FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

August 12, 2004

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2000-480-R
ADMINISTRATION (MSHA)	:	WEST 2002-131
	:	
v.	:	
	:	
TWENTYMILE COAL COMPANY	:	

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

DECISION

BY: Beatty, Commissioner[1]

This case involves a consolidated contest and civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (2000) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order pursuant to section 104(g) of the Act, 30 U.S.C. § 814(g), to Twentymile Coal Company ("Twentymile") as a result of an alleged violation of a mandatory training standard set forth at 30 C.F.R. § 48.7(c) (2002). Administrative Law Judge David Barbour affirmed the order, concluding that a violation had occurred and that it was significant and substantial ("S&S"). 25 FMSHRC 373, 384, 385 (July 2003) (ALJ). The judge also concluded that the proposed penalty assessment was issued within a reasonable time and dismissed the operator's challenge. *Id.* at 388. The Commission granted Twentymile's petition for review. For the reasons that follow, we affirm in part and reverse in part.

I.

Factual and Procedural Background

Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. 25 FMSHRC at 375. Twentymile employs approximately 300 miners and utilizes two developing sections and one retreat longwall section to mine coal. *Id.*

[1] A majority of the Commissioners joins in each section of Commissioner Beatty's opinion, and therefore it constitutes the Commission's decision in this case. A further explanation of which Commissioners join in particular sections is provided on page 6, *infra*.

Due to geological conditions in the mine, there are times when rock is extracted along with coal. *Id.* In order to avoid combining coal from other areas of the mine with the rock-coal mixture, Twentymile separately transports the mixed material out of the mine. *Id.* Prior to the events in this proceeding, Twentymile utilized a series of four conveyor belts to move the mixed material. *Id.* In order to more efficiently transport the rock-coal mixture, Edwin Brady, conveyance manager at the mine, designed a chute to assist in this process and supervised its installation. *Id.*

The vertical chute that Brady designed is five feet square and is located in a vertical shaft, the "Glory Hole," which is approximately 12 feet in diameter. *Id.* at 376; Tr. 20. The chute, which is about 45 to 50 feet in height, connects an upper level of the mine to a lower level. 25 FMSHRC at 375-76. At the upper level, the rock-coal mixture moves to the chute on a conveyor belt that has a gate positioned over the chute. *Id.* at 376. When the gate is positioned to divert the rock-coal mixture away from a bunker where coal is stored, material is dumped from the conveyor belt into a hopper at the top of the chute and falls through the chute to the lower level. *Id.* Rocks entering the chute range in size from one inch to eight inches in diameter. *Id.* at 379. At the bottom, there is a "rock box," or slanted chute, which channels the material onto a conveyor belt that moves it out of the mine. *Id.* at 375-76.

Brady's design includes baffles to slow the fall of the material and prevent damage to the rock box or conveyor belt at the lower level. *Id.* at 376. A vertical ladder stands alongside the chute with four landings that are accessible by the ladder. *Id.* At each landing, a door opens to the interior of the chute for observation or maintenance. *Id.* The door is secured by a latch that is held in place by an eye bolt that must be loosened before the door can open. *Id.* When the door to the chute is opened, it swings outward. T. Ex. 3 and 4. In order to avoid material coming through the doorway, a miner must stand back and behind the door. 25 FMSHRC at 376. At the top and bottom of the chute are electronic signals that are triggered when the chute becomes clogged. *Id.* The conveyor is designed to stop automatically if materials can no longer move through the chute. *Id.*; Tr. 159-60.

On May 26, 2000, Twentymile placed the chute in service. 25 FMSHRC at 376. For several days, the chute operated without problems. *Id.* On June 6, the chute became clogged, and the conveyor on the upper level stopped feeding the chute. *Id.* Brady instructed electricians to check the motor on the conveyor feeding the chute. *Id.* They reported to him that the motor was fine and that the chute was clogged. *Id.*

Brady then walked to the top of the chute, climbed onto the ladder, and got off on the platform closest to the top of the chute. *Id.* He loosened the eye bolt on the latch, opened the door accessing the chute, and observed that large rocks were blocking the door. *Id.*; Tr. 167-68. He closed the door, secured the latch by tightening the eye bolt, and climbed down the ladder. 25 FMSHRC at 376. At each level, Brady opened the door and observed more rock until he reached the bottom of the chute where he met beltmen Craig Bricker and Rick Fadely. *Id.* at 377. Brady

instructed Fadely to go to the lowest landing, open the access door, and try loosening the material with a steel bar. *Id.* Fadely was unable to free the material with the bar. *Id.* Brady then ordered the miners to get the water hose and spray the material because he believed the material might become unstuck if it became "soupy." *Id.*

Kevin Olson, the acting shift supervisor, learned that the chute was clogged and assigned Matthew Winey, the production crew foreman, to go to the bottom of the chute and help in unplugging it so that mining could begin again. *Id.* Winey, in turn, directed members of his crew to go to the bottom of the rock chute. *Id.* When Winey reached the chute, Bricker and Fadely were assisting Brady in connecting the hose. *Id.* When it was connected, Fadely and Winey climbed to the lowest landing and Winey commenced spraying the stuck material in the chute while Brady began to hit the bottom of the chute with a hammer. *Id.* After about five minutes of spraying and hitting the chute, the material in the chute began to move. *Id.*

Kyle Webb was a member of Winey's crew with more than four years of mining experience. *Id.* Members of Winey's crew came to the chute at varying times, and Webb arrived at the chute with several other miners. *Id.* Either before or after Winey and Fadely began spraying the stuck material, Webb climbed the rock chute ladder above the lowest platform. *Id.* Neither Fadely nor Winey instructed Webb to go up the ladder, nor did Winey ask Webb where he was going. *Id.* at 377-78. According to Brady, there was no need for any miner to go up the ladder because there was nothing to do above the access door where Fadely and Winey were spraying the stuck material. *Id.* at 378.

As the material started to move in the chute, Webb fell and landed on the bottom platform. *Id.* At about the same time that Webb fell, the rock-coal mixture began to spill out of the top access door and down the outside of the chute.[2] *Id.* The material hit Webb as he lay on the platform. *Id.* Winey and Fadely took cover underneath the platform as the material fell. *Id.* An electrician who was working at the top of the chute heard shouting below and climbed down the ladder and closed the top access door. *Id.* When the material ceased falling, several miners went to assist Webb. *Id.* Webb was airlifted to a local hospital where he was diagnosed with and treated for serious, but non-fatal, head injuries. *Id.*

The mine's safety manager, R. Lincoln Derick, was notified at his home regarding the accident. *Id.* In turn, he immediately contacted MSHA Inspector Philip Gibson. *Id.* Derick and Gibson both went to the mine. *Id.* Gibson went into the mine with several representatives of Twentymile and an officer of the Routt County Sheriff's department. *Id.* at 378-79. Gibson began his investigation at the top of the chute and proceeded to the bottom. *Id.* at 379. The access door on the lowest level was open and material began to spill out of the chute, causing

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[2] It is not clear from the record how the upper access door was opened. Winey speculated that Brady might not have adequately secured it after he opened it to examine the stuck material or that the door might have opened due to a design flaw. It is also possible that Webb himself could have opened the door prior to his fall. 25 FMSHRC at 378 & n.9.

Gibson to move quickly out of the way when he slipped and slightly injured himself. Tr. 52. Thereafter, Gibson issued an imminent danger order to Twentymile that required it to obtain MSHA's approval before resuming mining operations.[3] 25 FMSHRC at 379.

From June 7 through June 14, Gibson returned to the mine where he continued his investigation by interviewing witnesses, taking photographs, and reviewing training records. *Id.* During this time, Twentymile completed the accident investigation report that it was required to file under Part 50 of MSHA's regulations. *Id.*; Gov't Ex. 11.

On June 16, 2000, Gibson issued an order, pursuant to Section 104(g)(1), 30 U.S.C. § 814(g)(1),[4] charging Twentymile with an S&S violation of 30 C.F.R. § 48.7(c)[5] when it allowed miners to unplug the rock chute without first receiving task training. The order stated in pertinent part:

> Personnel such as mining crews, supervisors, and laborers, who had reason to work from or travel on the ladders and landings of the "Rock Chute" at the "Glory Hole" area had not received the requisite safety training . . . before they performed their work in this

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[3] That order is not at issue in this proceeding.

[4] Section 104(g)(1) provides:

> If, upon any inspection or investigation . . . , the Secretary . . . shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary . . . shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

[5] At the time the order was issued, section 48.7(c) stated, "Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task." "Task" is further defined at section 48.2(f), 30 C.F.R. § 48.2(f): "*Task* means a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge."

> area. The "Rock Chute" had become plugged with blasted roof material on June 6, 2000. These persons entered the area to work at unplugging the chute before they had received safety training.

Order 7618153. The order was abated when Twentymile adopted procedures for working around the rock chute, including instructing miners in safe work practices. Tr. 44-45; Gov't Ex. 4.

Twentymile filed a notice of contest. The judge assigned to the case stayed the contest proceeding pending issuance of a penalty assessment. Order, dated Aug. 1, 2000. On January 4, 2001, MSHA issued its accident investigation report. Gov't Ex. 5. On November 9, 2001, MSHA issued a proposed penalty assessment, and the case proceeded to trial. 25 FMSHRC at 386.

The judge issued a decision[6] in which he rejected Twentymile's challenge to the order on the basis that it was impermissibly vague in identifying the miners needing task training and in describing the task for which training was needed. *Id.* at 382. He concluded that the order, as initially written, used a permissible "class description" in identifying those who worked or traveled around the rock chute. *Id.* He further noted that the order was amended at trial to include the names of the miners who were not given adequate task training. *Id.* With regard to the task described, the judge concluded that there was no doubt as to the task for which training was required. *Id.*

With regard to the merits of the violation of section 48.7(c), the judge found that none of the miners who were assigned to unplug the chute received any task training regarding the assignment beforehand. *Id.* at 383. Concluding that Twentymile should have anticipated that the job of unplugging the chute would occur on a "regular" basis, he affirmed the violation. *Id.* at 384. In addressing the S&S designation of the violation, the judge found that the lack of training created conditions under which a miner could have fallen or been struck by escaping material and that the resulting injury would have been serious. *Id.* at 385-86.

The judge rejected Twentymile's challenge to the penalty that was based on a 17-month delay between the order and the issuance of the proposed penalty. *Id.* at 386-88. The judge initially noted that the Act gave the Secretary "a reasonable time" within which to notify an operator of a proposed civil penalty and that the Secretary met this requirement. *Id.* at 387. In addition, the judge analyzed the reason for the delay and whether the operator was prejudiced. *Id.* He concluded that the reasons MSHA gave for the delay – a shift in personnel in MSHA offices and the failure of a new employee to understand his duties – were "understandable" and that the

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[6] The case proceeded to trial before Judge August Cetti. However, before he issued a decision in the case, he retired and the matter was transferred to Judge Barbour. The parties agreed that Judge Barbour could decide the case on the basis of the record that he received from Judge Cetti without the need to take further evidence.

lapse in time was not prejudicial to Twentymile. *Id.* at 388. The judge, therefore, declined to dismiss the penalty petition. *Id.* In weighing the penalty criteria, the judge concluded that the Secretary's proposed penalty of $6,000 was excessive and reduced it to $1,500. *Id.* at 389.

II.
Disposition

Generally, Twentymile argues that the language of sections 48.7(c) and 48.2(f) is clear and unambiguous and that task training was not required because unplugging the chute was not a "task" that was performed on a regular basis. T. Br. at 9-11. Twentymile further argues that the order was not sufficiently specific (*id.* at 16-21), and that the inclusion of the six miners in the amended order is not supported by substantial evidence. *Id.* at 22-25. Twentymile contends that the judge misapplied the Commission's test for determining whether a violation is S&S. *Id.* at 25-28. Finally, it challenges the judge's conclusion that MSHA's delay in issuing a penalty proposal was not unreasonable. *Id.* at 28-33.

In support of the judge's decision, the Secretary argues that she should be given deference in interpreting the regulation at issue. S. Br. at 12-14. The Secretary further argues that the order gave Twentymile adequate notice of the allegations against it. *Id.* at 28-32. The Secretary asserts that substantial evidence supports the judge's determination that the miners named in the amended order needed task training. *Id.* at 21-24. She argues that the judge correctly found that the violation of the training regulation was S&S. *Id.* at 24-28. Finally, the Secretary challenges the assertion that the penalty assessment should be dismissed because she took too much time in proposing it. *Id.* at 32-44.

The Commission unanimously finds that Twentymile violated the training standard and that the violation was S&S, but Chairman Duffy and Commissioner Suboleski reach a finding of violation on separate grounds. Chairman Duffy and Commissioners Beatty and Young conclude that a section 104(a) citation should have issued instead of a section 104(g) order. All Commissioners agree that the citation was sufficiently specific. The Commission, with Commissioners Jordan and Young dissenting, concludes that the proposed penalty was not issued within a reasonable time and, accordingly, vacates the civil penalty.

A. Adequacy of the Order

The judge concluded that the order was not deficient in identifying those to whom it applied and that, even if the order lacked sufficient specificity, it was amended at hearing to include the names of those miners who had not been given the required task training. 25 FMSRHC at 382. He further held that the order made clear which task required training. *Id.* Before the Commission, Twentymile argues that the order did not specifically identify the miners to be trained or the task for which training was required. T. Br. at 16. The Secretary responds that the order satisfied the requirements of an administrative pleading because it gave Twentymile fair notice of the allegations against it. S. Br. at 28-29.

1. Issuance of a Section 104(g) Order

We conclude that the section 104(g) order issued to Twentymile in this case was void *ab initio* for its failure to conform to the requirements of section 104(g), 30 U.S.C. § 814(g). However, since the fact of violation survives the deficiencies of the order, we modify the order to a section 104(a) citation, an action within our authority under section 105(d) of the Act, 30 U.S.C. § 815(d).

In the course of legislating the 1977 Mine Safety and Health Act, Congress recognized with a significant degree of criticism that no mandatory safety and health standards addressing the training of miners existed under either of the predecessor statutes, the 1966 Metal and Nonmetallic Safety Act, 30 U.S.C. § 721 et seq. (1976), and the 1969 Coal Mine Health and Safety Act, 30 U.S.C. § 801 et seq. (1976) ("1969 Coal Act"): "It is unacceptable that years after enactment of these mine safety laws, miners can still go into the mines without even rudimentary training in safety." S. Rep. No. 95-181, at 4 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 592 (1978) ("*Legis. Hist.*").

> The Committee considers the presence of miners in a dangerous mine environment who have not had even rudimentary training in self-preservation and safety practices inexcusable; and in the fact that regulations requiring said training have not yet been promulgated is a serious failure in mine safety administration.

S. Rep. No. 95-181, at 49-50, *reprinted in Legis. Hist.* at 637-38. Accordingly, in section 115 of the Act, Congress mandated new miner training for both surface and underground miners, annual refresher training for all miners, and task training for "any miner who is reassigned to a new task in which he has had no previous work experience." 30 U.S.C. § 825(a).

To ensure compliance with the new training mandates, Congress also authorized use of the withdrawal order set forth in section 104(g). Under that provision, if an authorized representative of the Secretary

> [f]ind[s] employed at any coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, [he] shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal

or other mine, and be prohibited from entering such mine until an authorized representative . . . determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

The wording of section 104(g) could not be clearer: a section 104(g) withdrawal order is an order aimed at a specific individual (one deemed a hazard to himself and to others), and it is to be issued on the spot in real time.

Given that there were no statutory or regulatory requirements for safety and health training in place prior to the passage of the Act, it is clear that the enforcement action authorized in section 104(g) was intended to ensure that miners without even "rudimentary training in self-protection and safety practices" would not be allowed to work in mines once the Act took effect. Thus, the withdrawal provision was, at the outset, intended to spur the Secretary to promulgate training regulations and operators to implement training plans during the six-month period between enactment of the new law and its effective date. In our view, Congress, in fashioning the section 104(g) order, chiefly had in mind those new miners who had not received their initial 40 or 24 hours training and those experienced miners who had not received their annual 8 hours of refresher training since it would be logical to remove those miners from the mine and place them in classrooms or in practical training environments until the requisite hours had been met.

Conversely, the inclusion of task training within the scope of a withdrawal order is somewhat problematical. It is singularly counterintuitive to remove a miner from the area where a particular task is to be performed in order to provide him with training in that task.[7] Be that as it may, as the statute reads, a section 104(g) order is authorized in a situation where an inspector discovers that a miner has not been given necessary task training.[8]

Although the Secretary is generally authorized to issue a section 104(g) withdrawal order upon finding that a miner has not received required task training, the plain meaning and intent of section 104(g) mandates that such an order must meet at least two basic requirements. First, it must specify the miner or miners being withdrawn and prohibited from re-entering the mine or relevant area within the mine until the lack of training has been rectified. Second, the order must be issued on the spot – during or immediately following an inspection – and provide for immediate withdrawal of the miner(s) in question.

With regard to the requirement that the section 104(g) order specifically identify affected miners, the statutory language clearly contemplates that the order be directed at a particular miner

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[7] We note that 30 C.F.R. § 48.7(a)(1) provides that task training for "work tasks, equipment, and machinery . . . shall be given in an on-the-job environment."

[8] Withdrawal orders can be issued to encompass a part of a mine or even a particular piece of equipment on the theory that the definition of "mine" in the Act encompasses areas or equipment within the mine. Perhaps then, a section 104(g) withdrawal order, in practical terms and effect, could mean that a miner requiring task training could be removed from the immediate area within which the task is being performed, taught the appropriate procedures, and then returned to the scene of the task to demonstrate proficiency and safety consciousness in carrying out the task.

who is a hazard to "himself and to others," not that it simply conclude that training violations exist. Moreover, the statute provides that the miner affected by a withdrawal order shall "be prohibited from entering such mine until . . . the Secretary determines that such miner has received [the necessary] training . . . ." Thus, as a practical and fundamental matter, the miner or miners subject to a section 104(g) order must be specifically identified so that the Secretary can subsequently determine whether the necessary training has been received and the order has thereby been properly abated.[9] By contrast, a citation issued under section 104(a) need not necessarily identify the miners involved in a training violation so long as the operator is provided fair notice of the violation and the means of abatement and can adequately prepare for a hearing on the matter. *See* p. 10, *infra*. The second requirement – that the order be issued on the spot during or immediately following an inspection and provide for immediate withdrawal of the miners in question – also follows from the statutory language. Section 104(g) calls for the "immediate withdrawal" of an affected miner to address an immediate hazard created by the miner's lack of training, not an order issued much later seeking to address a situation that has already been resolved, or is in the process of being resolved.

In this case, MSHA's issuance of the section 104(g) order failed to satisfy the requirements above for such an order. The order did not name the miners affected, and therefore MSHA could not properly determine later whether the miners in question had received the requisite task training so that they could be allowed to re-enter the mine as provided in section 104(g). The order likewise clearly did not satisfy the on-the-spot, immediate withdrawal requirement because it was issued ten days after the inspection in question – at a time when no immediate withdrawal was necessary. The conclusion that the issuance of a withdrawal order was inappropriate in this case is further demonstrated by the fact that MSHA agreed that Twentymile's general plan to provide training *prospectively* to miners working in the rock chute (Gov't Ex. 4) constituted proper abatement of the withdrawal order. As discussed above, the statute makes clear that a properly issued section 104(g) order is to be abated by actually providing specific task training to the affected miner so that he may re-enter the mine.

Finally, as to the argument that a section 104(g) order must be issued in all circumstances involving training violations, that simply is not the case. The Commission recently issued a

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[9] For example, the task training received by the miner in question must be recorded and certified in accordance with 30 C.F.R. § 48.9(a), which provides in relevant part:

> Upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training. A copy of the training certificate shall be given to the miner at the completion of the training. The training certificates for each miner shall be available at the minesite for inspection by MSHA and examination by the miners, the miner's representative, and State inspection agencies.

decision in *Dacotah Cement*, 26 FMSHRC 461 (June 2004), wherein a section 104(a) citation, not a section 104(g) order, was issued when an inspector cited the operator for failing to provide task training.

For these reasons, we hereby modify the section 104(g) order to a section 104(a) citation with S&S findings.

2. Specificity of the Order[10]

Section 104(a) of the Mine Act requires that each "citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 30 U.S.C. § 814(a). The Commission has generally recognized that this requirement for specificity serves the dual purposes of allowing the operator to discern what conditions require abatement and to adequately prepare for a hearing on the matter. See *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993), and cases cited.

The citation generally referred to the miners who "entered the area to work at unplugging the chute." 25 FMSHRC at 382. The judge concluded that this "class description" was permissible in light of the operator's "presumed knowledge" of those working at the chute. *Id.* Contrary to Twentymile's argument (T. Br. at 18), there is no language in section 104(a) requiring that miners be identified by name. Moreover, as Twentymile acknowledges, the miners included in the citation were identified by MSHA in two responses to interrogatories. *Id.* Significantly, the Secretary amended the citation at trial to include the names of the miners who were not task trained before working on the rock chute.[11] Tr. 71. In light of this identification of the miners included in the citation, Twentymile cannot seriously contest its ability to respond to the violation alleged at trial. Nor is it apparent that the lack of inclusion of named miners within the citation impeded Twentymile's abatement of the violation. Twentymile abated the violation when it implemented work practices embodied in "Glory Hole - Rock Chute and Coal Bunker Safe Work Procedures," which included a requirement for task training for miners working in or around the rock chute. Gov't Ex. 4. Because the assignment of miners to the task of unplugging the chute is wholly within Twentymile's control, for purposes of abatement, the class of miners requiring training must necessarily be broadly defined to identify potential miners who may be assigned to the same task in the future and, thus, also require task training.

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[10] Hereafter, we refer to the order as a "citation," consistent with our above modification.

[11] Twentymile generally objects to the judge permitting the citation to be amended at trial. T. Br. at 19. However, the Commission has long held that leave to amend citations and orders should be freely granted, and a judge's determination in this regard is reviewable under an abuse of discretion standard. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Twentymile has not made any showing that the judge abused his discretion in this proceeding in granting the amendment to the citation.

Finally, Twentymile objects to the description of the task for which training was required. The citation generally described the miners' work assignment as involving the rock chute on the day of the accident. In addition, the citation was specific in referring to the task as unplugging the rock chute before safety training was given. Consistent with the description in the citation, the accident report that Twentymile prepared following the accident described the task as "cleaning plugged chute." Gov't Ex. 11, at 1. Thus, the judge's conclusion, "[t]here was no doubt as to the task for which training was required" (25 FMSHRC at 382), is well supported by the record.

In short, the citation was sufficiently specific to provide notice to Twentymile of the conditions that existed at the mine that were the basis for the alleged violation.

B. Violation of Section 48.7(c)

Although he did not explicitly say so, the judge appears to have based his reading of the regulation on a plain meaning analysis. *See* 25 FMSHRC at 382-84. Before the Commission, Twentymile argues that the meaning of the regulation is plain. T. Br. at 9-11. The Secretary argues that the regulation is ambiguous and that she is entitled to deference in her interpretation. S Br. at 12-13.

Section 48.7(c) provides that miners who are assigned to a "new task" "shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task."[12] 30 C.F.R. § 48.7(c). "Task" is further defined in section 48.2(f) as a "work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f).

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

The parties essentially do not disagree over the meaning of section 48.7(c). Nor was it disputed by the parties that the miners who were sent to unplug the chute on June 6 were not

[12] The regulation mirrors the language in section 115(a)(4) of the Mine Act, 30 U.S.C. § 825(a)(4), which states, "[A]ny miner who is reassigned to a new task in which he has no previous work experience shall receive training in accordance with a training plan approved by the Secretary . . . in the safety and health aspects specific to that task." The regulation has been revised since the violation that occurred in this proceeding. *See* 30 C.F.R. 48.7(c) (2003).

trained in the job prior to the assignment.[13] 25 FMSHRC at 383. Rather, they largely disagree over whether Twentymile should have anticipated that the job of unplugging the chute would occur on a "regular basis" so as to come within the regulatory definition of "task."

The judge concluded that the task of unclogging the chute was one that would occur on a regular basis and that Twentymile violated section 48.7(c) when it assigned miners to work on the chute without training them. 25 FMSHRC at 384. When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).[14]

Substantial evidence supports the judge's findings regarding the recurring nature of unplugging the rock chute. The judge began his analysis of whether Twentymile should have foreseen that the task would occur on a regular basis by examining the conditions and work practices at the mine. 25 FMSHRC at 383. The judge noted that the rock chute was newly installed and had only been in full operation for several days before it became clogged on June 6. *Id.* at 384. He also noted that Twentymile had installed four doors on the chute. *Id.* These doors allowed access to the chute for observation and maintenance from platforms that were adjacent to the chute. *Id.* at 376. Twentymile also installed two internal monitoring devices, one at the bottom of the chute and one at the top, to signal when material in the chute stopped flowing. *Id.* at 384. In addition to the presence of the signals noted by the judge, the record also indicates that the conveyor that fed the hopper to the chute was designed to automatically cut off if material stopped flowing in the chute. *Id.* at 376.

The judge further noted that the problem of clogged or blocked chutes was not new to the mine. *Id.* at 384. Other chutes became clogged when wet, "sticky" material went into the chutes. *Id.* In conveyance manager Brady's words, it was a "recurring problem," happening about every four, five, or six months. Tr. 190-91. In light of the fact that the rock chute carried similar material with a known propensity to jam chutes, the judge inferred that a "reasonably prudent person" would have anticipated that the material in the rock chute would clog at least as

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[13] The operator's training plan, which had not been updated since 1993, contained nothing about task training in chute maintenance. Gov't Ex. 13; Tr. 127-28.

[14] The Commission has further held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Id*.

frequently and that Twentymile therefore violated section 48.7(c) when it assigned the miners to unplug the chute without training them. 25 FMSHRC at 384.

Twentymile argues that the judge engaged in speculation in determining that the newly-installed chute would clog, that the devices on the chute that the judge examined as evidence that the operator anticipated clogging were there for other reasons, and that, even if the chute clogged several times a year, unclogging it would not meet the dictionary definition of a "regular" task. T. Br. at 13-15. Despite Twentymile's contentions, however, the installation of a new piece of equipment requires an operator to consider whether tasks involving the equipment will occur on a regular basis. Where a task cannot be scheduled, but is reasonably foreseeable as a recurring duty with discrete health and safety concerns, an operator is expected to provide proper planning and communication to ensure that workers performing the task receive appropriate training. To hold otherwise would be to defer training necessary to guard against the hazards associated with the job until an unfortunate experience ratifies the need for task training.

Jams, clogs, or other failures are, of course, not scheduled events. If they occurred on a literally "regular" basis, an operator presumably would take some course of action to prevent their "regular" occurrence. Imposing a literal definition of "regular," however, creates a situation in which the health and safety aspects of events that are reasonably foreseen as recurring, but not at scheduled or fixed intervals, would escape the mine's training program.[15] This is contrary to the general intent of the Mine Act and more specifically to the training provisions. S. Rep. No. 95-181, at 49-50, *reprinted in Legis. Hist.* at 637-38 (1978) (recognizing "[t]he hazards involved with . . . mining . . . and the need to provide for the health and safety of the nation's miners" and that "health and safety training of miners is essential to achieving" safety under the Act). *See also Cannelton Industries, Inc.*, 26 FMSHRC 146, 151 (Mar. 2004), *appeal docketed*, No. 041126 (D.C. Cir., Apr. 12, 2004) (reading the plain words of a provision literally can carry a different meaning than intended), citing *Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999). While we do not know how "regularly" the rock chute would become clogged in normal day-to-day mining operations, the record suggests it became clogged after several days of operation before it was substantially modified. 25 FMSHRC at 376; Tr. 70, 169, 276-77. That, combined with Twentymile's experience with periodic clogging of other chutes in the mine and design features of this chute indicating that Twentymile was aware of the potential for clogging or jamming, support the judge's conclusion that the rock chute would reasonably be anticipated to clog or jam on a recurring basis.[16]

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[15] As the Secretary states (S. Br. at 14 n.8), Twentymile's safety manager testified that task training was given to miners prior to moving longwall mining equipment even though such moves only occur about every eight months. Tr. 294-95. Moreover, at oral argument counsel for Twentymile agreed that jobs performed at sporadic intervals would not necessarily be exempt from task training requirements. Oral Arg. Tr. 12-13.

[16] The fact that some of the devices noted by the judge, such as access doors, could be used for a purpose other than unclogging the chute does not undercut his findings and inferences.

Finally, Twentymile asks the Commission to overturn the judge's decision with respect to the citation because he failed to analyze whether each of the six miners named in the amended citation needed task training. T. Br. at 22-25. The named miners included Ed Brady, Rick Fadely, Kyle Webb, Eric Hough, Matt Winey, and Craig Bricker. Tr. 71. The judge concluded that none of the miners assigned to unplug the chute had been trained in the health and safety aspects of the task, implicitly rejecting Twentymile's position. 25 FMSHRC at 383. The Secretary responds that such an individual-miner analysis was unnecessary and that substantial evidence supports the judge. S. Br. at 21.

Based on record testimony, the judge found that the shift supervisor assigned Winey as foreman of the production crew, which included Webb and Hough, to go to the chute and assist in unplugging it. 25 FMSHRC at 377. When Winey arrived at the chute, beltmen Bricker and Fadely were already working on unplugging the chute. *Id.* Winey joined in working with Bricker and Fadely in spraying the stuck material with a hose, while Brady hit the bottom of the chute with a hammer. *Id.* Hough assisted in connecting the hose and shoveled at the bottom of the chute. Tr. 220. Without being instructed to do so, Webb climbed up the ladder adjacent to the chute.[17] 25 FMSHRC at 377. Given these miners' active involvement with unplugging the chute and the fact that it was undisputed that no miner had received *any* task training with regard to the rock chute, the inclusion of these miners' names in the citation is well supported by the record.[18]

While we certainly agree with our concurring colleagues' view that Twentymile could have met the training requirements of the Act and the regulations by incorporating the training into the duties of the beltmen, the facts of this case do not support limiting the violation to those miners. Once an operator has made a decision to assign miners to a task requiring training, it

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We review the judge's findings and conclusions in light of the whole record. *See Arch of Kentucky*, 20 FMSHRC 1321, 1329 (Dec. 1998) (reviewing record as a whole to conclude that substantial evidence supports judge's finding of a violation); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (stating that an appellate tribunal must review the whole record and consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding). Taken as a whole, the evidence of the design features noted by the judge supports his conclusion.

[17] Twentymile argues that neither Webb nor Hough were "assigned" the task of unplugging the chute as they received no direct orders to perform any job related to this work. T. Br. at 24. This ignores the evidence that Winey was given general instructions to unplug the chute and directed his crew to go to the chute. 25 FMSHRC at 377. Thus, while neither Webb nor Hough received specific orders when they arrived at the chute, both acted in a manner consistent with the general instruction given the crew.

[18] While it is not apparent that Ed Brady, the designer of the chute, would have needed task training given his familiarity with the rock chute and the hazards that accompanied work around it, the judge's failure to explicitly exclude Brady does not require us to vacate the citation.

must ensure that those miners are provided with the appropriate training. As conceded by the Secretary at oral argument, task training need not be formal or elaborate and may be provided readily to miners assigned on an *ad hoc,* temporary, or limited basis. Oral Arg. Tr. 34. The central point, however, is that the miners were so assigned in this case and therefore fell squarely within the training requirement of section 48.7.

C. S&S

Twentymile argues that the judge misapplied the Commission's S&S analysis because of his use of the word "could," which indicated he was not applying a "reasonable likely" standard and because he did not evaluate the background and experience of the miners involved with unplugging the chute. T. Br. at 26-28. The Secretary responds that substantial evidence supports the judge's S&S determination and that Twentymile has taken out of context the judge's use of the word "could" on several occasions. S. Br. at 25-27.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Here, the parties' disagreement with the judge's analysis of the *Mathies* factors revolves around the third and fourth criteria – whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury that would be of a reasonably serious nature. The judge concluded that the violation was S&S. 25 FMSHRC at 385. Substantial evidence supports the judge. As the judge noted, Twentymile assigned a group of miners to a job without the training necessary to guard against hazards inherent to the task. *Id.* Thus, the miners were assigned to unplug the rock chute without training in the appropriate procedures and

techniques to protect themselves. *Id.* In this regard, the rock chute posed hazards involving slipping and falling around the ladder and platforms and spillage of the rock-coal mixture from the chute if the access doors to the chute were improperly handled. Injuries resulting from these accidents would be serious because the ladder posed the hazard of a 40-50 foot vertical drop should a miner slip. *Id.* at 376. Rocks falling from the chute were as large as eight inches in diameter. *Id.* at 379. In fact, on June 6, Webb received the kind of injuries that the MSHA inspector was concerned with when he designated the violation as S&S (Tr. 42). *See Dynatec Mining Corp.*, 23 FMSHRC 4, 14 (Jan. 2001).

Twentymile takes issue with the judge's analysis because he used the word "could." However, the judge's use of "could" in weighing the likelihood of an injury of a reasonably serious nature did not materially affect his analysis. *Compare Zeigler Coal Co.*, 15 FMSHRC 949, 953-54 (June 1993) (". . . statements that such events could occur, *standing alone*, do not support a finding that there was a reasonable likelihood of an ignition.") (emphasis added). The judge's analysis of the *Mathies* factors relies on substantial evidence in the record to support his conclusion that a potentially serious injury would be likely to occur and is therefore is not speculative. *Compare Union Oil Co.*, 3 FMSHRC 289, 299 (Mar. 1989). The judge recited the Commission's *Mathies* test and noted that it was incumbent on the Secretary to establish a reasonable likelihood that the hazard contributed to would result in an injury, which must be evaluated assuming continued normal mining operations. 25 FMSHRC at 385. In these circumstances, the judge's several uses of the word "could" in his analysis are not sufficient grounds for reversing his S&S determination.

Finally, Twentymile cites no Commission case in support of the proposition that we must look at the background and experience of individual miners to make an S&S determination once a violation has been established. Therefore, we affirm the judge's S&S determination.

D. Timeliness of the Penalty Proposal

Twentymile challenges the civil penalty in this case on the grounds that the 17-month delay between the issuance of the underlying section 104(g) order and the ultimate issuance of the proposed penalty contravenes the mandate of section 105(a) of the Act, 30 U.S.C. § 815(a). T. Br. at 28-33. Section 105(a) requires the Secretary to issue a proposed penalty within a reasonable time once a violation has been found. The Secretary concedes that the delay was caused by MSHA's inattention to its responsibilities regarding the processing of the accident report and the eventual penalty proposal but, nevertheless, contends that the delay should be deemed reasonable and therefore in compliance with the statutory requirement for timeliness. S. Br. at 33-37; Oral Arg. Tr. 48 (Secretary's counsel concedes that he "can't make excuses for anyone involved here.").

Section 105(a) provides in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order . . . , he shall, within a *reasonable time* after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . for the violation cited . . . . . [Emphasis added.]

The legislative history of the Mine Act states with regard to section 105(a) that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34, *reprinted in Legis. Hist.* at 622.

While delay on the Secretary's part may not vitiate the civil penalty proceeding and the finding of a violation, an inordinate and unjustifiable delay might well vitiate the imposition of the penalty itself. The issue ultimately turns on whether the delay is reasonable under the circumstances of each case. *See Salt Lake County Rd. Dep't*, 3 FMSHRC 1714, 1716-17 (July 1981) (Secretary must establish "adequate cause" for failing to file penalty within 45 days of notice of contest).[19] The Commission has held that the requirement in section 105(a) that the Secretary propose a penalty assessment "within a reasonable time" does not impose a jurisdictional limitations period. *See Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996). Rather, in cases of delay in issuing proposed penalties, we have examined whether adequate cause existed for the Secretary's delay in proposing a penalty. Apart from that consideration, we have also considered whether the delay prejudiced the operator. *See Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982). *Accord Black Butte Coal Co.*, 25 FMSHRC 457, 459-61 (Aug. 2003). Either consideration may be a ground for dismissing the penalty petition. *See Steele Branch*, 18 FMSHRC at 13-14. Consequently, we reject the Secretary's request that the Commission "revise its analysis in late penalty cases and consider whether the operator suffered prejudice even if it finds that the Secretary has not established adequate cause." S. Br. at 43. Our precedents do not hold that an operator should only merit relief under section 105(a) if it can show that the delay in proposing a penalty is both unreasonable *and* that it has resulted in prejudice to the operator.

The judge in this case determined that the lapse in time between the order and the penalty proposal was not prejudicial to Twentymile, 25 FMSHRC at 388, and the operator does not

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[19] The Commission has generally applied the same test to penalty proposals, which are to be issued within a "reasonable time" under section 105(a) of the Act (*see* Rule 25, 29 C.F.R. § 2700.25), and to petitions for assessments of penalties, which are used to provide notification to the Commission "immediately" following a notice of contest under section 105(d) of the Act, 30 U.S.C. § 815(d) (*see* Rule 28, 29 C.F.R. § 2700.28, implementing section 105(d) with a 45-day period for filing a petition for assessment of penalty with the Commission). *See Steele Branch*, 18 FMSHRC at 13-14 (proposed penalty under section 105(a)); *Salt Lake*, 3 FMSHRC at 1715-16 (penalty assessment under section 105(d)).

challenge that conclusion on review. Thus, resolution of this issue turns on whether the Secretary has established adequate cause for the delay so as to render it "reasonable."

Here, there was nearly a 17-month delay from the date of the section 104(g) order,[20] June 16, 2000, until the issuance of the proposed penalty assessment for the alleged violation on November 9, 2001. MSHA used approximately the first seven months of that period to finalize the accident report (Gov't Ex. 5) on January 4, 2001. 25 FMSHRC at 388. The Secretary argues that this period should be excluded from the time computation under section 105(a), thereby shortening the period under examination to ten months. S. Br. at 33-35. The issuance of a penalty assessment under section 105(a), however, is pegged to the completion of an investigation or inspection and issuance of a citation (or, in this case, an order), not the completion of an accident report. Accordingly, it would be inappropriate to exclude from our analysis of the delay in assessing the penalty the time dedicated to completing an accident report. *See Black Butte*, 25 FMSHRC at 461; *Steele Branch*, 18 FMSHRC at 14.

With respect to why it took seven months to finalize the accident report, Inspector Gibson, the investigating officer, completed his work on the report one month after the accident, on July 6, 2000 (Tr. 74-75), and submitted it for review to William Denning, MSHA's district accident investigation coordinator. 25 FMSHRC at 380. Denning did not begin working on the report for three months, in October of 2000, and did not contact Twentymile for additional information until mid-November. *Id.* at 387. He testified that Twentymile promptly provided the requested information and that he forwarded the report in late November to the district manager for his signature. In the absence of the district manager, the report was signed by the acting assistant district manager and finally issued on January 4, 2001. *Id.* at 388.

However, seven additional months subsequently elapsed before the report was sent from the district office to MSHA's Assessment Office, on July 31, 2001. *Id.* According to Denning, there was a personnel change in the office, and the new employee, who was responsible for completing the special assessment form that had to accompany the accident investigation, was not aware of his responsibility to complete the form.[21] *Id.* After the report and form reached the Assessment Office, it took that office an additional three and one-half months to issue the proposed penalty. *Id.*

In examining the 17-month total delay, the judge separately analyzed the delay in completing the accident investigation and the delay in completing the special assessment form.

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[20] The judge inadvertently referred to the order as the "section 103(k) order." 25 FMSHRC at 386. However, the order upon which the violation was based is a section 104(g) order, now modified to a section 104(a) citation. Order 7618153.

[21] The record contains no explanation regarding why MSHA apparently lacked a back-up or "tickler" system that would have alerted officials that the special assessment form was long overdue.

The judge concluded that the delay involved with each was "understandable," noting in particular that the second delay was caused by a shift in personnel and the failure of the person who should have completed the form to understand his duties. *Id.* For the reasons that follow, we hold that, as a matter of law, the judge erred in finding that the delay here was reasonable under the circumstances.[22]

Commission case law offers a basis of comparison with respect to delays in issuing section 105(a) penalty assessments. In *Black Butte,* there was a 13-month delay, but that was due in large part to ongoing revisions to an accident report requested by the operator. 25 FMSHRC at 458, 460. In *Steele Branch*, the Secretary delayed issuing the proposed penalty assessment for 11 months and offered no reason for the delay, although the Commission took judicial notice of her unusually high case load at that time. 18 FMSHRC at 13-14.

In contrast to the foregoing cases, here the bulk of the delay was due to (1) unexplained delays in the review and issuance of Inspector Gibson's accident report, which he had completed within a month of the accident (Tr. 74-75), and (2) outright neglect in moving the report through established agency channels ostensibly designed to arrive at an appropriate proposed penalty in a timely manner. In determining whether a particular delay in proposing a penalty is "reasonable" the Commission must look at the entire set of circumstances surrounding the delay. While we could possibly excuse delay in *either* the preparation of the accident report *or* the processing of the proposed penalty, the cumulative effect of the two significant delays that took place in this case lies beyond the boundaries of what the Commission has previously allowed as reasonable under the circumstances.

Moreover, the delays greatly exceed the Secretary's own goals for timely proposing penalty assessments. MSHA's guidance document in effect at the time, Program Policy Letter (PPL) No. P99-III-5, at 6 (Aug. 16, 1999), stated that even cases involving "a serious accident, fatality, or other special circumstance should be assessed within 180 days [six months] of the accident."[23] In addition, MSHA stated that, to meet that goal, "the Office of Assessments should process citations and orders within . . . 45 days for accident-related special assessments." *Id.* In this case, we are dealing with a delay that exceeds the Secretary's own six-month benchmark by almost three times. Even though there had been substantial delays before the special assessment

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[22] Contrary to the assertion of our dissenting colleagues (slip op. at 28), our opinion does not establish that a 17-month delay (or any other time period) is "per se" unreasonable. Instead, in each case the Commission must examine the particular circumstances and the justification offered by the Secretary and determine whether, as a matter of law, the overall delay should be deemed "reasonable."

[23] The relevant portions of the August 16, 1999 PPL have been incorporated into MSHA's Program Policy Manual. III U.S. Dep't of Labor, MSHA, *Program Policy Manual*, at 49, Part 100.6(f) (2001), *available at* http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL3D. (last visited Aug. 4, 2004).

report was sent to the Office of Assessments, that office still took approximately 105 additional days, rather than the benchmark of 45 days, to actually propose the penalty.[24]

While the PPL further stated that MSHA believed that "[f]or proposed assessment purposes, 'reasonable time' is normally within 18 months of the issuance of a citation or order or, in the case of a fatal accident, within 18 months of the issuance of the accident report" (*id*. at 5), the Commission is certainly not bound in any way by that policy statement.[25] As discussed below, the Commission, not the Secretary, is ultimately responsible for determining whether a proposed penalty assessment has been made "within a reasonable time."

In short, while we are reluctant to vacate any civil penalty for a violation that has been upheld, we find the Secretary's handling of this penalty assessment and her rationale for the excessive delay in issuing it to be wholly inadequate. Accordingly, we are compelled to invoke the extraordinary remedy of vacating the civil penalty. We stress that our action vacates the imposition of the penalty, but leaves intact the finding of a violation. Among other things, that violation will become part of the operator's history of violations for future assessment purposes. Thus, our decision is wholly consistent with the goals and purposes of the Act in that the operator is held accountable for violating the regulation in question.[26]

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[24] For this reason, the parties' stipulation that testimony would have indicated that "three months is a routine amount of time for an accident case to spend in the assessment process" (Stip. No. 25) is irrelevant. Because the case had already been subject to substantial delays, it should not have been handled in a "routine" manner.

[25] The Commission has held that MSHA's policy statements such as a PPL or MSHA's Program Policy Manual are not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996), (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)). While the Secretary's policy statements may, in appropriate circumstances, be entitled to deference (*King Knob*, 3 FMSHRC at 1420), she has not asked that the Commission defer to the relevant PPL provision in this proceeding.

[26] In this regard, our dissenting colleagues' reliance on certain language in *Salt Lake*, 3 FMSHRC at 1716, dealing with "dismissal" of the Secretary's case and "nonsuiting" the Secretary (slip op. at 30-31), is not on point. The *Salt Lake* case involved the question of whether a civil penalty proceeding should be dismissed because the Secretary's petition for penalty assessment was filed beyond the 45-day period provided in Commission Rule 27. In this case, the civil penalty proceeding has gone forward, a violation has been found, and the question is whether the penalty should be vacated for unreasonable delay. Moreover, the Commission stated in *Salt Lake* that "situations will inevitably arise where strict compliance by the Secretary does not prove possible." 3 FMSHRC at 1716. That was not the case here where key delays resulted from inattention or neglect.

The Secretary argues that delay in issuing a proposed penalty assessment can never be a ground for vacating the penalty. S. Br. at 37-39. We reject this position as a significant departure from Commission precedent discussed previously and contrary to the language of section 105(a). In addition, adopting the position of the Secretary would contravene clear Congressional intent.

When Congress amended the 1969 Coal Act by enacting the current statute, it found that the prompt imposition of civil penalty sanctions for violation of mandatory safety and health standards was vital to the success of a federal mine safety and health program. Establishing that "the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards" (S. Rep. No. 95-181, at 41, *reprinted in Legis. Hist.* at 629), Congress expressly stated that, "[t]o promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly." *Id*. at 622.

Moreover, under the 1969 Act, operators had been entitled to *de novo* review of all enforcement actions in U.S. District Courts, a process that led to significant delays between an allegation of wrongdoing and its ultimate vindication through the civil penalty sanction:

> This right to a *de novo* hearing before a jury in the District Court has had the effect of encouraging operators to require enforcement of civil penalties in the district courts, thus delaying still further the actual payment of the penalties assessed. The resultant backlog of penalty cases has flooded the district courts in the coal mining areas of the country, and the delay engendered has seriously hampered the collection of civil penalties.

Id. at 633. "Clearly, so long a delay in assessment and collection of civil penalties does not encourage operator compliance with the Act and its standards." *Id*. at 632.

To further remedy situations where delays between enforcement actions and the imposition of sanctions were undermining the effectiveness of the mine safety and health program, Congress severely restricted the time within which an operator could contest the imposition of a civil penalty:

> The Committee believes that requiring that individuals who intend to contest a proposed penalty assessment to do so promptly furthers the objective of the Act. Penalty matters should be finally determined as quickly as possible. The Committee notes that contestants are required under this provision to notify the Commission of their intention to contest penalty proposals within fifteen days, and that the Commission would then subsequently schedule such matters for hearing before an Administrative Law

> Judge. For this reason, the Committee does not believe that fifteen days is an unreasonably short period of time to expect a contestant to so notify the Commission.

Id. at 622. We do not believe that Congress would find parity in circumstances where the Secretary has 17 months to arrive at a proposed sanction of several thousand dollars while the operator, in jeopardy of forfeiting its rights under the Act, must respond to the demand for payment within 15 days.[27]

Most significantly, under the Mine Act, this Commission is ultimately responsible for ensuring that civil penalties are assessed in a fair and expeditious manner. Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. § 820(i). Although the Secretary issues citations and orders under the Act and proposes civil penalties, it is the Commission that is responsible for assessing civil penalties and providing other appropriate relief. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Congress adopted the bifurcated enforcement scheme under which the Secretary and the Commission now operate, wholly independent from each other, in order that both justice and, if need be, a change in an operator's compliance habits could be promptly achieved:

> The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and instills confidence in the program. This separation is also important because it obviates the need for de novo review of matters in the courts, which has been a source of great delay.

Conf. Rep. on S. 717 (unnumbered), *reprinted in Legis. Hist.* at 1360.

The important role played by this Commission in the process by which hazardous conditions in the Nation's mines are identified and corrected through civil sanctions necessarily requires that we exercise our discretion to assure that the intention of Congress is carried out. Accordingly, the question of whether a particular penalty has been proposed "within a reasonable time" is one to be ultimately answered by the Commission, not the Secretary. When it can be shown that the overriding purposes of the Act are compromised by inordinate and unjustifiable delays between an allegation of wrongdoing and its accompanying sanctions, we are bound to take the steps necessary to uphold the integrity of the Mine Act and the bifurcated enforcement scheme under which we operate.

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[27] We note that, in the enacted version of the 1977 legislation, the time operators were given in which to contest proposed penalty assessments was extended from 15 to 30 days. 30 U.S.C. § 815(a).

There is an additional public policy argument that weighs heavily in favor of our decision to nullify the penalty in this case: retaining the confidence of miners in the effectiveness of the Mine Act. Section 109(a) of the Act requires operators to post all "orders, citations, notices and decisions required by law or regulation" on a mine bulletin board accessible to miners. 30 U.S.C. § 819(a). The order in this case, issued on June 16, 2000, was presumably posted by the operator. As the Bard wrote, "the rest is silence" until November 9, 2001, when, presumably again, the notice of proposed penalty was posted at the mine. Surely this time lapse would leave the average miner wondering whether the matter was even being pursued, let alone resolved, during the 17 intervening months.

Accordingly, in order to vindicate the Congressional imperative that mine safety and health violations be remedied through the prompt and fair imposition of appropriate sanctions, we vacate the civil penalty proposed in this case.

III.

Conclusion

Based on the foregoing, the judge's decision is affirmed in part and reversed in part.

Robert H. Beatty, Jr., Commissioner

Commission Suboleski, concurring:

I join in part II. A.,[28] C., and D. of the opinion of Commissioner Beatty.

While I agree with the majority that a violation of section 48.7(c) occurred, I cannot agree with the reasoning in part II B. of the opinion and the opinion of the administrative law judge whom they affirm. I am not persuaded that the evidence shows that the plugging of the rock chute would occur on a regular basis, and I am not prepared to overlook the requirement for a task to occur on a regular basis before task training is required.

Pursuant to section 48.7(c), miners who are "assigned a new task" must receive safety and health training prior to performing that task. 30 C.F.R. § 48.7(c). "Task" is defined in the regulations as "a work assignment that includes duties of a job that *occur* on a regular basis . . . ." 30 C.F.R. § 48.2(f) (emphasis added). The definition does not specify duties that *could occur* on a regular basis. To say that task training is required for any event that foreseeably might occur more than once is to redefine the word "regular." Further, while it may be reasonable to characterize events which occur infrequently, but predictably (such as longwall moves), as "regular" and to include events which would be expected to occur unpredictably, but frequently (such as tire repairs) as "regular," it is another matter to similarly characterize events which are expected neither frequently nor predictably.

The record indicates that the rock chute clogged only once, and the chute was then modified to reduce the likelihood of any future clogging. Tr. 177-80; 276-77. The judge, by imposing a "reasonable prudent person" test, concluded that Twentymile should have anticipated at the time of its installation that the rock chute would clog more often, thus giving rise to the obligation to task train miners who would be assigned to unplug the chute. I cannot agree with this approach. It wrongly presumes that the operator would have tolerated a faulty design in the chute whereby it would clog regularly. Further, for purposes of establishing a violation of the task training regulation, the judge's approach essentially assumes that any miner in the vicinity of the rock chute would have to be given task training on working on the chute. This, however, ignores the structure of the job assignment system at the mine, which would have limited the assignment of maintaining the rock chute on an everyday basis to beltmen. Gov't Ex. 10.

There is a further problem with tying the violation to all those present at the chute when the accident occurred. The Secretary's training expert, Robert Breland, testified that workers providing assistance during a task are not required to be trained on the entire task, only the subtask in which they are engaged:

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[28] I find it unnecessary to reach the analysis in section II. A. of whether a section 104(a) citation should have been issued as a result of the task training violation, instead of a section 104(g) order. Accordingly, I do not join in the majority's opinion on this issue.

> Q. Now with regard to the men that were working on clearing the plug, are you saying that each of those men needed training in each of these particular items . . . ?
> A. No. I wouldn't say that at all.
> Q. What are you saying?
> A. . . . I would expect that they had been trained in this part of that task they had been assigned to do.
> * * * *
> Q. So is it okay to do partial training?
> A. To the extent of the exposure of the activity, the work activity the people are going to do. That is normal in the industry.

Tr. 119-20. The mine's conveyance system manager, Edwin Brady, was responsible for designing and installing the chute, and he was directing the work of unplugging the chute. Tr. 158-59. With the possible exception of Webb, whose actions are unknown and who was not given a specific task involving the chute, none of the other workers engaged in any independent action that involved the unique features of the chute before the accident occurred. Tr. 169, 172-74, 213-17. That is, the hazards they faced either were encountered under the direction of Brady or were general mining hazards, such as climbing a ladder, connecting a hose, or shoveling spilled material. Thus, I cannot conclude that there was a violation of section 48.7(c) based on the analysis set forth in the majority opinion.

Nonetheless, the rock chute does possess unique aspects of operation, particularly with regard to the door design and the manner in which the rock is redirected as it is transferred (Tr. 159-65), and, at the time that the violation of section 48.7(c) was issued, there were workers in the mine for whom working on and around the unique aspects of the chute occurred on a regular basis. Maintaining the rock chute was a regularly occurring subtask within the general assignments of a beltman that posed distinct dangers and hazards requiring task training. Tr. 85-86. Treating the rock chute as an extension of the duties of a beltman that was sufficiently different to require its own training was consistent with practice at the mine. Thus, Twentymile's safety manager, Lincoln Derick, testified that task training was required when changes in equipment would affect miner safety and health. Tr. 267, 281. He also testified that task training would be required when a miner was moved from operating a front end loader above ground to operating a scoop underground. Tr. 282. There are sufficient differences between above-ground chutes and the rock chute (Tr. 130, 222) that would have led to task training of miners if the operator were addressing the hazards posed by the rock chute in a similar manner.

Moreover, both the Secretary's and Twentymile's witnesses testified in support of a general practice of task training that occurred as the responsibilities of a job assignment or equipment changed. Tr. 120-21 (Breland), 281-82 (Derick). *See* 48 Fed. Reg. 47454, 47457 (Oct. 13, 1978) ("The intent is to provide task training for experienced miners who are undertaking a new task assignment."). This analysis better reflects the realities of work

assignments at the mine while adhering to the language of the regulation. Assignment to a new element of an existing assignment – maintaining the rock chute that was part of the mine's conveyance system maintenance – required task training of beltmen in that new element.

Stanley C. Suboleski, Commissioner

Chairman Duffy, concurring:

I join in part II. A., C., and D. of the opinion of Commissioner Beatty.

I concur that a violation has been shown, and I agree with Commissioner Suboleski's approach in determining whether a violation of 30 C.F.R. § 48.7(c) has been proven. I would merely add that to the extent that beltmen Bricker and Fadely and foremen Winey performed discrete tasks associated with the clogged chute and to the extent that the chute in question possessed unique aspects of operation significantly different from other smaller chutes these miners may have worked on previously, Bricker, Fadely, and Winey should have been task trained according to the requirements of section 48.7(c). Likewise, only to that extent has the Secretary proven a violation of the training regulations.

Michael F. Duffy, Chairman

Commissioner Jordan and Commissioner Young, concurring in part, and dissenting in part:

We agree with our colleagues that Twentymile violated the training standard, the violation was S&S, and the order was sufficiently specific, and join in sections II.A.2., II.B. and II.C. of Commissioner Beatty's opinion.[29] However, we disagree with the majority's decision to vacate the penalty assessment in this case and write separately on that subject.

When reviewing whether the Secretary assessed a proposed penalty "within a reasonable time," 30 U.S.C. § 815(a), apart from considering the length of the delay, the Commission has examined whether adequate cause existed for the Secretary's delay in proposing the penalty and whether the delay prejudiced the operator. *See Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996).[30] Below, the judge concluded that the Secretary's delay in issuing the proposed penalty did not prejudice the operator, 25 FMSHRC 373, 388 (July 2003) (ALJ), a finding which the operator does not challenge. In considering the reason for the delay, the judge examined the time it took MSHA to finish the accident report and the special assessment form, and concluded that the delays were "understandable," noting that the lapse in time in completing the form was caused by a change in personnel and the failure of the person responsible to understand his duties. *Id.*

Without citing authority, the majority holds that, "as a matter of law" the judge wrongly determined "that the delay here was reasonable under the circumstances." Slip op. at 19. Despite the majority's protestations, our colleagues appear to be stating that in effect the 17-month delay would be "per se" unreasonable, while at the same time bolstering this conclusion by relying on the specific "circumstances" of this case. *Id.* at 19 n.22. The majority cannot have it both ways. Without articulating a clear legal test by which to measure the standard of "reasonableness," our colleagues merely conclude the reasons for the delay here were inadequate, substituting their judgment for that of the judge below.

We believe that the judge's determination is more appropriately reviewed using a "substantial evidence" standard. This is consistent with long-established Commission case law utilizing a "substantial evidence" test when reviewing a trial judge's conclusion applying a legal

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[29] Commissioner Young also agrees with the majority that the order should be modified to a citation, and joins in section II.A.1. of Commissioner Beatty's opinion. Commissioner Jordan, like Commissioner Suboleski, slip op. at 24, n.28, finds it unnecessary to reach the issue of whether the order should have been issued as a citation.

[30] Commissioner Young agrees with the majority that under Commission precedent, our analysis of delayed penalty proposals warrants vacating a penalty if the Secretary's delay is unreasonable or if the delay results in prejudice to the operator, and would reject the Secretary's contention that a penalty may never be vacated on timeliness grounds alone. Slip op. at 17. Commissioner Jordan sees no need to address this issue here, as she finds there was no prejudice to the operator and the judge properly found adequate cause for the delay.

principle in the Mine Act to the facts of a particular case. *See, e.g., Island Creek Coal Co.*, 15 FMSHRC 339, 348 (Mar. 1993) (finding that substantial evidence supported the judge's determination that MSHA failed to meet its burden of proving that it was reasonable for inspectors to conclude that mine conditions constituted an imminent danger); *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990) (finding that substantial evidence supported the judge's finding that the violation was of a significant and substantial nature); *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003) (holding that on the basis of substantial evidence in the record, the judge's determination that the violation was not a result of unwarrantable failure should be affirmed). In applying this test, we ask whether there is "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Based on substantial evidence in the record, we would affirm the judge's conclusion that the Secretary's delay in issuing a proposed penalty assessment was reasonable, particularly in light of other Commission cases (discussed below) which offer a basis to compare delays in issuing 105(a) penalty assessments. Moreover, we believe that our colleagues have failed to recognize additional record evidence explaining the delay. For instance, the majority relies on the "unexplained delays in the review and issuance of Inspector Gibson's accident report" (slip op. at 19), ignoring testimony by William Denning, MSHA's district accident investigation coordinator, that his delay in finalizing the report was due to conflicting work responsibilities. Tr. 75. The majority also asserts that the accident report was virtually complete within a month of the accident (before it was sent to Denning), failing to take into account the additional tasks he had to perform in order to finish the report (e.g., editing, obtaining additional information from the operator, etc.). Tr. 75-76, 78.

We note that of the 17-month period at issue here, slightly more than three months consisted of the time it took the MSHA Assessment Office to propose a penalty. 25 FMSHRC at 388. According to the Office of Assessments, three months is a routine amount of time for an accident case to spend in the assessment process. Stip. No. 25. While it would have been preferable for the assessment office to treat this matter expeditiously rather than routinely, we are mindful that between July 31, 2001 (when the report was sent to the assessment office) and November 9, 2001 (when the assessment was issued), one of the four assessors in the office was on extended leave, and another was in training during much the [sic] preceding year." *Id.*

The staffing issues asserted by the Secretary as reasons for the delay here are similar to several of those asserted by the Secretary in *Black Butte Coal Co.*, 25 FMSHRC 457 (Aug. 2003), a recent case in which the Commission upheld a judge's findings that the Secretary provided adequate cause for a 13-month delay in assessing a penalty. The majority characterizes the delay in *Black Butte* as "due in large part to ongoing revisions to an accident report requested by the operator" (slip op. at 19), neglecting to discuss the other reasons we took into account in concluding that the judge did not abuse his discretion in denying the operator's motion to dismiss based on the delay. We noted in that case the Secretary's undisputed assertion that the delay was

also due to an extremely high case load and less than normal staffing levels due to training and leave absences. 25 FMSHRC at 460. In *Black Butte* we stated that, as here:

> [t]he operator knew about the investigation and citation, and clearly was able to gather evidence in support of its position. To absolve [the operator] of liability due to a late issuance would undermine the purpose of the Mine Act, especially here where the operator has not demonstrated any prejudice from the delay.

Id. at 461. Vacating a penalty assessment is an extraordinary remedy, and, as in *Black Butte*, we are reluctant to vacate a penalty where it is undisputed that Twentymile has suffered no prejudice from the delay.[31]

We also find troubling the majority's selective reliance on the Secretary's Program Policy Letter ("PPL"). The majority cites to the PPL to spotlight the Secretary's delay in this case as being incongruent with her 180-day goal within which to assess penalties for a serious accident, but dismisses as non-binding authority the Secretary's assertion in the PPL that 18 months normally constitutes a "reasonable time." Slip op. at 19-20. *See* Program Policy Letter No. P99-III-5, Part 100.6(f) at 5 (Aug. 16, 1999) ("'reasonable time' is *normally* defined as within 18 months of the issuance of a citation or order") (emphasis added). We note that the Secretary's goal of assessing penalties for serious accidents within 6 months is laudable, but is no more binding than the 18-months she has declared to be a "reasonable time in which to assess a penalty."

The Senate Report comprising a section of the legislative history of the Mine Act acknowledged that circumstances could prevent the Secretary from promptly issuing a proposed penalty, but explicitly rejected the suggestion that such delay should necessarily result in termination of penalty proceedings: "[T]he [Senate] Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate *any* proposed penalty proceeding." S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) ("*Legis. Hist.*") (emphasis added). In *Rhone-Poulenc of Wyoming Co.*, the Commission noted that the cited language in the legislative history "bespeaks the overriding concern with enforcement." 15 FMSHRC 2089, 2092-93 & n.8 (Oct. 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995) (rejecting the operator's challenge to the Secretary's late-filed penalty petition) (citations omitted). Referring to the same language, the Tenth Circuit, quoting *Salt Lake County Road Department*, 3 FMSHRC 1714, 1716 (July 1981), noted the need to "balance considerations of procedural

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[31] The other case the majority uses as a basis of comparison is *Steele Branch*, 18 FMSHRC 6 at 13-14, in which the Commission excused an 11-month delay in assessing a penalty when the Secretary offered *no* reason whatsoever for the delay, but the Commission took judicial notice of the Secretary's unusually heavy caseload. Slip op. at 19. This indicates the Commission's extraordinary reluctance to vacate a penalty.

fairness against the severe impact of dismissal" and stated that the "'drastic course of dismissing a penalty proposal would short circuit the penalty process and, hence, a major aspect of the Mine Act's enforcement scheme.'" 57 F.3d at 984. Thus, contrary to our colleagues' position, we do not see how vacating the penalty under the circumstances present in this case would serve the deterrent purposes intended by the enforcement provisions of the Mine Act.

We also believe that our colleagues' reliance on other sections of the Mine Act's legislative history inappropriately compares Congress' views on penalty assessment delays and its views on the need for operators to promptly contest or pay penalties. For example, as the majority notes, the legislative history of the Mine Act does indicate that the right to *de novo* review of penalty proceedings was eliminated, in part, to reduce delays, and specifically noted the need to require operators to promptly contest penalty proposals. Slip op. at 21. However, these provisions relate to the delays that *operators* had used to avoid or defer payment of penalties, and not to the Secretary's enforcement activity. S. Rep. No. 95-181, at 45, *reprinted in Legis. Hist.* at 633 ("This right to a *de novo* hearing before a jury in the District Court has had the effect of encouraging operators to require enforcement of civil penalties in the district courts, thus delaying still further the actual payment of the penalties assessed.").

Moreover, our colleagues in the majority suggest that Congress would not have sanctioned a 17-month delay in proposing a penalty when an operator has only 30 days to contest it. Slip op. at 22. Such a comparison is misplaced, as the two involve dramatically different procedures. An operator deciding to contest a penalty simply makes a strategic choice as to whether it is better to pay the penalty or challenge it, and then notifies MSHA of its decision by checking a box on a form and mailing it to MSHA. *See* 30 U.S.C. § 815; 29 C.F.R. § 2700.26; Contest of Civil Penalty Proceedings, Nov. 9, 2001. On the other hand, to determine the amount of a special assessment, the Secretary must confirm the facts asserted in the citation and then weigh numerous factors. *See* 30 C.F.R. §§ 100.3(a), 100.4(b), and 100.5(b). In addition, in this case, as the judge found, it was prudent for the Secretary to wait to propose a penalty until the accident report and the special assessment form accompanying it were completed. 25 FMSHRC at 388. As the judge explained, "findings regarding the validity of the alleged violation, its gravity and Twentymile's negligence could have been impacted by the report and the form." *Id.* In short, there is simply no basis upon which to compare these two time frames, as the operator and Secretary proceed along two different tracks. As the Commission has previously stated, "[n]onsuiting the Secretary in such situations [when she has filed a late penalty proposal] presents quite a different situation from defaulting the tardy private litigant." *Salt Lake*, 3 FMSHRC at 1716.

Finally, we also agree that delays in the imposition of a penalty could send a disconcerting signal to the miners who depend on the Secretary to ensure their right to a safe and healthy work environment. Slip op. at 23. To nullify that penalty entirely, however, sends an even more ominous message by ending the "silence" of a delay with a decision that can only erode a miner's confidence in the agency's ability to ensure that violations of mandatory health and safety standards will be subject to an appropriate sanction. Whether the old saying that

"justice delayed is justice denied" is true in a given case may be open to question; the effect of justice denied outright is beyond question.

Accordingly, we would affirm the judge's conclusions, that, based on the facts of this case, the Secretary's delay in issuing a proposed penalty was reasonable.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Distribution

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1340
Pittsburgh, PA 15222

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021