FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2002-194
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners[1]

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), Administrative Law Judge Richard W. Manning determined that owner-operator Twentymile Coal Company ("Twentymile") had been properly cited for six violations of mandatory safety standards committed by its independent contractor, Precision Excavating, Inc. ("Precision"). 25 FMSHRC 352, 358-62 (July 2003) (ALJ). The Department of Labor's Mine Safety and Health Administration ("MSHA") had cited Precision for the same conditions described in the citations issued to Twentymile. *Id.* at 353. The Commission granted Twentymile's subsequent petition for discretionary review of the judge's decision. For the reasons set forth below, we reverse the judge's decision and vacate the citations issued to Twentymile.

I.

Factual and Procedural Background

Twentymile operates the Foidel Creek Mine, an underground coal mine in Routt County, Colorado. 25 FMSHRC at 352. Twentymile hired Precision to remove clay from the No. 2

[1] Commissioner Beatty participated in the consideration of this matter, but his term expired before issuance of this decision.

refuse pile, which was located on the surface area of the mine. *Id.* at 355. Precision operated a pan scraper and service truck to perform its duties at the refuse pile. *Id.* at 353. Twentymile did not own, operate, or maintain that equipment. *Id.*

On August 30, 2001, MSHA Inspector Michael Havrilla inspected the surface areas of the mine, including the No. 2 refuse pile. *Id.* at 355. During his inspection, the inspector observed Precision employees operating the service truck at the refuse pile. *Id.* at 356. At that time, Precision employees had been working at the refuse pile for about one week. Tr. 40. Inspector Havrilla inspected the service truck and concluded that he would issue five citations to Precision alleging the following violations: (1) a violation of 30 C.F.R. § 77.412 because the service truck had an inoperable pressure gauge on the air compressor; (2) a violation of 30 C.F.R. § 77.400(a) because there was a ten-by-ten inch opening on the compressor which would allow contact with the drive belts and pulley; (3) a violation of 30 C.F.R. § 77.1110 for failure to examine a fire extinguisher on the service truck at least once every six months; (4) a violation of 30 C.F.R. § 77.1103(a) because there were three unlabeled metal containers of gasoline on the service truck; and (5) a violation of 30 C.F.R. § 77.1103(a) because a plastic container of gasoline on the service truck did not meet National Fire Protection Association requirements. 25 FMSHRC at 356.

When Inspector Havrilla discussed the alleged violative conditions with Precision's lead man, he discovered that Twentymile had not examined Precision's equipment when the equipment was first brought onto the property. *Id.* The inspector decided to speak with Diane Ponikvar, a safety representative with Twentymile. *Id.* As the inspector was driving to the mine office, he observed that the diesel fuel tank of Precision's pan scraper was leaking, and he told the scraper's operator to shut down the equipment. *Id.* The inspector issued an additional citation alleging a violation of 30 C.F.R. § 77.404 to Precision because the scraper was being operated in an unsafe condition due to the leaking fuel tank. *Id.*

When the inspector arrived at the mine office, he informed Ms. Ponikvar of the conditions that he had observed and that he would be issuing the six citations to Precision. Tr. 37, 103. Ms. Ponikvar contacted Precision personnel and directed them to remove their equipment to the parking lot. 25 FMSHRC at 356; Tr. 37-38. She informed Precision employees that they would have to abate the citations and that Twentymile would examine the equipment before it would be allowed back on-site. 25 FMSHRC at 356; Tr. 37. The inspector then informed Ponikvar that he was issuing the same citations to Twentymile. 25 FMSHRC at 356; Tr. 103, 105. The inspector testified that he believed that it was appropriate to cite Twentymile in part in order to address a problem he perceived with contractor violations at the mine and because citing Twentymile would bring more attention to the violations. 25 FMSHRC at 359, 361; Tr. 33-35, 42; Gov't Ex. 2 at p. 20. Ms. Ponikvar testified that the inspector told her that he was citing Twentymile in order to teach it a lesson regarding its failure to inspect the equipment. 25 FMSHRC at 361; Tr. 105.

Twentymile challenged its six citations and the matter proceeded to hearing before Judge Manning. Twentymile and the Secretary of Labor entered into a number of stipulations. They stipulated that the issue before the judge was whether it was appropriate for the Secretary to cite Twentymile for the conditions described in the citations. 23 FMSHRC at 353. The parties further stipulated that if the judge determined that Twentymile had been properly cited, the parties agreed to the designations set forth in the citations, and that the penalties proposed by the Secretary were consistent with section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.*

The judge affirmed the six citations issued to Twentymile. *Id.* at 362. The judge reasoned that the Secretary did not abuse her discretion in citing Twentymile, based upon the inspector's belief that there was a problem with contractor violations at the mine and that citing Twentymile would bring more immediate attention to the problem. *Id.* at 359, 361. The judge determined that, although the inspector's enforcement decision was subjective rather than based on an objective, comprehensive analysis of contractor violations at the mine, such action did not rise to the level of arbitrary or capricious action sufficient to support a finding of abuse of discretion. *Id.* at 361. The judge reasoned that the inspector believed that the conditions needed to be brought to Twentymile's attention because they were obvious and he learned that the equipment had not been inspected by Precision or Twentymile. *Id.* at 359, 361.

In addition, the judge concluded that the citations fit within the first and fourth factors set forth in MSHA's enforcement guidelines used by inspectors to determine when an owner, in addition to an independent contractor, ought to be cited for the contractor's violation. *Id.* at 359-60 (citing III MSHA, *Program Policy Manual*, Part 45, 45 Fed. Reg. 44,494, 44,497 (July 1, 1980) ("Enforcement Guidelines")). As to the first factor, whether the owner-operator contributed to the violation by act or omission during the course of the independent contractor's work, the judge concluded that Twentymile contributed to the equipment violations by failing to inspect the equipment or to ensure that Precision inspected it. *Id.* As to the fourth factor, whether the owner had control over the condition requiring abatement, the judge concluded that Twentymile controlled the equipment by reserving the right to remove the equipment from the site and by inspecting other contractor equipment during safety audits. *Id.* at 360. Accordingly, the judge assessed civil penalties in the sum of $900, the amount proposed by the Secretary. *Id.* at 362.

Twentymile filed a petition for discretionary review challenging the judge's decision, which the Commission granted. In addition, Twentymile filed a request for oral argument. The Commission granted the request and heard oral argument on June 29, 2004.

II.

Disposition

A. Whether the Secretary May Issue Dual Citations under the Mine Act

Twentymile asserts that it should not be held liable for the violations committed by its independent contractor, Precision. T. Br. at 8-29. Twentymile argues that sections 3(d) and 104(a) of the Mine Act, 30 U.S.C. §§ 802(d) and 814(a), clearly provide that an operator is liable for only its own violations, and that court and Commission precedents holding that an owner-operator may be held liable for the violations of independent contractors are contrary to such statutory language.[2] *Id.* at 8-9; T. Reply Br. at 3-4. It maintains that the definition of "operator" set forth in section 3(d) of the Mine Act was expanded to include independent contractors in order to require that independent contractors be held liable for their own violations as "fully responsible operators." T. Br. at 9-10, 13, 15; Oral Arg Tr. 20, 60-61. The Secretary responds that she has the authority to cite an owner-operator, independent contractor or both for a violation by an independent contractor, and that her interpretation of the Mine Act is entitled to deference and should be accepted because it is a permissible statutory construction S. Br. at 5-6, 7-17.

Since passage of the Mine Act, the Commission and courts have consistently recognized that, in instances of multiple operators, the Secretary generally may proceed against an owner-operator, an independent contractor, or both, for violations by the independent contractor.[3] *See, e.g., Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991); *Old Ben Coal Co.*, 1

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[2] Section 3(d) of the Mine Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). Section 104(a) describes the manner in which the Secretary may issue a citation to an operator, stating in part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that *an operator* of a coal or other mine subject to this Act, has violated this Act, or any mandatory health or safety standard, . . . he *shall,* with reasonable promptness, *issue a citation to the operator*.

30 U.S.C. § 814(a) (emphasis added).

[3] Prior to passage of the Mine Act, the Commission and courts concluded that provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), generally permitted the Secretary to cite an owner-operator, independent contractor, or both, for violations by the independent contractor. *See Republic Steel Corp.*, 1 FMSHRC 5, 9-11 & n.13 (Apr. 1979); *Bituminous Coal Operators' Ass'n, Inc. v. Sec'y of Interior*, 547 F.2d 240, 246-47 (4th Cir. 1977).

FMSHRC 1480, 1483 (Oct. 1979); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998), 1998 WL 3613, **2. The Commission and courts have reached this conclusion by reading section 3(d) together with other enforcement provisions of the Mine Act[4] and by relying upon pertinent legislative history.[5] *See Old Ben*, 1 FMSHRC at 1481-83; *Cyprus*, 664 F.2d at 1119; *Brock v. Cathedral Bluffs Shale Oil Co.*, 976 F.2d 533, 535 (D.C. Cir. 1986). In so holding, courts have rejected the argument advanced by Twentymile in this proceeding that independent contractors were added to the definition of "operator" in section 3(d) of the Mine Act in order to "insure that the party controlling the work would be held *solely* responsible" for its violations. *Cyprus*, 664 F.2d at 1119 (emphasis in original); T. Br. at 9-10. Courts have explained that, by expanding the definition of operator to include independent contractors, "Congress was clearly concerned with the *permissive* scope of the Secretary's authority, not with the *mandatory* imposition of statutory duties on independent contractors." *Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 703 (3d Cir. 1979) ("*NISA")* (emphasis in original); *see also Cyprus*, 664 F.2d at 1119. We therefore conclude that Twentymile has not advanced a compelling reason for overturning a body of precedent that spans nearly twenty-five years.[6]

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[4] *See, e.g., Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 (4th Cir. 1981) (citing section 110(a) of the Mine Act, 30 U.S.C. § 820(a), which provides that "the operator of a . . . mine in which a violation occurs . . . shall be assessed a civil penalty by the Secretary.").

[5] We disagree with Twentymile's assertion that it is inappropriate to consult legislative history and that, in any event, the legislative history does not support dual citations. T. Br. at 12-14; T. Reply Br. at 6-9. The Commission and courts have recognized that consulting legislative history is appropriate as an aid to construction, even when the meaning of the statutory language is plain. *See, e.g., Jim Walter Res., Inc.*, 22 FMSHRC 21, 24 & n.5 (Jan. 2000); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44, 46 (D.C. Cir. 1990). Moreover, courts have relied upon the subject legislative history as support for the conclusion that an operator may be cited for the violations of its independent contractor. *Cyprus*, 664 F.2d at 1119; *Cathedral Bluffs*, 796 F.2d at 535.

[6] Be that as it may, we are mindful of the fact that the same quarter-century following passage of the 1977 Act has provided independent contractors such as Precision more than sufficient notice of their responsibilities to provide their miners with a safe and healthful workplace in conformance with the Act and the mandatory safety and health standards. Recognition of that fact must necessarily be considered in determining the appropriate allocation of liability for violations committed by contractors while performing services on mine property. Thus, for example, the assumption made by the court in *Cyprus*, 664 F.2d at 1119, that mine operators are in a better position than contractors to know the compliance responsibilities under the Act and the standards, no longer applies to a contractor such as Precision which has extensive experience under the Mine Act.

B. Whether the Secretary Has Unreviewable Discretion

The Secretary argues that her decision to cite Twentymile for Precision's violations is essentially unreviewable by the Commission because there is no meaningful standard against which to review her exercise of discretion. S. Br. at 6, 17-23. Twentymile responds that the Mine Act authorizes the Commission to review the Secretary's exercise of discretion. T. Reply Br. at 13-15. Consistent with our precedent, we reject the Secretary's argument. *Old Ben*, 1 FMSHRC at 1484; *W-P Coal Co.*, 16 FMSHRC 1407, 1410-11 (July 1994).

In asserting that she has unreviewable enforcement authority, the Secretary relies upon cases such as *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985), and its progeny that involve preclusion of review under section 701(a)(2) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). As the Commission has previously recognized, section 507 of the Mine Act[7] expressly provides that section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable.

Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion.[8] To the contrary, the breadth of the Commission's review is broad. The Commission, in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).[9]

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[7] Section 507 of the Mine Act provides that, "Except as otherwise provided in this Act, the provisions of . . . sections 701-706 of [5 U.S.C.] shall not apply to the making of any order, ... or decision made pursuant to this Act, or to any proceeding for the review thereof." 30 U.S.C. § 956.

[8] Section 104(h) of the Mine Act further detracts from the Secretary's argument that she has unreviewable enforcement discretion. Section 104(h) provides that any citation or order issued under that section "shall remain in effect until modified, terminated or vacated by the Secretary or [her] authorized representative, *or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.*" 30 U.S.C. § 814(h) (emphasis added).

[9] Issues involving the question of whether the Commission may review the Secretary's enforcement discretion pertain to the Commission's jurisdiction, and the Commission is not required to defer to the Secretary's interpretation of Commission jurisdiction. *W-P*, 16 FMSHRC at 1410; *Drummond Co.*, 14 FMSHRC 661, 674 n.14 (May 1992); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).

The Commission has explained that these powers were given to the Commission as the "'ultimate administrative review body'" under the Act in order to "enable [the Commission] to 'develop a uniform and comprehensive interpretation of the law,' providing 'guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.'" *Old Ben*, 1 FMSHRC at 1484 (citations omitted). As the Commission has reasoned, these "provisions demonstrate that the Commission was intended to play a major role under the [Mine] Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis." *Id.* Given the Commission's unique and independent role under the Mine Act, we reaffirm our prior holdings and conclude that the Commission's review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion. *Id.*; *W-P*, 16 FMSHRC at 1411.

C. Whether the Secretary Abused Her Discretion in Citing Twentymile

Twentymile maintains that the Secretary abused her discretion in citing Twentymile – in addition to its independent contractor Precision – for the six violations committed by Precision. T. Br. at 19-29. Twentymile argues that the Secretary exercised her discretion in such a way as to deviate from her own policy guidelines for taking enforcement actions against independent contractors, that she failed to consider the proper factors in determining whether to cite a production-operator for an independent contractor's violation, and that the MSHA inspector did not conduct a proper investigation of whether independent contractor violations were a serious problem at the mine before issuing the citations. The Secretary answers by contending that issuance of the citations to Twentymile was consistent with MSHA's Enforcement Guidelines, *supra* at 3, and that Twentymile has otherwise failed to meet its burden of showing an abuse of discretion. S. Br. at 24-30.

The Commission has held that the general test to be used in determining whether a production-operator has improperly been cited for violations committed by its independent contractor is whether the Secretary has committed an "abuse of discretion" in issuing such citations.[10] *Mingo Logan,* 19 FMSHRC at 249; *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998). In applying this general test, the Commission must determine whether the Secretary's decision to cite the production-operator for violations committed by its independent contractor "was made for reasons consistent with the purpose and policies" of the Mine Act. *Old Ben,* 1 FMSHRC at 1485; *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy*, 20 FMSHRC at 5.

[10] As explained by the Commission, "[a]buse of discretion may be broadly defined to include errors of law." *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623, n.6 (Oct. 1991). Furthermore, "the choice of sanction is largely within an agency's discretion; the reviewing court may overturn it only if it is unwarranted in law or unjustified in fact." *Id.* (citation omitted). "'Abuse of discretion' is a phrase which sounds worse than it really is." *Id.* (citation omitted).

Over the years, the Commission has considered a number of factors on a case-by-case basis in determining whether the Secretary's citation of a production-operator is "consistent with the purpose and policies" of the Mine Act. The principal factors are summarized below:

(1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. *E.g., Phillips*, 4 FMSHRC at 553; *Bulk*, 13 FMSHRC at 1360-61; *Extra Energy*, 20 FMSHRC at 5. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns. *Calvin Black Enter.*, 7 FMSHRC 1151, 1155 (Aug. 1985);

(2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. *E.g., Extra Energy*, 20 FMSHRC at 5-6. A closely related factor is "the nature of the task performed by the contractor." *Calvin Black*, 7 FMSHRC at 1155;

(3) Whether the production-operator contributed to the violations committed by the independent contractor. *E.g., Calvin Black*, 7 FMSHRC at 1155; and

(4) Whether the production-operator's actions satisfy any of the criteria set forth in the Secretary's Enforcement Guidelines.[11] "In addition [to the factors above], the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied." *Extra Energy*, 20 FMSHRC at 5. The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: "(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." 45 Fed. Reg. at 44,497. As explained below, the four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

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[11] The Enforcement Guidelines were issued by the Secretary in 1980 as an appendix to regulations requiring that independent contractors provide certain information to production-operators before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. 45 Fed. Reg. at 44,494, 44,497. The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operators or independent contractors. *E.g., Mingo Logan*, 19 FMSHRC at 250-251.

Based upon our review of the record in this case, we conclude that the Secretary's decision to cite Twentymile for the violations committed by its independent contractor Precision was not "consistent with the purpose and policies" of the Mine Act and constituted an abuse of discretion. Consideration of the various factors outlined above establishes that there was an insufficient basis in the record for issuing the citations to the production operator in addition to the independent contractor.

1. Which Entity Was in the Best Position to Prevent the Violations

The record shows that the independent contractor Precision was in the "best" position to prevent the violations in question.[12] Precision was hired because of its special expertise in working with refuse piles (Tr. 69-71, 85) and is an experienced independent contractor that is familiar with MSHA's safety standards. Tr. 117. Importantly, the violations in question all involved equipment owned and maintained solely by Precision. 25 FMSHRC at 353. Moreover, Precision carried out its work without direct or continuing supervision from Twentymile (Tr. 71, 85). Under the terms of the contract between Precision and Twentymile, Precision was required to comply with all MSHA safety and health standards. T. Ex. 26; Tr. 71-72. In addition, Twentymile provided a safety guide to Precision that included specific provisions requiring a preshift examination of all equipment and the repair of all safety defects. T. Ex. 27; Tr. 73, 121; 25 FMSHRC at 357. The safety guide also contained provisions relating to each of the six cited conditions and required Precision to correct the conditions before the equipment was operated at the mine. 25 FMSHRC at 357.

As the Commission stated in *Phillips*, where "[l]arge, skilled contractors were retained for their expertise in an important and familiar facet of mine construction" and the contractor "created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring," the Secretary's decision to proceed against the production operator is inconsistent with the purpose and policies of the Act. 4 FMSHRC at 553 (dismissing the production operator as a party and substituting the independent contractor in its place). "'In many circumstances . . . it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to

[12] The dissenting opinion does not argue, and cannot argue based on the record, that Twentymile was in the "best" position to prevent the violations. Instead, it maintains only that Twentymile was in an "excellent" position to affect safety (slip op. at 22), which is not the test used by the Commission. *See Extra Energy*, 20 FMSHRC at 5 ("whether the operator is in the best position to affect safety"). As demonstrated below, the record shows that Precision was clearly in the "best" position to affect safety and prevent the violations in this case. Moreover, contrary to the dissenting opinion (slip op. at 22 n.3), because determining whether the operator was in the "best" position to prevent the violations is just one of the factors to be considered by the Commission, a conclusion that an independent contractor was in the "best" position does not, by itself, mean that the Secretary is foreclosed from issuing dual citations in appropriate circumstances.

eliminate the hazard and prevent it from recurring.'" *Id.* (quoting *Old Ben*, 1 FMSHRC at 1486).

In *Calvin Black,* the Commission reiterated the principles expressed in *Phillips* that should guide the Secretary in determining the party against whom she should proceed. 7 FMSHRC at 1155.[13] Those factors include "the size and mining experience of the independent contractor [and] the nature of the task performed by the contractor," in addition to which party contributed to the violation and was in the best position to eliminate the hazard and prevent its recurrence.[14] *Id.*

Here, Precision was an experienced contractor carrying out customized mining activities (removal of clay from the refuse pile) and performing those duties autonomously. The violations all involved Precision's equipment. 25 FMSHRC at 353. Precision was familiar with the Mine Act and MSHA's regulations, and Twentymile had favorable experience with Precision in this regard.[15] Tr. 85. These factors all support citing the contractor, Precision, and holding it solely accountable for compliance with the Mine Act.

[13] We note that the facts in this case are readily distinguishable from those in *Calvin Black*, where the Commission ruled that the production operator should be liable for safety standard violations where the independent contractor's employees worked at the mine only intermittently, the employees (geologists) lacked experience in working in mines, and the employees were generally unfamiliar with MSHA's standards. 7 FMSHRC at 1155-56.

[14] While our dissenting colleague characterizes *Phillips* and *Calvin Black* as "cases that the Commission has declined to follow for at least the past ten years" (slip op. at 21), those decisions have not been overruled, and the propositions for which they are cited in our opinion are still valid. Although both cases were decided when the Secretary was following a policy of citing "owners only" for violations committed by their independent contractors, their general discussions of factors to be considered in determining whether an owner-operator should be cited for its independent contractor's violations are still applicable today in determining whether the Secretary has abused her discretion in citing an owner-operator or production operator for its independent contractor's violations. Here, we rely on portions of the decisions in *Phillips* and *Calvin Black* as setting forth some of the factors to be considered in determining whether an abuse of discretion occurred.

[15] The record in this case establishes that Precision had an excellent compliance and accident record. For the two-year period prior to August 30, 2001, Precision had received no citations from MSHA despite the fact that it had worked for Twentymile and other mines during that period. 25 FMSHRC at 358. During the four-year period preceding August 2001, Precision had no reportable injuries. *Id.*

2. Extent of the Production Operator's Involvement in Relevant Activities

Twentymile did not have a significant, continuing involvement in the work specifically being performed at the refuse pile – the stripping and hauling of clay. Although Twentymile did have a substantial, continuing involvement with the underground operations and certain other surface areas at its Foidel Creek Mine, Precision was hired to perform the work at the No. 2 Refuse Pile because of its special expertise with refuse piles.[16] Tr. 69, 74, 85. Because of the nature of the tasks being performed, Precision was responsible for providing the equipment to be used at the refuse pile and for operating it. T. Ex. 26 (Ex. C). No Twentymile employees worked at or near the refuse pile (Tr. 85-86), although Dave Wallace, Twentymile's supervisor of surface operations, testified that he checked on Precision's progress at the refuse pile once each day or day and one-half. Tr. 85. While Twentymile regularly performed general safety audits at the mine that would at some point include equipment at the refuse pile (Tr. 120), the contract between Twentymile and Precision provided that Precision was responsible for complying with all applicable safety requirements. T. Ex. 26; Tr. 71-72. There was no evidence that Twentymile ignored the defects complained of or was directly involved in creating the violative conditions.

In the context of the relationship between the parties, Twentymile's involvement appears to be nothing more than prudent oversight of the contractor's compliance with the contract for services at the refuse pile, including the safety and health provisions of the contract. Punishing a production operator for such steps taken to "ensure" contractor compliance is contrary to the intent of the Mine Act and our precedent in these cases. *See, e.g., Phillips,* 4 FMSHRC at 553. The Secretary asserts that Twentymile should be liable for failing to either inspect the equipment or ensure that Precision would do so. Oral. Arg. Tr. 35-38. But there is no standard requiring production operators to inspect each piece of equipment every time it enters a mine site, and as will be further discussed under factor 3, *infra*, Twentymile did, through the contract, require that Precision inspect the equipment. Given Twentymile's limited involvement in the activities at the refuse pile, we cannot say that this factor supports the decision to cite Twentymile in this case.

3. Whether the Production Operator Contributed to the Violations

The record establishes, foremost, that Twentymile did not directly contribute to the violations that are involved in these citations. The violations involved Precision's equipment at the refuse pile, and no Twentymile employees were involved in any way in operating or

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[16] The dissenting opinion suggests that because Twentymile had substantial involvement with the underground operations and certain other surface areas of the mine, it should *automatically* be treated as having substantial involvement with the refuse pile. Slip op. at 22-23. However, where a production operator contracts with an independent contractor to perform specified work in a discrete area of the mine site (such as the refuse pile here) and the production operator's employees will not be subjected to hazards in that area, the extent to which the production operator should be regarded as involved with activities within that area should be determined on a case-by-case basis.

maintaining that equipment. Tr. 85-86. There is no other evidence that Twentymile took any action that directly contributed to the violations.

Moreover, the record does not establish that Twentymile contributed to the violations through any significant omission on its part. In order for a production operator to contribute to a violation through an omission, that omission must be a significant one. Whenever an independent contractor commits a violation, there is almost always some action that a production operator could theoretically have taken that might have prevented the violation. Without a "significant" threshold, the production operator could be found to have contributed to the violation in virtually every situation, and this contribution factor essentially would be a meaningless test. See the discussion regarding satisfaction of the Secretary's Enforcement Guidelines, *infra*, at 12-14.

Although the Secretary argues that Twentymile contributed to the violations through omission by not having inspected Precision's equipment before it entered the mine site or subsequently (S. Br. at 28-29), for the following reasons, we conclude that this does not constitute a significant omission under the circumstances of this case.

As an initial matter, it is important that MSHA's regulations nowhere require that a production operator inspect an independent contractor's equipment before it enters the mine site. In the absence of any such explicit requirement, we are reluctant to impose one.[17] Accordingly, the fact that Twentymile did not inspect Precision's equipment before it entered the mine site each day does not, by itself, mean that Twentymile contributed to the violations through a significant omission.[18]

In *Extra Energy*, 20 FMSHRC at 6, the Commission provided guidance regarding the measures a production operator should take in order not to contribute to an independent contractor's violation. In that case, a security guard employed by an independent contractor died from carbon monoxide poisoning because the car in which he was sitting at the mine site during his watch was defective. The Commission ruled that the production operator contributed to the equipment violation because it "took no measures to ensure that the cars were safe, either by inspecting them itself or by requiring that [the independent contractor] did so." *Id*. Stated somewhat differently, we believe that the appropriate test in such a case is whether the

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[17] Significantly, Precision's service truck entered the mine site daily to service its equipment at Twentymile's site, as well as at other locations (Tr. 21, 86), indicating that it exercised complete control over its equipment. Thus, Precision was in the best position to inspect its equipment to ensure compliance with MSHA's regulations.

[18] In addition, Twentymile undertook general safety audits at the mine that would have eventually included the equipment at the No. 2 Refuse Pile. Tr. 120. Since Precision had been working at the mine for only one week prior to MSHA's issuance of the citations (25 FMSHRC at 355; Tr. 62-63), Twentymile had not yet conducted an inspection at the refuse pile.

production operator took reasonable steps under the circumstances to ensure that the independent contractor's equipment is safe, either by inspecting the equipment itself or by requiring that the independent contractor conduct inspections of the equipment.

In the instant case, we conclude that Twentymile took reasonable measures to ensure that Precision inspected its equipment and complied with MSHA's safety standards. The contract between Precision and Twentymile required that Precision comply with MSHA's safety standards. T. Ex. 26; Tr. 71-72. Likewise, the safety guide that Twentymile gave to Precision explicitly required that Precision conduct preshift examinations of its equipment and correct any safety defects. T. Ex. 27; Tr. 121-122. Moreover, Precision was advised that it was subject to safety audits and inspections to ensure its compliance with the Mine Act (Tr. 120), and Twentymile exercised reasonable diligence and oversight by having mine management regularly check on the refuse pile project. Tr. 85. We conclude that these measures constituted a reasonable approach to ensuring that the equipment was safe. Therefore, Twentymile did not contribute, through omission, to the violations involving Precision's equipment.

Moreover, we conclude that the reasoning relied upon by the ALJ in finding that Twentymile had not done enough to ensure the safety of the equipment does not withstand scrutiny. The ALJ agreed that Twentymile had taken "important steps" to ensure that the equipment in question had been inspected. 25 FMSHRC at 360. However, he believed that Twentymile employees should have additionally asked Precision employees whether the equipment had been inspected when the equipment entered the mine each day or after it arrived at the refuse pile. *Id*. Given the clear requirement that Precision conduct preshift examinations of its equipment, we disagree that it was necessary for Twentymile employees to ask Precision employees additionally whether the equipment had been inspected each time that the equipment entered the mine site or after it reached the refuse pile. Contrary to the ALJ's position that a production operator must necessarily "follow-through" on a requirement that an independent contractor inspect its equipment (25 FMSHRC at 360), *Extra Energy* provides only that a production operator must "ensure that the [equipment was] safe, either by inspecting the [independent contractor's equipment] itself or by requiring that [the independent contractor] did so." 20 FMSHRC at 6. It was reasonable and sufficient for Twentymile, through the contract and the safety guide, to require expressly that Precision carry out such inspections on its own.

4. Whether Any Criteria in the Secretary's Enforcement Guidelines Were Satisfied

In addition to the three factors above that traditionally have been applied by the Commission in cases where both production operators and independent contractors are involved, the Commission has also considered whether any of the four criteria in the Secretary's non-binding Enforcement Guidelines have been satisfied. *Extra Energy*, 20 FMSHRC at 5. We also examine the criteria in this case because the MSHA inspector relied upon them in issuing the

citations (Tr. 35) and the Secretary relied upon them on appeal (S. Br. 26-27, 29-30).[19]

Before discussing the four individual criteria in the Enforcement Guidelines, we reiterate that a particular criterion should be found to be satisfied only if a significant threshold has been reached. In other words, a criterion is not satisfied unless the production operator's involvement in the violation extends beyond the minimal level that would be found with regard to virtually every independent contractor violation. For example, as discussed above, in virtually every case it would be possible to find some action that the production operator could have taken that might have prevented the independent contractor's violation, thereby arguably showing that the production operator contributed to the violation through omission. Similarly, the fourth criterion is whether the production operator had "control" over the actions of the independent contractor. Because virtually every agreement between a production operator and independent contractor will give the production operator some minimal control over the independent contractor's activities, e.g., the ability to order the independent contractor to leave the production operator's property, the degree of control must also be significant in order to satisfy that criterion.[20] If the guidelines were construed so broadly as to be satisfied with regard to essentially every independent contractor violation, the test based on the four criteria would be meaningless. Accordingly, we conclude that a particular criterion is satisfied only if the production operator's involvement is in some way "significant," i.e., it exceeds the minimal level that would be present with regard to virtually every independent contractor violation.

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[19] While we have acknowledged that the Enforcement Guidelines are not binding on the Secretary, slip op. at 8 n.11, we cannot agree with our dissenting colleague's refusal to apply them, slip op. at 23, in light of MSHA's and the Secretary's reliance on them. Further, the "broad leeway" that the dissent would accord the Secretary to issue citations to mine operators, slip op. at 21, becomes boundless discretion (and unreviewable) absent consideration of the Secretary's Enforcement Guidelines to review the Secretary's exercise of enforcement discretion. More significantly, mine operators must be able to rely on the Enforcement Guidelines in guiding their conduct vis a vis their contractors.

[20] *In Bulk*, 13 FMSHRC at 1360, the Commission found that the Secretary had satisfied the criterion in citing the independent contractor rather than its subcontractors where the independent contractor had "substantial control" over the condition requiring abatement. Our use of "substantial" in that case correlates to our use of "significant" in other cases and our use of that term in this case.

The dissenting opinion states that Twentymile had "sufficient" control over the conditions needing abatement in that Twentymile reserved the right to remove violative equipment from its property. Slip op. at 24. By using the word "sufficient," the dissenting opinion recognizes that the extent of the production operator's control must exceed some threshold before the control criterion can be satisfied. Our establishment of the "significant" threshold is entirely consistent with this proposition.

a. Whether the production operator contributed either to the violations in question or to their continued existence

As discussed above with regard to the factors separately considered by the Commission (slip op. at 8-13), we have concluded that Twentymile took reasonable measures to ensure that Precision inspected its equipment and complied with MSHA's safety standards. Accordingly, Twentymile did not contribute to Precision's violations either by direct action or through any significant omission on its part. For the same reasons, the record does not indicate that Twentymile contributed in any significant way to the continued existence of the violations in question.[21] Thus, the first and second criteria of the Enforcement Guidelines have not been met by the Secretary.

b. Whether the production operator's employees were threatened by the hazards

The record further indicates that Twentymile's employees were not threatened in any significant way by the safety hazards associated with the violations in question. The workers at the refuse pile were exclusively Precision employees, and testimony established that no Twentymile employees worked near the refuse pile. Tr. 85-86. Although the inspector contended that Twentymile's fire brigade might some day be required to extinguish a fire resulting from Precision's equipment (Tr. 26), this speculative possibility alone is not sufficient to satisfy this criterion. As the ALJ found, "[Twentymile's] employees were not exposed to the hazards presented by the violations in any meaningful sense . . . . Moreover, a production-operator would always respond to a fire or other emergency involving a contractor's equipment. Under the Secretary's interpretation, virtually all contractor violations would expose the production-operator to citations under this factor." 25 FMSHRC at 360, n.2. On appeal, the Secretary does not challenge this finding.

c. Whether the production operator had significant control over the condition in question

Twentymile had no significant or special control over the conditions requiring abatement in this case. Indeed, the ALJ found that "Twentymile did not have direct control over the cited equipment." 25 FMSHRC at 360. Although, under its contract with Precision, Twentymile had the right to order Precision to remove its equipment from the mine site, there is no indication that this provision gave Twentymile any rights that any other production operator would not typically have had. In *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871 (Aug. 1984), *rev'd*, 796 F.2d 533

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[21] Moreover, the MSHA inspector admitted on cross-examination that, in applying the first two criteria under the Enforcement Guidelines, he concluded that Twentymile had contributed to the violations and their continued existence simply because it had failed to prevent them. Tr. 57-58. He further conceded that, pursuant to that approach, the first two criteria "would apply to virtually every contractor situation . . . ." *Id.* The inspector's testimony emphasizes the need to apply the criteria in such a way that the test is meaningful and only significant actions or omissions meet the criteria.

(D.C. Cir. 1986), the Commission concluded that similar standard contract language (reserving the right to monitor work and to terminate the contract if the independent contractor disregarded applicable laws) was not sufficient to satisfy the control criterion in the Secretary's Enforcement Guidelines:[22]

> The rights reserved by [the production operator] are basic contractual rights universally reserved in well-drafted contracts in this industry and others. To hold that the mere presence of such language satisfies the criterion of "control" under the Secretary's independent contractor enforcement guidelines, would vitiate the very essence of the guidelines. The plain fact is that if the contractual provisions in this case constitute "control" for citation purposes, every production-operator could be cited for every contractor violation. This result has long been criticized as ineffective enforcement of mine safety statutes and was ostensibly abandoned by the Secretary upon the adoption of his new policy. [Citations omitted.]
>
> We hold that before a production-operator can be deemed to "control" a contractor's activities sufficient to justify the issuance of a citation to it for a contractor's violation, some functional nexus, beyond the contractual nexus reflected here, must be demonstrated linking the production-operator's involvement with the contractor's violation.

6 FMSHRC at 1876.

If the Secretary were found to have met the control criterion with regard to Twentymile in this case based on the contractual right to remove Precision's violative equipment, then virtually every production operator could automatically be found liable for its independent contractor's violations, thereby rendering the four-criteria test essentially meaningless. Accordingly, the fourth criterion has not been met in this case and cannot provide a basis for upholding the Secretary's action.

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[22] The Commission's decision was subsequently overturned on appeal because the D.C. Circuit concluded that the Commission had improperly applied the Enforcement Guidelines as "binding norms." *Cathedral Bluffs*, 796 F.2d at 538-39. Although the D.C. Circuit ruled that the Commission cannot apply the Enforcement Guidelines as though they are regulations, the court's decision did not prohibit the Commission from considering the criteria as factors to be examined in determining whether the Secretary has abused her discretion, and the Commission has considered them in this manner. *E.g., Extra Energy*, 20 FMSHRC at 5. Accordingly, the Commission's reasoning in *Cathedral Bluffs*, 6 FMSHRC 1871, regarding how individual criteria should be applied remains valid today.

5. The Additional Rationale Relied Upon By the MSHA Inspector

The specific rationale given by MSHA inspector Havrilla for citing Twentymile in this case provides no additional basis for upholding the citations. According to the inspector, he issued the citations to Twentymile, as well as to Precision, on August 30, 2001, because he believed that there was a "serious problem" with contractor violations at the Foidel Creek Mine. Tr. 35. He primarily based his conclusion that there was a serious problem on the number of violations he found and the fact that the equipment had not been inspected. *Id.* He further stated that he believed that the criteria in the Enforcement Guidelines had been satisfied. *Id.*

To the extent that the inspector issued the citations to Twentymile as well as Precision because of the number of violations and the absence of inspections, the question to be resolved remains whether the Secretary's action was "consistent with the purpose and policies of the Act."[23] That question hinges upon an analysis of the factors traditionally applied by the Commission. As discussed above, that analysis shows that issuance of the citations to Twentymile was unwarranted in this case. Thus, the inspector's subjective conclusion that there was a "serious problem" with independent contractor violations at the mine is not an independent justification for citing the production operator in this case.

* * *

In summary, we conclude that none of the factors traditionally applied by the Commission in determining whether a production operator should be cited for its independent contractor's violations, including the criteria in the Enforcement Guidelines, support the issuance of the citations to Twentymile in this case.[24] Moreover, the MSHA inspector's additional rationale for

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[23] To the extent that the inspector may have believed that there was an increasing trend of contractor violations at the Foidel Mine, the record indicates that the inspector did not conduct an analysis of recent contractor violations at the mine before issuing the citations. Tr. 52. In addition, for the two-year period preceding August 30, 2001, Precision – the independent contractor hired by Twentymile – had received no citations from MSHA despite the fact that it had previously worked for Twentymile and other mines during that period. 25 FMSHRC at 358. For the preceding four-year period, Precision had no reportable injuries. *Id.* Moreover, the record does not otherwise indicate the existence of a significant problem with contractor violations at Twentymile's mine within the past two years. Because the inspector's apparent belief that a "serious problem" with independent contractor violations existed was not supported by an objective analysis, it is insufficient, particularly in light of the foregoing analysis of the factors traditionally applied by the Commission, to support the issuance of citations to Twentymile.

[24] The cases cited by our dissenting colleague for the proposition that our decision in this case is inconsistent with longstanding Commission precedent are all distinguishable. In *W-P*, the Commission concluded that, because of W-P's "substantial" involvement in numerous activities at its mine, it should also be liable for its production contractor's violations. 16 FMSHRC at

issuing the citations to Twentymile does not provide an independent basis for this action. Based on the analysis set forth above, we conclude that the Secretary's action in issuing citations to Twentymile for the violations of Precision in this case was not "consistent with the purpose and policies" of the Mine Act, was not supported by substantial evidence, and therefore constituted an abuse of discretion.

III

Conclusion

For the foregoing reasons, we reverse the judge's decision and vacate the citations issued to Twentymile.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

1411. That case did not involve an independent contractor hired to perform a specified, discrete task as does this case. In both *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989), and *Mingo Logan*, 19 FMSHRC at 250, the Commission found that the production operator's employees were exposed to hazards caused by the independent contractor's violations – a situation unlike this case. In *Bulk*, the production operator (BethEnergy) was *not* issued citations for violations at its mine. Instead, the issue was whether Bulk, BethEnergy's independent contractor, should be liable for violations committed by individual truck drivers who were deemed to be its subcontractors. 13 FMSHRC at 1356, 1360-61. Finally, in *Extra Energy*, the Commission held that the production operator was properly cited for its independent contractor's violations where the production operator took no steps to either inspect the vehicle in question or require, as Twentymile did here, that the independent contractor inspect it. 20 FMSHRC at 6.

Commissioner Jordan, concurring and dissenting:

I concur with the conclusion of my colleagues in the majority that we need not overturn precedent holding that, under the Mine Act, the Secretary of Labor may properly cite an owner-operator, independent contractor, or both for a violation of an independent contractor. In addition, I concur with my colleagues that the Commission may review the Secretary's enforcement decision in citing an operator. However, I disagree with the majority's conclusion that the Secretary abused her discretion in issuing the subject citations to Twentymile.

The majority has dramatically departed from longstanding Commission precedent in its consideration of whether the Secretary abused her discretion in citing Twentymile. During the past twenty years, the Commission has not vacated the Secretary's enforcement decision to cite an owner-operator for an independent contractor's violation.[1] *See, e.g., Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989); *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994); *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998).

The Commission has affirmed the Secretary's enforcement decisions to cite an owner-operator for contractor violations in recognition of the liability scheme of the Mine Act, which places responsibility for violations at a mine on the owner-operator of the mine whether those violations were committed by the operator's employees, agents, or contractors. *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359 (Sept. 1991); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997), *aff'd*, 133 F.3d 916, 1998 WL 3613 (4th Cir. 1998) ("MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations . . . that occur at the mine site, whether committed by one of its employees, or an employee of one of its contractors."). The owner-operator's fault may be taken into account only in the context of assessing a civil penalty based upon the operator's negligence. 30 U.S.C. § 820(i); *Int'l Union, UMWA v. FMSHRC*, 840 F.2d 77, 83-84 & n.13 (D.C. Cir. 1988) (noting that while the Mine Act establishes an operator's liability without regard to fault, fault may be considered in the context of penalty assessment). Long-accepted policy reasons supporting citing an owner-operator for contractor violations include the fact that an owner is generally in continuous control of conditions at the entire mine; the owner is more likely to know federal health and safety requirements; and the owner should not be able to evade responsibility for such requirements by using independent contractors. *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119-20 (9th Cir. 1981).

In affirming the Secretary's decisions to cite-owner operators, the Commission has also been guided by the recognition of the discretion afforded the Secretary in making enforcement

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[1] It appears that the Commission last affirmed the vacation of a citation issued to a production-operator in circumstances in which the Secretary had also issued an identical citation to an independent contractor in *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871, 1872-1877 (Aug. 1984), *rev'd,* 796 F.2d 533, 535 (D.C. Cir. 1986). The Commission's decision was reversed on appeal because the Commission had erroneously considered as binding the Secretary of Labor's Enforcement Guidelines. *Brock v. Cathedral Bluffs*, 796 F.2d at 537-39.

decisions. In *Cathedral Bluffs*, the court noted that "courts have traditionally been most reluctant to interfere" with an agency's exercise of enforcement discretion, and that "policies underlying that restraint extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the . . . Commission." 796 F.2d at 538. Referring to that precedent, the Commission has stated that "[c]ourt precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion." *Consolidation Coal*, 11 FMSHRC at 1443 (citing *Brock v. Cathedral Bluffs*, 796 F.2d at 538). For the past twenty years, the Commission has exercised such restraint in reviewing the Secretary's enforcement decisions in recognition of the Secretary's "wide" enforcement discretion. *W-P*, 16 FMSHRC at 1411; *Bulk*, 13 FMSHRC at 1359-60.

An owner-operator cannot avoid liability for independent contractor violations at its mine unless the Secretary abused her discretion in citing the owner-operator. *W-P*, 16 FMSHRC at 1411; *Mingo Logan*, 19 FMSHRC at 249-50. Twentymile "bears a heavy burden" in proving that the Secretary abused her discretion by citing it. *Mingo Logan*, 19 FMSHRC at 249 n.5; *Extra Energy*, 20 FMSHRC at 5. In cases in which the Commission has reviewed the Secretary's decision to cite an operator, the Commission has repeatedly recognized that it may find an abuse "*only if there is no evidence to support the decision* or if the decision is based on a misunderstanding of the law." *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (emphasis added).

In evaluating the evidence supporting the Secretary's decision to cite an operator, the Commission has considered various factors, including:

> the operator's day-to-day involvement in the mine's operations (*Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk Transp.*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (Oct. 1979)).

Extra Energy, 20 FMSHRC at 5.

While the majority recognizes the first part of the Commission's test, that an abuse of discretion may include errors of law (slip op. at 7 n.10), it fails to mention that "[a] litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision." *Extra Energy*, 20 FMSHRC at 5 (citing *Mingo Logan*, 19 FMSHRC at 249-50 n.5).

In addition, the majority raises the threshold of the evidence necessary to support the Secretary's enforcement decision. For instance, while the Commission has considered "the operator's day-to-day involvement in the mine's operations" (*Extra Energy*, 20 FMSHRC at 5 (citing *Mingo Logan*, 19 FMSHRC at 250); *W-P*, 16 FMSHRC at 1411), the majority has considered "*[w]hether, and to what extent,* the production operator had a day-to-day involvement

in the activities in question." Slip op. at 8 (emphasis added). In *W-P*, the Commission affirmed a citation issued to a owner-operator for a citation alleging a failure to maintain a bathhouse floor "even though an independent contractor operated the mine," and was contractually responsible for controlling the mine and complying with mine safety and health laws. *Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1408. In considering whether the owner-operator was "sufficiently involved with the mine" to support the Secretary's decision to proceed against it, the Commission did not narrow its consideration to the operator's involvement with maintenance of the bathhouse floor. Rather, it considered that the owner-operator was involved in such general activities as preparing the mine map, calculating mining projections, visiting the mine to "discuss production and other matters," and waiving fees owed by an independent contractor. *W-P*, 16 FMSHRC at 1411.

Moreover, the majority bases its conclusion on a Commission decision subsequently reversed by the D.C. Circuit, and also relies heavily upon cases that the Commission has declined to follow for at least the past ten years. First, try as they might, my colleagues fail to successfully resuscitate the Commission's decision in *Cathedral Bluffs*, 6 FMSHRC 1871, which was overturned by the D.C. Circuit. *Cathedral Bluffs*, 796 F.2d at 537-39. In fact, the majority's inflexible adherence to the Secretary's Enforcement Guidelines is precisely what the D.C. Circuit cautioned against when it referred to "[t]he four criteria which the Commission's decision requires the Secretary to observe so rigidly." 796 F.2d at 538. In addition, the majority repeatedly cites *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982), and *Calvin Black Enter.*, 7 FMSHRC 1151 (Aug. 1985) regarding principles that "should guide the Secretary in determining the party against whom she should proceed." Slip op. at 10; *see also* slip op. at 7-11. In 1994, the Commission distinguished *Phillips*, explaining that the decision "was directed to the Secretary's earlier policy of pursuing only owner-operators for their contractors' violations" and that since that time the Secretary's "policy has been broadened to include pursuit of independent contractor-operators in some instances." *W-P*, 16 FMSHRC at 1410; *see also Cathedral Bluffs*, 6 FMSHRC at 1873 (stating that the "rationale . . . relied on to vacate the citation at issue in *Phillips* [was] not relevant" in part because that citation had been issued as a result of the Secretary's "'owners-only' policy."). In *Calvin Black*, the Commission applied the principles enunciated in *Phillips*. 7 FMSHRC at 1155. Since at least 1994, the Commission has not relied upon *Phillips* or *Calvin Black* in its decisions reviewing the Secretary's enforcement decisions.

The majority attempts to construct a veneer of moderation by maintaining that it is simply taking into account "the factors traditionally applied by the Commission in determining whether a production-operator should be cited for its independent contractor's violations," slip op. at 17, and insisting that its views are consistent with viable prior Commission case law. In fact, it has turned the legal standard in this area on its head. Instead of the Secretary having broad leeway to cite an operator (unless she abuses her discretion), it appears that, under the majority's ruling, the Secretary is prohibited from citing an operator unless she meets the factors set forth by my colleagues, slip op. at 8, and surpasses the high bar the majority has erected by insisting that the criteria in the Secretary's Enforcement Guidelines are satisfied only if a "significant threshold has been reached." Slip op. at 14.

Applying relevant Commission precedent leads inexorably to the conclusion that substantial evidence supports the judge's determination that the Secretary did not abuse her discretion in citing Twentymile.[2] While the majority questions the quality and quantity of the evidence supporting the Secretary's decision to cite Twentymile, there is no dispute that there is evidence to support the Secretary's decision sufficient to satisfy the low threshold traditionally required by the Commission.

First, Twentymile, as the owner-operator, had the overall responsibility of running the mine and was substantially involved in the day-to-day operations. Twentymile hired independent contractors and reviewed their safety records. Tr. 67-70. Twentymile maintained a constant presence at the mine during the time that Precision performed its services for Twentymile. Tr. 15-17, 94, 143. Twentymile's surface operations supervisor, Dave Wallace, traveled to the refuse pile and checked Precision's work every day or day and-a-half. Tr. 94-95. Wallace testified that if he had seen a safety problem while he was there, he would have told Precision to fix it. Tr. 95. Twentymile conducted periodic safety inspections of its facilities that were not restricted to its equipment and miners, but that encompassed an area of the mine and all equipment in the area, whether it belonged to Twentymile or an independent contractor. Tr. 101-02, 111-12. Twentymile's involvement in day-to-day mining activities far "surpasses that of the operator in *W-P*, [16 FMSHRC 1407]." *Mingo Logan*, 19 FMSHRC at 250.

Furthermore, Twentymile was in an excellent position to affect safety.[3] If Twentymile found violative equipment while inspecting contractor's work, it required its contractor to correct the condition, or it required the contractor to remove the equipment from the site, as it did with respect to Precision's equipment. Tr. 78-79, 94-95, 105, 111-12, 129-30. Twentymile also

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[2] 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)).

[3] While we recognize that no one factor is dispositive, my colleagues insist that only the operator in the "best" (as opposed to an excellent) position to prevent the violations should be cited. Slip op. at 9-10 & n.12. I do not read the Commission cases cited by the majority in so narrow a fashion. To do so is inconsistent with our determination that MSHA may issue dual citations. In this case, both operators were in a position to affect safety. Precision was certainly capable of maintaining its equipment but, in Inspector Havrilla's experience, bringing Twentymile's influence to bear had proven to be a potent force. In 1999, concerned about the number of contractor violations at this mine, the inspector warned Twentymile that both it and its contractors would be cited if the number of violations was not reduced. 25 FMSHRC at 356-57; Tr. 34. The inspector testified that he noticed a subsequent decrease in the number of violations by independent contractors. 25 FMSHRC at 356-57; Tr. 35.

demonstrated its ability to affect safety by refusing to allow the cited equipment back on-site until Twentymile had inspected the equipment.[4] Tr. 108. In addition, Twentymile provided site-specific hazard training to contractors' employees and ensured that such employees had MSHA-required training. 25 FMSHRC at 357-58; Tr. 110-11, 117-18.

Because the Secretary's Enforcement Guidelines are not binding, I need not also consider whether the Enforcement Guidelines were satisfied in order to uphold the Secretary's actions in citing Twentymile. *Mingo Logan*, 19 FMSHRC at 250-51. However, while failure to satisfy the criteria is not fatal to an enforcement decision (*id.* at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse of discretion (*e.g., Bulk*, 13 FMSHRC at 1360). For the first time since the Commission's decision was reversed in *Cathedral Bluffs*, 796 F.2d 533, the majority has relied on the Enforcement Guidelines to support its conclusion that the Secretary abused her discretion.[5]

Moreover, in applying the Enforcement Guidelines, the majority has raised the level of evidence necessary to satisfy its criteria.[6] The majority states that "a particular criterion should be found to be satisfied only if a significant threshold has been reached," (slip op. at 14) and applies this standard de novo. The Commission has not previously articulated such a standard. In fact, such a high evidentiary threshold seems inconsistent with the Commission's recognition that the Guidelines need not even be satisfied in order to uphold the Secretary's enforcement decision, or that an enforcement decision must be affirmed unless there is "no evidence" to support it. *Mingo Logan*, 19 FMSHRC at 250 & n.5.

Even if I were to apply the Enforcement Guidelines, I would conclude that substantial evidence supports the judge's conclusion that the first and fourth factors were satisfied. Twentymile contributed to the equipment violations by an act or omission during the course of

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[4] Twentymile was not required to inspect the equipment in order to abate five of the subject citations. Tr. 108; Gov't Ex. 2 (Citation Nos. 7618775, 7618777, 7618788, 7618884, 7618886).

[5] In *Cathedral Bluffs*, the Commission reasoned that evidence that the Secretary contended satisfied the Enforcement Guideline criteria would be present in any contractual relationship and that the Enforcement Guidelines would be vitiated if such evidence were sufficient to subject a production-operator to liability. 6 FMSHRC at 1874-76. The majority's reasoning in this case is strikingly similar to the reasoning employed by the Commission in *Cathedral Bluffs*, from which my colleagues quote extensively. Slip op. at 16.

[6] As the majority states (slip op. at 14 n.20), in *Bulk*, the Commission concluded that the Secretary had satisfied an Enforcement Guidelines criterion where the cited operator exhibited "*substantial* control" over the condition requiring abatement. 13 FMSHRC at 1360. While there was evidence of substantial control in *Bulk*, the Commission did not hold that such evidence was necessary to satisfy the evidentiary threshold in future cases. *Id.*

Precision's work because it is undisputed that Twentymile did not inspect Precision's equipment when the equipment entered the mine or at any time when it was working at the refuse pile. 25 FMSHRC at 360; Tr. 35, 87-88, 105-06, 119. Nor did Twentymile take adequate measures to ensure that Precision inspected its equipment by inquiring as to whether it had inspected its equipment.[7] Tr. 35, 93, 126-27. I agree with the judge that requiring Twentymile to "follow-through" in this manner is reasonable, particularly given Twentymile's actions in requiring its contractors to present evidence that its employees meet MSHA's training requirements. 25 FMSHRC at 360. Moreover, the Enforcement Guidelines clearly provide that an owner-operator is required to assure compliance with regulations applicable to independent contractors' work. 45 Fed. Reg. at 44497 ("This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine.").

In addition, I conclude that substantial evidence supports the judge's finding that Twentymile had sufficient control over the conditions that needed abatement in that Twentymile reserved the right to remove violative equipment from its property. Tr. 75, 78-79, 104, 109. Also, Twentymile conducted safety audits of its facilities, including the performance and equipment of its contractors on-site. Tr. 101-02, 111-12. If Twentymile found violative equipment, it required its contractor to correct the condition, or it required the contractor to remove the equipment from the site, as it did with respect to Precision's equipment. Tr. 78-79, 94-95, 105, 112.

[7] Although Twentymile may have contractually required Precision to inspect its equipment or to maintain its equipment in a certain manner, such contractual arrangements do not absolve Twentymile of responsibility for violations by Precision. *See Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979) ("A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted."). In any event, even a contractual document provided to Precision explicitly acknowledges that although MSHA may cite an independent contractor, Twentymile is "not completely relieve[d] . . . from all responsibilities or liabilities." T. Ex. 26 (Ex. D); Tr. 77.

In conclusion, given Twentymile's involvement in the mine's day-to-day affairs, its position to affect safety, its failure to inspect or ensure that the vehicles were inspected, and its control over the conditions that required abatement, I conclude that Twentymile has failed to prove that "there is no evidence to support the [Secretary's] decision" to cite it for the equipment violations. *Mingo Logan*, 19 FMSHRC at 249-50 n.5; *Extra Energy*, 20 FMSHRC at 6. Thus, substantial evidence supports the judge's determination that the Secretary did not abuse her discretion in citing Twentymile for the six violations. Given the record evidence and my reluctance to join my colleagues in discarding twenty years of Commission and court precedent in this area, I would affirm the judge's ruling.

Mary Lu Jordan, Commissioner

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