

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

February 25, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 95-70-M
	:	
GOUVERNEUR TALC COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners<sup>1</sup>

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

---

<sup>1</sup> Commissioner Beatty assumed office after this case had been considered at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (Mine Act). At issue is Administrative Law Judge Avram Weisberger's determination that Gouverneur Talc Company (GTC) did not violate 30 C.F.R. § 57.4362.<sup>2</sup> 18 FMSHRC 73, 77-78 (January 1996) (ALJ). The Secretary of Labor seeks reversal of that decision and remand for determination of whether the violation was significant and substantial (S&S) and the result of GTC's unwarrantable failure.<sup>3</sup> For the reasons that follow, the judge's decision is affirmed in result.

## I.

### Factual and Procedural Background

GTC operates the No. 1 Mine, an underground talc mine in St. Lawrence County, New York. 18 FMSHRC at 73. At the time of the alleged violation, the primary mining method there was open stope.<sup>4</sup> *Id.* Men and supplies were transported into the mine via a production shaft, with openings into the ore veins every 200 feet, starting at the 300-foot level and ending at the 1100-foot level. *Id.* at 74.

On the morning of June 21, 1994, Mark Trombley, a repairman, and Vincent Woods, a maintenance mechanic, were using a Miller welder to repair a bucket blade on stope 19-A at the 500-foot level. *Id.* at 75-76; Tr. 283-84. According to Trombley, the welder began sparking, growling, sizzling, popping, and lighting up the drift. 18 FMSHRC at 76; Tr. 285. The two stopped working, and when the noise grew louder and smoke started rolling, they headed for an exit. 18 FMSHRC at 76; Tr. 285-86.

Walking up the stope they met two miners who were close enough to hear the noises the welder was making. 18 FMSHRC at 76; Tr. 286. Together, the four then went to the 300-foot

---

<sup>2</sup> Section 57.4362 requires that following evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base.

<sup>3</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard. The unwarrantable failure terminology is also taken from section 104(d)(1) and refers to more serious conduct by an operator in connection with a violation.

<sup>4</sup> A stope is defined as an excavation from which ore has been removed in a series of steps. U.S. Dept. of Interior, *Dictionary of Mining, Mineral, and Related Terms* 541 (2d ed. 1997) (ADMMRT). The open-stope method is one in which no regular artificial method of support is employed, although occasional props or cribs may be used to hold local patches of insecure ground. *Id.* at 377.

level, where they attempted to call the hoist man. 18 FMSHRC at 76; Tr. 286-87. When the telephone at that level did not work, they decided to leave the mine and have the power to the 500-foot level shut off. 18 FMSHRC at 76; Tr. 287. Once out of the mine they reported the situation to the acting general mine foreman, Donald Fuller. 18 FMSHRC at 76; Tr. 262-63.

Fuller notified Terry Jacobs, GTC's personnel and safety director, who came over to Fuller's office. Tr. 192, 263. The mine's electrician, Steven Smith, came by during a conversation between Fuller and Trombley and told Fuller that he thought that the power to the 500-foot level should be shut off. 18 FMSHRC at 76; Tr. 264, 298. Fuller and Smith then headed together underground, but neither took along self-contained breathing apparatus (ASCBA®). 18 FMSHRC at 76; Tr. 94.

Once on the 500-foot level, approximately 1500 feet from the 19-A stope, Smith shut off power to the 19-A stope. 18 FMSHRC at 76. Fuller and Smith proceeded to the 19-A stope where Smith turned off the disconnect to the welder and unplugged it. *Id.* Fuller and Smith then exited the 500-foot level, along with acting underground mine foreman Craig Woodard and three or four miners, all of whom had been working at that level. *Id.*; Tr. 201, 225. At trial, Fuller stated that he and Woodard discussed bringing the miners up because it was lunchtime, and *we* said as long as it is this close to noon, let's bring them up and see what's going on.® 18 FMSHRC at 76; Tr. 272. The seven other men remaining in the mine left the mine around 11:45 a.m. Tr. 202-03.

Safety director Jacobs's written report on the sequence of events states that between 11:00 and 11:15 a.m., after speaking with Trombley and Wood, and reviewing a ventilation map, he *decided to get all personnel off the 500 level.*® Pet. Ex. 2 at 3. When asked at trial what he did to implement that decision, Jacobs could not recall. Tr. 388. Jacobs did alert the local office of the Department of Labor's Mine Safety and Health Administration (MSHA®) regarding the welder incident at approximately 11:20 a.m. Tr. 212. He identified the incident as a fire, but MSHA never ordered an evacuation of the mine. Tr. 212-15. Jacobs also summoned the official mine rescue team, which went underground after all of the miners had come up. Tr. 205.

MSHA Electrical Mine Inspector William L. Korb, Jr., after inspecting the welder and interviewing some of the GTC personnel involved, issued a section 104(a) citation, subsequently amended to a section 104(d)(1) order, alleging that GTC violated section 57.4362 when Fuller and Smith went underground without SCBA protection. 18 FMSHRC at 74. At trial, the Secretary contended that the departure of the four employees from 500-foot level to the surface of the mine constituted an evacuation in a fire emergency, thus triggering the regulation and obligating Smith and Fuller to take SCBA when they went underground. *S. Post-Hearing Br.* at 9; Tr. 103-04, 485.

Both Korb and MSHA supervisory mine inspector Randall Gadway also opined that GTC should have implemented its emergency evacuation plan for the mine. Tr. 102-03, 109,

481-82. Gadway further stated that MSHA considered the surface of the mine to be the Afresh air base@referenced in section 57.4362. Tr. 481.

The judge concluded that, while the term Afire emergency@is not defined in the regulations, and there is no common meaning of the term in the mining industry, there was a Afire emergency,@due to the presence of sparking and rolling smoke in the area of the welder. 18 FMSHRC at 77. Relying on a dictionary definition of the term Aevacuation,@the judge also concluded that because the first group of four miners all left together after two of them had observed sparking and smoke, they had evacuated in a fire emergency. *Id.* at 77-78. The judge further held that, because miners remained on the 500-foot level, the evacuation was not total. *Id.* at 78.

The judge also found that Fuller and Smith went to the 500-foot level to shut off the power to the 19-A stope. *Id.* While recognizing that the two had subjected themselves to the hazards of smoke and gas inhalation by not being equipped with SCBA, the judge determined that there had not been a violation of section 57.4362. *Id.* Finding insufficient evidence to establish that Fuller and Smith were participating in rescue or fire fighting operations, the judge concluded that the regulation was not violated. *Id.*

## II.

### Disposition

The Secretary argues that the language of section 57.4362 is clear, but that if the Commission finds it ambiguous, it should defer to the Secretary=s interpretation of the standard, which, according to her, is consistent with both the language and purpose of the regulation. S. Br. at 5-6. The Secretary contends that the judge erred in concluding that the actions of Fuller and Smith did not constitute Afirefighting@under the terms of the standard, as the purpose of those actions was to stop the spread of, or put out, a possible fire. *Id.* at 7-9. The Secretary also submits that the judge=s decision leads to the absurdity of section 57.4362 being interpreted to permit individuals to enter a mine during a fire emergency without SCBA protection as long as they do not intend to engage in fire fighting or rescue operations. *Id.* at 9-12.

In response, GTC contends that the judge correctly found that Fuller and Smith were not engaged in Afirefighting,@as they only went underground to examine the situation, turned off the power when they got there, and found no fire. GTC Br. at 11-13. Asserting that the situation was not covered by GTC=s evacuation plan, no evacuation was ordered, and there were many miners engaged in normal mining operations in the mine when Fuller and Smith entered the mine to turn off the power, GTC also attacks the judge=s conclusion that there was an Aevacuation@under section 57.4362. *Id.* at 6-8. GTC further argues that the judge erred in finding a Afire emergency,@citing the condition of the welder as evidence that there was simply an electrical problem with the welder. *Id.* at 8-11.

In reply, the Secretary states that the judge's conclusion that an "evacuation" occurred is supported by substantial evidence and that the judge applied a proper interpretation of the term as it is used in the section 57.4362. S. Reply Br. at 1-4. The Secretary contends that the judge's conclusion that there was a "fire emergency" is also supported by the evidence. *Id.* at 5-6.

A majority of Commissioners vote to affirm the judge's decision in result. Commissioners Riley and Verheggen would affirm the judge's decision on the ground that section 57.4362 was not violated because there was no "evacuation." Chairman Jordan would affirm the judge's decision on the ground that the Secretary failed to prove that Fuller and Smith traveled "in advance of the fresh air base." Commissioner Marks would reverse the judge's decision that there was no violation.

### III.

#### Separate Opinions of the Commissioners

Commissioners Riley and Verheggen, in favor of affirming the decision of the administrative law judge:

We believe that proper construction of the term "evacuation" in section 57.4362 disposes of this case. It is undisputed that the alleged "evacuation" was merely the response by the four miners on the 500-foot level to the malfunctioning of the welder. According to the Secretary's interpretation of the standard, the requirements of section 57.4362 were triggered when those miners exited the mine. In the Secretary's view, this obligated GTC to treat the incident as one covered by section 57.4362. We do not agree, based on the plain meaning of the term "evacuation."

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). *See also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). In the absence of statutory or regulatory definitions or technical usage, the Commission applies the ordinary meanings of words chosen by the drafters. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). However, this does not necessarily mean each word in a given regulation should be viewed in isolation.

The Secretary, like the judge and GTC, interprets section 57.4362 by parsing its language into the individual terms and phrases "evacuation," "fire emergency," and "participate in rescue and firefighting operations." However, while "[i]t is recognized that, in the absence of express definitions, terms in regulations should be defined according to their 'commonly understood definitions[,]— in interpreting such terms . . . reviewing bodies cannot concentrate on individual terms and ignore a consideration of the context in which the term appears.'" *Pyramid Mining*

*Inc.*, 16 FMSHRC 2037, 2039 (October 1994) (citations omitted).<sup>1</sup> Therefore, consideration of the context in which a term is used in section 57.4362 may also be relevant in ascertaining its ordinary meaning.

The term "evacuation" is not defined in 30 C.F.R. Part 57. In finding that a partial evacuation of the 500-foot level took place, the judge relied on a definition of "evacuation" as an organized withdrawal from a place or area, especially as a protective measure. 18 FMSHRC at 78. However, that definition of "evacuation" is actually just an illustration of the term's primary definition, which is "the act of emptying, clearing of the contents, or discharging." *Webster's Third New International Dictionary (Unabridged)* 786 (1986) ("Webster's").

Here, there was no "emptying" or "clearing of the contents" of the 500-foot level, much less the GTC mine. Apart from the four miners who left the mine, the rest, including some on the 500-foot level, remained underground until later. 18 FMSHRC at 78; Tr. 271-72. In our view, such circumstances do not rise to the level of an "evacuation."<sup>2</sup>

Further support for the view that the standard was not intended to apply to the facts of this case is supplied by the preamble to section 57.4362, in which MSHA stated that the standard

establishes the conditions under which persons may advance beyond the fresh-air base in fire emergencies after a mine has been evacuated. It does not prevent mine personnel from fighting and controlling incipient fires prior to and during mine evacuation. However, once a fire emergency has been declared and a fresh-air

---

<sup>1</sup> See also *Deal v. United States*, 508 U.S. 129, 132 (1993) (fundamental principle that meaning of word cannot be determined in isolation, but must be drawn from context in which it is used); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.") (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)); *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3rd Cir. 1996) (meaning derives from context, hence constructional canon *noscitur a sociis*, which states that meaning may be inferred by examining surrounding words).

<sup>2</sup> Section 57.4362 restricts actions that may take place following evacuation "of a mine." While we do not believe it is necessarily unreasonable for the Secretary to interpret the term "mine" in section 57.4362 to mean less than an entire mine, see *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977), and *D.H. Blatner & Sons, Inc.*, 18 FMSHRC 1580, 1586 n.9 (September 1996), we do believe it is unreasonable for the Secretary to interpret "evacuation" under the regulation to cover a situation where miners remained on the same level of the mine that was purportedly evacuated. See 18 FMSHRC at 78.

base has been established, mine rescue apparatus must be worn as a precaution against the smoke, fumes, and toxic products of fire.

50 Fed. Reg. 4,022, 4,028 (1985). Thus, the preamble contemplates the situation where the mine, or at least that portion of it subject to the fire emergency, has been cleared of miners, and focuses on the terms under which rescue personnel may re-enter the cleared area.

The preamble further supports the notion that something more than the reaction of a few miners to an incident involving a fire is necessary before an operator is obligated to comply with section 57.4362. It states that the standard applies *once* a fire emergency has been declared. *Id.* In addition, it clarifies the otherwise unexplained reference to *the fresh-air base* in the regulation by stating that a fresh-air base is something that is *established*. *Id.* We believe that the language employed by both the standard and MSHA's explanation of it leads to the conclusion that the regulation is designed to apply when fire emergency procedures more formal than those GTC followed are invoked.<sup>3</sup>

Evidence of official company involvement of the type anticipated by the regulation is simply not present. There is no evidence that *a fire emergency [was] declared* by GTC. Nor was any evidence presented that *a fresh-air base [was] established* by GTC beyond which those *participat[ing] in rescue and firefighting operations* could *advance*.<sup>4</sup> Instead, the *firefighting* that took place was on a less formal basis, similar to the manner in which the alleged *evacuation* occurred.

The Secretary asserts that the safety purposes of the Act are furthered by her interpretation. *S. Br.* at 5-6. We believe the opposite is true. Safety is enhanced whenever a worker retreats from an area at the first apprehension of danger, whether the perceived threat of harm is real or later determined to be unfounded. The miners here acted prudently and swiftly with an abundance of caution in the interest of their own safety. They moved away promptly, attempted to report the faulty welder, and, after being unable to contact management because of an inoperable telephone, proceeded to the surface, leaving verification of an emergency to their superiors. 18 FMSHRC at 76; *Tr.* 285-87. These miners should be commended. Their employer

---

<sup>3</sup> The statement in the preamble that unprotected fire fighting *during* mine evacuation is permissible also militates against the conclusion that the standard applies to the *partial* evacuation that occurred at the GTC mine. *See* 18 FMSHRC at 78.

<sup>4</sup> Our colleague Chairman Jordan concludes there was no violation *because* the Secretary has failed to demonstrate that Fuller and Smith traveled *in advance* of the fresh air base. *Slip op.* at 9-10 (quoting 30 C.F.R. ' 57.4362). Since we find as a threshold matter that no evacuation occurred, we do not reach this question. We note, however, that the regulatory history is silent regarding how a *fresh-air base* is *established*, and the Secretary has failed to supply a consistent explanation of what she understands those terms to mean. The Secretary's brief implies that GTC should have taken steps *underground* to *set[] up* a fresh air base. *S. Br.* at 10-11. This contradicts her expert witness, who testified that in the case of GTC fire, MSHA considered the outside of the mine to be the fresh-air base. *Tr.* 481.

should also be lauded for its rapid response in immediately notifying rescue crews, rather than risking mobilization delays while striving to determine whether such extraordinary measures were necessary. By stretching the plain language of section 57.4362 beyond its ordinary meaning, the Secretary would tie operators' hands with respect to how they may respond in the event of similar incidents. We ought not discourage workers from being able to protect themselves by fleeing at the first hint of danger. The more formal our characterization of their withdrawal, however, the more obligations for their employer we attach to their actions. With each escalating regulatory burden will come, of necessity, a higher premium on verification before the possible overreaction of one or more miners triggers an evacuation of an entire mine.

It appears to us that the Secretary may have charged GTC with a violation of section 57.4362 because she disagreed, in hindsight,<sup>5</sup> with GTC's response to the incident.<sup>6</sup> However, the regulations are silent regarding when an operator is obligated to evacuate a mine, and also fail to impose on operators the duty to comply with their mine evacuation and rescue plans. *See* 30 C.F.R. Part 57, Subpart C; 30 C.F.R. ' 57.11053. If the Secretary is concerned that mines are not being evacuated when they should be, or that evacuation and rescue plans are not being adhered to, her proper course is to fill those holes in the regulatory scheme by engaging in notice and comment rulemaking, rather than to attempt to invoke an existing regulation that addresses a different hazard.

For the foregoing reasons, we affirm the judge's determination that GTC did not violate section 57.4362.

---

James C. Riley, Commissioner

---

Theodore F. Verheggen, Commissioner

---

<sup>5</sup> MSHA did not fault GTC for its handling of the incident when it occurred. At that time, more than one MSHA representative was in contact with GTC regarding how the incident was being handled, but evacuation was never discussed. Tr. 212-15.

<sup>6</sup> MSHA's witnesses testified that GTC should have activated its emergency evacuation procedures for the mine. Tr. 102-03, 109, 481-82.

Chairman Jordan, in favor of affirming the decision of the administrative law judge:

This regulation requires certain events to take place in order to trigger the requirement that mine rescue apparatus be worn. First, an evacuation must occur. Second, rescue and fire fighting operations must be initiated. And third, a fresh air base must be established. The Secretary's failure to prove this final element is fatal to her case. I find no violation here because the Secretary has failed to demonstrate that Fuller and Smith traveled *in* advance of the fresh air base. *See* 30 C.F.R. § 57.4362. Therefore, I would affirm the judge in result.

Although the regulations do not define *fresh air base*,<sup>1</sup> one authority describes it as:

[a]n *underground station, located in the intake airway*, that is used by rescue teams during underground fires and rescue operations. The base should be as close to the fire as safety will permit, adequately ventilated, and in constant touch with the surface by telephone.

*DMMRT* at 223 (emphasis added). According to this definition, therefore, the regulation contemplates the formal establishment of a properly ventilated underground area to demarcate the boundary beyond which apparatus must be used.<sup>1</sup>

The Secretary never demonstrated the location of that boundary. Instead, the Secretary appears to treat the entrance of Fuller and Smith into the mine as the event which triggered the violation. But her regulation does not require individuals to wear mine rescue apparatus simply upon going into a mine. It explicitly dictates that the equipment be worn *in* advance of the fresh air base.<sup>2</sup>

---

<sup>1</sup> The Secretary's own preamble to section 57.4362 emphasizes that a fresh air base is a predicate for the standard's mandate. In her preamble, the Secretary emphasized that *once* a fire emergency has been declared and a fresh-air base has been established, mine rescue apparatus must be worn. *See* 50 Fed. Reg. at 4,028.

The only direct evidence in the record on this point is an offhand statement by Inspector Korbelt referring to the outside of the mine as the fresh air base. Tr. 481. This comment is utterly at odds with the explicit description of the elements of a fresh air base set forth above in the DMMRT. It is also inconsistent with the Secretary's brief, which implies that GTC should have taken steps to set up a fresh air base. S. Br. at 10-11.<sup>2</sup> As the Secretary presented no additional evidence regarding the formation of a fresh air base (and the operator did not address the issue), she failed to prove that a violation occurred.

My colleague, Commissioner Marks, has concluded that the judge implicitly ruled that the miners went past the fresh air base when he ruled that Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA. Slip op. at 13 (quoting 18 FMSHRC at 78). I decline to adopt this approach. If the Secretary intends to penalize an operator for violating a standard, it is incumbent on her to explain how the operator failed to comply with each element of that standard, and to offer evidence in support of her contentions. She failed to do so here.

I do agree with Commissioner Marks, however, that our colleagues, Commissioners Riley and Verheggen, erred in concluding that the departure of the four employees from the 500-foot level does not constitute an evacuation of a mine for purposes of section 57.4362. While conceding that an evacuation need not be mine-wide, my colleagues nevertheless assert that this withdrawal cannot trigger the application of section 57.4362 because it did not involve all of the miners on the 500-foot level.<sup>3</sup> Slip. op. at 6 n.2. The judge relied on a dictionary definition which describes evacuation as an organized withdrawal . . . from a place or area especially as a protective measure. 18 FMSHRC at 78 (citing Webster's at 786). That is precisely what occurred here. The withdrawal involved all the miners who were in the vicinity of the welder and therefore in a position to make a decision about the dangers posed when that equipment malfunctioned. After discussing the situation and unsuccessfully attempting to call outside, the four miners decided to leave the mine together. *Id.* at 76. One of the miners offered to walk down a second exit to shut off the power but, given the amount of smoke, the rest of the miners were concerned he would not return. They insisted they stick together and leave the mine as a group. Tr. 287.

---

<sup>2</sup> Moreover, the evidence in the record pertaining to gas levels would not lead one to conclude that the surface of the mine should be deemed the boundary beyond which SCBA should have been used, since it appears that even the members of the mine rescue team did not wear their apparatus until they entered the sub-level just above five hundred 19-A. See Tr. at 37.

<sup>3</sup> The regulation refers to an evacuation of a mine in a fire emergency. Specifying the entire 500 foot level as the minimum area to be emptied in order for an evacuation to occur is an arbitrary approach which directly contradicts my colleagues' own exhortation that reviewing bodies consider the context in which the term appears. Slip op. at 5 (quoting *Pyramid Mining*, 16 FMSHRC at 2039).

My colleagues contend that there must be A[e]vidence of official company involvement@ and that A[t]here is no evidence that a fire emergency [was] declared= by GTC.@ Slip. op. at 7 (alteration in original). The record, however, demonstrates ample company involvement and leaves no doubt that GTC viewed the situation as a fire emergency. Upon learning of the problem with the welder, Safety Director Jacobs reviewed the ventilation map and according to his notes, Adecided to get all personnel off the 500 level.@ Pet. Ex. 2 at 3.<sup>4</sup> Jacobs then proceeded to notify MSHA<sup>5</sup> about the fire and also summoned the official mine rescue team. Tr. 205, 212-15. My colleagues, however, would require Afire emergency procedures more formal than those GTC followed@before the regulation could apply. Slip op. at 7.

Commissioners Riley and Verheggen explain that they are reluctant to Atie operators= hands@with respect to how they may respond to emergencies, for fear it may discourage workers from fleeing at the first hint of danger. *Id.* While I share my colleagues= view that A[s]afety is enhanced whenever a worker retreats from an area at the first apprehension of danger@(id.), I trust they would also agree that safety is not enhanced if fellow workers endanger themselves as they attempt to control the fire emergency that prompted the withdrawal. Here, although the fire was considered a potentially serious situation that might require the involvement of the mine rescue team, Fuller and Smith proceeded underground to combat it without taking the precaution of carrying a gas tester, much less the self-contained breathing apparatus referenced in the regulation. Tr. 266, 344-45. While underground, they resorted to using smoke from a lighted cigarette to ascertain the direction in which air was moving. Tr. 276, 331. Mine foreman Craig Woodard, who was underground when he learned of the fire, also proceeded to investigate the situation without a carbon monoxide detector, but another miner called him back to the dinner hole and reminded him to take one. Tr. 237. Thus, while there are negative safety implications that can flow from an overly broad application of the evacuation requirement, it is also worth bearing in mind the safety implications that flow from an unduly narrow approach to this term.

---

Mary Lu Jordan, Chairman

---

<sup>4</sup> At trial Jacobs was unable to explain what he did to implement that decision. Tr. 388.

<sup>5</sup> My colleagues point out that upon learning of the fire MSHA never ordered an evacuation of the mine. Slip. op. at 8 n.5. It seems entirely possible, however, that MSHA assumed an evacuation had already occurred or was underway.

Commissioner Marks, dissenting:

I would reverse the judge's finding of no violation of 30 C.F.R. § 57.4362. That section provides that "[f]ollowing evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base." The judge found that four miners "evacuated" in a fire emergency. 18 FMSHRC 73, 77-78 (January 1996) (ALJ). Substantial evidence supports the judge's findings. It is undisputed that on the morning of June 21, 1994, the Miller welder began "sparking," "sizzling," "growling," "popping," "alighting" up the drift, and the noise and smoke grew progressively worse. *Id.* at 75-76; Tr. 285-86. Thus, the judge properly found the existence of a fire emergency. Likewise, it is undisputed that the "evacuation" at issue was by the four miners from the 500-foot level as a result of the incident involving the Miller welder. 18 FMSHRC at 76. Accordingly, the dictionary definition of "evacuation" used by the judge "Any organized withdrawal or removal . . . from a place or area especially as a protective measure" describes the actions of the four miners. *Id.* at 78; see *Webster's Third New International Dictionary (Unabridged)* 786 (1986) ("Webster's"). Applying the plain meaning of the standard, which the judge correctly did, the four miners' retreat from the mine qualified as an evacuation.<sup>1</sup>

In rejecting the interpretation of evacuation of both the judge and the Secretary, Commissioners Verheggen and Riley incorrectly rely on the preamble to the regulation to indicate that the evacuation must involve formal procedures. Slip op. at 6. It must be remembered that a preamble is not the law, is "not officially promulgated," and does not take precedence over the express words of the regulation. See *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) ("the express language of a statute or regulation unquestionably controls" over material like a . . . manual); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (enforcement guidelines published in Federal Register held to be nonbinding on Secretary).

Restrictively applying the regulation to only those situations where the operator declares an emergency and formally acts to clear a mine, as Commissioners Riley and Verheggen suggest (slip op. at 7), will lead to the absurd result that miners will enter dangerous fire situations without wearing safety equipment when an operator fails to take the proper steps in calling an

---

<sup>1</sup> Commissioners Riley and Verheggen have taken the view that the plain meaning of the term evacuation calls for a more formal emptying of a mine than was present on these facts. Slip op. at 5-7. Such a restrictive view is at odds with the Secretary's interpretation of her own regulation, which like the judge, would apply the regulation in cases of partial evacuation. S. Reply Br. at 1-2. While I believe that the meaning of evacuation is plain and applies to a less than complete exit of miners as a result of a dangerous situation, I note that when a standard is ambiguous, the Commission must defer to the Secretary's reasonable interpretation of the regulation. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Given the difference of opinion on the meaning of evacuation leads me to the additional conclusion that the Secretary's interpretation, which is reasonable and based on the dictionary definition of evacuation, should be accepted by this Commission.

evacuation. In fact, this is exactly what happened in this case C two miners entered the mine without wearing safety apparatus when the welder was potentially on fire, subjecting themselves to dangerous levels of carbon monoxide, and, because the operator had not formally called a mine evacuation, my colleagues believe there is no violation. Such a result actually rewards operators who fail to take proper fire prevention measures, is contrary to the safety purposes of the Mine Act, and should not be countenanced. *See Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993) (rejecting construction of standard that would lead to absurd result).

Although correctly finding an evacuation and a fire emergency, the judge erred in determining that foreman Fuller and electrician Smith were not participating in . . . firefighting operations under section 57.4362 when they traveled to the 500-foot level with the intent of shutting the power off. 18 FMSHRC at 78. Although the term firefighting is not defined in the standard, its dictionary definition is the effort to extinguish or to check the spread of a fire. Webster's at 855. As the Secretary points out, it is standard firefighting procedure in fighting an electrical fire to first deenergize electrical circuits. S. Br. at 8 (citing C. Goodson, B. Adams and M. Sheed, *Industrial Fire Brigade Training: Incipient Level*, at 35 (1995)). Fuller testified that they entered the mine to shut the power off so that it wouldn't make things worse than what it was. Tr. 265. In other words, Fuller and Smith acted in an attempt to prevent the spread of fire. Therefore, their actions fall clearly within the term firefighting. In addition, the judge's interpretation, which would permit miners not engaged in fire fighting to enter the mine when there is a fire emergency without wearing protective equipment (18 FMSHRC at 78), is completely illogical and thwarts the safety protection purposes of the standard!

I disagree with Chairman Jordan's opinion in which she states that the Secretary failed to prove that the two miners advanced beyond the fresh air base (slip op. at 9-10), an issue that was never raised by the parties on review. The judge implicitly ruled that the miners went past the fresh air base when he ruled that Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA. 18 FMSHRC at 78. The record revealed that, after Fuller and Smith descended into the mine, the mine rescue team entered the mine and detected a potentially deadly level of carbon monoxide of 700 parts per million, causing the team to utilize oxygen apparatus in order to complete their examination of the mine. Tr. 36-37, 385-87. Further, Inspector Korbel testified that, according to MSHA's view, the surface of the mine was the fresh air base, which the two men advanced beyond when they entered the mine. Tr. 481. I also find it intriguing that Chairman Jordan criticizes the unduly narrow approach taken by Commissioners Riley and Verheggen towards section 57.4362 (slip op. at 11), when her own view of the regulation also permits miners to enter a mine, when there is a potentially serious fire, without wearing appropriate fire safety equipment.

Therefore, I believe that all the elements of section 57.4362 were present when the two miners went into the mine, after learning that the welder was potentially on fire, to shut the power off as a fire fighting measure, without wearing mine rescue apparatus. Accordingly, I dissent from the positions of my colleagues and would reverse the judge's determination that section

57.4362 was not violated and remand for a determination of whether the violation was significant and substantial and a result of the operator's unwarrantable failure as alleged by the Secretary.

---

Marc Lincoln Marks, Commissioner

Distribution

Colleen A. Geraghty, Esq.  
Office of the Solicitor

U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Sanders D. Heller  
Attorney at Law  
23 E. Main Street  
P.O. Box 128  
Gouverneur, NY 13642

Administrative Law Judge Avram Weisberger  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
5203 Leesburg Pike, Suite 1000  
Falls Church, VA 22041