

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 21, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-157
Petitioner	:	A. C. No. 36-08746-26476
v.	:	
	:	Quecreek No. 1 Mine
BLACK WOLF COAL COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-158
Petitioner	:	A. C. No. 36-08746-26477 LVY
v.	:	
	:	Quecreek No. 1 Mine
PBS COALS, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-152
Petitioner	:	A. C. No. 36-08746-26478 KQN
v.	:	
	:	Quecreek No. 1 Mine
MUSSER ENGINEERING, INC.,	:	
Respondent	:	

**ORDER GRANTING IN PART AND DENYING IN PART THE
SECRETARY OF LABOR'S
MOTION FOR SUMMARY DECISION AND
DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION**

These consolidated civil penalty proceedings are brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (hereinafter the "Mine Act" or "the Act"), as a result of a nonfatal entrapment accident at the Quecreek No. 1 Mine, located in Somerset, Pennsylvania. They involve three alleged violations of mandatory safety standards for underground coal mines with aggregate civil penalties of \$14,100.00. Unless otherwise noted, the summaries of

the facts throughout this Order are derived from the parties' joint stipulations of fact.

Background and Procedural History

On July 24, 2002, at approximately 8:45 p.m., water broke through the working face of the No. 6 entry of the Quecreek No. 1 Mine after a cut was made in the entry during mining operations. The deluge came from a long-abandoned and flooded underground coal mine known as the Harrison No. 2 Mine. The Harrison No. 2 Mine was located immediately updip (at a higher elevation) of the Quecreek No. 1 Mine permit boundary. As a result of the inundation, nine miners narrowly escaped and nine others were trapped in the mine. While the world anxiously watched, the nine trapped miners were rescued one by one approximately 76 hours later, on July 28, 2002.

Under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), a mine operator is required to have an accurate map of the mine pursuant to 30 C.F.R. § 75.1200. Among other requirements, section 75.1200 requires a mine operator to show "adjacent mine workings within 1000 feet." 30 C.F.R. §75.1200(h). Part of the investigation's purpose was to determine why the workings in the Harrison No. 2 Mine were not shown on the Quecreek No. 1 map. As a result of the investigation, the Secretary determined that the Quecreek No. 1 Mine's section 75.1200 map was not completely accurate because the intersected workings of the adjacent Harrison No. 2 Mine were not shown on Quecreek No. 1 Mine's section 75.1200 map. Consequently, MSHA issued single citations to the three Respondents in this proceeding; specifically, Musser Engineering, Inc. ("Musser"), PBS Coals, Inc. ("PBS"), and Black Wolf Coal Company ("Black Wolf"), which was the production operator of the mine (collectively "the Respondents").

On November 21, 2005, both Musser and PBS filed Motions for Summary Decision in this matter. The Secretary of Labor filed her response to the Respondents' motions and her own Motion for Summary Decision on December 21, 2005. In support of their cross-motions for summary decision, the parties submitted extensive stipulations and certain joint exhibits.¹ Black Wolf did not file or join in the cross-motions for summary decision but did sign the joint stipulation of facts.

The Secretary contends that PBS and Musser are liable as independent contractor operators of the mine. Musser responds that it is not an operator within the meaning of the Mine Act and, therefore, should not be held liable. PBS does not dispute the Secretary's jurisdiction; however, it does dispute the validity of the citation.

Statement of Facts

Black Wolf's Quecreek No. 1 Mine is located in Somerset County, Pennsylvania. At the time of the inundation, 61 people were employed at the mine, 6 on the surface, and 55 in the mine itself.

¹ The following abbreviation is used herein as a citation to the administrative record: Stip. = the parties' joint stipulations.

Stip. 24. On Wednesday, July 24, 2002, at 8:45 PM, miners working on the No. 1 entry on the 1-left section during mining operations broke through the working face and caused a serious inundation. Stip. 29. The water came from the abandoned Quecreek No. 2 mine. Stip. 28, 29. Of the 18 miners underground that evening, 9 were trapped. Stip. 29. Within hours the local and national media had joined in the vigil for the trapped miners. Soon the watch spread worldwide. Not since the Carmichaels disaster of 1962 at the Robena Frosty Run Mine had Western Pennsylvania's coal fields faced a crises of this magnitude. By the next morning, after approximately 16 hours of rising water, the nine miners estimated they had about an hour left to live. The entrapped miners did what miners do: accepted their fate and prepared for the worst. Goodbye notes were written to their families and sealed in a bucket for recovery. But over the next few hours, the rising water slowed and reached the highest elevation.² Hope returned as the rescue efforts continued. After 3 days, in a dramatic rescue led by Federal Mine Safety and Health Administration workers, the nine trapped miners were brought to the surface using MSHA's mine rescue capsule. MSHA Report at 30.

Quecreek No. 1 Mine

Prior to opening a new mine, mining permits and plan approvals are required from state and federal authorities, respectively. MSHA Report at 54; Stip. 50. In 1994, the Double C Coal Company ("Double C") initiated an application to obtain a permit for the Quecreek No. 1 Mine from the Pennsylvania Department of Environmental Protection ("PA DEP"). *Id.* MSHA Report at 54; Stip. 50. Double C contracted with Musser to prepare a permit application for its submission under the Pennsylvania Small Operator Assistance Program. MSHA report at 54. PBS acquired the project from Double C in 1995 and the project was transferred to Quecreek Mining, Inc. ("Quecreek Mining"), a subsidiary of PBS. MSHA report at 54; Stip. 10, 21, 50. PBS hired Musser to prepare the original permit application for the Quecreek No. 1 Mine. Stip. 12. This work included researching and showing the location of old mine works adjacent to the planned mine. *Id.*

The initial permit application was submitted to the PA DEP on February 28, 1998. The permit, number 56981301, was issued to Quecreek Mining, Inc., on March 13, 1999. MSHA Report at 54; Stip. 51, 73. Black Wolf Coal Company conducted the underground mining operations at Quecreek No. 1 and contracted with Mincorp, Inc. ("Mincorp") to perform the mining. Stip. 23. PBS is a subsidiary of Mincorp. Stip. 9, 10, 23. Mining was conducted by the use of remote controlled mining machines. Stip. 19. The Quecreek No. 1 Mine opened into the Upper Kittanning coal seam, and Quecreek Mining developed the surface area, the portals, and the mains, which were driven down dip from the portals. Stip. 18, 22, 32.

Harrison No. 2 Mine

In 1913, the Quemahoning Creek Coal Company opened what is now known as the Harrison No. 2 Mine and the Saxman Coal and Coke Company ("Saxman") subsequently

² Some miners believed it to be about noon, Thursday, July 25th, while others estimated it to be noon on Friday, July 26th.

purchased the mine in 1925. Stip. 28. Saxman operated the mine until 1963, although the mine was idle from 1934 through 1941. *Id.* Prior to the mine's 1963 closure, Consol Energy, Inc. ("Consol") owned the coal reserves and leased the reserves to Saxman in exchange for monthly royalty payments. Stip. 48, 65. Saxman also provided Consol with updated mine maps on a biannual basis. *Id.* After the mine stopped producing coal in 1963, it was abandoned, sealed, and became flooded. Stip. 54. The Harrison No. 2 Mine was located in the same seam and immediately updip of the Quecreek No. 1 Mine permit boundary. Stip. 28, 32. In general, the Harrison No. 2 Mine is located east of the Quecreek No. 1 Mine. Stip. 32.

Pennsylvania Bituminous Coal Mine Act of July 17, 1961 ("PA Mine Act")³

The PA Mine Act requirements regulate bituminous coal mining in Pennsylvania. Stip. 33. The PA Mine Act requires operators or superintendents of mines to survey the workings of their mines and to create an accurate map of the mine that shows, among other items, "an accurate delineation of the boundary lines" between the mine and "all adjoining mines or coal lands and the relation and proximity of the workings of said mine to all adjoining mines or coal lands." PA Mine Act, 52 P.S. §701-235; Stip. 34. In addition, a professional engineer or registered professional surveyor must certify the mine maps. *Id.* Sections 238 and 239 of the PA Mine Act require that the mine map be updated every six months and a copy of the updated mine map must also be provided to the Pennsylvania Mine Inspector. PA Mine Act, 52 P.S. §§701-238,239; Stip. 35, 36. The Pennsylvania Mine Inspector is required to take custody of the mine maps as "official records pertaining strictly to the office of mine inspector in the district," and to transfer all of the maps to his successor as district mine inspector. PA Mine Act, 52 P.S. §701-239; Stip. 37. Within 60 days of abandonment of a mine, the operator or superintendent must update the mine inspector's map and must also send the PA DEP a "complete original tracing or print of the complete original map, which shall be kept in the department as a public document." PA Mine Act, 52 P.S. §701-2240; Stip. 38. Moreover, a registered professional engineer or registered surveyor must certify that the map is a true and correct copy and a "true, complete and correct map and survey of all the excavations made in such mine." PA Mine Act, 52 P.S. §701-240; Stip. 39. Substantially similar provisions have existed in Pennsylvania Mine Safety Law since 1911 and in 1963, when the Harrison No. 2 Mine was abandoned, mine operators were required to supply mine closure information to the Commonwealth including a final mine map. PA Mine Act, P.S. § 701-240; Stip. 40, 43.

Endeavors and Process in Locating Maps of Harrison No. 2 Mine

During the permitting process, it was not practical or feasible for the Harrison No. 2 Mine to be surveyed because it was abandoned, sealed, flooded, and inaccessible. Stip. 54. Prior to submitting the permit application to the PA DEP, both Musser and PBS conducted searches for maps of the abandoned Saxman Mine. Stip. 55. In the summer of 1995, every known mine map repository in central and western Pennsylvania was searched and five maps of the Saxman Mine were located. *Id.* These included the Federal Office of Surface Mining map repository in

³ P.L. 659, 52 P.S. 701-101 through 701-706.

Greentree, Pennsylvania (“OSM”), the Pennsylvania Department of Environmental Protection in McMurry, Pennsylvania, the MSHA District 2 Office in Hunker, Pennsylvania, and Consol Energy, Inc., which was the owner of the coal mined at Harrison No. 2, and the DEP Bureau of Deep Mine Safety (BDMS”) Uniontown Office. Stip. 55, 58, 59. Musser also consulted Carlton Barron of Boswell, Pennsylvania, who was an owner of Saxman Coal and Coke Company. Musser Mot. at 4. The search was conducted for mines with the names “Saxman” and “Harrison,” since the adjacent mine was frequently referenced by either name. Stip. 55.

Most of the maps discovered during the searches were older and of no practical use. Stip. 62. Two maps located during the search, however, were used for permitting the Quecreek No. 1 Mine. *Id.* PBS and Musser located a map of the Harrison No. 2 Mine at the OSM repository in Greentree, Pennsylvania. Stip. 63. This map was not dated, marked final, or certified by a professional engineer or professional surveyor. *Id.* It depicts the general mine workings of the Harrison No. 2 Mine. *Id.* Unknown to Musser and PBS, a frame of the legend portion of this map is dated 1957. *Id.* This map was not indexed properly in the OSM archives and was not located in the searches performed at Musser’s and PBS’s request. *Id.* The Greentree map was the most current map of the Harrison No. 2 Mine available at either the state or federal mine map repositories. Stip. 64.

Musser also contacted Consol Energy Inc., in Library, Pennsylvania and requested a copy of any maps of the Harrison No. 2 Mine that Consol had available. Stip. 65. Because Consol previously owned the coal reserves at the Harrison No. 2 Mine and was entitled to royalties on all coal removed from the mine, Musser expected that Consol would have had accurate maps of the Harrison No. 2 Mine. *Id.* A Consol employee located a copy of the Harrison No. 2 Mine and provided a copy to Musser. *Id.* PBS also received a copy of this map. *Id.* The Consol map is not dated or marked final, and the map is not certified by a professional engineer or professional surveyor. *Id.*

The Consol map showed the most extensive mining in the Harrison No. 2 Mine that was located, and Musser believed it to be the final map. Stip. 66. Musser, with the concurrence of PBS, used the Consol map to plot the boundary of the Harrison No. 2 Mine on the Quecreek Mine permit maps. *Id.* The plot of the boundary led to the extent of the development limits for the Quecreek No. 1 Mine, leaving a 200-foot barrier with the Harrison No. 2 Mine based on the Consol Map. *Id.* Edwin Secor, a Musser employee, certified the permit map with a seal. *Id.*

Records indicate that John E. Kimmel, the superintendent and engineer at the Harrison No. 2 Mine, supplied mine closure information and final maps to the Commonwealth prior to 1961 and that he also gave a final map for the Harrison No. 2 Mine to C.H. Maize, the Pennsylvania Mine Inspector, in 1964. Stip. 44 and 45. The MSHA investigation team found no evidence that Mr. Kimmel failed to comply with the Pennsylvania mine closure requirements. Stip. 46. Nonetheless, the PA DEP did not have the final mine map of the Harrison No. 2 Mine available in its archives when the Quecreek No. 1 Mine was planned and permitted, and a final mine map was not found until after the accident at the Windber Coal Heritage Center (“Windber

Center”). Stip. 47.⁴ This map, however, is not certified by a professional engineer or surveyor. Stip. 83. A certified final map for the Harrison No. 2 mine has not been found. Stip. 85. The room that the Black Wolf miners broke into is not on any map yet found. Stip. 94. However, using the Windber map, the 200 foot buffer zone enforced by law would have included the abandoned workings, and likely prevented the inundation.

As a result of its investigation, MSHA issued a Significant and Substantial (“S&S”) Section 104(a) Citation, No. 7322481, to Black Wolf, alleging a violation of 30 C.F.R. § 75.1200 with “low” negligence. MSHA issued a Section 104(a) S&S Citation, No. 7322487, to Musser alleging a violation of 30 C.F.R. § 75.1200 with “moderate” negligence. PBS was also issued a Section 104(a) S&S Citation, No. 7322488, by MSHA, alleging a violation of 30 C.F.R. § 75.1200 with “moderate” negligence. The standard 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:

- (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 coal bed;
- (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.

The citations were properly served to all parties.

Discussion

⁴ The Windber Center map was donated to the museum in June 2002 by Inspector Maize’s granddaughter. Evidently, she found the map among his personal effects after he died. Stip. 84.

The Mine Act provides, in pertinent part, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - *the miner*” and “it is the purpose of this Act to direct . . . the Secretary of Labor to develop and promulgate improved mandatory and health or safety standards to protect the health and safety of the Nation’s coal or other miners” and to require that each operator of a coal or other mine and every miner in such mine comply with such standards.” 30 U.S.C. § 801(a)(g) (emphasis added).

The standard for granting summary decision is set forth in Commission Rule 67(b), which provides that, [a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b).

Regarding Black Wolf, if a non-moving party fails to establish sufficient evidence of an essential element to its claim, on which it bears the burden of proof, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court is required, in reviewing all of the evidence on the record, to draw all reasonable inferences from the underlying facts in the light most favorable to the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000); *Matsuchi Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The parties have stipulated to the material facts, and, therefore, the first prong of 29 C.F.R. § 2700.67(b) is met, provided those facts can provide a sufficient factual basis for a decision. Based on the stipulated facts and my reasons outlined below, I conclude that the Secretary is entitled to partial summary judgment as a matter of law.

PBS

A. Whether PBS Violated Section 75.1200

PBS presents a sub-issue as to whether the Secretary properly charged a violation of section 75.1200. First, it argues that the language “accurate and up to date” does not apply to “adjacent mine workings because under a plain reading of the regulation, the language “an accurate and up to date map of such mine” refers to the operator’s mine, not adjacent mine workings within 1,000 feet, as it relates to the Harrison No. 2 Mine. PBS Memo of Law at 22. Also, within this sub-issue, PBS argues that the Secretary’s interpretation is contrary to the plain meaning of the text; the Secretary’s interpretation is inconsistent with her overall regulatory scheme, averring, in particular, that section 75.1200-2(b) requires an operator to use an accurate method of survey to produce a map, while section 75.1200 presents an operator with the impossible task of accurately surveying an inaccessible and abandoned mine; and the Secretary’s interpretation would lead to the absurd result of requiring an operator to accurately depict inaccessible, abandoned mine workings. *Id.* at 21-23. Thus, an adjacent mine, according to PBS, is not subject to the section 75.1200 map

requirement because a mine operator cannot accurately map the mine workings of another mine, particularly one that has been closed for years. *Id.* PBS further argues that the Secretary's interpretation of the standard is not reasonable as she requires an operator to depict with survey accuracy the location of abandoned mine workings for which such maps are not available. *Id.* at 27-28. PBS argues in the alternative that, even if the Secretary argues the language is ambiguous, she should not be afforded deference because her interpretation is unreasonable. *Id.* at 26-27. Finally, PBS avers it was not on notice that "accurate and up to date" applied to its mapping of the Harrison No. 2 Mine. I note that PBS does not contest its status as an "operator" under the Act. *Id.* at 28.

When the breakthrough accident occurred, the operator's mine map showed that the Harrison No. 2 Mine was located approximately 450 feet away. PBS's Section 104(a) S & S Citation. In reality, given that the workings of the Harrison No. 2 Mine were actually intersected, it logically follows that the mine was much closer. To 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.

The Secretary argues that she properly issued the citation because, under a plain reading of the regulatory text, PBS was required to show a complete and accurate map of adjacent mine workings within 1,000 feet, which PBS did not do. Thus, a violation occurred, resulting in the issuance of the subject citation. Sec'y Br. at 7-8. The Secretary concedes that the "level of accuracy" for an inactive, abandoned mine would be different from that of an active mine. *Id.* at 11. However, she notes that a duty to depict inactive, abandoned mine workings still exists, and should be depicted with "the most recent and reliable evidence of what existed," and wherever there is doubt, such doubt should be indicated on the map. *Id.* Such indication could be made by using a dotted line or simply stating "unknown" on the map. *Id.* Regarding "notice," the Secretary avers PBS's argument is without merit because the plain language of the regulatory text was notice enough, and a "reasonably prudent person" would know the provision applies to the situation. *Id.* at 13.

First, as a general matter, the Mine Act is a strict liability statute. As such, the Mine Act assesses liability without regard to the individual operator's fault. *International Union, UMWA v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988). However, fault may be considered in setting the level of the civil penalties by considering whether the operator was negligent. 30 C.F.R. § 100.3.

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. *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998). In addition, ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. *Norman J. Singer Statutory Construction*, § 45.02 (5th ed. 1992).

I conclude, as have both parties, that the language of section 75.1200 is clear and unambiguous and warrants a plain meaning interpretation. Accordingly, no discussion of *Chevron*,

467 U.S. 837 (1984) deference to the Secretary is necessary.⁵

Section 75.1200 states in pertinent part, “the operator of a coal mine shall have . . . an accurate and up-to-date map of such mine . . . [s]uch map shall show . . . [a]djacent mine workings within 1,000 feet.” PBS, in its reading of the regulation, disjoints the “adjacent mine workings” clause. The Secretary is correct in stating that this phrase should be read as one of “12 classes of information” required to be included on the map. Sec’y Br. at 7. The language “such a mine” *does* refer to the operator’s mine, as proffered by PBS. PBS Memo of Law at 22. However, the 12 items following the clause stipulate what additional information is to be included on that map, such as a bordering abandoned mine. There can only be one meaning for “[s]uch map shall show . . . [a]djacent mine workings within 1,000 feet.” The map of the mine operator’s mine must do just that: show the location of applicable adjacent mine workings.

PBS asserts that the Secretary is requiring it to have accurate and up-to-date mapping of the adjacent mine (in this case, the Harrison No. 2 Mine) and cites the language of the citation, not the regulation, to emphasize this point. PBS Memo of Law at p. 22. Consequently, the only ambiguity is in the wording of the citation itself, as PBS is misinterpreting it to mean that the Secretary “is requiring ‘accurate and up-to-date’ information regarding the workings of the abandoned Harrison No. 2 Mine on the section 1200 map.” PBS Memo of Law at p. 22. This is incorrect. The Secretary maintains that the Quecreek No. 1 Mine Map was inaccurate because it failed to show the existence of adjacent mine workings within 1,000 feet. Sec’y Response at 5, 7. While the citation itself may be awkwardly worded, the issue here is the language of the standard, which is designed to put operators on notice as to a requirement before an accident occurs, as opposed to a citation, which penalizes after the fact. There is no ambiguity here.

The Secretary’s interpretation is not contrary to her overall regulatory scheme. As the Secretary correctly states, the map could have been drafted in such a way as to show uncertainty and still be considered “accurate.” If there had been some indication on the map that the location of mine workings in the Harrison No. 2 mine were unknown, the miners would most certainly have proceeded with more caution. The 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. This reading of the text does not lead to the absurd result of requiring operators to produce exact depictions of inaccessible mine workings. This reading leads to the result of the operator considering the safety of its miners by providing all the relevant and important information it possesses, and where pertinent and life saving information is not available, so indicating. This interpretation is in keeping with a plain reading of the text and is in line with the purpose of the Act - to protect the safety of any miners from accidents such as the one that brought about these proceedings.

The breakthrough accident occurred because the miners were working from the operator’s

⁵ PBS evidently agrees with this interpretation, as its brief emphasizes that “such mine” and “such map” as used in the standard are, in fact, referring to the operator’s mine and map. PBS Memo of Law at p. 22

inaccurate map that did not show the adjacent mine workings within 1,000 feet. If the location of the adjacent Harrison workings were accurately depicted—within 1,000 feet—on the map, the miners would not have intersected those workings that evening and the accident would not have occurred.

Similarly, PBS's argument that it was not "on notice" that the phrase "accurate and up-to-date" applied to its depiction of the workings of the Harrison No. 2 Mine on the section 75.1200 map is also erroneous. PBS argues it was not on notice because the Secretary's application of "accurate and up-to-date" to the depiction of the Harrison No. 2 Mine workings is contrary to the plain language of the regulation. PBS Memo of Law at 29-30.

The Commission has held that a safety standard must provide adequate notice of the conduct it...requires, so that the mine operator...may act accordingly. *Freeman United Coal Mining*, 18 FMSHRC 438, 448 (Mar. 1996). The standard is objective and the appropriate test is not whether the operator had explicit prior notice of a specific...requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific...requirement of the standard. *Id.*

PBS agrees that the standard requires a mine operator be "accurate and up-to-date" with respect to the working of its own mine. PBS Memo of Law at p. 29. Basic common sense dictates that a map is not accurate if it contains incorrect information. As an illustration, a 2006 map of the continental United States would not be accurate if its western border stopped at Colorado. The Quecreek No. 1 Mine's section 75.1200 map incorrectly depicted the location (read: border) of the Harrison No. 2 Mine workings. A reasonably prudent person would not only recognize that the plain meaning of the statute requires an operator to have an accurate and up-to-date map of its own mine workings (as PBS agrees that it does), but that its own map cannot possibly be accurate if the information contained therein is wrong. Moreover, a reasonably prudent person familiar with the coal mining industry (and likely many reasonably prudent people who are unfamiliar with coal mining), would understand that an accurate map is an important part of mine safety and can help prevent unintentional breaches of flooded, abandoned mines and other potential dangers like oil and gas wells.

An operator's map (or any map, for that matter) cannot be accurate if its boundaries are wrong. The boundaries on the Quecreek No. 1 Mine's section 75.1200 map were wrong because PBS incorrectly depicted them on the Quecreek No. 1 section 75.1200 map. PBS argues there is no accepted practice for annotating maps to show uncertainty. *Id.* at 31. However, I find it incomprehensible that a skilled map maker would have no means of notating uncertainty or inconclusiveness on a map. Because the boundary information contained in the Quecreek No.1 Mine's section 75.1200 map was wrong, the map itself was not accurate and consequently, the standard was violated. The reasons behind the incorrect boundary depiction are not relevant to the question of whether a violation did in fact occur, which is the only inquiry in the face of a strict liability statute. The reasons for the incorrect depiction are a question of negligence and that issue is addressed below.

Accordingly, I find that the language of section 75.1200 is clear, PBS had notice of the regulation's requirements, a violation of 30 C.F.R. § 75.1200 did occur, and the Secretary's citation was properly predicated on the violation.

Therefore, the Secretary's Motion for Summary Judgment on this issue is granted.

B. Whether PBS Was Negligent

PBS argues that even if it is determined that a violation occurred, it was not negligent in any fashion because it exercised diligence in searching for a final map and it reasonably believed the Consol map, though uncertified, was the final map. Moreover, it is not common for miners to annotate their maps with dashed lines, and PBS, in fact, was not aware of such a requirement. PBS Memo of Law at 31-34.

The Secretary asserts that where information is uncertain, there exists a duty to disclose to MSHA the basis for the use of a map such as the Consol map, and, when in doubt, any uncertainty. She states PBS's failure to acknowledge any level of doubt about the location of the adjacent mine workings constituted negligence. Sec'y Br. at 27.

The citation states that PBS's violation of section 75.1200 was the result of "moderate" negligence. Stip. 97. Moderate negligence means, "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d)(Table VIII). This section further provides that "[m]itigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. 30 C.F.R. § 100.3(d).

The parties stipulated to the extensive searches performed by PBS. Stip. 55. Indeed, Edwin P. Brady, MSHA's lead investigator, testified in his deposition that the engineers performed a diligent search and that he is not questioning their integrity or diligence. Brady Deposition at p. 51-52. Moreover, it is not PBS' fault that the Windber map was hidden in the personal effects of the former Pennsylvania Mine Inspector during the time of its search. Stip. 84. It is also not PBS's fault that the OSM map was not indexed properly. Stip. 63. Additionally, the parties agree that the Consol map used by PBS showed the most extensive mining in the Harrison No. 2 Mine that was located before the accident. Stip 66. These circumstances, however, are mitigating factors.

The key inquiry as set forth in section 100.3 is: Should PBS have known of the violative condition - in this case that the operator's map was not accurate - because it failed to show the existence of adjacent mine workings within 1,000 feet? As previously discussed, a reasonably prudent person familiar with the mining industry would know that a map with incorrect boundaries is not an accurate map. In addition, the same reasonably prudent person would know that relying on an inaccurate map in the mining industry could lead to disastrous results, as happened here. Consequently, unless PBS reasonably believed that the map it relied on to depict

the boundaries and workings of the Quecreek No. 1 Mine was valid itself, it should have known that the Quecreek No. 1 Mine's section 75.1200 map would not be accurate and therefore would violate the standard.

PBS submits that it reasonably believed the Consol Map was a final map of the Harrison No. 2 Mine because Consol, as lessor of the coal reserves mined at the Harrison No. 2 Mine, would be expected to possess a final map. PBS Memo of Law at 32. In support of this statement, PBS references the deposition testimony of Kelvin Wu, a member of the MSHA accident investigation team, in this matter. However, the testimony needs to be taken in context. Mr. Wu stated that he would expect the lessor of coal reserves to have a reliable map because they have a financial incentive to do so. Wu Deposition at 43. However, he states that his confidence level would be higher with a certified map, and he would take extra steps to validate an uncertified map. *Id.* I also note that the full transcripts of the deposition testimony are not a part of the stipulated facts.

The question of whether PBS's reliance on the Consol map was reasonable is a question of fact. I am inclined to think it is not reasonable, since the map was not dated or certified, despite Consol's incentive to have a final map. As the parties acknowledge, the PA Mine Act requires that within 60 days of abandonment of a mine, the operator or superintendent must update the mine inspector's map and must also send the PA DEP a "complete original tracing or print of the complete original map, which shall be kept in the department as a public document." PA Mine Act, 52 P.S. §701-2240; Stip. 38. Moreover, a registered professional engineer or registered surveyor must certify that the map is a true and correct copy and a "true, complete and correct map and survey of all the excavations made in such mine." PA Mine Act, 52 P.S. §701-240; Stip. 39. Consequently, a reasonably prudent person could also assume that the reason Consol's "final" map was uncertified and undated was because it was not the final map and that the final map was lost or misplaced.

PBS submits "nothing in the plain language of § 75.1200 or in the Secretary's Program Information Bulletins, Program Policy Letters, Procedure Instruction Letters, or Program Policy Manual indicated to the regulated community that there was a requirement to do more than PBS did to depict the workings of an adjacent, inaccessible mine." PBS Memo of Law at 33. This misses the point. There are many prophylactic actions taken by reasonably prudent people that are not set forth in the statutes.

PBS next maintains that it was not a common practice for mine operators to annotate their section 75.1200 maps with disclaimers, or to use dashed lines to signify uncertainty, or that under the reasonably prudent person standard, PBS was not "on notice" that section 75.1200 required it to notify MSHA or any other party, that it relied on a map of the Harrison No. 2 Mine that was not dated, "final" or certified. PBS Memo of Law at 34. PBS provides a consultative report from CME Engineering, to demonstrate that Pennsylvania is covered with uncharted and abandoned mines and that the steps it took to locate a valid map of the Harrison No. 2 Mine not only complied with the standards of the engineering and mining community but actually

exceeded the standards. PBS Exhibit 11.

While custom and practice evidence may be useful in determining that PBS's actions were within the standards of the mining community, given the gravity of the accident, I cannot dismiss basic common sense. First, I note that Pennsylvania's mining laws at the time of the actions giving rise to this accident were woefully inadequate in terms of mine safety. Because of the inadequacy of the laws, accurate mine maps of closed and abandoned mines appear to be the exception, rather than the rule. As a result, engineers and surveyors are at a disadvantage when putting together section 75.1200 maps. However, just because most mine engineers and surveyors do not put disclaimers on maps, or use dashed lines to signal uncertainty, does not mean that it cannot or should not be done. Mine disasters such as those that occurred at Hana, Wyoming, Marianna, Pennsylvania, and Farmington, West Virginia, stand as grim reminders of a time when miners died by the hundreds. Time and again, our attention has been captured by the tragedy of those who risk their lives each day toiling in the bowels of the earth to make our lives more comfortable. But since the passage of the Federal Mine Safety and Health Act, the culture of our mining industry has changed from one of risk to a culture of safety. What was once considered acceptable risk is no longer.

The crux of the matter, however, is whether PBS's reliance on the Consol map was reasonable. This is a material factual question. I do not have enough information in the record before me in order to fairly determine whether PBS was moderately negligent pursuant to section 100.3(d)(Table VIII). At a minimum, without the full deposition testimony subject to stipulation, I cannot make a final determination of what a reasonable engineer would do in the same situation. Additionally, there is no evidence in the record before me as to whether PBS ever indicated to the production operator, Black Wolf, that the map it relied on was uncertified and undated. If Black Wolf had concerns about the boundaries of its mine before the accident, which is also a material question of fact, it might indicate that PBS conveyed any uncertainties it might have had about the map to Black Wolf. As previously discussed, my personal inclination is that an uncertified map from a lessor company like Consol would more likely indicate that the final map was lost or misplaced. Accordingly, because there remain outstanding questions of material fact, I am prohibited from a full review of the Secretary's determination of the level of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act. Summary judgment, as to the issue of PBS's degree of negligence and the appropriateness of the penalty assessed, is therefore denied.

Musser

A. Jurisdiction

As a threshold issue, Musser avers it is not an operator of the Quecreek No. 1 Mine and, therefore, is not subject to Mine Act jurisdiction. Musser submits that pursuant to the Commission's ruling in *Berwind Natural Resources Corp*, 21 FMSHRC 1284, 1393 (Dec. 1999), the test for determining "operator" status is whether there was "substantial involvement with the mine." Musser

Mot. at 8. Musser also argues that operator status is determined on a case-by-case basis, pursuant to the Commission's ruling. *Id.* Applying the *Berwind* decision, Musser claims it did not have substantial involvement with the mine, but rather had the limited role of preparing a permit application. It could not make engineering decisions at the mine; it never represented the Quecreek No. 1 Mine in health and safety matters; it had no authority in mine financial matters; and it had no control over supervision, production, or personnel matters at the mine. Thus, Musser asserts it does not meet the "substantial involvement" test and is not an "operator" within the meaning of the Act. *Id.* at 10.

The Secretary rejects Musser's argument, stating that Musser is an independent contractor subject to Mine Act jurisdiction that performed "essential engineering services for the mine," including "assisting PBS and Blackwolf [sic] at the mine in the form of assisting PBS with surveying the mine in 2001 and then. . . [conducting] a check survey of the mine's mains in February 2002." Sec'y Br. at 20-21. The Sec'y Response of January 6, 2006, further asserts that MSHA's independent contractor records confirm that Musser's last change for its contractor I.D. of KQN was January 23, 1992, prior to the activity in question here and that Musser was clearly engaged in the business of providing mining engineering services to the mining community in their area of operation, including at the Quecreek No. 1 Mine. Sec. Br. at 20. Moreover, the mine map that Musser created played an integral role in the mining of Quecreek No. 1 Mine. *Id.* The Secretary asserts that the Commission and Courts of Appeals have addressed independent contractors as mine operators, citing, in particular, a Tenth Circuit ruling that "independent contractor status is to be based not on the existence of a service contract or control . . . but on the performance of significant services at the mine." *Id.* at 23, citing *Joy Technologies*, 99 F.3rd 991, 998 (10th Cir. 1996). Musser's work, the Secretary submits, "constituted the performance of services" at the mine. *Id.* at 22. In addition, the Secretary distinguishes the instant case from *Berwind*, stating that, while in *Berwind*, the Secretary sought to hold Respondent Jessie Branch jointly liable for violations committed by the production operator, in this case the Secretary is seeking to hold Musser responsible for its own unique actions with respect to mapping the mine. *Id.*

Musser's reliance on *Berwind* is misplaced. In *Berwind* the Commission considered the status of Jesse Branch, an engineering firm which performed mapping operations very similar to the actions of Musser, and three of the four Commissioners, constituting the majority found that Jesse Branch *could* have been cited as an independent contractor. (Commissioner Jordan stated: "The evidence unquestionably reveals that Jesse Branch was an independent contractor performing . . . the engineering services of surveying, spad setting and preparation of mine maps." Commissioner Marks: "[T]he record compels the conclusion that [Jesse Branch] was an independent contractor performing services at the mine." Commissioner Riley: "Jesse Branch could simply have been cited as a contractor performing services at a mine. . . .")⁶

For the following reasons, I conclude that Musser is an independent contractor operator within the meaning of section 3(d) of the Mine Act, and, therefore, is subject to Mine Act jurisdiction.

⁶ Commissioner Beatty, writing for the majority, and Commissioner Verhaggen, the lone dissenter, did consider Jesse Branch an independent contractor.

The Mine Act defines an 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) (emphasis added). Although undefined in the Act, “independent contractor” is defined in MSHA’s regulations as “any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to *perform services or construction at a mine.*” 30 C.F.R. § 45.2(c) (emphasis added).

Prior to the 1977 amendments to the Mine Act, the term “independent contractor” was not included in the definition of “operator,” although “courts interpreted this provision to include independent contractors whenever the contractors, in performing services at the coal mine, controlled or supervised all or part of the mine.” *Joy Technologies.*, 99 F.3d at 993-94. Explaining its rationale for inclusion of “independent contractor” in the definition of “operator,” Congress noted in the legislative history its “intent to thereby include individuals or firms who are engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of [the Mine Act].” S. Rep. No. 95-181, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414. While Musser was not engaged in the extraction process, it is apparent that Congress intended to expand the Mine Act’s reach to include entities one would not consider to be an “operator” in the traditional sense.

Circuits are split on the proper test for determining when an independent contractor’s activities and services constitute sufficient ties to a mining operation as to bring the contractor under the jurisdiction of the Mine Act. The District of Columbia, Ninth, and Tenth Circuits have relied on the plain language of section 3(d) to conclude that “any independent contractor performing services” at a mine could come under jurisdiction of the Mine Act. *D.H. Blattner & Sons, Inc.*, 152, 1102 (9th Cir. 1998); *Joy Technologies*, 99 F.3d 991 (10th Cir.1996) *Otis Elevator Co.*, 921 F.2d 1285 (D.C. Cir. 1990).⁷ Accepting the broad statutory reading adopted in *Otis Elevator*, the court in *Joy Technologies* recognized that Congress chose the phrase “independent contractors performing services or construction at [a] mine” to broaden the reach of the Mine Act “to include all those whose presence at a mine affected the health and safety of miners.” *Joy Technologies*, 99 F.3d at 997-98. While the Seventh Circuit followed the *Otis Elevator* and *Joy Technologies* test, it concluded that Northern Illinois Steel Company - whose only connections to a mine were delivering steel orders, loosening restraints on the loads, and occasionally assisting with rigging the load - had such *de minimis* ties to mining operations as to prevent it from falling under Mine Act jurisdiction. *Northern Illinois Steel Supply Co.*, 294 F.3d 844, 848-49 (7th Cir. 2002). The court took a slightly more narrow approach in its reading of the statute, requiring an entity to perform more than minimal activity at a mine before it can be determined that “services” were performed.

Musser argues that it is not an operator under the Mine Act because, pursuant to *Berwind*, it does not have “substantial involvement” with the mine, and the Commission did not consider an operator’s supervision or control of a mining operation to be a deciding factor in determining whether

⁷ I have found no recent or applicable Third Circuit case law dealing with the issue of independent contractor status under the Mine Act.

an entity is an operator. Instead, the Commission focused on the entity's "participation and involvement in the operation of the mine."

Under District of Columbia, and Tenth Circuit precedent, Musser is subject to the Mine Act if it performed significant services rendering more than *de minimis* ties to mining operations. Musser was contracted to provide "certain engineering services" for the Quecreek No. 1 Mine, which included researching and preparing the original permit application for the mine. Stip. at 12. This work included creating and certifying a map of the mine, which served as a baseline map and boundary line for updating changes and current mining operations. Stip. at 87. A Musser employee certified the boundary line that served as a foundation for mining operations and contributed to the events of July 24, 2002.

I conclude that under either the "plain language," "substantial involvement," or "*de minimis*" tests, Musser falls within the definition of independent contractor, and, thus, is an operator for Mine Act purposes. Mining operations require engineering support, mapping, and surveying services. The Mine Act makes no distinction between activities done to meet operational requirements of the mine and those done in a direct effort to meet specific criteria of the Mine Act. Although Musser was not hired to create a map for submission to MSHA, it was hired to perform necessary services required in the overall extraction process. Survey operations, mapping, and advising on required barrier distance between active mining and an abandoned mine all have sufficient ties to mining operations to overcome the *de minimis* standard set forth in *Joy Technologies* and *Otis Elevator*.

Additionally, even considering the somewhat narrower interpretation of "operator" that the Commission discussed in *Berwind*, under the totality of the circumstances, Musser's activities rise to the level of "substantial involvement" with the mine. A "substantial involvement" test based on the totality of the circumstances must be applied in light of Congress' intention that the Mine Act be liberally construed to protect the health and safety of the miners. See, e.g., *Cannelton Indus.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). Here, Musser was substantially involved in the operation of the mine when it developed the boundary line for the Quecreek No. 1 Mine, conducted surveys, and performed other engineering services within the mine itself. Considering Congress's intent and under the totality of the circumstances, I conclude that Musser is an independent contractor operator subject to Mine Act jurisdiction.

B. Whether Musser Violated Section 75.1200

Musser argues that, even if the court determines it is subject to Mine Act jurisdiction, the map it prepared was a permit application map that was not intended to be submitted to MSHA. Musser Mot. at 11. The Secretary contends, however, that as an independent contractor, Musser is subject to the standards set forth in the Mine Act. The Secretary charged Musser with violating Section 75.1200 because Musser's inaccurate mapping of the abandoned Harrison No. 2 Mine in relation to the Quecreek No. 1 Mine contributed to the breakthrough and inundation. Musser argues that it could not have violated 30 C.F.R. § 75.1200 because it was never hired to create the specific maps submitted to meet MSHA requirements.

PBS hired Musser to prepare the original PA DEP permit application for the Queecreek No. 1 Mine, which included researching and identifying the location of old, abandoned mine workings adjacent to the planned mine. It is undisputed that Musser and PBS searched every known mine map repository in central and western Pennsylvania. Stip. at 55. They sought information on the potential location of adjacent mines from all the expected sources, both public and private. Stip. at 55-65, 68. Through this research, Musser located two maps, the “Greentree Map” and the “Consol Map,” which were considered the most extensive representations of mining that had occurred at the Harrison No. 2 Mine. Stip. at 62.

Musser used the Consol Map to plot the boundary of the Harrison No. 2 Mine on the Queecreek No. 1 Mine permit map. Stip. at 66. 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 Queecreek No. 1 Mine. Stip. 71. This line represented a 200-foot-wide hydraulic barrier between the Harrison No. 2 Mine and the Queecreek No. 1 Mine. Stip. 71, JE 11. This hydraulic barrier line on the permit map indicated the limit of planned mining for the Queecreek No. 1 Mine. Musser employee, Edwin S. Secor, P.E., certified the permit map with the presumed outline of the Harrison No. 2 Mine and the established 200-foot-wide hydraulic barrier. Stip. 66. This sealed map was submitted in conjunction with the DEP permit application. Stip. 66. The Musser permit map, including the placement of the Harrison No. 2 Mine and the barrier distance between active workings planned for the Queecreek No. 2 Mine, was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200. Stip. 87.

As the Mine Act is a strict liability statute, the inundation on July 24, 2002, provides sufficient evidence to prove that Musser’s depiction of the Harrison No. 2 Mine workings within 1,000 feet of the Queecreek No. 1 Mine was not accurate.

The Secretary has wide enforcement discretion to proceed against “either an owner-operator, his contractor, or both.” *W.P. Coal Co.*, 16 FMSHRC 1354, 1360 (Sept. 1991); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989). Indeed, simultaneous to the writing of this decision, the District of Columbia issued a decision in *Twentymile Coal Co.*, 2006 WL 1867249, at *5 (Jul. 7, 2006) and unequivocally holding “that the Secretary of Labor has authority to cite an owner-operator for safety violations committed by its contractor.” In this case, the Secretary did not abuse her discretion by citing Musser because a violation of section 75.1200 existed and Musser, as an independent contractor under section 3(d), is subject to the jurisdiction of the Mine Act.

The Commission recently determined that due process requires an operator to be in a position to prevent the violation before it can be charged with the violation under the strict liability of the Mine Act. *National Cement Co. Of Ca., Inc.*, 27 FMSHRC 721, 733 (Nov. 2005); *Cf. Miller Mining Co.*, 713 F.2d 487, 491 (9th Cir. 1983) (operator held liable for violation that occurred when unknown party entered operator’s underground mine and altered ventilation system); *Cyprus Indus. Minerals Co.*, 664 F.2d 1116, 1119 (9th Cir. 1981) (holding that mine owner can be held liable for violation by its independent contractor because the owner is generally in continuous control of

conditions at mine). Here, Musser was in a position to prevent the errors on the section 75.1200 map submitted to MSHA 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. PBS relied on Musser's permit map without conducting additional surveys and research of the area. The inaccurate placement of the Harrison No. 2 Mine on the permit map transferred to the section 75.1200 map. Musser would likely have prevented the violation of the Mine Act had it preserved the uncertainty of the Consol Map on the permit map. Its failure to do so led to the Secretary properly citing Musser for violating the Mine Act.

C. Whether Musser Was Negligent

Although I find the "significant services" test of *Joy Technologies* and *Otis Elevator* instructive, and I find the Secretary's arguments pertaining to the importance of certain engineering services and their consequent effects on safety, regardless of the location at which they are actually performed, to be particularly compelling, I note that all of these cases are very fact-specific. Despite the numerous stipulations of fact, there is at least one factual area in contention that precludes my granting summary decision on the degree of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act. Part of Musser's main argument is that its work was incident to preparation of the permit application, was *not* prepared in accordance with 30 C.F.R. § 75.1200 and *was never intended* to be used as a submittal to MSHA. Musser Mot. at 4. Indeed, at one point, Musser argues that the map it certified for the permit application was prepared for environmental purposes, not for health and safety purposes. Musser Reply Br. at 2. Musser also averred that:

In fact, the physical area encompassed by the permit application that Musser was initially hired to prepare was *much smaller* than the physical area encompassed by the final mine plan for the Quecreek No. 1 Mine. The Saxman/Harrison No. 2 Mine workings were not even within the physical area of the initial permit application that Musser prepared.⁸

However, elsewhere in the record, the parties stipulated that all future engineers certified only their new work and accepted the prior sealed work as being complete. The parties further stipulated that the original permit map was used as a basis for the maps required to be prepared under 30 C.F.R. § 75.1200. Stip. 87. While the record before me consisting of the stipulated facts and the Joint Exhibits suggests that Musser knew or should have been reasonably aware that its permit map would serve as the basis for the section 75.1200 map, the parties have only stipulated to the admission but not the validity of the Joint Exhibits. Stip. 116. I also note that even though Musser emphasizes that the difficulties in locating the final, certified map were not

⁸ All boldface and italics are taken directly from Musser's Motion.

“secret” because PBS was also engaged in the same search process,⁹ again it appears from the record before me that Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map.

A determination of whether Musser knew or had reason to believe that its permit map would serve as the basis for the MSHA section 75.1200 map is of paramount importance to me in making a final determination on Musser’s potential moderate negligence citation. Accordingly, as the facts underlying Musser’s role in the preparation of the section 75.1200 map exists, summary judgment on the degree of negligence and the remaining penalty assessment criteria as required by section 110(i) of the Act is improper and must be denied and my final decision must await a full hearing on the facts.

Black Wolf

Section 110 of the Mine Act, states:

The operator of a coal or other mine *in which a violation occurs* of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary

30 U.S.C. § 820(a) (emphasis added).

Black Wolf Coal Company is the operator of Que Creek Mine No. 1. Stip. 1. Black Wolf has stipulated to the facts which support my findings above that violations of the Mine Act have been committed by both PBS and Musser as independent contractors for Black Wolf. As previously discussed, in *Twentymile Coal*, the District of Columbia Circuit Court, strongly agreed with established precedent that the Secretary may cite an owner-operator for violations committed by its contractors. The Court cited the District of Columbia’s seminal decision in *Brock v. Cathedral Bluffs Shale Oil Co.*, observing:

“To determine the meaning of the term “operator,” the court reviewed the legislative history of the Mine Act, first noting that the Federal Coal Mine Health and Safety Act of 1969-the Mine Act’s precursor-defined “ ‘operator” ’ as “ ‘any owner, lessee or other person who operates, controls, or supervises a coal mine.” ’ *Id.* (quoting 30 U.S.C. § 802(d)(1976)). The court next pointed out that, in *Bituminous Coal Operators Ass’n v. Secretary of Interior (“BCOA”)*, 547 F.2d 240 (4th Cir.1977), the Fourth Circuit “interpreted that definition of ‘operator’ to include independent contractors performing services at the production-operator’s mine, and held that the Secretary had the power to cite the independent contractor, the operator, or both for independent contractor violations.” 796 F.2d at 535.

Twentymile Coal Co., 2006 WL 1867249, at *4 (Jul. 7, 2006) *citing Brock v.*

⁹ Musser Motion at p. 8.

Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986) (Scalia, J.).

Reaffirming its decision in *International Union, United Mine Workers of America v. FMSHRC* (“*UMWA*”), the District of Columbia Circuit Court further observed that “the owner of a mine is liable without regard to its own fault for violations committed or dangers created by its independent contractor.” *International Union, United Mine Workers of America v. FMSHRC* (“*UMWA*”) 840 F.2d 77, 83 (D.C. Cir. 1988) (Citing *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 n.2 (4th Cir. 1981); *BCOA*, 547 F.2d at 246 (4th Cir. 1977).

The court further found the holding to be consistent with the legislative history and the statutory language explaining:

“Without exemption or exclusion, section 819 makes the operator of a coal mine in which a violation occurs subject to a civil penalty Th[is] section[], when read with the definition of operator, impose[s] liability on the owner or lessee of a mine regardless of who violated the Act”

Twentymile Coal Co., 2006 WL 1867249, at *4 (Jul. 7, 2006) *citing UMWA* at 83 (quoting *BCOA*, 547 F.2d at 246).

The court in *Twentymile* concluded:

[T]he Commission is generally without authority to review the Secretary’s discretionary decisions regarding whether to cite owner-operators, their independent contractors, or both for safety violations committed by the independent contractors.

Id. at 10

As I have found that independent contractors PBS and Musser both violated section 75.1200, I accordingly find that operator Black Wolf is jointly liable and was properly cited by the Secretary.

Penalties

Although the joint stipulations of fact to an extent address some of the section 110(i) criteria, I have insufficient information to make a determination as to the validity of the proposed penalty assessments for any of the parties. To make this determination, an evidentiary hearing must be held.

ORDER

In light of the foregoing, the Secretary's Motion for Summary Decision is **GRANTED IN PART** and **DENIED IN PART** and the Respondents' Motion for Summary Decision is **DENIED**. The violations of mandatory safety standards for underground mines issued by the Secretary of Labor against Musser, PBS, and Black Wolf are affirmed. The parties are **ORDERED** to confer and inform this court within 30 days of their availability for a hearing in the matter to be held in Somerset County Court House, Somerset, Pennsylvania, solely for the purpose of presenting testimony and argument regarding the appropriateness of the penalties proposed by the Secretary

Robert J. Lesnick
Chief Administrative Law Judge

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