FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

August 6, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2006-212-RM
	:	
v.	:	
	:	
PHELPS DODGE TYRONE, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), Administrative Law Judge Richard W. Manning upheld a citation against Phelps Dodge Tyrone, Inc. ("Phelps Dodge") for violating the requirement of 30 C.F.R. § 50.10 that a mine accident be reported to the Department of Labor's Mine Safety and Health Administration ("MSHA") within 15 minutes.[1] 29 FMSHRC 669 (July 2007) (ALJ). Phelps Dodge petitioned for review of the judge's decision, which the Commission granted.

[1] Section 50.10 provides in pertinent part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred." 30 C.F.R. § 50.10. Section 50.2(h)(6) defines "[a]ccident" to include "in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery." 30 C.F.R. § 50.2(h)(6).

I.

Factual and Procedural Background

Phelps Dodge's Tyrone Mine is a large surface copper mine in Grant County, New Mexico. 29 FMSHRC at 669. In 2006, Phelps Dodge sold one of the electric mining shovels it had been using there to P&H Mine Pro ("P&H") and moved the shovel to what was then the salvage yard at the mine. *Id*.; Tr. 126-27, 131; PD Ex. 1. The salvage yard was several miles away from active mining operations. 29 FMSHRC at 669; Tr. 126-27. P&H removed all of the shovel's usable parts, leaving only the shell of the shovel, referred to in this case at its "car body." 29 FMSHRC at 669; Tr. 131-32; Gov't Ex. 2. The car body was left resting on stacked railroad ties in the salvage yard. 29 FMSHRC at 670; PD Ex. 3.

At that point, Metal Management of Arizona, LLC ("Metal Management") became involved in further salvage work on the car body. Specifically, Metal Management was to cut the car body into smaller pieces so that the scrap metal could be hauled away from the mine. 29 FMSHRC at 669-70; Tr. 129-30.

Because oxyacetylene torches were to be used in cutting the car body, Phelps Dodge required that Metal Management complete a "hot work" permit at the mine. 29 FMSHRC at 670; Tr. 132, 188; PD Ex. 4. Upon arriving at the mine around 6:00 a.m. on June 17, 2006, Metal Management's Raudel Davila filled out the permit form. 29 FMSHRC at 669-70; Tr. 132; PD Ex. 4. Davila supervised two other Metal Management employees, Rafael Dominguez and Sergio Caudillo, in the salvage operation. 29 FMSHRC at 670; Tr. 100-01. The permit indicated that Davila would stand fire watch over the operation. 29 FMSHRC at 670; PD Ex. 4. None of the three Metal Management employees spoke much English. 29 FMSHRC at 673; Tr. 22, 101.

The account of further events that morning differs among the witnesses, and even between testimony and statements given by the same witness. None of the three Metal Management employees testified at the later hearing in this case. 29 FMSHRC at 675. Instead, each submitted written statements later that day to Phelps Dodge that were subsequently translated and entered into the record below. *Id*. at 673; Tr. 103-05; Gov't Exs. 5-7. The three explained that grease on the car body towards its center was ignited by the torches and began burning, and that the car body consequently was on fire by 7:30 a.m. 29 FMSHRC at 673; Gov't Exs. 5-7.

Around that same time, Phelps Dodge mine shift supervisor Yancy McCauley was driving along a mine road when he observed thick black smoke coming from the salvage yard, so he returned to investigate. 29 FMSHRC at 670; Tr. 16, 18-19. In a statement he drafted later that day, McCauley stated that there was a fire inside the car body of the shovel when he first arrived but that he "wasn't sure at that time if it was a concern or not." 29 FMSHRC at 674; Tr. 17; Gov't Ex. 4.

After briefly speaking with Metal Management supervisor Davila, McCauley left to resume his work duties and called the front gate to alert the Phelps Dodge fire brigade of the need to stand fire watch at the salvage area. 29 FMSHRC at 670; Tr. 28-31. Consequently, Phelps Dodge firefighter Hank Bobo was told by the mine dispatch operator that he was needed at the salvage yard for fire watch. 29 FMSHRC at 671; Tr. 61-63. Bobo drove the mine's fire truck to the scene. 29 FMSHRC at 671; Tr. 63.

Bobo testified that he arrived there shortly after 9:00 a.m. 29 FMSHRC at 671; Tr. 65-66. According to the written statement Bobo prepared and gave to MSHA later in the day, employees of Metal Management were then spraying water on the bottom of the car body, and "[t]here wasn't a lot of flames then but a lot of smoke." 29 FMSHRC at 672, 674; Gov't Ex. 8.

After finding a Spanish-speaking Phelps Dodge electrician to interpret, Bobo instructed the Metal Management employees to move away from the smoke, because he did not believe that they were wearing the proper protective equipment, given the amount of smoke they could be inhaling. 29 FMSHRC at 671; Tr. 66-67, 81-82. Bobo also called McCauley, who returned to the scene around 9:15 a.m. 29 FMSHRC at 671; Tr. 33-35, 67. Bobo explained to him that company policy required that three firefighters and a water truck be used when the fire brigade was activated. 29 FMSHRC at 671; Tr. 33-35. McCauley arranged to get the two additional firefighters and the mine's water truck to the area, and remained there for about 10 minutes. 29 FMSHRC at 671; Tr. 35-36.

In the statement he originally gave to MSHA, Bobo said that he put on his bunker gear, and while he saw flames inside the car body, he knew he could not douse them using the hose he had. Gov't Ex. 8. When the flames started coming out of the bottom of the car body, however, he began shooting water on the fire. *Id*. When the water truck arrived, he directed that its cannon be used to get water to the inside of the car body. *Id*.

McCauley visited the car body again after 10:30 a.m. 29 FMSHRC at 671; Tr. 36-37. The statement that he gave MSHA indicated that the fire had been put out by that time, after Bobo had decided that it needed to be extinguished. Gov't Ex. 4. McCauley later testified that, because he understood that the fire was extinguished in about 20 minutes, he believed that the fire did not have to be reported to MSHA. 29 FMSHRC at 671; Tr. 46-49.[2]

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[2] McCauley states that he based this conclusion, in part, on an event which he

understood to have occurred earlier in the year, where Phelps Dodge reported to MSHA as a "fire" an incident in which smoke inside an operating shovel activated the shovel's fire suppression system. 29 FMSHRC at 671-72; Tr. 47-48. Matthew Main, a health and safety specialist at the mine who in June 2006 became the mine's health and safety manager, reported the event to MSHA as a mine fire lasting more than 30 minutes because there was smoke coming from the shovel for more than 30 minutes. 29 FMSHRC at 672; Tr. 97, 123. At the conclusion of its investigation of the incident, MSHA decided that the event was not immediately reportable as a mine fire under section 50.10. 29 FMSHRC at 672; Tr. 125; PD Ex. 2 at 4.

McCauley tried to call Phil Tester, the company's safety supervisor on the shift, at about 10:45 a.m., for assurance that he was not required to call MSHA to report the fire. 29 FMSHRC at 672; Tr. 38. However, McCauley was not able to speak with Tester until around 11:30 a.m. 29 FMSHRC at 672; Tr. 39. After McCauley used the word "fire," Tester immediately ended the conversation and called MSHA at 11:40 a.m. to report the incident. 29 FMSHRC at 672; Tr. 39, 99, 161.

Tester and Matthew Main, the mine's health and safety specialist, also went to the car body at about 1:00 p.m. so that Main could investigate the incident. 29 FMSHRC at 672; Tr. 100-01. Main spoke with a number of witnesses and had the Metal Management employees provide their written statements for later translation. 29 FMSHRC at 672; Tr. 103-06. Main also called Benny Lara, MSHA's acting field office supervisor in Albuquerque. 29 FMSHRC at 672; Tr. 106. Lara asked for a written report of the event and issued an oral order of withdrawal for the car body pursuant to section 103(k) of the Act, 30 U.S.C. § 813(k), leading Phelps Dodge to cordon it off. 29 FMSHRC at 672; Tr. 106, 111, 134-35.

Later in the day, Main e-mailed Lara a summary of the event, writing that while working on the car body, around 7:30 a.m., the Metal Management employees had "*started a fire*." 29 FMSHRC at 672 (emphasis added by judge); Gov't Ex. 3. Main informed Lara that the "incident commander decided to let the grease on the car body burn itself out," but that later he "made the decision to put the fire out and the fire was out by 10:45 A.M." 29 FMSHRC at 672; Govt' Ex. 3. Main later testified that these statements were not accurate as they were the result of an incomplete investigation, and that any fire only lasted 20 minutes, between 9:30 and 9:50 a.m. 29 FMSHRC at 675; Tr. 112, 115, 146-47.

After an investigation, MSHA issued Citation No. 6244790, which alleged a violation of 30 C.F.R. § 50.10 on the ground that a fire started at 7:30 a.m, the fire was not extinguished within 30 minutes of discovery, and MSHA was not notified within 15 minutes of that failure to extinguish the fire. 29 FMSHRC at 670; Gov't Ex. 1. Phelps Dodge contested the citation, and a hearing was held.

At the hearing, McCauley testified that he did not see any flames when he first arrived at the scene of the incident at 7:30 a.m. 29 FMSHRC at 670, 674; Tr. 25, 27, 43-44, 50-51. When asked about his earlier statement that he saw a fire when he first arrived, he testified that he used the word "fire" as "a generalization of the scene," believing the smoke he saw coming from the car body to be an indication of a fire. 29 FMSHRC at 674; Tr. 20-22. McCauley also testified that he saw no flames during this second trip to the scene. 29 FMSHRC at 671; Tr. 43-44.

Bobo also contradicted his earlier statement, testifying that upon arriving at the scene he saw no flames at all. 29 FMSHRC at 671; Tr. 68. Bobo testified that during the 9:00 to 9:30 a.m. time period, he prepared fire hoses, set out air packs, and put on his bunker gear. 29

FMSHRC at 671; Tr. 67-68, 83-84. During that time, he observed the car closely for flame, including through the holes cut into its sides, and saw none. 29 FMSHRC at 671; Tr. 69-70, 83-84.

In the account that he gave at the hearing, Bobo stated that it was not until about 9:30 a.m. that he saw flames inside the car body. 29 FMSHRC at 671; Tr. 68, 72, 84. According to his testimony, as soon as he spotted flames, he put on his air pack and began spraying the flames with water from the fire truck, dumping, in his estimate, about 300 gallons of water on the car body in the next 20 minutes. 29 FMSHRC at 671; Tr. 72, 75, 77. Bobo testified that he extinguished all of the flames that he could see by around 9:50 a.m., right after which the water truck arrived. 29 FMSHRC at 671; Tr. 72, 75, 78, 85-86. Bobo testified that he had the water truck operator spray water at the smoke that was still rising from the car body, so as to cool the car body down and prevent more flare-ups. 29 FMSHRC at 671; Tr. 79, 86.

In his decision, the judge accepted Phelps Dodge's position that flames must be present for there to be a "fire" under the dictionary definition of that term. 29 FMSHRC at 674. The judge found that a fire started soon after 7:30 a.m., and was not completely extinguished in less than 30 minutes, as he further found it to have continued until it was fully extinguished at 9:50 a.m. *Id*. at 674-76. He relied primarily on the statements that witnesses provided shortly after the event and found them more probative than some of the witnesses' later accounts, including their trial testimony. *Id*. at 674-75. While acknowledging that the appearance of flames may have only been brief and intermittent, with each flare-up lasting less than 30 minutes, the judge rejected Phelps Dodge's argument that the company was not required to notify MSHA of the occurrence of a fire. *Id*. at 675-76. The judge held that once flames appear, the mine operator is under the obligation to report the fire to MSHA unless the fire is totally extinguished within 30 minutes. *Id*. at 676. The judge also concluded that the evidence of preparation for a fire occurring failed to establish that the fire was not "unplanned" and thus outside the ambit of the regulation. *Id*. at 676-77. The judge held that the regulatory language provided Phelps Dodge with sufficient notice that the conditions that day constituted an accident as defined by section 50.2(h)(6). *Id*. at 677. However, the judge reduced the negligence finding from high to low and affirmed the citation as modified. *Id*. at 677-78.

II.

Disposition

Phelps Dodge maintains that any fire that took place was not "unplanned" under the plain meaning of that term, and points to seven facts that it believes establishes that the fire was actually a planned fire. PDR at 18-20.[3] The operator also argues that because there is no evidence that flames were present for 30 minutes, the judge erred in affirming the citation. *Id*. at 20-24. Phelps Dodge would also have the Commission reverse the judge's finding that it was on

[3] Phelps Dodge adopted its PDR as its initial brief.

notice of the requirements of the regulation, both with respect to the judge's interpretation of "unplanned" and "extinguished," as well as the Secretary's interpretation, proffered here, that the smoldering of the car body was sufficient evidence by itself of a fire. *Id*. at 24-25; PD Reply Br. at 11-15.

The Secretary submits that the meaning of "fire" is ambiguous, and that there is reputable authority to consider a "fire" to include instances not just of flaming, but also those marked by smoldering, glowing, or nonflaming combustion. S. Br. at 13-17. According to the Secretary, the Commission should apply such an interpretation of "fire" in this instance and affirm the judge's decision in result. *Id*. at 17-20. In the alternative, the Secretary would have the Commission uphold the interpretation adopted by the judge and find that substantial evidence supports the judge's application of that interpretation. *Id*. at 20-27. The Secretary further argues that the judge properly found that the fire was not planned, and that the operator was on notice of the regulatory requirements in this instance. *Id*. at 27-30.

At issue in this case is whether, pursuant to section 50.10, an "accident" occurred which Phelps Dodge was required to report to MSHA within the 15 minutes required by the standard. "Accident" is defined in section 50.2(h), and in this instance the category of accident at issue is "an unplanned fire." Section 50.2(h)(6) specifies that an "[a]ccident" includes "[i]n underground mines, an unplanned mine fire not extinguished within 10 minutes of discovery; *in surface mines* and surface areas of underground mines, *an unplanned fire not extinguished within 30 minutes of discovery*." 30 C.F.R. § 50.2(h)(6) (emphasis added).[4]

[4] On June 17, 2006, sections 50.10 and 50.2(h)(6) were each actually an emergency temporary standard ("ETS"). 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006). Each was based on existing MSHA regulations, except that unplanned underground mine fires not extinguished within 10 minutes were to be reported to MSHA, rather than just those not extinguished within 30 minutes, as had been the case previously. That change is not relevant to this case. *See generally* 71 Fed. Reg. 71,430, 71,434-36, 71,452 (Dec. 8, 2006) (adoption of each ETS as new permanent standard).

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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).[5]

The "language of a regulation . . . is the starting point for its interpretation." *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

A. Whether a Fire Occurred

Below, the Secretary did not directly address the issue of how the term "fire," as it is used in section 50.2(h)(6), should be interpreted. Rather, she simply relied upon the statements of the three Metal Management employees, who described how their use of torches in cutting the car body resulted in an ignition and fire. S. Post-Hearing Br. at 4.[6] In contrast, Phelps Dodge directly addressed the issue of interpretation and argued that the presence of flame was necessary for there to be a "fire" under the plain meaning of that term. PD Post-Hearing Br. at 19-20.

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[5] The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts' review, involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

[6] Metal Management supervisor Davila, said that "at about 7:30 the fire started," as the torches "made sparks and ignited in the center of the structure. . . ." 29 FMSHRC at 673; Tr. 103-05; Gov't Ex. 5. Mr. Caudillo confirmed in his written statement that at "7:30 we started the fire." 29 FMSHRC at 673; Gov't Ex. 6. In his written statement, Mr. Dominguez attributed the fire to cutting into the car body where there was a lot of grease and indicated that the grease started to burn after about 15 minutes. 29 FMSHRC at 673; Gov't Ex 7.

The judge, relying upon a dictionary definition of "fire," agreed with Phelps Dodge that flame must be present for there to be a fire, and held that grease that was smoking without any flames did not qualify as a fire that must be immediately reported under section 50.10. 29 FMSHRC at 674. Specifically, the judge relied upon a definition of "fire" which describes it as a "rapid, persistent chemical change that releases heat and light and is accompanied by flame, especially the exothermic oxidation of a combustible substance." *Id*. (quoting *American Heritage Dictionary of the English Language* 62 (4th ed. 2006)).

Commissioners disagree as to how to address the judge's conclusion that a "fire" requires the presence of flames. The issue is discussed below in separate opinions, one by Chairman Duffy and Commissioner Young (slip op. at 18-19) and one by Commissioners Jordan and Cohen (slip op. at 12-15). It is not necessary to reach this issue, however, because the full Commission agrees that the judge's ultimate conclusion – that an unplanned fire which was not extinguished within 30 minutes of discovery – was based on substantial evidence and correct legal analysis.

The judge found that the statements provided to MSHA on the day of the incident, in which witnesses used the term "fire" to describe what they saw at times between 7:30 and 9:30 a.m., established that there were flames observed well before 9:30 a.m.[7] The judge found that these statements were more reliable than the hearing testimony of some of those witnesses that they only saw smoke, and not flames. 29 FMSHRC 674-76. In essence, the judge credited the earlier version of events provided by witnesses over the later version.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) ("*Dust Cases*") (citing *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, there is nothing in the earlier version of events that the judge credited that is self-contradictory, and those versions are amply documented in the record. The statements provided on the day of the event by all four witnesses who were at the scene of the incident at 7:30 a.m.—

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[7] 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)).

the three Metal Management employees and then McCauley—all described the scene as a "fire" as of 7:30 a.m., and Main used that description in his e-mail message to MSHA's Lara later that day. Gov't Exs. 3, 4, 5, 6, 7. Moreover, Bobo's statement that day mentioned seeing some flames as soon as he arrived on the scene around 9:00 a.m. Tr. 63-66; Gov't Ex. 8.

While McCauley, Bobo, and Main all later testified to the contrary at the hearing, the judge was free to credit their earlier statements over their trial testimony. The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *Dust Cases*, 17 FMSHRC at 1878 (quoting *Ona*, 729 F.2d at 719). Consequently, we uphold the judge's finding that flames were observed at the scene as early as 7:30 a.m., and by Bobo as early as 9:00 a.m., and that the flames were not fully extinguished until 9:50 a.m.

B. Whether the Fire That Occurred Was "Unplanned"

As it did below, Phelps Dodge contends that any fire that occurred at the mine on June 17, 2006, was not "unplanned," and thus did not qualify as a reportable accident. PDR at 18-20; PD Reply Brief at 1-4. The judge rejected this argument on the ground that while the evidence suggests that Phelps Dodge and Metal Management knew that a fire was possible and took some of the precautions necessary to isolate and fight a fire, those precautions were not sufficient to establish that the fire that actually occurred was "planned." 29 FMSHRC at 676-77.

On review, Phelps Dodge, invoking the dictionary definition of "plan," argues that because the evidence shows that the mine fire that day was an event that Metal Management and Phelps Dodge to one degree or another "had in mind" and "projected" would occur, any subsequent fire cannot be considered to be "unplanned." PDR at 18; PD Reply Br. at 2.[8] The Secretary urges the Commission to uphold the judge on this issue. S. Br. at 29-31. According to the Secretary, a planned fire is one in which there is an intent to have a fire, and in this instance the evidence shows that the fire in the car body was not intended. *Id*. at 30.

[8] As evidence of the event's planned nature, Phelps Dodge points out that: (1) the salvage work took place in the scrap yard, which was situated away from other aspects of the mine's operations; (2) it was not unexpected that Metal Management would use an oxyacetylene torch to cut the car body, and thus fire would be involved; (3) the Metal Management supervisor filled out a Phelps Dodge hot work permit upon arriving at the mine that day, under which it was acknowledged that one of its employees would stand fire watch; (4) the fire watch was established; (5) the Metal Management employees had fire extinguishers and a pressure watcher with them at the car body; (6) Phelps Dodge dispatched its fire truck to augment the fire watch; and (7) the truck was used to extinguish the flames on the car body when the need to do so arose. PDR at 18-20.

The regulation's use of the term "unplanned fire" clearly means that "planned" fires are excluded from the scope of the regulation. This is entirely consistent with the overall regulation, because a "planned" event can hardly be considered to be an "accident."

All four Commissioners agree in this instance that the fire that occurred was unplanned, and thus uphold the judge's determination. Their rationales are set forth in the separate opinions below.

C. Whether the Fire Was Not Extinguished Within 30 Minutes

Lastly, Phelps Dodge takes issue with the judge's conclusion that the fire lasted for more than 30 minutes, reiterating the arguments it made below that what occurred was not a single fire, but rather individual episodes of flames lasting no more than a few minutes each. PDR at 22. The operator submits that the meaning of "extinguish" is plain in this instance, and relies upon dictionary entries for the term which define it in connection with a "flame" as having "died" or been "put out." *Id*. at 21 (quoting Oxford Am. Dictionary of Current English 274 (Oxford Univ. Press 2002)); *see also* PD Reply Br. at 8-10. The Secretary urges that the judge's analysis rejecting Phelps Dodge's interpretation of "extinguish" be upheld. S. Br. at 21-23.

In arguing that the meaning of "extinguish" is plain in this instance, Phelps Dodge is urging the Commission to accept a definition of "extinguish" that does not apply to the term as it is used in section 50.2(h)(6). Even if there must be evidence of flames for there to be a "fire," once such flames appear, there is no corollary notion that a fire is considered "extinguished" by the mere lack of flames. We agree with the judge that the interpretation of "extinguish" by Phelps Dodge is neither logical nor consistent with the language of the regulation or the purpose of the Mine Act: "[u]nder Phelps Dodge's interpretation, a fire could last for hours and not come under the definition of an accident under section 50.2(h)(6) so long as flames are not present [for] more tha[n] 30 minutes at a time." 29 FMSHRC at 676. It is not in the interest of mine safety to suggest that if a fire flares up and flames last for 20 minutes followed by billowing smoke with the potential to flare up again, the operator need not contact MSHA.

Accordingly, we believe that the judge properly applied the regulation when he concluded from the evidence of burning and intermittent flare-up that there continued to be a "fire" until it was "totally extinguished" or "fully extinguished" at 9:50 a.m. *Id*. at 676. The judge found, and Phelps Dodge does not dispute, that oil and grease were burning from 7:30 a.m. to 9:50 a.m, even if flames were not always present during that time. *Id*. at 675-76.[9]

In addition to this evidence of at least the intermittent appearance of flames, the description of the scene provided by McCauley and Bobo, the only two eyewitnesses to the events who testified at trial regarding the 7:30 a.m. to 9:50 a.m. time period, is of "thick," "a lot of," or "intense" smoke coming from the car body at all times. Tr. 19, 21, 25, 28, 33, 58, 66, 68, 69, 70, 77, 93. As Bobo explained, it was the oil and grease that was burning, the oil "was everywhere" inside the car body and the railroad ties upon which it sat, and there was too much grease on the car body for the Metal Management employees to avoid igniting it. Tr. 71, 80-81.

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[9] Furthermore, counsel for Phelps Dodge stated at oral argument before the Commission that from about 7:30 a.m. onwards, a period of over two hours, the Metal Management employees were not applying the torch to the car body. Oral Arg. Tr. 32-33.

This supports the judge's conclusion that the event should be considered as one fire, not separate individual fires, as maintained by Phelps Dodge. Accordingly, we affirm the judge's finding that the fire that occurred on June 17, 2006, was not extinguished within 30 minutes, and thus the operator was obligated to report the fire within 15 minutes to MSHA.

Phelps Dodge also argues that it did not have adequate notice that MSHA would consider what it claims were several discrete fires to be a single fire for reporting purposes. PDR at 24-25; PD Reply Br. at 14-15. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

In order to avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

> [T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); *see also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an "objective standard." *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

Given the continual thick smoke that was emanating from the car body for over two hours, we cannot agree that a reasonably prudent person would conclude from the circumstances here that there was not a single fire. Accordingly, we conclude that Phelps Dodge had adequate notice as to what constituted "extinguished" under section 50.2(h)(6).

In summary, all Commissioners agree with the judge that a fire occurred, that it was unplanned, and that it was not extinguished within 30 minutes. Consequently, for the reasons stated herein, the Commission affirms the judge's determination that Phelps Dodge violated section 50.10.

III.

Separate Opinions of the Commissioners

Opinion of Commissioners Jordan and Cohen, in favor of addressing the Secretary's alternate interpretation of the term "fire," and finding that the fire that occurred was unplanned:

1. The Secretary's Alternative Interpretation of "Fire"

The Commission is affirming the judge's determination that Phelps Dodge violated 30 C.F.R. § 50.10 because the operator failed to contact MSHA within 15 minutes once it knew that an accident (an unplanned fire not extinguished within 30 minutes) had occurred. Slip op. at 7-11. In so doing, the Commission has presumed, for purposes of this analysis, that a "fire" requires the existence of flames, as the judge concluded. 29 FMSHRC at 674. Thus, the Commission has determined that substantial evidence supports the judge's finding that flames occurred as early as 7:30 a.m. and were not extinguished for approximately two and one-half hours. Slip op. at 8-9, 10.

The Commission's opinion disposes of the issues in the case. Strictly speaking, it is not necessary to reach the issue of whether the existence of flames is necessary to constitute a "fire" within the meaning of 30 C.F.R. § 50.2(h)(6). Nevertheless, we are concerned about the possible ramifications of the judge's finding that a "fire" requires the presence of flames.[1] Under the judge's formulation, smoking grease alone would not be reportable under section 50.10. This was the position that the operator argued vigorously in its post-trial brief (PD Post-Hearing Br. at 19-20), and Judge Manning accepted. His decision in this regard is not a precedent binding upon the Commission. 29 C.F.R. § 2700.69(d). However, the judge's determination on this issue conceivably could influence operators not to report incidents involving smoldering or smoke in the absence of flame. Such an outcome, particularly in an underground mine, is detrimental to the safety of miners and contrary to the purpose of the Mine Act. Hence, although we recognize that it is dicta, we feel compelled to address this question.

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[1] Although the decisions of administrative law judges are not precedents binding upon the Commission, we note that parties at times do base their arguments on the reasoning in these decisions to support their positions before the Commission. This occurred in a case presently pending before the Commission. *Spartan Mining Co.,* Docket Nos. WEVA 2004-117-RM, et seq., Sp. Br. at 14-15, Sp. Reply Br. at 8-10, Oral Arg. Tr. 23-25. Hence, parties do rely on decisions of administrative law judges when the Commission itself has not resolved an issue.

Our colleagues are reluctant to reach this issue because they believe that notice and comment rulemaking is a more appropriate forum in which to address this matter. Slip op. at 19. Our colleagues make the good point that there are a myriad of situations where smoldering or smoking could exist in which different reporting requirements would be appropriate. *Id*. The issue certainly is appropriate for notice and comment rulemaking.[2] However, the Secretary has requested the Commission's guidance on this issue in the context of this case. Oral Arg. Tr. 56. Similarly, counsel for Phelps Dodge agreed that "the regulated community needs to understand and know what is intended by the definitions in this section [of the regulations] . . . what is unplanned, what is a fire, what is extinguished." Oral Arg. Tr. 8. In this separate opinion, we are not purporting to define reporting requirements for all of the myriad of situations which could occur. We are merely stating our view that the judge was incorrect when he found that a fire requires flames to be reportable under 30 C.F.R. § 50.10.

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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).

The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable). The Secretary's interpretation of a regulation is reasonable where it is "'logically consistent with the language of the regulation[s] and . . . serves

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[2] However, it is clearly established that an agency may choose to define law or policy through adjudication even if it has rulemaking authority, and the Supreme Court has held that an agency can expand on a rule through adjudication. 1 Charles H. Koch, Jr., Administrative Law & Practice § 2.12 (2d ed. 2007). In *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 96 (1995), the Court emphasized that "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication." The D.C. Circuit has also noted that "[i]nherent in an agency's ability to choose adjudication rather than rulemaking, *see SEC v. Chenery Corp.*, 332 U.S. 194 (1947), . . . is the option to make policy choices in small steps, and only as a case obliges it to." *SBC Commc'ns Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998).

a permissible regulatory function.'" *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

Here, section 50.2(h)(6), which defines "[a]ccident" to include "an unplanned fire," is silent as to whether flame must be present before a fire can be said to have occurred. Accordingly, we must examine the Secretary's interpretation and decide whether it is reasonable and entitled to deference.

The Secretary interprets the word "fire" in section 50.2(h)(6) to include both events marked by flaming combustion and those marked by "smoldering combustion that reasonably has the potential to burst into flames." S. Br. at 17. We believe that this interpretation is reasonable. It is consistent with the preamble to the relevant Emergency Temporary Standard (ETS) in effect when this incident occurred. In the preamble, the Secretary stated:

> Existing paragraph (h)(6) of § 50.2 defines "accident" to include "an unplanned mine fire not extinguished within 30 minutes of discovery." MSHA believes that there are situations in the mines that involve more than one fire *or a smoldering condition at a particular place*. Each episode of flame *or smolder* may have been extinguished within 30 minutes.
>
> The Agency is concerned that such events may represent a serious or potentially serious hazard, and should be reported as an "accident" and subject to the immediate notification requirement of § 50.10.

71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (emphases added).

The Secretary's regulation regarding the minimum requirements for "[a]utomatic fire sensor and warning device systems" in underground mines[3] is also consistent with a broad reading of the term "fire" that is not confined to the presence of flame. That standard, 30 C.F.R. § 75.1103-4(a)(2), refers to "sensors responding to radiation, smoke, gases, *or other indications of fire*" (emphasis added). Thus, if a belt in an underground mine were smoking, detection alarms would go off, it would be treated as a fire, and every effort would be made to extinguish it. The absence of flame would not reassure the miners and operator of an underground mine that no danger was present.

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[3] The regulations at issue here, 30 C.F.R. § 50.10, and the definition in section 50.2(h)(6), also apply to underground mines.

The Secretary also relied on publications of the National Fire Protection Association ("NFPA") indicating that fire may exist without flame. S. Br. at 14-16. One such publication states that:

> The combustion process occurs in two modes: (1) the flaming mode, and (2) the flameless surface mode. The flaming mode, which includes explosions, is characterized by relatively high burning rates. This results in intense temperatures and high rates of heat release. On the other hand, an example of the flameless surface mode is the presence of glowing embers.

Arthur Cote, P.E., and Percy Bugbee, National Fire Protection Association, *Principles of Fire Protection*, 59-60 (1988).[4]

Finally, the meaning of the word "extinguish" adopted by the Secretary (S. Br. at 21-23), the judge (29 FMSHRC at 676), and all Commissioners (slip op. at 10), is consistent with our view that flames need not be present to constitute a fire. Phelps Dodge argues that the incident of June 17, 2006, involved individual episodes of flames lasting only a few minutes each (and thus not reportable) rather than a single fire. PDR at 21-22. However, both the judge and our colleagues agree that once flames appear, a fire is not extinguished even if the flame disappears. They thus acknowledge that, as long as there is the potential for the flame to reoccur, a fire exists even when the flame goes out. In fact, despite the judge's holding that there is no fire without flame, he states in the same breath that once a fire starts, it is still a fire *even in the absence of flame*. 29 FMSHRC at 676 ("Although it does not appear that flames were present or at least visible the entire time, I find that this event constituted one fire not multiple fires."). If a fire is considered to endure, even in the absence of flame, because the possibility of flame continues to exist, then it is reasonable to conclude that a fire is present initially, even if there are no flames visible but the smoldering combustion has a reasonable potential to burst into flames.

For the reasons noted above, we find the Secretary's interpretation reasonable, as clearly it is not "'plainly erroneous or inconsistent with the regulation.'" *Western Fuels-Utah*, 900 F.2d at 321 (citations omitted). Accordingly, we would hold that to constitute a reportable accident under 30 C.F.R. § 50.10, a fire, as defined in 30 C.F.R. § 50.2(h)(6), need not contain flames.[5]

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[4] Our colleagues note that some of the NFPA materials cited by the Secretary indicate that at times there can be fire without flame but at other times there must be flame to constitute a fire. Slip op. at 19. This is one of the rationales they offer for refusing to squarely address the definition of "fire" in their opinion. However, these NFPA references indicate that, at a minimum, the interpretation adopted by the judge (that, for purposes of the accident-reporting regulation, there is no fire without flame) is underinclusive. Thus, we are reluctant to allow his determination to stand unaddressed.

[5] Although Commissioner Cohen finds the Secretary's interpretation reasonable, he believes that Phelps Dodge did not have the requisite notice of her interpretation required to

support the imposition of a civil penalty on this theory. *See Gen. Elec.*, 53 F.3d at 1333-34. In March 2006, approximately three months prior to the citation at issue here, MSHA issued an order at the same mine, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k). PD Ex. 2. The order, citing a "reportable fire," required the operator to obtain prior approval from MSHA for all actions to recover or restore operations to the affected areas of the mine. *Id*. at 1. However, the order was terminated several days later. In the termination order, the inspector stated "[t]he conditions that contributed to the smoke were corrected and normal operations can resume[.] *No fire existed*." *Id*. at 4 (emphasis added). Commissioner Cohen concludes that a reasonably prudent mine operator (the standard applied by the Commission in addressing notice questions, *Alabama By-Products Corp.*, 4 FMSHRC at 2129) who had received such an order would not recognize that the June 17 incident was a reportable fire, as the March termination order implied that smoke alone did not constitute such a fire. He recognizes, however, that because the Commission is upholding the judge's finding that flames were observed as early as 7:30 a.m. and not extinguished until 9:50 a.m., there is an alternative theory of liability serving as the basis for the penalty. Consequently, the operator's lack of notice of the Secretary's interpretation of "fire" would not affect the ultimate outcome of this case.

B. Whether the Fire was Unplanned

On the question of intent and what Phelps Dodge had in mind with respect to "fire," there is no question that there was an intent that fire would be present. This fire would come from the tip of the oxyacetylene torch, and the Metal Management crew filled out the "hot work" permit in advance as a prerequisite to using the torch on the Phelps Dodge property.

The fire that Phelps Dodge was charged with failing to timely report to MSHA, however, was not the fire coming from the torch,[6] but rather the fire that resulted from using the torch. 29 FMSHRC at 675; Gov't Ex. 1 at 4 ("A fire occurred at this operation on June 17, 2006 at 7:30 a.m. when a contractor, using an oxygen/acetylene torch to cut apart the car body of the #16 shovel, ignited oil and grease which had been allowed to accumulate."). As Bobo explained, it was the oil and grease that was burning, as the oil "was everywhere" on the car body and the railroad ties upon which it sat. Tr. 71, 80-81.

At the hearing, Phelps Dodge's safety director Main conceded that the ignition of these materials into flame was an "unplanned" part of work being performed by the Metal

[6] Phelps Dodge points to MSHA guidance indicating that "hot work" projects are considered to be "planned." PD Reply Br. at 3-4, 12 (citing Emergency Mine Evacuation Final Rule Questions & Answers on MSHA's web site). It is true that Metal Management had permission from Phelps Dodge to conduct "hot work." However, we cannot agree that the "planned" nature of the hot work here – use of the torch on the car body – can be reasonably considered to extend to any fire that results from the hot work, regardless of how big the fire was, the damage that it caused, and the lives that it put in danger. To interpret the MSHA guidance regarding "hot work" in the way Phelps Dodge urges would eviscerate the meaning of "accident" and lead to absurd results. *See Central Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001).

Management crew. Tr. 120. Thus, Phelps Dodge cannot maintain that it intended that the oil and grease be burned off as part of the operation.[7]

As for whether the actions that Phelps Dodge took in advance that indicate that it anticipated a fire could result from use of the torch on the car body, those actions mean that Phelps Dodge "planned for" a fire possibly occurring, not that the fire that occurred was a "planned" fire.

Moreover, as our colleagues agree, slip op. at 20-21, the fire that took place exceeded whatever expectations of fire there were prior to the start of the work that led to the fire. Despite the precautions taken by the Metal Management employees, McCauley, upon observing the scene and speaking with Metal Management supervisor Davila, had to call for the Phelps Dodge fire brigade to come and stand watch on the site. 29 FMSHRC at 670; Tr. 28-29, 63. Consequently, Phelps Dodge firefighter Bobo was dispatched in the mine's fire truck to the scene, whereupon on his arrival he had to have the Metal Management employees instructed to move away from the emanating smoke, because they did not have the equipment necessary to protect them from smoke inhalation. 29 FMSHRC at 671; Tr. 62-63, 66-67, 81-82. Bobo also had McCauley take action to get two additional firefighters and a water truck dispatched to the area. 29 FMSHRC at 671; Tr. 33-35. Because of the flames, Bobo found it necessary to put on his air pack and spray the flames with approximately 300 gallons of water before the water truck could arrive. 29 FMSHRC at 671; Tr. 72, 75.

Thus, even accepting Phelps Dodge's argument that actions taken in anticipation of a fire occurring are relevant to establishing that the fire was "planned," in this case it quickly became apparent to the Phelps Dodge personnel that, regardless of what fire the Metal Management employees may have "had in mind" or "projected" could occur when they started working, the measures taken in advance were going to be insufficient. Consequently, we uphold the judge's finding that the fire was "unplanned" under section 50.2(h)(6).

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Mary Lu Jordan, Commissioner

[7] In contrast, immediately adjacent to the mine's scrap yard, Phelps Dodge would burn scrap wood, as part of its fire brigade training program. Tr. 90-91, 127-28.

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Robert F. Cohen, Jr. Commissioner

Opinion of Chairman Duffy and Commissioner Young, in favor of not reaching the Secretary's alternate interpretation of the term "fire," and finding that the fire that occurred was unplanned:

A. The Secretary's Alternative Interpretation of "Fire"

On review, the Secretary takes the position that the Commission need not even take into account the evidence of flaming. According to the Secretary, the term "fire" is ambiguous, and she interprets it to "include both events marked by flaming combustion *and* events marked by smoldering combustion that reasonably has the potential to burst into flames." S. Br. at 13, 17 (emphasis in original). To demonstrate the reasonableness of this interpretation of "fire," the Secretary points to a different dictionary definition of "fire" than the judge relied upon and fire protection industry literature on the subject. *Id*. at 13-16.

The Secretary thus would have the Commission treat "fire" as a technical term, and have us decide between competing technical definitions of the term, one which requires the presence of flame, and one which does not. While it is apparent from the facts of this case and many others that have come before the Commission that the hazard posed by a fire is not limited to exposure to flame, we do not see the need in this case to choose between the parties' definitions and establish the full parameters of what constitutes a "fire" as that term is used in the definition of "accident." Rather, we believe the issue of whether there was a "fire" in this case can and should be decided on the narrower grounds found by the judge in his decision below.

Thus, while it may be reasonable for the Secretary to construe the term "fire" more broadly, encompassing combustion which produces no flame yet threatens the health or safety of miners, we see no need to address in deciding this case whether the smoldering of the car body and the smoke billowing from it was sufficient by itself to establish a "fire" under section 50.2(h)(6). The judge found that the observations of flames were roughly concurrent with the other indications that there could be a fire occurring, so this case simply does not hinge upon whether those other indications, by themselves, establish that a "fire" was in fact occurring.

Judicial principles of temperance and restraint dictate that cases not be over-decided; rather, they should be resolved on the narrowest set of grounds supported by the facts. Far-ranging conclusions, not necessary to the disposition of issues presented to the reviewing court in one case, may, ironically, end up constricting the court's discretion in subsequent cases where the facts may be significantly different. This is particularly true in instances where the reviewing court is presented with a broader rationale for deciding the case for the first time on appeal.

Such is definitely the case here, where all Commissioners unanimously agree that a "fire," even by the Judge's or Phelps Dodge's definition, occurred at 7:30 am on June 17, 2006, and recurred, intermittently, until it was successfully extinguished more than two hours later. As such, we further agree that the "fire" needed to be reported once it had not been extinguished within 30 minutes. We need not, and should not, decide more.

Moreover, we do not view this appeal as the proper vehicle to engraft upon the Mine Act and its regulations the broader interpretation of "fire" the Secretary has urged upon the Commission as an alternative to relying upon the definition of the term the judge utilized in upholding the citation. While we are not unsympathetic to the notion that there need not be evidence of flame to establish a "fire" under section 50.2(h)(6), we do not agree with the Secretary that it is necessarily the Commission's role to use this case to establish a broader definition of "fire," particularly where, as here, the Secretary did not even attempt to argue for the broader definition below.

Furthermore, section 50.2(h)(6)'s employment of the term "fire" is hardly unique in the Mine Act and its regulations. "Fire" is found in numerous sections of the amended Mine Act and in more than 100 of MSHA's Mine Act regulations. We are reluctant to accept the Secretary's suggestion to use this case, involving a relatively minor incident in a remote area of a surface mine, to establish the meaning of a term so prevalent in MSHA's regulatory regime.

Rather, we believe notice and comment rulemaking is a much more appropriate forum in which to establish a definition of a term that is so prevalent in, and important to, the amended Mine Act.[1] *See generally* I Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.68, at 368-74 (4th ed. 2002) (discussing nine different advantages of rulemaking over adjudication as a source of generally applicable rules).

This conclusion is confirmed by the substance of the authority the Secretary cites for broadening the definition of "fire," the National Fire Protection Association ("NFPA"). S Br. at 13-16. The NFPA literature cited by the Secretary indicates that not all solids can be considered to be on fire without the presence of flame. *See* I Arthur E. Cote, P.E., NFPA, *Fire Protection Handbook*, 2-55 (19th ed. 2003) ("*Some solids* can burn directly by glowing combustion or smoldering.") (emphasis added) (quoted in S. Br. at 15); Raymond Friedman, NFPA, *Principles of Fire Protection Chemistry* 56 (2d ed. 1989) ("Smoldering generally is limited to porous materials that can form a carbonaceous char when heated") (cited in S. Br. at 15-16). Developing a definition of fire that reflects that some of the time there can be fire without flame, but at other times there must be flame, is clearly a task much better accomplished through rulemaking than in a case such as this.

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[1] "[A] brief review of the legislative history of the [Mine] Act makes clear that fire is one of the primary safety concerns that has motivated federal regulation of the coal mining industry." *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (citing H.R. Rep. No. 312, 95th Cong., 1st Sess. (1977); S. Rep. No. 181, 95th Cong., 1st Sess. (1977)).

Lastly, adoption of the Secretary's alternative interpretation of "fire" would raise notice issues. We see no need to complicate the resolution of this case by substituting as the basis for upholding the citation an interpretation of "fire" that the operator offered below that the Secretary did not oppose, for one that was not suggested by the Secretary until the appellate stage of this case.

2. Whether the Fire was Unplanned

While we agree with our colleagues that the fire at issue was not a planned fire exempt from the reporting requirements of 30 C.F.R. § 50.10, we write separately because we disagree with the analysis supporting the conclusion. We do not agree that only a fire planned and executed with the intent of generating combustion may be exempt from the reporting requirement. The cramped focus on the objective is not the most protective approach, and we believe miner safety and health would be enhanced by directing our attention instead to the preparations made in advance of any incident where combustion is a foreseeable result. In that case, the operator's planning for the consequences of the use of torches or other heat sources in proximity to or contact with combustible materials must be evaluated in terms of whether the consequences were fully anticipated by thorough planning before and proper action during the event in question.

The Secretary's assertion, accepted by our colleagues, that only a deliberately set fire may be exempt from the reporting requirement is unnecessarily narrow. While it is true that in this case, Phelps Dodge Health and Safety Manager Main conceded that the ignition of materials was an "unplanned" result of the work being performed by the Metal Management crew (Tr. 120), mine hazards are often a foreseeable consequence of ordinary operations. If they are foreseen, planned *for*, and anticipated with proper precautionary measures to ensure miners are not exposed to danger, the circumstances do not ordinarily cause a hazard. For instance, the *planned* subsidence incident to longwall mining is not a reportable "accident." The collapse of the gob is simply a foreseeable event proximately caused by the operator's ordinary operations. The operator proceeds with a plan to mine in a way that prevents miners from being exposed to the hazards of the collapsing gob, and no "accident" occurs when the gob caves in as foreseen.

In much the same way, an operator may not intend that a fire consume the grease and other combustible material in a piece of equipment that is being cut with a torch for salvage. However, if the operator proceeds with a plan that fully anticipates that possibility, prepares for its occurrence in advance, and fully manages the event by extinguishing the fire, the event should not be a reportable accident under section 50.2(h)(6). We would therefore allow the exception to include activities from which an operator reasonably expects a fire to result, prepares for that event as though the fire will in effect happen, and maintains control over the progress of the fire from ignition through extinction.

Applying this analysis, we would nonetheless affirm the violation because the foresight and preparation in this case were inadequate. Phelps Dodge took a number of steps, as detailed *supra*, slip op. at 9 n.8, in preparation for the hot work involved in cutting up the car body, but the activity did not proceed as foreseen by those charged with carrying it out. As a result, Phelps

Dodge management, employees, and equipment necessary for controlling any anticipated problems arising from the salvage work had to be assigned after the fact to help control and extinguish the fire. *See* 29 FMSHRC at 670-71; Tr. 28-29, 33-36, 72-75 (McCauley, fire marshal Bobo and two additional firefighters responded to the scene; water truck summoned and Bobo required to spray car body with approximately 300 gallons of water to control fire until water truck arrived).

By affirming the violation on this basis, we would encourage operators to engage in thoughtful preparation before undertaking activities that pose danger and risk exceeding the operator's efforts to contain them without such preparation. It is also entirely consistent with the organic source term used in 30 C.F.R. § 50.10, which is not "fire" but "accident." Finally, it is consistent with logic and sound public policy. Had the operator prepared in advance for a significant and prolonged fire, the likelihood of the fire getting out of control would have been greatly reduced. Applying the regulatory language in this way would thus be preventive, hortatory, within the language of the standard, and, therefore, more likely to protect miners from serious hazards.[2]

We would also strongly urge the Secretary, preferably through regulation, or, at least through clear guidelines, to distinguish between confined areas containing combustible materials where propagation could be expected, and remote, open, areas where the possibility of propagation is limited and threats to miners can be more easily controlled.

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[2] Phelps Dodge argues that it lacked notice of the ALJ's interpretation that the term "planned" was not satisfied by the precautions taken by Phelps Dodge. PD Reply Br. at 12-13. Application of the reasonably prudent person test demonstrates that the operator had adequate notice in this instance. There is no better evidence of what a reasonably prudent person would think in this case than the immediate reaction of the miners when faced with a situation. Here, it is plain from the actions of both McCauley and Bobo when they came upon the scene that neither believed that the Metal Management employees had adequately planned for the fire that resulted from their work on the car body. Consequently, we reject the notion that Phelps Dodge lacked adequate notice of how the term "unplanned" could be applied in this case.

Michael F. Duffy, Chairman

Michael G. Young, Commissioner

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