that is referred to as the "1-hour rule" as follows:

> [With respect to] the need for evacuating miners . . . during hoist outages when the minimum requirements for escapeways could not be met because the hoist was unavailable for use in one of the two escapeways[,] . . . [w]e believe that [section 57.11050(a)] does not authorize maintenance to interfere with a mine operator's ability to use the hoist in the event of an emergency if it is part of, or one of, the two required escapeways.
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> . . . [A]s a practical application of this standard, if a hoist could be returned to service within 1 hour of the need to be used then evacuation of the mine would not be required.

> within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

18 FMSHRC at 2019-20; Vol. I, Doc. Tab S at 4-5. On December 15, 1995, counsel for Akzo informed the Secretary that Akzo planned a hoist outage over the upcoming holidays that would provide the basis for a Commission test case for MSHA's interpretation of section 57.11050(a). 18 FMSHRC at 1955.

During the evening and early morning of December 24 and 25, 1995, Akzo took the production hoist out of service for approximately 3-1/2 hours. *Id.* It was stipulated that there was a period during which it would not have been possible to put the hoist back into service in less than 1 hour if it became necessary to use. *Id.* While maintenance work on the production hoist was being performed, three miners performed work underground that did not involve the production hoist, including checking pumps and fans and conducting preventive maintenance on the service hoist. *Id.* No salt extraction or cutting or welding occurred during the outage. *Id.*

Akzo reported the incident to MSHA. *Id.* MSHA investigated the matter and subsequently issued Citation No. 4546276 alleging a violation of section 57.11050(a). *Id.* at 1956. The citation was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and states that Akzo "failed to comply with [section 57.11050(a)] because the miners who were underground were not provided with two properly maintained escapeways to the surface to use in the event of an emergency for a period in excess of one hour." *Id.* at 1957; Vol. I, Doc. Tab U at 1.[2]

Akzo contested the citation, and extensive pretrial discovery ensued.[3] Among those deposed were a number of MSHA officials and inspectors, who were questioned at length regarding MSHA's past and present enforcement positions with respect to section 57.11050(a). *See* 18 FMSHRC at 1958-83, 1990-93. Through their testimony, as well as by documents submitted as exhibits, Akzo sought to show not only that MSHA staff did not have a clear

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[2] The citation goes on to state:

> During part of the time that the production hoist was out of service, the service hoist (the primary escapeway) was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. However, during that time both escapeways were not in service.

Vol. I, Doc. Tab U at 1.

[3] After the Secretary proposed, and Akzo paid, a $50.00 penalty for the citation, the Secretary moved to dismiss the contest proceeding on the ground that, by paying the penalty, Akzo had waived its right to contest. *See* S. Mot. to Dismiss Contest Proceedings at 1. In an unappealed decision, the judge denied the Secretary's motion, accepting Akzo's contention that its payment of the penalty was inadvertent. Unpublished Order at 1-2 (June 10, 1996) (distinguishing *Old Ben Coal Co.*, 7 FMSHRC 205 (Feb. 1985)).

understanding of the application and enforcement of the 1-hour rule, but that the 1-hour rule was a change in MSHA's previous interpretation of the standard. Under the previous interpretation, hereinafter referred to as the "end-of-shift rule," MSHA allegedly "allowed production to continue until the end of the shift, provided miners were notified that only one escapeway was available and they agreed to continue working until the end of the shift, and provided the next shift was not permitted to go underground until the second escapeway was repaired." 18 FMSHRC at 2026.

Akzo moved for summary decision on the ground that "there was no violation of [section] 57.11050 . . . in that, at all relevant times, Akzo maintained two properly maintained escapeways to the mine's surface." A. Mot. for Summ. Dec. at 2. Akzo contended that it was at all times in compliance with section 57.11050, in that it could perform maintenance on hoisting equipment without violating the standard, the standard does not require both escapeways to be functional at the same time, and MSHA had previously recognized the end-of-shift rule. Mem. in Supp. of A. Mot. for Summ. Dec. at 16-23. Akzo also characterized the 1-hour rule as a new evacuation requirement, which MSHA was engrafting onto section 57.11050(a) in violation of the Administrative Procedure Act ("APA") and the terms of the Mine Act. *Id*. at 23-34.

The Secretary cross moved for summary decision on the ground that the facts as stipulated established a violation of section 57.11050(a) as set forth in the citation. S. Resp. to A. Mot. and Cross Mot. for Summ. Dec. at 2. The Secretary argued that it was reasonable for her to interpret the standard as prohibiting what occurred in this case, which she characterized as a failure by Akzo to "properly maintain two separate escapeways" while non-necessary personnel were underground. S. Mem. in Supp. of Cross Mot. for Summ. Dec. at 5-9, 14-17.

The judge determined that Akzo had not violated section 57.11050(a). 18 FMSHRC at 2016-27. He concluded that MSHA's interpretation and application of section 57.11050(a) went well beyond the language of the provision, was unreasonable, and not entitled to deference. *Id*. at 2027. He found no credible evidence of the existence, prior to the instant litigation, of any written MSHA national policy statements concerning mandatory mine-wide evacuation if compliance with section 57.11050(a) is not achieved within 1 hour, or the fixing of an "automatic" 1-hour abatement time to achieve such compliance, or uniform enforcement methods for citing a mine operator for a violation of section 57.11050(a). *Id*. at 2016.[4] The

[4] The judge found that, prior to the Gomez Response, "MSHA's inspectors in the North-Central District, and probably other districts, followed an apparent long[-]standing practice of *not* requiring the evacuation of miners working underground when only a single escapeway was available during a shift." *Id*. at 2026 (emphasis in original). Among the evidence the judge relied upon was a 1990 memorandum from James M. Salois, District Manager for MSHA's North Central District, to MSHA field staff in that district. *Id*. at 2017; *see* Vol. I, Doc. Tab G. In his memorandum, Salois stated that, in the absence of a national policy on mine evacuation related to hoist repairs and maintenance in mines with only two escapeways, the North Central

judge characterized the Gomez Response as having been prepared unilaterally and not shared with other members of the mining community, and noted that its contents had not been reduced to other written form or included as part of MSHA's enforcement guidelines or policy manuals. 18 FMSHRC at 2020-21. He further found, from the deposition testimony of the MSHA officials and inspectors, that there appeared to be inconsistent, uncertain, and confusing enforcement practices as to the interpretation and application of section 57.11050(a). *Id*. at 2021-24. The judge particularly noted that MSHA witnesses could not agree regarding how the 1-hour rule would apply in practice. *Id*. at 2021-22.

The judge found nothing in the text of section 57.11050(a) to support MSHA's 1-hour rule. *Id*. at 2025-26. He also concluded that the language of subsection (a), requiring the positioning of escapeways so that damage to one shall not lessen the effectiveness of the others, recognizes that one escapeway in a two-escapeway mine may not always be available, because of damage or for maintenance. *Id*. at 2026. The judge rejected MSHA's reliance on subsection (b) of section 57.11050 as authority for requiring evacuation of an entire mine if one of the only two escapeways is going to be unavailable for more than 1 hour. *Id*. at 2024. He concluded that subsection (b) does not provide for any mine evacuation, but only for refuges if miners cannot reach the surface within an hour by using the escapeways provided by subsection (a). *Id*. Finally, the judge agreed with Akzo that the Gomez Response was not just a general explanatory or interpretative statement regarding the application of section 57.11050(a), but instead constituted a substantive rule and was therefore subject to the notice, comment, and publication requirements of the APA. *Id*. at 2027.

The Commission granted the Secretary's PDR in which she requests that we reverse the judge's decision, affirm the citation, and remand for penalty assessment.

II.

Disposition

A. The Parties' Arguments

The Secretary contends that the 1-hour rule is an interpretative rule, falling under the exception to the APA that does not require notice and comment rulemaking, because it is based on the regulation's language and intent. S. Br. at 5-12. The Secretary argues for deference to the 1-hour rule because it is a "safety-promoting" interpretation of section 57.11050 that is reasonable and consistent with the language and purpose of the standard. *Id*. at 14-20. Citing to the legislative history of the Mine Act and its predecessor statute, the Secretary claims that the purpose of the standard is to ensure that miners will have a way out of the mine at all times in an emergency, even if one escapeway is damaged. S. Br. at 16-17.

District would begin to follow variations of the end-of-shift rule. Vol. I, Doc. Tab G at 1-3.

The Secretary argues that the 1-hour rule is consistent with past MSHA national practice. *Id*. at 21-23. She argues that even if, at an earlier time, MSHA staff applied a different interpretation of section 57.11050(a), she is not precluded from announcing a new interpretation of the standard. *Id*. at 23-25. The Secretary contends that this arguably is the first time she has advanced the 1-hour rule, which does not in itself make it undeserving of deference under applicable case law. *Id*. at 25-27. She also asserts that even if she is found to have modified her position, it is permissible for her to do so as long as she adequately identifies a reasonable basis for the change. *Id*. at 27-28.[5]

Amicus United Steelworkers of America ("USWA") repeats many of the Secretary's arguments. USWA Br. at 1, 3-5. It also contends that section 57.11050(a) could be reasonably interpreted to prohibit all underground work when there are less than two escapeways available. *Id*. at 3, 5.

Akzo urges that the judge's decision be affirmed on the ground that MSHA's interpretation of section 57.11050(a) is very different than its previous interpretation, is unsupported by the language of the standard, and is an attempt to engraft new substantive requirements onto the regulation, which would result in a requirement that the operators of all two-shaft mines either add an additional shaft or evacuate the entire mine whenever a hoist is to be disabled for an hour or more. A. Br. at 11-12, 14-21. According to Akzo, this new interpretation should have been subject to APA procedures. *Id*. at 23-28. Akzo further contends that no reasonably prudent operator would have had notice of MSHA's regulatory construction of the standard. *Id*. at 21-23. Akzo argues that a mandatory evacuation requirement exceeds any withdrawal authority under the Mine Act, and facially violates the statutory requirement that MSHA grant each operator a "reasonable time" to abate any violation. *Id*. at 12-13. Akzo nevertheless concedes "that a common sense reading of the standard includes the tacit requirement that miners may not remain underground indefinitely while there is only one functioning escapeway." *Id*. at 15 n.12.

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[5] The Secretary advanced a number of inconsistent arguments for finding a violation. While the citation at issue referenced the 1-hour rule, and the case was litigated under that theory before the judge, the Secretary's briefs to us repeatedly describe her new interpretation as one requiring that two escapeways be available at all times, and that miners would have to evacuate if, for any length of time, there were less than two escapeways available. *See* S. Br. at 17, 18, 20; S. Reply Br. at 2, 7. At oral argument, her counsel disavowed statements made in the briefs, and explained that section 57.11050(a) was being interpreted to include the 1-hour rule. Oral Arg. Tr. 13, 38. However, the Secretary also contended for the first time at oral argument that the 1-hour rule was compelled by the plain meaning of the standard. Oral Arg. Tr. 6, 13-14. Her counsel also claimed that there were two reasonable interpretations of the 1-hour rule — one measuring the hour by the time it would take to return the hoist to service, and the other measuring it by time it would take to return the hoist to service and evacuate the mine. Oral Arg. Tr. 15-16.

Amici National Mining Association ("NMA") and the Salt Institute ("SI"), who filed a joint brief in support of Akzo's position, make similar APA and notice arguments. NMA/SI Br. at 2-9, 14-17. They add that the 1-hour rule is so significant a departure from the standard's plain meaning that it does not merit the Commission's deference. *Id*. at 9-14.

While arguing that MSHA's 1-hour rule is a radical change from its previously recognized end-of-shift rule, neither Akzo nor NMA/SI argue for the end-of-shift interpretation of section 57.11050(a). At oral argument, counsel for Akzo denied that by opposing the 1-hour rule Akzo sought to retain in place by default the end-of-shift rule. Oral Arg. Tr. 25. Akzo's counsel stated that Akzo instead wants MSHA "to take into account [the] enumerable variety of circumstances and fashion a rule that speaks to that continuum of circumstances so that the requirements imposed on the . . . operator are reasonable in view of the circumstances that are occurring at the time." Oral Arg. Tr. 32.

B. Interpretation of Section 57.11050(a)

The Commission has recognized that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "'are to be given their usual, natural, plain, ordinary, and commonly understood meaning.'" *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original).

Section 57.11050 states:

> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Under the plain terms of the standard, an operator must provide two means of escape at all times.[6] We disagree with the judge that the phrase requiring the positioning of escapeways so "that damage to one shall not lessen the effectiveness of the others" somehow signals that both escapeways do not always have to be operational when miners are underground. 18 FMSHRC at 2026. Instead, the phrase simply means that escapeways in a mine should be located so that if an accident causes damage to one escapeway the others will remain functional, to provide miners a way out. The standard unequivocally states that two escapeways must be provided. It follows therefore that an operator risks being cited if miners remain underground when two escapeways are not operational.[7]

This two-escapeway requirement is of utmost importance to miner safety because of the constant threat of unforeseen hazards in underground mines. When Congress enacted the requirement as an interim mandatory standard for all underground coal mines, Congress specifically provided that two escapeways be provided *at all times*. Section 317(f) of the Mine Act provides: "[A]t least two separate and distinct travelable passageways which are maintained to insure passage *at all times* of any person, . . . and which are to be designated as escapeways, . . . shall be provided from each working section continuous to the surface . . . ." 30 U.S.C. § 877(f) (emphasis added). This two escapeway requirement was originally included in section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), and was carried over without change to the Mine Act. The legislative history of the Coal Act indicates that the continual need for two escapeways applies to salt mines as well as coal mines. The report from the Senate Committee responsible for drafting the Coal Act states:

> Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a *salt mine* lost their lives because a second escapeway was not provided.

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[6] In support of his argument that the standard is not plain, Commissioner Verheggen argues that Akzo would never have brought this test case if the regulation were clear on its face. Slip op. at 20. However, the mere fact that a party contests a citation — even setting up a violation as a "test case" seeking clarification of a regulation's meaning — does not automatically lead to the conclusion that the standard at issue is ambiguous. It would be curious indeed if, simply because litigants disagree about the interpretation of a regulation, the Commission were then precluded from finding that the standard was clear.

[7] We nevertheless believe that when citing a violation of section 57.11050(a), the Secretary should carefully consider all of the facts surrounding the violative condition to properly characterize the nature of the violation, and to also correctly fix a reasonable time for abatement pursuant to section 104(a) of the Mine Act.

S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975) (emphasis added). The plain meaning of the regulation, requiring two escapeways when miners are underground, is not only consistent with this Congressional view, but also with the primary purpose of the Mine Act. *See Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) ("This court has several times observed that the 'primary purpose' of the Mine Act was 'to protect mining's most valuable resource — the miner'") (citations omitted). As the Secretary explains, the "purpose of the standard and the statute is to ensure that miners will have a way out of the mine at all times, even if something happens during an emergency situation and one escapeway is damaged." S. Br. at 17.

Here, it is undisputed that two emergency escapeways were not provided at all times for the miners' protection. The judge found, and the parties stipulated that, on December 24, 1995, the "cited production hoist, which was one of the escapeways, was not available for use for approximately three hours and thirty seven minutes while the hoist rope was being shortened." 18 FMSHRC at 2016. Under the plain terms of section 57.11050(a), Akzo violated the standard by closing down one of its escapeways for approximately 3-1/2 hours while miners were underground.

Commissioner Verheggen contends in dissent that the presence of the requirement in Mine Act section 317(f) that coal mine operators maintain two escapeways at all times is "an indication that the Secretary, in promulgating section 57.11050(a), may have opted not to include an 'at all times' element in the regulation."[8] Slip op. at 21. It is noteworthy however that at least two metal/non-metal regulations, 30 C.F.R. §§ 57.8518(a) and 57.8534(a), mandate that fans be continuously operated in active workings when individuals are present *except* for "scheduled production-cycle shutdowns or planned or scheduled fan maintenance." Applying the same logic as our dissenting colleague, the presence of this exception in those regulations makes its absence from section 57.11050 all the more significant, reinforcing our conclusion that this standard contains no implicit exception for planned maintenance.

Our dissenting colleagues believe we are "ignoring . . . practical problems" and claim that our ruling "will seriously inhibit the ability to maintain escapeways[.]" Slip op. at 21, 26.[9] Our colleagues also imply that our ruling may have a negative impact on safety in that an operator

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[8] There is no regulatory history to support this assertion.

[9] Our dissenting colleague Commissioner Beatty questions how escapeway maintenance and repair work could ever be performed in a two escapeway mine under our approach, since the miners doing the repair work would not have two escapeways until the work was finished. Slip op. at 26-27. We note, however, that the Mine Act allows those persons necessary to abate a condition to remain in a mine even when other personnel are required to be withdrawn. *See* section 104(c), 30 U.S.C. § 814(c), and section 107(a), 30 U.S.C. § 817(a).

who is required to stop production in order to service its hoist or perform other maintenance work may be deterred from doing that work at all. Slip op. at 27. Alternatively, they raise the concern that "frequent calls to evacuate could result in miners . . . begin[ning] to second-guess the need to evacuate." Slip op. at 28.

We recognize that adopting the plain meaning of section 57.11050(a), and thus requiring two operational escapeways while miners are underground, may be inconvenient, because the nature of the mining industry presents numerous situations, other than the malfunctioning of a hoist, where an escapeway may become temporarily unavailable for a certain period of time. However, when a regulation states unequivocally that each mine "shall have two or more . . . escapeways" (30 C.F.R. § 57.11050(a)), it would be adding an improper gloss to tack on an "only some of the time" qualification. The requirement that mines must have two or more escapeways does not apply for only two shifts out of three, or only when it is convenient for the operator, or only during times when maintenance is not being performed. When a standard says "[e]very mine *shall* have two or more" escapeways (*id*.), it follows that two escapeways be provided and available at all times when miners are underground.

We are confident that our ruling is faithful to the objectives of the Mine Act, which was enacted for the express purpose of strengthening the safety protections under the predecessor Metal/Non-Metal Act and to prevent the recurring mine disasters in that industry. S. Rep. No. 95-181, at 4-5, 8-9, *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589, 592-93, 596-97 ("*Legis. Hist.*"). Congress was concerned with improving safety protection for all miners in both coal and non-coal mines. H.R. Rep. No. 95-312, at 8 (1977), *reprinted in Legis. Hist.* at 357, 364; S. Rep. No. 95-181, at 9, *Legis. Hist.* at 597. One of the disasters that prompted enactment of the Mine Act was the tragedy at the Sunshine Silver Mine in Idaho in May 1972, where 91 miners died of carbon monoxide asphyxiation. S. Rep. No. 95-181, at 4, *Legis. Hist.* at 592. The Senate Report attributed one of the major causes for this disaster as "the failure of mine management to provide a secondary escape route trap[ping] miners as much as a mile underground." *Id*. Providing two escapeways, as section 57.11050(a) mandates, is an important measure to prevent recurrence of such disasters in the future.

We believe our dissenting colleagues' extrapolation that dire consequences may result from our ruling is hypothetical rather than supported by the record before us.[10] In addition, like the Secretary, our colleagues are unable to indicate how long an operator can require miners to

[10] Our colleagues claim we are being impractical, yet, as indicated above, operators of coal mines are already required by section 317(f) of the Act to provide two escapeways "at all times." Moreover, although they supported the Secretary's 1-hour rule in this case, the United Steel Workers of America, on behalf of the miners at this facility, additionally argued that it would also be reasonable for the Secretary to prohibit all underground work when there are less than two escapeways available, USWA Br. at 3, 5.

work underground with only one escapeway available. Commissioner Beatty urges "the Secretary to engage both miners, and the regulated community, in an attempt to develop a uniform rule that provides clear guidance . . . ." Slip op. at 29. Commissioner Verheggen contends that "the Secretary is in a better position to balance . . . concerns and promulgate an appropriate guidance document or rule that clearly and reasonably addresses these problems." Slip op. at 23. Both of our dissenting colleagues express concern about our "inflexible" approach (*see* slip op. at 21, 28), yet their decision would leave the miners' escapeway protection standard in legal limbo while their suggested rulemaking process occurs.

Having found the meaning of the regulation to be plain, we would normally have no need to consider the reasonableness of the 1-hour rule set out in the Gomez Response. *Heckler*, 735 F.2d at 1509. However, because we find the Secretary's interpretive gloss in this case to be particularly troubling, we feel compelled to comment on it.

The Gomez Response states that "routine maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within 1 hour." 18 FMSHRC at 2020; Vol. I, Doc Tab S at 5. Under this interpretation of the regulation adopted by the Secretary, miners could remain underground regardless of the length of time an escapeway is inoperable, so long as it could be placed back in service and miners withdrawn from the mine within 1 hour.[11] Because the Secretary considers an escapeway operable, for purposes of the escapeway standard, as long as it "*could* be returned to service within one hour of the need to be used" (18 FMSHRC at 2020 (emphasis added)), an operator could simultaneously disable both escapeways for maintenance while miners were underground and would apparently not violate the escapeway standard unless the escapeways would not be available for use within 1 hour of any need which may arise. Under this approach, miners could technically remain underground for an indefinite period of time, without access to *any* escapeway, so long as the operator is able to make the escapeways operable within 1 hour of intended use.[12]

We have carefully considered the Secretary's arguments in favor of adopting a 1-hour rule. However, the Secretary's conflicting arguments were more confusing than illuminating. *See* slip op. at (6 n.5). In the instant case, the Secretary's 1-hour rule leaves unresolved whether the hour is fixed or floating as to when it starts and stops and whether the entire hour is available for restoration of service or includes the time necessary to evacuate the mine. Under this policy,

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[11] Counsel for the Secretary confirmed this interpretation during oral argument by stating that "[a]s long as at any point in time, you are capable of bringing that escapeway back into service within an hour, . . . it doesn't really matter how long the escapeway is out of service." Oral Arg. Tr. 37.

[12] Significantly, even Akzo concedes that miners cannot be left underground indefinitely when only one escapeway is available. *See* A. Br. at 15 n.12.

the requirement that every mine provide two escapeways has been reduced to merely a showing of the *potential* for making two escapeways available within an hour.[13]

In sum, we conclude that section 57.11050(a) means what it says — that two escapeways must be provided to miners while underground. Therefore, the operator had adequate notice of the terms of the standard. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (adequate notice provided by unambiguous regulation); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (operator had "sufficient notice of its regulatory obligations because the Commission's interpretation of [the regulation at issue] is consistent with the plain meaning of the regulation and a reasonably prudent mine operator would take the Mine Act's objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder.").

Accordingly, we reverse the judge and find a violation. While the Secretary requests that we remand for penalty assessment, we note that the operator has already paid the $50 penalty the Secretary proposed. In such circumstances, and in the interest of judicial economy and finality, we see no reason to remand for penalty assessment. *See* 30 U.S.C. § 823(d)(2)(C) (Commission empowered to affirm, set aside, or modify decision of ALJ in conformity with record); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (Mar. 1983) (Commission eschewed remand to set penalty where there was no dispute between Secretary and operator regarding penalty). Taking into account the statutory criteria of section 110(i), we conclude that such a nominal penalty is appropriate under the unique circumstances of this case, where the operator staged the violation in order to test the Secretary's interpretation of a standard at a time no mining was underway.

[13] In light of our holding, we do not address the Secretary's argument that the 1-hour rule is an interpretative rule that is not subject to notice and comment rulemaking.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination and find that there was a violation of section 57.11050(a) and assess a penalty of $50.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Marc Lincoln Marks concurring:

I write separately to specifically emphasize the safety aspects of this case and to call attention to certain facts in the evidence not a part of the opinion filed by Chairman Mary Lu Jordan and Commissioner James Riley.

BACKGROUND

When the Mine Act of 1977 was passed by the 95th Congress of the United States and signed by then President Jimmy Carter, this extraordinary piece of legislation set the public policy of the United States once and for all, above all else, in favor of SAFETY. As has been said over and over again, the primary purpose of the Mine Act was to protect mining's most valuable resource — the miner. *See* 30 U.S.C. § 802 (a).

During that legislative process there were many voices who attempted to temper the safety provisions — trying to weaken them — but fortunately those voices were overridden by the vast majority of the legislative and executive branch and therefore strong safety and health provisions prevailed.

There were also those voices of gloom who predicted that the safety and health provisions of the Act would penalize the operators so harshly that production would be reduced, if not curtailed so drastically that only bankruptcy of the mining industry would follow.

Neither of these predictions proved true! In fact, not only have the miners benefitted from the Act but so have the operators.

Yet, today, there are still those operators and their defenders who try to weaken the safety provisions of the 1977 Act and as well as those regulations that have come about as a result of it. The battle to uphold the 1977 Act's sole purpose, greater safety and better health for miners, is still being fought. This case, as much as any case that has come before this tribunal while I have served, makes that point!

Because of that, I choose to write separately, so that timidity will not keep the real issue in this case hidden. That real issue is whether or not production should be our first consideration or should the safety and health of our miners continue to take priority even though it may cost an operator some production time and/or additional money to provide the safety necessary to the miners' well being.

Let me begin by going back to March 5, 1968. On that date a disastrous and horrendous fire occurred in a Louisiana mine called Belle Island Salt Mine, which was owned by a company named Cargill. Vol. I, Doc. Tab. B., *Final Report on Major Mine - Fire Disaster Belle Isle Salt Mine* ("*Belle Isle Report*"). At the time the fire started, there were 21 miners working underground. ALL 21 MINERS SUFFERED AN AWFUL DEATH. *Id.* at 1. Twenty of them

died of carbon monoxide poisoning and one apparently as the result of a massive skull fracture. *Belle Isle Report* at 1.

Over a period of the next number of months, an investigation was made of that fire, (perhaps the most thorough investigation ever made up to that time), by the Department of Interior's Bureau of Mines under Public Law 89-577, the Federal Metal and Nonmetallic Mine Safety Act. *Id*. Subsequently, a report was filed that indicated, in no uncertain terms, that a separate shaft for use as an escapeway would prevent underground disasters such as the one that killed the 21 men during the fire in that Louisiana salt mine. *Id.* at 44, 46. The Bureau pointed out that the blast and intense heat in the single shaft made escape of any of the 21 men in the mine at the time, impossible! Bureau of Mines, Press Release at 1 (Feb. 14, 1969). The Bureau's report cited the fact that the lack of A SECOND WAY OUT OF THE MINE was a major contributing factor to the loss of life. *Belle Isle Report* at 44. That report also points out that the company had been advised to place a second shaft in its mine nearly six months before the disaster occurred, although at the time of the disaster work on the second escapeway had not even started! *Id*.

What makes all of this even more relevant, is the fact that Cargill owns the Cleveland mine that is involved in the case at bar. But you say, it didn't own it at the time all escapeways were closed down with miners underground, which prompted the citation that brought this case before us. And you're right. However, interestingly enough the company that did own the mine at the time, Akzo, sold the mine in question to Cargill before this matter was heard in oral argument by us. In fact the sale took place on April 25, 1997. Akzo's Status Report, ¶ 1 (May 23, 1997). Although it seems unusual that the name Cargill does not appear on the caption or that at no time has any attempt been made to substitute or add Cargill as a party on the record, such neglect, if one thinks about it, is understandable. How in the world could Cargill have wanted its name to appear on a matter in which it was promoting the idea that when a mine regulation says every mine shall have two or more separate properly maintained escapeways, that isn't what it really means, in light of the experience it had back in 1968. When counsel was asked who he represented at the oral argument of this matter, counsel indicated that he represented Akzo Nobel Salt and did not indicate that he represented Cargill. Oral Arg. Tr. 4. No explanation was given for this mysterious posture, even though a representative of Cargill sat at the counsel's table alongside of "Akzo's" counsel. Oral Arg. Tr. 4.

Akzo Nobel Salt, Inc., at the time it was cited in violation of section 57.11050(a) was a company owned by Akzo Nobel N.V., headquartered in the Netherlands. Akzo Nobel N.V., Press Release (Aug. 15, 1996) <http://www.akzo.nobel.se/om_akzo_nobel_press960815.htm>. This huge foreign organization, worth billions of dollars in assets, chose to make an issue of what is now before us: whether or not there must be two escapeways or more at all times for miners underground according to section 57.11050(a).

I want now to discuss, somewhat briefly, but importantly, the background that led to this case coming before us and who was responsible for the plot that set it up.

There is no question but that the record indicates that counsel for Akzo Salt Inc., from the very beginning set up the procedures that were to be followed, in fact the record would indicate that none of the company officials who were involved in the shutdown would speak to any one of the MSHA investigators unless their counsel was present. *See* Vol. I., Doc. Tab T at 16, 19. And when the MSHA investigators began to question the company officials, the officials refused to answer the question as to whether they knew that they were violating the law, as a result of being told not to answer by their counsel. *Id.* at 17, 19. The record is clear that this matter was set up and carried out in detail as a result of instructions from legal counsel.

At this time it is incumbent upon us to ask the question, why would this huge foreign company, aware of the public policy of the United States to provide United States miners with a way out of a mine at all times, want to involve itself in this type of a dispute? Why would it take the chance that an accident of any nature would take place during the 3-1/2 hours there were not two escapeways available to the miners underground, trapping the miners? What insensitivity would prompt Akzo company officials to take the advice of their counsel and not evacuate the miners during the shutdown — and by the way, not advise the miners at any time either before or during this happening? Vol. I., Doc. Tab. X at 5, 7, 8; Vol. I., Doc. Tab. Y at 22. I believe that the answer to those questions is obvious.

This billion dollar foreign corporation owned a salt mine that had but two escapeways and it was going to cost them a substantial amount of money and a loss of production to dig a third escapeway so that it would be in conformance with the requirement, that if one escapeway was shut down for any reason, there would be two escapeways as required by section 57.11050(a). Rather than spend the money, or have some loss of production when any one of its escapeways were down,[1] it was willing to gamble on expending the lives of the miners underground.

SECTION 57.11050(a)

Section 57.11050(a) provides:

> (a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others.

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[1] In his dissenting opinion. Commissioner Beatty takes out of context the suggestion of Commissioner Marks that one of the ways that an operator could come into compliance with section 57.11050(a) was to dig a third escapeway so that two would be available at all times. Slip op. at 25 & n.2. Commissioner Beatty neglects to mention that Commissioner Marks stated that an operator also could halt production when any one of its escapeways were down in order to be in compliance.

Our responsibility in this case, as in all cases that come before us, is to decide without equivocating the meaning of section 57.11050(a). To do this there are certain guidelines that have been set down for us to follow by Congress, the Supreme Court of the United States, the Federal Courts of Appeals, and by our own tribunal.

First and foremost, we are directed by Congress that our prime concern and chief responsibility, as laid out under section 2(a) of the Mine Act, is the SAFETY of the miners! *See* 30 U.S.C. § 802(a). Additionally, the Court of Appeals for the District of Columbia made it clear that Congress intended the Mine Act to be liberally construed to achieve that goal of mine safety. *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc*., 867 F.2d 1432, 1437 (D.C. Cir. 1989). Again, the Second Circuit recently stated that it is the responsibility of this Commission to interpret the Mine Act and its regulations, consistent with the remedial goal of the Act, and to enhance safety. *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 161 (2d Cir. 1999) (Commission interpretation correctly took into account Mine Act goal of preventing "mine accidents"). Justice Marshall writing for a majority of the United States Supreme Court recognized in *Donovan v. Dewey,* 452 U.S. 594, 602-03 (1981), that the Mine Act was "specifically tailored" to address the mining industry's "notorious history of serious accidents and unhealthful working conditions," and that "there is a substantial federal interest in improving the health and safety conditions in the nation's underground and surface mines."

Having established our responsibility, we now turn to the law we must follow when we find a regulation to be plain on its face. It is well established that if a regulation's meaning is plain on its face, it must be interpreted to mean what it says (and not something different from its plain meaning). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984); *K Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 291 (1988); *Old Colony R.R. v. Commissioner of Int. Rev.,* 284 U.S. 552, 560 (1932) (in interpreting statutory language, "the plain, obvious and rational meaning of a statute is to be preferred to any curious, narrow, hidden sense.")

At this point it would seem appropriate to define the word "shall" as it applies to its use in a government regulation. The ordinary connotation of the word "shall" is "must." *Exportal Ltda. v. United States,* 902 F.2d 45, 50 (D.C. Cir. 1990). "The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *Association of Civilian Technicians v. FLRA,* 22 F.3d 1150, 1153 (D.C. Cir. 1994). Many courts have explained that "shall" is a term of legal significance in that it is mandatory or imperative, not merely precatory. *Exportal,* 902 F.2d at 50 (citing *Conoco, Inc. v. Norwest Bank, Mason City*, 767 F.2d 470, 471 (8th Cir. 1985); *Continental Airlines, Inc. v. Department of Transp.,* 850 F.2d 209, 216 (D.C. Cir. 1988); *Weil v. Markowitz,* 829 F.2d 166, 171 (D.C. Cir. 1987); *Association of Am. R.R. v. Costle,* 562 F.2d 1310, 1312 (D.C. Cir. 1977)). *See also Jim Walters Resources, Inc.*, 3 FMSHRC, 2488, 2490 (Nov. 1981) (the language "shall be used" in a standard was mandatory).

Accordingly, the Commission construes standards that use the word "shall" to require a certain condition, to mean that the condition "must" be provided. For example, in *Amax Coal Co.,* 19 FMSHRC 470, 474 (Mar. 1997), the plain language of the standard stated that methane content of the air "*shall* be less than 1.0 volume per centum" and the Commission reversed the judge's finding of no violation because methane exceeded that level. *See also Fluor Daniel, Inc.,* 18 FMSHRC 1143, 1146 (July 1996) (when standard provides that "[s]elf-propelled mobile equipment *shall* be equipped with a service brake system capable of stopping and holding the equipment . . . the service brakes *must* be capable of stopping and holding the equipment") (emphasis added).

The use of the word "shall" in the standard at issue means "must"; there must be two escapeways, and these must be functional at all times when miners are underground.[2]

The case *Fluor Daniel,* 18 FMSHRC 1145-46, makes the point dramatically. In that case, the regulation in question required mobile equipment to be equipped with a service brake system and the operator argued that since the regulation did not use the words "in functional condition," the regulation did not require the brakes to be functional. *Id*. at 1145. That foolish argument was rejected by this tribunal. *Id.* at 1146. The same thing was made clear in *Mettiki Coal Corp.,* 13 FMSHRC 760 (May 1991). There, the regulation required all electric equipment to be provided with switches for lockout purposes. *Id*. at 768. The Commission held that this meant that the switches be installed with "functioning lockout devices." *Id*. The end result is that the Commission requires what common sense dictates — that if a regulation requires a piece of equipment, such as brakes, then it follows that the equipment must be functional at all times, that is the brakes must work at all times.

Thus, when the regulation in our case requires two or more escapeways to the surface, it means two or more escapeways functional and available at all times!! Otherwise, the regulation would have to be read, that there must be two or more escapeways to the surface only some of the time or perhaps none of the time. This is a result that is antithetical to the purpose and intent of the Mine Act.[3] Can one believe that a Congress and a President intended that miners were to

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[2] Both dissenting colleagues fault the majority for adding an "at all times" requirement to section 57.11050(a). Slip op. at 21-22, 26 n.4. However, the dissenters overlook that section 57.11050(a) is written in mandatory terms, explicitly using the word "shall."

[3] In 1998, there were 80 fatalities in coal and metal and non-metal mines. As of July 31, 1999, 50 fatalities from mining have been reported. MSHA, *1999 Fatalgrams and Fatal Investigation Reports Metal and Nonmetal Mines* (visited Aug. 6, 1999) <http://www.msha.gov/FATALS/FABM99.HTM>; MSHA, *1999 Fatalgrams and Fatal Investigation Reports Coal Mines* (visited Aug. 6, 1999) <http://www.msha.gov/FATALS/FABC99.HTM>. Therefore, it remains critical to construe the Mine Act in a manner that promotes miner safety. As Mine Act Section 2(a) provides, "the first priority and concern of all in the coal or other mining industry

have two functioning escapeways only part of the time and the rest of the time be left in a black hole in the ground without any means of escape, gambling that no roof would fall or no fire would start and snuff out their lives — as happened to those 21 miners in the Louisiana Salt Mine owned by Cargill back in 1968! In sum, the standard's plain terms require two functioning escapeways that are available AT ALL TIMES when miners are underground. To hold otherwise would be to disregard the plain meaning of section 57.11050(a) and denigrate the spirit and purpose of the Mine Act.

Therefore, I join the majority in reversing the judge and find a violation of section 57.11050(a). I also join the majority in its conclusion that, under the circumstances of this case, a remand for penalty assessment is not necessary.

Marc Lincoln Marks, Commissioner

must be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a).

Commissioner Verheggen, dissenting:

I disagree with the majority's conclusion that the standard at issue, section 57.11050(a), is clear on its face and requires that two operable escapeways be available at all times.[1] I fail to see how the meaning of such a standard could be clear given the multiplicity of interpretations that were advanced in this case by Akzo and the Secretary. I would affirm the judge in result, however, and find no violation because the Secretary has failed to articulate a coherent or reasonable basis for the citation issued to Akzo. In reaching this conclusion, I am in accord with my colleague Commissioner Beatty.

As a threshold matter, I disagree with my colleagues that section 57.11050(a) clearly and unambiguously requires operators to "provide two means of escape *at all times*." Slip op. at 8 (emphasis added). Aside from the fact that the words "at all times" simply do not appear in section 57.11050(a), the regulation does require, among other things, that the two requisite escapeways be "properly maintained." This requirement begs two questions: (1) whether the two-escapeway requirement applies while escapeways are in the process of being serviced pursuant to a maintenance schedule; and (2) whether an operator would be in violation of the standard if an escapeway becomes unavailable as the result of an unplanned, unforeseeable event. It is up to the Secretary to fill this gap in the regulation, as she attempted to do in this case — unsuccessfully, as I explain further below. This case is before us because the Secretary, prompted by Akzo's counsel, attempted to provide guidance to the company on the meaning of the "properly maintained" element of section 57.11050(a). If this provision were clear on its face, this case — which Akzo brought and the Secretary defended as a "test case" (*see* 18 FMSHRC at 1955) — would never have arisen.

I find the Tenth Circuit's recent decision in *Walker Stone Co. v. Secretary of Labor* instructive on this point. 156 F.3d 1076 (10th Cir. 1998). In *Walker Stone*, the court had before it a case in which "[t]he administrative law judge and the Commission both relied on their own respective perception[s] of the plain language of the applicable regulation." *Id*. at 1081. The judge and Commission, however, "reached opposite results," which led the court to conclude that "[t]here is thus ambiguity *inherent* in the safety standard." *Id*. (my emphasis). The court noted that "[n]either the . . . judge's interpretation nor the contrary interpretation adopted by the Commission is either clearly required or clearly prohibited by the language of the regulatory safety standard." *Id*. Similarly, here, section 57.11050(a) does not explicitly require that two escapeways be available "at all times." Nor does the standard explicitly require that the Secretary make allowances for maintenance. Section 57.11050(a) is silent as to the issue presented by this case, and thus inherently ambiguous.

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[1] In fact, the majority's ruling that two operable escapeways be available at all times has the effect of imposing a requirement that operators covered by section 57.11050(a) have *three* escapeways available. *See* slip op. at 16 (Commissioner Marks, concurring) (Akzo's "salt mine . . . had but two escapeways and it was going to [be expensive] to dig a third escapeway").

My colleagues, though, have unilaterally added an "at all times" element to section 57.11050(a), without addressing the practical problems posed by planned and unplanned escapeway maintenance, problems which Commissioner Beatty outlines in his dissent.[2] I find it significant that the Secretary did not advance the majority's plain meaning interpretation of section 57.11050(a) at trial. Indeed, she flatly rejected such an interpretation in the instant appeal at oral argument. Oral Arg. Tr. 13, 38 (counsel's disavowal of the "at all times" interpretation argued in the Secretary's briefs). What emerges from the Secretary's various interpretations of the standard is a desire to avoid an inflexible reading of the standard like that announced today by the majority, a reading that poses problems with both enforcement and compliance. Under the majority's new interpretation of section 57.11050(a), the Secretary is faced with having to police *all* escapeway outages and, as the majority acknowledges, "carefully consider all of the facts surrounding the violative condition to properly characterize the nature of the violation." Slip op. at 8 n.7. Moreover, operators can be cited for even the briefest of interruptions in escapeway accessability, even interruptions occurring as a result of totally unforeseeable circumstances such as short power outages or minor mechanical problems. As the Secretary's various interpretations of the standard suggest, she probably wanted to avoid problems such as these.

The Secretary simply did not intend that the standard be an absolute requirement that at least two escapeways be available at all times. Put another way, I find no indication in section 57.11050(a) that the Secretary "has directly spoken to the precise question in issue" in this case — i.e., how operators of metal and nonmetal mines must balance the escapeway requirement with their need to maintain such escapeways. *Cf. Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (in determining whether a "regulation is consistent with the [Mine Act]," the first inquiry is "whether Congress has directly spoken to the precise question in issue") (citations omitted).

My colleagues find support for their interpretation in the requirement of Mine Act section 317(f) that coal mine operators must maintain "[a]t least two separate and distinct travelable [escapeways] . . . *at all times*." 30 U.S.C. § 877(f) (emphasis added); *see* slip op. at 8-9. I view this, however, as an indication that the Secretary, in promulgating section 57.11050(a), may have opted not to include an "at all times" element in the regulation. Congress provided the Secretary a blueprint for such an approach in section 317(f), yet for whatever reason, the Secretary did not use this blueprint when promulgating the similar standard for metal and nonmetal mines. Instead, she has attempted to address the particular concerns and problems of the metal and nonmetal mining industry — and even more specifically, those mines with only two escapeways

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[2] Commissioner Marks states that the "real issue [here] is whether or not production should be our first consideration or should the safety and health of our miners continue to take priority." Slip op. at 14. I disagree. This case is about the meaning of section 57.11050(a). In fact, I believe that the majority's precipitous approach, and the confusion that it could create, could very well *diminish* safety. I thus believe that it would be much better if the Secretary addressed this issue through additional study and promulgation of guidance or more formal rules.

— in guidance documents such as the Salois interpretation (*see* 18 FMSHRC at 2017-18, 2026) and Gomez letter (*id*. at 1955, 2019-20).[3]

Having found that section 57.11050(a) does not address the question of escapeway requirements during maintenance, the issue presented by this case, I next turn to the question of whether the Commission is required to "accord special weight to the Secretary's view" of the regulation. *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979). Herein lies the central problem presented by this case: It is simply impossible to determine just what the Secretary's interpretation of section 57.11050(a) is. The record contains a variety of Secretarial interpretations, including:

(1) The Salois interpretation, or "end-of-shift rule." *See* 18 FMSHRC at 2017-18, 2026.

(2) The Gomez letter, or "one-hour rule." *See id.* at 2019-20.

(3) The various interpretations of section 57.11050(a) appearing in the pleadings, all of which indicate that no one appears to have known just what MSHA policy was or what the Gomez letter meant. *See id.* at 1958-83, 1990-93, 2021-22 ("there appears to be inconsistent, uncertain, and confusing enforcement practices among MSHA's inspectors as to the interpretation and application of this regulation").

(4) The "at all times" interpretation argued in the Secretary's briefs (*see* S. Br. at 17-20; S. Reply Br. at 2, 7), but later disavowed at oral argument (*see* Oral Arg. Tr. 13, 38).

(5) The Secretary's "one-hour rule" interpretation that was revived at oral argument, and upon which counsel elaborated, agreeing that there were two possible interpretations of the rule. *See* Oral Arg. Tr. 15-16.

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[3] The majority notes that sections 57.8518(a) and 57.8534(a) contain exceptions from what is essentially an "at all times" requirement for the operation of mine fans, arguing that the absence of such an exception from section 57.11050(a) reinforces their "conclusion that this standard contains no implicit exception for planned maintenance." Slip op. at 9. My point, however, is that the absence of an *explicit* "at all times" requirement in section 57.11050(a) — unlike sections 57.8518(a) and 57.8534(a), which *explicitly* require mine fans to be run "continuously" — provides the Secretary enough regulatory flexibility to effectively administer the standard. Furthermore, the two regulations cited by the majority illustrate that when the Secretary promulgated the Part 57 regulations, she knew just how to say "at all times," yet did not do so in section 57.11050(a).

(6) A plain meaning interpretation advanced by the Secretary for the first time at oral argument — which amazingly differs from the majority's plain meaning interpretation — deriving a one-hour rule from reading sections 57.11050(a) and 57.11050(b) together. *See* Oral Arg. Tr. 6, 13-14.

I find that the Commission need not "accord special weight" to the Secretary's views here because she has failed to articulate any coherent interpretation of section 57.11050(a). On this ground alone, I would find no violation. Even assuming that the Secretary's position is memorialized in the Gomez letter, which was, after all, the initial basis for the Secretary's case, I agree with my colleagues that the letter is an unreasonable interpretation of section 57.11050(a). The Gomez letter states that "routine [escapeway hoist] maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within one hour." 18 FMSHRC at 2020. As my colleagues point out, under this interpretation, an operator could have any number of escapeways laying dormant so long as they could be activated within an hour. *See* slip op. at 11. I find unreasonable any interpretation of section 57.11050(a) that would allow miners to remain underground without access to *any* escapeway indefinitely so long as the escapeway could be rendered operational in at least an hour. The Gomez letter — which served as the basis for the Secretary's case — being unreasonable,[4] I am not prepared to sanction the regulatory confusion apparent in the Secretary's subsequent prosecution of the case by finding a violation. I therefore would affirm the judge's decision in result.

In the absence of a clear interpretation of section 57.11050(a) from the Secretary, the Commission could offer its own interpretation — the solution my colleagues adopt in their plain meaning analysis. But the problem with their approach is that we, as members of the Commission, are not escapeway experts, and are not equipped to balance the problem of planned and unplanned escapeway outages with miner safety. I believe that in this case, the Secretary is in a better position to balance these concerns and promulgate an appropriate guidance document or rule that clearly and reasonably addresses these problems.[5]

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[4] The purpose of section 57.11050(a) is to ensure that miners working underground are provided escapeways. The Gomez letter is not "logically consistent" with this goal. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

[5] I disagree with the majority's claim that this dissent, together with Commissioner Beatty's dissent, "would leave the miners' escapeway protection standard in legal limbo while [the] suggested rulemaking process occurs." Slip op. at 11. This issue has been in litigation for several years now. There is no indication in the record that there is now suddenly a compelling need to rush to judgment and fashion a new rule imposing a brand new "at all times" requirement. Moreover, I fear that the majority's course will be more unworkable than that urged in the dissents because the majority imposes a new solution on all concerned without the benefit of input from miners, operators, or even the Secretary's experts.

I must also take issue with the majority's penalty assessment, which they make without considering the unequivocal requirements of section 110(i) of the Mine Act to make findings on the gravity of the violation, the effect of the penalty on the operator's ability to continue in business, and the operator's negligence, history of violations, good faith, and size. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983) (when a penalty is assessed under the Mine Act, "[f]indings of fact" must be made "on each of the statutory criteria"), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).[6]

For all of the foregoing reasons, I therefore join Commissioner Beatty in dissent.

Theodore F. Verheggen, Commissioner

[6] The majority's reading of *Sellersburg* is incorrect. That case does not allow the Commission to eschew a remand "where there [is] no dispute between [the] Secretary and operator regarding [the] penalty." Slip op. at 12. Instead, under *Sellersburg*, "the Commission's entering of undisputed record information as findings [on the criteria is] proper under the [Mine] Act." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984).

Commissioner Beatty, dissenting:

I respectfully dissent from the holding of my colleagues in the majority regarding their reading of the escapeway requirements of 30 C.F.R. § 57.11050(a). Slip op. at 7-9. Instead, I concur in Commissioner Verheggen's position in favor of affirming the judge's decision in result based on the Secretary's failure to articulate a consistent means of application of the standard. Further, it is clear that the Secretary has failed to offer a reasonable interpretation of the standard that warrants the Commission's deference. I write separately from Commissioner Verheggen to state my own separate additional views.

As a threshold matter, I disagree with my colleagues that the language of section 57.11050(a) is clear and unambiguous. To the contrary, I find the language of the standard inherently ambiguous and particularly difficult to reconcile given the facts of the instant case.[1]

In my view, the language of the standard is ambiguous, particularly when applied to mining operations that employ a two-entry escapeway system. The relevant language of section 57.11050(a) states that, "[e]very mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others." 30 C.F.R. § 57.11050(a). It is unclear to me, from reading this language, precisely how the requirement for two escapeways *at all times*, as articulated by my colleagues in the majority, could possibly apply in the context of an underground mine that has only two escapeways. The standard explicitly requires that escapeways be "properly maintained" and "positioned so that damage to one shall not lessen the effectiveness of the *others*." *Id.* (emphasis added). Where only two escapeways are present, however, the use of the word *others,* when referring to the remaining escapeway, makes no sense unless the drafters envisioned that underground mining operations would always have more than two escapeways. Thus, an argument could be, and in fact has been, made that the standard requires at least three escapeways to comply.[2] Alternatively, the standard could be read, as the Secretary has suggested, to mean that in a two escapeway system, a single escapeway is permissible during brief periods of routine maintenance. See Vol. I, Doc. Tab S ("Gomez Response") at 4-5. The point to all of this, of course, is to illustrate that because of the standard's

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[1] It is also important to recognize that this case presents a rather unusual set of circumstances since, according to the representation of the Secretary's counsel at oral argument, most metal/non-metal underground mines have more than two means of escape. Oral Arg. Tr. 35.

[2] In his concurring opinion, Commissioner Marks states explicitly that an operator would need to "dig a third escapeway so that it would be in conformance with the requirement [of section 57.11050(a)]." Slip op. at 16; *see also* slip op. at 20 n.1 (dissent of Commissioner Verheggen).

ambiguity, even my colleagues in the majority cannot agree on exactly what the regulation requires.

Given the ambiguity in the language of the standard when applied to a mine with two escapeways, I do not agree with the majority that the standard is plain on its face. In my view, this ambiguity is the reason why neither of the parties in this litigation have advanced a reading of section 57.11050(a) that would require continuous access to two escapeways *at all times*. In fact, the Secretary, who drafted and promulgated the standard at issue, did not advance a plain meaning interpretation of the standard prior to oral argument before the Commission.[3] Oddly, this leaves my colleagues in the majority as the driving force behind the adoption of a plain meaning interpretation[4] of section 57.11050(a) that in theory appears to provide escapeway protection but which, in practical application, will seriously inhibit the ability to maintain escapeways in a manner that will assure miners of their readiness in the event of an emergency.

Aside from the analytical questions raised by the majority's position, my primary concern is that the majority does not address several problems that emerge from a practical application of its ruling. First, the majority does not address the question of how an operator can legally maintain an escapeway under their interpretation of section 57.11050(a). It is important to note that an escapeway is not limited to the hoist and shaft or slope areas of a mining operation, but instead encompasses the entire entryway from the shaft or slope bottom to the work area. *See* 30 C.F.R. § 57.4000. As the majority recognizes, "the nature of the mining industry presents numerous situations, other than the malfunctioning of a hoist, where an escapeway may become temporarily unavailable for a certain period of time." Slip op. at 10. Indeed, something as serious as a roof failure, or as common as an accumulation of water, could have the effect of rendering an escapeway unavailable. The unpredictable nature of underground mining conditions is undoubtedly one reason the standard requires "properly maintained" escapeways. Under the majority's approach to section 57.11050(a), however, neither maintenance, nor repair of these problems could ever be legally conducted in a mine with only two escapeways.

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[3] During oral argument, the Secretary did for the first time advance a plain meaning construction of section 57.11050(a), but it was one that supported her "one-hour rule" interpretation of that standard, rather than the interpretation adopted by the Commission majority. Oral Arg. Tr. 6.

[4] My colleagues in the majority argue they are enforcing the plain meaning of the standard, yet they appear to base their interpretation on a requirement that two escapeways must be operational "at all times," language that does not appear anywhere in the regulation. As Commissioner Marks states in his concurring opinion: "It is well established that if a regulation's meaning is plain on its face, it must be interpreted to mean what it says (and not something different from its plain meaning)." Slip op. at 17.

Under the majority's approach, once miners are sent underground to correct an escapeway problem, or to conduct routine maintenance, the standard is violated. Logic dictates that if an escapeway is in the process of being maintained, miners will, out of necessity, be underground and involved in correcting the problem. Permitting miners underground, however, directly contradicts the majority's position that "two escapeways be provided and available *at all times when miners are underground*." Slip op. at 10 (emphasis added).[5] In effect, the majority's engrafting of an "at all times" requirement onto the language of section 57.11050(a) will impede the correction of escapeway problems, or place miners who have been chosen to correct the problem in the very position that the majority has identified as dangerous. In my opinion, such an interpretation does not promote "the primary purpose of the Mine Act ." *Id.* at 9. To the contrary, the majority's reading of section 57.11050(a), when carried to its logical extreme, can result in a situation that actually inhibits the ability to maintain escapeways.

The majority also fails to recognize the impact that their plain meaning construction of section 57.11050(a) will have on compliance with other standards designed to promote mine safety. Section 57.11050(a) does not exist in a vacuum, but instead is an integral part of a group of health and safety standards including, but not limited to, those relating to the testing and maintenance of shafts, hoists, and escapeways, whose collective requirements are crucial in assuring the availability of functional, properly maintained escapeways in an emergency.[6] The majority's interpretation of section 57.11050(a) will make it difficult, if not impossible, to comply with these standards in a mine with only two escapeways.

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[5] My colleagues in the majority take issue with this criticism of their "plain meaning" interpretation, noting that persons necessary to abate a violative condition may remain in a mine even when other miners are required to be withdrawn under provisions of the Mine Act relating to withdrawal orders (section 104(c), 30 U.S.C. § 814(c)) and imminent danger (section 107(a), 30 U.S.C. § 817(a)). Slip op. at 9 n.9. These limited exceptions to the general evacuation requirement envisioned by the majority fail to effectively rebut my central point, however, since they would not apply to an operator which sought merely to perform routine maintenance work or to comply with any of the various maintenance and inspection requirements applicable to escapeways and hoists. *See infra* at 27 n.6. Under the majority's interpretation of section 57.11050(a), an operator with a two-escapeway system would thus be unable to take an escapeway out of service to perform such work, albeit temporarily, without the risk of being cited for a violation of this standard.

[6] *See, e.g.*, 30 C.F.R. § 57.11051 (maintenance and inspection of escape routes); 30 C.F.R. § 57.11056 (requirements for inspecting, testing, and maintenance of emergency hoists); 30 C.F.R. § 57.19023 (mandating examination of wire ropes every 14 calendar days); 30 C.F.R. § 57.19132 (testing of safety catches); 30 C.F.R. § 57.19134 (inspection of sheaves in operating shafts); 30 C.F.R. § 57.19135 (lubrication of rollers in operating incline shafts).

Finally, the majority does not address the concerns associated with the inevitable evacuations that will result from its interpretation of section 57.11050(a). Under the majority's view, miners must be evacuated *anytime* a situation exists where two escapeways are not "provided at all times," regardless of the length of time the escapeway may be out of service. Slip op. at 9. In other words, even a momentary loss of power at an elevator would result in a requirement that the mine be evacuated immediately. In my view, this leads to several specific problems. First, it is important to recognize that evacuating an underground mine is quite different than the evacuation of an office building during a fire drill. Underground evacuation is an arduous task involving procedures that raise a variety of safety concerns beyond those associated with the temporary loss of an escapeway. Second, frequent calls to evacuate could result in miners developing a "fire drill" mentality whereby they actually begin to second-guess the need to evacuate.[7]

My colleagues in the majority characterize my concerns regarding the possible adverse consequences of a plain meaning reading of section 57.11050(a) as an extrapolation of "dire consequences" that is "hypothetical rather than supported by the record before us." *Id*. at 10. A close reading of the record, however, illustrates that many of these same concerns were previously raised by Akzo on the record in this proceeding. *See, e.g.,* A. Br. at 14-15 & n.11 (discussion of regulatory requirements for routine maintenance of hoists and escapeways); *id.* at 10, 12-13 (problems associated with mandatory evacuation requirement); Oral Arg. Tr. 20 ("there are a host of required maintenance and testing regulations for hoists [which] require that certain maintenance and testing activities be done on a regular basis."). While the record thus contains several references to the regulatory compliance problems I have mentioned, there can be little question that my criticism of the majority's interpretation of section 57.11050(a) must, by its very nature, be hypothetical, at least until the Secretary has had the opportunity to apply that approach in her future enforcement of that standard. Indeed, the majority's own criticisms of the Secretary's proposed interpretation of that standard (the "one-hour" rule) are also hypothetical.

I find it particularly significant that, as noted above, the Secretary did not argue during this litigation for a strict construction of this standard, but instead argued strongly in favor of an interpretation of section 57.11050(a) that permitted some flexibility in its application. Why would the Secretary, who is charged with promulgating and enforcing health and standards, advance an interpretation of a regulation that resulted in a reduction in the level of protection provided to miners? It is obvious from the Secretary's position throughout this litigation that she wisely recognized that an unduly restrictive interpretation of section 57.11050(a) could impede

[7] This evacuation requirement also appears to directly conflict with the requirement that a citation set forth a reasonable abatement period, which is set forth in section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

compliance with other mandatory health and safety standards designed to insure that escapeways are properly maintained, and inhibit the ability to correct escapeways problems.[8]

Under the interpretation advanced by the Secretary in this case, miners could remain underground regardless of the length of time an escapeway is inoperable so long as it could be placed back in service and miners withdrawn from the mine within one hour. Slip. op at 11. I agree wholeheartedly with my colleagues on both sides of this issue that this interpretation of section 57.11050(a) does not merit the Commission's deference. I believe, however, unlike my colleagues in the majority, that mine safety would be better served by allowing the Secretary to engage both miners, and the regulated community, in an attempt to develop a uniform rule that provides clear guidance on this important matter. In the alternative, I believe that, at a minimum, we should allow the Secretary an opportunity to refine her interpretation of this standard.

Accordingly, for the reasons discussed above, I respectfully dissent.

Robert H. Beatty, Jr., Commissioner

[8] In my view, the holding of the majority that the language of section 57.11050(a) is clear and unambiguous is further undermined by its statement that it "carefully considered the Secretary's arguments in favor of adopting a 1-hour rule." Slip op. at 11. If the language of the standard is indeed unambiguous, and can support only one interpretation, there would appear to be little need for a close examination of other alternative interpretations.

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