FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 98-15-R
CYPRUS CUMBERLAND RESOURCES CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; Riley and Beatty, Commissioners

In this contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), Administrative Law Judge Jerold Feldman concluded that, between the time that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order to Cyprus Cumberland Resources Corporation ("Cyprus") in June 1997 pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and its issuance of a section 104(d)(2) order on September 25, 1997, MSHA had conducted an inspection of the Cumberland Mine that disclosed no similar violations.[1] 20 FMSHRC 285

[1] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

(Mar. 1998) (ALJ). The Commission granted the Secretary's petition for discretionary review of the judge's decision, granted the National Mining Association ("NMA") leave to participate as amicus curiae, and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand for further consideration consistent with this decision.

I.

Factual and Procedural Background

Cyprus operates the Cumberland Mine, an underground bituminous coal mine near Waynesburg, Pennsylvania. 20 FMSHRC at 287. The mine receives four regular AAA inspections,[2] which are conducted over the course of the following quarters: (1) October 1 through December 31; (2) January 1 through March 31; (3) April 1 through June 30; and (4) July 1 through September 30. *Id.* at 287-88. MSHA assigns two inspectors on a full-time basis to conduct each quarterly inspection. *Id.* at 288. The assigned inspectors spend between three to five days per week at the mine, and usually take the full quarter to complete the inspection. *Id.* The assigned inspectors are assisted by other inspectors from MSHA's Waynesburg field office. *Id.* As a result, there is essentially a continuous presence at the mine of at least two inspectors. *Id.* The two assigned inspectors keep a record of the areas that they have inspected by highlighting, and making notations on a mine map. *Id.*; Tr. 101-02. The map does not reflect areas inspected by other inspectors during that quarter. 20 FMSHRC at 288.

During the third quarter, from April 1 to June 30, 1997, MSHA Inspectors Thomas McCort and Barry Radolec were assigned to conduct the regular inspection of the mine. *Id.*; Tr. 96. On June 18, during that inspection, Inspector McCort issued to Cyprus a section 104(d)(1) order for a significant and substantial ("S&S") and unwarrantable violation of 30 C.F.R. § 75.360(b)(1).[3] Jt. Ex. 1, ¶ 11; Gov't Ex. 2.

> Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

[2] A regular AAA inspection is a "[s]afety and [h]ealth [i]nspection of an entire mine." MSHA, U.S. Dep't of Labor, MSHA Handbook Series, *Coal General Inspection Procedures*, at 8-1 (Sept. 1995).

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 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." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply

During the fourth quarter, from July 1 to September 30, 1997, MSHA Inspectors Victor Patterson and George Rantovich were assigned to conduct the regular inspection. Tr. 106. On September 24, during that inspection, Inspector Patterson issued a section 104(a) citation for a violation of the roof control standard, 30 C.F.R. § 75.202(a). Jt. Ex. 1, ¶ 18; Gov't Ex. 6. The citation was abated when a hydraulic jack was placed in the cited area to support the roof. Gov't Ex. 6. The next day, on September 25, Inspector Patterson issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.202(a) when he discovered that the hydraulic jack, which had been used to abate the cited condition, had been removed, and there were indications that miners had worked under the area of unsupported roof. Jt. Ex. 1, ¶¶ 7, 17; Gov't Exs. 7, 8; Tr. 250-51. No other unwarrantable failure orders had been issued at the mine between June 18 and September 25. Jt. Ex. 1, ¶ 13; Tr. 175.

The fourth quarterly regular inspection concluded on the next day, September 26, when Inspector Patterson inspected the 60 West Mains haulage. Jt. Ex. 1, ¶ 16; Tr. 294-95. The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the mine since 1983. 20 FMSHRC at 288. Between June 18 and September 25, inspectors traveled through the area "many times," or approximately 60 or more round trips. *Id.*; Jt. Ex. 1, ¶ 15. The inspectors traveled on the tracks by closed mantrips, which travel approximately 15 to 20 miles per hour ("mph"), and by open jeeps, or "crickets," which travel approximately 10 to 12 mph 20 FMSHRC at 289.

Cyprus challenged the section 104(d)(2) order and the matter proceeded to hearing before Judge Feldman. During the hearing, Cyprus stipulated that it had violated section 75.202(a) on September 25, and that the violation was S&S and had been caused by its unwarrantable failure. Tr. 10, 770. The parties also stipulated that the issue before the judge was whether an inspection disclosing no similar violations, or an intervening "clean inspection," had occurred between the time that the section 104(d)(1) order was issued on June 18, and the section 104(d)(2) order was issued on September 26. Jt. Ex. 1, ¶ 12(a). They agreed that if the Secretary failed to prove the absence of an intervening clean inspection, the disputed section 104(d)(2) withdrawal order should be modified. *Id.*

The judge concluded that there had been a intervening clean inspection between the issuance of the sections 104(d)(1) and 104(d)(2) orders. 20 FMSHRC at 294. The judge reasoned that the purpose of an intervening inspection is to disclose whether additional violations caused by unwarrantable failure exist, and that such violations are generally more readily detectible. *Id.* The judge determined that MSHA inspectors' repeated trips through the 60 West Mains haulage in addition to the regular inspection that had occurred prior to September 25 constituted a clean inspection within the meaning of the Act. *Id.* at 294. Accordingly, the judge modified the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 295.

---

with . . . mandatory health or safety standards." *Id.*

II.

Disposition

A. Section 104(d) Chain

Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by unwarrantable failure, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Colleries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." 30 U.S.C. § 814(d)(1); *Wyoming Fuel* Co., 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he issues a withdrawal order for the violation under section 104(d)(2).[4] 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.*; *see Naaco*, 9 FMSHRC at 1545.

B. Clean Inspection

The Commission has explained that section 104(d)(2) of the Mine Act establishes three prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard caused by unwarrantable failure; and (3) the absence of an intervening clean inspection. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984). Here, the parties dispute the third factor, whether the Secretary has established the absence of an intervening clean inspection.

The Commission has determined that a clean inspection under section 104(d)(2) requires an inspection of a mine in its entirety, noting that such an interpretation is consistent with legislative history and Commission precedent. *Kitt Energy Corp.*, 6 FMSHRC 1596, 1599 (July

---

[4] The Commission has interpreted the phrase "similar violations" in section 104(d)(2) (*see* n.1, *supra*) to mean violations of any mandatory standard caused by unwarrantable failure. *Greenwich*, 12 FMSHRC at 945; *see also* S. Rep. 95-181, at 32 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978) (providing that "similar violations" in section 104(d)(2) means "'unwarrantable' violations, whether or not the violations found are substantively similar to the violation upon which the order . . . was based.").

1984) (citing *CF&I Steel Corp.*, 2 FMSHRC 3459, 3600 (Dec. 1980)), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985); *see also U.S. Steel Corp.*, 3 FMSHRC 5 (Jan. 1981); *Old Ben Coal Corp.*, 3 FMSHRC 1186 (May 1981). As the Commission subsequently described its holding, "an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety." *U.S. Steel*, 6 FMSHRC at 1912. The Commission also held that the burden of proving the absence of an intervening clean inspection resides with the Secretary. *Kitt Energy*, 6 FMSHRC at 1600. In proving the absence of a clean inspection, the Secretary must prove that there were portions of the mine that remained to be inspected at the time that the disputed section 104(d)(2) order was issued. *Id.*

In reaching its holding, the Commission expressly reaffirmed the prior consistent interpretation of the same phrase in section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act") by the Department of Interior's Board of Mine Operations Appeals.[5] *Id.* at 1598-99 (citing *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974)). In *Eastern*, the Board held that a prerequisite for lifting withdrawal order liability under section 104(d)(2) is "a clean *complete* inspection," rather than a clean spot inspection. *Id.* at 357-58 (emphasis added). It explained that a clean complete inspection requires "a *thorough* examination of the conditions and practices throughout a mine." 3 IBMA at 358 (emphasis omitted and added). The Board later explained its holding that "several completed partial or completed spot inspections of a mine may be required to constitute a "complete inspection" of a mine in order to lift the withdrawal order liability . . . ." *Eastern Associated Coal Corp.*, 3 IBMA 383, 386 (1974) (emphasis omitted).

In affirming *Kitt Energy*, the Court of Appeals for the D.C. Circuit rejected a reading of the Commission's decision that "an inspector's physical presence in each area of the mine — regardless of the object of the inspection or the hazards actually examined for in each particular area — qualifies as an intervening 'clean' inspection." 768 F.2d at 1479. The Court explained that the "Mine Act provides for safeguards against unseen, as well as visible, hazards," and that to "hold that the Secretary need only inspect for obvious hazards to break the 'chain' would disregard those safeguards." *Id.* at 1480. The Court noted that satisfaction of the clean inspection requirement must be decided on a case-by-case basis. *Id.*

We conclude, in the instant case, that the judge erred in his application of Commission precedent. The judge was required to consider whether the Secretary made out her prima facie case establishing the absence of an intervening clean inspection by examining all inspection activity in the mine to determine whether any part of the mine remained to be inspected. *Kitt Energy*, 6 FMSHRC at 1600. The judge correctly stated that the question of whether a clean inspection has occurred must be decided on a case-by-case basis, and that inspections other than regular inspections may enter into that consideration. 20 FMSHRC at 294 (citing *Kitt Energy*;

---

[5] Section 104(d)(2) was carried over without substantive change from section 104(c)(2) of the Coal Act.

UMWA v. FMSHRC, 768 F.2d at 1480). In addition, he correctly noted undisputed evidence that, between the time that the sections 104(d)(1) and 104(d)(2) orders were issued, all areas of the mine had been inspected as part of a regular inspection except for the 60 West Mains haulage. 20 FMSHRC at 287; *see also* Jt. Ex. 1 ¶ 13. The judge erred, however, by failing to examine any of the evidence regarding spot or other inspection activity to determine whether the 60 West Mains haulage remained to be inspected. Such an examination was fundamental to determining whether the Secretary met her burden.

Instead, the judge concluded that MSHA inspectors' travel "somewhere between the sixth round trip, and the hundredth round trip" through the 60 West Mains haulage amounted to an inspection of the area within the meaning of section 104(d)(2) because such travel would disclose unwarrantable violations, which he considered to be "generally more readily detectible." 20 FMSHRC at 294. Under *Kitt Energy* and its progeny, an intervening clean inspection must encompass the mine in its entirety, and be thorough and complete, rather than designed to disclose only obvious violations.[6] *Kitt Energy*, 6 FMSHRC at 1601 ("the essential determinant of a clean inspection under section 104(d)(2) is whether the entire mine has been inspected since issuance of a prior 104(d) order with no 'similar' violations cited"); *Eastern*, 3 IBMA at 357-58 (stating that statutory language requires a "clean complete inspection," or a "thorough examination of conditions and practices throughout a mine.") (emphasis omitted). Moreover, the premise for the judge's conclusion is erroneous because any violation potentially may be caused by unwarrantable failure, and factors that contribute to that determination may not be immediately apparent. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC 106, 115-16 (Feb. 1998) (finding unwarrantable failure for foreman's failure to order meaningful search for unexploded bags of pyrodex that were buried under rocks), *aff'd in rel. part*, 170 F.3d 148, 157-58 (2d Cir. 1999).

---

[6] We note that witnesses of both parties agreed that there were conditions along the track that could not be inspected from either the mantrip or the cricket when the vehicles traveled at their normal speeds. In order to inspect the haulage, inspectors examined roof conditions; rib conditions; the condition of any ventilated stoppage; the direction of air flow; track conditions, including whether the track is blocked properly and the joints are tight; any manholes; clearances; fire-fighting equipment; and any electrical installations in the area, including cables, wiring, and switches. Tr. 117-18, 287-88, 472-74. MSHA witnesses testified that it was not possible to adequately inspect for some violative conditions from a moving vehicle, particularly violations that are hidden, in the roof, ribs, haulage tracks, stoppings, or those pertaining to ventilation, fire protection, and electrical installations. Tr. 117-19, 145-47, 288, 292, 475, 488-89. Cyprus's safety manager, Robert Bohach also acknowledged that an inspector would have to stop and exit the vehicle in order to inspect a number of conditions, including examining electrical installations, fire fighting equipment, roof and rib conditions, ventilation, and the condition of the track. Tr. 772, 818, 827-29, 844-48. In addition, Michael Konosky, a safety representative at the mine, testified that some of the conditions on the 60 West Mains haulage would require an inspector to exit a moving vehicle in order to more closely examine it. Tr. 684, 735.

In arguing that she met her burden of proving the absence of a clean inspection, the Secretary relies upon testimony by MSHA Supervisory Inspector Robert Newhouse and a log submitted as evidence by Cyprus depicting all inspection activity at the mine, including both state and federal inspections.[7] S. Reply Br. at 3-5; Oral Arg. Tr. 15. Inspector Newhouse's testimony, however, was limited to the regular inspections conducted at the mine. Tr. 110, 119, 152-54. Because evidence is undisputed that the 60 West Mains haulage was not part of a regular inspection from June 18 to September 26, Inspector Newhouse's testimony is not probative of whether the Secretary met her burden. On the other hand, Cyprus's log includes spot as well as regular inspection activity throughout the mine during the time period in question. R. Ex. 1. The log and its various entries must be examined and weighed against other evidence admitted into the record.[8] Such examination and fact-finding more appropriately resides with the judge in the first instance, rather than with the Commission on review. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1139 (May 1984) ("It is . . . the judge's duty to draw conclusions from the record . . . ."); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1283 (Dec. 1998).

Accordingly, we vacate the judge's decision and remand for the judge to consider, consistent with Commission precedent, whether the Secretary met her burden of proving the absence of a intervening clean inspection by examining evidence regarding any inspection activity in the 60 West Mains haulage area during the time period in question.

---

[7] At the hearing, the Secretary's counsel stated that MSHA maintains separate records relating to quarterly inspections and relating to how much of the mine has been inspected since the issuance of any section 104(d)(1) order. Tr. 134-35. Curiously, the Secretary failed to admit any records depicting how much of the Cumberland Mine had been subject to inspections, other than regular inspections, since issuance of the section 104(d)(1) order on June 18. We note that in future cases, besides entering into the record an inspection log depicting all inspection activity at the mine since the issuance of a section 104(d)(1) order, such as that admitted by Cyprus, the Secretary may also rely upon inspectors' direct or hearsay (i.e., affidavit) testimony regarding their inspection activity.

[8] During oral argument, Cyprus's counsel clarified one of the log's entries. Oral Arg. Tr. 16-17, 35-36.

III.

Conclusion

For the foregoing reasons, the judge's decision modifying the section 104(d)(2) order issued to Cyprus to a section 104(d)(1) citation is vacated. We remand this matter to the judge for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I agree with the majority that the judge erred in concluding that an inspector's traveling on a moving vehicle through a haulageway constituted an inspection of the area for purposes of section 104(d)(2). Slip op. at 6. I also join with the majority in rejecting the judge's incorrect reasoning that a section 104(d)(2) inspection need only inspect for obvious violations that are the result of unwarrantable failure. *Id.* I write separately however because I believe the Secretary's interpretation of section 104(d)(2) is entitled to deference. Furthermore, I dissent from my colleagues decision to remand because the record in this case supports only one conclusion — that no clean inspection occurred. Therefore, I would reverse the judge.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).[1] Cyprus argues that the language and structure of the Mine Act demonstrates that an inspection of the mine in its entirety for all mining hazards was not required to qualify as a clean inspection under section 104(d)(2). C. Br. 11-13. For the most part, it relies on the fact that the phrase "in its entirety" is absent in section 104(d)(2) but is present in section 103(a), indicating to Cyprus that an inspection in section 104(d)(2) means something other than an inspection of the mine "in its entirety." C. Br. at 11. I reject Cyprus' plain meaning approach. The Mine Act contains many references to inspections that are simply not defined, and that may refer to an inspection of a mine in its entirety. *See, e.g.,* sections 103(a), 104(a), 104(d)(1), 103(g)(1), 105(a), 107(a) & (b). Additionally, the use of the phrase, "an inspection of such mine" as opposed to merely "an inspection" or "an inspection in a mine" could easily be read to mean an inspection of an entire mine. Furthermore, the Commission has rejected a narrow, literal interpretation of the term "an inspection" to mean any inspection, including an inspection of only a portion of a mine. *Kitt Energy Corp.*, 6 FMSHRC, 1596, 1599 (July 1984). Accordingly, Congress has not directly spoken to the issue at hand and the Mine Act is ambiguous as to whether "an inspection of such mine which discloses no similar violations" requires an inspection of the entire mine for all hazards, as the Secretary proposes.[2]

---

[1] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Thunder Basin*, 18 FMSHRC at 584.

[2] I conclude that the Secretary is interpreting the portion of section 104(d)(2) that provides that the chain of withdrawal order liability remains in effect "until such time as an inspection of the mine discloses no similar violations." 30 U.S.C. § 814(d)(2). Such an inspection is commonly referred to as a "clean" inspection of the mine. The Secretary's briefs to the Commission mistakenly cited the portion of section 104(d)(2) involving "any subsequent inspection" *See e.g.*, PDR at 6. However, at oral argument, Counsel for the Secretary clarified that the Secretary was interpreting the section 104(d)(2) provision dealing with clean inspections:

When a statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc*. v. *Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied,* 520 U.S. 1209 (1997). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

Applying this settled law, I conclude that the judge erred when he rejected the Secretary's interpretation of the Act. The judge expressly found the Secretary's interpretation was reasonable. 20 FMSHRC at 289. Because of his finding of reasonableness, he was required under *Chevron* principles to adopt the Secretary's interpretation. *See Secretary of Labor v. FMSHRC*, 111 F.3d 913, 916 (D.C. Cir. 1997) (where the Secretary and the Commission disagree over the interpretation of the statute, deference is owed to the Secretary); *Secretary of Labor ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) (same).[3]

In addition, I also find the Secretary's interpretation to be reasonable. The Secretary asserts that a clean inspection requires an inspection of the entire mine for all hazards. PDR at 6. As the judge recognized, the legislative history supports an interpretation that a clean inspection

---

"an inspection of such mine which discloses no similar violations." Oral Arg. Tr. 5-6, 40-41. The Secretary also based her arguments to the judge on the same section 104(d)(2) provision: "an inspection of such mine which discloses no similar violations." S. Post-Hr'g Br. at 11.

[3] Cyprus and amicus The National Mining Association incorrectly argue that the Supreme Court case of *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994), which was not a deference case, somehow changed this well-established deference principle. *See* C. Br. at 18-24; NMA Br. at 4-12. However, well after the *Thunder Basin* decision, the courts of appeals have consistently applied the rule that when the Secretary and the Commission diverge on ambiguous statutory or regulatory provisions, it is the Secretary to whom deference is owed. *Secretary v. FMSHRC*, 111 F.3d at 920; *Joy Technologies*, 99 F.3d at 995; *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114-16 (4th Cir. 1996). Indeed, neither dissenting Commissioner Verheggen nor counsel for Cyprus provide us with citation to a case where a court of appeals deferred to an interpretation of the Commission, when the interpretation of the Secretary and that of the Commission differed. Oral Arg. Tr. at 26. Additionally, my dissenting colleague's reliance on *The Helen Mining Co.*, 1 FMSHRC 1796 (Nov. 1979), to discredit the principle of *Chevron* deference is faulty. *See* slip op. at 16-17. *Helen* was issued five years prior to the *Chevron* case and therefore the Commission did not have the benefit of Supreme Court guidance on this issue.

must be complete and cover the entire mine. 20 FMSHRC at 289; *Kitt Energy*, 6 FMSHRC at 1598-1600. The Senate Report for the Mine Act provides that "the inspector shall promptly issue a withdrawal order under [section 104(d)(2)] on each such occurrence until an inspection of the mine *in its entirety* shows 'no similar violations.'" S. Rept. 95-181 at 31; *Legis. Hist.* at 619 (emphasis added.) That same report repeats that "an inspection of the mine *in its entirety"* is necessary "in order to break the sequence of the issuance of orders." S. Rept. 95-181 at 34; *Legis. Hist.* at 622 (emphasis added).

Not only is the Secretary's interpretation consonant with the legislative history of the Mine Act, it is also consistent with Commission and court precedent. In *Kitt*, the Commission recognized that "an inspection of such mine" has been consistently "construed to require the inspection of a mine *in its entirety*." 6 FMSHRC at 1599 (emphasis in original). In *UMWA v. FMSHRC*, 768 F.2d 1477, 1480 (D.C. Cir. 1985), the court affirmed the Commission's *Kitt* decision, but clarified that "[t]he only rational reading of the intervening 'clean' inspection requirement is that all areas of a mine must be inspected for all hazards during the time period in question." The D.C. Circuit rejected the approach that a clean inspection could be based on an inspector's physical presence in each area of the mine, specifically declining to give significance to any portion of the Commission's *Kitt* decision that suggested that inspector presence in an area was enough for a clean inspection. *Id.* at 1479.

Finally, such a construction is consistent with the remedial and safety promoting goals of the Act. *Cannelton*, 867 F.2d at 1437 (because Mine Act is a statute that is intended to protect health and safety of miners, it must be interpreted in a broad manner to actually achieve that goal); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 161 (2d. Cir. 1999) (interpretation correctly took into account Mine Act's goal of preventing "mine accidents"). Cyprus asserts that something less than what the Secretary proposes, such as an inspection for only obvious hazards, would satisfy the clean inspection requirement. *See* Oral Arg. Tr. at 28-29. However, Cyprus' construction contravenes the purpose of the clean inspection requirement, which is to save lives and prevent injuries.[4] Instead it is the Secretary's construction of a clean inspection, which requires an examination of an entire mine for all hazards, that is the reasonable one under the Act. In holding that a clean inspection necessarily entails a complete mine inspection, the predecessor of the Commission, the Department of Interior's Board of Mine

---

[4] In 1998, there were 80 fatalities in coal and metal and non-metal mines. As of July 26, 1999, 47 fatalities from mining have been reported. MSHA, 1999 Fatalgrams and Fatal Investigation Reports Metal and Nonmetal Mines (visited July 27, 1999) <http://www.msha.gov/FATALS/FABM99.HTM>; MSHA, 1999 Fatalgrams and Fatal Investigation Reports Coal Mines (visited July 27, 1999) <http://www.msha.gov/FATALS/FABC99.HTM>. As these figures reveal, despite efforts to improve safety in mining, fatalities continue to mount. Therefore, it remains crucial to construe the Mine Act in a manner that promotes miner safety. As Mine Act section 2(a) provides: "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a).

Operation Appeals in *Eastern Associated Coal Corp.*, 3 IBMA 331, 358 (1974) (case cited with approval by Commission in *Kitt*), explained that:

> the intensive and quite possibly prolonged scrutiny seems entirely called for in the case of an operator which may have repeatedly demonstrated its indifference to the health or safety of miners and where its record suggests that other equally grave infractions resulting from unwarrantable failures to comply may exist elsewhere in the mine.

I could not agree more with the Board's explanation.

Thus, I conclude that deference is owed to the Secretary's interpretation that a clean inspection under section 104(d)(2) requires an inspection of the entire mine for all hazards. Applying that interpretation to case before us, it is abundantly clear that a clean inspection did not occur.

The parties agree that between June 18 and September 25, Cumberland had received a complete quarterly inspection except for the 60 West Mains haulage. 20 FMSHRC at 287; Jt. Ex. 1, ¶ 13. The 60 West Mains haulage was not inspected as part of a regular inspection until September 26, 1997, the day after the subject 104(d)(2) Order was issued. 20 FMSHRC at 289; Tr. 154.[5] In addition, the record showed that the 60 West Mains haulage had not been the subject of any other inspection during the time in question. Cyprus admitted into evidence a log of all inspection activity in the mine. R. Ex. 1. That log showed that there were no inspections listed for the area of 60 West Mains haulage between the period of June 18, 1997, and September 25, 1997. *Id.*[6]

---

[5] Dissenting Commissioner Verheggen takes issue with the Secretary's decision to inspect the 60 West haulage at the end of her inspection. Slip op. at 15 n.1. It seems inappropriate for this reviewing body to second guess the everyday enforcement decision of the Secretary and her agents.

[6] I reject Cyprus' contention, adopted by dissenting Commissioner Verheggen (slip op. at 15), that the Secretary must prove that none of the inspectors in the mine stopped their vehicles at any time to inspect the haulage. Even if an inspector stopped his vehicle to examine a condition in the haulage between June 18 and September 25, such conduct would not amount to an inspection for purposes of section 104(d)(2), because such an inspection would not be complete and cover all hazards in the area. *See also UMWA v. FMSHRC*, 768 F.2d at 1479 (an inspector's presence in an area of a mine when he is not examining for all hazards does not amount to a sufficient inspection for purposes of section 104(d)(2)).

Accordingly, I conclude that the record only supports the conclusion that the entire mine had not been inspected for all mining hazards between June 18 and September 25 because the 60 West Mains haulage had not been the subject of a regular or other inspection until after the disputed section 104(d)(2) order had been issued. Accordingly, the record establishes the absence of a clean intervening inspection within the meaning of section 104(d)(2), and the judge's decision should be reversed. I would reinstate the subject section 104(d)(2) order.

Marc Lincoln Marks, Commissioner

Commissioner Verheggen, dissenting:

This case presents the issue of whether the Secretary proved that there was no "clean inspection" of the Cumberland Mine between September 25, 1997, when Inspector Patterson issued the section 104(d)(2) order challenged by Cyprus Cumberland, and June 18, 1997, when the previous section 104(d) order had been issued. My colleagues in the majority conclude that the judge failed to examine this issue adequately. Slip op. at 6. I conclude that the record compels the conclusion that the Secretary failed to meet her burden of proof. I would affirm the judge in result, and therefore, respectfully dissent.

It is well established that "[t]he burden of establishing the validity of [a section 104(d)(2) withdrawal] order, *necessarily including proof that an intervening clean inspection has not occurred*, appropriately rests with the Secretary." *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984) (emphasis added), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). In *Kitt*, the Commission clearly explained this burden:

> It is not necessary to view this burden . . . as requiring proof of a negative. Rather, the Secretary must only demonstrate that when [her] inspector issued the contested order, portions of the mine remained to be inspected. . . . In order to carry out [her] statutory duties properly, the Secretary maintains records of all inspections conducted in a mine and the extent of those inspections. The contention that the Secretary or [her] representative cannot determine the areas of a mine that have been inspected in any given period, or the areas that remain to be inspected in a future period, gives us great concern. The very same record keeping, which the Secretary claims to be burdensome, is necessary in order to support the claim that a "regular" clean inspection has not occurred. . . . [P]roper administration of the Mine Act requires that the Secretary maintain a workable mine inspection record keeping system.

Id. (footnote omitted). Thus, under *Kitt*, the Secretary is required to maintain detailed records of inspections, and to adduce these records in some fashion when defending the validity of a section 104(d)(2) order.

Here, however, the Secretary singularly failed to follow the evidentiary requirements of *Kitt*. There is no dispute that MSHA had inspected all areas of Cyprus' Cumberland Mine except the 60 West Mains track haulage entry. 20 FMSHRC at 287; Jt. Ex. 1 ¶ 13. As for the 60 West Mains, the Secretary adduced no clear, unequivocal evidence that the track haulage "remained to be inspected" (6 FMSHRC at 1600), despite the fact that several inspectors made scores of trips along the entry. *See* 20 FMSHRC at 294. Yet under the liberal evidentiary rules governing Commission proceedings, the Secretary should have been able to meet the *Kitt* burden with ease. For example, any one of the Secretary's witnesses (such as Supervisory Coal Mine Inspector

Robert Newhouse) could have interviewed all the inspectors who ever traveled along the 60 West Mains (which would have been easy enough to accomplish over the telephone) to determine whether any had inspected the area, and the nature of any such inspections. The witness could then have testified regarding the results of his or her investigation. *See* 29 C.F.R. § 2700.63(a) (hearsay admissible in Commission proceedings, under which rule Secretary's counsel would not have had to resort to calling each inspector to the stand). Or the Secretary's counsel could have assembled affidavits from all the inspectors and introduced the affidavits into evidence through an appropriate sponsoring witness. *Id*.; *cf*. slip op. at 7 n.7.

Indeed, the record is devoid of any evidence on this question. I find this void in the record difficult to justify in light of the statement at trial by the Secretary's counsel that "[f]ollowing the *Kitt* decision[,] now, MSHA is forced to keep track of . . . two different sets of inspection data, their quarterly inspections and . . . how much of the mine has been inspected." Tr. 134-35. No such records were introduced into evidence. Instead, the Secretary offered only maps (Gov't Exs. 3, 4) tracking the activities of but two of the several inspectors who were actively inspecting the Cumberland Mine, and the testimony of Inspector Newhouse which my colleagues find "is not probative of whether the Secretary met her burden." Slip op. at 7.

My colleagues in the majority focus on the inspection log maintained by Cyprus and conclude that it "must be examined and weighed against other evidence" on remand. *Id*. After examining this log, and in light of statements made by Cyprus' counsel at oral argument, it is abundantly clear to me, however, that no inferences can be drawn from the log that the 60 West Mains were not inspected. All the log shows is the areas to where inspectors traveled to conduct inspections. It does not indicate what any inspectors did in transit. Given the extensive amount of travel in the 60 West Mains, I find that it was incumbent upon the Secretary to establish that none of her inspectors examined the track haulage for hazards, a point on which Cyprus' log is silent.[1]

The judge based his decision largely on his finding that "somewhere between the sixth round trip [through the 60 West Mains track entry] and the hundredth round trip, . . . the inspection requirements of [section 104(d)(2)] were complied with." 20 FMSHRC at 294. In light of the evidentiary weaknesses of the Secretary's case, I find that the judge did not need to make such a finding. Nor do I need to reach the merits of this finding. Instead, I find that the Secretary failed to establish a prima facie case, *see U.S. Steel Corp.*, 6 FMSHRC 1908, 1914 (Aug. 1984) (Secretary failed to meet burden of proving validity of section 104(d)(2) order where evidence was "entirely too vague and uncertain"), and on this ground alone, I affirm the judge's decision in result.

Given my finding that the Secretary's case failed at the outset when she failed to meet her

---

[1] I find it curious that the Secretary would have saved for last an area which saw such a heavy volume of mine traffic. It only stands to reason that one should inspect the entrance to a mine before going any further so as to ensure that travel through the entrance is safe.

burden under *Kitt*, I normally would go no further. I would like to respond, however, to some points made by my colleague Commissioner Marks in his dissent. He bases much of his dissenting opinion on his belief that "the Secretary's interpretation of section 104(d)(2) is entitled to deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), and its progeny. Slip op. at 9. I respectfully disagree with this basis for his decision.

Before the judge, the Secretary asserted that "the 'clean inspection' requirement to break the [section] 104(d) chain in this case required a detailed inspection of the 60 West Mains entry conducted on foot." 20 FMSHRC at 289. The judge rejected this interpretation of section 104(d), even though he found it "plausible." *Id*. at 294. In reaching this conclusion, the judge relied on the Commission's decision in *The Helen Mining Co.*, 1 FMSHRC 1796 (Nov. 1979), which rejected arguments made by the Secretary that her interpretations of the Mine Act are due considerable deference. *Id*. at 1798-1801. Citing what he terms the "settled law" of deference, Commissioner Marks argues that the judge erred. Slip op. at 10 (citing *Chevron* and its progeny).

I find, however, that the judge was correct. I believe that the reasoning set forth in *Helen Mining* is as valid today as when written, and was not superseded by *Chevron* when that decision was handed down in 1984. *Chevron* deference principles[2] were tailored by the Supreme Court for other federal courts of general jurisdiction. The *Chevron* decision itself drives this point home, a decision in which the federal courts were faced with the task of reviewing a highly complex regulatory program promulgated by the Environmental Protection Agency. 467 U.S. at 840, 845-59. In *Chevron*, the Court recognized that the federal courts must not become mired in detailed review of such programs. *Id.* at 865-66.

The Commission, however, is not a federal court of general jurisdiction, as the judge correctly pointed out. *See* 20 FMSHRC at 290. Under the plain terms of the Mine Act, the Commission is a specialized body, 30 U.S.C. § 823(a), charged by Congress with the specialized tasks of "assessing civil penalties for violations of safety and health standards, [of] reviewing the enforcement activities of the Secretary of Labor, and [of] protecting miners against unlawful discrimination." Nomination Hearing Before the Senate Committee on Human Resources, 95th Cong. at 1 (1978). It is at the very heart of our statutorily mandated purpose to concern ourselves with detailed review of the Secretary's programs, and even more so, interpreting the Mine Act. *Helen Mining*, 1 FMSHRC at 1801 ("Resolution of . . . questions [of statutory interpretation] is a primary role of the Commission.").

The Commission was correct in *Helen Mining* when it held:

> [W]e will accord special weight to the Secretary's view of the

---

[2] Which must be distinguished from another principle set forth in *Chevron* that when a statute is clear and unambiguous, effect must be given to its language. 467 U.S. at 842-43.

> [Mine] Act and the standards and regulations [she] adopts under them. [Her] views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special knowledge or experience through [her] inspection, investigation, prosecution, or standard-making activities, it will not rise to the inappropriate level the Secretary has sought here.

1 FMSHRC at 1801 (citing Mine Act legislative history in which Congress stated that the Commission would "accord weight to the Secretary's views").

But as I stated above, the judge did not have to reach the issue of whether the Secretary's interpretation of section 104(d)(2) was due deference. Instead, he ought to have dismissed the Secretary's case on purely evidentiary grounds. Thus, I choose to limit my discussion of deference to the preceding general principles. I need not, and do not, reach the merits of whether any weight is owed to the Secretary's interpretation here.

Theodore F. Verheggen, Commissioner

Distribution

Colleen Geraghty, Esq.
U.S. Department of Labor
Office of the Solicitor
4015 Wilson Boulevard
Arlington, VA 22203

R. Henry Moore, Esq.
Buchanan Ingersoll
One Oxford Centre
301 Grant St., 20th Floor
Pittsburgh, PA 15219-1410

Michael Duffy, Esq.
National Mining Association
1430 17th Street, N.W.
Washington, D.C. 20034

Administrative Law Judge Jerold Feldman
Federal Mine Safety and Health Review Commission
2 Skyline, 10th Floor
5203 Leesburg Pike
Leesburg Pipe, VA 22041