FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 29 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2014-77 LAKE 2014-132
v.	:	
MACH MINING, LLC	:	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Althen, Acting Chairman; Young and Cohen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Mach Mining, LLC ("Mach"). The citations allege that Mach violated 30 C.F.R. § 75.821(a) by failing to maintain chirp alerts on a disconnect box and power center.[1]

Mach contested the citations and the associated civil penalties. The case proceeded to a hearing before a Commission Administrative Law Judge. After counsel for the Secretary of Labor presented his case, Mach's attorney moved for a directed verdict. The Judge granted Mach's motion and vacated both citations. 38 FMSHRC 1379 (June 2016) (ALJ). Thereafter, the Secretary filed a petition for discretionary review challenging the Judge's grant of directed verdict in favor of Respondent.

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[1] Section 75.821 is entitled "Testing, examination and maintenance." Subsection (a) requires that:

> At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices are being properly maintained to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment. Tests must include activating the ground-fault test circuit as required by § 75.814(c).

We find that substantial evidence supports the Judge's conclusion: The Secretary did not present evidence demonstrating that Mach failed to perform the testing and examination required by section 75.821(a). *Id.* at 1381-82 n.2. Accordingly, we affirm the Judge's decision.

I.

Factual and Procedural Background

Mach operates an underground bituminous coal mine in Williamson County, Illinois. On June 18, 2013, MSHA Inspectors Britt Belford and John Butcher conducted a quarterly longwall inspection at the mine, accompanied by Parker Phipps, the Mach longwall coordinator.

When the inspectors reached the headgate in the No. 2 entry outby the longwall face, they began to examine the mule train.[2] Inspector Butcher observed that two of the mule train's chirp alerts[3] were inoperative. According to Inspector Butcher, the chirp alerts should have been both flashing and producing a high-pitched noise every two to three seconds. However, Butcher observed that the chip alerts on the disconnect box and 4000 KVA power center were silent and did not flash.

Butcher then issued two citations alleging violations of section 75.821(a). Both citations were designated as "significant and substantial" ("S&S"),[4] and the result of a moderate degree of negligence.

A hearing was held before a Commission Administrative Law Judge. At the conclusion of the Secretary's case, Mach made a motion for directed verdict as to the two citations in question. Mach argued that section 75.821(a) requires that a qualified person must test and examine each unit of high-voltage longwall equipment and circuits at least once every seven days. Mach noted that Inspector Butcher testified that the examinations had in fact been performed. In addition, Mach noted that the Secretary had failed to offer any evidence about the required seven-day examination of electrical equipment at the longwall.

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[2] A "mule train" is a colloquial name for the collection of equipment, including disconnect boxes, pumps, and power centers, that are used to distribute electric and hydraulic power to the longwall. A "disconnect box" is an electrical box where high voltage cables bring power into the mule train. The box has a switch that allows miners to cut all power to the entire mule train. From the disconnect box, power is transferred to power centers and ultimately onto the electrical equipment used on the longwall.

[3] A "chirp alert" is a safety feature on an electrical box that provides an auditory and visual warning when equipment is energized, thereby reducing the risk of electric shock or electrocution.

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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."

The Secretary contended that it was reasonable to infer from Butcher's testimony that the chirp alerts had not been tested, since two were inoperative at the time of the inspection. Moreover, the Secretary argued that the standard required an ongoing duty of maintenance that required Mach to maintain the chirp alerts in working condition.

The Judge orally granted Mach's motion at the hearing. In his written decision, the Judge explained that he had granted the motion because Inspector Butcher's allegation rested solely on the fact that he believed the chirp alerts were not properly maintained. The Judge noted that the inspector had answered in the affirmative when asked if there was "no dispute in your mind that the tests that are required by [Section] 75.821(a) were actually performed at the times required, correct?" 38 FMSHRC at 1382 n.2 (quoting Tr. 109). Because the Secretary had failed to establish that a qualified person had not tested and examined the chirp alerts within the last seven days to ensure that the equipment was being properly maintained, the Judge granted the motion for directed verdict and vacated the citations.

II.

Disposition

On appeal, the Secretary argues that the Judge erred in finding that section 75.821(a) does not require operators to maintain electrical protection devices on high-voltage longwall equipment. According to the Secretary, such a reading would allow operators to ignore nonfunctional electrical equipment for up to an entire seven days, until the operator is required to perform the next examination. Instead, the Secretary claims that the standard's regulatory history and placement strongly supports a plain reading of the standard requiring an ongoing duty to maintain the chirp alerts.

We find the Secretary's arguments unconvincing. The Secretary's characterization of the regulatory history presupposes that section 75.821(a) was intended to replace the multiple requirements contained in other regulations that impose a duty to maintain electrical equipment. However, the standard's history and context make clear that section 75.821(a) was intended to supplement, not supplant, existing examination and maintenance requirements.

Prior to the promulgation of section 75.821, mine operators were required to petition for a modification of 30 C.F.R. § 75.1002 before high-voltage cables could be used to supply power to their longwall operations. 57 Fed. Reg. 39,041, 39,041-42, 39,047-48 (proposed Aug. 27, 1992). In 1989, MSHA proposed significant revisions to the existing electrical standards in 30 C.F.R. Part 75. The proposed revisions would have allowed the use of high-voltage cables without petitioning for a modification, in exchange for more stringent rules governing electrical longwall equipment. *See* 54 Fed. Reg. 50,062-01, 50,122 (proposed Dec. 4, 1989). The proposal, which did not contain an analog to section 75.821, did not become a final rule. MSHA later said that its withdrawal of the proposed rule was due, in part, to the fact that the 1989 proposed rule "specifically focuse[d] on the safety issues related to use of high-voltage with longwall mining systems and [was] not incorporated within the context of an overall revision to the electrical safety standards." 57 Fed. Reg. at 39,042.

In 1992, MSHA proposed a new rule to address these deficiencies. The 1992 proposed rule included a new section 75.821to address testing and examination requirements of high voltage longwall electrical equipment. *Id.* at 39,047-48. MSHA stated that section 75.821 was to be "used in conjunction" with other regulations requiring maintenance, specifically section 75.1002.[5] *Id.* at 39,047. Moreover, the 1992 proposed rule created section 75.813,[6] which requires that all other existing electrical standards apply to longwall circuits and equipment where appropriate. *Id.* at 39,043. The final rule, which included section 75.821, was issued on March 11, 2002, after an extended notice-and-comment period. 67 Fed. Reg. 10,972, 10,992-95.

Consistent with its history and placement, the plain language of section 75.821(a) specifically requires periodic examinations of longwall electrical equipment. Section 75.821(a) does not require maintenance of electrical equipment. By its clear and unambiguous terms, it requires only that:

> At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits. . . .

30 C.F.R. § 75.821(a).

In light of the clear and unambiguous regulatory language, we decline the Secretary's invitation to read a requirement for maintenance into the standard where one simply does not exist.[7] Had the Secretary intended the standard to contain an ongoing maintenance requirement, he surely would have done so, as is evident in the numerous regulations that expressly require maintenance. *See, e.g.,* 30 C.F.R. §§ 75.503, 75.506(a), 75.506-1(a), 75.1002(a), 75.512, 75.1725(a). Indeed, section 75.512 provides, in pertinent part: "All electric equipment shall be

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[5] 30 C.F.R. § 75.821(a) states that "Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar workings or longwall faces."

[6] 30 C.F.R. § 75.813 states that: "Sections 75.814 through 75.822 of this part are electrical safety standards that apply to high-voltage longwall circuits and equipment. All other existing standards in 30 CFR must also apply to these longwall circuits and equipment where appropriate."

[7] The Secretary cites the Commission's decision in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011), as supporting his reading that section 75.821(a) establishes a duty to maintain. However, the Secretary's reliance on *Nally & Hamilton* is inapposite. In that case, the Commission found that the inclusion of the term "maintain" in 30 C.F.R. § 77.410(c) imposed a continuing responsibility on the operator to ensure that warning devices were maintained in working condition at all times. *Id.* at 1763. By contrast, section 75.821(a) contains no such explicit maintenance requirement.

frequently examined, tested, *and properly maintained* by a qualified person *to assure safe operating conditions*." 30 C.F.R. § 75.512 (emphasis added).

In the context of high-voltage longwall equipment, however, the Secretary elected to promulgate a standard that complemented existing regulations by imposing stricter requirements for examinations of longwall electrical equipment but did not create an additional maintenance requirement.

The standards governing high-voltage electrical equipment are part of a total set of regulations to protect miners' safety. As 30 C.F.R. § 75.813 clearly states, "[a]ll other existing standards . . . must also apply to these longwall circuits and equipment where appropriate." Thus, the Secretary could have looked beyond section 75.821 for a standard more appropriately suited to the facts of the case, such as section 75.512. He did not do so.

Instead, the Secretary proceeded to present his case at hearing on a theory not supported by the evidence. The Secretary alleged a violation of section 75.821(a), which requires a weekly examination of electrical longwall equipment, but failed to provide any evidence that adequate examinations were not performed. The Secretary did not submit Mach's examination records as evidence nor did he attempt to elicit testimony from adverse witnesses. The only evidence that the Secretary presented was the testimony of Inspector Butcher, and he testified that Mach had unquestionably performed the tests required by section 75.821(a).

Because an operator has an ongoing duty under Section 75.512 to maintain its equipment to protect miner health and safety, it appears that the inspector could have issued citations under that section. The Commission's procedural rules provide that petitions for assessment of penalties by the Secretary shall identify the section of the Mine Act or regulations alleged to have been violated. 29 C.F.R. § 2700.28(b)(1). These rules reflect the fundamental requirements of due process that an operator charged with a violation of the Act be given fair notice of the standard that it has allegedly violated. Neither the citation nor the penalty petition in this case refers to, let alone asserts, a violation of section 75.512.

Here, after filing the penalty petition, the Secretary could have moved to amend the citations. In the interest of justice, Judges freely grant such motions absent a showing of prejudice. *See, e.g., Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981). However, the Secretary never made such a motion prior to resting his case. Quite reasonably, Mach mounted its defense against the Secretary's allegations that the operator violated section 75.821. The Secretary's citation of a violation of section 75.821(a) went to a directed verdict without any mention of section 75.512.[8]

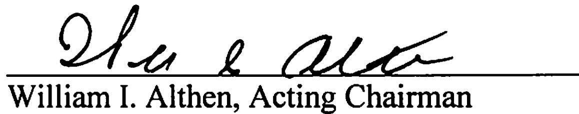
[8] Our colleague points to *Faith Coal Co.*, 19 FMSHRC 1357 (Aug. 1997), to suggest this matter should be remanded for the judge to consider whether Mach violated section 75.512. Slip op. at 10. In *Faith Coal*, the inspector mistakenly entered an outdated number for the cited regulation in the citation paperwork. Neither party noticed the error and proceeded to try the case at hearing under the correct safety standard, which still existed under a different number in the Secretary's safety regulations. The Commission therefore determined that the operator had suffered no prejudice from the Secretary's pleading deficiencies and that the Secretary's request

Thus, we are left to adjudge only the Secretary's allegations under section 75.821(a). Given the lack of evidence of a violation of that section, the Judge correctly vacated the citations upon Mach's motion for a directed verdict.[9]

III.

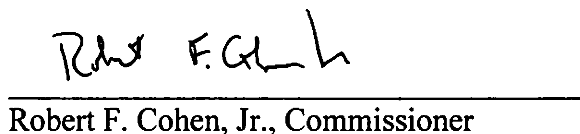
Conclusion

For the reasons set forth herein, we affirm the Judge's decision.



William I. Althen, Acting Chairman

Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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to amend the citation should be allowed. 17 FMSHRC at 1362. Here, in contrast, Mach directed its defense against a citation under section 75.821(a) and the Secretary's novel, expansive reading of that standard. Mach has not had the opportunity to defend against allegations that it violated section 75.512. Thus, the procedural history of *Faith Coal* renders it inapposite to the case at hand. We decline to send this case back to the judge to consider whether the operator has violated a standard the Secretary has never sought to allege.

[9] This decision is not criticism of Inspector Butcher. We recognize that MSHA inspectors have difficult jobs and must make quick determinations in the field when issuing citations. Inspector Butcher identified defects in the chirp alerts and issued citations to remedy what he saw as a danger to miner safety. Inspectors may not have the legal expertise required to always select the appropriate standard when issuing a citation. However, after a citation has been initially issued, it will be reviewed again by MSHA staff in the process of preparing the petition for assessment of penalties. Then, if the operator contests the penalty, it is reviewed again by the Secretary's trial counsel in preparation for the hearing. Trial counsel must determine that the facts alleged in the citation constitute a violation of the section of the regulations cited and, if not, should seek to amend the citation as appropriate. It is incumbent on the Secretary to make corrections to his pleadings before hearing to ensure the correct violation is charged and to provide due process.

Commissioner Jordan, dissenting:

This case arose when an MSHA inspector determined that two "chirp alerts" on the high voltage longwall equipment failed to emit any audible sound. Without proper notification from a functioning chirp alert that certain equipment is energized, miners are at risk of fatal injuries from electrocution. 38 FMSHRC 1379, 1381 n.2 (June 2016) (ALJ); Tr. 74-75.

The inspector issued two citations, each referencing a violation of 30 C.F.R. § 75.821(a).[1] The judge below dismissed the challenged citations. He determined that the standard relied upon by the inspector required tests and examinations of the equipment, but did not require that the equipment be properly maintained. According to the Judge, unless MSHA could show that the operator had failed to conduct the mandatory tests and examinations, the agency could not sustain a violation of this standard. Since the inspector's testimony did not contain such proof, the Judge granted the operator's motion for a directed verdict and dismissed the two challenged citations. My colleagues have agreed with this narrow construction of section 75.821(a).

I. Section 75.821(a) requires operators to properly maintain high voltage equipment.

As the Judge and my colleagues correctly note, the standard in question explicitly mandates periodic testing and examination of the longwall equipment and circuits. Contrary to my colleagues' contention, this instruction does not equate to "clear and unambiguous regulatory language" restricting the scope of the standard to those specified activities. Slip op. at 4. My colleagues have chosen to ignore the language explaining that the reason for these exams and tests is "to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices *are being properly maintained* to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment." 30 C.F.R. § 75.821(a) (emphasis added).

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[1] The standard states:

> **Testing, examination and maintenance.**
>
> (a) At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits *to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices are being properly maintained* to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment. Tests must include activating the ground-fault test circuit as required by § 75.814(c).

30 C.F.R. § 75.821(a) (emphasis added).

A standard that mandates certain steps be carried out on equipment for the purpose of determining that such equipment is being properly maintained, necessarily imposes an obligation on the operator to maintain that equipment. This is made evident when one considers the entire standard. The purpose of section 75.821(a) is not simply to perform tests and examinations. The purpose, as the standard states, is "to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment." 30 C.F.R. § 75.821(a). In order to prevent these operational hazards, the equipment must be "properly maintained." *Id.*

The standard the inspector referenced in citing Mach is one of a group of regulations promulgated in 2002 directed at high voltage longwalls. In proposing these standards the Secretary explained that "[p]roper testing, examination, and *maintenance* of high voltage longwall systems would assure that they would not pose increased hazards to miners." 57 Fed. Reg. 39,041, 39,047 (proposed Aug. 27, 1992) (emphasis added). By promulgating standards "related specifically to the safe use of high-voltage longwall equipment," 67 Fed. Reg. 10,972 (Mar. 11, 2002), MSHA envisioned "increased protection from electrical hazards" (*id.* at 10,973).

Despite the efforts of the Secretary to create a comprehensive and focused regulatory scheme relevant to high-voltage longwall equipment, our colleagues insist that only the more generic standard at 30 C.F.R. § 75.512 may be used to enforce a maintenance requirement in this case.[2] The majority relies on 30 C.F.R. § 75.813 for this holding.[3] However, that standard simply clarifies that, in addition to the specific safety standards that apply to high-voltage longwall circuits and equipment, other existing MSHA safety standards continue to apply. MSHA did not want the mining community to conclude that the new standards were the exclusive means of regulating high-voltage longwall equipment—section 75.813 means no more than that. Unfortunately, however, the measure that was included so as to avoid any gaps in the miners' protection is being used instead to restrict the Secretary's prosecutorial discretion and provide a rationale for vacating citations.[4]

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[2] Section 75.512 states in relevant part that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions."

[3] 30 C.F.R. § 75.813 states: "Sections 75.814 through 75.822 of this part are electrical safety standards that apply to high-voltage longwall circuits and equipment. All other existing standards in 30 CFR must also apply to these longwall circuits and equipment where appropriate."

[4] According to my colleagues, because operators had an ongoing duty to maintain equipment under section 75.512, and because section75.821(a) should be read to supplement rather than supplant this obligation, the "standard more appropriately suited to the facts of the case" is 75.512. Slip op. at 5. The mental acrobatics that will be required of inspectors as a result of this decision seems daunting.

Indeed, the majority acknowledges that "[i]nspectors may not have the legal expertise required to always select the appropriate standard when issuing a citation." *Id.* at 6 n.9.

II. Even if section 75.821(a) were limited to an examination and testing requirement, the Secretary's evidence was adequate to sustain a violation.

Section 75.821(a) requires that a qualified person test and examine each unit of high-voltage longwall equipment and circuits "*[a]t least* once every 7 days." 30 C.F.R. § 75.821(a) (emphasis added). The referenced language implies an obligation to examine the equipment more frequently under certain circumstances. Surely one such circumstance occurs when the equipment develops a visible defect. In this case the inspector arrived at the site and observed that two separate warning devices were not functioning.

The inspector testified that miners frequented the area where this equipment was located and would have noticed the fact the chirpers did not work.

> [A]nybody that is around that longwall train should notice that chirp alert is not working, because, you know, they're on all the time there's power. They're on—every day when a crew goes—goes in and gets out of the truck and walks by the disconnect and the power centers, they're walking by it and those are chirping and also the light is flashing. . . . There's people come there at the beginning of every shift and there's electricians walk by, the foreman walks by, the maintenance foremens walk by, and it's noticeable when those chirp alerts are working that they're working, and in this case, you know, both boxes, they weren't working.

Tr. 76, 91-2.

The existence of the hazardous condition, of which the operator was aware or should have been aware, would trigger the requirement to test and examine the chirp alerts. Since failing to take steps to address the defective warning devices could constitute a violation of section 75.821(a), even under the narrow construction adopted by the Judge and my colleagues, the Judge erred in issuing a directed verdict at the close of the Secretary's case.

III. Even if the majority ruling that the operator should have been cited under section 75.512 were correct, the Commission should remand the case instead of vacating the citation.

My colleagues in the majority vote to vacate these citations because they conclude the inspector listed the wrong safety standard on the citation. They believe he should have written 30 C.F.R. § 75.512 on the citation form, instead of section 30 C.F.R. § 75.821(a). Slip op. at 5.

Even if the majority's determination that section 75.512 is the relevant standard is correct, the appropriate response would be to remand this matter in order for the Judge to consider whether the operator violated that section. This approach would be consistent with our decision

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With respect, I suggest that the miners' safety may suffer to the extent enforcement of mandatory standards is dependent on inspectors needing sufficient "legal expertise."

in *Faith Coal Co.*, 19 FMSHRC 1357 (Aug. 1997). In that case, the citation alleged a violation of the wrong standard (the cited standard had previously applied to methane monitors but had been amended and renumbered). The Judge vacated the citation on the ground that it alleged a violation of the wrong standard and was never modified to assert a violation of the correct standard. The Commission reversed the Judge's decision to vacate the citation, holding that the Judge erred by vacating the citation on the basis of the Secretary's pleading error. We remanded for a determination of whether Faith's conduct violated the correct standard. *Id.* at 1361-62. Given that the majority's central complaint here appears to be that the inspector should have written section 75.512 on the citation instead of section 75.821(a), we should follow our case precedent and remand to the Judge.

My colleagues' concern that such an approach would violate the requirements of due process is unfounded. Of course, due process requires that an operator receive adequate notice of charges made against it. Here, Mach was on notice from the time it was first cited that the inspector considered the violative conduct to be a failure to maintain electrical equipment as evidenced by the defective chirpers. The citations allege that the volt disconnect box and power center are "not being properly maintained to prevent electrical shock hazards" and that the "chirp alerts fail[ ] to emit any audible sound to signal that the [equipment] is energized." S. Exs. 111, 112. Both citations were abated when new chip alerts were installed. *Id.*

The Judge recognized that MSHA was charging the operator with failing to properly maintain the electrical equipment. He emphasized that the inspector stated "it wasn't his contention it was a test and examination requirement. He was saying the chirp alerts didn't work. It was a maintenance requirement. . . . It's the inspector's theory of the case . . . ." Tr. 258.[5] Although I believe it to be entirely reasonable and appropriate for the inspector to have referenced the high voltage longwall standard at 30 C.F.R. § 75.821(a), it would hardly be prejudicial to amend the citation to refer instead to the requirement at section 75.512.

Mine operators have long been aware of their obligation to maintain electrical equipment. Section 305(g) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), used language identical to that of section 75.512 to mandate that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." Pub. L. No. 91-173, § 305(g), 83 Stat. 742, 778 (1969). This language requirement was retained in section 305(g) of the Mine Act, 30 U.S.C. § 865(g).

The Commission long ago made clear that an operator's requirement to maintain mine equipment is an ongoing responsibility. As we observed in *Nally v. Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011), a case involving a back-up alarm on a truck, we have "consistently construed 'maintain' . . . to require a continuing functioning condition." *See also Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-08 (July 2001) ("[t]he inclusion of the word 'maintain' in the standard . . . incorporates an on-going responsibility on the part of the operator"). In sum, Mach was well aware of its legal duty to properly maintain the chirpers.

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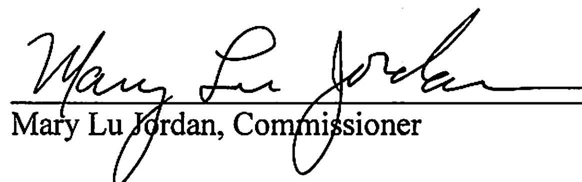
[5] The Judge also told counsel for the Secretary: "You proved that there was a defect." Tr. 251.

IV. Conclusion

I would vacate the Judge's decision and remand this case for further proceedings.



Mary Lu Jordan, Commissioner

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