FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

September 20, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 97-170
	:	PENN 97-190
v.	:	PENN 97-194
	:	PENN 98-8
TARGET INDUSTRIES, INC.,	:	PENN 98-98
PHILLIP K. PETERSON, and	:	PENN 98-104
GREGORY L. GOLDEN	:	

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

DECISION

BY THE COMMISSION:

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge David F. Barbour affirmed nine citations against Target Industries, Inc. ("Target"), one against Phillip K. Peterson, and two against Gregory L. Golden for violations of the Secretary of Labor's main mine fan regulations. 21 FMSHRC 1031 (Sept. 1999) (ALJ). We granted Target's petition for discretionary review ("PDR") challenging the judge's decision.

The Commission's vote in this case is evenly split. Commissioners Jordan and Beatty would affirm the judge's decision. Chairman Verheggen and Commissioner Riley would reverse the judge's decision. For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

At Target's No. 1 Mine, an underground bituminous coal mine in Greene County, Pennsylvania, the room and pillar method of mining is used. 21 FMSHRC at 1034. During the

spring of 1997, between 35 and 38 people were employed at the mine, in general working three shifts: two production and one maintenance. *Id.* Junior Golden was the company's president and his son, Gregory Golden, maintenance foreman. *Id*. at 1036; Tr. 317.

Three surface fans ventilate the mine, and all have pressure gauges (also known as pressure charts), which record fan operation over 7 consecutive days by constantly recording the pressure of the air pulled by the fans. 21 FMSHRC at 1034. The mine's primary surface fan, known as the No. 1 fan, exhausts air from the active workings via return entries, with the capacity to pull approximately 120,000 cubic feet of air per minute ("cfm") out of the mine through a borehole approximately 89 inches in diameter. *Id.* On the mine map, the No. 1 fan is shown as "main mine fan." Gov't Ex. 25.

The other two surface fans, No. 2 and No. 3, were installed in 1989 or 1990 as bleeder fans. 21 FMSHRC at 1034; Tr. 269; Resp't Ex. 1. Identified in Target's mine ventilation plan as "gob bleeder fans"[1] (Gov't Ex. 22 at 9), and shown on the mine map as "Ventilation Borehole #2" and "Ventilation Borehole No. 3," each pulls approximately 4,000 to 5,000 cfm out of the mine through boreholes approximately 12 inches in diameter. 21 FMSHRC at 1034; Gov't Ex. 25. Fan No. 2 ventilates the three-left gob area of the mine, while No. 3 ventilates the four-left gob area. 21 FMSHRC at 1034.

A. The February-March 1997 Fan Stoppage

On the morning of March 3, 1997, MSHA ventilation specialist Ronald Hixson was at the mine to evaluate Target's proposal to amend its MSHA-approved ventilation plan to reflect a different location for a bleeder evaluation point. 21 FMSHRC at 1035. Hixson met with Phillip Peterson, a mine surveyor hired by Target approximately a year earlier, who was responsible for drafting the mine's ventilation plan and supplements, as well as for submitting ventilation proposals to MSHA. *Id.* Target had also assigned Peterson the task of conducting daily examinations of the No. 2 and No. 3 bleeder fans after Target had been advised by a state mine inspector that those fans, which were only being examined on a weekly basis, had to be examined daily. *Id.*; Tr. 389-90.

When Hixson and Peterson arrived at the No. 3 fan and discovered it was not operating, Peterson restarted it. 21 FMSHRC at 1035-36. According to the fan's pressure chart for the week beginning February 25, the fan had not been running since approximately 2:00 p.m. on Thursday, February 27. *Id.*; Tr. 43-44; Gov't Ex. 26. Knowing that Peterson was supposed to

[1] Bleeder fans are surface fans which pull air from bleeder entries, over the gob, and up and out of the mine. 21 FMSHRC at 1033 n.1. "Bleeder entries" are defined as "[p]anel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 55 (2nd ed. 1997).

examine the fan on a daily basis, Hixson asked him if he had examined the fan on Friday February 28, the first full day after it shut down. 21 FMSHRC at 1036. Peterson replied that he did not have a key to the fan house gate with him on February 28, but that he had gone there and seen and heard indications from outside the locked gate that the fan was running. *Id.*; Tr. 47.

Hixson also knew that Target had contracted with an off-site firm, Commonwealth Security Company ("Commonwealth"), to maintain an alarm system to monitor the No. 2 and No. 3 fans. 21 FMSHRC at 1036; Tr. 48-49. Commonwealth would receive a signal from a fan when the fan's pressure gauge showed a significant drop in air pressure, whereupon Commonwealth was expected to immediately contact the mine. 21 FMSHRC at 1036. Peterson told Hixson that Target had not heard from Commonwealth that the No. 3 fan had stopped. *Id.*[2]

Back at the mine office, Hixson reviewed examination books, including one entitled Daily and Monthly Examination of Ventilation Equipment. *Id.* at 1037. In that book he saw that Peterson's signature accompanied a 6:40 a.m, February 28, 1997, entry for a pressure gauge reading at the No. 3 fan of 8.6 inches. *Id.*; Gov't Ex. 15 at 3. Consequently, Hixson returned to the mine the next day, March 4, accompanied by his supervisor and an MSHA electrical inspector, to further investigate the status of the No. 3 fan. 21 FMSHRC at 1037.

While inside the No. 3 fan house that day, the MSHA personnel pulled the lines from the pressure gauge to the fan chart, causing the air pressure to fall to zero. *Id.* Commonwealth immediately called the mine office to report the signal indicating that the No. 3 fan was down. *Id.* Back at the mine office, after again reviewing ventilation equipment examination books,[3] Hixson again asked Peterson whether he had examined the No. 3 fan on February 28. 21 FMSHRC at 1037. At that point Peterson admitted that he had not made the examination on February 28, saying that he had meant to, but when he failed to do it,[4] not wanting to get in trouble he entered 8.6 inches of pressure in the book, a pressure reading within the normal range recorded. 21 FMSHRC at 1037; Tr. 316. There had been crews underground between the afternoon of February 27 and the restart of the No. 3 fan on the morning of March 3. Tr. 61-63.

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[2] This system of reporting borehole fan slowdowns and outages was accepted by MSHA while Target was in the process of installing a direct line from the fans to the mine office in order to provide an immediate signal to the office when a fan slowed or stopped. 21 FMSHRC at 1036 n.5. While MSHA regulations that took effect in 1996 required a signal "at the mine when the fan slowed or stopped" (30 C.F.R. § 75.310(a)(3)), Target was permitted to continue relying only on Commonwealth until the direct signal line was installed and activated. *Id.*

[3] The book used to record inspections of the No. 2 fan did not include entries for February 28 or March 1 or 2. 21 FMSHRC at 1037. There was no evidence the No. 2 fan had stopped on those days. Tr. 71-72.

[4] Peterson testified that he expected to meet with a state inspector at the fans on Friday, February 28, but when the inspector did not show up he forgot to check the fans. Tr. 313-14.

Target was subsequently cited for multiple violations of MSHA's main mine fan regulations, while Peterson was cited for one violation under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). In addition to two citations and one order that were later settled (21 FMSHRC at 1060), Target was issued separate citations for violating 30 C.F.R. §§ 75.310(a)(3), 75.312(c), and 75.312(a) with respect to each of the two bleeder fans, as well as for violating 30 C.F.R. § 75.311(a)[5] with respect to the No. 3 fan. 21 FMSHRC at 1044-50; Gov't Ex. 1-6, 10. Each citation was designated significant and substantial ("S&S), and the section 75.311(a) violation as well as the Fan No. 3 section 75.312(a) violation were alleged to have resulted from Target's unwarrantable failure. 21 FMSHRC at 1044-50; Gov't Ex. 1-6, 10.[6] Peterson was individually charged with the No. 3 fan section 75.312(a) violation. 21 FMSHRC at 1056-57.

B. The April 1997 Fan Stoppage

After tracing the extended Fan No. 3 stoppage to a breakdown of communication between Target and Commonwealth on February 27 after a series of power failures that day (Tr. 81-88; Gov't Ex. 17, 18), at MSHA's prompting the two companies agreed in writing that, when Commonwealth received a signal that a fan at the mine had slowed or stopped, the signal was not to be disregarded and that Commonwealth would notify the mine site. 21 FMSHRC at 1037; Tr. 149-51; Gov't Ex. 23. If Commonwealth could not reach anyone at the mine, it was to notify Gregory Golden. 21 FMSHRC at 1037; Gov't Ex. 23. If it could not reach Gregory Golden, it was to find and notify Junior Golden. 21 FMSHRC at 1037; Gov't Ex. 23. While MSHA did not consider the agreement to be part of the mine ventilation plan, it accepted the agreement until Target was in full compliance with section 75.310(a)(3). 21 FMSHRC at 1037-38.

To better meet MSHA requirements, Target also hired new employees to monitor the No. 2 and No. 3 fans 24 hours a day. *Id.* at 1038; Tr. 99-100. One of the new employees, Donte Soucy, was at the No. 3 fan on April 7, 1997, when he heard it slow down, and later, after returning to normal, completely stop at around 9:40 p.m. 21 FMSHRC at 1038. Soucy testified

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[5] Section 75.310(a)(3) requires a working signaling device between each main mine fan and a surface location that alerts the operator to fan slowdowns or stoppages, and that the signal location always be manned by a responsible person who has equipment to communicate with working sections and stations. Section 75.312(c) requires testing of the signaling device every 31 days by fan stoppage. Section 75.312(a) mandates examination of main mine fans each day that personnel are to be underground. Section 75.311(a) requires main mine fans to be continuously operated, with exceptions not pertinent here.

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

that he could not restart the fan, that he tried to call the mine office several times to report that the fan was down but was unable to get through, and that while the fan was stopped no one called him. *Id.*

Logs and a transcript of the conversations that night between Commonwealth representative Lori Kreider and the Goldens regarding the No. 3 fan (Gov't Ex. 17-18) revealed that, at 9:45 p.m., Kreider first called Gregory Golden at his home to report that the fan was down and that she would try to restart it from her remote location. *Id.*; Tr. 172-74. At both 10:35 and 10:51 p.m. Kreider again called Gregory Golden to report she had been unsuccessful in restarting the fan. 21 FMSHRC at 1038. In response to her statement that "Someone there needs to check the fan to make sure there is not some kind of equipment malfunction with the fan," Gregory Golden told her he would have someone attend to it in the morning. *Id.*[7]

Gregory Golden testified that from his home he tried to get through by phone to the mine office on all three of its telephone lines, on his cellular telephone that he had left at the mine, and on the line for the No. 3 fan, but that one of the mine office lines was busy, and no one answered any of the others. *Id.* at 1038-39. Gregory Golden did not travel to the mine when he could not reach anyone by telephone. *Id.* at 1039. When asked why he did not go to the mine, he said that he had hired people like Donte Soucy to be at the fans to monitor them and report to the mine site or to him if something happened to a fan, and he had assumed that the fan was running because Soucy was there to restart it, and must not have heard the telephone ringing over the noise of the running fan. *Id.*; Tr. 405, 409. Gregory Golden believed that it would have taken him 30 to 40 minutes to reach the mine from his home. 21 FMSHRC at 1038.

The next day, April 8, MSHA Inspector James Dickie, who was at the mine to check on Target's progress in developing fan information for the mine's ventilation plan, was told by Peterson that the mine telephone system was out of order due to a transformer problem. *Id.* at 1039. A state mine inspector named Miller, who was also there, told Dickie that when he arrived at the mine at approximately 7:30 a.m. that morning, all of the miners were above ground because the No. 3 fan was not operating. *Id.* Dickie subsequently saw in the mine fan examination book a notation for that day indicating the No. 3 fan was down. *Id.*; Gov't Ex. 27 at 32. Dickie's later review of that fan's pressure chart (Gov't Ex. 13) revealed that, around 7:30 p.m. the previous day, the fan went off, then came back on, but a little over 2 hours later shut down again and did not restart. 21 FMSHRC at 1039; Tr. 170-71.

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[7] Kreider had also called Junior Golden at 9:47 p.m. to notify him about the fan and her call to Gregory Golden. 21 FMSHRC at 1038. When she asked Junior Golden if he wanted to be called back when the fan was restarted, he told her "No, call Greg." *Id.* Also, immediately after Kreider first notified Gregory Golden, Gregory Golden called Junior Golden to tell him the fan was not working. *Id.* Gregory Golden maintained that Junior Golden only told him to "take care of it. To take care of the call." *Id.* Junior Golden claimed he told his son more, namely, that if Gregory could not contact the mine, he should go to it. *Id.* The judge credited Junior Golden's account over Gregory Golden's. *Id.* at 1057.

The second shift was underground when the fan ceased operating. 21 FMSHRC at 1039; Tr. 162-63. Its foreman, Carl Betchey, told Dickie that he had not learned of the fan stoppage until Jim Orendorff, the foreman of the next shift, so informed him at 10:45 p.m., by which point the second shift was on its way out of the mine, and exited approximately 5 minutes later. 21 FMSHRC at 1039; Tr. 162-63. Dickie also spoke with Gregory Golden, and when Dickie asked him what he had done as a result of the calls from Commonwealth, Gregory Golden replied that he did not do anything. 21 FMSHRC at 1039. Gregory Golden also admitted to Dickie that he had not notified anyone at the mine that the fan was off, or that the fan had a problem and needed to be checked. *Id.* Gregory Golden also answered in the negative to the question of whether he had gone to the mine to see for himself if there was a problem with the fan. *Id.* at 1040. Target and Gregory Golden were each subsequently cited for violating 30 C.F.R. §§ 75.313(c)(1) and 75.311(d). *Id*. at 1052-54, 1057; Gov't Ex. 28, 29.[8]

C. The Judge's Decision

On the question of whether the two Target bleeder fans were main mine fans, the judge, finding no definition of "main mine fan" in either the regulations or the Secretary's *Program Policy Manual* ("*PPM*"), looked to a 1996 MSHA ventilation publication made available to operators. 21 FMSHRC at 1040. A question was posed in the booklet as to whether a "small, surface bleeder fan (i.e. 50,000 cfm)" is considered to be a main mine fan, and the answer given was that it would be considered to be so if shutting it down would have an immediate and perceptible impact on mine or section ventilation. *Id*. at 1040-41. The judge found this understanding of the term to be consistent with the treatment of main mine fans in the ventilation regulations and their preamble. *Id*. at 1041. Relying on the trial testimony of various MSHA inspectors and the Secretary's expert witness to find that shutting down either of the Target bleeder fans would have an immediate and perceptible impact on the mine's ventilation, the judge concluded that those fans were subject to MSHA regulations governing main mine fans. *Id.* at 1041-42.

The judge also found the MSHA ventilation publication sufficient to put a reasonably prudent mine operator on notice of MSHA's interpretation, and credited MSHA ventilation supervisor Dennis Swentosky's account that he had informed Target 9 months earlier that it would have to begin bringing the bleeder fans into compliance with the requirements for main mine fans. *Id.* at 1042-43. The judge stated that MSHA's forbearance in not citing Target at that time had no relevance to the issue of notice, but rather was more properly considered at the penalty assessment stage. *Id.* at 1043-44. Consequently, the judge affirmed all nine of the citations and orders issued to Target, the S&S designation of each, and the four unwarrantable

[8] Section 75.313(c)(1) requires withdrawal of all miners from a mine within 15 minutes after a main mine fan stops, while section 75.311(d) requires that the mine foremen or equivalent mine official be notified if an electrical or mechanical deficiency in the main mine fan is detected.

designations. 21 FMSHRC at 1044-55. He assessed penalties against Target in the amount of $6,600. *Id*. at 1060-61.

In the section 110(c) cases, the judge found that, because Peterson's function at the mine involved a level of responsibility normally delegated to management personnel, Peterson was an agent of Target. *Id.* at 1055-56. The judge also concluded that, in failing to make the daily examinations of the No. 3 fan, and thus violating section 75.312(a), Peterson acted knowingly, even though Peterson did not realize that such examinations were required by federal regulation. *Id.* at 1050, 1057. The judge also found that, by failing to go to the mine to make sure the miners were removed from the mine and that the foreman on duty knew of the April 7 No. 3 fan stoppage, Gregory Golden knowingly violated sections 75.313(c)(1) and 75.311(d). *Id.* at 1056, 1057. The judge was persuaded that Gregory Golden was a person in a position to protect employee safety who had information that gave him reason to know of the existence of a violative condition, yet had failed to act. *Id.* at 1057. The judge ordered Peterson and Gregory Golden to pay penalties of $300 and $1000, respectively. *Id*. at 1061.

II.

Disposition

Target's PDR was limited to the issues of whether the No. 2 and No. 3 fans are governed by the main mine fan regulations, whether Target can be held to have sufficient notice of the applicability of those regulations, and the section 110(c) charges against Peterson and Gregory Golden.

Target contends that, by relying on the short excerpt from the ventilation publication which uses a 50,000 cfm bleeder fan as an example, the Secretary is not reasonably interpreting her main mine fan regulations to include the Target bleeder fans. T. Br. at 11-13. Target also argues that, because the Target bleeder fans were not considered to be main mine fans prior to the issuance of the citations, the judge's conclusion should be reversed. *Id.* at 8-10, 12. Target further maintains that, even if the Secretary's definition is reasonable, the record evidence does not support the judge on the question of the effect of the fans on the mine's ventilation. *Id*. at 13-14. Target also contends that the judge should not have credited ventilation supervisor Swentosky's testimony, and questions why, if Swentosky considered the fans were main mine fans, Target was not cited earlier. T. Br. at 15-17, 18-19. According to Target, it also had no reason to consider regulatory comments about main mine fans, given MSHA's previous treatment of the fans. *Id*. at 18-19.

The Secretary argues that the judge properly deferred to her regulatory interpretation. S. Br. at 14-15. She maintains that treating the bleeder fans as main mine fans is consistent with the regulations, and their preambles, governing main mine fans, as well as the purpose and legislative history of the Mine Act. *Id.* at 16-18. The Secretary contends that substantial evidence supports the judge's finding on the effect of the fans on the mine's ventilation, and

responds to Target's notice argument by arguing that the inspector put Target on actual notice, and the judge's decision to credit the inspector should not be overturned. S. Br. at 19-22, 24-26.

III.

Separate Opinions of the Commissioners

Commissioner Beatty, in favor of affirming the decision of the judge:

A. The Citations Issued to Target

I would affirm the judge's determination that Target and its agents committed twelve separate violations of the regulations applicable to main mine fans under the Mine Act.

At the outset, it is worthwhile to recognize the importance of the issue involved in this proceeding. This case focuses the Commission's attention on the most hallowed of all safety issues involving underground mining — the mine's ventilation system. The results of ineffective or poorly maintained mine ventilation systems have left an indelible mark on the history of underground mining in America, as witnessed by catastrophic methane gas and coal dust explosions that have left in their wake many dead or seriously injured miners.

Fortunately, over the years, and particularly since the adoption of the Mine Act, improvements in mine ventilation systems and enforcement of MSHA's ventilation regulations have significantly reduced the number of mine fatalities occurring from methane gas and coal dust explosions in the mining industry. While an underground mine's ventilation system is comprised of a myriad of ventilation devices, the mine's fans are perhaps the most significant part of the ventilation system. In the instant case, we have been presented with a fundamentally important question in this significant area of mine safety: what is the definition of a main mine fan?

As the judge acknowledged (21 FMSHRC at 1033), and even Chairman Verheggen and Commissioner Riley appear to concede (slip op. at 27), the central issue in this case is whether the No. 2 and No. 3 bleeder fans at the Target mine are main mine fans. The resolution of this issue depends, in turn, on the definition of the term "main mine fan." As the judge noted, the term "main mine fan" is not defined in MSHA's regulations, and MSHA's *Program Policy Manual* ("*PPM*") provides no guidance on the subject. 21 FMSHRC at 1040. Since the term "main mine fan" is not defined in the pertinent regulations or the *PPM*, I conclude that the meaning of the term is ambiguous.

In the case of an ambiguous standard, courts have deferred to the Secretary's reasonable interpretation of the 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 and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy W.*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary, relying on language contained in an informational booklet entitled *Ventilation Questions and Answers* (MSHA, Nov. 9, 1992) (Gov't Ex. 20),[1] takes the position that she will consider a fan to be a "main mine fan" if its shutdown would have an *immediate and perceptible impact* on mine or section ventilation. 21 FMSHRC at 1040-41 (emphasis added). Specifically, responding to a question as to whether a "small surface bleeder fan" may be considered a "main mine fan," the document states that the determination "depends on the impact a shutdown of the fan would have on the overall ventilation system." *Id.* at 1041; Gov't Ex. 20 at 6. It further states: "If the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." 21 FMSHRC at 1040; Gov't Ex. 20 at 6. Like the judge, I find no inconsistency between the definition adopted by the Secretary and her main mine regulations, and conclude that her interpretation of the term "main mine fan" does serve a permissible regulatory function. In proposing its present main mine fan regulations, MSHA stated that "[m]ain mine fans provide the means by which mechanically produced pressure is supplied to the mine ventilating current." 53 Fed. Reg. 2382, 2383 (1988). Among other things, that ventilating current routes methane away from worked-out areas and areas where pillars are being mined, via the mine's bleeder system. *See* 30 C.F.R. § 75.334; 53 Fed. Reg. at 2393.

As explained below, this is *exactly* what the No. 2 and No. 3 bleeder fans at Target were designed to accomplish. If the bleeder fans at Target cannot be considered main mine fans they would not be regulated at all as they clearly are not covered by the regulations governing other types of mine fans: booster fans, backup fans, and auxiliary fans.[2] The record in this case

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[1] This publication, disseminated in connection with MSHA's revision of its underground coal mine ventilation regulations, states that its questions and answers were compiled from internal MSHA training sessions, the 18 public informational meetings held regarding the new ventilation standards, and subsequent discussions with industry and labor representatives. Gov't Ex. 20 at 2.

[2] Booster fans are underground fans designed to assist main mine fans, and in any event are prohibited in bituminous coal mines. *See* 30 C.F.R. § 75.302. Auxiliary fans are also underground fans, and provide face ventilation. *See* 30 C.F.R. § 75.331. The only other fans mentioned in the regulations are the backup fans to main mine fans. *See* 30 C.F.R. § 75.372(b)(6).

unequivocally shows that Target's bleeder fans played such an integral role in the proper ventilation of the mine that it is implausible to suggest they were intended to be unregulated under the Mine Act.[3] In my view, the Secretary's definition of the term "main mine fan" — as any fan whose shutdown would have an *immediate and perceptible* impact on mine or section ventilation — is a reasonable interpretation that is entitled to deference.

This is not the end of the analysis, however, because when we are examining whether or not to grant deference to the Secretary's interpretation, we must also address the question of whether the operator had adequate notice of the Secretary's interpretation of her standard or regulation. My reading of the record in this case suggests that Target did have adequate notice of the Secretary's interpretation of what constituted a "main mine fan." In fact, the record supports the judge's finding that Target was provided with *actual* notice by MSHA that it considered the No. 2 and No. 3 bleeder fans to be main mine fans. 21 FMSHRC at 1043. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (due process is satisfied when an agency gives actual notice of its interpretation prior to enforcement). In finding actual notice, the judge credited (21 FMSHRC at 1043) the testimony of MSHA ventilation supervisor Swentosky who testified that: (1) in two phone conversations with Junior Golden between April and June of 1996, Swentosky informed him that MSHA considered the bleeder fans to be main mine fans, and that Target would therefore have to modify them to meet MSHA's structural requirements for main mine fans (Tr. 260-62); (2) Swentosky met with Junior Golden on June 21, 1996, at the mine to discuss the modifications (Tr. 262-66; Gov't Ex. 14);[4] (3) during the visit, in response to Junior Golden's complaints that the previous owner of the mine had not had to comply with the main mine fan regulations, Swentosky agreed that Target would have time to phase in its compliance with the structural regulations, which was why MSHA did not issue any citations at that time. Tr. 287.

While Junior Golden denied during trial testimony that Swentosky had informed him that the bleeder fans were main mine fans (Tr. 392), his denial lacks credibility. The record clearly indicates that, prior to March of 1997, Target had started the process of bringing the bleeder fans into compliance with some of the main mine fan regulations, specifically by installing pressure recording devices and circulation doors on the fans and offsetting them. Tr. 293-94. In fact,

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[3] The preamble to the proposal to revise the ventilation regulations supports treating all surface fans as main mine fans. Main mine fan regulation is derived from the Federal Coal Mine Health and Safety Act of 1969, but that statute did not use the term "main mine fan." Rather, section 303(a) of the 1969 Coal Act simply required mines to be ventilated with mechanical ventilation equipment. In the 1988 preamble, MSHA stated that such pieces of equipment "in all cases, are main mine fines." 53 Fed. Reg. at 2383.

[4] The judge found that, at this meeting, Swentosky and Golden discussed work Golden had already started to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet. 21 FMSHRC at 1043; Tr. 264, 285-86.

Junior Golden himself conceded that Target took these actions because it had been told to do so by MSHA. Tr. 294. Thus, the record evidence not only supports the judge's decision to credit Swentosky, but provides additional, independent evidence that Target was on actual notice of the MSHA interpretation. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) (record evidence of operator's repairs recognized as evidence of notice).

As we have held on numerous occasions, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Given the aforementioned record evidence on this issue, I see no compelling reason to disturb the judge's credibility determination with respect to the issue of notice and would affirm his conclusion that Target had actual notice of MSHA's interpretation.[5]

I also believe that there is substantial evidence[6] in the record to support the judge's determination that a shutdown of the No. 2 and No. 3 bleeder fans would have had an *immediate and perceptible impact* on mine and section ventilation at the Target mine. On this issue, the Secretary presented testimony from three inspectors — Ronald Hixson, James Dickie, and John Urosek. Urosek, chief of the ventilation division of MSHA's Safety and Health Technologies Center, testified without objection as an expert on bleeder and gob ventilation systems. *See* 21 FMSHRC at 1042-43; Tr. 335.

In order to appreciate the significance of the safety issues involved in this case, it is necessary to have a general understanding of bleeder systems, and their impact on the safe and efficient operation of the overall mine and section ventilation systems. During the trial in this matter, Urosek provided critical testimony to illustrate this point.[7] According to the record,

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[5] I agree with the judge that the fact that Swentosky did show forbearance in not requiring Target to bring its bleeder fans into immediate compliance with all of the main mine fan regulations is not relevant to the notice issue. Once MSHA took the position that the Target bleeder fans were main mine fans, there is no evidence that it ever wavered in its opinion.

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

[7] In their separate opinion, Chairman Verheggen and Commissioner Riley fail to give any credence to the testimony of Urosek. Their analysis fails to take into account how the shutdown of a bleeder fan would impact the mine's overall ventilation. As I understand their analysis, if the mine ventilation plan does not designate a fan as a "main mine fan," its impact, either positive or negative on mine ventilation, is simply not important. This helps to explain their

Urosek spent an entire day at the Target mine conducting a study of the mine's ventilation system to determine, inter alia, how a shutdown of the No. 2 and No. 3 bleeder fans impacted the mine's overall ventilation. Tr. 336-42. During the study, Urosek visited each of the surface boreholes as well as all of the underground approved evaluation points in the ventilation plan. Tr. 336. At each of these locations he took air quantity, quality, and direction readings utilizing an anemometer or smoke tubes. Tr. 341. Based on the result of the aforementioned tests, Urosek concluded that the No. 2 and No. 3 boreholes were drawing air from the mains into the gob area and subsequently to the borehole fans. Tr. 343.

Based on this and other information gathered during the ventilation study, Urosek opined that the No. 2 and No. 3 bleeder fans were primary ventilation sources and critical to the effective ventilation of the entire mine. Tr. 350. He further cautioned that although this type of system can be very effective, operation of the bleeder fans was crucial because they provide a primary ventilation pressure source for the bleeder system. Tr. 349-52.

To illustrate this point, Urosek provided extensive testimony outlining the impact that a failure of either of the bleeder fans would have on ventilation at the Target mine. According to Urosek, failure of either fan could result in an accumulation of methane in the most recently mined gob area, which could migrate to the active areas of the mine. Tr. 355-59. Urosek stated that methane is only explosive at levels in the range of five and fifteen percent, and could begin to accumulate in the gob areas as soon as a bleeder fan stops operating. Tr. 364-65. Therefore, the amount of time that a fan is not operating compounds the problem. Tr. 364.[8]

According to Urosek's calculations, Target's bleeder fans were pulling approximately five to ten cubic feet of methane per minute from the gob area, or roughly 300 cubic feet of methane per hour. Tr. 364-65. Using the upper range of ten percent, Urosek hypothesized that this situation could have produced a volume of 3000 cubic feet of methane in the explosive range. Tr. 365. He further stated that ventilation changes in other areas of the mine could force the accumulated methane out of the gob area and into the active areas. Tr. 360. At the time that Target's bleeder fans were shut down, the most recently mined gob was the area *closest* to the active workings of the mine. Tr. 355-56. This is extremely significant, because the active areas of an underground mine have the greatest potential to provide an ignition source since most of the mining equipment used outby the last open crosscut does not have to be permissible.

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reasoning when they criticize the idea of experts in the field of mine ventilation conducting detailed mine ventilation studies to determine the overall impact on mine and section ventilation that occurs from the shutdown of a bleeder fan. *See* slip op. at 33.

[8] It is estimated that the No. 3 bleeder fan at the Target mine was down for approximately 4 days between February 27 and March 3, 1997, and for an additional period of at least several hours on April 7-8, 1997. 21 FMSHRC at 1036-37, 1038-39.

Urosek's testimony clearly provides substantial evidence that the No. 2 and No. 3 bleeder fans at the Target mine were an integral part of the mine's overall ventilation system, and that a shutdown of the fans would have an *immediate and perceptible* impact on both mine and section ventilation at Target. I find it noteworthy that Target failed to offer any evidence whatsoever to rebut the testimony of MSHA's ventilation expert on the importance of the bleeder fans to the mine's overall ventilation. Instead, Target's counsel argues that the Secretary's evidence on the question is no more than "hypothetical scenarios . . . in which the shutdown of the cited fans could create hazardous conditions[,]" and that there is no evidence that mine ventilation was adversely impacted during the three days the No. 3 fan was not running. T. Br. at 13. I find this argument meritless, and frankly somewhat alarming. It is well established that the Commission may rely solely upon the testimony of MSHA inspectors and expert witnesses in making factual findings regarding violations and hazards posed by mining conditions, even when they are not eyewitnesses to the events. *See Buck Creek Coal Co. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988). Fortunately for the miners employed by Target, our law does not require a major methane explosion and loss of life for MSHA to cite these conditions. Counsel's argument in this regard illustrates his fundamental misunderstanding of mine ventilation, and the critical nature of the conditions at the Target mine during the fan outage.

I disagree strongly with the approach taken by Chairman Verheggen and Commissioner Riley in their separate opinion. First, I am puzzled by the circular reasoning they employ in an attempt to resolve the dispositive issue in this case — namely, whether the No. 2 and No. 3 bleeder fans constitute "main mine fans" subject to the requirements of 30 C.F.R. §§ 75.310-.313. They reason that there is no ambiguity regarding the meaning of the term "main mine fan," even though they appear to admit that the term is not defined in the applicable regulations. They take the position that what constitutes a "main mine fan" at any particular mine is ultimately governed by the designation of main mine fans in the ventilation plan for that facility. Slip op. at 30. The problem with their analysis is that in the end it begs the ultimate question presented here: how do you define a main mine fan?

This situation can be illustrated by the following hypothetical. Suppose that operator X wants to begin producing coal at a small mining operation utilizing a single mine fan. Before production begins the operator is required by law to submit a ventilation plan to MSHA for approval. 30 C.F.R. § 75.370(a)(2). Furthermore, the operator would be required to provide a mine map identifying, inter alia, the *location* of all main mine fans. 30 C.F.R. § 75.372(a)(6).[9] In this hypothetical there would be little trouble determining whether the fan identified by the operator's mine map was a "main mine fan" inasmuch as it serves as the mine's only surface ventilation fan.

[9] Section 75.372(a)(6) refers only to the "location" of main mine fans on the map; it does not in any way attempt to define a main mine fan.

The problem identified in this case, however, arises when operator X determines that a change in the ventilation plan is needed, or the plan is reviewed by the Secretary pursuant to Section 75.370(g).[10] More specifically, what occurs if the ventilation change involves adding an additional mine fan to assure that ventilation is suitable to the current conditions at the mine? In our hypothetical, MSHA argues that the new fan is a "main mine fan" and that it intends to enforce all regulations relating to main mine fans. Conversely, operator X does not agree that the fan is a "main mine fan." How are the parties to resolve this fundamental disagreement? Under the view of Chairman Verheggen and Commissioner Riley, the parties would simply turn to the mine's ventilation plan because as they reason "a particular mine's fans are *defined* . . . in the mine's ventilation plan . . . ." Slip op. at 30 (emphasis added). The problem, of course, is that the new mine fan did not exist in the original ventilation plan, and under the position of my colleagues the parties are left with no objective criteria for determining whether or not the new fan is a main mine fan.

Chairman Verheggen and Commissioner Riley go to great lengths to emphasize that ventilation plans are individualized and need to address the specific conditions at a particular mine. Slip op. at 27 (citing *Peabody Coal Co.*, 15 FMSHRC 381, 385-86 (Mar. 1993)). They also emphasize that changes in a ventilation plan do not occur without discussion and negotiations with the mine's operator. In this regard, they cite *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 906-07 (May 1987), where the Commission held that "[t]he process is flexible, [and] contemplates negotiation toward complete agreement . . . ." Slip op. at 27-28.

I do not take issue with Chairman Verheggen and Commissioner Riley on this point, nor do I disagree with the case law they rely on holding that ventilation plans must be mine specific and allow for input by mine operators. What troubles me is that while my colleagues appear to promote negotiation and consultation between operators and MSHA concerning changes to ventilation plans, in reality their decision does not facilitate that process. In fact, the position they advocate will have the opposite effect, particularly with respect to disagreements over the status of mine fans. Their failure to provide any objective criteria for defining the term "main mine fan" will only impede the negotiation process, both in the initial formulation of a ventilation plans, and in the context of subsequent operational changes.

With respect to the negotiation process in this case, my colleagues assert that "[*i*]*t appears* that Swentosky made this decision [to treat the bleeder fans as main mine fans] unilaterally." Slip op. at 31 (emphasis added). This is only speculative, and certainly not the theory upon which Target litigated this case. As a result, the record was not developed on this issue and my colleagues are left to speculate about how much, if any, involvement Target had in the decision to consider the bleeder fans to be main mine fans. If anything, however, the record appears to indicate that Target acquiesced in the decision to bring these fans into compliance

[10] Section 75.370(g) states that "the ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions at the mine."

with the requirements for main mine fans. As noted above, the judge found that at a meeting held on June 21, 1996, to discuss modifications to the bleeder fans to meet MSHA's requirements for main mine fans, Swentosky and Junior Golden discussed work Golden had already initiated to install an explosion door for one of the fans and whether there was enough room to offset a fan from the mine opening by at least 15 feet. 21 FMSHRC at 1043; Tr. 262-66, 285-86; Gov't Ex. 14. In addition, Junior Golden himself conceded that actions taken by March of 1997 to bring the bleeder fans into compliance with some of the main mine fan regulations — which included installing pressure recording devices and circulation doors on the fans and offsetting them — were undertaken by Target in response to directives from MSHA. Tr. 293-94. This credited evidence directly refutes my colleagues' assertion that Target had no input into the decision to treat the fans as main mine fans or the means by which they would be brought into compliance with the applicable regulatory requirements.

Fortunately, as Chairman Verheggen and Commissioner Riley recognize (slip op. at 28-29), in the event of a disagreement regarding a ventilation plan, MSHA has the ultimate responsibility to insure that the plan achieves its protective purpose. In this case, it therefore follows that when the disagreement arose between Target and MSHA over whether the bleeder fans should be considered main mine fans, MSHA had the final say. This suggests that my colleagues' focus on the importance of negotiation between mine operators and MSHA over the designation of main mine fans in a ventilation plan exalts form over substance.[11] This is perhaps best illustrated by their recognition that they have chosen to focus on "when and how MSHA ought to have revised the operational requirements for the fans" (slip op. at 32 n.6), rather than the more important issue of whether the fans are subject to regulation as main mine fans.

My colleagues criticize me for deferring to the Secretary's interpretation of the term "main mine fan," based upon the impact of a fan on mine or section ventilation. They characterize my approach as endorsing an overly general standard that lacks clarity and whose resolution will ultimately turn on the opinions of inspectors in the field or the conflicting opinions of experts at trial. Slip op. at 34. I respectfully disagree. While the standard itself is

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[11] Chairman Verheggen and Commissioner Riley argue that an operator who disagrees with MSHA's determination that a particular requirement must be included in its ventilation plan may seek review before this Commission by *refusing to comply* with the disputed provision. Slip op. at 29 n.2 (emphasis added). Without minimizing the importance to aggrieved operators of the availability of review by the Commission, and ultimately the courts, I do not believe we should encourage operators to refuse to comply with ventilation requirements. This would lead to uncertainty regarding the terms and status of a mine's ventilation plan for a considerable period of time. There can be little question that it is far more efficient for the operator and the Secretary to consult and negotiate regarding the terms of a ventilation plan — including what fans are to be designated as main mine fans — in the manner described by my colleagues. *See* slip op. at 27-29. In addition, I find it interesting that my colleagues, having initially raised the issue (*see* slip op. at 29 n.2), then proceed to criticize my approach as one that will foster litigation before the Commission. Slip op. at 32 n.6.

general, its application in any given case will depend upon an evaluation of a fan's impact on mine and section ventilation at a particular facility, based on mine-specific conditions. Thus, it is not a "vague and unworkable standard," as my colleagues suggest (*id.*), but rather one that is entirely consistent with the mine-specific approach they advocate.

_____ Third, despite substantial evidentiary support that the bleeder fans had an *immediate and perceptible* impact on Target's overall ventilation, and the apparent agreement by Chairman Verheggen and Commissioner Riley that MSHA's actions were based on "valid safety concerns" (slip op. at 32 & n.6), they have chosen to focus on inspector Swentosky's and Hixson's conduct to raise doubts about the consistency of MSHA's position regarding the bleeder fans. Slip op. at 31-32. In fact, my colleagues go as far as to allege that inspector Hixson's conduct "is inconsistent with and seriously undercuts the Secretary's position in this case." Slip op. at 32. I find this characterization factually inaccurate, and legally unpersuasive.

To begin with, there is no evidence in the record to support their assertion that inspector Hixson acquiesced in Peterson's decision to restart the No. 3 bleeder fan after discovering that it was not operating. To the contrary, the record indicates that the evidence on this issue is inconclusive.[12] More importantly, however, the judge did not make any direct findings on the issue, nor did he discuss Hixson's failure to cite Target for Peterson's actions. While I may question inspector Hixson's reaction to this particular situation, I am unwilling, in the absence of any pertinent record evidence on the issue, to invade the fact finding province of the judge and find the inspector's conduct created an inconsistency in MSHA's position that the bleeder fans were main mine fans.

In addition, the record evidence contradicts the additional assertion of Chairman Verheggen and Commissioner Riley that Swentosky "may well have been the only person who fully comprehended" the safety implications of having the gob bleeder fans comply with the requirements for main mine fans. Slip op. at 32. Swentosky testified that when he visited the Target mine on June 21, 1996, to discuss the applicability of the main mine fan requirements to the bleeder fans with Junior Golden, he was accompanied by another MSHA inspector James Conrad. Tr. 262-63. In addition, as my colleagues concede (slip op. at 30 n.5), an MSHA 2000-204 form was prepared at the conclusion of a ventilation inspection at the Target mine on March 7, 1996, clearly raising the applicability of the main mine fan regulations to Target's bleeder

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[12] On this point, inspector Hixson testified:

> We pulled down in the driveway to the fan and due to not hearing the fan running we knew the fan was down. I got out of the Jeep *and got into the back seat to get my hard hat and my detectors* and Phil had opened the gate and opened the door and gone in the building. Phil had gone over and started the fan.

Tr. 42 (emphasis added).

fans. This document was initialed or signed by the following MSHA officials: Jim Conrad, Thomas Light, Swentosky, and Kevin Strickland. Resp't Ex. 1; Tr. 274-75.

Moreover, MSHA's position regarding the importance of bleeder fans was published in a 1996 MSHA course text on bleeder ventilation systems. Gov't Ex. 31 at 113. This text was co-authored by MSHA's expert in this case, John Urosek, and was developed as a direct response to a series of mine explosions during the 1990's, many of which were a result of ineffective bleeder systems that allowed methane to accumulate in the mine's gob area. Tr. 345-46. The purpose of the 1996 text was to develop a mine ventilation course that would enhance the knowledge and skills of all coal industry ventilation personnel in establishing and maintaining safe and effective bleeder systems. Gov't Ex. 31 at 2. According to Urosek, the course was taught to *every* MSHA mine inspector, and to various members of the mining industry on at least ten occasions. Tr. 348. The text states very clearly that bleeder fans must be *maintained and operated* in accordance with sections 75.302, 75.310, 75.311, 75.312, and 75.313. Gov't Ex. 31 at 118. For my colleagues to state that Swentosky may have been the only MSHA official concerned with the agency's position regarding the appropriate regulatory treatment of the bleeder fans is simply an inaccurate assessment of the record in this case.

Even assuming that inspector Hixson's conduct at the Target mine on March 3, 1997, could be construed as inconsistent with MSHA's general position that bleeder fans were to be treated as main mine fans, neither his conduct, nor MSHA's prior practice of not treating Target's bleeder fans as main mine fans, could exonerate Target for its failure to comply with the applicable requirements. We have consistently held that such an enforcement background does not supply a defense to violations of the Mine Act. As we recently stated:

> The Commission has held that the estoppel defense is not ordinarily available against the government. Furthermore, the Commission has held that an inconsistent enforcement pattern by its inspectors does not estop MSHA from proceeding under an interpretation of the standard that it concludes is correct. *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993) ("[T]he fact that U.S. Steel was not cited prior to July 1990 for failing to conduct weekly examinations of the items cited . . . is not a viable defense to liability.").

Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (Sept. 2000) (other citations omitted). Accordingly, I cannot agree with Chairman Verheggen and Commissioner Riley that the conduct of inspector Hixson during his March 3, 1997, visit to the Target mine, however it is characterized, undermines MSHA's authority to enforce the requirements of the main mine regulations with respect to Target's bleeder fans.

Finally, I find my colleagues' criticism of MSHA's role in this case, and particularly their statement that "[i]n our opinion, the agency's *conduct* [in this case] compromised the safety of

miners at Target" (slip op. at 32 (emphasis added)), misplaced.[13] While the agency may not have dotted enough i's or crossed enough t's in handling this matter to satisfy Chairman Verheggen and Commissioner Riley, I cannot say that its conduct was egregious enough to provide a basis for a reversal of the judge and dismissal of the serious violations alleged in this case. We should not lose sight of the fact that it was Target's disregard for ventilation that allowed this dangerous condition to exist in the first place. Even my colleagues admit that, by failing to correct problems with its gob bleeder fans and falsifying inspection records relating to the fans, Target committed serious violations that put miners at risk. Slip op. at 33. In my opinion MSHA's conduct in this case, albeit not textbook, did advance a reasonable and fundamentally important interpretation of their ventilation regulations that ultimately rectified a problem at the Target mine that, left unchecked, could have easily resulted in a tragic loss of life.

I am troubled by the net effect of my colleagues' decision, which, in my view, exonerates Target and its agents for conduct that seriously compromised the health and safety of the miners employed at the Target mine. As stated earlier, after working through their reasoning I find myself asking the very same question over and over again: how do they define a main mine fan? Instead of providing clarity on this important issue, their approach is focused on highlighting what they consider to be an inappropriate method of handling a change in Target's ventilation plan. Regardless of fault, at the end of the day the fact remains that this incident endangered the lives of many miners. I therefore respectfully disagree with their position, and instead vote to affirm the judge's finding that Target violated the main mine fan regulations with respect to the No. 2 and No. 3 bleeder fans.

B. The Section 110(c) Charges

The Secretary contends that the section 110(c) cases of Phillip Peterson and Gregory Golden are not properly before the Commission because only Target petitioned for and was granted review, and Target lacks standing to challenge the judge's section 110(c) determinations against Peterson and Golden. S. Br. at 26-29. I disagree.

The section 110(c) citations were tried before the judge together with the Target citations, and the same attorney represented all the respondents throughout the proceeding. By signing the answers of Peterson and Golden to the Secretary's section 110(c) complaints against them,

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[13] While I have not refrained from serving as an outspoken critic of the regulatory agency's conduct at times, I believe it is important to limit such criticism to situations where MSHA advances a position or an interpretation of a statute or regulation that is actually antithetical to safety. *See Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 715 (June 2000) (requirements for qualification of electricians); *Excel Mining LLC*, 23 FMSHRC 600, 613-14 (June 2001) (concurring opinion of Commissioner Beatty) (finding Secretary's interpretation of regulations relating to respirable dust sampling to be unreasonable and inconsistent with protective intent of applicable Mine Act provision), *appeal docketed*, No. 01-1335 (D.C. Cir. July 31, 2001).

Target's attorney entered an appearance for both the individuals. *See* 29 C.F.R. § 2700.3(c). Moreover, the Commission docket numbers assigned to Peterson's and Golden's cases — PENN 98-98 and PENN 98-104, respectively — appear on both the cover of the PDR and the Commission's Direction for Review. Moreover, and most importantly, the PDR clearly states that review is sought of the judge's section 110(c) findings. Consequently, this is not, as the Secretary seems to suggest, a case in which Target is attempting to assert the rights of an absent party. *See* S. Br. at 27. The individual respondents are simply acting collectively with Target, as they did below.

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knew or had reason to know of the violative conditions, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). For the reasons discussed below, I would uphold the judge's findings of section 110(c) liability on the part of Phillip Peterson and Gregory Golden.

1. Phillip Peterson

Peterson contends that, because he conducted the examinations in the belief that they were required not by federal regulation, but rather by state requirements, he was not an agent of Target. T. Br. at 21-22. The Secretary responds that, if the Commission reaches the substance of the 110(c) charges against Peterson, it should affirm the judge's decision because Peterson's inspection responsibilities were those normally delegated to management, and he knowingly acted in failing to make the examinations. S. Br. at 30-32.

Here, by focusing on whether Peterson was performing a function which involved a level of responsibility normally delegated to management personnel, I believe that the judge applied the proper test for determining whether Peterson was an agent of Target. *See Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996). We have held that even rank-and-file miners qualify as "agents" under the Mine Act when they perform examinations mandated by law. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Mettiki Coal Corp.*, 13

FMSHRC 760, 772 (May 1991). Therefore, Peterson's undisputed responsibility to conduct the fan examinations supplies substantial evidence to uphold the judge's finding that he is properly chargeable under section 110(c) as an agent of Target, and I would hold that the judge was correct in deeming Peterson's lack of understanding regarding the legal source of the examination requirement as irrelevant to the issue of his agency. *See* 21 FMSHRC at 1056.

I would also conclude that the judge correctly rejected that lack of understanding as a valid defense to whether Peterson acted knowingly. The Commission has rejected ignorance of the existence of the standard being violated as a defense to a section 110(c) charge. *See Warren Steen*, 14 FMSHRC at 1131. It logically follows that ignorance of the legal source of a requirement is equally unavailing. Accordingly, I would affirm the judge's decision holding Peterson liable under section 110(c) for knowingly failing to examine the No. 3 fan on February 28, March 1, and March 2, 1997. Recognizing that the assessment of civil penalties is a function of the trier of fact in the first instance (*Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)), I would affirm the judge's assessment of a $300 penalty against Peterson. I simply note, however, that a $300 penalty seems hardly sufficient to penalize an individual who committed such an "extremely serious violation," and "exhibited more than ordinary negligence" in failing to conduct the required examinations. 21 FMSHRC at 1059.

2. Gregory Golden

Gregory Golden contends that he acted reasonably under the circumstances and that his conduct did not rise to the level of aggravated conduct. T. Br. at 22. He argues that it was reasonable not to travel to the mine because of Target's history of false fan alarms, his understanding that a miner was stationed at the No. 3 fan on April 7, and his belief that, by the time he would have arrived at the mine, the shift would already be on its way out. *Id*. at 22-23. The Secretary responds that Gregory Golden did not act reasonably in failing to take action. S. Br. at 33-34. According to the Secretary, Gregory Golden cannot escape liability for a violation by sitting idly by while miners may be in danger. *Id.* at 34-35.

The judge found that Gregory Golden knew a production shift was in the mine at the time he was notified of the No. 3 fan stoppage, and that another crew was due to enter the mine at 11:00 p.m. 21 FMSHRC at 1039. It is undisputed that, in response to communications from Commonwealth that the alarm system was indicating that the No. 3 fan had stopped and was not restarting, Gregory Golden chose not to travel to the mine to ensure that miners were removed from the mine and that the foreman on duty knew of the fan stoppage, in compliance with section 75.313(c)(1) and 75.311(d). Furthermore, he did so despite an instruction from his father to go to the mine to check out the alarm in the event he could not get through on the phone. 21 FMSHRC at 1057; Tr. 394. I conclude that the judge's section 110(c) findings are therefore supported by substantial evidence.

I am simply astounded by Gregory Golden's assertion that his reliance on assumptions was so reasonable under the circumstances as to compel the conclusion that he should not have

been held liable under section 110(c). His assumption that the No. 3 fan was operating, and thus drowning out the ringing of the phone at the fan house, was not only incorrect but was made in blatant disregard for the lives of an entire shift of miners who were in the mine at the time of the fan shutdown, and another shift of miners who were then preparing to enter the mine. Moreover, Gregory Golden's assumption that the fan alarm was a false one was also a violation of Target's avowed policy, testified to by his father, of checking out every fan alarm because there was no way of knowing whether it was false without doing so. Tr. 395. Finally, accepting Gregory Golden's remarkable assertion would also be directly contrary to Commission precedent. In finding aggravated conduct, the Commission has rejected an agent's reliance on "best-case scenario" assumptions as a basis for failing to take action despite evidence of a potentially dangerous condition. *See, e.g., Prabhu Deshetty*, 16 FMSHRC 1046, 1051-52 (May 1994) (finding unreasonable agent's assumption that lower level employees or agents will attend to the condition); *see also Roy Glenn*, 7 FMSHRC 1583, 1587 (July 1984) (stating that supervisor's self-induced ignorance not defense to section 110(c) liability).

For the foregoing reasons, I would affirm the judge's finding of section 110(c) liability on the part of Gregory Golden. While I also affirm the judge's assessment of a $1000 penalty for the two violations committed by Gregory Golden, based upon his analysis of the statutory penalty criteria — in particular his findings that the violations were "extremely serious" and the result of high negligence (21 FMSHRC at 1059) — it is my personal view that a much higher penalty should have been assessed against Gregory Golden because of his blatant disregard for the lives of the miners employed at Target.[14]

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Robert H. Beatty, Jr., Commissioner

[14] I note that a former superintendent for North Star Mining, Inc.'s No. 5 Mine in Leslie County, Kentucky, faces the possibility of a sentence of one year in prison and/or a $100,000 fine, plus up to one year of supervised release, after pleading guilty to a knowing failure to comply with provisions of the mine's ventilation plan. *Supervisor Guilty of Ventilation Violations*, 8 Mine Safety & Health News, August 3, 2001, at 354.

Commissioner Jordan, in favor of affirming the decision of the judge:

Although I concur with Commissioner Beatty's decision to affirm the judge, I reach that result by a different analysis and therefore I write separately.

The issue before us is whether the two borehole bleeder fans at Target's mine are main mine fans, as that term is used in several of the mandatory regulations contained in Subpart B of 30 C.F.R. Part 75. As the administrative law judge observed: "A definition of the term 'main mine fan' is found neither in the Act nor in the regulations, even though sections 75.310, 75.311, 75.312, and 75.313 apply only to such fans and even though the regulations repeatedly use the term." 21 FMSHRC at 1040.

The Secretary determines whether a particular fan must comply with main mine fan requirements by considering that fan's impact on the overall ventilation of the mine. S. Br. at 11-12. According to the explanatory booklet MSHA distributed to the mining community, "if the impact of a shutdown on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." Gov't Ex. 20 at 6. Relying on the testimony submitted by MSHA's ventilation experts, the judge concluded that a shutdown of either of the bleeder fans in question here would have the requisite effect on the overall ventilation of the mine and that such fans were appropriately considered to be main mine fans. 21 FMSHRC at 1042.

In their opinion reversing the judge's decision and vacating his findings of liability, Chairman Verheggen and Commissioner Riley maintain that the status of the bleeder fans is more appropriately determined by referring to the ventilation plan in effect at Target's mine. Slip op. at 27. They point out that such plans are intended to address the specific conditions of a particular mine, and that the provisions of a ventilation plan approved by the Secretary are enforceable as mandatory safety standards. *Id.* Concluding that Target's plan unambiguously designates only the No. 1 fan as a main mine fan, they disagree with the judge's conclusion that the Secretary's regulations do not define the term "main mine fan," at least as it applies to Target's mine. *Id.* at 30-31.

I agree with these colleagues that to the extent the Secretary has unambiguously designated certain fans as main mine fans in a mine's ventilation plan, she must enforce the requirements of 30 C.F.R. § 75.310 et. seq. in a manner consistent with that designation. I also share their view regarding the benefits of an enforcement approach based on the requirements of a plan that has been tailored to the conditions of the mine in question, as opposed to one based on the generalized statement in the Secretary's question-and-answer booklet. Having said that however, I respectfully disagree with their conclusion that we can discern an unambiguous designation of main mine fans from the ventilation plan in this case.

The Secretary's regulation at 30 C.F.R. § 75.370(a)(1) informs us that ventilation plans "consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372." Chairman Verheggen and Commissioner Riley contend

that the term "main mine fan" is "defined insofar as each underground coal mine is required to have one or more main mine fans . . . identified on the mine's ventilation map." Slip op. at 30 (citations omitted). In relying on this aspect of the map, however, they ignore 75.370's caveat that *"[o]nly that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager."* 30 C.F.R. § 75.370 (a)(1) (emphasis added). Although the mine ventilation map must contain information about "[t]he locations of all main mine fans, . . ." 30 C.F.R. § 372(b)(6), this information is specifically excepted from MSHA's approval since it is required pursuant to section 75.372, not section 75.371.

Unlike Chairman Verheggen and Commissioner Riley, I am unwilling to conclude that the reference to the main mine fan on Target's map amounts to an unambiguous determination by MSHA that only the No. 1 fan need comply with the protective requirements that pertain to main mine fans, and that the No. 2 and No. 3 bleeder fans (which are also clearly identified on the map) are exempted from these requirements. These map designations were not subject to MSHA's approval, and the record in this case is completely bereft of any information regarding how these designations were arrived at, what the drafters (who were presumably Target employees) intended by the labels used to describe the fans, and whether MSHA ascribed any significance to, or even considered these designations in the course of approving Target's ventilation plan.[1]

In addition to the map, a descriptive ventilation plan for the No. 1 mine was also introduced into the record. Gov't Ex. 22. Unfortunately, this document also fails, in my view, to clarify which fans must comply with main mine fan requirements. The plan repeats the requirements contained in section 75.371 regarding the information that must be submitted by each operator, and then either provides that information or indicates that the requirement is not applicable to the Target No. 1 mine. *Id.* On page 1 of the plan, the information required by section 75.371 (c) is set forth in typed form:

> (c) Methods of protecting main mine fans and associated components from the forces of an underground explosion if a 15-foot offset from the nearest side of the mine opening is not provided (see 75.310(a)(6)); and the methods of protecting main mine fans and intake air openings if combustible material will be within 100 feet of the area surrounding the fan or these openings (see 75.311(f)).

Gov't Ex. 22 at 1.

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[1] Surprisingly, the parties made no effort to enlighten the judge regarding the significance, or lack thereof, to be awarded to Government Exhibits 22 (Target's ventilation plan) and 25 (Target's mine map), in determining which fans are main mine fans. Consequently, the judge did not even refer to the ventilation plan in reaching his conclusion. On appeal, the parties scarcely refer to the ventilation plan in urging their respective positions upon this Commission.

In response to this requirement, the plan contains a handwritten instruction directing the reader to a drawing found on page 22 which, one is informed, is an alternative 15 foot offset plan for the No. 2 Borehole fan.[2] A reference to the No. 2 borehole fan in connection with a ventilation plan requirement that pertains to main mine fans seriously undermines my colleagues' contention that the plan unambiguously excludes the borehole bleeder fans from the category of a main mine fan. Indeed the allusion to the borehole fan would appear to be an acknowledgment that these bleeder fans must meet the requirements that pertain to main mine fans.

The opinion of Chairman Verheggen and Commissioner Riley relies primarily on page 9 of the ventilation plan. Slip op. at 30. That page is titled "Ventilation Fan Data Sheet," and contains information such as the model, size, manufacturer, and RPM for three fans. Gov't Ex. 22 at 9. Unlike the preceding eight pages of the ventilation plan, however, this information is provided without reference to a requirement of section 75.371, leaving one less certain about the drafter's purpose in providing this information. Chairman Verheggen and Commissioner Riley rely on the fact that two of the fans are designated as "gob bleeder fans," while one carries the designation of "main line fan." Slip op. at 30, citing Gov't Ex. 22 at 9, which actually reads "main line fan" in the ventilation plan. Presumably this designation is a misprint for what should have read "main mine fan." However given the dearth of testimony or argument related to the ventilation plan, one wonders if we can even be certain of this fact.

Even assuming that the designation was supposed to be "main mine fan," what should we conclude from that? Are we to assume that only one fan was expected to comply with the protective requirements pertaining to main mine fans? While that might be a plausible assumption, it is one that does not comport with the plan's acknowledgment on page 1 that the borehole fan must meet the offset requirements that pertain to main mine fans. Perhaps the references on page 9 to "gob bleeder fan" and "main mine fan" were not meant to be mutually exclusive. Perhaps "gob bleeder fan" was meant as an additional descriptive term of a main mine fan, the function of which is to ventilate the gob.

I thus cannot agree that Target's ventilation plan removes any ambiguity about which fans must comply with the requirements that pertain to main mine fans. Having determined that neither the mandatory standards nor the ventilation plan clearly define which of Target's fans are "main mine fans," I find myself in agreement with Commissioner Beatty's conclusion: the meaning of the term is ambiguous. Slip op. at 8. As he has indicated in his opinion, the appropriate analysis in such cases is to determine whether the Secretary's interpretation of the term is a reasonable one. *Id.* at 8-9.[3]

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[2] As explained previously, the borehole fans referred to on the mine map are bleeder fans. Slip op. at 2. *See also* S. Br. at 2 n. 1 (the terms "bleeder fan" and "borehole fan" were used interchangeably in Target's ventilation plan and at the hearing).

[3] Commissioner Beatty concludes that the Secretary's interpretation is reasonable. Slip op. at 9-10.

As I stated earlier, the Secretary has interpreted the term "main mine fan" to apply to those fans which, if shut down, would have an "immediate and perceptible" impact on mine or section ventilation. In determining whether this is a reasonable interpretation, we must consider whether it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (DC. Cir. 1995) (citations omitted).

At the outset, we must consider whether the Secretary's interpretation is consistent with the phrase "main mine fan," which might arguably be said to encompass only a single fan in each mine. Such a restrictive interpretation, however, would not be consistent with the regulation at 30 C.F.R. § 75.302 which is titled "Main mine fans" and which clearly contemplates that mines may have more than one main fan, stating that "Each coal mine shall be ventilated by one or more main mine fans." *See also* 30 C.F.R. § 75.310(f) ("In mines ventilated by multiple main mine fans . . .).

Having determined that the Secretary can reasonably designate more than one fan as a main mine fan, we must consider whether a designation based on the fan's contribution to the overall ventilation of the mine is consistent with the language and purpose of the main mine fan regulations. The standards in question require operators to take certain precautions in connection with the installation, operation, and examination of these fans. The Secretary's determination that main mine fans are those with an "immediate and perceptible impact on the mine's overall ventilation system," S. Br. at 15, follows from the text of the specific regulatory requirements. For example, section 75.311(d) requires an operator to promptly repair any electrical or mechanical deficiencies in a main mine fan. Section 75.313(a)(3) requires that all miners be withdrawn from working sections if a main mine fan stops and there is no adequate back-up system. Thus the language of the regulations reflects the importance of the main mine fans to the mine's ventilation system, and it is perfectly logical for the Secretary to apply the designation of a main mine fan on the basis of the fan's role in providing ventilation to a working section or to the mine in general.

Because the Secretary's interpretation is reasonable and therefore entitled to deference, the next step is to consider the reasonableness of the Secretary's main mine fan designation in this particular case. For although it may be a reasonable approach to classify fans as main mine fans on the basis of their impact on mine or section ventilation, the question remains: Did MSHA prove that Target's No. 2 and No. 3 bleeder fans met this criteria? Although Target contends that MSHA failed to demonstrate the requisite impact, all of my colleagues have cited to the extensive evidence in the record that supports the judge's determination that shutting down a bleeder fan would have an immediate and perceptible impact on ventilation. Slip op. at 13 (sep. op. Comm'r Beatty), 32 n.6 (sep. op. Chairman Verheggen and Comm'r Riley). I agree with their analyses and conclude that the Secretary met her burden of proof in this regard.

We must also consider, as Commissioner Beatty points out, whether the operator had adequate notice of MSHA's interpretation. Slip op. at 10. After discussing specific parts of the

record, Commissioner Beatty concludes that ample support exists for the judge's determination that Target was provided with actual notice by MSHA that the No. 2 and No. 3 bleeder fans were considered by the agency to be main mine fans. *Id.* at 10-11. I concur with my colleague's reasoning and finding on this point.

As a final matter, I agree with Commissioner Beatty's analysis of the section 110(c) cases. Slip op. at 19-21. I join him in upholding the judge's finding of section 110(c) liability and the penalty determination against Phillip Peterson and Gregory Golden.

Accordingly, for the reasons stated above, I would affirm the judge's decision.

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Mary Lu Jordan, Commissioner

Chairman Verheggen and Commissioner Riley, in favor of reversing the judge and vacating his findings of liability:

A. The Citations Issued to Target

Both the Secretary and Target have argued this case under theories of statutory interpretation. This case, however, involves components of Target's ventilation system, the operations of which are regulated by a mine ventilation plan. *See* 30 C.F.R. §§ 75.370, 75.371, and 75.372. We have thus looked to the law of mine ventilation plans to resolve the question presented here, which is whether, at the time they were cited, Target's No. 2 and No. 3 gob borehole fans were subject to the various requirements that pertain to main mine fans. The judge concluded that they were main mine fans. For the reasons that follow, we would reverse the judge and vacate his findings of liability on the part of Target and its agents.

We begin by reiterating the well-established principles of law set forth in previous Commission decisions relating to mine ventilation plans. Section 303(o) of the Mine Act states:

> A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title.

30 U.S.C. § 863(o). The provisions of a ventilation plan are enforceable as mandatory safety standards. *Wyoming Fuel Co. n/k/a Basin Res., Inc.*, 16 FMSHRC 1618, 1624 (Aug. 1994), *aff'd.*, 81 F.3d 173 (10th Cir. 1996) (table). The legislative history of section 303(o), and decisions by the Commission and the courts, emphasize "the individual nature of . . . ventilation plans." *Peabody Coal Co.*, 15 FMSHRC 381, 385-86 (Mar. 1993). Such plans "must address the specific conditions of a particular mine." *Id.* at 386.

The Commission has also commented on the procedures whereby ventilation plans become law at a mine:

> Ventilation plans are approved by the Secretary and adopted by mine operators pursuant to section [75.370] and section 303(o) of the Mine Act. The approval and adoption process is bilateral and results in the Secretary and the operator, through consultation, discussion, and negotiation, mutually agreeing to ventilation plans suitable to the specific conditions at particular mines. The process is flexible, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements. Under the approval and adoption process, the operator submits a plan to the Secretary who may approve it or

> suggest changes. The operator is not bound to acquiesce in the Secretary's suggested changes. The operator and the Secretary are bound, however, to negotiate in good faith over disputes as to the plan's provisions and if they remain at odds they may seek resolution of their disputes in enforcement proceedings before the Commission. The ultimate goal of the approval and adoption process is a mine-specific plan with provisions *understood by both the Secretary and the operator* and with which they are in full accord.
>
> . . . .
>
> The Act and the mandatory standard require the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good faith to develop a conclusive and suitable plan containing provisions *clearly understood by both*. . . . It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted.

Jim Walter Res., Inc., 9 FMSHRC 903, 906-07, 909 (May 1987) ("*JWR*") (citations omitted, emphasis added).

Although the plan approval process anticipates that negotiation and consultations will occur, MSHA must ultimately make sure that the plan achieves the protective purpose for which it is intended. The D.C. Circuit pointed this fact out in a roof control case:[1]

> We note that while the mine operator had a role to play in developing plan contents MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress "caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgement with respect to the

[1] The process of developing a roof control plan is analogous to the ventilation plan process. *See* 30 C.F.R. § 75.220.

> content of such plans in connection with his final approval of the plan."

United Mine Workers of Am., Int'l Union v. Dole, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989) (citation omitted).[2]

The Secretary's regulation pertaining to the approval of mine ventilation plans, 30 C.F.R. § 75.370, in keeping with the "the individual nature of . . . ventilation plans" (*Peabody,* 15 FMSHRC at 385), clearly contemplates periodic revisions being made to such plans. In fact, the regulation requires that the "ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine." 30 C.F.R. § 75.370(g). If the Secretary finds a plan provision that is not suitable, section 75.370 sets forth the procedures to be followed for a plan to be revised. *See, e.g.*, 30 C.F.R. § 75.370(a)(2) ("The proposed ventilation plan and any revision to the plan shall be submitted in writing to the [MSHA] district manager."); 30 C.F.R. § 75.370(c)(1) ("The district manager will notify the operator in writing of the approval or denial of approval of a . . . proposed revision.").

Here, the threshold legal question is the proper definition of the term "main mine fan." 21 FMSHRC at 1033. The judge concluded that the Secretary's ventilation regulations do not define the term, but that the Secretary offered a general definition of the term in the course of litigating this case to which deference was owed. *Id*. at 1040-42. The interpretation offered by the Secretary in support of the enforcement actions under review is a passage from a publication entitled *Ventilation Questions and Answers*, dated November 9, 1992, which states: "If the impact of a shutdown [of a fan] on mine or section ventilation is immediate and perceptible, the fan is a main mine fan." Gov't Ex. 20 at 6.

Under the body of law set forth above, however, mine fans are designated as main fans on a mine specific basis in an operator's ventilation plan. Section 75.370 states that a "ventilation plan shall consist of two parts, the plan content as prescribed in [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372." 30 C.F.R. § 75.370.

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[2] An operator who disagrees with MSHA's determination that a particular requirement must be included in its plan can seek review before the Commission by attempting to mine under a plan that does not include the disputed provision, thereby subjecting itself to a citation or order for failure to have an approved ventilation plan. *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 n.8 (Dec. 1981). An operator who believes a revision of its plan is warranted and believes the Secretary "has acted in bad faith in refusing to approve the revision" can seek review "by refusing to comply with the disputed provision, thus triggering litigation before the Commission." *Id*. (Of course, under either of these scenarios, MSHA would require immediate compliance with the plan it approved as a precondition for abatement of any such citation or order, thus ensuring that no mining would occur under any provisions the agency had not approved.)

Ventilation maps must include, inter alia, "locations of all main mine fans . . . and each fan's specifications, including size, type, model number, manufacturer, operating pressure, motor horsepower, and revolutions per minute." 30 C.F.R. § 75.372(b)(6). All fans designated as main mine fans are further subject to the general requirements of sections 75.302, 75.310, 75.311, 75.312, 75.313, etc. Thus, a particular mine's fans are defined as main fans in the mine's ventilation plan developed under sections 75.371 and 75.372.

We therefore disagree with the judge's conclusion that the Secretary's ventilation regulations, taken as a whole, do not define the term "main mine fan." To the contrary, the term is defined insofar as each underground coal mine is required to have one or more main mine fans (30 C.F.R. § 75.302) identified on the mine's ventilation map (30 C.F.R. § 75.372(b)(6)) and subject to the general operational requirements set forth elsewhere in the Secretary's ventilation regulations.[3]

Here, the cited fans were designated in the narrative portion of Target's ventilation plan, *which was approved by the Secretary*, as "gob bleeder fans" on the same page where a single main fan is clearly identified. Gov't Ex. 22 at 9. The narrative also included the information required under section 75.372(b)(6) — i.e., detailed specifications for the mine's main and borehole fans. Gov't Ex. 22 at 9; *see* 30 C.F.R. § 75.371 ("The mine ventilation plan shall contain . . . any additional provisions required by the district manager.").[4] There is some indication that MSHA considered revising the plan to require Target to bring the cited fans up to the specifications main mine fans must meet under section 75.310.[5] But it does not appear from

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[3] We also disagree with the judge's statement that "The problem is that the Act and the [ventilation] regulations do not provide for a gradual approach to compliance with regard to sections 75.310 through 75.313." 21 FMSHRC at 1043. To the contrary, as the Commission stated in *JWR*, the ventilation plan "process is *flexible*, contemplates negotiation toward complete agreement, and is aimed at compliance with mine safety and health requirements." 9 FMSHRC at 907 (emphasis added). Section 75.370 also contemplates periodic revisions being made to such plans, and in fact requires that the "ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine." 30 C.F.R. § 75.370(g). Clearly, this flexible regulation provides ample room for phasing in particular requirements, regardless of whether an existing fan has been previously designated as a main mine fan or a new fan is being added to the plan.

[4] The gob bleeder fans were thus regulated under the ventilation plan, which detailed the specifications for each of the fans. Gov't Ex. 22 at 9. The requirements in the plan covering the gob bleeder fans were enforceable as mandatory safety standards. *Wyoming Fuel Co.*, 16 FMSHRC at 1624.

[5] Approximately one year before issuing the citations under review, MSHA inspectors included the following notation on a form 2000-204 — a document prepared at the conclusion of a ventilation inspection:

the record that any follow-up ever occurred. Instead, MSHA ventilation supervisor Swentosky, during several calls and visits to Target during April and June 1996, simply told company officials "that the fans were main mine fans" (21 FMSHRC at 1043), having made no attempt whatsoever to revise Target's ventilation plan. It appears that Swentosky made this decision unilaterally, contrary to the requirements of section 75.370 and the principles set forth in the Commission's *JWR* decision (*see* 9 FMSHRC at 906-07, 909).

We are unwilling to uphold an enforcement action on the basis of a generalized statement in an MSHA question and answer document, while ignoring statutorily mandated mine specific safety provisions contained in the operator's ventilation plan which clearly do not identify the fans at issue as main mine fans. Accordingly, we would reverse the judge and dismiss these proceedings not to condone Target's irresponsible actions but because the Secretary's enforcement action contradicts her own regulations.

This is not the end of our analysis, however. It is troubling that, apparently, not all the MSHA officials involved in this case were aware that Swentosky considered the gob bleeder fans to be main fans when Hixson visited the mine on March 3, 1997 (a Monday). We can find no other explanation for Hixson's conduct when he and Peterson discovered that the No. 3 gob bleeder fan was not operating. *See* 21 FMSHRC at 1035-36. When they arrived at the fan, "Hixson could not hear the fan." *Id*. at 1036. "The men got out of the Jeep, and Peterson unlocked the gate. Hixson and Peterson went into the fan house and found that the fan was not operating. Peterson restarted it by pressing the fan's restart buttons. Meanwhile, Hixson looked at the fan's pressure chart." *Id*.; *see also* Tr. 42 (Hixson testifying that "I got out of the Jeep and got into the back seat to get my hard hat and my detectors and Phil . . . had gone over and started the fan"). Hixson discovered that the fan had not been operating since the previous Thursday, February 27. 21 FMSHRC at 1035-36. After some conversation about procedures Target had in place to alert company officials of fan outages, the men "left the fan house and traveled back to the mine office." *Id*.

> Recently questions concerning the two bleeder borehole fan installations were raised. The concern was dealing with their present installation and whether they should be required to meet the main fan regulations installation as defined in section 75.310 of the CFR. It appears that an in depth ventilation survey may be needed to be conducted at this mine. The results of this survey could be used to determine what degree or impact these bleeder borehole fans have on the mine's main ventilation system and what if any changes would be needed on the two bleeder borehole fan installations. *The approved ventilation plan upon completion of this inspection appears to be adequate.*

Resp't Ex. 1; Tr. 274-75 (emphasis added).

Had it been clearly understood by everyone at the mine, including all MSHA inspectors, that the No. 3 fan was a main fan, Hixson would undoubtedly have taken emergency measures set forth in 30 C.F.R. § 75.313, or even issued an imminent danger order under section 107(a) of the Act due to a potential build up of methane in the gob, to ensure the safety of miners then underground. *See* 21 FMSHRC at 1045-46 n.8. That he did not do so is inconsistent with and seriously undercuts the Secretary's position in this case.

It is just this sort of potentially dangerous confusion that mine ventilation plans, including adoption and revision procedures, are designed to avoid. Swentosky's desire to have the gob bleeder fans meet the regulatory requirements for main mine fans was undoubtedly motivated by valid safety concerns.[6] The problem was that he may very well have been the only person who fully comprehended those concerns. Clearly, Hixson did not. But if the agency had proceeded under section 75.370 to revise Target's ventilation plan, all persons affected by the revision would have been "on the same page." *See* 30 C.F.R. § 75.370(e) ("Before implementing . . . a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions."). We disapprove of MSHA's disregard of the requirements and procedures of section 75.370 in its relations with Target. In our opinion, the agency's conduct compromised the safety of miners at Target.

In the litigation that followed in the wake of MSHA's actions at the mine, the Secretary sought to justify those actions by arguing that her inspectors were acting under the authority of a non-authoritative interpretation of what "main mine fan" means found in the question and answer document. The Secretary thus only compounded the problem by defending the confusion of her inspectors with a post hoc explanation (no record evidence indicates that any MSHA official relied explicitly on the question and answer document at the time confusion reigned at Target's mine). We consider the Secretary's failure to rely upon the clarity provided by her mine

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[6] MSHA introduced ample testimony, which the judge credited, about the impact of the bleeder fans on the ventilation of the mine. *See* 21 FMSHRC at 1042-43; Tr. 335-71. Contrary to Commissioner Beatty's suggestion that we find this testimony "simply not important" (slip op. at 11 n.7), we fully recognize that the cited fans were critical components in Target's ventilation system. In fact, given that they ventilated gob areas where methane could have accumulated, we find Hixson's reaction to the outage of the No. 3 fan inexplicable. But the larger question here is when and how MSHA ought to have revised the operational requirements for the fans. In sanctioning MSHA's actions here, our colleagues appear to prefer an approach in which MSHA can regulate fans on an ad hoc, after the fact basis in litigation before this Commission. We find such an approach misguided — and contrary to MSHA's ventilation plan regulations, which clearly require that fans be regulated on the front end of the ventilation plan process so as to avoid the potentially life-threatening confusion that occurred in this case. It would have been erring far more on the side of safety, and been in accordance with the law, had MSHA evaluated the impact of the gob bleeder fans on the mine's ventilation, and required Target to revise its ventilation plan based on the evaluation.

ventilation plan regulations, and instead pursuing this litigation, as contrary to the overall safety purposes of the Mine Act.

We would hasten to add that it was *Target's* conduct in the first place that put the miners at risk. The record in this case clearly demonstrates that the company and its agents violated the requirement to ventilate its gob areas when it failed to correct the problems with its gob bleeder fans. *See* 30 C.F.R. § 75.334 (ventilation requirements for worked-out areas and bleeders). Furthermore, falsification of a record is a very serious offense under section 110(f) the Act itself. 30 U.S.C. § 820(f). Thus, although we find that the Secretary failed to establish that the fans at issue in this case were main mine fans, we certainly do not endorse Target's conduct, which we find reprehensible. It is unfortunate that MSHA chose to prosecute this case under an insupportable theory.

Turning briefly to the separate opinions of our colleagues, we begin by noting that both Commissioner Jordan and Commissioner Beatty ultimately rely upon the Secretary's interpretation in finding that Target violated the cited standards. Slip op. at 25 (sep. op. Comm'r Jordan); slip op. at 9-10 (sep. op. Comm'r Beatty). They both believe that the fans at issue were main mine fans because shutting them down would have an immediate and perceptible impact on mine or section ventilation.[7] This approach is problematic because it imposes a general standard where the Secretary's regulations clearly call for a mine specific approach. The standard they endorse also provides no useful guidance — shutting down virtually *any* fan in a mine would have an immediate and perceptible impact on mine or section ventilation.

On the other hand, given that the standard endorsed by our colleagues lacks any clarity, whether the effect of a fan shutdown was immediate and perceptible would be left to the opinions of inspectors in the field — notwithstanding relevant provisions of a mine's ventilation plan — or to the conflicting opinions of experts at trial. As written, the Secretary's regulations explicitly require that main mine fans be clearly identified on a mine specific basis. We reject our colleagues' approach because it is based on a vague and unworkable standard rather than the bright line of a mine specific ventilation plan. Our colleagues invite the chaos of uncertainty and needless litigation in an area where the Secretary's regulations are perfectly suited to the problem raised by this case.

We also note that Commissioner Jordan recognizes that Target's ventilation plan includes "an alternative 15 foot offset plan for the No. 2 Borehole fan. . . . [a] requirement that pertains to main mine fans." Slip op. at 24. She insists that this plan provision "would appear to be an acknowledgment that these bleeder fans must meet the requirements that pertain to main mine

[7] Although Commissioner Jordan states that she would favor "an enforcement approach based on the requirements of a plan that has been tailored to the conditions of the mine in question, as opposed to one based on the generalized statement in the Secretary's question-and-answer booklet" (slip op. at 22), she nevertheless bases her opinion on those very "generalized statements" (slip op. at 25).

fans." *Id*. But the provision applies to only one of the fans, so we fail to see how it somehow proves that both fans should have met the main mine fan requirements. More importantly, though, if the fans had been designated as mains, this plan provision would not have been needed at all. They would have been subject to *all* the regulations pertaining to main mine fans. All this offset provision shows is that mine ventilation plans can and do include additional requirements tailored to the circumstances of a particular mine that may go above and beyond the requirements set forth elsewhere in the ventilation regulations.

Finally, we agree with Commissioner Beatty that this case addresses issues of vital importance to the mining community — namely, mine ventilation. We disagree, however, when our colleague states that MSHA's position in this case is not "actually antithetical to safety," which is why he has refrained from joining us in questioning the agency's actions in this case. Slip op. at 18 n.13. To the contrary, MSHA's actions here seriously compromised the safety of miners, and if repeated elsewhere, would needlessly put other miners in serious jeopardy of their lives. Not only did the agency's actions create confusion regarding the requirements Target's fans had to meet, which alone was a serious enough safety problem. But when Peterson turned on the No. 3 fan as Hixson discovered that the fan had been out of service for approximately four days (21 FMSHRC at 1035-36), there could very well have been a build up of methane in the gob the No. 3 fan should have been ventilating, a build up of methane that could have killed and maimed any number of miners as Hixson stood idly by. Our colleagues' separate opinions do nothing to avoid such a scenario from playing out again in the future. We find it unfortunate that this Commission cannot come together and forestall such legal confusion and the ensuing danger that such uncertainty fosters by instructing MSHA to ensure that all mine ventilation plans more clearly delineate the components of the ventilation systems of each and every mine in this nation.

B. The Section 110(c) Charges

We agree with our colleagues that the section 110(c) cases of Phillip Peterson and Gregory Golden are properly before the Commission. Slip op. at 18-19. Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). We have found, however, that the Secretary failed to establish that Target violated the cited standards. We would thus reverse the judge's findings of section 110(c) liability on the part of Phillip Peterson and Gregory Golden.

C. Conclusion

Accordingly, for the foregoing reasons, we would reverse the judge's decision, vacate his findings of liability in these proceedings, and dismiss the case.

Theodore F. Verheggen, Chairman

James C. Riley, Commissioner

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