FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 23, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 99-280-M
v.	:	WEST 99-376-M
WATKINS ENGINEERS & CONSTRUCTORS	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves an accident in which an employee of Watkins Engineers and Constructors ("Watkins") sustained severe injuries when he fell 70 feet while working at the Lyons Cement Plant (the "Plant"). The Department of Labor's Mine Safety and Health Administration ("MSHA") charged Watkins with violating three mandatory safety standards, and further alleged that the violations were significant and substantial ("S&S"), and that two of the violations were due to Watkins' unwarrantable failure.[1] 23 FMSHRC 81, 89, 93-94, 100 (Jan. 2001) (ALJ). Administrative Law Judge Richard W. Manning upheld the Secretary of Labor's charges. *Id.* at 91-93, 98-102. He also rejected Watkins' arguments that the Plant was not a mine within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and that section 3(h)(1) sets forth an unconstitutional delegation of legislative power to the Secretary. 23 FMSHRC at 86-87. For the reasons below,

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

we affirm the judge's jurisdictional and constitutional determinations, his three violation determinations, his S&S determinations, and his two unwarrantable failure determinations.

I.

Factual and Procedural Background

The Plant, which is located in Boulder County, Colorado, and owned by Southdown, Inc., produces portland cement.[2] 23 FMSHRC at 81. Portland cement is primarily composed of limestone, shale, and quartz. Tr. 33-36. Limestone and shale are mined at a nearby quarry owned by Southdown and transported to a primary crusher located at the quarry site. 23 FMSHRC at 81-82. Once crushed, the rock is carried on a two-mile conveyor belt to the Plant where it is stockpiled. *Id.* at 82. Quartz is mined at a second nearby quarry and is transported by truck to the primary crusher at the first quarry. *Id.* The crushed quartz is then transported to stockpiles at the Plant via the conveyor belt. *Id.*

The stockpiled material at the Plant then goes through various operational steps in the production of cement. *Id.* The material is crushed, ground into powder, and heated to 2,500 degrees Fahrenheit in a kiln where it undergoes a chemical reaction to form chunks of crystalized cement known as "clinker." *Id.*; *see* n.2, *supra*. The clinker is ground into fine powder in a finish mill. 23 FMSHRC at 82. The only waste created during cement production is large amounts of carbon dioxide released from the limestone when it is heated in the kiln. *Id.*; Tr. 39-40. The cement from the finish mill is drawn by vacuum into the "bag house" where it is collected in large bags. 23 FMSHRC at 82; Tr. 29-30. The cement in the bags is then emptied into hoppers and transported to storage silos for sale. Tr. 29-30.

The above description of the process is a simplification of a more complex process. 23 FMSHRC at 82. For example, other material, such as gypsum, is added and coarse material is recirculated back through the process at several steps. *Id.* Most of the material that enters the Plant is used in the finished product. *Id.*

In January 1999, Watkins, a construction contractor, was constructing a new bag house building for Southdown at the Plant. *Id.* at 81. During construction, openings at the north and south ends of the bag house building provided access to the large compartments inside the bag house. *Id.* at 89-90, 94. Each opening was four- to five-feet wide and was about 70 feet above the ground. *Id.* at 89. At the time of the accident, there were no railings or barriers at these openings. *Id.* at 89-90. The two openings were connected by a breezeway that ran between the

[2] Portland cement is "[a] calcium-aluminum silicate produced by fusing or clinkering limestone and clay in a kiln so as to drive off carbon dioxide and produce an oxide glass [or clinker]. The clinker is ground very fine and, when mixed with water, will recrystallize and set." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 420 (2d ed. 1997) ("*DMMRT*").

two compartments inside the bag house. *Id.* The floor of the breezeway was the top of a heating duct. *Id.*

Watkins accessed the opening on the north end of the bag house with the man-lift of a subcontractor onsite, Mountain States Engineering ("Mountain States"). *Id.* at 94. Prior to using the man-lift to transport employees to the breezeway, Mountain States and Watkins agreed that the long side of the man-lift basket would be positioned against the breezeway opening because the breezeway opening was nearly three feet wider than the short end of the man-lift's basket. *Id.* at 95-96.

On the day of the accident, January 21, 1999, Jeremy Boyette, a Watkins' employee, was operating the man-lift, which was transporting another Watkins' employee, Jefferson B. Davis, up to the north opening.[3] *Id.* at 95. Davis testified that, for some reason, Boyette positioned the short end of the basket against the opening. *Id.* at 96; Tr. 102, 112-13. When the basket reached the opening, Davis pulled himself on top of the insulation panels that were in the basket.[4] 23 FMSHRC at 96. When he reached the top rail of the end of the basket next to the building,[5] he placed one foot on the middle rail and unhooked his safety line from the railing of the basket because that was as far as the safety line would allow him to go. *Id.*; Tr. 112. Davis did not attempt to re-tie the line because he was going to tie off on the structure of the bag house building. 23 FMSHRC at 96; Tr. 139. Davis testified that, as he was sitting on the top rail with one foot on the middle rail, he placed the other foot on the entrance to the breezeway. 23 FMSHRC at 96. His forward foot slipped and he fell backwards, hitting the left corner of the basket, and causing him to fall through the three-foot gap on to the concrete pad below. *Id.* Davis suffered serious injuries as a result of the accident and had to have one of his legs amputated. *Id.* at 99.

Following the accident, MSHA Inspector Richard Laufenberg inspected the Plant. He issued Citation No. 7923622 to Watkins, alleging that the unguarded openings constituted a fall hazard, and that the violation was S&S and caused by unwarrantable failure. *Id.* at 89, 92. He issued Order No. 7923625 to Watkins, alleging a failure "to ensure that a safe means of access [to the breezeway] was provided and being used," and that the violation was S&S and unwarrantable. *Id.* at 93-94. Finally, the inspector issued Citation No. 7923626 to Watkins, alleging that Davis' safety line was not tied off when he transferred from the basket to the breezeway, and that the violation was S&S and due to moderate negligence. *Id.* at 100.

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[3] Davis testified that a Mountain States employee operated the man-lift most of the time and that Boyette operated it at other times. 23 FMSHRC at 95.

[4] There were four insulation panels, each of which were about 22 inches wide, 48 inches high, 4 inches thick, and weighed between 19 and 20 pounds. 23 FMSHRC at 95.

[5] The basket contained a top and a middle rail. 23 FMSHRC at 95. Mountain States and Watkins had agreed that the proper way to enter and exit the basket would be to lift the middle rail and crawl under the top rail. *Id.*

Watkins contested the citations and order and also asserted that MSHA lacked the jurisdiction to inspect the Plant. It further contended that the authority granted to the Secretary to construe the term "milling" in section 3(h)(1) of the Mine Act was an unconstitutional delegation of legislative power.

The judge rejected the operator's challenges. He determined that the Plant was within the jurisdiction of the Mine Act and that the authority granted to the Secretary was not an unconstitutional delegation of authority. *Id.* at 86-89. The judge affirmed the citations and order issued to Watkins and their S&S designations. *Id.* at 91-92, 98-99, 101-02. He also affirmed the unwarrantable designations for Citation No. 7923622 and Order No. 7923625, but determined that the violation in Citation No. 7923626 was not due to the operator's negligence. *Id.* at 93, 100-01. The judge assessed a penalty of $2000 for Citation No. 7923622 as proposed by the Secretary. *Id.* at 89, 93. However, he reduced the Secretary's proposed penalties for Order No. 7923625 from $50,000 to $40,000, and for Citation No. 7923626 from $35,000 to $500. *Id.* at 94, 100, 102.

The Commission granted Watkins' petition for discretionary review challenging the judge's jurisdictional and constitutional determinations, his three violation determinations, and his two unwarrantable failure determinations.[6]

II.

Disposition

A. Whether the Plant is Within MSHA's Jurisdiction Because it Engages in "Milling"

Section 4 of the Mine Act provides, in part, that "[e]ach coal or other mine, the products of which enter commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h)(1) of the Act defines a "coal or other mine" to include "facilities . . . used in . . . the milling of . . . minerals." 30 U.S.C. § 802(h)(1). Section 3(h)(1) further provides that, in determining "what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." *Id.* The term "milling" is not defined in the Act.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord*

[6] Watkins did not contest the judge's S&S determinations on review. Hence, because we affirm the violations, we also automatically affirm the associated S&S determinations.

Local Union No. 1261, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). However, when a statute is ambiguous or silent on a point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. *See In re: Kaiser Aluminum and Chem. Co.,* 214 F.3d 586, 591 (5th Cir. 2000) ("Congress expressly delegated to the Secretary . . . authority to determine what constitutes mineral milling") (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13.

The Secretary has determined that the term milling can apply to facilities like the cement plant at issue here, which engage in the grinding and crushing of ore, even if the plant does not separate waste from valuable material. Sec'y Br. at 21-24. Consistent with that view and noting the administrative convenience that would be served, the Secretary in 1979 entered into an interagency agreement (the "Agreement") with OSHA, section B(6) of which gave MSHA jurisdiction over "alumina and cement plants." 44 Fed. Reg. 22827, 22827 (Apr. 17, 1979).

Watkins (W. Br. at 11), however, directs our attention to Appendix A of the Agreement, wherein milling is defined as requiring the "separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." 44 Fed. Reg. at 22828. Watkins claims that this section restricts MSHA's jurisdiction to only those facilities which also engage in this separation process. W. Br. at 12-13. We note, however, that section B(6) of the Agreement, does not place any restrictions on the kinds of cement plants that fall within MSHA jurisdiction. 44 Fed. Reg. at 22827.

Moreover, the section upon which Watkins relies is not the only relevant definitional provision. The appendix also refers to a list of "general definitions of milling processes for which MSHA has authority to regulate subject to [Section B(6) of] the Agreement." *Id.* at 22829.

This "general definitions" section defines "milling" in terms of "one or more of" a list of processes. *Id.* The list includes crushing, grinding, pulverizing, sizing, calcining, and kiln treatment, all of which, according to the uncontested testimony of Steven Mossberg, Southdown's safety and environmental compliance manager at the Plant, occur at the plant at issue here. *Id.*; Tr. 21-29, 31, 38-39, 71, 73-76. We conclude that the Agreement, when read as a whole supports MSHA's application of the term "milling" to cement plants regardless of whether the facility engages in the separation of waste from valuable material.[7] *See Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1548, 1552 (D.C. Cir. 1984) (stating that, although "not dispositive," the Agreement could assist in resolving the jurisdictional question of whether the Secretary's application of the term "milling" to a slate gravel processing facility was reasonable).[8]

The Secretary's interpretation of "milling" is consistent with the general usage of the term within the mining industry and with ordinary usage. Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents . . . ," while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." *DMMRT* at 344 (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission . . . look[s] to the ordinary meaning of terms not defined by statute"). These definitions are consistent with the Secretary's interpretation that milling includes processes such as grinding and crushing, but that

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[7] Contrary to Watkins' assertion (W. Br. at 19-20), the Secretary provided a sufficient explanation for her determination that cement plants fall under MSHA jurisdiction. In section B(6) of the Agreement, the Secretary explained that cement plants are under MSHA jurisdiction for "convenience of administration" considerations. 44 Fed. Reg. at 22827. In section B(5) of the Agreement, she described various factors used to determine whether a facility is under MSHA jurisdiction, including "Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act." *Id.*

[8] Watkins contends that the "convenience of administration" clause in section 3(h)(1) was intended solely to alleviate the potential for overlapping jurisdiction at "one physical establishment," and does not extend MSHA's authority to plants where no mineral milling occurs. W. Br. at 13-15; 30 U.S.C. § 802(h)(1). This argument fails for two reasons. First, in *Donovan*, the D.C. Circuit, rejecting a similar argument, held that the "convenience of administration" clause of section 3(h) (on which the Secretary relied in formulating the Agreement) is a broader concept than the need to eliminate overlapping jurisdiction. 734 F.2d at 1553. Second, Watkins' argument assumes that no milling occurs at the Plant, a premise that we reject. *See infra* at 7-8.

the separation of waste from valuable materials is not an essential component of milling.[9] Sec'y Br. at 21-23.

Dr. Baki Yarar, Watkins' expert witness, testified that milling requires a separation of waste from valuable materials, but he admitted that people in the mining industry use other definitions of milling "[a]ll of the time." Tr. 332, 340, 368-69. The judge correctly concluded that Yarar's testimony related to a technical definition of milling that is not dispositive of the scope of mineral milling under the Mine Act. 23 FMSHRC at 84. In enacting the Mine Act, Congress did not impose upon the Secretary a technical definition of milling based on the separation of valuable from valueless materials, nor in the Act's legislative history did it intimate that such separation was critical to the determination that "milling" took place. Moreover, Watkins' position, that a cement plant is outside of MSHA jurisdiction if it does not separate waste from valuable materials, implies that, for jurisdictional purposes, the Secretary must determine for each cement plant whether at some point in its operations it separates valuable from waste materials. As the judge noted, under Watkins' interpretation, whether a cement plant comes under MSHA or OSHA jurisdiction could depend on the current purity of the limestone entering the plant, presumably a variable factor at some plants. *Id.* at 86. Hence, administrative convenience is served by including all cement plants under the jurisdiction of MSHA. 30 U.S.C. § 802(h)(1) (stating that the Secretary should take "the convenience of administration" into account when determining what constitutes milling).

Many processes at the Plant are commonly associated with the concept of milling and fall squarely within the Secretary's interpretation of that term. Mossberg gave uncontested testimony that the processes at the Plant include crushing (Tr. 21-22, 24, 31, 38, 71), grinding (Tr. 23, 25, 28-29, 73-74, 77-78), pulverizing (Tr. 23), sizing (Tr. 73), calcining (Tr. 39, 75), and kiln treatment (Tr. 26-28, 71, 75-76). He also testified that the Plant's processes include a "raw mill," also called a "ball mill,"[10] comprising a 25-foot long rotating cylinder in which raw materials are ground and pulverized using steel balls. Tr. 23. He further testified that the Plant uses a 50-foot long "finish mill" in which cement clinker and gypsum are ground using steel balls. Tr. 28-29. He described the operations taking place in the finish mill as "fine milling." Tr. 38.

The legislative history of the Mine Act also supports the Secretary's interpretation of "milling." Congress clearly intended that any jurisdictional doubts be resolved in favor of

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[9] We note that, although the Secretary did not challenge Watkins' assertion before the judge or on review that waste is not separated from valuable components at the Plant, the judge determined that waste in the form of carbon dioxide is released at the facility when the limestone is heated in a kiln. 23 FMSHRC at 82. The record reveals that "out of every hundred tons of limestone that [enters the Plant, only] 60 tons . . . ends up in the cement," because of the release of carbon dioxide from the limestone during heating in the kiln. Tr. 39-40.

[10] The *DMMRT* definition of "mill" expressly encompasses separate components such as a ball mill. *DMMRT* at 344.

coverage by the Mine Act. S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*") ("[I]t is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.").

In addition, the Secretary has enforced her interpretation consistently. All cement plants in the nation, including the plant at issue here, have been inspected by MSHA since the agency's creation in 1978. 23 FMSHRC at 82, 87-88. Until the subject litigation, MSHA's jurisdiction over the Plant has never been challenged. *Id.* at 88. Even the present jurisdictional challenge is not being raised by Southdown, the owner and operator of the Plant, but by Watkins, a contractor working at the facility. *Id.* at 81.

We find further support for the Secretary's interpretation in relevant precedent. In *Kaiser*, the operator of the alumina plant claimed that its plant was not within MSHA's jurisdiction because of operational differences between its plant and other alumina plants. 214 F.3d at 590-91. The operator maintained that the processes at its plant were predominantly chemical, while "milling" under the Mine Act refers to mechanical processes involving primarily crushing and grinding. *Id.* at 591-92, *quoting DMMRT* at 344. The court determined, in light of the explicit delegation of authority granted to the Secretary in section 3(h)(1) to define milling, that the Secretary's definition of milling was reasonable. *Id.* at 592-93. The court reasoned, in part, that the Mine Act does not exclude chemical processes, and that the Secretary's interpretation was supported by definitions in the *DMMRT* and the Agreement. *Id.* at 592.

Thus, the Secretary's application of the term "milling" to cement plants is consistent with both ordinary usage, as well as the general usage of the term within the mining industry. It is also consistent with the legislative history of the Mine Act, the Secretary's past enforcement, relevant precedent, and the Agreement. Accordingly, we conclude that the Secretary's interpretation is reasonable and entitled to deference.

For the foregoing reasons, we affirm the judge's determination that the Plant is a mill within MSHA's jurisdiction.

B. Whether Delegation was Constitutional

We reject Watkins' assertion that Congress' grant of authority to the Secretary in section 3(h)(1) to construe milling was an unconstitutional delegation of legislative power. W. Br. at 22-26. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this language, the Supreme Court has derived the "nondelegation doctrine," which provides that "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). In applying the nondelegation doctrine, however, the Supreme Court has also recognized that, "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated

authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (internal quotation marks and citation omitted). Expanding on this principle, the Supreme Court recently stated that it "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474-75 (2001) (internal quotation marks and citation omitted) (holding that Clean Air Act provision requiring EPA to set air standards at levels "requisite to protect the public health" was not an unconstitutional delegation of legislative power).

Moreover, in the instant case we believe that the Mine Act places sufficient constraints on the Secretary's authority to define the term "milling" so as to prevent an unconstitutional delegation of legislative power. First, in defining the term "milling," section 3(h)(1) requires the Secretary to take into consideration "the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." 30 U.S.C. § 802(h)(1). Second, section 3(h)(1) expressly restricts the Secretary's interpretation of the term "milling" to the milling of minerals extracted from their natural deposits. Third, the legislative history of the Mine Act indicates that the Secretary must follow the principle that jurisdictional doubts be decided in favor of Mine Act coverage. S. Rep. No. 95-181, at 14 (1977), *reprinted in Legis. Hist.* at 602; *see Mistretta*, 488 U.S. at 376 n.10 ("legislative history provides additional guidance" for agency to determine limits of its delegated power). For the foregoing reasons, we affirm the judge's determination that Congress' grant of authority to the Secretary to construe the word "milling" was not an unconstitutional delegation of legislative power.

C. Violations and Unwarrantable Failure

1. Citation No. 7923622

Watkins asserts that the judge erred in determining that it violated section 56.11012,[11] and that the violation was unwarrantable. W. Br. at 26. It maintains that, at the time of the accident, the breezeway was not a travelway within the meaning of the standard. *Id.* at 27-28. Watkins contends that the judge erred in his unwarrantability determination because the alleged violation was not obvious and only lasted for two days prior to the accident. *Id.* at 29. The Secretary responds that the judge properly determined that Watkins violated section 56.11012 and that the violation was due to unwarrantable failure. Sec'y Br. at 29-30, 32-33.

[11] 30 C.F.R. § 56.11012 provides, in pertinent part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers."

Substantial evidence[12] supports the judge's determination that the breezeway was a travelway under section 56.11012. The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. The record indicates that the breezeway was the designated way for accessing the bag house area because Watkins instructed employees to use it and, significantly, it was the only available route. Tr. 95, 194, 197-98. Employees regularly used the breezeway several times a day for several days prior to the accident. 23 FMSHRC at 90-91; Tr. 100, 195-97. We reject Watkins' additional argument (W. Br. at 27-28) that the breezeway was not a travelway because the permanent travelway had not yet been constructed. As the Secretary correctly noted (Sec'y Br. at 30-31), the fact that the permanent travelway was not yet available supports the proposition that the breezeway was being used as a travelway.[13]

In addition, substantial evidence supports the judge's conclusion that the openings were unguarded and created a fall hazard. 23 FMSHRC at 89-91. It is undisputed that the openings adjacent to the breezeway were not protected by railings, barriers, or other guards and that each opening led immediately to a 70-foot drop. *Id.* at 89; Tr. 193. Employees also passed through and near to the unguarded openings several times a day for several days prior to the accident. 23 FMSHRC at 92; Tr. 100, 195, 197. The inspector testified that there were tripping hazards on the breezeway and that its surface could be slippery due to snow or rainfall. Tr. 195. Accordingly, we affirm the judge's determination that Watkins violated section 56.11012.

Substantial evidence also supports the judge's unwarrantable failure determination. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar.

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[12] 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)).

[13] We are not persuaded by Watkins' assertion that, even if the breezeway were a travelway, the railings or barriers were not required because the standard calls for railings that are parallel rather than perpendicular to the travelway. W. Br. at 28. The standard sets forth no such limitations. *See* 30 C.F.R. § 56.11012.

2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Substantial evidence supports the judge's finding that the violation was obvious. 23 FMSHRC at 93. The inspector testified that the cited condition was obvious because a number of employees accessed the bag house several times through the unguarded openings. Tr. 196. His testimony was collaborated by Davis who testified that he used the unguarded openings at least eight times a day. Tr. 100.

Because the openings were unguarded and led immediately to a 70-foot drop, the record also supports the proposition that the openings posed a high degree of danger. We find unconvincing Watkins' argument (W. Br. at 29) that the unguarded openings posed minimal danger because, when positioned properly with its long side next to the bag house, the man-lift basket completely covered the opening. As we have already stated, often the short end of the basket was placed against the opening and it is undisputed that the short end was narrower than the opening and left unprotected gaps there. Tr. 52, 108, 141, 263, 300. The judge credited the inspector's testimony that Boyette and Donald Busbee, both hourly employees of Watkins, told him that the short end of the basket was regularly placed next to the openings when employees were accessing the breezeway. 23 FMSHRC at 98; Tr. 176, 179, 182. We do not find the lack of evidentiary support that would form a basis for overturning the judge's credibility determination. *Cf. Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (providing that the Commission will not affirm credibility determinations if there is no evidence or dubious evidence to support them). Furthermore, the practice of placing the short end of the basket next to the opening was collaborated by Davis. 23 FMSHRC at 98; Tr. 101-03. Robert Bartholomew, Watkins' construction superintendent, also testified that the short end of the man-lift basket was against the opening when he arrived at the accident scene soon after the accident. 23 FMSHRC at 98; Tr. at 232-33, 245, 290.

As to the duration of the violation, we reject Watkins' argument that the judge erred in concluding that the violation was unwarrantable because the cited condition only lasted for two days prior to the accident. In light of the degree of danger and obviousness of the violation, a duration of two days demonstrates aggravated conduct. *Cf. Midwest Material*, 19 FMSHRC at 32, 36 (finding unwarrantable failure for extremely unsafe violation that lasted only minutes). Further, the operator had knowledge of the existence of the violation, because on the day of the accident but prior to its occurrence, Bartholomew passed through the unguarded opening en route to inspect the bag house worksite. Tr. 274, 285; *see Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator was aware of brake malfunction but failed to remedy problem). Accordingly, given the obviousness,

danger, duration of the violation, and the operator's knowledge of the violation, we affirm the judge's unwarrantable failure determination.

2. Order No. 7923625

Watkins asserts that the judge erred in determining that it violated section 56.11001,[14] and that the violation was unwarrantable. W. Br. at 30. It contends that it provided safe access to the breezeway because it provided the man-lift and a safe procedure for using it, and it maintains that it was unaware that employees were accessing the breezeway using the short end of the man-lift basket. *Id.* at 30-32. Watkins asserts that the alleged violation was not unwarrantable because the man-lift was only used for two days before the accident to access the breezeway and because Davis knew the correct method for accessing the breezeway from the man-lift. *Id.* at 33. The Secretary responds that the judge's determinations were correct. Sec'y Br. at 31-32.

The Commission has held that section 56.11001 comprises the dual requirements of providing and maintaining safe access to working places. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001). In *Lopke*, we explained that the term "maintained" in the standard "incorporates an on-going responsibility on the part of the operator to ensure that [the] means of safe access is utilized, as opposed to a purely passive approach in which an operator initially provides safe access and then has absolutely no further obligation." *Id.*

Even if Watkins initially provided a safe means of accessing the breezeway, substantial evidence supports the judge's determination that Watkins violated the standard by failing to maintain safe access. As discussed above, we accept the inspector's credited testimony that the short end of the basket was regularly placed against the unguarded opening and that employees had to climb over the top rail on the short end to enter the breezeway. 23 FMSHRC at 98; Tr. 179, 182. Davis also testified that the short end of the basket was regularly used to access the opening. 23 FMSHRC at 98; Tr. 103. He testified that, although he knew how the basket should have been positioned with respect to the breezeway opening, no one instructed him on how to get in and out of the basket. Tr. 139-41, 145-46. In addition, Watkins does not contest that Boyette, who operated the man-lift at the time of the accident, had not been instructed on how to operate the man-lift to provide safe access to the breezeway. 23 FMSHRC at 95, 98; Ex. P-8 at 4-5. The inspector also gave uncontested testimony that Watkins' general foreman, Jeffery Bochette, stated that he never discussed with his employees the proper procedure for accessing the breezeway via the man-lift. 23 FMSHRC at 94-95; Tr. 185.

We are also not persuaded by Watkins' argument that, because management did not know that employees were using the short end of the man-lift basket, the judge erred in determining that it violated section 56.11001. W. Br. at 30-31. Watkins' alleged lack of knowledge is no defense against the judge's violation determination because "[t]he Mine Act is a strict liability

[14] 30 C.F.R. § 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places."

statute and an operator may be held liable for violations without regard to fault." *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (Jan. 1994). Watkins' assertion that it did not know that employees were regularly using the short end of the basket actually supports the judge's finding that Watkins failed to adequately maintain safe access because it shows that Watkins took inadequate steps to determine whether the procedure for safe access was implemented. 23 FMSHRC at 99; *see Lopke*, 23 FMSHRC at 708 (holding that section 56.11001 incorporates ongoing responsibility to ensure safe access is maintained). Thus, we affirm the judge's determination that Watkins violated section 56.11001.

The judge's unwarrantable failure determination is also supported by substantial evidence. Watkins failed to instruct employees such as Davis and Boyette on the safe procedure for accessing the breezeway and failed to follow up to ensure that employees were accessing the breezeway in a safe manner. 23 FMSHRC at 100; Tr. 145-46, 185; Ex. P-8 at 4-5. As to the extent of the violation, the inspector's credited testimony and Davis' collaborating testimony support the judge's finding that employees frequently accessed the breezeway using the unsafe short end of the basket. 23 FMSHRC at 98; Tr. 100, 179, 182, 196. Furthermore, the violation posed a high degree of danger, given the 70-foot fall hazard (Tr. 189), such that Watkins should have had a heightened sense of awareness that precautions were called for when accessing the breezeway. The violation was also obvious because employees regularly accessed the breezeway using the short end of the basket, and this position of the basket against the opening would have been clearly visible. Tr. 100, 196. Given the danger and obviousness of the violation, the two day duration of the violation demonstrates aggravated conduct. Accordingly, we affirm the judge's unwarrantable failure determination.

3. Citation No. 7923626

Watkins disputes the judge's determination that it violated section 56.15005.[15] W. Br. at 33-35. It asserts that the plain language of the standard requires employees to wear safety belts and lines, but does not require that such belts and lines be used or "tied off." *Id.* at 33-34. Watkins argues that it complied with the standard because Davis was wearing a safety belt and line at the time of the accident. *Id.* The Secretary responds that the judge properly concluded that Watkins violated section 56.15005. Sec'y Br. at 34. She contends that the standard requires safety lines to be tied off and that this interpretation is supported by Commission case law and by the language and purpose of the standard. *Id.* at 34-35.

The purpose of the Part 56 regulations is "the protection of life, the promotion of health and safety, and the prevention of accidents." 30 C.F.R. § 56.1. Consistent with that purpose, the Commission has interpreted section 56.15005 to require that safety lines not only be worn but be worn in a safe and proper manner in the vicinity of a fall hazard. *Mar-Land Indus. Contractor,*

[15] 30 C.F.R. § 56.15005 provides that "[s]afety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

Inc., 14 FMSHRC 754, 757 (May 1992). Similarly, the Commission has previously recognized with respect to 30 C.F.R. § 57.15-5 (1979), a regulation with wording almost identical to section 56.15005, that "[a]lthough a literal reading of the standard might suggest that compliance is achieved whenever a miner wears any kind of line in any manner, such an interpretation is inconsistent with the [safety enhancing] purposes of the Part 57 regulations and this standard in particular." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). In *Kerr-McGee*, the Commission affirmed the judge's determination that the operator violated section 57.15-5 when a miner, wearing a safety belt and line, suffered a fatal fall because his safety line was not properly used. *Id.* at 2497-2500; *see also Austin Power, Inc.*, 9 FMSHRC 2015, 2019-21 (Dec. 1987), *aff'd* 861 F.2d 99 (5th Cir. 1988) (affirming violation of a similarly worded regulation where three miners wearing safety belts and lines did not use their safety lines in the presence of a fall hazard).

Moreover, an interpretation of section 56.15005 requiring that a safety belt or line be used, in addition to being worn, in the presence of a fall hazard is consistent with a harmonious reading of all portions of the standard. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (holding that regulations should be read as a whole). The second part of section 56.15005 requires that "a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." As the Secretary notes (Sec'y Br. at 34-35), it does not make sense to require an operator to assign a second person to tend the safety line if, as Watkins asserts, the employee wearing the safety line does not have to use it.

We conclude that substantial evidence supports the judge's determination that Watkins violated the standard. Watkins does not dispute (W. Br. at 7-8) that, although Davis was wearing a safety belt and line immediately prior to the accident, he did not tie off his safety line before moving from the man-lift to the opening. Tr. 111. As discussed, the judge's determination that the openings adjacent to the breezeway created a fall hazard finds substantial evidentiary support in the record. 23 FMSHRC at 101; Tr. 189, 193, 195. Accordingly, we affirm the judge's determination that Watkins violated section 56.15005.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determinations that the Plant falls within MSHA jurisdiction and that the authority granted to the Secretary by section 3(h)(1) to define "milling" is not an unconstitutional delegation of legislative power. We also affirm the judge's

determinations that Watkins committed S&S violations of sections 56.11001, 56.11012, and 56.15005, and that the violations of sections 56.11001 and 56.11012 were due to Watkins' unwarrantable failure to comply with the standards.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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