FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 2, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 93-298
WESTERN FUELS-UTAH, INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman and Riley, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Western Fuels-Utah, Inc. (AWestern Fuels@) violated 30 C.F.R. ' 75.1102 because slippage and sequence switches on a conveyor belt allegedly failed to stop the belt at the time of an incident on August 10, 1992, that resulted in a fire; whether Western Fuels violated 30 C.F.R. ' 75.1101-16(a) because sensing devices contained in its dry powder chemical fire suppression system allegedly failed to stop the conveyor drive motor at the time of the August 10 fire; and whether an alleged violation of 30 C.F.R. ' 75.1101-14(a) was duplicative of a separate violation of 30 C.F.R. ' 75.1101-15(d), both of which involve requirements applicable to dry powder chemical fire suppression systems. Administrative Law Judge August F. Cetti concluded that the Secretary of Labor failed to prove violations of sections 75.1102 and 75.1101-16(a), and vacated the citation alleging a violation of section 75.1101-14(a) on the ground that the alleged violation was duplicative of the section 75.1101-15(d) violation. 17 FMSHRC 891, 895, 896, 899, 901 (June 1995) (ALJ). We granted a petition for discretionary review filed by the Secretary challenging these determinations. For the reasons that follow, we reverse in part, vacate in part, affirm in part, and remand.

I.

[1] Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

Factual and Procedural Background

Western Fuels operates the Desperado Mine, an underground coal mine in Rio Blanco County, Colorado. 17 FMSHRC at 892. The mine utilizes a conveyor belt system, consisting of a connected series of belt flights, to carry coal from the longwall face out of the mine. Tr. I 24-25, 34-35, 104-05; Tr. III 70-72; Gov=t Ex. M-4.[2] Each belt flight contains a drive roller, which is used to power a 48 inch-wide rubber belt, as well as a takeup carriage and a tail piece. Tr. I 128-29, 132; Tr. II 113-17, 120-21, 144; Resp. Ex. A. In order to avoid a coal pile-up or spill, the belt system contains several devices designed to turn off the belts when any one belt is stalled or stopped. Tr. I 26-27. One such device is a slippage switch that turns off the conveyor belt if there is slack or a break in the belt, or the belt slips for other reasons, such as being wet or overloaded. Tr. I 124-27. A sequence switch is designed to shut down a belt when the belt in front of it has stopped, in order to avoid the continued dumping of coal on the inactive belt. Tr. I 28-29, 64, 121-22.[3] The conveyor belts at the mine were also equipped with dry chemical fire suppression systems designed to sound an alarm and stop the belt in the event of a fire, and to extinguish the fire by spraying it with a chemical powder through nozzles connected to an overhead piping system. Tr. I 131; Tr. II 21-25; Tr. III 17-18.

On August 10, 1992, at about 7:10 p.m. during the evening shift, a fire occurred in the drive unit of the conveyor belt located in the Number 3 East Mains (AEM3@) of the Desperado Mine. 17 FMSHRC at 892. The fire was detected when the Conspec computer system at the mine noted a carbon monoxide (ACO@) alarm and the activation of the fire suppression system. *Id.* While the fire suppression system activated the fire control system and sounded the alarm, it did not appear to immediately activate a switch to shut down EM3 conveyor belt, which continued to operate for a while longer. *Id.* at 892, 896; Tr. I 33, 45-47, 63, 92, 157-58, 199; Gov=t Ex. M-2 at 9-10; Gov=t Ex. M-3 at 1. Once the fire was detected, the mine was quickly evacuated with the exception of a few miners who remained to fight the fire with water hoses. 17 FMSHRC at 900; Tr. I 52, 99-101. The fire was brought under control at about 7:34 p.m., and was extinguished by 8:00 p.m. Tr. I 58, 80; Tr. III 144; Gov=t Ex. M-3 at 2. No miners were injured as a result of the

[2] The hearing in this case was conducted on July 26, 27, and 28, 1994. ATr. I@ refers to the transcript of the July 26 hearing; ATr. II@ refers to the transcript of the July 27 hearing; and ATr. III@ refers to the transcript of the July 28 hearing.

[3] The belt flight is also equipped with other safety switches, such as a plugged chute switch and a tension switch, which are not at issue in this proceeding. *See* Tr. I 122-24, 127-28.

fire. 17 FMSHRC at 892, 900. The fire was promptly reported by Western Fuels to MSHA, even though it was not considered to be a reportable fire by MSHA inspectors. *Id.* at 892.

On the following day, August 11, MSHA inspectors Gary Frey and William Vetter went to the Desperado Mine, where they inspected the area of the fire and the equipment at the EM3 belt drive and questioned Western Fuels management about the origin of the fire. 17 FMSHRC at 892; Tr. II 5-10. No citations were issued at the time of this initial inspection. 17 FMSHRC at 892. A week later, on August 18, Frey and Vetter returned to the mine along with MSHA inspector Art Gore. *Id.* at 892, 894; Tr. I 115; Tr. II 26. During this reinspection, Frey and Vetter examined and measured the dry chemical powder fire suppression system for the EM3 belt drive, while Gore checked the electrical circuitry on the belt drive. Tr. II 27. On this occasion, MSHA issued four citations to Western Fuels related to the August 10 fire. 17 FMSHRC at 892. Two of the citations (Citation Nos. 3587226 and 3587227) involved alleged deficiencies in the electrical safety switches designed to stop the EM3 belt drive; the other two (Citation Nos. 3587228 and 3587229) involved the fire suppression system. *Id.* The first two citations were terminated within minutes of their issuance, without any significant changes in the belt drive or fire suppression system. *Id.* at 896; Tr. I 191-92. The MSHA inspectors gave Western Fuels one week, until August 25, to abate the other two citations relating to the fire suppression system. 17 FMSHRC at 900; Tr. II 42.

When MSHA inspectors returned to the mine on August 26, they found that nothing had been done to abate the two citations involving the fire suppression system, and accordingly issued two failure to abate orders pursuant to Section 104(b) of the Mine Act, 30 U.S.C. ' 814(b). 17 FMSHRC at 900; Tr. II 43-45; Tr. III 161-62. Western Fuels abated the two citations later that morning by installing a second dry chemical reservoir on the system, which shortened the length of the piping from each reservoir to the dispensing nozzles to less than fifty feet, and the orders were terminated. 17 FMSHRC at 899, 900; Tr. II 43.

II.

Slippage and Sequence Switch Violation (Citation No. 3587226)

A. Judge=s Decision

The judge vacated Citation No. 3587226, concluding that a preponderance of the probative evidence failed to establish that the EM3 belt conveyor at the Desperado Mine was not Aequipped with slippage and sequence switches,@ as required by section 75.1102.[4] 17 FMSHRC

[4] Section 75.1102, which restates the language of the first sentence of section 311(g) of the Mine Act, 30 U.S.C. ' 871(g), provides that:

> Underground belt conveyors shall be equipped with slippage and sequence switches.

at 895. The judge interpreted section 75.1102 as requiring only that the conveyor be Aequipped@ with the necessary switches, and therefore concluded that a temporary malfunction of the switches would not violate this standard. *Id.* He analogized this situation to an automobile that would be considered to be Aequipped@ with a transmission even if its transmission Awere to suddenly not function properly for a short period of time.@ *Id.* The judge explained that Aif the promulgators of the regulation intended to make the sudden unexpected malfunction of the required equipment a citable offense, they would have worded the regulation differently so that a person of reasonable prudence on reading the regulation would have known of that intent.@ *Id.*

Based on this interpretation of section 75.1102, the judge concluded that the Secretary had failed to establish a violation, relying upon undisputed evidence that sequence and slippage switches designed to perform the required function had been installed in the conveyor belt flight; that the switches had been inspected and found to be working properly three days before the August 10, 1992 fire; and that they were still functional two years later, at the time of the hearing, without any subsequent repair or alteration. *Id.* at 894-95. The judge also noted that MSHA inspector Gore did not examine the switches during the August 18 inspection, but instead relied upon a computer printout of questionable reliability in concluding that the switches did not function properly at the time of the fire. *Id.* at 894.

2. Disposition

The Secretary contends that the judge erred in finding that Western Fuels did not violate section 75.1102 merely because the EM3 conveyor belt was equipped with slippage and sequence switches. S. Br. at 7-12. The Secretary asserts that the judge=s interpretation of that standard as only requiring that a conveyor belt be Aequipped@ with the specified switches, even if they are not functioning properly, is unreasonable and contrary to the purposes of that standard and the Mine Act. *Id.* at 11-12. The Secretary contends that the judge should have instead deferred to her interpretation of section 75.1102 requiring that a conveyor belt be equipped with slippage and sequence switches that function properly, since that interpretation is consistent with the language and purpose of the statute, and entitled to deference as the interpretation by the agency charged with the administration of the Mine Act. *Id.* at 7-10.

Western Fuels contends that the judge properly vacated this citation because the Secretary failed to meet her burden of proving a violation of section 75.1102 by establishing conclusively that the switches were not functioning at the time of the August 10 fire. W.F. Br. at 2-8. Western Fuels argues that the Secretary has improperly attempted to rely on the mere occurrence of a fire on August 10 to support an inference that the switches did not work properly on that occasion. *Id.* at 6-8. Western Fuels also contends that the Secretary has attempted to convert a factual dispute about whether the switches functioned properly on August 10 into an issue of statutory interpretation. *Id.* at 9-10.

1. Statutory Interpretation

The parties disagree over the appropriate interpretation of the word Aequipped@ in section 75.1102. Because section 75.1102 restates the language contained in the first sentence of section 311(g) of the Mine Act, the proper construction of that term presents a question of statutory interpretation. The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question in issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal* Co., 18 FMSHRC 582, 584 *(*April 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Deference to an agency=s interpretation of the statute may not be applied Ato alter the clearly expressed intent of Congress.@ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute=s text and legislative history, may be employed to determine whether ACongress had an intention on the precise question at issue,@ which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a A*Chevron I*@ analysis. *Id.*; *Thunder Basin*, 18 FMSHRC at 584*; Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994).[5]

We conclude that the language of section 311(g) embodied in section 75.1102 is plain on its face and requires that a conveyor belt be Aequipped@ with *functional* slippage and sequence switches. The Supreme Court has indicated that A>[i]n determining the scope of a statute, we look first to its language,= . . . giving the >words used= their >ordinary meaning.=@ *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981) and *Richards v. United States*, 369 U.S. 1, 9 (1962)). The term Aequip@ is most generally defined to mean Ato provide with what is necessary, useful, or appropriate[.]@ *Webster=s Third New International Dictionary (Unabridged)* 768 (1986). It is also defined as Ato make ready or competent for service or action or against a need[.]@ *Id.* Similarly, the term is defined in Black=s Law Dictionary as follows: ATo furnish for service or against a need or exigency; to fit out; to supply with whatever is necessary to efficient action in any way.@ *Black=s Law Dictionary* 537 (6th ed. 1990). These definitions all contain a functional component, indicating that the term Aequipped@ means that the item provided will be adequate to achieve the intended purpose. Therefore, a functional interpretation, requiring that belts be equipped with slippage and sequence switches that work, is consistent with the plain meaning of the pertinent statutory language.

This interpretation is also consistent with the relevant legislative history and the underlying purpose of the Mine Act **C** which is to provide safe working conditions for miners. Certainly, a belt conveyor Aequipped@ with slippage and sequence switches that do not function properly will

[5] If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a A*Chevron II*@ analysis, is required to determine whether an agency=s interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal* Co., 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

not provide required safety protection for miners, and may indeed result in further danger to miners if the switches fail to stop the belt as intended.

The legislative history of this statutorily-based requirement further supports this reading of section 75.1102. The language of section 311(g) of the Mine Act reiterated in this regulation was carried over without change from section 311(g) of the Federal Coal Mine Health and Safety Act of 1969 (ACoal Act@), 30 U.S.C. ' 871(g) (1976). The Senate Report on the Coal Act reveals Congress= recognition of the importance of slippage and sequence switches on underground belt conveyors, stating that this section Aprovides for equipment to stop a belt if slippage occurs, since slippage can overheat the belt and cause a fire.@ S. Rep. No. 411, 91st Cong. 1st Sess. 78 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 204 (1975). The Senate Report further explains that A[a] slippage switch is designed to stop the belt drive if the conveyor belt begins slipping and sequence switches stop the conveyor belts in by the belt that initially began slipping.@ *Id.* Thus, the express purpose of the requirement for safety switches, as set forth in section 75.1102 and section 311(g) of the Mine Act, is to stop the conveyor belt in the event of a problem and thereby prevent the type of belt-related fire that occurred at the Desperado Mine on August 10. Clearly, a conveyor belt Aequipped@ with safety switches that fail to perform their intended function of stopping the belt in appropriate circumstances will not accomplish the result sought by Congress in adopting this safety requirement.

Accordingly, we conclude, based upon the plain language of the statute, as well as the applicable legislative history and the underlying purpose and structure of the Mine Act, that Congress intended to require that conveyor belts be equipped with functioning slippage and sequence switches.[6] Accordingly, the judge erred by not adhering to this language, and we reverse his determination that section 75.1102 does not require that conveyor belt slippage and sequence switches accomplish their intended function of stopping the belt in appropriate circumstances.

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[6] This interpretation of the statutory language is also consistent with Commission precedent. *See Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator=s claim that 30 C.F.R. ' 56.14101(a)(1) did not require brakes once installed to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. ' 77.507 to require that switches be installed with *functioning* lockout devices).

2. Remand

There is conflicting evidence in the record concerning whether or not the slippage and sequence switches on the EM3 conveyor belt functioned properly on August 10. The most persuasive evidence that these switches did not function properly is evidence indicating the motor on the EM3 belt continued running well after all other nearby conveyor belts had stopped. Tr. I 33, 38, 45.[7] As the judge noted, however, there is also evidence that the switches were inspected and found to be working properly prior to the August 10 fire, and that the same switches continued to be used without incident for at least two years after the fire, without being replaced or modified. 17 FMSHRC at 895; Tr. II 91, 155-56, 171-72, 200-01; Tr. III 11-16, 39-40, 59-60, 74; Resp. Exs. B & C. In addition, MSHA inspector Gore, who wrote the relevant citation, admitted that during his inspection at the mine on August 18 he did not examine either of the switches to determine whether they were operating or not. 17 FMSHRC at 894.[8] Instead, Gore based his conclusion on an inspection of electrical wiring diagrams and a computer printout that Western Fuels contends is unreliable. *Id.*[9]

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[7]According to the Secretary, the only other possible cause for the failure of this conveyor belt motor to stop operating, and the resulting fire, would have been the presence of a jumper **C** a device designed to bypass the switches **C** at the control center. 17 FMSHRC at 893; Tr. I 153. The Secretary rejected this potential explanation based upon the statements from Western Fuels personnel that there were no jumpers present at the time of the fire. 17 FMSHRC at 893; Tr. I 95-96, 154, 206; Tr. III 74, 98.

[8] Gore wrote in item 17 of the citation: AThe system was examined and no malfunctions were found or occurred at the time of examination.@ *Id.*

[9] To support its claim that the printout was unreliable, Western Fuels adduced evidence that certain events that were known to have occurred underground are either not shown on the printout or are depicted as having occurred at incorrect times or out of sequence. *See* Tr. I 75-76, 83-84; Tr. II 96, 99-100, 158-62, 164-67.

Thus, the record does not clearly establish whether or not the switches on conveyor belt EM3 actually malfunctioned at the time of the August 10 incident and, if so, why they appear to have worked properly both before and after the incident without being serviced or repaired. Based upon his erroneous legal conclusion that Western Fuels could establish a valid defense to this citation by simply showing that the EM3 conveyor belt was Aequipped@ with the required safety switches, the judge essentially concluded that any malfunction of the switches was irrelevant, and thereby avoided making critical factual findings as to whether these switches functioned properly at the time of the August 10 fire. We therefore remand this matter to the judge to make findings regarding these critical factual issues, and thereby determine whether a violation of section 75.1102 occurred.

III.

Sensing Devices on Dry Powder Chemical Fire Suppression System (Citation No. 3587227)

1. Judge=s Decision

The judge vacated Citation No. 3587227, which alleged a violation of section 75.1101-16(a),[10] based on a rationale similar to that underlying his vacation of Citation No. 3587226. The judge concluded that a preponderance of evidence did not establish that the dry powder chemical fire suppression system for the EM3 conveyor belt was not Aequipped@ with sensing devices Adesigned@ to activate the fire control, sound the alarm and stop the conveyor drive in the event of a rise in temperature, as required by this regulation. 17 FMSHRC at 896. The judge found that the system was equipped with a sensing device that did in fact activate the fire control system and sound the alarm. *Id.* In addition, he relied upon undisputed evidence that the citation was abated without any repair or modification of the sensing device, and that the device continued to function properly after the August 10 fire, as Avery strong, if not[] conclusive evidence that the fire suppression system was equipped with sensing devices >designed= to stop the conveyor drive motor in the event of a rise in temperature.@ *Id.*[11] While noting that there was conflicting evidence as to whether this sensing device also stopped the conveyor drive motor at the time of the fire, the judge concluded that even if it did not, no persuasive evidence was presented that the system was not Aequipped@ with a sensing device Adesigned@ to accomplish that result. *Id.*

2. Disposition

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[10] Section 75.1101-16(a) provides, in relevant part:

> Each self-contained dry powder chemical system shall be equipped with sensing devices which shall be designed to activate the fire-control system, sound an alarm and stop the conveyor drive motor in the event of a rise in temperature, ...

[11] The judge also noted that inspector Gore wrote in this citation: AThe system was examined and no malfunctions were found or occurred at the time of examination.@ *Id.*

The Secretary asserts that the judge=s interpretation of section 75.1101-16(a) as only requiring that the fire suppression system be Aequipped@ with devices Adesigned@ to stop the belt motor, irrespective of whether those devices actually function properly when required, is unreasonable since it is contrary to the purposes of the Mine Act and could render lawful systems that fail to stop the spread of fire and result in the injury or death of miners. S. Br. at 14-15. The Secretary also contends that substantial evidence establishes that the sensing devices on the system failed to stop the conveyor drive motor, making it necessary to turn off the motor manually. *Id*. at 3-4, 13-14.

While Western Fuels did not directly address this alleged violation in its brief, we construe its brief as raising an argument that the judge properly vacated the citation because the Secretary failed to demonstrate by a preponderance of evidence that the sensing devices on the fire suppression system failed to function properly. W.F. Br. at 2-8.

The Commission has recognized that, 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. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary=s interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We conclude that the language of section 75.1101-16(a) is clear and unambiguous, and requires that a dry chemical fire suppression system be equipped with *functional* sensing devices. For essentially the same reasons discussed above with respect to the proper interpretation of the word Aequipped@ in section 311(g) of the Mine Act, we believe that reading that term as used in section 75.1101-16(a) to have a functional component **C** that is, requiring that the sensing devices perform their intended function, including stopping the conveyor drive motor **C** is consistent with the ordinary meaning of that term, and the structure and underlying safety purpose of Mine Act. Therefore, we conclude that the judge erred by reading the component of functionality out of the regulatory language, and reverse his determination that section 75.1101-16(a) does not require the sensing devices on fire suppression systems to actually perform the specified functions.

It is undisputed that the fire suppression system was equipped with sensing devices that did in fact activate the system and sound the alarm, in accordance with the requirements of section 75.1101-16(a). 17 FMSHRC at 896. There is conflicting evidence, however, as to whether the system also stopped the drive motor on conveyor belt EM3, as further required by this regulation. The judge failed to resolve this conflict in the evidence, but rather concluded that no violation of section 75.1101-16(a) was established even A[a]ssuming arguendo that [the system] did not stop the conveyor drive motor[,]@ in the absence of evidence that the system was not Aequipped@ with a sensing device that was Adesigned@ to stop the motor. *Id.* Thus, the judge=s ultimate determination was based directly on his erroneous interpretation of this standard. In these circumstances, we remand for a determination whether section 75.1101-16(a) was violated.

IV.

Adequacy of Dry Powder Chemical Fire Suppression System (Citation No. 3587228, Order No. 3587231)

3. Judge=s Decision

The judge concluded that a preponderance of the evidence established a violation of section 75.1101-15(d), governing the number of nozzles and reservoirs on dry powder chemical fire suppression systems, relying on the testimony of MSHA inspector William Vetter that the fire suppression system at issue here was inadequate to completely put out the August 10 fire. 17 FMSHRC at 899. The judge further concluded that this violation was S&S, affirmed the corresponding section 104(b) order, and assessed a civil penalty of $4,000. *Id.* at 900-01.

The judge also concluded that the remaining citation (No. 3587228), alleging, as amended, a violation of section 75.1101-14(a), was duplicative. He reasoned that it was abated by the same action taken to abate the section 75.1101-15(d) violation **C** installing a second dry chemical reservoir which shortened the length of the piping to less than 50 feet from each reservoir to the nozzles, thereby permitting more effective disbursement of the chemicals. *Id.* at 899; Tr. II 38-39; Resp. Ex. A. Based on this analysis, the judge vacated this citation and the corresponding section 104(b) order. 17 FMSHRC at 899.

B. Disposition

The Secretary contends that the judge erred in vacating this citation as duplicative merely because it was abated by the same action taken by Western Fuels to abate a separate violation of section 75.1101-15(d). S. Br. at 15-17. The Secretary asserts that the two alleged violations were not duplicative, even though they may have been abated by the same action, since they involved two distinct violations of standards that impose separate and distinct duties on the operator. *Id.* at 16-17.

Western Fuels asserts that the judge properly vacated this citation because the Secretary originally alleged a violation of an inapplicable standard, and it was abated by the same action that abated the section 75.1101-15(d) violation. W.F. Br. at 10-12. Western Fuels also contends that because this citation was first amended at the hearing to allege a violation of section 75.1101-14(a), it never refused to comply with that standard and therefore the related section 104(b) order, which was based upon the alleged failure to abate a violation of a different standard, cannot be sustained. *Id.* at 11.

We affirm the judge=s decision to vacate this citation as duplicative. The Commission has held that citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). *See also Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982); *El Paso*

Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981). However, as applied to the faulty fire suppression system at issue here the two standards did not impose separate and distinct duties on Western Fuels. Rather, section 75.1101-15(d) simply specified a particular method of carrying out the broadly worded obligation contained in section 75.1101-14(a).

Section 75.1101-14(a), the standard that Western Fuels was alleged to have violated in Citation No. 3587228, requires that:

> Self-contained dry powder chemical systems shall be installed to protect each belt-drive, belt takeup, electrical-controls, gear reducing units and 50 feet of fire-resistant belt or 150 feet of non-fire resistant belt adjacent to the belt drive.

This standard imposes a broad obligation to install dry powder chemical systems that will protect the components of a conveyor belt system most susceptible to fires.

Section 75.1101-15 contains several directives pertaining to the construction of such dry powder chemical systems. Western Fuels was found to have failed to comply with subsection (d), which specifies that:

> Nozzles and reservoirs shall be sufficient in number to provide maximum protection to each belt, belt takeup, electrical controls and gear reducing unit.

Implicit in the duty to install a self-contained dry powder chemical system that protects the specified components of the conveyor belt is the duty to install a sufficient number of nozzles and reservoirs so that the chemical substance is effectively disbursed to those components. Because the duty to install a sufficient number of reservoirs is subsumed in the duty to install a dry powder chemical system that adequately protects the specified components, every violation of section 75.1101-15(d) will inexorably constitute a violation of section 75.1101-14(a). This occurs because any system which lacks a sufficient number of reservoirs automatically fails to Aprotect each belt-drive, belt takeup, electrical-controls, [and] gear reducing unit@ as required by section 75.1101-14(a). Thus, section 75.1101-14(a) indirectly imposes the same duty to provide

sufficient nozzles and reservoirs by virtue of its broad requirement that the system be installed to protect each of the belt components specified therein.[12]

[12] Contrary to the impression created by our dissenting colleague, our determination that the two citations are duplicative is not based on our premise that every violation of 15(d) is also a violation of 14(a). Our inquiry does not stop there. Rather, we ask whether MSHA is citing the operator on the basis of more than one specific act or omission. Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence (lack of sufficient reservoirs) used to support the violation of the specific standard, we would not have found them duplicative.

Since both standards require sufficient reservoirs, an operator who constructs a system that contains an inadequate number of reservoirs can be cited under either standard. However, in order for the Secretary to sustain two distinct violations under both standards, she must be able to point to more than just the single shortcoming of insufficient reservoirs. Accordingly, because these two standards did not impose separate and distinct duties on Western Fuels with respect to the proper installation and construction of the dry chemical fire suppression system involved here, the judge could reasonably conclude that the section 75.1101-14(a) violation alleged in this citation was duplicative of the section 75.1101-15(d) violation he had already found. We affirm this determination, and the judge=s resulting decision to vacate this citation and the related section 104(b) order (Order No. 3587231).[13]

V.

Conclusion

For the foregoing reasons, we (1) reverse the judge=s determinations that section 75.1102 does not require slippage and sequence switches to be functional, and that section 75.1101-16(a) does not require sensing devices on dry powder chemical fire suppression systems to be functional; (2) vacate his findings that the Secretary failed to establish a violation of sections 75.1102 and 75.1101-16(a); (3) affirm his decision to vacate Citation No. 3587228, alleging a violation of section 75.1101-14(a), and Order No. 3587231, as duplicative; and (4) remand for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

[13] Given our disposition based on our conclusion that the citations alleging violations of sections 75.1101-14(a) and 75.1101-15(d) are duplicative, we do not address Western Fuels= alternative argument that the related section 104(b) order could not be sustained because it was based upon the alleged failure to abate a violation of a different standard.

James C. Riley, Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I concur in the foregoing disposition of all charged violations, except the disposition regarding Citation No. 3587228 alleging a violation of 75.1101-14(a). As to that citation, I conclude that the judge erred in finding that the citation was Aduplicative@ merely because it was abated by the same conduct that abated a separately charged violation of section 75.1101-15(d) **C** the installation of a second dry chemical reservoir. 17 FMSHRC at 899. Accordingly, I dissent from the majority=s conclusion to affirm the judge=s determination regarding Citation No. 3587228.

While the two referenced standards both contain requirements that are applicable to dry powder chemical fire suppression systems, this does not in itself warrant a finding that they are duplicative. As the Commission has recognized:

> [t]he 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory safety standard simply because the operator violated a different, but related, mandatory standard.

Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378 (March 1993) (quoting *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981)). We have also recognized that even though violations may have emanated from the same events, they will not be found duplicative where the applicable regulations impose separate and distinct duties on an operator. *Cyprus Tonopah*, 15 FMSHRC at 378; *see also Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (August 1982) (upholding judge=s finding of two violations A[d]espite the fact that . . . transgressions arose out of a single series of events@).

Although the judge did not engage in any independent analysis of whether the requirements of section 75.1101-14(a) were in fact violated, or whether those requirements were significantly different from those contained in section 75.1101-15(d), I conclude that sections 75.1101-14(a) and 75.1101-15(d) impose separate and distinct duties on an operator. Section 75.1101-15(d) requires a sufficient *number* of nozzles and reservoirs on a fire suppression system to provide maximum protection to the belt control system. Section 75.1101-14(a), by contrast, is concerned with the general installation of the system, and contains the additional requirement that the system must be designed to protect either 50 feet of fire-resistant belt or 150 feet of non-fire-resistant belt. Thus, it is possible for an operator to violate section 75.1101-14(a) without necessarily violating the requirements of section 75.1101-15(d).

My colleagues, however, have concluded that Athe two standards did not impose separate and distinct duties on Western Fuels,@ and therefore the violations were duplicative. Slip op. at. 11. This conclusion is supported by their determination that every violation of section 75.1101-15(d) will constitute a violation of 75.1101-14(a). In so concluding, my colleagues expand the reach of the Commissions= review authority beyond the limit set forth in *Cyprus Tonopah.* Slip op. at 10-11. In that case two related standards were charged by the Secretary and ultimately sustained by the presiding judge and Commission. *Cyprus Tonopah*, 15 FMSHRC at 378. One of the standards, 30 C.F.R. ' 56.3200,[14] not unlike the subject section 75.1101-14(a), set forth a *general* over arching requirement to maintain a hazard-free work environment. *Id.* Whereas, the second standard charged, 30 C.F.R. ' 56. 3130,[15] provided *specific* types of requirements not unlike section 75.1101-15(d). *Id.* In both cases there is substantive overlap; however, in *Cyprus Tonopah*, the Commission did not condition its determination on whether every violation of section 56.3130 would also be a violation of section 56.3200. Had that analysis been considered

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[14] Section 56. 3200, entitled ACorrection of hazardous conditions,@ provides:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

[15] Section 56. 3130, entitled AWall, bank, and slope stability,@ provides:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

relevant to the disposition of that case, it is entirely possible that the Commission would have concluded that every charge of the *specific* standard section 56.3130 could support a charge of the *general* standard section 56.3200. Rather, the Commission correctly limited its consideration and determination to whether the standards imposed separate and distinct duties on the operator **C** they did in *Cyprus Tonopah* and they do in this case. To require that the Secretary may not charge a violation of two separate standards that stem from one condition, as my colleagues have chosen to do in this case, represents an unsupported and unnecessary encroachment upon the Secretary=s enforcement authority.

Indeed, no statutory authority or any other basis is supplied to support my colleagues= conclusion that the Secretary may not charge a violation of both standards, as was done in this case. Slip op. at 11. The cited sections of the Code of Federal Regulations are distinct standards that have been duly promulgated and enforced. That there is some overlap between the specific requirements found in section 75.1101-15(d) and the general requirements found in section 75.1101-14(a) is the result of time honored, wise promulgation practice that provides for the enumeration of *specific* requirements and prohibitions, and also a more *general* standard in order to ensure that the broad goal of the standard is effectuated even if some circumstances that could potentially diminish the intended level of safety were unanticipated at the time of promulgation. Thus, this case is not unlike the common situation where a motorist is simultaneously charged with the *general* violation of operating a vehicle in a dangerous manner, and the *specific* violations of failing to observe a traffic signal and failing to observe the speed limit **C** with all charges stemming from one traffic stop. Similarly, in this case the Secretary had the discretion to charge a violation of both the *general* and the *specific* standards after inspection of the fire suppression system.

Because I conclude that the two standards impose separate and distinct requirements, and because I am unaware of any requirement that bars the Secretary from enforcing the standards as was done in this case, I conclude that the judge erred in vacating Citation No. 3587228 as duplicative.

Accordingly, I would reverse the judge=s decision to vacate the citation as duplicative, and remand for a determination whether the fire suppression system in place at the time of the subject August 10 fire separately violated section 75.1101-14(a).

Marc Lincoln Marks, Commissioner