FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	Docket Nos. PENN 2004-152
v.	:	PENN 2004-158
MUSSER ENGINEERING, INC., and PBS COALS, INC.	:	

BEFORE: Jordan, Chairman; Duffy and Cohen, Commissioners[1]

DECISION

BY: Cohen, Commissioner[2]

This consolidated civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), involves citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against PBS Coals, Inc. ("PBS") and Musser Engineering, Inc. ("Musser"). The citations were the result

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[1] Commissioner Michael G. Young did not participate in this matter. Commissioner Patrick K. Nakamura assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Nakamura has elected not to participate in this matter.

[2] A majority of the Commissioners joins in each section of Commissioner Cohen's opinion, and therefore it constitutes the Commission's decision in this case. A footnote at the beginning of each section of this opinion explains which Commissioners join in that section. Chairman Jordan and Commissioner Duffy have also issued separate dissenting opinions on certain issues.

of a July 2002 near-fatal, 77-hour entrapment of nine miners at the Quecreek No. 1 Mine.[3] In response to cross motions for summary decision, Chief Administrative Law Judge Robert J. Lesnick affirmed the citations against PBS and Musser and ordered a hearing on proposed penalties. 28 FMSHRC 699, 718-19 (Jul. 2006) (ALJ).[4] In a subsequent decision, the Chief Judge concluded that Musser and PBS acted in a grossly negligent manner, determined that the violations were significant and substantial ("S&S"), and imposed the maximum penalties allowed by the Mine Act. 30 FMSHRC 1087, 1095-96 (Nov. 2008) (ALJ). PBS and Musser filed petitions to review the judge's decisions, and the Commission granted both petitions. For the reasons that follow, we affirm, in part, and vacate and remand, in part, the judge's decisions.

I.

Factual and Procedural Background

A. The Mine Inundation

Beginning in 2001, Black Wolf Coal Company, Inc. ("Black Wolf") operated the Quecreek No. 1 Mine, an underground coal mine in Somerset County, Pennsylvania. 28 FMSHRC at 700-01; Stip. 23. Black Wolf employed 61 miners, 55 of whom worked underground. 28 FMSHRC at 700-01; Stip. 24. The mains, which consisted of seven entries, were driven down dip (at a lower elevation level) from the portals, and coal was produced in the 1-Left and 2-Left sections. 28 FMSHRC at 701; Stips. 16, 18. Mining was conducted by use of remote-controlled continuous mining machines that loaded coal directly into electrically operated shuttle cars, which carried the coal to a conveyor belt for transport out of the mine. Stip. 19.

On July 24, 2002, at 8:45 p.m., miners working in the 1-Left section broke through the working face into the room of an abandoned coal mine known as the Harrison No. 2 Mine. 28 FMSHRC at 701. The breakthrough resulted in a serious inundation of water from the Harrison No. 2 Mine, which was located up dip (at a higher elevation) from the Quecreek No. 1 Mine. *Id.* Nine miners were able to escape by wading through chest-high water and changing their route several times when they encountered impassable areas, while nine other miners were trapped underground. *Id.*; Tr. 393. Although the trapped miners retreated to the highest possible elevation and attempted to build a barricade against the rising water, the flooding reached a height of four feet at their last refuge point. Tr. 395-96. In addition to the hazard of drowning, the trapped miners suffered hypothermia and difficulty breathing as a result of low oxygen content in the atmosphere. Tr. 397. The nine miners wrote last notes to their loved ones, which

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[3] Black Wolf Coal Company, Inc., the operator of the Quecreek No. 1 Mine when the entrapment occurred, was also issued a citation and entered into a settlement agreement with the Secretary just before the hearing in the proceeding. Tr. 9-10.

[4] PBS and Musser filed petitions for interlocutory review of the Judge's initial decision of July 21, 2006, which the Commission denied. Unpublished Order, dated Feb. 15, 2007.

they placed in a waterproof container, and tied themselves together so that when they were at last overtaken by the water, they would be found together. Tr. 396. The nine trapped miners were ultimately rescued, following dramatic rescue efforts over a four-day period. 28 FMSHRC at 701.

B. Events Leading to the Permitting of the Quecreek Mine

Prior to the opening of a mine in Pennsylvania, a mine operator must apply for permits from state and federal authorities. *Id.* For the Quecreek No. 1 Mine, beginning in 1994, the Double C Coal Company ("Double C") initiated the application process with the Pennsylvania Department of Environmental Protection (DEP). *Id.* PBS subsequently acquired the Quecreek Mine No. 1 from Double C[5] and contracted with Musser to prepare a permit application for submission to DEP. *Id.*

Pennsylvania state law requires that operators must survey the workings of their mines and create accurate maps of their mines with accurate boundaries of adjoining mines. *Id.* at 702; Stip. 34. In addition, an engineer must certify the map. 28 FMSHRC at 702. There were a total of four abandoned coal mines around the Quecreek permit area, including Harrison No. 2 Mine. Tr. 249. The Harrison No. 2 Mine was located in the same coal seam and immediately up dip from the Quecreek No. 1 Mine boundary. 28 FMSHRC at 702. Part of Musser's work in preparing the permit application was researching and showing the location of these abandoned mine works adjacent to the planned Quecreek No. 1 Mine. 28 FMSHRC at 701-02; Stip. 12.

Prior to the closing of the Harrison No. 2 Mine, which began operating in 1913, Consol Energy, Inc. ("Consol") had purchased the mine's coal reserves. 28 FMSHRC at 702; Stip. 28. Consol leased the coal reserves to Saxman Coal and Coke Company ("Saxman"), which operated the mine. 28 FMSHRC at 702; Stip. 48. Saxman provided updated mine maps of the Harrison No. 2 Mine to Consol on a biannual basis. 28 FMSHRC at 702. When the mine was closed in 1963, Saxman was required to supply a final mine map to the state of Pennsylvania. *Id.* After the mine was closed, it was abandoned and sealed and became flooded. *Id.* Consequently, during the state permitting process for the Quecreek No. 1 Mine, the Harrison No. 2 Mine could not be surveyed. *Id.* These circumstances led both Musser and PBS to conduct searches for maps of the Harrison No. 2 Mine. *Id.*

Although records indicated that the superintendent of the Harrison No. 2 Mine supplied final mine closing information and a final mine map to state authorities, the DEP did not have a final mine map in its archives when the Quecreek No. 1 Mine was planned and permitted. *Id.* at 703. Indeed, none of the four abandoned mines surrounding the Quecreek mine had final

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[5] The parties' stipulations provide that the Quecreek No. 1 Mine was "initially opened" by PBS and RoxCoal, Inc., which are both identified as subsidiaries of Mincorp, Inc. Stips. 13, 20. In 2001, PBS contracted with Black Wolf for Black Wolf to conduct underground mining at Quecreek. 28 FMSHRC at 701; Stip. 23.

certified maps that were used in preparing the permit application for Quecreek. Tr. 249. Musser and PBS tried over a multi-year period to locate maps of the Harrison No. 2 Mine through visits to state and federal governmental offices and by contacting individuals connected to the mine. 28 FMSHRC at 702-03. For instance, PBS and Musser located a map of the Harrison No. 2 Mine at the Department of Interior's Office of Surface Mining ("OSM") office in Greentree, Pennsylvania ("the Greentree map"). *Id.* at 703. The Greentree map was not dated nor marked final, but it was the most current map of the mine that could be located at the state or federal mine map repositories. *Id.; see* Gov't Ex. 9; Stips 63, 64, and Jt. Ex. 3-4 (these copies of the Greentree map are dated; the original copy that Musser and PBS obtained is not).

In addition, PBS personnel reviewed maps at an MSHA district office and two DEP offices. Stips. 59, 60. Musser employees also retrieved maps from DEP offices. Stip. 61. Many of the maps that PBS and Musser uncovered were older ones and not useful for drawing the final boundaries of the Harrison No. 2 Mine on the Quecreek No. 1 Mine permit application maps. 28 FMSHRC at 703.

Musser contacted Consol because it had owned the coal reserves at the Harrison No. 2 Mine. Musser expected that Consol would have had accurate maps of the coal removed from the mine for purposes of checking its royalties. *Id.* A Consol employee at its facility in Library, Pennsylvania, located a map of the Harrison No. 2 Mine and provided a copy to Musser. *Id.*; Stip. 65. The map proved to be inaccurate because it showed coal reserves that had been mined. 30 FMSHRC at 1089; Tr. 44-46. Musser and PBS subsequently obtained a second map from Consol. 30 FMSHRC at 1089; 28 FMSHRC at 703. This map was neither dated, certified by an engineer, nor marked final. *Id.* This second Consol map showed the most extensive workings of the Harrison No. 2 Mine of any map located and was accepted as the final map. *Id.*

Musser, with the concurrence of PBS, used the second Consol map, Gov't Ex. 3, to draw in the boundaries of the Harrison No. 2 Mine on the Quecreek permit map. 30 FMSHRC at 1089; 28 FMSHRC at 703. The Harrison No. 2 Mine boundary on the permit map determined the extent of the development of the Quecreek No. 1 Mine, the limit of which was a 200-foot "hydraulic" barrier when there was an unsurveyed adjacent mine. 30 FMSHRC at 1089; 28 FMSHRC at 715; Tr. 653. Musser engineer Ed Secor certified the permit map. 28 FMSHRC at 703; *see* Gov't Ex. 5.

On February 28, 1998, the permit application for the Quecreek No. 1 Mine was submitted to the DEP. 28 FMSHRC at 701. During the DEP review of the application, DEP staff members conducted their own search for mine maps to confirm the accuracy of the mine map submitted with the application. Stip. 64. The most current map of the Harrison No. 2 Mine that could be located at the state and federal repositories was the Greentree map. *Id.* Based on the application prepared by Musser and submitted by PBS, including the mine map with the Harrison No. 2 Mine boundaries as reflected in the second Consol map, the DEP issued a permit for the Quecreek No. 1 Mine on March 13, 1999. 28 FMSHRC at 701; Stip. 73.

Once Musser engineer Secor certified the state permit map, all further maps created during the permitting process accepted the information (such as the boundary of the Harrison No. 2 Mine) on the prior sealed maps as complete. Stip. 87. The Musser permit map, including the placement of the Harrison No. 2 Mine and the established 200-foot hydraulic barrier, was used as the basis for maps submitted to MSHA, including the mine map required under 30 C.F.R. § 75.1200. 30 FMSHRC at 1089; Tr. 591-97.

C. The MSHA Investigation and Subsequent Citations

After the breakthrough from the Quecreek Mine into the Harrison No. 2 Mine, MSHA conducted a search for Harrison mine maps. Stip. 77. It was determined that the second Consol map, upon which Musser had relied in drawing on the permit map the boundaries of the Harrison No. 2 Mine, was not a final map and showed mining only through approximately 1961, while mining operations had continued through 1963. Stip. 67.

During MSHA's investigation, it was also ascertained that the Greentree map of the Harrison No. 2 Mine that appeared to be the most recent map filed with state or federal authorities prior to its closing, was actually a map from 1957. Stip. 78. Due to a filing error at OSM, a portion of the map that had a date of 1957 on it was not supplied to PBS and Musser when they obtained the Greentree map. 28 FMSHRC at 703. *See* Stips. 63, 78-81.

In determining whether the operator of the Harrison No. 2 Mine complied with state law in submitting a final mine map,[6] MSHA identified John Kimmel as the superintendent and engineer for Saxman at the Harrison Mine. 28 FMSHRC at 703. Records indicated that Kimmel had submitted final mine maps for other mines in the area when they closed. *Id.* However, the Commonwealth of Pennsylvania had no record of a final mine map for the Harrison No. 2 Mine. *Id.*

In August 2002, MSHA discovered a final mine map at a museum, the Windber Coal Heritage Center. *Id.* at 703-04. MSHA investigators traveled to the museum and went to the museum's attic to examine old un-cataloged maps. Stip. 86. The family of a deceased Pennsylvania mine inspector, C.H. Maize, who had inspected the Harrison No. 2 Mine, had donated a map in his possession to the museum in June 2002. Stip. 84. The map was not available to the public prior to July 24, 2002, the date of the Quecreek inundation. Stip. 86. A note on the outside of the map indicated that it was the "final" mine map, and it had a date of 1964. Stip. 82. This map ("the Windber map") was the final mine map presented by Saxman to the state, and it was signed and dated by state inspector Maize. Stips. 82, 86; PBS Ex. 19.

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[6] The Mine Act, 30 U.S.C. § 312(c), and the Secretary's regulations, 30 C.F.R. §§ 75.1204 to 75.1204-1, now require that an operator file a final mine map with the MSHA district office that is accurate up to the time of closure. The Harrison No. 2 Mine closed in 1963, well before the effective date of either the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et. seq. ("Coal Act") or the Mine Act.

However, the Windber map was not certified by a surveyor or engineer, as required by state law, and the map did not show mining in the room at the Harrison No. 2 Mine where the breakthrough from the Quecreek No. 1 Mine had occurred. 28 FMSHRC at 704. MSHA investigators never located a final certified map of the Harrison No. 2 Mine nor any map that showed mining in the Harrison No. 2 Mine where the actual breakthrough occurred. *Id.*

A second mine map that was identical to the Windber map was located after the conclusion of MSHA's investigation. This map was found in the storage area in an attorney's office at Consol. Stips. 99, 102. The box containing the map was marked with the name of an environmental matter under investigation by the U. S. Environmental Protection Agency. Stip. 102. The map was not cataloged and had been placed in the storage area in the mid-1990's. Stips. 101-02. During a review of the stored boxes for possible donation to an educational institution, documents relating to Quecreek were discovered, and MSHA was contacted. Stips. 103-04. In July 2004, MSHA examined the contents of the box and located a map identical to the Windber map, along with a letter from state inspector Maize reminding Saxman of its obligation under state law to supply a final mine map 60 days after mine closure. Stips. 105-07.

At the completion of its investigation, on August 12, 2003, MSHA issued citations to Black Wolf, Musser, and PBS that charged each with violating 30 C.F.R. § 75.1200. That section provides:

> *The operator of a coal mine shall have* in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, *an accurate and up-to-date map of such mine* drawn on scale. *Such map shall show*:
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> (a) The active workings;
> (b) All pillared, worked out, and abandoned areas, except as provided in this section;
> (c) Entries and aircourses with the direction of airflow indicated by arrows;
> (d) Contour lines of all elevations;
> (e) Elevations of all main and cross or side entries;
> (f) Dip of the coalbed;
> (g) Escapeways;
> (h) *Adjacent mine workings within 1,000 feet*;
> (i) Mines above or below;
> (j) Water pools above; and
> (k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and

(l) Such other information as the Secretary may require. Such map shall identify those areas of the mine which have been pillared, worked out, or abandoned, which are inaccessible or cannot be entered safely and on which no information is available.

30 C.F.R. § 75.1200 (emphases added).

In substantially similar citations, MSHA charged Musser and PBS with violating the standard because the workings of the Harrison No. 2 Mine "were not accurately and completely shown on the mine map." The citations further specified that the operator's mine map showed the Harrison No. 2 Mine to be 450 feet away from where the breakthrough occurred and "the primary cause of the accident was the use of an undated and uncertified mine map of the Harrison No. 2 Mine that did not show the complete and final mine workings." The citations further stated that Musser and PBS had improperly relied on the second Consol map as the most up-to-date map even though it was not dated or represented as a final map. Finally, the citations stated that, even though the Windber map would not have been available to Musser, "other information . . . would indicate that the boundaries used were questionable." The citations specified that the violations were S&S; that the gravity of the violations was high; and that PBS and Musser were moderately negligent. Docket Nos. PENN 2004-152 and PENN 2004-158, Pets. for Assessment of Civ. Pen. (Exs. A, citations dated Aug. 12, 2003). The Secretary proposed penalties of $5,000 each against PBS and Musser. *Id.*

PBS and Musser filed notices of contests, and the case was assigned to the Chief Judge. In response to motions for summary decision from the Secretary, PBS, and Musser, the judge, on July 21, 2006, issued a decision addressing whether PBS and Musser violated section 75.1200.

With regard to PBS, the judge noted that the Mine Act is a strict liability statute and that the language of the regulation is clear. 28 FMSHRC at 706. Among other things, section 75.1200 requires an operator to show on a mine map adjacent mine workings that are within 1000 feet. *Id.* at 707. The judge found that the mine map at the Quecreek No. 1 Mine did not accurately show the workings of the abandoned Harrison No. 2 Mine. *Id.* Therefore, the judge concluded that PBS violated the standard when it depicted inaccurate boundaries of the abandoned mine on the map. *Id.* at 707-08. The judge did not address PBS's degree of negligence nor the appropriateness of the proposed penalty because of outstanding questions of material fact that could only be resolved following a hearing. Thus, he denied summary decision on those issues. *Id.* at 709-11.

In response to Musser's argument that it was not an operator subject to the jurisdiction of the Mine Act, the judge held that Musser was an independent contractor providing engineering services to the mine that were more than *de minimis*. *Id.* at 711-14. The judge concluded that Musser violated section 75.1200 because it was in a position to prevent the errors on the mine map submitted to MSHA in that "Musser created, certified, and sealed the permit map, on which the section 75.1200 map was based." *Id.* at 714-16. On the issue of Musser's negligence, the

judge concluded, as he had with PBS, that he could not determine the degree of Musser's negligence or the penalty assessment without a hearing.[7] *Id.* at 716-18.

Following a hearing, the judge issued a second decision on November 3, 2008, addressing the degree of negligence of PBS and Musser in committing the violations, whether the violations were S&S, and the amount of penalties. 30 FMSHRC at 1087. With regard to negligence, the judge concluded that PBS and Musser acted in "a grossly negligent manner." *Id.* at 1092-94. The judge reasoned that PBS and Musser were aware that they had received contradictory maps from Consol, that final certified maps are rarely available, and that the Harrison No. 2 Mine was at a higher elevation and full of water. *Id.* Rather than take additional precautions such as placing a notation on the mine map indicating uncertainty about the boundaries, PBS and Musser chose instead "to play Russian roulette with the lives of miners." *Id.* at 1093-94. The judge also concluded that the violations were S&S, noting in particular that the death of the nine miners was a near certainty but for a dramatic rescue. *Id.* at 1095. Finally, in addressing the proposed penalties, the judge found that the violations were "of the utmost gravity," *id.* at 1091-92, and he imposed the maximum penalty of $55,000 against PBS and Musser. *Id.* at 1095.

II.

Disposition

PBS challenges the judge's reading of section 75.1200 in finding a violation because the judge's decision requires PBS to comply with the "impossible" requirement of producing an accurate map with the boundaries of the abandoned and sealed Harrison No. 2 Mine when there was no complete final mine map available from any source. PBS Br. at 15-16. PBS argues that the judge's reading of the standard misinterpreted section 75.1200 to mandate "accurate and up-to-date" information about the abandoned Harrison No. 2 Mine when the regulation only requires such information about the operator's own mine. *Id.* at 16-17. PBS also contends that the judge's reading of the standard is inconsistent with the regulatory scheme. *Id.* at 18-20. In support of its position, PBS also notes that the Secretary's regulation for ventilation plan maps, 30 C.F.R. § 75.372(c) (which may be satisfied by a mine map prepared under section 75.1200), requires boundaries of only "known" mine workings, which is consistent with Pennsylvania regulations. PBS Reply Br. at 5. PBS further argues that the judge erred when he required PBS to annotate the mine map to indicate uncertainty about the boundaries of the adjacent abandoned mine. PBS Br. at 19-25; PBS Reply Br. at 7-9. PBS states that it was not aware of such a requirement under section 75.1200 and therefore lacked notice. PBS Br. at 25-26; PBS Reply Br.

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[7] The judge concluded that Black Wolf, as the operator of the Quecreek No. 1 Mine, was jointly liable with the independent contractors, PBS and Musser, for the violation of section 75.1200. *Id.* at 717-18. As previously noted, Black Wolf settled with the Secretary and is no longer in the proceeding. The judge approved a settlement in which Black Wolf was ordered to pay $4100, the amount that the Secretary had proposed in its penalty against Black Wolf. Unpublished Order, Docket No. PENN 2004-157 (Nov. 3, 2008).

at 9. PBS takes issue with the judge's finding that PBS's level of negligence was very high or "gross," noting that the Secretary only alleged that the level of negligence was "moderate." PBS Br. at 26-31. PBS also asserts that the violation was not S&S. *Id.* at 31-33. Finally, PBS contends that the judge's increase in the Secretary's proposed penalty was improper and that he failed to provide an adequate explanation for departing from the proposed amount. *Id.* at 33-34.

Musser initially argues that it is not an "operator" within the meaning of the Mine Act and therefore that MSHA has no jurisdiction over it. M. Br. at 6-15; M. Reply Br. at 8-12. Musser contends that a mine must exist before Mine Act jurisdiction attaches, and that Quecreek No. 1 Mine was not in existence at the time Musser performed services. M. Br. at 7-11. Musser further argues that it did not violate section 75.1200 because it never created any map of the Quecreek No. 1 Mine, M. Reply Br. at 6-7, and never certified the section 75.1200 map nor submitted it to MSHA. M. Br. at 16-17. Musser asserts that it played no role in making sure an up-to-date map was kept at the mine, M. Br. at 16, and that it could not have met the requirements of section 75.1200 because there was no "mine" in existence at the time it prepared the state permit map. M. Reply Br. at 6-7. Musser challenges the judge's S&S determination because he failed to correctly apply the test set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984). M. Br. at 17-18. Musser asserts that the judge's finding that Musser acted in a grossly negligent manner is contrary to the record evidence, clearly erroneous, and that the judge ignored mitigating factors in his determination. *Id.* at 19-25. Musser further challenges the judge's negligence holding because it was based on Musser's failure to place a warning or notation on the state permit map, when such a disclaimer would have been inappropriate. M. Br. at 21-22; M. Reply Br. at 2-3. Musser finally argues that the Commission should reverse the judge's penalty assessment because he failed to properly consider whether the increased penalty was appropriate to Musser's size and whether it would affect its ability to continue in business. M. Br. at 25-26.

In response, the Secretary argues that Musser failed to raise either before the judge or in its PDR that it was not covered by the Mine Act. S. Br. at 12-13, 15-16. The Secretary further argues that Musser provided sufficient services to the Quecreek mine to be an "independent contractor" under the Act. *Id.* at 14-18. With regard to the regulatory requirement to provide an accurate mine map showing adjacent mine workings, the Secretary argues that the standard is plain and that Musser and PBS violated it when they failed to show the correct boundaries of the Harrison No. 2 Mine. *Id.* at 18-20. In response to Musser's and PBS's argument that they did not have adequate notice of the standard's requirements, the Secretary asserts that a reasonably prudent operator would have understood that a mine map that indicates there were no immediately adjacent workings, when in fact, that information was unknown, is not "accurate." *Id.* at 24-25. The Secretary argues that the judge's S&S determination is correct under *Mathies*. *Id.* at 26-30. The Secretary states that the judge's finding of gross negligence is supported legally and factually. *Id.* at 30-39. In the assessment of penalties against Musser and PBS, the Secretary states that a remand to the judge for a further analysis of the penalties and two of the penalty criteria in section 110(i), size of business and ability to continue in business, is necessary. *Id.* at 41-42.

A. Musser's Status as an Operator/Independent Contractor under the Mine Act[8]

Section 3(d) of the Mine Act expanded the definition of "operator" in the Coal Act, and defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The phrase "independent contractor" is not defined in the Mine Act, but MSHA regulations define it as an entity that "contracts to perform services . . . at a mine." 30 C.F.R. § 45.2(c). The Secretary cited Musser as an operator based on the independent contractor clause of section 3(d).[9]

Musser challenges MSHA's authority to issue it a citation under the Mine Act. M. Br. at 6-17. It essentially argues that before there can be jurisdiction over it, there must, pursuant to section 3(d), be a "mine" in existence from which minerals are being extracted, and that in this case, the actions for which it was cited occurred years before there was a mine. *Id.* at 6-9 & n.4. Musser additionally argues that MSHA lacked jurisdiction to issue the citation because its work was not performed at the prospective mine site, and hence, was not "at such mine" within the meaning of 30 U.S.C. § 802(d).

Initially, we disagree with the Secretary that Musser has not adequately preserved the issue for review. In its petition for discretionary review, Musser identifies the first issue for review in the following words, "There is no Mine Act jurisdiction." M. PDR at 6. Musser states in its petition that it is not an "operator," which includes "any independent contractor performing services," within the meaning of section 3(d) of the Act. *Id.* Musser's identification and treatment of the issue in its PDR largely parallels the judge's discussion of the issue that he titled, "Musser - Jurisdiction" in his first decision. 28 FMSHRC at 711. In any event, Musser's arguments regarding its status as an operator and independent contractor under section 3(d) are clearly related to those presented to the judge, M. Reply Br. on Mot. for Sum. Dec. at 1-5, and can be considered by the Commission. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds,* 170 F.3d 148 (2nd Cir. 1999) (addressing unwarrantable failure findings not specifically raised in a PDR because the arguments were sufficiently related to the negligence issue in the PDR); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (holding that the arguments raised on review were sufficiently related to those presented to the judge, as they enlarged the initial contention to the judge by presenting an additional rationale).

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[8] Chairman Jordan joins Commissioner Cohen in Part II.A. of this opinion.

[9] In response to Musser's argument based on *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Dec.1999), an argument which Musser now seems to have abandoned, the Judge correctly pointed out that a majority of Commissioners concluded that the engineering firm in *Berwind* could have been cited as an independent contractor. 28 FMSHRC at 711-12.

In finding that Musser was an "independent contractor performing services . . . at [a] mine" under section 3(d), the judge relied on *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996), and *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002), which hold in effect that section 3(d) covers any independent contractor performing more than *de minimis* services at a mine. *See* 28 FMSHRC at 712-14. The judge's analysis of this issue is correct.[10]

First, clearly Musser was an independent contractor which performed engineering services for PBS in connection with the Quecreek No. 1 Mine. It prepared the original permit application including the maps that were an integral part of securing a mining permit from state and federal authorities. Stips. 11, 12. Once Musser engineer Secor certified the state permit application map that indicated the boundaries of the Harrison No. 2 Mine, all future mine maps, including mine maps submitted to MSHA, were prepared using that map as the "base map." 30 FMSHRC at 1089. Substantial evidence supports the judge on this point.[11] Tr. 59-60, 194, 335, 377-82.

The next inquiry is whether Musser was performing services "at a mine." Relying on the Commission's decision in *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784 (Nov. 1985), *aff'd*, 812 F.2d 717, 720 (D.C. Cir. 1987), Musser argues, M. Br. at 7-8, that there can be no Mine Act jurisdiction if there is no mine in existence. In *Paul*, the Commission dismissed a section 105(c) discrimination complaint because the individual was not working at a "mine," and was involved

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[10] Commissioner Cohen notes that previous Commission cases have utilized a cumbersome and obscure two-pronged test for determining whether an independent contractor is an operator under section 3(d). First, the Commission has reviewed the independent contractor's "proximity" to the mining process and determined whether its work is "sufficiently related" to it. *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989), *aff'd* 921 F.2d 1285 (D.C. Cir. 1990). Next, the Commission has considered "the extent of [the contractor's] presence at the mine." *Id.* By contrast, the D.C. Circuit in *Otis Elevator,* the 10th Circuit in *Joy Technologies,* and the 7th Circuit in *Northern Illinois* have adopted an approach based on the plain meaning of the statute. This approach to section 3(d) is also advocated by the Secretary. S. Br. at 18 n.15. Commissioner Cohen believes this view is more straightforward and in keeping with the language of the Mine Act. He notes that no court has endorsed the Commission's analysis of the independent contractor component of section 3(d). Consequently, he suggests that our older precedent in this area merits reexamination by the Commission.

[11] 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)).

in design and exploratory activity that was "simply too far removed from what reasonably can be regarded as mining activity in order to qualify for Mine Act coverage." 7 FMSHRC at 1788.

However, Musser's argument ignores an essential provision of the Mine Act that is applicable in this proceeding. Section 3(h)(1) of the Act defines "mine" as including "*lands* . . . or other property . . . used in, or *to be used in*, or resulting from, the work of extracting such minerals from their natural deposits." 30 U.S.C. § 803(h)(1) (emphases added).[12] The significant distinction between *Paul* and this case is that in *Paul*, the engineer was preparing designs to explore the feasibility of storage of nuclear waste in shafts constructed in underground salt formations, but no prospective mine site was involved. Further, in *Paul*, "[t]he design never left the drawing board. It was never implemented." 7 FMSHRC at 1787. Thus, the "mine" was wholly conceptual in nature. As the D.C. Circuit noted, "[c]onceptual designs do not endanger lives or property; any hazards they pose, prior at least to their final approval or the initial stages of their implementation, are purely hypothetical. The Act was not designed to regulate *ideas*." 812 F.2d at 720.

Here, in contrast, the site for the mine had been selected, and Musser's work was in relation to that specific site. The Quecreek No. 1 Mine was located at that site. Thus, we conclude that the absence of a mine from which minerals were being extracted at the time of Musser's work is not dispositive of Musser's status as an independent contractor. *See* 7 FMSHRC at 1785, 1788.[13]

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[12] We disagree with Musser's assertion, stated at oral argument before the Commission, Oral Arg. Tr. 57-58, that MSHA has no jurisdiction over any actions taken by an operator before ground is broken for a new mine.

[13] We also reject Musser's argument based on the language of section 4 of the Mine Act, that it is not subject to the Act because "[a]t the time of the acts for which Musser was cited, there was no 'mine, the products of which enter[ed] commerce or the operations or products of which affect[ed] commerce." M. Br. at 8-9, quoting 30 U.S.C. § 803; Oral Arg. Tr. 50. Musser relies on *Paul* for the proposition that this section of the Act "says nothing about the *prospective effects* of commerce." M. Br. at 9, quoting 812 F.2d at 720 n.3 (emphasis in brief). Musser's reliance is misplaced. Musser ignores the fact that the services Musser performed (which, as discussed below, included surveying, field investigations, and water sampling at the mine site), were contemporaneous "operations . . . which affect commerce." *See United States v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (holding that the operation of a mine whose coal was sold locally, and which purchased mining supplies from a local dealer and consumed commercially produced electricity, were sufficient to prove that "operations or products" of the mine affected interstate commerce under the Act); *Sec'y of Interior v. Shingara*, 418 F. Supp. 693 (M.D. Pa. 1976) (holding that defendants' mining activities fell within the coverage of the Act based in part on their purchase of items of equipment and an insurance policy produced by out-of-state sources which "affects commerce"); *see also D.A.S. Sand & Gravel, Inc.*, 386 F.3d 460 (2nd Cir. 2004)

Musser's second argument as to jurisdiction is that its work was not actually performed at the prospective mine site. In response, the Secretary argues that the words "at such mine" are applicable if the services related to the mine site even if Musser performed them somewhere else. S. Br. at 15-17. The words "at such mine" in section 3(d) are ambiguous, and we conclude that the Secretary's interpretation is reasonable and thus entitled to deference under the *Chevron II* standard. *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842-44 (1984).

Even without according deference to the Secretary's interpretation of the words "at such mine," there is substantial evidence to support the finding that Musser's work was performed, in part, at the mine site. This conclusion is supported by Musser's time records contained in Musser Exhibit 4. These time records indicate repeated visits to the mine site for work related to the permitting process, including surveying, field investigations, and water sampling. *See* M. Ex. 4. These types of visits were acknowledged by Musser's counsel at oral argument. Oral Arg. Tr. 44-45. Moreover, the services performed by Musser, which determine whether it is subject to MSHA jurisdiction include all of the work performed by Musser in connection with submitting the permit application to the Pennsylvania Department of Environmental Protection in 1998. This work was much more extensive than just the work of locating the boundaries of the Harrison No. 2 Mine and placing them on the Module 19.2 permit map. The specific work relating to the Harrison Mine boundaries is the only work relevant to the citation in this case, but it is the totality of the work Musser performed in preparing the permit application which must be considered on the jurisdiction issue.[14]

Our examination of Musser's activities does not end here. We must determine whether its contact was so infrequent or *de minimis* that it would be difficult to conclude that services were being performed. *Northern Illinois*, 294 F.3d at 848-49. Musser's engineering services for RoxCoal, PBS, and Black Wolf were extensive in time and substantial in content. Musser's time records reflect work on a monthly, weekly, or more frequent basis, throughout 1992 to 1999. *See* M. Ex. 4. As the judge found, 28 FMSHRC at 714, Musser's activities included "engineering support, mapping, and surveying services" that were performed to meet the operational needs of the mine. Substantial evidence supports the judge in this regard. Accordingly, the services provided by Musser were not *de minimis*, unlike the contractor in *Northern Illinois*.

Finally, in considering the role of Musser in the pre-extraction, operational activities at the Quecreek mine, it is consistent with the purposes of the Mine Act to conclude that Musser is an operator. As the Commission has noted, Congress' inclusion of language in section 3(d) to include independent contractors under the definition of "operator" represents an intentional

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(affirming Commission holding that the Mine Act applies to mines the products of which are sold entirely intrastate).

[14] However, we reject the Secretary's argument that the work performed by Musser at the Quecreek Mine in 2001 and 2002 is relevant to establishing jurisdiction for work performed up to submission of the Pennsylvania permit application in 1998.

expansion in the coverage of the statutory term. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1357 (Sept. 1991). Moreover, according to the Senate Report, "[I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation." 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 & Health Act of 1977*, at 602 (1978). Indeed, if we did not find coverage of Musser under the Act, we would reach the anomalous result that a mine owner performing the same work as an independent contractor would be covered, but the contractor would not.

B. Whether Section 75.1200 Was Violated

PBS and Musser were cited for violating section 75.1200, 30 C.F.R. § 75.1200. Section 75.1200 is a standard that has its origin in, and closely tracks, section 312 of the Mine Act, which provides that "[t]he operator of a coal mine shall have . . . an accurate and up-to-date map" that shows "adjacent mine workings within one thousand feet." 30 U.S.C. § 872.[15]

1. Liability of PBS[16]

In agreement with the judge, we conclude that the language of section 312 of the Mine Act and the regulation, 30 C.F.R. § 75.1200, is clear in requiring a coal mine operator to maintain an "accurate" mine map showing adjacent mine workings, including abandoned workings within 1000 feet. The judge correctly determined that PBS violated 30 C.F.R. § 75.1200. PBS violated the standard's requirement of an accurate map because, as the judge pointed out, "[t]o say that the operator's map was inaccurate would be an understatement. If the operator's map were accurate, the Harrison No. 2 Mine workings would not have been intersected because the Harrison No. 2 Mine really would have been approximately 450 feet away, as indicated on the operator's map." 28 FMSHRC at 706. Accordingly, as the judge noted, if the Quecreek mine map had been "accurate," no breakthrough would have occurred. *Id.*

PBS raises a number of defenses regarding this liability issue. First, PBS argues that section 75.1200's requirement for an "accurate" mine map only applies to the mine "being mapped and operated." PBS Br. at 16-17. It asserts that the regulation does not require an "accurate and up-to-date map" of the adjacent workings (in this case, of the Harrison No. 2 Mine).

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[15] Section 312(a) of the Coal Act had similar wording, requiring accurate and up-to-date mine maps including "adjacent mine workings within one thousand feet." 30 U.S.C. § 872(a) (1976).

[16] Chairman Jordan and Commissioner Duffy join Commissioner Cohen in Part II.B.1. of this opinion.

We reject this contention, as the framework and language of the standard are clear that it does.[17] Quoting section 312(a) of the Act, the regulation states: "The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, *an accurate and up-to-date map* of such mine drawn on scale." 30 C.F.R. § 75.1200 (emphasis added). The regulation goes on to state, "*[s]uch map* shall show" and then enumerates specific items which must be shown. *Id.* (emphasis added). Of the 12 items listed, eight (the first seven and the last) refer to the operator's mine, while the other four items, including "(h) Adjacent mine workings within 1,000 feet," do not refer to the operator's mine. PBS's assertion that the requirement of accuracy of the mine map applies to the eight specified items relating to the operator's mine but not to the remaining four items has no basis in the statutory or regulatory language, which makes no such distinction. PBS's argument contravenes the well-known principle that a statutory or regulatory provision must be construed "as a whole, giving comprehensive, harmonious treatment to all provisions." *Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996). Certainly, it would trivialize the requirement of an accurate mine map to carve out an exception for the boundaries of adjacent mines.

Moreover, the legislative history of the Coal Act, which, as mentioned previously, contains the predecessor provision to section 312 of the Mine Act, makes clear that the requirement of an accurate mine map applies to workings adjacent to the mine. As stated in the Senate Report, "[r]ecent inundation accidents . . . point up the need for the accurate mapping of mines. Active mines often cut through into adjacent mines, or worked[-]out and abandoned areas of the same mine, because of the lack of maps or because of inaccurate maps." S. Rep. 91-411, at 82 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 208 (1975). Hence, the operator's argument that the regulation does not require "accurate" mapping of the adjacent mine workings within 1,000 feet is groundless.

PBS also challenges the judge's finding of a violation because the judge's reading of the regulation "requires what is impossible," as no final complete mine map of the Harrison No. 2 Mine was available, and because it was impossible to survey the abandoned and flooded mine. PBS Br. at 15-16.

In support of its argument, PBS cites four cases – *Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Dantran, Inc.*

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

v. Department of Labor, 171 F.3d 58, 65 (1st Cir. 1999); and *Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998). However, none of these cases stand for the proposition advanced by PBS. Rather, they stand for the principle that a statute or regulation may not be construed so as to lead to absurd results.

In any event, PBS's argument that the citation in this case required it to do the "impossible" because the precise location of the Harrison No. 2 Mine workings was unknown ignores the precept that "operators may be held liable for violations of mandatory safety [standards] under the Mine Act even if they did not have knowledge of facts giving rise to the violation." S. Br. at 20, citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2nd Cir. 1999); *see also Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1183-84 (9th Cir. 1998). As noted by the Second Circuit, this is consistent with the purpose of the Mine Act because it encourages "greater vigilance" and avoids creating an incentive for operators "to avoid gaining knowledge." *Rock of Ages,* 170 F.3d at 155.

Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd,* 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636. Thus, because the standard requires that the operator maintain an "accurate and up-to-date map," it follows that if the mine map fails to meet these requirements, the operator has violated the standard, regardless of whether it did everything possible to locate an accurate historical map of adjacent mine workings.

We also reject PBS's assertion that the judge's interpretation of the regulation (requiring an operator to accurately depict the workings of an abandoned adjacent mine even if it is not possible for the operator to survey the abandoned mine) is inconsistent with the regulatory scheme. PBS Br. at 18-19. PBS first relies on 30 C.F.R. § 75.1200-2, which addresses the surveying of mine property. PBS reasons that this standard equates the accuracy of a mine map with the accuracy of an operator's survey methods. *Id.* However, references to the methodology of surveying in other MSHA regulations do not vitiate the plain language of section 75.1200(h), which requires an "accurate and up-to-date map" of adjacent mine workings within 1,000 feet.

PBS also relies on borehole regulations (30 C.F.R. § 75.388) that, according to PBS, have more stringent requirements in areas of a mine not shown by surveys. PBS contends that the different requirements involving the drilling of boreholes in advance of mining[18] recognize that

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[18] PBS compares 30 C.F.R. § 75.388(a)(1), which requires boreholes in advance of mining when the working place approaches "[t]o within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined," with 30 C.F.R. § 75.388(a)(3), which requires boreholes in advance of mining when the working place approaches "[t]o within 200 feet of any mine workings of an

some adjacent mines cannot be accurately mapped, and so build in a 200-foot borehole drilling requirement as a replacement for accurate mapping. *Id.* at 19. However, the requirement for boreholes in advance of mining when the working place approaches to within 200 feet of any mine workings of an adjacent mine located in the same coal bed (unless the mine workings have been preshift examined), 30 C.F.R. § 75.388(a)(3), does not displace the requirement for an accurate map of adjacent mine workings within 1,000 feet. Rather, this is an additional safety precaution which provides additional protection from breakthroughs.[19] The fact that section 75.388(a)(1) requires borehole drilling when the working place approaches to within 50 feet of an area "located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor" is irrelevant. This provision relates to mining coming close to an already-mined area within the operator's mine rather than an adjacent mine.

PBS also contends that under MSHA's regulations governing ventilation maps, 30 C.F.R. § 75.372(b)(3), an operator need only show "known" mine workings in the same seam and that Pennsylvania state law only requires "known workings of . . . abandoned, underground or surface mines," on permit application maps, 25 Pa. Code. § 89.154(a)(4). PBS Reply Br. at 5. PBS notes that pursuant to C.F.R. § 75.372(c), MSHA accepts a mine map prepared under 30 C.F.R. § 75.1200 as fulfilling the requirements of a ventilation map under 30 C.F.R. § 75.372(b). *Id.* However, neither section 75.372(b)(3) nor the Pennsylvania environmental statute supplants the plain language requirements of section 75.1200(h). PBS appears to accept the premise that the language of 30 C.F.R. § 75.372(b)(3), with its reference to "known mine workings," is less stringent than 30 C.F.R. § 75.1200(h), which omits the word "known." The fact that the Secretary accepts the more rigorous provision of section 75.1200 as satisfying section 75.372(b)(3) can in no way be interpreted to imply the inverse – that the Secretary intended to accept a watered-down version of a section 75.1200 mine map to satisfy section 75.1200. If anything, comparison of section 75.1200 with section 75.372 supports the judge's conclusion that the plain meaning of section 75.1200 requires an accurate depiction of adjacent mine workings within 1,000 feet.

Additionally, PBS takes issue with the judge's findings that the Quecreek Mine map would have been "accurate" within the meaning of section 75.1200 if it had been drafted so as to show uncertainty regarding the location of workings in the Harrison No. 2 Mine. 28 FMSHRC at 707. PBS argues that it had no notice of a requirement that, when the precise boundaries of an adjacent mine are uncertain, it must show the uncertainty on its mine map by using dotted lines or other form of disclaimer. PBS Br. at 20-26. However, we need not reach the issue of whether a mine map depicting an uncertain area becomes "accurate" if it shows the uncertainty. As stated

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adjacent mine located in the same coalbed unless the mine workings have been preshift examined."

[19] If the Quecreek Mine map had been less inaccurate, e.g., 180 feet wrong rather than 450 feet, then the borehole requirement of section 75.388(a)(3) would have avoided the disaster which occurred on July 24, 2002. However, the gross inaccuracy of the mine map here meant that the 200-foot borehole requirement, by itself, was not sufficient to prevent the inundation.

supra, the plain meaning of section 75.1200 is that a mine map's depiction of the workings of an adjacent mine within 1,000 feet must be accurate.[20]

An operator in the position of PBS in this case – recognizing the existence of an abandoned mine up dip of its proposed mine, but uncertain of the boundaries of the abandoned mine because of the lack of a final, dated, and certified map of the abandoned mine – is not without means to operate its mine legally and safely. The Mine Act envisions situations in which

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[20] Chairman Jordan believes it is necessary to address the judge's holding that, had the map at issue merely indicated uncertainty about the mined out area, it would have met the requirement for an accurate map under 30 C.F.R. § 75.1200. According to the judge, such map "would have 'accurately' shown that adjacent mine workings existed, and would have 'accurately' shown that the exact location of those workings was not known." 28 FMSHRC at 707. The judge indicated this was the construction urged by the Secretary, and indeed the Secretary has maintained this position on appeal, stating that compliance with the regulation could have been achieved "simply by indicating in some way on the map that the exact location of the adjacent workings in the Harrison No. 2 Mine was unknown." S. Br. at 21.

The judge considered this construction of 75.1200 to be in accord with a "plain reading of the text" as well as "in line with the purpose of the Act" because, as he explained, "[i]f there had been some indication on the map that the location of mine workings in the Harrison No. 2 [M]ine w[as] unknown, the miners would most certainly have proceeded with more caution." 28 FMSHRC at 707. Moreover, the judge concluded, "[t]his reading of the text does not lead to the absurd result of requiring operators to produce exact depictions of inaccessible mine workings." *Id.*

Putting aside for the moment the issue of whether it is reasonable to assume that the miners (particularly at an unorganized mine) would actually see the mine map, collectively realize the need to implement extra precautions, and then be in a position to determine which precautions were advisable, the fact remains that under the judge's holding, those miners have no recourse if their employer declines to address their concerns. If the miners went to MSHA, that agency could not insist on any precautions since, under the judge's (and apparently the Secretary's) construction of section 75.1200, the operator is considered to be in compliance with that standard merely by indicating on the map that it is not certain where a particular boundary is located. An operator who disagreed with the need to implement certain precautions, and whose miners subsequently broke through into flooded workings, would not be considered to have violated section 75.1200's requirement of an accurate mine map as long as the map indicated the operator's uncertainty about the location of the adjacent flooded workings. Chairman Jordan respectfully suggests that this is the absurd result that should be avoided. She therefore rejects the Secretary's argument, which was adopted by the judge, that a map with incorrect boundaries may nevertheless comply with section 75.1200's requirement for an "accurate and up-to-date map" as long as the map indicated those boundaries might be wrong. She believes such construction is not consistent with either the language or purpose of the standard.

an operator is permitted to deviate from a standard's requirements, if adequate alternative precautions are implemented. Section 101(c) of the Mine Act authorizes the Secretary to modify the application of any mandatory safety standard to a particular mine if she finds that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard." 30 U.S.C. § 811(c). An operator in the situation of PBS in this case may petition the Secretary, pursuant to section 101(c), to modify the strict application of 30 C.F.R. § 75.1200. In the petition, the operator could explain what steps it would put in place, in other words, what "alternative method" it is proposing to implement, so that miners would have the same level of protection as is afforded by compliance with the standard. Thus, in the absence of a final, dated certified map of an adjacent mine, the operator could propose procedures such as horizontal drilling at the face in advance of the mining, as suggested by Black Wolf President David Rebuck, Tr. 280-81, and MSHA expert Stanley Michalek, Tr. 429.

Hence, we reject PBS's defenses and conclude that it violated section 75.1200 when it failed to maintain an accurate mine map.

2. Liability of Musser[21]

Musser appeals the judge's conclusion that it violated 30 C.F.R. § 75.1200 by preparing the Pennsylvania DEP environmental permit application for the Quecreek No. 1 Mine, including a map showing the location of abandoned mine workings adjacent to the planned mine. 28 FMSHRC at 714-16. In his decision finding Musser liable, the Judge reasoned that the Musser environmental permit map, including the location of the Harrison No. 2 Mine, was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200; that the Mine Act is a strict liability statute; that the Secretary has wide discretion to proceed against an owner-operator, its contractor, or both; and that Musser was in a position to prevent the errors on the section 75.1200 map submitted to MSHA. *Id.*

Musser argues that it never certified or submitted a map to MSHA under section 75.1200. M. Br. at 16. Musser further contends that its certification of the maps submitted to the Pennsylvania DEP was guided solely by state requirements under which it appropriately certified the maps and boundaries. *Id.* at 16-17. At its essence, Musser's primary argument is that its state environmental permit work was too attenuated to the map preparation and submission required under section 75.1200 for Musser to be held responsible. In response, the Secretary argues that section 75.1200 has no words that would limit its application to an operator involved with preparing or certifying maps for MSHA, and thus Musser committed a violation because it prepared the state permit map upon which the section 75.1200 map was based. S. Br. at 23.

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[21] Commissioner Duffy joins Commissioner Cohen in Part II.B.2. of this opinion.

Previously, Chairman Jordan and Commissioner Cohen found that Musser's services as an independent contractor at the mine justified the judge's conclusion that Musser was an "operator" of the mine pursuant to section 3(d) of the Mine Act, 30 U.S.C. § 802(d). However, the fact that Musser was an "operator," together with the fact that Musser prepared the Pennsylvania environmental map, is not sufficient to justify the conclusion that Musser is liable for a violation of section 75.1200. As we noted in *Joy Technologies, Inc.*, 17 FMSHRC 1303, 1309 (Aug. 1995), *aff'd*, 99 F.3d 991 (10th Cir. 1996), an independent contractor will not be held responsible for a violation where it exercised no control. As recently stated by the D.C. Circuit in *Secretary of Labor v. National Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009), "strict liability means liability without fault. . . . . It does not mean liability for things that occur outside one's control or supervision."

The citation issued to Musser states that the information it supplied "was used by PBS to show the Harrison No. 2 boundary on the map required by 30 C.F.R. § 75.1200 for the Quecreek No. 1 Mine." Stip. 96. Section 104(a) of the Mine Act limits citations to an operator that has "violated" the Act or any mandatory standard. 30 U.S.C. § 814(a). The liability of Musser in this case is a very close question. The issue is whether an engineering firm which produced a map under a state environmental permit statute is liable for a violation under the Mine Act when information on the state map was carried over to the section 75.1200 mine map, and was erroneous. If Musser had itself participated in the actual preparation of the section 75.1200 mine map, we would have no problem in upholding the violation. But the issue presented by Musser's involvement in the inundation at the Quecreek No. 1 Mine is a matter of first impression.

We conclude that the company's preparation of the Pennsylvania environmental permit map was too attenuated a circumstance to justify imposition of liability for the erroneous mine map under 30 C.F.R.§ 75.1200, even though the location and boundaries of the Harrison No. 2 Mine were identical on both maps. Musser was not involved with the preparation or submission of the section 75.1200 mine map to MSHA. It had no direct control over the submission of the map to MSHA.[22]

As noted *supra* at 17, the Pennsylvania environmental statute under which the permit application was submitted differs from 30 C.F.R. § 75.1200, in that it only requires "[t]he location and extent of known workings of active, inactive or abandoned, underground or surface mines" to be shown on permit application maps. 25 Pa. Code § 89.154(a)(4) (emphasis added). Thus, it would appear that Musser may have been in compliance with the Pennsylvania statute under which it prepared the permit map, since the mine workings in the Harrison No. 2 Mine which were erroneously placed on the permit map were not "known" from any map which Musser was able to locate. It would be anomalous to hold that Musser violated a statute under which it did not

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[22] As a verb, "control" has been defined as "[t]o exercise authority or dominating influence over; direct; regulate." *The American Heritage Dictionary of the English Language, New College Edition* 290 (1976).

prepare the map when it arguably complied with the statute which was applicable to the map it did prepare.

Moreover, although Musser engineer Secor was the person who certified the Pennsylvania environmental permit map, PBS was fully involved in the process of producing it. PBS vice-president Joseph Gallo testified that he "approved" the boundary lines for the Harrison No. 2 Mine that appeared on the state permit map. Tr. 247. Clearly, PBS knew what Musser knew with regard to the boundaries of the Harrison No. 2 Mine at the time of submission of the state permit map. Tr. 144-46. Both Gallo and PBS chief mining engineer John Yonkoske testified that PBS then continued to search for maps of adjacent mines after Musser submitted the state environmental permit application. Tr. 189-92, 227, 235-36, 321-22. Thus, in preparing the section 75.1200 mine map, PBS concluded independently from Musser that the location and boundaries of the Harrison No. 2 Mine were correctly placed.

The judge rested his conclusion that Musser was liable on the finding:

> Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map, on which the section 75.1200 map was based. Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy.

28 FMSHRC at 716. Essentially, this is a conclusion based on the concept of foreseeability. The argument is that because it was foreseeable that the location and boundaries of the Harrison No. 2 Mine placed on the permit map would then be placed on the section 75.1200 mine map (a conclusion with which we do not disagree), Musser committed a violation under the Mine Act because of the inaccuracy of the mine map.

The concept of foreseeability of injury as a basis for finding negligence has long been an integral part of Anglo-American tort law. *See* W. Page Keeton et al., *Prosser and Keeton on Torts,* § 43, at 280 (5th ed. 1984) ("*Prosser*"). However, tort law is inherently different from the law of governmental regulation. Tort law

> is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally . . . .
>
> The law of torts, then, is concerned with the allocation of losses arising out of human activities . . . . The purpose of the law of torts is to adjust these losses, and to afford compensation for

> injuries sustained by one person as the result of the conduct of another.

Id., § 1, at 5-6. In contrast, the concepts underlying governmental regulation such as the Mine Act do not include allocation of losses or compensation to a person injured by the actions of another.[23] Penalties under the Mine Act are payable to the public via payment to the federal government. Whether or not a penalty is imposed under the Mine Act (although not the amount of the penalty) is determined by whether the operator committed a violation of the Act, which is a matter of strict liability. Section 110(a) is specific in this regard: "The operator of a coal or other mine in which a violation occurs . . . shall be assessed a civil penalty . . . ." 30 U.S.C. § 820(a). The issue of negligence is not part of the analysis of whether or not a violation of the Act occurred under section 110(a).[24] The rationale for strict liability under the Mine Act is that "it is a common regulatory practice to impose a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers' safety." *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982).

Consequently, the foreseeability of the potential injury caused by an operator's conduct is rarely, if ever, a factor in determining whether a strict liability penalty is assessed under section 110(a). Rather, the issue in Mine Act litigation is usually whether an operator or its contractor is subject to a statutory or regulatory provision, and if so, whether there was compliance with the applicable legal mandate. Indeed, the Commission has emphatically rejected a proposed "unforeseeable employee misconduct exception" to the principle of liability without fault, declaring that "[s]uch an exception . . . would vitiate the underlying principle." *Western Fuels-Utah Inc.*, 10 FMSHRC 256, 261 (Mar. 1988). If unforeseeable conduct may not be used as a defense to liability under the Mine Act, then conversely, the foreseeability of injury caused by an actor's conduct should not generally be relevant to establish liability.

We have found very few precedents from other areas of federal administrative law. However, it is instructive to compare two cases, both of which involve the liability of an engineering firm under the Clean Water Act, 33 U.S.C. § 1251 et seq. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, provides that a person or other entity must obtain a permit from the

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[23] Thus, our conclusion that Musser is not liable for a violation of the Mine Act does not resolve the question of whether Musser may be liable under tort law to miners and their families injured in the Quecreek Mine inundation.

[24] Of course, issues relating to negligence under tort law do come into play in considering monetary penalties under section 110(i) of the Mine Act., 30 U.S.C. § 820(i). As discussed *infra*, Chairman Jordan and Commissioner Cohen hold that the concepts applicable to the law of negligence generally are applicable to consideration of an operator's negligence under section 110(i). We also look to the law of negligence in determining whether a violation is attributable to an operator's unwarrantable failure, which is defined as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

Army Corps of Engineers for the discharge of dredged or fill material into navigable waters of the United States, except in certain specified situations. Civil liability under the statute is predicated on either (1) performance, or (2) responsibility for or control over the performance of the work. *See United States v. Bd. of Trustees of Florida Keys Community College*, 531 F. Supp. 267, 274 (S.D. Fla. 1981). Thus, an engineering firm can face liability under the Clean Water Act if it has responsibility for, or control over, the performance of work which violates the Clean Water Act, even if it performs none of the work itself. Accordingly, an engineering firm's liability under the Clean Water Act predicated on "control" is similar to the concepts of control and liability under the Mine Act, as discussed previously in reference to *Joy Technologies* and *National Cement*.

In *United States v. Weisman,* 489 F. Supp. 1331 (M.D. Fla. 1980), an engineering firm was held liable for the violation of 33 U.S.C. § 1344 when it designed a new roadway, submitted permit applications to the Corps of Engineers, and wrote the Corps again in response to denial of the permit. The engineering firm became liable under the Clean Water Act when the owner of the property constructed the roadway despite not having a permit. In contrast, in *United States v. Sargent County Water Resource District,* 876 F. Supp. 1081 (D. N.D. 1992), an engineering firm was found not liable under 33 U.S.C. § 1344 in connection with a project to clean silt out of a ditch through wetlands. The engineering company provided drawings to Sargent County showing the pre-existing depth of the ditch, placed depth stakes in some areas of the ditch, and placed centerline stakes in the ditch, but did not apply for any permits. The Court found the engineering firm not liable under the Clean Water Act because the firm's work was too attenuated from potential violations arising from the construction work performed on the ditch. *Id.* at 1088-89. In the present case, Musser's actions are more akin to those of the engineering firm in *Sargent County* than to the engineering firm in *Weisman*, particularly in that Musser did not prepare the section 75.1200 mine map.

In sum, we conclude that Musser's role in preparing a "base" map that PBS used in preparing the section 75.1200 mine map was insufficient to bring it within the parameters of the specific standard involved in this case. Thus, we conclude that Musser did not violate section 75.1200.

C. S&S[25]

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*,

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[25] Chairman Jordan and Commissioner Duffy join Commissioner Cohen in Part II.C. of this opinion.

3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The judge addressed the S&S designation of the citations in his second decision. 30 FMSHRC at 1094-95. He found that, with regard to the first two elements of *Mathies*, the standard had been violated when an inaccurate mine map was produced, and that the violations directly contributed to the very dangerous inundation at Quecreek when the breakthrough occurred. *Id.* at 1095. With regard to the third and fourth *Mathies* criteria, the judge found that, as a consequence of the inaccurate mine map, 18 miners were placed in peril of their lives and nine miners were trapped for three days and four nights before being dramatically rescued. *Id.* We conclude that substantial evidence fully supports the judge's S&S determination; indeed, most of the evidence concerning the *Mathies* elements is undisputed.

PBS alleges that the judge did not address the third *Mathies* criterion. PBS also contends that to demonstrate that the event was "reasonably likely," the Secretary was required to produce evidence of other mines that relied on abandoned mine maps that were not final and the number of times this resulted in a breakthrough and injuries, and that the Secretary failed to produce such evidence. PBS. Br. at 32. In making these arguments, PBS fails to distinguish between the words "violation" and "hazard" in the *Mathies* test.

The second element in *Mathies* requires consideration of whether a discrete safety hazard – that is, a measure of danger to safety – is contributed to by the violation. There is no requirement of "reasonable likelihood." The third element is whether there is a reasonable likelihood that the hazard contributed to will result in an injury.

As applied to this case, the "violation" is the failure to have an accurate map. The "hazard" is the danger of breakthrough to an adjacent mine and resulting inundation. PBS concedes that the judge properly found that the hazard – the danger of breakthrough – was contributed to by the mapping failure. But in turning to the third element, PBS conflates "violation" with "hazard." PBS argues that there must be a reasonable likelihood that the

violation will cause injury. However, that is not the test. The test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, as PBS argues.

The Secretary presented evidence regarding the likelihood of injury as a result of the hazard through the testimony of her expert witness, Stanley Michalek. He testified that miners who broke through into a flooded adjacent mine would face numerous dangers of injury: drowning, blocked escapeways, disrupted ventilation, entrapment, hypothermia, air with low oxygen or high noxious gas levels, and roof falls. Tr. 389-91. The testimony constitutes substantial evidence supporting the judge's conclusion that the Secretary proved the third *Mathies* element.

In addition to confusing the concept of a "violation" versus a "hazard" in the *Mathies* test, PBS's challenge to the judge's finding of S&S contains another significant flaw. In asserting that the Secretary was required to produce "an analysis . . . of situations where mining was conducted without a final map . . . and the number of times that resulted in a breakthrough and the number of times that resulted in injuries," PBS Br. at 32, PBS misstates the Secretary's evidentiary burden. Indeed, in arguing that testimony regarding the likelihood of fatal injuries was "a theoretical possibility, not actual reality, which is insufficient for an S&S finding," PBS ignores our previous caselaw in this area. We have held that the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S. *See Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) (judge erred in concluding that Secretary failed to carry her evidence burden by not presenting evidence of roof falls or stress on the roof in defending her S&S designation of a roof control plan violation); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition is not dispositive of S&S determination).

Hence, the judge's treatment of the S&S designation was legally correct and supported by substantial evidence.

D. Negligence[26]

In setting the penalty, the judge concluded that PBS acted in "a grossly negligent manner." 30 FMSHRC at 1094. His finding was based on PBS's use of a map of the Harrison Mine that was neither dated, final, nor certified, despite the obvious risk of catastrophe presented by the flooded Harrison No. 2 Mine up dip from the Quecreek No. 1 Mine. *Id.* at 1093-94.[27] The

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[26] Chairman Jordan joins Commissioner Cohen in Part II.D. of this opinion.

[27] The judge also relied on the absence of a disclaimer on the map. 30 FMSHRC at 1094. We conclude that the judge's finding of gross negligence can be upheld on the evidence relating to the use of the non-final, undated, uncertified property map.

Commission must decide whether substantial evidence in the record supports this determination. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163.

The issue of PBS's negligence turns on the question of whether, in fulfilling its legal duty to maintain an accurate mine map, it was reasonable for PBS to reproduce the second Consol map on the section 75.1200 map as an accurate depiction of the extent of mining in the Harrison No. 2 Mine. We agree that PBS conducted a diligent search for a final map of the abandoned Harrison No. 2 Mine, and that it used the best map available to it. 28 FMSHRC at 709; Stip. 55. However, the fact that the second Consol map was the best map it could locate does not mean it was reasonable for PBS to conclude that this map was a reliable indicator of the boundaries of the Harrison No. 2 Mine.

PBS assumed that the second Consol map of the Harrison No. 2 Mine was accurate. As stated by Gallo, who was then the PBS vice-president for engineering, the second Consol map contained the most extensive mine workings, and PBS "equate[d] extensive with correct and accurate." Tr. 186, 237. Similarly, Yonkoske, the PBS chief mining engineer, testified: "If you've done everything possible to locate what you have, you plot that on your map, and that goes as your mine line . . . ." Tr. 366. Thus, PBS equated "best map available" with "accurate map."

The false assumption that the second Consol map was accurate lay at the heart of PBS's negligence. This map was not only undated, but uncertified and not marked as final. It was, as MSHA expert witness Stanley Michalek testified, "simply a line drawing of some workings on a property map." Tr. 417, referring to Gov't Ex. 4. By assuming that the second Consol map was accurate, PBS assumed that no further mining had occurred at the Harrison Mine which could impact the Quecreek Mine. PBS concluded that no further mining had occurred beyond the area shown despite the fact that it did not know the date of the second Consol map.

Although PBS did not know the date of the map upon which it was relying, it did have information in its possession which indicated the direction in which the mining had been advancing prior to the preparation of the second Consol map. Michalek testified that if PBS had compared the second Consol map with the Greentree map previously located, it would have detected that the mining was progressing in a certain direction. By extrapolating from the most recently known mining, PBS would have seen that additional mining occurring after the time that the second Consol map was prepared likely would have been in the direction of the Quecreek Mine it was planning. Tr. 417-429. Thus, "if mining had continued in the direction . . . shown, it would have been pretty clear that . . . the possible additional workings, if they were present, would have intersected the Quecreek Mine." Tr. 428.[28] Witness Richard T. Stoltz, the MSHA Acting

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[28] Government Exhibit 4 is a reproduction of a portion of the second Consol map prepared by MSHA, showing the outline of the Harrison No. 2 Mine. On this map, Michalek circled the area of the Harrison No. 2 Mine representing the mined-out area which was not shown as being mined-out on the Greentree map, Gov't Ex. 9. Tr. 417-418, 421-23. Michalek indicated the direction of this mining on the map with an arrow. Tr. 426-27. Later at trial, Gallo placed an

Ventilation Division Chief, confirmed that comparison of the two maps showed the additional mining on the second Consol map compared with the Greentree map. Tr. 830, 844-46, 862-66.

Because the second Consol map was undated, Michalek testified that PBS's engineers had a duty to assume that additional mining may have occurred, and that it would have been in the direction of the planned Quecreek Mine. Tr. 428-29. As Michalek stated, prudent engineers "could have conducted additional exploration to try to delineate the workings of the [Harrison] Mine by vertical holes." Tr. 429. They could have also set their "drill-in-advance barrier" further back based on an extrapolation from previous mining at the Harrison Mine. *Id.* They could also have "done long-hole drilling in advance of where their Mains were advancing." *Id.*[29]

However, there is no evidence that PBS performed the extrapolation of the direction of possible additional mining based on maps in its possession as Michalek outlined. Tr. 483-85. Nor, as Judge Lesnick noted, did PBS take any additional precautions. 30 FMSHRC at 1093.[30] PBS simply assumed that the second Consol map represented the final extent of the Harrison Mine workings.

"X" on the map indicating where the Quecreek breakthrough occurred. Tr. 710-11. The arrow points directly toward the location of the breakthrough.

[29] Regarding Michalek's testimony, Commissioner Duffy states, "[n]evertheless, when asked what he would have done under the circumstances, he replied that he would have done the same thing that Musser and PBS did. Tr. 490." Slip op. at 42. Michalek's testimony that he "would have done what Musser and PBS did" refers to the overall approach followed by Musser and PBS ("Go out to the likely sources for that information, find out what they have, bring it back, study it, use some engineering judgment, and decide what to do with it from that point." Tr. 490). Michalek clearly stated that he disagreed with the engineering judgment used by PBS and Musser upon finding, at best, an undated, uncertified, non-final line drawing of some workings of the Harrison No. 2 Mine on a property map. Tr. 412-13, 429-30.

[30] PBS argues that more pre-mining drilling would have been akin to "finding a needle in a 3,000-acre haystack" (quoting its expert witness Sean Charles Isgan, Tr. 794) because it would have had to encompass the entire perimeter of the mine – a distance of several miles – with drill holes every 10 feet. PBS Reply Br. at 9-10. This argument ignores the fact that if its engineers had performed the extrapolation described by Michalek from the maps already in their possession, they would have narrowed their "haystack" to the relatively small area in which the direction of mining at the Harrison No. 2 Mine was proceeding. A limited number of boreholes across the potential additional entries in the Harrison Mine would have disclosed whether additional mining had occurred after the preparation of the second Consol map. See Government Exhibits 4 and 9, as marked by Michalek and described by him. Tr. 416-28. The entire perimeter of the mine would not have required the drilling of additional boreholes, because PBS would have only had to check abandoned mines that were updip of the proposed Quecreek Mine.

In making his negligence determination, the judge relied in part on the testimony of David Lucas, the Musser engineer[31] who did the actual mapping of the Harrison Mine in consultation with PBS engineers. 30 FMSHRC at 1093. Lucas testified that although the Consol map was the best map PBS and Musser had, he did not consider it an accurate rendition of the Harrison No. 2 Mine, and was unsatisfied with it. Tr. 57-58. In fact, when asked if he had any reservations about placing that boundary on the permit map, Lucas replied "always." Tr. 56-57.[32]

The judge also justifiably relied on the fact that before receiving from Consol the map they relied on, PBS and Musser had received a different map from Consol in response to their request for a map of the Harrison No. 2 Mine. Quoting the testimony of Michalek, the judge concluded: "Having received two contradictory maps from Consol ought to have put the Respondents on notice that all was not right, that 'these guys [Consol] didn't have their system down like they used to.' Tr. 458." 30 FMSHRC at 1093 (alteration in original). The judge noted that Musser's expert witness, Hiram C. Riblett, "agreed that getting an unreliable map would raise doubts about other maps received from the same source. Tr. 651-52." *Id.*[33]

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[31] The testimony of Musser officials is relevant to the analysis of PBS's negligence because the two entities both searched for maps and both agreed to use the second Consol map. *See* Tr. 43-44, 58-60, 106-07, 192-93. Lucas acknowledged that "[PBS] knew what [Musser] knew." Tr. 62.

[32] PBS challenges the judge's reliance on this testimony by citing the testimony of Musser mining engineer Secor that after receiving the second Consol map, Lucas talked again with Carlton Barron. Barron had worked at the Harrison No. 2 Mine, and later came to own the assets of Saxman Coal and Coke after mining ceased (Tr. 19, 38, 43). As PBS notes, Secor testified that he understood that Barron had told Lucas that the mining had not progressed beyond the point shown on the Consol map. PBS Br. at 29. However, as acknowledged by PBS counsel at oral argument before the Commission (Oral Arg. Tr. 26), this testimony was disputed by Lucas, the person who actually talked with Barron. Lucas himself testified that he had gone back to Barron and shown him the Consol map, and Barron said that he did not know about it. Tr. 58. As Lucas testified, this contact with Barron after the receipt of the second Consol map engendered concern rather than confirmation of the accuracy of the Consol map. Tr. 58.

[33] PBS contends that the judge erred in finding significance in the fact that the first map obtained from Consol was found by Musser and PBS to inaccurately depict the boundaries of the Harrison No. 2 Mine. PBS Br. at 28. PBS argues that multiple searches of possible map sources were made, and "the ALJ fundamentally misunderstands the search process: it is an ongoing process that may involve multiple visits or contacts with each source." *Id.* It would logically follow from this argument that a search for maps is never complete because the source visited may always have more maps than those located. And if, as PBS argues, it is important that "when Mr. Secor at Musser initiated a second visit to Consol, he asked for the latest most up-to-date map," *id.*," this would imply that Musser did not clearly indicate to Consol in its first request that it was seeking the "latest most up-to-date map." At most PBS's argument raises the

However, PBS asserts that it was reasonable to rely on the second Consol map because it had asked Consol for its best map, because Consol is a large and reputable mine operator with an extensive collection of maps, because PBS had good experiences with Consol maps,[34] and because Consol, as the lessor of the coal and collector of royalties from the mining, would have a self-interest in having an accurate map of the Harrison No. 2 Mine workings. PBS Br. at 27-28; Tr. 217-219. We agree that Consol, as lessor of the coal, certainly had a strong self-interest in having, and indeed did have, accurate maps of the Harrison mine workings. But this strong self-interest became greatly reduced after Consol was no longer receiving royalties, which occurred after the mine ceased operations in 1963. As witness Stoltz agreed, the fact that Consol had an interest in keeping its maps accurate while it was receiving royalties does not mean that Consol has a continuing interest in filing them well, storing them well, or organizing them well. Tr. 857.

The question is not whether Consol had an accurate map in the 1960's, but whether it still had such a map, catalogued for availability to Musser and PBS or some other entity, in the mid-1990's, 30 years later. As it turned out, Consol did have an accurate map of the Harrison No. 2 Mine workings, but, as mentioned *supra*, this map (together with other mine-related documents including correspondence) had been sent to one of its attorneys, who, many years earlier, had been handling a request from the Environmental Protection Agency about mines that may have caused discharges into the Casselman River. Stips. 99-107. The attorney had requested maps from the Consol repository about such mines, which included the Harrison No. 2 Mine. Thus, the accurate map was in one of six boxes in a storage room of the Consol Legal Department. *Id.*

This was exactly the type of problem that should have been anticipated in relying on Consol not only to have a map, but to keep it catalogued for availability for 30 years. As Judge Lesnick noted, PBS should have been aware that the Consol map cataloguing system was not reliable in terms of a 30-year-old map when it received, in response to its first request for the map of the Harrison No. 2 Mine workings, a map which proved to be incomplete, and Musser had to go back to Consol a second time. 30 FMSHRC at 1093. Clearly, as Michalek testified, the receipt of an incomplete map in response to the first request should have raised a "red flag" regarding the reliability of Consol's cataloguing system. Tr. 458.

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possibility that there is more than one inference which the judge could have drawn from the fact that the first map obtained from Consol proved to be inaccurate. However, the judge has discretion to draw inferences from the facts as long as such inferences are reasonable. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Judge Lesnick's inference here was certainly reasonable, and consistent with the testimony of two expert witnesses, Michalek and Riblett, discussed above.

[34] Gallo was the PBS official who testified about his good experiences with Consol maps. Tr. 221-23. Gallo acknowledged that he had no actual knowledge of whether Consol had a system for keeping tracks of mine maps but "[could] only assume that a company of that size and reputation, that they would accumulate data." Tr. 219.

In sum, for the reasons stated above, it was not reasonable for PBS to conclude that the second Consol map, on which it based its section 75.1200 map, was an accurate indicator of the boundaries of the Harrison No. 2 Mine.

In considering PBS's degree of negligence, the judge correctly took into account the significant risk posed by the abandoned Harrison Mine, as PBS knew that this mine was full of water and updip from the proposed Quecreek mine. 30 FMSHRC at 1093. The judge properly noted that "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it." *Id.*, quoting *Prosser* § 34, at 208; *see also A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that "[a]n operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with that danger").

The judge noted testimony indicating that PBS had placed its production agenda ahead of concerns for safety. 30 FMSHRC at 1093. In this regard, Lucas[35] testified that he used the Consol map because he "had no choice" after years of searching for an accurate map of the Harrison No. 2 Mine. Tr. 58. He agreed that at the time, getting a permit "was the most important thing." *Id.* This is evidence from which the judge could properly find that PBS placed its desire to open a mine ahead of concerns for the safety of the miners who would be working in the mine. This evidence, together with the evidence showing the unreasonable basis for assuming that the second Consol map – an undated, uncertified map which was nothing more than "a line drawing of some workings on a property map," Tr. 417 – truly represented the extent of mining at the Harrison No. 2 Mine, especially after the first map provided by Consol had proven to be inaccurate, and the failure to take any additional precautions, justifies the judge's conclusion that PBS chose "to play Russian Roulette with the lives of miners." 30 FMSHRC at 1093-94.

PBS offered testimony that it was common in Somerset County, Pennsylvania for boundaries of abandoned mines to be depicted on the basis of maps that were not final or certified maps. Tr. 77, 218. It suggests that the standard of care it exercised conformed to the standard in existence in the MSHA District 2 area or the Somerset County area. While the standard behavior in that geographic area is a factor that may considered in determining negligence, it does not mean that the "reasonable person" standard is limited to that area. *See Bell v. Jones*, 523 A.2d 982, 987-88 (D.C. 1987) (holding that "the standard of care by which the professional acts of surveyors are measured is a national standard, not a local or regional one"); *Prosser*, § 32, at 187-88.

Furthermore, even if PBS was correct in suggesting that the proper standard of care was a local one, and that local practice did not require final certified maps, this would not insulate it

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[35] Although Lucas worked for Musser, the judge found that Musser and PBS, "in consultation with each other," agreed to use the second Consol map as the basis for the boundary of the Harrison No. 2 Mine. 30 FMSHRC at 1093.

from a negligence finding. As one commenter has explained:

> [C]ustoms and usages themselves are many and various; some are the result of careful thought and decision, while others arise from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence. . . .
>
> Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard. . . . And if the only test is to be what has been done before, no industry or group will ever have any great incentive to make progress in the direction of safety.

Prosser, § 33, at 194-95 (footnotes omitted).

In arguing that substantial evidence does not support the judge's negligence finding, PBS asserts that the judge did not consider all of the relevant evidence. In addition to the arguments already discussed, PBS contends that the judge "ignore[d] the fact that mining was over 200 feet from the start of the [section 75.388(a)(3)] barrier and that Black Wolf was going to cease mining in that direction well before the barrier." PBS Br. at 27. This claim has no validity. Mining stopped over 200 feet from the barrier because it intersected the old workings of the Harrison No. 2 Mine, which were 450 feet from where PBS believed them to be. Tr. 293-94; Stip. 97. Thus, PBS stopped mining 250 feet from the barrier only because of the near-tragedy which gave rise to this case. Moreover, the assertion that "Black Wolf was going to cease mining in that direction well before the barrier" is not only unsupported by any reference to the record, but devoid of any support in the record. Black Wolf President David Rebuck testified that the company "kept the boundary, permit boundary line further than 200 feet from the position of the abandoned mines." Tr. 293. However, neither Rebuck nor any other witness testified that Black Wolf was going to "cease mining in that direction well before the barrier."

PBS also contends that the judge "failed to discuss the extent and nature of PBS's search for maps in his finding of negligence." PBS Br. at 30. However, the judge clearly was aware of the extensive search for maps by PBS and Musser. The judge distinguished between the search for maps, and how PBS used the maps it found. In its use of the maps, the judge "f[ou]nd the record in this matter replete with instances of PBS . . . failing to act conservatively and to err on the side of safety." 30 FMSHRC at 1093. The fact that the judge drew different conclusions from those articulated by PBS in his review of the entire record does not mean that he failed to consider the evidence.

PBS also argues that "[t]here is always some uncertainty about the location of inaccessible workings of all abandoned mines," and this uncertainty is accounted for by the requirement of "a 200 foot barrier rather than a 50 foot one" in section 75.388. PBS Br. at 30-31. This argument does not undermine the judge's negligence finding. The 200-foot-barrier requirement would have

applied, rather than a 50-foot barrier, unless the adjacent Harrison mine workings could have been preshifted. 30 C.F.R. § 75.388(a)(3). In other words, this margin of safety is required even when there is not the uncertainty that was present here. Moreover, the argument ignores the reality that compliance with section 75.388 does not ensure that an operator which has an unreliable mine map will avoid a catastrophic breakthrough into adjacent abandoned workings. That reality is demonstrated by this case.

Hence, the record leads us to conclude that substantial evidence supports the judge's determination that PBS acted in a grossly negligent manner.

E. Civil Penalties[36]

At the time of trial, the Secretary had proposed penalties of $5,000 against PBS and Musser. In her main brief before the judge, the Secretary specifically referred to the proposed $5,000 penalty, which she considered a "minimum penalty," and the stipulations and trial exhibits, noted *infra*, in support of the proposed penalty. S. Tr. Br. at 31-32. It was not until the Secretary filed her post-trial reply brief that she requested the judge "to assess a penalty of $55,000 for each of these mine operators," S. Tr. Reply Br. at 22, which he did.[37]

On review, PBS argues that the judge failed to explain why his $55,000 penalty determination substantially diverged from the amount originally proposed by the Secretary. PBS Br. at 33-34. PBS also contends that the stipulations on which the judge relied applied to the proposed penalty, not to the maximum penalty he imposed. *Id.* at 33.

In her brief, the Secretary asserts that the judge sufficiently explained why he assessed penalties higher than the Secretary initially proposed. She relies on his statements that the violations "were of the utmost gravity," S. Br. at 41, quoting 30 FMSHRC at 1092. She also relies on his finding that PBS acted in "a grossly negligent manner." S. Br. at 41, citing 30 FMSHRC at 1094. However, the Secretary acknowledges that the judge's penalty criteria analysis was inadequate with regard to whether the $55,000 penalty was appropriate to the size of the operator's businesses and whether the proposed penalties would affect the operator's ability to continue in business. S. Br. at 41-42. She notes that the stipulations agreed to by PBS on these penalty criteria were entered into assuming that the penalties would be $5,000. *Id.* at 41-42.

It is well-established that the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In determining the amount of the penalty, neither the judge nor the Commission is restricted by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983),

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[36] Chairman Jordan joins Commissioner Cohen in Part II.E. of this opinion.

[37] Because Commissioners Cohen and Duffy find that Musser was not liable for the violation, the Commission vacates the $55,000 penalty the judge imposed against Musser.

aff'd, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Cantera Green*, 22 FMSHRC at 620.

The Commission in *Sellersburg*, 5 FMSHRC at 293, explained that "[w]hen . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." *See also Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) ("adequate findings are critical when a judge assesses a penalty that significantly departs from that proposed by the Secretary"). In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria."[38] 22 FMSHRC at 621.

We reject PBS's contention that the judge failed to adequately explain the significant departure from the Secretary's initial proposed penalty. The judge relied primarily on the gravity of the violation and PBS's gross negligence to increase the proposed penalties from $5,000, which was proposed by the Secretary, to $55,000, the maximum penalty allowed under the Secretary's regulations at the time of the violations. 30 FMSHRC at 1088, 1091-92, 1095. The Commission held in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), that a judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria. Also, the Commission has recently held that it is appropriate for a judge to raise a penalty "significantly" based on his findings of extreme gravity and unwarrantable failure. *Spartan Mining*, 30 FMSHRC at 725. Similarly, the judge was justified in emphasizing the factors of gravity and negligence in this case.

However, we agree that a remand for further consideration of two penalty criteria is necessary. In the judge's initial discussion of the penalty criteria, he relied on a set of stipulations that were admitted at trial, Gov't Trial Stip. No. 1, and two exhibits that showed Musser's and

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[38] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

PBS's history of violations and production, Gov't Ex. 1 and 2. The stipulations stated that the proposed penalties "will not affect the ability . . . to remain in business;" that each of the violations was abated in good faith; that the government exhibits referred to above accurately set forth the operators' production and history of violations;[39] and that those exhibits could be used in determining the penalty assessments. Gov't Trial Stip. No. 1, at 1. In finding that the $55,000 penalty was appropriate considering the size of PBS's business and its ability to stay in business, the judge erroneously based his conclusion on the stipulations, which were entered into on the basis that the penalty would be $5,000. It is apparent that, given the judge's substantial increase in penalties for PBS, he did not give PBS an adequate opportunity to address the two criteria once the proposed penalty was increased.

Accordingly, we vacate the judge's penalty determination with regard to PBS. We remand the case to the judge for the purpose of making findings concerning these two statutory criteria based on the assumption that the penalty is $55,000, and for the purpose of assessing a penalty based on the statutory criteria of section 110(i) of the Act.

Robert F. Cohen, Jr., Commissioner

[39] PBS incorrectly asserts that the judge failed to discuss and properly consider the absence of any previous violation history. PBS Br. at 33. The judge explicitly referenced the parties' stipulation that PBS had "no significant history of previous violations." 30 FMSHRC at 1091, which we deem sufficient. *See Spartan Mining*, 30 FMSHRC at 724; *see also Lopke Quarries*, 23 FMSHRC at 713.

Chairman Jordan, concurring in part and dissenting in part:

I join Commissioners Duffy and Cohen in affirming the judge's determination that PBS Coals, Inc. ("PBS") violated 30 C.F.R. § 75.1200, and that the violation was significant and substantial. I also join Commissioner Cohen's opinion affirming the judge's finding that PBS acted in a "grossly negligent manner," and in the section of his opinion vacating the judge's penalty determination with regard to PBS and remanding it to the judge.

Regarding the liability of Musser, I join Commissioner Cohen's opinion holding that in this case Musser was properly cited as an operator based on its status as an independent contractor at the mine.[1] However, I dissent from my colleagues' conclusion that substantial evidence does not support the judge's determination that Musser can be held liable for the violation of section 75.1200. I would find Musser liable and uphold the judge's negligence finding.

Commissioner Cohen and I have determined that Musser can reasonably be considered an operator by virtue of the services it performed as an independent contractor, in connection with the issuance of the permit allowing mining at the Quecreek mine. Moreover, all three Commissioners hearing the appeal of this case agree with the judge's determination that the mine map retained at the Quecreek mine did not accurately depict "[a]djacent mine workings within 1,000 feet," as required by section 75.1200. Section 110(a) of the Mine Act states: "The operator of a coal or other mine in which a violation occurs . . . shall be assessed a civil penalty . . . ." 30 U.S.C. § 820(a)(1). This provision has been construed as imposing strict liability, regardless of fault, against the operator of a mine in which a violation occurs. A literal application of the statute, therefore, would appear to support the imposition of a penalty against Musser. Musser is an operator of the Quecreek mine; a violation occurred in that mine; the Act imposes strict liability against an operator of a mine in which a violation occurs. Accordingly, Musser can be held liable for the violation of section 75.1200.

Musser's status as an operator, however, is that of "an independent contractor performing services at the mine." The fact that an independent contractor is considered an operator of a mine does not necessarily mean that the contractor can exert control over the entire mine, or even over the activities or area involved in the violation. A contractor is sometimes hired to perform a particular skilled activity that is limited to a certain area of the mine. A contractor hired solely to sink a shaft, for instance, would presumably have no control over how another contractor constructed the preparation plant. Although the Mine Act imposes strict liability, Commissioner Cohen is rightly mindful of the D.C. Circuit's observation that "strict liability means liability without fault. It does not mean liability for things that occur outside one's control or supervision." *Sec'y of Labor v. Nat'l Cement Co. of California,* 573 F.3d 788, 795 (D.C. Cir. 2009) (citations omitted). Commissioner Duffy also properly notes Commission precedent invoking limitations in holding an independent contractor liable for matters over which it has no

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[1] Commissioner Duffy did not reach this issue.

control. Slip op. at 40. I agree with my colleagues that it is pertinent to consider the issue of control in determining Musser's liability for the violation of section 75.1200.

My colleagues have concluded that Musser should not be liable for the violation of section 75.1200 because, in their view, Musser had no direct control over the preparation of the map required to be maintained at the mine. Slip op. at 20-21, 39-40. It is true that PBS, not Musser, prepared the map that was required under section 75.1200 to depict the adjacent mine workings within 1,000 feet. 30 FMSHRC 1087, 1089-90 (Nov. 2008) (ALJ). Musser, however, prepared the environmental permit map for the Quecreek mine and that map had to show, among other things, an outline of abandoned mines adjacent to the proposed mine being permitted. 28 FMSHRC 699, 715 (July 2006) (ALJ). After plotting the outline of the Harrison No. 2 Mine on the permit map, Musser drew a line between the outline of the Harrison No. 2 Mine and the planned workings for the Quecreek No. 1 Mine. Stip. 71. This line represented a 200-foot-wide hydraulic barrier between the Harrison No. 2 Mine and the Quecreek No. 1 Mine. Stip. 71, Jt. Ex. 11. It indicated the limit of planned mining for the Quecreek No. 1 Mine. Edwin Secor, a Musser employee, certified the permit map with the presumed outline of the Harrison No. 2 Mine and the established 200-foot-wide hydraulic barrier. Stip. 66. Mining would be limited by the requirement that a 200-foot barrier remain between the furthest development in the Quecreek mine and the furthest extent of the Harrison No. 2 mine.

Musser's map was used as the base map for complying with section 75.1200's requirement that the operator keep an up to date and accurate mine map showing, among other things, the "adjacent mine workings within 1,000 feet." The adjacent mine workings placed on the section 75.1200 map coincided with the boundaries depicted by Musser in the map submitted as part of the permitting process. Indeed, the judge found that it was "standard practice for an environmental permit map, such as the one Musser prepared and submitted on behalf of Quecreek, to be used as the base map from which the mine map required by MSHA would be drawn" and that "[t]he location of adjacent mines does not change once they are plotted on a permit map, but are simply transferred over to the mine map required by MSHA." 30 FMSHRC at 1089 (citing Tr. 33, 196, 336). In this case "PBS prepared all of the maps of the Quecreek No. 1 Mine by transferring the boundary of the Harrison No. 2 Mine as delineated on the permit map prepared by Musser." *Id.* (citing Tr. 198, 203-04).

The PBS engineers involved in drafting the mine map required under section 75.1200 never thought about making any changes to the boundaries of the Harrison No. 2 mine that were delineated by Musser on the environmental permit map. Tr. 238-39. As one PBS witness explained, the engineer generally takes the previous map and positions it correctly with reference to the map being created. Tr. 335-36. Indeed the PBS expert witness testified that when engineers certify a map created to comply with section 75.1200, they are certifying "that to the best of their ability, they . . . positioned that abandoned mine map on their mapping as accurately as possible." Tr. 745.

The record provides substantial evidence for the judge's conclusion that "Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map on which the section 75.1200 map was based." 28 FMSHRC at 716. Furthermore, as the judge pointed out:

> Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy.

Id.

Whether the section 75.1200 map would accurately reflect "the adjacent mine workings within 1,000 feet" depended on whether the permit map accurately depicted those workings. Musser prepared and certified the permit map. Admittedly, the section 75.1200 mine map requires more information than "the adjacent workings" and Musser was not the entity that actually prepared the section 75.1200 map. Nevertheless, this record offers substantial evidence for the conclusion that Musser had sufficient control over the ultimate contents of the section 75.1200 map, at least at it pertained to the adjacent workings. Thus, it is not unreasonable to hold Musser strictly liable as an operator, for the violation of section 75.1200 that occurred at the Quecreek mine.

I also conclude that substantial evidence supports the judge's finding that Musser acted in a grossly negligent manner.[2] Musser's reliance on the second Consol map to determine the location of the abandoned Harrison Mine for the environmental permit map was unreasonable. Musser knew that the Consol map was not dated, not marked final, and not certified by a professional engineer or professional surveyor. Stips. 65, 66. Moreover, as mentioned above, Musser's Vice President at the time, David Lucas, testified that he was not satisfied with the Consol map and did not consider it an accurate rendition of the Harrison No. 2 Mine. Tr. 57-58. In fact, Lucas admitted that he always had reservations about placing the Harrison Saxman Mine boundary on the permit map. Tr. 56-57. This uncertainty was compounded by the fact that the receipt of the first incomplete Consol map should have put Musser on notice regarding the reliability of Consol's cataloguing system. Tr. 458. Nonetheless, Musser used the boundary from the Consol map on its permit map which it knew would form the basis of the mine map required under section 75.1200. Tr. 32-33; 59-60.

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[2] I incorporate by reference the opinion of Commissioner Cohen and myself in which we uphold the judge's finding that PBS acted in a grossly negligent manner, *supra* at 25-32. It is appropriate to rely on this analysis, as Musser concurred with the decision of PBS to use the second Consol map to plot the boundary of the Harrison No. 2 Mine on the permit maps. Stip. 66; Tr. 58-60, 106-07, 192-93.

As the judge correctly noted, Musser's negligence was also heightened due to the major risk posed by the abandoned Harrison Mine. 30 FMSHRC at 1093-94. Given Musser's reliance on a map it did not consider accurate, its knowledge that the map it was preparing would be used to prepare the section 75.1200 map, and its elevated duty of care, I would affirm the judge's determination that Musser acted in a grossly negligent manner.

Mary Lu Jordan, Chairman

Commissioner Duffy, concurring in part and dissenting in part:

I concur with Commissioner Cohen in reversing the judge's finding that Musser Engineering, Inc., was liable for a violation 30.C.F.R. § 75.1200, but I would do so on additional grounds, discussed below. I also join Commissioner Cohen and Chairman Jordan in affirming the judge's finding that PBS Coals, Inc., violated the standard and that the violation was significant and substantial in nature. I dissent, however, from my colleagues' affirmance of the judges's determination that the violation was owing to PBS Coals' gross negligence. Accordingly, I would also vacate the judge's penalty determination and remand that issue for further analysis, based on a moderate level of negligence as originally charged by the Secretary and, only then if it becomes necessary, for the purpose of taking into consideration all the appropriate penalty criteria set forth in section 110(i) of the Act, as explained in the opinion of Commissioner Cohen.

My colleagues set forth an extensive summary of the facts in this case which I will not iterate here, except to the extent that they are pertinent to the conclusions I have reached contrary to those of the majority.

I. Musser's Liability.

Under the Pennsylvania Mine Act, which regulates coal mining in that state, mine operators must secure permits from the Pennsylvania Department of Environmental Protection ("DEP"). 28 FMSHRC at 701. When PBS acquired the land that would ultimately contain the Quecreek Mine No. 1 Mine, it contracted with Musser Engineering to prepare a permit application for submission to DEP. *Id.* Musser's duties included the preparation of a mine map that would, among other things, delineate "*known* workings of . . . abandoned, underground or surface mines." 25 Pa. Code. § 89.154(a)(4) (emphasis added); *see* P. Reply Br. at 5. That required Musser to secure maps for the four abandoned underground mines adjacent to the Quecreek permit area, including the Harrison No. 2 Mine. 28 FMSHRC at 701-702; Stip.12.

Musser's responsibility to PBS was limited to helping secure the DEP permit. The engineering company had no involvement and no control over the PBS's submissions to MSHA when the mine opened in 2001 – three years after the initial permit application had been submitted to DEP. Musser did not submit any maps to MSHA, and would not have been in a position to place a disclaimer or notation on the section 75.1200 map that would have warned about any uncertainties regarding the Harrison No. 2 Mine boundaries, assuming that such a disclaimer was required under the circumstances. Musser's role, even in preparing the state permit maps, was limited in that it only prepared an initial map with proposed boundaries of the Quecreek No. 1 Mine that would not have intersected the Harrison No. 2 Mine at the point where the breakthrough and inundation occurred. M. Reply Br. at 11 (citing Tr. 34, 153).

The citations issued to both Musser and PBS, respectively, state that the information supplied by Musser was "used by PBS to show the Harrison No. 2 boundary on the map required by 30 CFR 75.1200 for the Quecreek # 1 mine." Citation No. 7322487, at 2 (Aug. 12, 2003), and

Citation No. 732488, at 2 (Aug. 12, 2003). However, the Secretary's position in this case – that Musser violated the standard because it was involved in preparing a map that later served as the basis for PBS's preparation of the map that Black Wolf maintained pursuant to section 75.1200 – ignores the language of the standard. Moreover, the Secretary's theory of liability regarding Musser ignores the record evidence that indicates Musser's limited role and PBS's expansive role in preparing the mine maps submitted to MSHA.

Section 75.1200, by its plain language, applies to "[t]he operator of a coal mine" and requires that particular operator to maintain an accurate mine map "in a fireproof repository in an area on the surface of the mine." 30 C.F.R. § 75.1200. Thus, even if the judge were correct that Musser "knew or had reason to believe" that its state mine map would later be used in preparing maps that were required by MSHA (30 FMSHRC at 1092), Musser is not "the operator of a coal mine" within the intended scope of section 75.1200.[1] *See also* Comm. on Education and Labor, H.R. Rep. No. 91-563, at 54 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1084 (1975) (section "requires the *operator* of an active mine to have in a safe location on the surface an accurate map of the mine") (emphasis added).

The Commission's decision in *Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006), is instructive in this area. There, the Commission dismissed a citation issued against an independent contractor for allegedly violating a reporting requirement that was applicable to "the person owning, operating, or controlling" a waste impoundment. *Id.* at 270. The Commission contrasted the specific reporting requirement with a general safety standard where the responsibility for complying with the standard can rest with the production operator, an independent contractor, or both. *Id.* Similarly, in *Joy Technologies Inc.*, 17 FMSHRC 1303, 1309 (Aug. 1995), the Commission noted the limitations in holding an independent contractor liable for matters over which it and its employees have no control.

The record in this proceeding fully reflects that PBS and Black Wolf had ultimate control over the preparation, submission, and storage of the section 75.1200 mine map. Significantly, even in the preparatory planning and submission of the state DEP maps, PBS worked closely with Musser. Indeed, PBS vice-president Joseph Gallo testified that he "approved" the boundary lines for the Harrison No. 2 Mine that were on the state permit map. Tr. 247. Finally, PBS's research did not end with Musser's preparation of the state DEP application; PBS continued its efforts to search for maps of the Harrison No. 2 Mine to establish its boundaries in anticipation of submitting the map to MSHA for purposes of complying with section 75.1200. Tr. 321-22; Stip. 60.

In contrast, Musser had no involvement and no control over the section 75.1200 map and did not certify any maps for submission to MSHA. Musser did fully comply with Pennsylvania

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[1] By its terms, section 104(a) of the Mine Act limits citations to an operator that has *violated* the Act or any mandatory standard. 30 U.S.C. § 814(a).

law in submitting to the DEP the map that it did prepare, that is, a "general mine map" that showed "[t]he location and extent of *known workings* of active, inactive or abandoned, underground or surface mines." 25 Pa. Code. § 89.154(a)(4) (emphasis added).

Thus, Musser's limited role in preparing a "base" map that PBS used in preparing the section 75.1200 mine map is insufficient to bring it within the parameters of the specific standard involved in this case. Accordingly, I join Commissioner Cohen in reversing the judge's holding that Musser violated the standard.[2]

II. The Degree of Negligence Attributable to PBS.

As noted above, I find that the judge correctly found that PBS violated the standard and that the violation was significant and substantial in nature. As for the level of negligence chargeable to PBS, I conclude that substantial evidence does not support the judge's conclusion that the operator demonstrated "gross negligence" in its efforts to provide an accurate map of the Harrison No. 2 Mine.

Because the Mine Act is a strict liability statute, an operator will be held liable if a violation of a mandatory safety standard occurs regardless of the level of fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd,* 868 F.2d 1195 (10th Cir. 1989). In *Asarco*, the Commission concluded that "the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Id.* at 1636.

Thus, the Mine Act's principle of strict liability dictates that if an operator maintains a mine map that is not accurate with regard to the features listed in section 75.1200, including adjacent mine workings within 1000 feet, that operator is in violation of the standard. Once that is established, it remains to determine the appropriate level of negligence attributable to the violation.

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[2] I am also persuaded by Musser's argument that it was not liable because at the time it performed the work for PBS, there was no "mine" in existence that would bring Musser's activities under Mine Act jurisdiction. M. Br. at 8. In my view, the facts of this case fall squarely within the parameters set forth by the D.C. Circuit Court of Appeals in *Paul v. FMSHRC,* 812 F.2d 717 (D.C. Cir. 1987). Although the Secretary argues that Musser's activities involved "property . . . to be used" in the work of mineral extraction (S. Br. at 14-15), the D.C. Circuit made it clear that the phrase "to be used" had its limits: "[W]e think the more reasonable interpretation is that § 3(h)(1) is not applicable prior to the commencement of any mineral extraction or construction activities. The phrase "to be used in" merely refers to property that has not yet, but will be, committed to the work of extraction at a *preexisting* site or structure." *Id.* at 720 (emphasis in original). Nevertheless, it is sufficient for the purpose of deciding this case that section 75.1200, by its clear terms, did not apply to Musser.

The judge concluded that, in violating section 75.1200, PBS acted in a "grossly negligent manner." 30 FMSHRC at 1094. He based his conclusion in part on the fact that PBS had received two contradictory maps from Consol, which should have put PBS on notice "that all was not right." *Id.* at 1093. The judge further noted that final, certified mine maps "were a rare commodity," but found that PBS should have taken additional precautions. *Id.* The judge summarized the basis for his negligence conclusion, stating that he found it "incomprehensible" that PBS failed to place any type of warning on the section 75.1200 map. *Id.* at 1094.

The judge relied principally on the testimony of David Lucas, a technical assistant employed by Musser, to conclude that both Musser and PBS did not find the Consolidation Coal map to be reliable. *Id.* at 1093. Mr. Lucas did testify that he was not satisfied with the map, as the judge states, but that statement needs to be placed in context. Twice in his testimony, on cross examination by counsel for PBS and on redirect by counsel for the Secretary, Mr. Lucas stated that he agreed with his earlier statement, taken during an MSHA interview, that he, in fact, was satisfied with the Consolidation Coal map. Tr. 69-70, 80-81.

This seeming contradiction is easily explained by other testimony by Mr. Lucas that the judge ignored. In the course of discussing the procedure for verifying old maps, Mr. Lucas stated that the only sure way to verify past mining development is to actually survey the underground area in question. In the absence of such definitive plotting of prior mining activity, according to Mr. Lucas, maps are not going to be completely reliable. Tr. 67-68, 79. Moreover, whatever personal doubts Mr. Lucas might have had, his testimony does not indicate that these concerns were shared with PBS.

The judge also relies on the testimony of MSHA witness Stanley Michalek to establish that Consolidation Coal's map repository was unreliable, inasmuch as PBS had to go back for a second, more up-to-date map. 30 FMSHRC at 1093. According to the judge, PBS was put on notice that, as Michalek put it, Consol no longer had its "system down. They [were] slipping." *Id.* (citing Tr. 458). It should be noted that Mr. Michalek admitted that he had never prepared a map for purposes of obtaining a permit from the state of Pennsylvania, and that he had never conducted a map search such as that undertaken by Musser and PBS in this case. Tr. 488-89. Nevertheless, when asked what he would have done under the circumstances, he replied that he would have done the same thing that Musser and PBS did. Tr. 490.

So the level of negligence assignable to PBS comes down to what steps the operator took to ensure that the map ultimately submitted to MSHA was "accurate." PBS asserts (PBS Br. at 26-31), and I agree, that it performed appropriate and accepted due diligence in researching all available sources for evidence of past mining development adjacent to the Quecreek mine. The record is replete with statements by MSHA witnesses that Musser and PBS exercised such due diligence in securing what they believed to be the most up-to-date maps. Tr. 348, 432, 501, 570.[3]

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[3] The judge accuses PBS of playing "Russian roulette with the lives of miners." 30 FMSHRC at 1093-94. If so, there were other players at the table. None of the governmental

The judge's principal basis for determining that PBS was guilty of gross negligence was the operator's failure to include on the mine map a disclaimer or a dotted line to indicate uncertainty regarding the boundary of the Harrison No. 2 Mine. 30 FMSHRC at 1094. The judge had concluded as a threshold matter that had PBS included such a disclaimer on the map it submitted to MSHA it would have been in compliance with section 75.1200. 28 FMSHRC at 707. I find, and my colleagues apparently agree, that the standard by its terms does not require the placing of a disclaimer on a map based on undated, uncertified prior maps, and I share Chairman Jordan's skepticism as to the efficacy of such a disclaimer in the circumstances presented here. *See* slip op. at 18 n.20. I would add that PBS believed the map it did submit to MSHA was, in fact, reliable, thus obviating the need to include a disclaimer in the first place. Finally, it seems to me that if the standard does not require a disclaimer, it is not logical to conclude that failure to provide one in these circumstances would support a finding of any negligence, much less gross negligence.

PBS argued below that is was impossible to comply with the standard, because no final certified map of the Harrison No. 2 Mine was available. 28 FMSHRC at 706. The Secretary countered, and the judge agreed, that PBS could have prepared an "accurate" mine map "by indicating *in some way* on the map that the exact location of the adjacent workings in the Harrison No. 2 Mine was unknown." S. Br. at 21 (emphasis added); *see* 28 FMSHRC at 707; S. Br. at 22 n.18.[4] Because the Secretary has maintained that the language of the standard is clear, the Secretary's placing of this additional gloss on the standard is neither necessary nor legally correct under *Chevron*, 467 U.S. at 842-43. And while 30 C.F.R. § 75.1200 is a reiteration of section 312 of the Mine Act and section 312 of the Coal Act, there is nothing in the Mine Act, the Coal Act, nor in the legislative history of either that would support such a reading of the standard.

I therefore conclude that the Mine Act and the Secretary's regulations do not provide for such a practice, and none can be read into the regulation when its language is so abundantly clear.

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entities charged with assuring the reliability of maps of abandoned mines met its responsibilities in this case. MSHA did not question PBS as to the existence of certified maps of adjacent areas, even though since 1969 the agency or its predecessor had been responsible for maintaining such documents (*see* 30 U.S.C. § 872(c); 30 C.F.R. § 75.1204); the Office of Surface Mining, the designated archival agency under federal law, had only a partial 1957 map of the areas in question (Stip. 78); and Pennsylvania DEP allowed its inspectors to retain official final maps among their own private papers. Stips. 84, 86. These derelictions of official duty played no small role in the near tragedy.

[4] The Secretary further states, "Section 75.1200's requirement of an 'accurate' map did not require PBS and Musser to prepare a map showing something they could not know; it required them to prepare a map indicating what they did not know." S. Br. at 21. This statement is both difficult to understand and unhelpful in resolving this case.

Any requirement that the operator indicate in some way that the exact location of an adjacent mine is unknown could only be imposed after notice-and-comment rulemaking.[5]

Notwithstanding the lack of any statutory or regulatory basis for requiring a disclaimer on a section 75.1200 map, the judge seized on the lack of a disclaimer to focus on PBS's actions from a general negligence perspective. 30 FMSHRC at 1093-94 ("As the danger becomes greater the actor is required to exercise caution commensurate with it") (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984)).[6] The judge stated that he considered it "incomprehensible" that PBS did not place any type of warning on the section 75.1200 map. *Id.* at 1094.

While the judge's sentiments are understandable, they are not grounded in the plain language of the standard. In *A. H. Smith Stone Co.*, 5 FMSHRC 13 (Jan. 1983), the Commission explained the nature of a negligence finding under section 110(i): "Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Id.* at 15. Under the Commission's holding, it is clear that the negligence finding must be grounded in the violation of the standard itself, not by general principles of tort

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[5] In further support of her position, the Secretary switches gears somewhat to assert that a "reasonably prudent operator" would read the standard to require that it provide some indication on a mine map when the exact location of adjacent mine workings is unknown. S. Br. at 24-25. That argument must be rejected as well. The Commission has long held that the "reasonably prudent person" test is invoked to determine whether an operator "would have ascertained the specific prohibition" of a broadly worded standard and "concluded that a hazard existed." *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008) (*citing Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). That test is clearly inapplicable here, where no broadly worded safety standard is involved and the Secretary essentially seeks to add a new requirement to a specific standard. Rather, the Commission has addressed the issue of notice of a plain language provision in the following manner: "'when the meaning of a standard is clear based on its plain language, it follows that the standard provided the operator with adequate notice of its requirements.'" *Austin Powder Co.*, 29 FMSHRC 909, 919 (Nov. 2007) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)).

[6] The Commission has generally considered "the high degree of danger posed by a violation" in regard to an *unwarrantable failure* finding, rather than a negligence determination. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998) (supervisor should have appreciated extreme danger posed by unexploded pyrodex). It is noteworthy here that the Secretary did not designate the citations as being the result of the operators' unwarrantable failure, which the Commission has generally characterized as "'aggravated conduct constituting more than ordinary negligence,'" . . . . and in so doing has "recognized that a finding of high negligence suggests unwarrantable failure." *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001) (quoting *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)).

law and general notions of what would be desirable. In other words, the operator's duty of care is prescribed by the standard. In *Smith Stone*, the Commission rejected the judge's reasoning that the operator failed to engage in a "safe practice," because the Commission concluded that its examination was limited to what the standard required. *Id.* at 16.

As the Commission's decision in *Smith Stone* indicates, the "duty of care" that PBS was required to meet was to maintain an accurate mine map. Obviously, PBS failed to do this, and the judge's examination of the operator's conduct should be focused on the strength of its efforts to locate an accurate mine map of the Harrison No. 2 Mine and its preparation of the section 75.1200 map. The judge instead relied upon a practice, apparently only beginning to emerge prior to the Quecreek inundation, that an operator indicate in some way unknown areas on a mine map.[7] However beneficial or exemplary this practice might be, the standard at issue was silent on this. Significantly, there was an absence of guidance from MSHA to even suggest that operators should follow this practice.

Moreover, adopting the judge's theory of negligence in this case would have the effect of imposing a general duty clause on mine operators similar to that imposed on general industry by section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1). By its terms, section 104(a) of the Mine Act limits citations to an operator that has violated the Act or any mandatory standard. 30 U.S.C. § 814(a); *see also* Conf. Rep. No 95-461, at 38-39 (1977), *reprinted in* Senate Subcomm. on Labor Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1316-17 (1978) (Mine Act as enacted rejected "general duty" clause that would have permitted citing operators for failing to furnish safe and healthful working conditions and to comply with rule and regulations under the Act).

Here, the judge's reliance on an arguably desirable but unpromulgated practice to require a disclaimer on a mine map stands on a similar footing to the "safe practice" rationale which the Commission rejected in *Smith Stone*. Thus, from the judge's decisions, it is evident that his negligence findings were not limited to PBS's actions in failing to provide an accurate map under section 75.1200. In addressing negligence in his first decision, the judge responded to PBS's

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[7] Most of the evidence concerning the practice of noting uncertainty regarding the boundaries of adjacent mines involved maps dated after the initial map was submitted to the Pennsylvania DEP. *See* Gov't Ex. 10 (final MSHA mine map dated Feb., 23, 1999 (punch line used to indicate unknown areas)); Gov't Ex. 11 (MSHA mine map dated Aug. 26, 2002 (notations used to indicate unsurveyed areas)); Gov't Ex. 12 (MSHA mine map appears to be dated Jan. 4, 2001 (notations used to indicate that extent of prior mining was unknown)); Gov't Ex. 13 (MSHA mine map dated July 15, 2002 (notation used to indicate extent of survey areas unknown)). All the maps came from MSHA districts other than the district in which the Quecreek No. 1 Mine is located, and testimony indicated that there may have been informal guidance as to the practice in those other districts. Tr. 548-49. There is no evidence that MSHA had issued any such guidance regarding mine maps in the district where the Quecreek No. 1 Mine is located.

argument that there was nothing in the standard or other guidance from the Secretary that required PBS to do more than depict the workings of an adjacent inaccessible mine, noting that "[t]here are many prophylactic actions taken by *reasonably prudent people* that are not set forth in the statutes." 28 FMSHRC at 710 (emphasis added). In further response to PBS's argument that it had met or exceeded "the standards of the mining community," the judge stated that, aside from those standards, "given the gravity of the accident, I cannot dismiss basic common sense." *Id.* at 711. Again, while these sentiments may well be of some moment in a case brought in tort, they are inapposite to the determination of culpability under the Mine Act. Umbrageous hindsight must not be substituted for legal analysis consistent with Commission precedent.

Consequently, I conclude, contrary to the judge's reasoning, that Commission case law establishes that PBS is not guilty of "gross" or high negligence. *See also Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990) (operator that followed a clean-up plan believing that such conduct was consistent with applicable regulations not guilty of aggravated conduct constituting more than ordinary negligence). In any event, even if the Secretary's regulations left room for interpretative guidance that indicated the need for map notations in light of uncertain boundaries, she has issued no guidance here that has been ignored. *See also Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1379 (Jul. 1990) (operator not guilty of high negligence where seemingly conflicting MSHA policies left operator in doubt as to what was required for compliance).

Finally, in its recent decision in *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008), the Commission held that negligence findings cannot be based on an operator's actions after a violation has occurred; rather the judge's examination must focus on the operator's actions before the violation occurred. *Id.* at 708. Here, PBS's failure to provide a notation or warning on a map to indicate uncertainty as to boundaries is, at best, inaction that followed its failure to provide an accurate map with boundaries under section 75.1200.[8]

In summary, I would reverse the judge's finding of gross negligence. To my mind, nothing presented before the judge below warranted a finding in excess of the moderate negligence originally charged by MSHA after an extraordinarily thorough investigation of the circumstances leading up to the Quecreek inundation.

Michael F. Duffy, Commissioner

[8] In order to abate the citations issued to it and Musser, PBS was ordered to correct the state mine map in light of the uncertified map found at the Windber Coal Heritage Museum, and to perform test bores when mining with 200 feet of the Harrison No. 2 mine. Citation No. 7322487, at 2-3; Citation No. 732488, at 2-3.

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