

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

1

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

----- :
SECRETARY OF LABOR, :
MINE SAFETY & HEALTH :
ADMINISTRATION (MSHA) :
Petitioner, : Civil Penalty Proceeding
: :
vs. : LAKE 2008-477
: AC No. 12-2258-150575
BLACK BEAUTY COAL COMPANY, :
Respondent :
----- :

Washington, D.C.
Thursday, February 23, 2012

The following pages constitute the proceedings held in the above-captioned matter before the Federal Mine Safety & Health Review Commission, 601 New Jersey Avenue, Northwest, Suite 9500, Washington, D.C. 20001 before Christina S. Hotsko of Capital Reporting Company, beginning at approximately 10:00 a.m.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

2

1 A P P E A R A N C E S

2 On behalf of Petitioner:
EDWARD WALDMAN, ESQUIRE
3 U.S. Department of Labor
1100 Wilson Boulevard, Suite 2228
4 Arlington, Virginia 22209
(202) 693-9344
5

6 On behalf of Respondent:
R. HENRY MOORE, ESQUIRE
7 Jackson Kelly, PLLC
Three Gateway Center
8 401 Liberty Avenue, Suite 1340
Pittsburgh, Pennsylvania 15222
9 (412) 434-8055
10
11
12
13
14
15
16
17
18
19
20
21
22

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

3

1 P R O C E E D I N G S

2 CHAIRMAN JORDAN: We will go on the record
3 and come to order. Good morning. This Commission is
4 hereby convened in open session Thursday,
5 February 23, 2012, to hear oral argument in the
6 matter entitled The Secretary of Labor Versus Black
7 Beauty Coal Company. Dock No. Lake 2008-477.
8 Present are myself, Chairman Jordan; Commissioner
9 Duffy; Commissioner Young; Commissioner Cohen; and
10 Commissioner Nakamura.

11 By the terms of the Commission order setting
12 oral argument, each side is allocated 30 minutes for
13 the presentation of its argument. Black Beauty shall
14 proceed first and may serve up to 5 minutes of its
15 designated time for rebuttal.

16 Counsel, would you please introduce
17 yourselves for the record.

18 MR. MOORE: Yes. R. Henry Moore of the law
19 firm Jackson Kelly, PLLC, representing Black Beauty
20 Coal Company.

21 CHAIRMAN JORDAN: Thank you.

22 MR. WALDMAN: Ed Waldman representing MSHA

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

4

1 and the Secretary.

2 CHAIRMAN JORDAN: Thank you. Counsel, you
3 can proceed.

4 MR. MOORE: May it please the Commission, I
5 would reserve 5 minutes for rebuttal if I may. This
6 case obviously involves a number of issues related to
7 essentially one topic: berms, and berms at dump
8 sites or roadways, S&S issues and unwarrantable
9 failure.

10 I'm going to proceed somewhat seriatim.
11 Obviously, if the Commission has a particular issue
12 that it is interested in, we will address that.

13 The first citation -- all three are
14 unwarrantable failures; all three are designated S&S.
15 The first one, however, involves a dragline bench,
16 which was 200 feet wide.

17 And the process that was going on was they
18 were moving the dragline. The dragline, as you are
19 all familiar, is a large piece of equipment. It
20 weighs 10 million pounds. It had stopped because
21 they had some electrical problems with it. And there
22 were three trucks that had come in from the other

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

5

1 side of the dragline, from what the inspector saw.
2 They had come down a road and the dragline was there.
3 And then there was a fourth truck that the inspector
4 was concerned about -- that was a welding truck --
5 and it had come down the bench approximately 18 feet
6 from the edge.

7 The question obviously is, is this a
8 roadway? Not to belabor the point, but this is not a
9 roadway. It's a bench.

10 CHAIRMAN JORDAN: Counsel, if you don't
11 mind, there was confusion in my mind that I think you
12 could clear up. It seemed to me in reading the
13 arguments that it's argued that the bench is not a
14 roadway; and therefore, would not need berms. But it
15 appeared that the briefs -- or what I read -- was
16 saying that prior to the move of the dragline there
17 were berms. That there's berms; and then the berms
18 needed to be lowered in order to have the dragline
19 have more room to maneuver; and then subsequent to
20 that, they would be built back up.

21 So I did find myself wondering, if this is
22 not a roadway and did not need berms, why were there

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

6

1 berms there prior to the move? And then there's
2 going to be berms there after the move? Does your
3 argument amount to during the time of the move, this
4 section of the bench is not a roadway?

5 MR. MOORE: That's essentially it,
6 Commissioner. It is not a roadway at the time of the
7 move. Prior to the move there is, in fact,
8 to-and-from haulage across that bench; and it is a
9 roadway.

10 CHAIRMAN JORDAN: Okay.

11 MR. MOORE: Once the dragline moves, it's a
12 messy process. The tub on the dragline -- which is
13 the bottom -- every time the feet pick up and put
14 down to advance the dragline, it pushes material in
15 front of it. So it creates an uneven surface that is
16 compounded by the fact that the four 8-foot-long
17 feet, every time they sit down, they indent the
18 surface of the bench and create a rough surface.

19 CHAIRMAN JORDAN: It appeared that the berms
20 that were in existence prior to the move -- I think
21 the record indicated -- they would be normally like
22 5-foot-high berms.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

7

1 MR. MOORE: Yes.

2 CHAIRMAN JORDAN: And then during the
3 move -- I know there's some dispute in the record
4 about what size the remaining berms were after the
5 operator lowered them. What I was a little confused
6 about is the operator contending that it's unable to
7 maintain the -- the phrase that's used, the
8 "remainder berms" or "interim" -- berms at a height
9 that would meet the mid-axle standard? Or is it just
10 that it's disputed in this case that, you know, the
11 operator is saying, "in fact, the berms that we left
12 there were adequate"? Or are you saying that during
13 the move this is not a roadway; we need to reduce the
14 berms for the dragline to maneuver, and we can't even
15 keep them at a height that would be mid-axle?

16 MR. MOORE: Well, they have to be --

17 CHAIRMAN JORDAN: Lowered?

18 MR. MOORE: Lowered. Because the 5-foot
19 berms that we're talking about that preexisted the
20 dragline move are there for haulage trucks, which
21 have a mid-axle height of 60 to 66 inches. The
22 trucks that we're talking about have a mid-axle

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

8

1 height of about 21 inches.

2 While the dragline is being moved, the
3 bulldozer that would be doing anything with the berms
4 is on the other side from where the inspector was
5 actually smoothing the bench for the dragline, even
6 though it was going to tear it up; and also reducing
7 the size of the berms so that the dragline could move
8 through safely.

9 And in this particular case there is also,
10 obviously, a dispute as to how much of the remnant
11 berms were left. Mr. Traylor, who came on the site,
12 looked over and saw the inspector's truck, saw the
13 remnant berm, and saw that it was the height of the
14 top of the wheels on the inspector's SUV, excuse me.
15 And that would have been adequate for the service
16 truck.

17 We believe that -- it's curious that both
18 the -- Mr. Traylor stopped short of the dragline.
19 And he said he stopped short of the dragline because
20 the bench was too rough, in his mind, to drive.

21 The inspector stopped short. And we have no
22 explanation in the record as to why he stopped short.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

9

1 But again, we're looking at a bench that is all dug
2 up and uneven. And it would be -- frankly, if you
3 drove over it, it would be uncomfortable to drive
4 over it because it's bumpy and you have to drive very
5 slowly.

6 It's easier just to get out and do what the
7 inspector did, do what Mr. Traylor did: walk up to
8 the dragline. Obviously the service truck that was
9 there, the welding truck, has to get up there because
10 they've got welding equipment to work on the
11 dragline.

12 We believe that this is not a roadway. But
13 we also think, more importantly, that it's certainly
14 not -- if there was a violation, if there was a
15 roadway, and if you accept the inspector's testimony
16 and it's inconsistent, and the judge's findings are
17 inconsistent --

18 CHAIRMAN JORDAN: Can I ask you to hold on?

19 MR. MOORE: Sure.

20 CHAIRMAN JORDAN: I just want to make sure
21 that this is being recorded.

22 (Discussion off the record.)

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

10

1 CHAIRMAN JORDAN: I'm sorry. I just wanted
2 to make sure the recording was done properly.

3 MR. MOORE: We have -- the Judge in this
4 case said that as long as one rubber tire vehicle
5 traveled on that bench, that was enough for it to be
6 a roadway. I would submit that is not a standard
7 that this Commission has adopted or a standard that
8 is logical because there are a lot of places you may
9 go in a mine in a vehicle that you go one time that
10 are not necessarily roadways.

11 But if I may on the S&S issue. We have,
12 what I think, is a clear deficiency of evidence on
13 the Secretary's part. The inspector, when he
14 testified --

15 COMMISSIONER COHEN: Excuse me. Are you
16 going to go back to the violation issue, or have you
17 passed that?

18 MR. MOORE: I'm moving on past there. So I
19 guess not.

20 COMMISSIONER COHEN: Mr. Stumbo testified
21 that there was no berm for a distance. And when you
22 were examining Mr. Traylor, he said that the berm --

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

11

1 which he estimated to be above 16 or 17 inches --
2 extended from the vehicle down along the bench. Is
3 it your position that Mr. Stumbo was incorrect when
4 he said that there was no berm for part of the area?

5 MR. MOORE: If he perhaps had stated it like
6 that, I would have less ability to disagree with him.
7 But since he stated it in what appeared to be a
8 hyperbolic fashion -- "zero berms, zero berms" -- I
9 think that we have an inspector we can look at over
10 the course of citation of two orders.

11 And if he had a -- one, he had some failures
12 of recollection; two, he had a tendency toward
13 hyperbole. And I think that the Judge's decision --
14 which is inconsistent because she's saying there was
15 remnant berm. But she's also saying there was an
16 inadequate berm and apparently not accepting Mr.
17 Stumbo's flat-out zero berms -- that we have to take
18 what he said with some grain of salt.

19 That it is -- he looked at his notes. He
20 doesn't identify any specific place along there where
21 he thought there was no berm. It doesn't make sense
22 in the context of what was going on. And if you look

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

12

1 at his notes, it would have been -- we had a drawing
2 that was a challenge, but the inspector has nothing.
3 We have just the bare minimum in his notes.

4 COMMISSIONER DUFFY: Counsel, would it be
5 fair to say that when Mr. Stumbo says "no berms," he
6 may be saying "no berms as the standard as I
7 interpret it should require"?

8 MR. MOORE: I can't speculate as to what he
9 meant.

10 COMMISSIONER DUFFY: Because it happens a
11 couple of times in the record.

12 MR. MOORE: Yes. He said "zero berms" and
13 then he talked about remnant berms. The inspector
14 tended to -- his testimony, in our view, lacks
15 clarity. And our way of thinking, he should have
16 identified if he says there's places where there's no
17 berms, he should have said, "Okay. From my vehicle
18 to that dragline, this is where." Because given the
19 practice, why would you assume there were zero berms?
20 That doesn't make sense.

21 Because after that dragline moves through
22 and is done, and they come back and repair the bench

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

13

1 so it can be a roadway, they're going to have to
2 reinstall berms. Well, if you go with the factor
3 that humans are not going to do more than they have
4 to do as an employee, then it's easier to reinstall a
5 berm that's from 3 feet up to 5 feet rather than no
6 berm at all.

7 COMMISSIONER COHEN: Now, it was not
8 clarified by counsel for the Secretary about what
9 this "no berm, zero berms" meant. But it also wasn't
10 cross-examined by you, I don't think, was it?

11 MR. MOORE: No. That's the Secretary's
12 burden as we see it. And if there isn't a clarity,
13 then it is not our job to establish clarity as we see
14 it. It is the Secretary's job to establish clarity.

15 COMMISSIONER COHEN: But since he said "no
16 berms, zero berms," could that not serve as
17 substantial evidence? Since we're looking at it --

18 MR. MOORE: I don't see.

19 COMMISSIONER COHEN: You know, it's a
20 different argument to the Judge than to us. We look
21 at it as substantial evidence.

22 MR. MOORE: I don't see that the Judge

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

14

1 accepted the zero berms because she referenced
2 remnant berms. So...

3 COMMISSIONER COHEN: Okay.

4 COMMISSIONER YOUNG: Well, you can have a
5 remnant berm. Like the Roman Coliseum is a remnant.
6 There are places where there aren't any walls there
7 anymore.

8 MR. MOORE: That is correct. But the
9 intention is not to lower them so far that there's
10 nothing there. It's simply to lower it far enough so
11 that when the dragline comes through, you've got the
12 maneuverability to move the dragline through.

13 COMMISSIONER YOUNG: But, I mean, just
14 looking at the evidence from the standpoint of what
15 the Judge found, she found there was a remnant berm.
16 If the inspector said "there's an area where there
17 was no berm," is it impossible that conditions or
18 errors in clearing the berms resulted in an area
19 being lowered so much that the berm appeared to not
20 be present for part of that?

21 MR. MOORE: I think if you're speaking of
22 remnants -- if you're speaking, for example, of the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

15

1 Roman Coliseum, there are things there that stick up
2 above the ground. And I would interpret the Judge's
3 decision where she's speaking of remnant berms as not
4 a non-existent no berm, but something was there.

5 COMMISSIONER YOUNG: But she didn't make a
6 specific finding that there was a remnant berm
7 extending the entire length of this bench.

8 MR. MOORE: No. Her decision is unclear in
9 that respect.

10 On the issue of S&S, the Secretary has asked
11 this Commission to assume that there would have been
12 overtravel. Obviously, that issue is -- although I
13 think it predated the Commission decision in
14 Cumberland -- but this is different.

15 This is not a situation where you can assume
16 the event. On lifeline you're assuming there was a
17 fire or explosion. I don't think this -- these berms
18 are intended to prevent overtravel. I don't think
19 you can assume overtravel.

20 I think you have to do the traditional
21 evaluation of whether it was reasonably likely there
22 would be overtravel, as the judges have consistently

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

16

1 done. And if you do that, the Judge's decision
2 doesn't meet the mark.

3 The problem, of course, is the inspector
4 testified -- if you look at his testimony, he's
5 testifying about what could happen if you overtravel.
6 Well, the problem you have with that is it doesn't
7 address the third prong of Mathies. And that's the
8 problem in all of these, the citation and two orders:
9 the third prong isn't really addressed.

10 And in this particular one, what we have is
11 one vehicle that was within 18 feet of the edge. The
12 ALJ referenced that the inspector's testimony about
13 perhaps the edge would be unstable. Well, if it's
14 unstable, that really is a non sequitur in a sense
15 because if it's unstable, the ground is giving way,
16 not the berm. The berm is irrelevant at that point,
17 frankly.

18 So there is that issue. And also, in fact,
19 they just brought a 10-million pound machine through
20 there, and there isn't any signs of instability.

21 COMMISSIONER YOUNG: Well, they're trying to
22 keep that 10-million pound machine away from the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

17

1 edge, right?

2 MR. MOORE: That 10-million pound machine is
3 within 25 feet of the edge; this truck was within 18
4 feet of the edge. So I'm -- and there's no
5 testimony, of course to --

6 COMMISSIONER YOUNG: The material underneath
7 the dragline is going to be compressed. I mean,
8 you're probably not going to have instability there.
9 But is it not at least possible that as you're
10 compressing that material, you're pushing more
11 unconsolidated material out? Where is it going to
12 go? Wouldn't it be more likely to extend out towards
13 the edge?

14 MR. MOORE: Then you would see signs of
15 instability, which there is no evidence of in this
16 case, Commissioner -- that there was any evidence of
17 instability. And even if there were, the problem is,
18 what your concern there is, is unstable ground, not
19 the lack of berms or the inadequacy of berms.

20 What we have --

21 CHAIRMAN JORDAN: So is it just one truck?
22 I know in this case there was one truck that was

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

18

1 doing welding.

2 MR. MOORE: Yes.

3 CHAIRMAN JORDAN: And that was brought in
4 because the dragline had an electrical problem. So
5 the vehicle that allowed people to do the electrical
6 work, that's a different vehicle?

7 MR. MOORE: There were -- the welding
8 truck -- if you're standing where the inspector was,
9 down the bench was the dragline. The welding truck
10 was between the inspector and dragline. There were
11 three other vehicles on the other side that were
12 dealing with the electrical issue. And they came
13 down a road that's shown on our drawing and were
14 right there at it. They wouldn't have been traveling
15 on the bench.

16 CHAIRMAN JORDAN: So they didn't travel in
17 the same area as the truck that was?

18 MR. MOORE: No. And there was no indication
19 that, except for that truck -- the welding truck --
20 leaving when they solved the electrical problem, that
21 there would be any other traffic on the bench before
22 the move was completed.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

19

1 COMMISSIONER YOUNG: But for the electrical
2 problem, would there have been any travel there at
3 all? Would the truck have gone down there at all?
4 Or another type of problem? Under normal conditions
5 was this foreseen?

6 MR. MOORE: Under normal conditions, there
7 wasn't any evidence that they would need to go down
8 there for any reason. Among other things that you
9 can -- they're all connected by radio. So if they
10 want to know what's happening, they can call.

11 And ALJ also referenced potential
12 malfunctions. Now, there is no real development of
13 that issue in the record by the Secretary. The fact
14 that you would, if you were driving on this bench,
15 have to drive slower, I don't believe is a detriment.
16 I believe there's case law that suggests if you drive
17 slower, it will be better.

18 And we all know that if you need -- the
19 basic physics of it are that the slower you drive,
20 the less momentum you have; and so the less -- if you
21 have a problem, you're going any place other than
22 stopping. But there's simply nothing in the record

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

20

1 that really supports what kind of malfunctions the
2 Judge or the inspector had in mind. And simply put,
3 they've been moving draglines at this mine for a long
4 time without any incidents.

5 COMMISSIONER COHEN: Mr. Moore, I want to
6 ask you about your reading of the Judge's decision in
7 a couple of places. At page 27 of your brief, you
8 said that the second violation -- well, let me --
9 we'll get there when we get there.

10 MR. MOORE: Okay. Simply put, there isn't
11 anything in this record that establishes on this
12 particular citation that it was reasonably likely
13 somebody was going to go over the edge; in fact, was
14 going to drive near the edge.

15 We have a 200-foot-wide bench. If I'm
16 driving down the middle of that bench or over toward
17 the spoil bank, that's a different situation than if
18 I'm driving right at the edge, and no one indicated
19 they were driving right at the edge.

20 And, in fact, the 18 feet is the width of
21 pretty much a standard country road in my experience.
22 And so there's some distance away from it. There is

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

21

1 no indication that this would be repeated. So we
2 don't believe it shows reasonably likely.

3 We also don't believe that it was
4 unwarrantable. Both the ALJ and the inspector relied
5 on the fact there had been two previous citations
6 issued for berms. One of those is illustrative of
7 the fact that after the dragline moves through, you
8 have to rebuild the bench and rebuild the roadway and
9 create a roadway with berms.

10 We also believe the case law doesn't show
11 that you need -- that two puts you on high alert.
12 The inspector's testimony in this regard -- we didn't
13 have the other two people who were helping him. But
14 the inspector could only be considered to be ignorant
15 of what those prior citations were or what the
16 discussions were with the supervisor in the company.
17 There wasn't any evidence that they had discussions
18 about that.

19 But what we do know, we have two citations
20 of the tenth most frequently cited standard in
21 surface coal. We have MSHA's own rules that talk
22 about repeats. They don't even begin to consider

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

22

1 something a repeated violations until there are six
2 in part 100; five for contractors, which obviously is
3 not an issue here.

4 What we have here, if you get beyond that,
5 is a circumstance where they had been lowering the
6 berm on the outer edge through dragline moves both at
7 this mine and other mines for years and it had never
8 been an issue as far as they knew. And yes, while
9 there were supervisors there, there was a distinct
10 dispute between what the supervisors testified to
11 what they saw and what the inspector saw. The ALJ
12 relied in finding unwarrantable to an extent on the
13 fact that it was the practice to lower the berm on
14 the outer edge when you were moving a dragline.

15 The testimony -- and it's really not
16 disputed -- is that was a safety issue. You had to
17 make sure you had enough room to maneuver the
18 dragline. And that that was the basis of that
19 practice. So I don't think, from a standpoint of the
20 ALJ's finding, that you can rely on the fact it was a
21 practice to lower. It was necessary.

22 CHAIRMAN JORDAN: Just so I'm clear, you're

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

23

1 not claiming that you're unable to lower it and still
2 be mid-axle height for any service truck that might
3 come up?

4 MR. MOORE: Yes. We can lower it and keep
5 it at mid-axle height. Yes.

6 CHAIRMAN JORDAN: Okay.

7 MR. MOORE: And that's, I mean --

8 CHAIRMAN JORDAN: I think you're claiming
9 that's essentially what happened here.

10 MR. MOORE: That's what happened here.

11 CHAIRMAN JORDAN: Under your facts.

12 MR. MOORE: Yes.

13 COMMISSIONER YOUNG: If it's not a roadway,
14 why are you worried about it?

15 CHAIRMAN JORDAN: Well, that's my first
16 question.

17 MR. MOORE: Because you have to rebuild it
18 after the dragline move through. I'd rather rebuild
19 something that's already at 3 feet then have to bring
20 it back up to 6 feet from zero.

21 And it's -- from what I assume what happened
22 is, the bulldozer that's doing this drives up to the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

24

1 berm and doesn't lower its blade all the way down.

2 It lows it so it cuts the top off the berm.

3 COMMISSIONER YOUNG: But I guess my question
4 is really you don't worry about the precision because
5 it's not going to be a roadway until you have to
6 rebuild the berm to accommodate the mine trucks?

7 MR. MOORE: Yes.

8 COMMISSIONER YOUNG: The regular mine
9 traffic.

10 MR. MOORE: I would think not. But all of
11 the, sort of, reasoning behind how they did it was
12 not on record in this matter. It was simply that
13 that was the practice and it was a practice based on
14 being able to move the dragline safely.

15 COMMISSIONER YOUNG: So precision is not
16 really a concern? It's possible there are areas
17 where too much berm was scalped off?

18 MR. MOORE: I can't really speculate,
19 Commissioner. I can't enter the mind of an
20 experienced dozer operator to see what they're doing.

21 The second enforcement action at issue here
22 is, of course, the ramp on. And I want to touch

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

25

1 briefly on the S&S issue there because here we have a
2 ramp that was built two hours before. It's a
3 short-term ramp, and it will be moved to move a
4 drill. And it's not going to exist more than another
5 24 hours because when they get up they'll drill; and
6 all that material that they'll drill in the upper
7 bench will get shot and will come down and obliterate
8 this area.

9 COMMISSIONER COHEN: I'm going to ask you
10 about that, the S&S argument that you made here. You
11 said that the Judge found that an incident of
12 overtravel was reasonably likely? Is that --

13 MR. MOORE: That's what the Judge had to
14 find in order to --

15 COMMISSIONER COHEN: Okay. Now, in the
16 Judge's opinion, she says, "further" -- this is as to
17 the second violation. "Further, I find that the
18 violation contributes to the danger of a vehicle
19 veering off the elevated roadway and rolling or
20 falling down the spoil incline."

21 Wasn't she speaking there of the hazard, not
22 the event?

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

26

1 MR. MOORE: Well, I don't know how you can
2 speak about the hazard and separate it from the facts
3 and circumstances. If she -- well, let me back up.
4 If she's speaking about the hazard there, the problem
5 is you cannot speak of the hazards and remove it from
6 the context of the particular circumstances. And the
7 particular circumstances, we believe here, show that
8 the potential hazard in this situation -- if, in
9 fact, a violation existed -- was not reasonably
10 likely.

11 If you came down that road -- and it's a
12 relatively short issue that's at dispute on that
13 road. If you came down that road -- and there's no
14 evidence that anybody else besides the one supervisor
15 came down was going to use it -- excuse me, there was
16 one other set of tracks that they assumed somebody
17 was leaving from that area -- you don't have any
18 significant traffic on this.

19 You have one supervisor who came down it.
20 And frankly, when he started down it -- and the ALJ
21 found a great deal of weight of his setting a bad
22 example, which I think -- I'm puzzled by because

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

27

1 there's no evidence that he'd been down that road
2 before. He'd seen the road before. When he starts
3 down that road, he's got walls on both sides of him.

4 COMMISSIONER COHEN: That's a negligence
5 issue.

6 MR. MOORE: Yes.

7 COMMISSIONER COHEN: I'm not asking about
8 that. You said that the hazard was not reasonably
9 likely. But under the Mathies Test, a hazard does
10 not have to be reasonably likely for the Secretary to
11 carry her burden. Isn't that true?

12 MR. MOORE: I think that the hazard does
13 have to be reasonably likely.

14 COMMISSIONER COHEN: Mathies says, "The
15 hazard is contributed to by the violation." Where in
16 there does it say reasonably likely? You get into
17 reasonably likely in the third prong but not in the
18 second.

19 MR. MOORE: Well, I'm talking about the
20 third prong, where you have to show that the hazard
21 coming to fruition is reasonably likely under the
22 circumstances of the case that we have.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

28

1 COMMISSIONER COHEN: Doesn't this depend on
2 how you define hazard in any given case?

3 MR. MOORE: I suppose it could. And that's
4 one of the problems we have here. When we look at
5 the third-leg of Mathies, whether you say it's the
6 hazard or the condition or whatever, you're still
7 looking at the fundamental fact: Will this
8 condition -- is it reasonably likely to result in
9 injury?

10 COMMISSIONER COHEN: Mathies is very precise
11 about this. It says "the violation has to contribute
12 to the hazard," second step; and then third step,
13 "the hazard must be reasonably likely to cause an
14 injury."

15 MR. MOORE: But --

16 COMMISSIONER COHEN: Reasonably likely.
17 There's some distinction between the second step and
18 third step. It seems to me you're kind of just
19 mushing them together.

20 MR. MOORE: Well, the second step does speak
21 of hazard. And if the third step speaks, you're
22 looking at the particular circumstances. The hazard

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

29

1 isn't a theoretical hazard under the standard. It's
2 a theoretical -- it's a hazarding of real world as to
3 whether or not the conditions here are reasonably
4 likely to result in an injury.

5 COMMISSIONER COHEN: Okay.

6 MR. MOORE: Now, I'm out of time. But let
7 me --

8 CHAIRMAN JORDAN: You can address, you know,
9 the third violation. We'll give some extra time,
10 given the questioning and the technological issues.

11 MR. MOORE: Okay. The third enforcement
12 action involves a dump site. Now, there are a number
13 of things about this that are at issue, obviously.
14 But the most important in a sense, the broadest
15 reaching, is this amendment by the Secretary to plead
16 in the alternative.

17 They initially cited it under 1605(k), which
18 is roadway; then they changed it to a dump site. And
19 we're not sure. It's a dump site. That's what it
20 is. It's not -- you can look at the inspector's
21 testimony, and it's pretty muddled. But it's a dump
22 site. They were taking material up there from the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

30

1 shovel and dumping it up there, and a dozer operator
2 was dealing with it once it was dumped on the ground.

3 But the problem we have had is, I looked in
4 my Document Management System just to see. And since
5 1909, the Denver Solicitor's Office alone has moved
6 in a similar fashion to here nine times just before
7 hearing to either plead in the alternative or amend
8 the citation.

9 This is an ongoing problem. And it's an
10 ongoing problem, as I see it, of the credibility of
11 MSHA because if you plead in the alternative, you are
12 pleading for "we've got to win some way; and it looks
13 like you've got a good argument on this, so we're
14 going to give you this." And that, I think is
15 inappropriate. And I think this Commission, at this
16 point, should say no.

17 The other thing that really is highlighted
18 with this particular order is -- and I think this
19 goes for both this and the ramp -- what did the
20 operator know? Let's look at what the operator knew.
21 The operator knew there was a dozer operator who was
22 supposed to be spotting trucks on that dump site.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

31

1 The operator knew that he'd called that dozer
2 operator and said "come down to the shovel that's
3 loading these trucks and rearrange the berm." The
4 operator also knew that he'd called the truck and
5 said not to go up there.

6 Now, we obviously have a dispute of facts
7 whether the inspector saw a truck up there dumping
8 and whether that truck had been spotted or not. But
9 what we know is up until the supervisor went up there
10 when he was called by the inspector, he thought that
11 he had somebody up there when trucks were up there;
12 he thought he had stopped the trucks; and he thought
13 as long as he had a spotter -- which is, if it's a
14 dump site, it's okay; and he had a spotter.

15 And until he walks up there and we get the
16 inspector's point of view, he doesn't see or know of
17 a problem. And if you have a question as to whether
18 it would be continuing truck movement up there, the
19 dozer operator went to the shovel that was loading
20 the trucks that were dumping. While it's down there,
21 that dozer is down there doing some work around the
22 shovel. The shovel is not loading trucks. The

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

32

1 shovel is waiting for the dozer operator to finish so
2 he can start loading trucks again. Or she.

3 So we have a situation where it's just like
4 the ramp in that sense: You don't know, in the ALJ's
5 finding on normal failures, where there isn't any
6 knowledge of the operator of the valative [sic]
7 condition if, in fact, it was valative [sic]. And
8 I've really used up my time. I apologize.

9 CHAIRMAN JORDAN: Thank you very much.

10 COMMISSIONER COHEN: One question here. The
11 thing that seems to be assumed by everybody is that
12 the spotter is the equivalent of the berms.

13 MR. MOORE: Yes.

14 COMMISSIONER COHEN: And I recognize that
15 that's what the inspector testified.

16 MR. MOORE: And that's what the standard
17 says.

18 COMMISSIONER COHEN: Well, doesn't it say it
19 is similar to?

20 MR. MOORE: Yes. And the spotter is
21 considered similar to --

22 COMMISSIONER COHEN: I'm just wondering.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

33

1 Berms, bumper blocks, or safety hooks: These are
2 physical things that stop a truck.

3 MR. MOORE: Yes. And a spotter is
4 considered the equivalent both by the industry and by
5 MSHA, as far as I know.

6 COMMISSIONER COHEN: Okay.

7 MR. MOORE: And in this case, think about
8 what the spotter was doing. He'd pull up and the
9 truck would pull up beside him and his dozer and tell
10 him where to dump it. Because what he's doing, he's
11 doing two things up there: He's pushing the material
12 out to the edge; and he's also working material down
13 the hill in that one gap in the bermed area because
14 he's trying to correct the unstable condition.

15 So he wants to know where things are going.
16 And he doesn't really want them up by the edge
17 because he's correcting conditions on the edge.
18 That's why they were dumping in the middle. Thank
19 you.

20 CHAIRMAN JORDAN: Thank you. Office of the
21 Secretary?

22 MR. WALDMAN: May it please the Commission.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

34

1 There was some discussion about the roadway regarding
2 the dragline violation, and some discussion back and
3 forth as to whether the bench was qualified as a
4 roadway. And I want to point out a couple of things
5 about that.

6 First of all, Inspector Stumbo's testimony
7 was not at all unclear. Inspector Stumbo was
8 unequivocal that there were no berms. He never
9 talked about inadequate berms. He never used that
10 phrase "inadequate berms." He simply said there were
11 "zero berms" or "no berms." And he identified
12 two-tenths of a mile as the area where there was no
13 berm. And he specifically pointed to the area where
14 the service truck had been moving towards the
15 dragline as the area in which there was no berm.

16 Things really only got confused when the ALJ
17 started using different terms: remnant berms,
18 inadequate berms, so on and so forth. But I think a
19 fair reading of the ALJ's decision in crediting
20 Stumbo's testimony and in the conclusions that she
21 reached is that she agreed with the inspector that
22 there were no berms for two-tenths of a mile.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

35

1 I understand that she used the phrase, at
2 some point, "inadequate berms." But also in her
3 discussion of the unwarrantable failure issue, she
4 did use the phrase "total lack of berms." That's on
5 page 7 of the ALJ's decision.

6 So to the extent that there's any ambiguity,
7 I think that will resolve it and show that, based on
8 what was written in the citation and what the
9 inspector said when he testified, is what she
10 credited.

11 COMMISSIONER YOUNG: But if she says in her
12 decision there's a "total lack of berms," and it says
13 elsewhere in her decision that there is a "remnant
14 berm," that's inconsistent. That's internally
15 inconsistent, is it not? A total lack means nothing.
16 So this is not a case where she is pointing out an
17 area where there is no berm. She's talking about a
18 total lack of berms in the context of the
19 unwarrantable failure. Like they didn't care; they
20 didn't leave one at all.

21 MR. WALDMAN: True. But the ALJ and the
22 Secretary as well recognizes that there were. There

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

36

1 was a remnant berm on that bench.

2 COMMISSIONER YOUNG: How is that consistent
3 with a total lack of berm? A remnant berm --

4 MR. WALDMAN: Because the bench is pretty
5 long. And we're only talking about two-tenths of a
6 mile where there was no berm.

7 COMMISSIONER YOUNG: But when it's your
8 burden of proof though -- just to analogize this to,
9 perhaps, a different scenario. When you have
10 inspectors go into underground mines and they're
11 talking about water in an escapeway, obstructions in
12 the escapeway, they're typically described with some
13 particularity. They're talking about the depth of
14 the water for this many feet; they talk about the
15 number of obstructions, where they're located.

16 Here we have an inspector who doesn't
17 specify exactly where it is, that there's no berm.
18 And it's not solidified or cleared up with the
19 Judge's decision as to where that is. I don't
20 believe.

21 MR. WALDMAN: Excuse me, but I would
22 respectfully disagree with that, Commissioner Young.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

37

1 The citation itself, which is Exhibit P4, says, "The
2 dragline bench travel road does not have a berm for a
3 distance of approximately two-tenths of a mile where
4 a service truck with two miners traveled within 18
5 feet of the outer banks of a bench."

6 And the inspector's testimony at page 29 of
7 the hearing transcript is absolutely consistent with
8 that. The only confusion comes in with the ALJ's
9 decision. And, you know, if the Commission thinks
10 that the ALJ is confused, then of course you can
11 remand it and tell her to clarify it.

12 COMMISSIONER DUFFY: Doesn't that assume
13 that we only need to look at the inspector's
14 testimony and not the testimony of everyone else? I
15 mean, what you're basically saying is there's a
16 conflict between the inspector and the Judge, so we
17 should find in favor of the inspector.

18 MR. WALDMAN: No, no.

19 COMMISSIONER DUFFY: Ignoring other evidence
20 in the record that talks about a reoccurrence.

21 MR. WALDMAN: I'm sorry, Commissioner Duffy.
22 That's not at all what I'm saying.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

38

1 COMMISSIONER DUFFY: Good.

2 MR. WALDMAN: I was addressing the
3 discussion before where it seemed that the point
4 being made was that the inspector's testimony was
5 somehow unclear. I think the inspector's testimony
6 is perfectly clear; and his citation is perfectly
7 clear as well.

8 Now, the ALJ confused it with her
9 terminology. I'll admit yeah, that Black Beauty's
10 witness, Mr. Traylor, his testimony was, "No. We had
11 an adequate remnant berm on the entire dragline."
12 However, the ALJ credited Inspector Stumbo's
13 testimony over that testimony.

14 COMMISSIONER DUFFY: Despite the fact that
15 she mentions a remnant berm.

16 MR. WALDMAN: But there is a remnant berm.
17 That's what I'm trying to say. Everybody agrees
18 there's a remnant berm. It's two-tenths of a mile
19 here. That's what the inspector said. That's what
20 the inspector wrote. And that seems to be what the
21 ALJ found, but, you know, that's for the Commission
22 to decide.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

39

1 In any event, unless the Commission has any
2 specific questions regarding the violations, the
3 Secretary will rest on her brief with respect to the
4 violations and address the S&S issue.

5 COMMISSIONER COHEN: I want to ask you this:
6 If the dragline experiences mechanical problems in
7 these repairs, is it MSHA's position that the berm
8 that had been reduced must be rebuilt prior to the
9 time that the truck goes up there to make the
10 repairs?

11 MR. WALDMAN: Yes.

12 COMMISSIONER COHEN: And then it can be
13 taken down again after the repairs?

14 MR. WALDMAN: It won't need to be taken down
15 again because the dragline has already passed that
16 point. If the berm has been taken down, the dragline
17 has moved.

18 And so, as the ALJ pointed out in her
19 decision, the dragline moves so slow that it really
20 wouldn't have been a problem at all for Black Beauty
21 to reestablish that berm as the dragline moved.

22 And in the case, whereas here, the dragline

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

40

1 breaks down along the way and needs servicing and
2 that service is going to be provided by a truck, then
3 yes, it would be essential for Black Beauty to make
4 sure that if the remnant berm that's there isn't
5 adequate, that it be restored to adequacy before that
6 service truck arrives.

7 COMMISSIONER YOUNG: All this presupposes
8 this is an elevated roadway, right? If it's not an
9 elevated roadway, you don't need berms, right?

10 MR. WALDMAN: That's right.

11 COMMISSIONER YOUNG: So he's driving 18
12 feet. 18 feet is a long way from the edge.

13 MR. WALDMAN: 18 feet isn't that long away
14 from the edge. It's maybe from here to that wall
15 (Indicating). And the road, as Black Beauty admits,
16 is in terrible condition.

17 COMMISSIONER YOUNG: If it's a road.

18 MR. WALDMAN: If it's a -- well, okay.
19 Yeah. If it's a road.

20 COMMISSIONER YOUNG: I mean, you're --

21 CHAIRMAN JORDAN: Well, counsel said it was
22 a road.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

41

1 COMMISSIONER YOUNG: If you're saying road
2 is defined by a single incident of vehicular travel
3 that didn't appear something was necessarily foreseen
4 but was driven by a need to repair the equipment and
5 send a vehicle over it, I'm having trouble grasping
6 that that, you know, is a road.

7 If a truck is driving in an area and gets
8 lost and goes out to an elevated area that doesn't
9 have any berms, does that transmute that area into a
10 road for purposes of the --

11 MR. WALDMAN: Probably not. But this is a
12 very different situation. Mr. Traylor himself -- no.
13 I'm sorry. Not Mr. Traylor. Mr. Hoehler, who was
14 the dragline manager, testified that this is a common
15 practice. When the dragline breaks down, they will
16 send a truck up there to do whatever repairs are
17 necessary. And the dragline is moved approximately
18 every seven days, according to the record.

19 So even though this particular dragline move
20 was temporary, it's a recurring activity at the mine.
21 Every seven days they're going to move this dragline.
22 And it's a recurring activity that the dragline will

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

42

1 need repairs during the moves. And it's a
2 reoccurring activity, then, that these trucks come up
3 to do that.

4 COMMISSIONER YOUNG: So the bench is 200
5 feet wide, and you're driving along there. Where's
6 the hazard? You're 18 feet from the edge. I mean,
7 you're building these berms to protect miners. Where
8 is the danger involved that requires a berm if you
9 don't need to be any closer than that?

10 And I don't see why you need to be closer
11 than that; the driver of the truck didn't see any
12 need. And you've got 200 feet to work with. Why
13 would you drive any closer to the edge than that?

14 MR. WALDMAN: You don't have 200 feet to
15 work with because the dragline is here (Indicating).
16 And you've got 25 feet between the dragline and the
17 edge. So you have 25 feet to work with, but not 200.

18 COMMISSIONER YOUNG: That's a long way.

19 MR. WALDMAN: That's a long way. But the
20 road is in terrible condition. And also, there's
21 testimony from the inspector that the closer you get
22 to the edge, the less stable it is. And that's where

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

43

1 the danger is.

2 COMMISSIONER YOUNG: Why is it less stable?

3 MR. WALDMAN: Why is it less stable? Nobody
4 asked the inspector that question, and I'm not
5 qualified to answer it.

6 COMMISSIONER DUFFY: If it's unstable and it
7 fails, it's going to take the berm with it.

8 CHAIRMAN JORDAN: Yes. I have to agree. I
9 think counsel for operator has a point. I'm not sure
10 the berm --

11 COMMISSIONER DUFFY: The berm is going to be
12 lost with anything else that goes over the edge.

13 MR. WALDMAN: That's fine.

14 CHAIRMAN JORDAN: That's not the purpose of
15 the berm, I don't know, to stabilize the ground. I
16 mean, if the ground is unstable, I'm not sure that
17 that's the point, you know, to put the berms up to
18 stabilize ground.

19 MR. WALDMAN: We've moved into the S&S
20 question, then. We're beyond the roadway? I mean,
21 that's where I'm going. And the question there is,
22 you know, the Commission's decision in Cumberland was

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

44

1 very enlightening. And, unfortunately, neither the
2 ALJ nor the parties when they briefed this case had
3 the benefit of that enlightenment. And the
4 Cumberland decision redirected the Mathies analysis
5 such that a lot of what was written in the briefs is
6 not really very helpful at this point.

7 If you're applying the Mathies analysis
8 that's directed by Cumberland, the most important --
9 not the most important, but the first important thing
10 you do after you've gotten past the violation, you go
11 to the second prong, and you have to identify the
12 hazard.

13 The hazard, in this instance, is going over
14 the edge of an elevated roadway in the event that the
15 driver of the vehicle loses control. Because unless
16 and until the driver loses control of that vehicle,
17 there's really no hazard of going over the edge.

18 It's an emergency. A driver loses control
19 of the vehicle. And if you've ever been behind the
20 wheel of a vehicle and lost control even for a second
21 or two, you know, you know that that's an emergency.
22 That's a terrifying prospect. You've got an

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

45

1 emergency when a driver loses control of a vehicle.

2 The question, then, is: In the event that a
3 driver -- then you move to the third element of
4 Mathies. And the question is, in the event that a
5 driver loses control of the vehicle, is it reasonably
6 likely that that vehicle is going to go over the
7 edge?

8 COMMISSIONER DUFFY: I have difficulty
9 applying Cumberland to this particular set of facts.
10 But I have a question: Is there any conceivable
11 standard other than, say, training or registration of
12 independent contractors, any kind of true safety and
13 health standard that the violation of which would not
14 induce some sort of an emergency? I mean it seems --

15 MR. WALDMAN: It's not a violation --

16 COMMISSIONER DUFFY: -- to me what you're
17 saying is, you're assuming that something bad is
18 going to happen just because something is violated.

19 MR. WALDMAN: No. That's absolutely
20 incorrect, Commissioner Duffy.

21 COMMISSIONER DUFFY: Well, then I have
22 difficulty with what you're saying. In your brief

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

46

1 you seem to be telling us that we should assume
2 overtravel.

3 MR. WALDMAN: Well, what I just said a
4 minute ago is that a lot of what's in the brief has
5 been overtaken by events and is no longer
6 particularly useful.

7 COMMISSIONER DUFFY: Fine. But in
8 Cumberland we assume a fire or smoke problem in an
9 underground mine, and then we move on to lifelines
10 and certain steps that are taken in response to that
11 emergency.

12 MR. WALDMAN: I disagree with that,
13 Commissioner Duffy. That's not what Cumberland says
14 at all. Cumberland says that, under the second
15 element of Mathies, you identify the hazard; and
16 then, under the third element, you inquire as to
17 whether the hazard is reasonably likely to come to
18 fruition.

19 COMMISSIONER DUFFY: The second element is
20 that you assume that that situation has occurred,
21 that that exists. You assume there's a fire.

22 MR. WALDMAN: Okay.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

47

1 COMMISSIONER DUFFY: You don't backtrack and
2 say, "Is there a likelihood in this mine --

3 MR. WALDMAN: That's right.

4 COMMISSIONER DUFFY: -- at that time --

5 MR. WALDMAN: Okay. Yes.

6 COMMISSIONER DUFFY: -- that there would be
7 a fire."

8 MR. WALDMAN: Okay.

9 COMMISSIONER DUFFY: Okay?

10 MR. WALDMAN: Yes.

11 COMMISSIONER DUFFY: So that's my point.
12 You're assuming a set of facts that have not
13 occurred.

14 MR. WALDMAN: That's correct.

15 COMMISSIONER DUFFY: Okay. Here you're
16 trying to, it seems to me, say the same thing about
17 virtually any safety standards. You assume that the
18 hazard the safety standard is aimed to prevent has
19 happened. In this case, you assume that the truck
20 has rolled off the edge.

21 MR. WALDMAN: No. The flaw in that logic is
22 that the berm standard is not designed to prevent

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

48

1 anybody from losing control of a vehicle. It's
2 designed to protect somebody if they lose control of
3 a vehicle. The only time when the protection of a
4 berm comes into play is if and when a driver loses
5 control of a vehicle. Just like with the case of a
6 lifeline --

7 COMMISSIONER DUFFY: I'm not sure about
8 that. The berm is there just like a guardrail on the
9 side of the highway is there. It's not necessarily
10 just to prevent me from going over the side of the
11 highway. It's for me to realize that, A, there's a
12 drop-off here.

13 MR. WALDMAN: Yes.

14 COMMISSIONER DUFFY: Its existence is
15 helpful to keeping me on the road.

16 MR. WALDMAN: That's true.

17 COMMISSIONER DUFFY: Whether or not I have
18 control of the vehicle or not.

19 MR. WALDMAN: That's true. But if that was
20 the purpose of the berm, they could have just put a
21 white line --

22 COMMISSIONER DUFFY: There's a little bit

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

49

1 more to it than that.

2 MR. WALDMAN: Oh, no. Oh, no. That would
3 serve exactly the same purpose of the guardrail. If
4 you put a bright line on the road, that gives
5 somebody notice that there's a drop-off and this is
6 where the road ends. It's the same thing.

7 If that was all that the berm standard was
8 intended to do, then that's -- I mean, why would they
9 require somebody to build this structure if all they
10 wanted to do is notify somebody?

11 COMMISSIONER DUFFY: I'm not saying that.
12 I'm saying it's not simply to prevent overtravel.
13 There are other reasons for having that guardrail and
14 that berm there.

15 MR. WALDMAN: There's other benefits to it.
16 That's a benefit for sure, but that's not the reason
17 for the standard.

18 COMMISSIONER DUFFY: It's certainly going to
19 help you with your perspective driving on that road
20 looking at the 6-foot high wall as opposed to a white
21 line on the side of the road.

22 MR. WALDMAN: I agree with you.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

50

1 COMMISSIONER YOUNG: So are you saying
2 there's no distinction, really, between the situation
3 in Cumberland -- where you have, as a fundamental
4 underlying premise, a mine-wide emergency or an
5 area-wide emergency within a mine that changes the
6 mining environment completely and brings into play
7 the safety measures designed to avert the worse-case
8 scenario, the worse catastrophes that we've seen
9 occur -- and your routine implementation of every
10 safety feature that's required in the Mine Act,
11 including these kinds of berms, including guards on
12 machinery?

13 I mean, at some point are we not at risk of
14 assuming too much and assuming that every
15 circumstance is going to be significant and
16 substantial where you have a high-degree of danger?
17 And you don't really need the Mathies test because as
18 long as there's enough danger involved, you have to
19 have this because you are going to assume somebody is
20 going to stick his arm into a machine or drive off
21 the side of the road because he's not paying
22 attention?

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

51

1 MR. WALDMAN: I understand your point and,
2 obviously, Commissioner Duffy, too. You need to have
3 a line. You need to draw the line somewhere so that
4 this "assume the emergency" thing doesn't swallow
5 every conceivable standard that there is. And the
6 Secretary fully agrees with that.

7 And I think this is where you draw the line:
8 You ask the question, "Is the protection afforded by
9 the standard meant to apply at all times, or is it
10 meant to apply in the case of a specific emergency?"
11 I think that's where, if you apply that principle,
12 you will be able to draw lines between the standards
13 that have been promulgated under the Mine Act.

14 And the berm standard is a standard in which
15 the protection that is intended to be afforded by it
16 comes into play only in the event that driver loses
17 control of a vehicle.

18 Now, just because a driver loses control of
19 a vehicle doesn't mean that the vehicle is going to
20 go over the edge. You've got to look at the scope
21 and the nature of the violation and the facts
22 surrounding -- or the surrounding circumstances to

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

52

1 determine whether that's going to happen or not in a
2 given case.

3 And unfortunately, because the Cumberland
4 decision came out much later, neither the ALJ nor the
5 parties addressed that issue in this case.
6 Ordinarily, that would suggest that the Commission
7 should remand the case to the ALJ and let the ALJ
8 address that.

9 The Secretary believes that that's not
10 necessary in this case because the facts are such
11 that the ALJ couldn't come to any other reasonable
12 conclusion; whereas here, there is an absence of a
13 berm for two-tenths of a mile, which is over a
14 thousand feet; and where this truck comes within
15 18 feet of the edge and the road is torn up.

16 And again, you're assuming that the driver
17 has lost control of the truck. And then you ask the
18 question, "under those circumstances, is it
19 reasonably likely that that truck is going to go over
20 the edge?"

21 COMMISSIONER COHEN: Actually, the decision
22 in Cumberland was directly derived from the previous

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

53

1 decision, PBS Musser. And I recognize that PBS
2 Musser was decided also decided after this was fully
3 briefed.

4 But I was asking Mr. Moore some questions
5 about the Judge's decision and suggesting that the
6 Judge's articulation -- when we were talking about
7 the second violation -- that the violation
8 contributed to the danger of a vehicle veering off
9 the elevated highway and rolling down the spoiling
10 point, which precisely is a description of a hazard.
11 Although she didn't -- she wrote that before --

12 MR. WALDMAN: Yes.

13 COMMISSIONER COHEN: -- those decisions.

14 MR. WALDMAN: I agree with that.

15 COMMISSIONER COHEN: And she later said, "If
16 a truck should go over, then there's a reasonable
17 likelihood of injury."

18 MR. WALDMAN: Well, I think I tend to agree
19 with Mr. Moore, though, that that's addressing the
20 fourth prong of Mathies. The question is --

21 COMMISSIONER COHEN: Doesn't it also address
22 the third prong? It addresses both.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

54

1 MR. WALDMAN: No. Because the question --
2 because it's assuming that the truck is going to go
3 over the edge. And I don't think that even the
4 Secretary would advocate that there should be an
5 assumption that the truck is going to go over the
6 edge.

7 The assumption is that the driver has lost
8 control; therefore, the berm standards protections
9 come into play. And then the question is, under the
10 circumstances and given the scope and the nature of
11 the berm violation, will the truck that's out of
12 control go over the edge? That would be the third
13 prong of Mathies.

14 And I understand that's different from the
15 way we briefed the case, but a lot of water has
16 passed under the bridge since we briefed the case.

17 So now applying the same test to the two
18 other violations, again, the cases are pretty
19 compelling in the Secretary's view, that it would be
20 very difficult for the ALJ to reasonably reach a
21 different conclusion on the S&S issue.

22 With the drill bench you've got a 75-foot

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

55

1 gap; you've got a berm at the top; you've got this
2 sort of double berm thing at the bottom; and you've
3 got no berm for 75 feet which, in the Secretary's
4 view, is about two-thirds of the length of the road
5 and in Black Beauty's view, it's half.

6 So at least half of the road has no berm.
7 And this road is not as wide as the dragline bench,
8 although there's actually no evidence saying exactly
9 how wide it is.

10 But again, if a truck on that road loses
11 control and there's no berm for half or two-thirds of
12 the distance of the truck, it's difficult to see how
13 that truck would not go over the edge. If the
14 Commission disagrees, of course the ALJ can address
15 this on remand.

16 On the third violation, the dumping
17 violation, I think that's the clearest case of all
18 because the inspector stopped the dump truck as it
19 was backing up towards the spot where there was no
20 berm. That makes it pretty clear, I think, that this
21 truck would have gone over the edge.

22 Now, on the unwarrantable issues, there's

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

56

1 one issue that's common to all three violations. And
2 that's the notice issue. And the ALJ relied on the
3 fact that there were two similar violations quite
4 recently as putting the operator on notice that it
5 needed to put forth greater efforts to comply with
6 the berm standards.

7 And according to Black Beauty, the
8 similarity of those previous violations wasn't
9 proved. And, in fact, Black Beauty's argument seems
10 to be that unless the previous violation was
11 identical or awfully close to identical to this
12 violation, then it doesn't serve the purpose of
13 notice. And I think that the Commission's case law
14 is pretty clear, that you don't need an identical
15 violation for purposes of notice.

16 In this case, the two previous berm
17 violations, one of them was on a dragline bench,
18 which was after the dragline had passed through and
19 it was in the process of being converted back into a
20 haul road; the berms weren't up yet but the trucks
21 were going. And that was a violation.

22 And the second of the two was at a dump

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

57

1 site. And there was no spotter and there was not an
2 adequate berm. That's virtually identical to the
3 third violation.

4 COMMISSIONER YOUNG: Mr. Moore, he
5 acknowledged, I think it was, the Peabody case where
6 we held, you know, you don't have to have identical
7 violations to put somebody on notice. You can have a
8 reasonable understanding here.

9 But I think he was more making a point, or
10 seemed to be more making a point, that there needs to
11 be something that is at least congruent. And that
12 if -- as he acknowledged -- you're building a
13 roadway, once you move the dragline, you know, then
14 it's going to be used again as a roadway; they're not
15 walking the dragline anymore and you need to have the
16 berms there. He didn't seem to dispute that.

17 They're talking about during the dragline
18 move here -- at least in that first violation --
19 where they're disputing that it's a road at all at
20 that point. From the standpoint if you're talking
21 about elevated misconduct, aggravated conduct here,
22 was somebody showing a disregard, doesn't that seem

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

58

1 like a different situation?

2 MR. WALDMAN: No. Because in the previous
3 violation, it was the fact that the trucks were
4 intended to resume traveling that area that indicated
5 to Black Beauty that it needed to restore the berm;
6 and here, there was a truck coming up to the
7 dragline. It wasn't a haul truck; it was a service
8 truck. But it's a truck nonetheless. In fact, a
9 much smaller truck, so a berm would be all the more
10 important.

11 COMMISSIONER YOUNG: Why would a berm be
12 more important for a smaller truck.

13 MR. WALDMAN: Why would a berm? Yeah, why
14 would a berm be more important for a smaller truck?
15 No. I take that back. You're right about that. It
16 just has to be proportional. That's all.

17 But again, I think it's the facts in both
18 cases that the truck is moving across the dragline
19 that puts the operator on notice that the berm needs
20 to be there. And that was true in the previous
21 situation, and that's true in this situation as well:
22 a truck was moving across the dragline.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

59

1 COMMISSIONER DUFFY: Counsel, in your brief
2 I see on a couple of occasions you say that, on the
3 notice question -- let's assume that these prior two
4 citations should have, as you argue, put the company
5 on notice. And you say that the operator is arguing
6 that Mr. Stumbo didn't know about these prior
7 citations. And you say "He doesn't have to. Only
8 Black Beauty does."

9 I'm looking at the sort of frame of mind of
10 the inspector when he decides to issue an
11 unwarrantable failure. And in other cases where we
12 looked at past citations, history of violation, et
13 cetera, when there's a component in determining
14 unwarrantable failure, it's usually been the case
15 where the inspector says, "I've warned them about bad
16 moves. I've warned them about ventilation problems.
17 They were aware that we had a problem. We discussed
18 this on several occasions." And that led to a pretty
19 solid finding that the operator had been put on
20 notice that greater efforts to comply were needed.

21 Here we don't have that kind of a
22 background. We just simply have the Secretary's

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

60

1 assertion that two prior citations ought to be enough
2 to put the operator on notice. And I think Mr. Moore
3 referred to the fact that berm standards are cited in
4 the top ten among surface mines; it goes double
5 underground for ventilation, electrical, move
6 control, and another one. I forget. I think
7 there's five or eight. Dust. Are, like, 85 or 90
8 percent of the citations issued underground.

9 But there's always been -- not always, but
10 it seems to me that the pattern has been in our cases
11 that there was some sort of actual notice; not just
12 the citations themselves but a warning that the
13 operator's conduct was heading toward that aggravated
14 level. And I don't see it here.

15 MR. WALDMAN: I hear you. Obviously this
16 would have been a much stronger case had there been
17 such a verbal warning. And there's maybe some vague
18 allusions to it in the testimony. But, you know, I
19 can't say that I see any evidence that such a verbal
20 warning was given.

21 COMMISSIONER DUFFY: I agree there. And I
22 also say that as a policy matter for the Agency, it

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

61

1 seems to me that an inspector who issues an
2 unwarrantable failure citation or order ought to have
3 a mine with this history. And if Stumbo was not
4 aware of it, then I have some problems with his
5 reaching a conclusion on unwarrantable, at least with
6 respect to that one.

7 MR. WALDMAN: I can understand that. Of
8 course, Mr. Stumbo wasn't alone that day. He was
9 with his supervisor. And his supervisor was the one
10 who told him of these previous violations. And, you
11 know, MSHA is not one person. MSHA is an
12 organization. And if the inspector himself didn't
13 have this specific knowledge, the organization did.

14 And besides that though, you know, if the
15 previous citations weren't similar enough to justify
16 claiming notice in this case, then the evidence would
17 have shown that. But instead the evidence that MSHA
18 put forth of these previous citations shows that they
19 arose in very similar situations.

20 So, you know, it's true that it would have
21 been stronger had, in addition to that, a verbal
22 warning had been given to the operator. But the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

62

1 Commission has never required that. And the fact
2 that there are these two prior similar violations --
3 neither of which the operator contested and both of
4 which occurred five days earlier -- at least with
5 respect to the first two violations; a few weeks
6 earlier with respect to the third violation -- it's
7 not irrational for an ALJ to conclude that they had
8 enough notice.

9 And by the way, the notice was only one of
10 the factors that the ALJ relied on to find the
11 unwarrantable.

12 COMMISSIONER DUFFY: I agree. That's just
13 troubled me when you said, "He doesn't have to know
14 what the history is." I think an inspector does have
15 to know what the history is before he reaches an
16 unwarrantable.

17 MR. WALDMAN: I understand that. But the
18 supervisor who did know was with him and was
19 supervising.

20 COMMISSIONER DUFFY: If that's what you
21 said, that would be different. You said that he
22 doesn't have to know.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

63

1 MR. WALDMAN: He doesn't have to know. I
2 stand by that. He doesn't have to know.

3 COMMISSIONER DUFFY: Well, somebody does.

4 MR. WALDMAN: Yes. And somebody did. And
5 somebody proved it.

6 CHAIRMAN JORDAN: Commissioner Cohen, do you
7 have a question?

8 COMMISSIONER COHEN: Yes. Two things.
9 First, I want you to comment on something that
10 Mr. Moore said. And I'm not sure that I heard
11 Mr. Moore correctly. He was saying, I believe, the
12 two priors are not enough to constitute notice,
13 suggesting maybe there has to be six. I don't know
14 if I'm getting that right. So first I'd like you to
15 comment on that.

16 MR. WALDMAN: Well, he was talking about
17 repeat violations for purposes of assessing a
18 penalty. This is a different issue. This is an
19 issue of whether the operator had notice that it
20 needed to put forth greater compliance effort with
21 respect to berms. We're not talking about increasing
22 a penalty based on repeated violations. That's not

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

64

1 this issue at all.

2 COMMISSIONER YOUNG: Well, you're not
3 talking an increase in penalty. But you're talking
4 about increasing the penalty. In other words, the
5 terms or the need to get through to the operator
6 under the Mine Act's progressive enforcement scheme.
7 Aren't they analogous?

8 MR. WALDMAN: No. The issue here is whether
9 the operator had notice that it needed to make
10 greater compliance efforts with respect to the
11 standard; whereas the citation that Mr. Moore -- I'm
12 sorry. Under the regulation that Mr. Moore referred
13 to, that is about repeated violations. It has
14 nothing to do with notice. It's about penalties for
15 recurring violations. This is a notice issue; that
16 isn't.

17 COMMISSIONER COHEN: My other question is,
18 it seems to me, going across these three cases, that
19 it's a pretty good argument Mr. Moore had that the
20 Judge did not address all of the factors that we have
21 made clear the Judge has to address in determining
22 unwarrantable.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

65

1 MR. WALDMAN: Correct.

2 COMMISSIONER COHEN: We've said that the
3 Judge doesn't necessarily have to give the same
4 weight to all of them but has to at least address
5 them. How do you respond to that?

6 MR. WALDMAN: I'm trying to recall which
7 factors, which violations the ALJ didn't address.

8 COMMISSIONER COHEN: Let's say in the second
9 one, extensiveness, length of time it has existed,
10 obviousness.

11 MR. WALDMAN: Are those ones she didn't?

12 COMMISSIONER COHEN: Did not.

13 MR. WALDMAN: That's not the way I remember
14 it, but let me take a quick look.

15 COMMISSIONER COHEN: I guess ultimately I'm
16 asking, do you think that the Judge adequately
17 addressed all of the factors that we've outlined for
18 unwarrantable failure?

19 MR. WALDMAN: Yes, I do. I mean, you know,
20 it's true that the Commission has held that the Judge
21 has to address -- has to at least consider and
22 mention every one of the unwarrantable failure

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

66

1 factors.

2 And, you know, that's up to the Commission
3 how strictly the Commission wants to enforce that,
4 whether the mere failure to mention one of the
5 factors is enough to require a remand. But that's
6 the Commission's call. But here, the ALJ discussed
7 the factors that she based her finding on. And
8 that's sufficient.

9 CHAIRMAN JORDAN: Thank you, Counsel.

10 MR. WALDMAN: Thank you.

11 MR. MOORE: I will be as brief as I can. A
12 couple points. First of all, there was a suggestion
13 that there was 25 feet to work with between the edge
14 of the bench and the dragline. There was no
15 suggestion that anybody would drive through on that
16 side. The truck that was at issue actually pulled up
17 to the dragline. It didn't go between the dragline
18 and the edge.

19 And there isn't any evidence, one way or the
20 other, as to whether that would be something that
21 they would do since, on the other side of the
22 dragline, they set it up so that you can drive over

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

67

1 the cables, protective equipment. I think that's the
2 more likely side they would drive over.

3 CHAIRMAN JORDAN: Excuse me, Counsel. Are
4 you saying that this was sort of an aberrant thing
5 that occurred? That the welding truck went on that
6 particular side of the bench? That normally the
7 welding truck should have driven up the other side
8 where the berms where?

9 MR. MOORE: I'm not sure why the welding
10 truck drove from the direction it did to get there.
11 But I know that there is no evidence to show that it
12 would have gone between the edge of the bench and the
13 dragline. It stayed on Mr. Stumbo's side of the
14 dragline. So it is not --

15 CHAIRMAN JORDAN: Right. And I thought then
16 you then went on to say "And, in fact, the evidence
17 shows it could have gone, the other trucks were on
18 the other side."

19 MR. MOORE: Well, if a truck came down --
20 the way the welding truck came down and if it came
21 down that way and wanted to go on the other side of
22 the dragline, that's set up so that you can do that

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

68

1 because they put protective covers over the cable so
2 that you can drive on that side. That would be the
3 expected side to drive on. That's all I'm saying.

4 COMMISSIONER YOUNG: Well, if the truck --
5 I'm figuring -- this is just speculation -- if the
6 truck drives down the other way, the wrong way --
7 because that's where the work is -- if he gets there
8 and has to go around the other side, is he going to
9 drive all the way back and then loop around and come
10 back?

11 MR. MOORE: Well, he would not drive all the
12 way back. He would simply go around the dragline on
13 the side that everybody else would go around.

14 COMMISSIONER YOUNG: All right.

15 MR. MOORE: There was also a suggestion
16 that, on the third order, that the inspector
17 testified that the truck that was dumping was headed
18 toward the opening in the berm. I took a quick look
19 at the testimony, and I don't see that in the
20 inspector's testimony. Perhaps I'm missing
21 something.

22 There was also discussion about the

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

69

1 supervisor of Mr. Stumbo. He, of course, did not
2 testify. He was not with the Agency. They did not
3 subpoena him. But I think we need to be careful of
4 this whole -- he called it high-alert notice --
5 what-have-you issue. Because what we are suggesting
6 to the operator is they should focus on a particular
7 standard. And the most common one where we have this
8 is 75.400, which is the most frequently cited
9 standard.

10 The problem is, 75.400, while it's the most
11 frequently sited standard because we're talking about
12 coal mines, is not -- for example, when the Agency
13 issued its rules to live by addressing standards that
14 result in fatalities, it wasn't on that list. It
15 wasn't on the second list. And I can't remember
16 whether it made the third list or not.

17 So yes, we want to -- we can say to an
18 operator, "Focus on particular conditions." But we
19 may well, in situations, be drawing their attention
20 away from things that are more serious.

21 And while on this issue of berms, we've
22 talked about -- while there were two prior ones, one

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

70

1 of which was non-S&S. But recognize what you have in
2 a surface coal mine: You are building berms all the
3 time; you are removing berms; road building all the
4 time. It is a continuous process. And I don't know,
5 the record doesn't show, how many -- what distance of
6 berms they have throughout the mine. But I expect
7 it's considerable.

8 And lastly, let me make one comment on
9 Cumberland. I think the argument the Secretary is
10 presenting here indicates the problem with
11 Cumberland. And this Commission know where I stand
12 on Cumberland, since I argued that.

13 The problem is, you are opening a door to
14 every standard. And if you're opening a door to
15 every standard, S&S has no meaning. And it's clear
16 that it does have meaning. Or why have it? And by
17 saying, "Well, it applies to this, it applies to
18 this," I think we are opening up Pandora's box in
19 terms of the application of Cumberland. And I don't
20 think that's where we want to be.

21 COMMISSIONER COHEN: Is that necessarily
22 inconsistent with what the Senate Committee said?

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

71

1 MR. MOORE: I am familiar with what the
2 Senate Committee said, but I don't think it makes
3 sense. S&S is too important. And I think the
4 Commission's Mathies decision is the better iteration
5 of what S&S means.

6 Leaving aside legislative histories that's
7 sometimes subject to question, we have S&S as a very
8 important part of the Mine Act. It should be used
9 judiciously so that if you put somebody on a pattern
10 of violations, for example, you're not putting them
11 on a pattern of violations because every citation is
12 written S&S. Otherwise that has no meaning.

13 And we know that, for example, pattern of
14 violations will have great meaning because it's
15 considered the death penalty for a mine. And I think
16 that still is the view in the industry.

17 So I think S&S has to mean something. If
18 it's only what are called "technical citations," as
19 the Senate Committee suggested, I think you lose the
20 value of what S&S means. And I think that would be a
21 significant loss for a Mine Act that actually works.

22 CHAIRMAN JORDAN: Counsel, actually I'd like

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

72

1 to clarify whether there is dispute between your view
2 of how the S&S analysis would apply here and counsel
3 for the Secretary's view, which I found helpful that
4 counsel walked through that.

5 As I understand, counsel of the Secretary
6 today said, "Well, with this berm violation" -- and
7 let's just take the one with the bench, the dragline
8 bench -- you would have to consider that a berm -- a
9 lack of a berm, and assume -- let's assume there was
10 a lack of a berm or an inadequate berm for a section
11 of it -- then you would have to then consider, under
12 the facts -- and that the hazard that a berm is
13 intended to address is the hazard of somebody losing
14 control of a truck vehicle, perhaps going over the
15 edge. That's the hazard that the standard was
16 designed to address.

17 And then the next step would be to consider
18 what was in existence in this case. Then we get into
19 having to decide, you know, between disputes and
20 parts of the record.

21 But in this case, then you would start to
22 consider, I believe -- I hope I'm stating this

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

73

1 correctly -- the particulars that were in existence
2 here in terms of what was the length that there was a
3 lack of a berm, what was the -- you know, what was
4 the width of the road, what was the state of the
5 road, in order to start to assess whether there was a
6 reasonable likelihood that a driver in this situation
7 would actually lose control of a truck.

8 I'm not so sure that that's different from
9 what you would say here. Because I know earlier you
10 said, in response to Commissioner Cohen, well, yes
11 there is a hazard, but we don't look at the hazard in
12 a totally theoretical way. A hazard could be a
13 vehicle overturning, but we have to then go back to
14 the particulars here.

15 I'm starting to wonder, is there a
16 distinction between the way the two of you would
17 actually apply the S&S analysis in your mind as to
18 where you sit now to a situation like this, with this
19 berm case?

20 MR. MOORE: Yes. I believe there is a
21 difference.

22 CHAIRMAN JORDAN: If so, could you please

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

74

1 illustrate the difference.

2 MR. MOORE: As I understand the Secretary's
3 argument, they want you to assume that a vehicle --

4 CHAIRMAN JORDAN: No. I don't mean the
5 argument that they made in the brief.

6 MR. MOORE: No. I'm not -- the argument
7 from what I've heard today.

8 CHAIRMAN JORDAN: Okay.

9 MR. MOORE: And I may be mishearing. As I
10 understand the Secretary's argument, they want you to
11 assume the vehicle has gone out of control. And
12 maybe that doesn't assume overtravel.

13 CHAIRMAN JORDAN: Right.

14 MR. MOORE: They want you to assume the
15 vehicle has gone out of control.

16 CHAIRMAN JORDAN: Right.

17 MR. MOORE: What I am saying is, you have to
18 evaluate the potential for that also. If you are
19 going to discuss a hazard and whether it's reasonably
20 likely to cause an injury, you have to evaluate
21 whether or not that hazard -- a hazard, as
22 Commissioner Cohen pointed out, is how you define it.

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

75

1 But you have to quantify the hazard. And
2 that's what, as I see the third step of the Mathies
3 test, it requires you to quantify the hazard. And in
4 quantifying it, you have to, as I see it, quantify
5 the likelihood of it going out of control.

6 CHAIRMAN JORDAN: Thank you. That's
7 helpful. You would say, first, let's assess the
8 likelihood of a driver going out of control; and
9 then, even if we were to concede there was a
10 likelihood the driver may get out of control, let's
11 look at the likelihood of a driver out of control
12 going over the edge.

13 MR. MOORE: Yes.

14 CHAIRMAN JORDAN: And the Secretary is
15 saying, let's assume there's a driver that loses
16 control; but now let's see the conditions that exist
17 in this environment. Let's assess the likelihood of
18 a driver losing control, whether they would be likely
19 to go over the edge.

20 MR. MOORE: Yes. The problem, as I see with
21 any kind of assumption, is, let's assume the test
22 is -- we're assuming he went out of control. Well,

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

76

1 okay. What does that mean? Because you can't -- are
2 we assuming he's out of control over by the remnant
3 berm? Or are we assuming he's out of control 18 feet
4 away from it going at a very slow speed?

5 Or do we assume -- that's only one truck.
6 We assume the next truck comes right down the middle
7 of the bench. And then he's a hundred feet. So what
8 are we assuming? And that's my problem with this
9 assumption is, what are you assuming? And I don't
10 think you can assume anything like that. I think the
11 Secretary has to sustain a burden of proof.

12 COMMISSIONER YOUNG: Do you think it would
13 be unfair or inappropriate to look at a situation
14 such as we have here and look at the facts that
15 either occurred or were likely to occur in this
16 situation where you have infrequent vehicle
17 traffic, where the only vehicle we have shown was
18 18 feet -- I'm talking about the first, the dragline
19 bench violation just as an example -- is 18 feet away
20 from the edge driving at a slow rate of speed.

21 But if you didn't, at a certain level,
22 assume that a truck driver sooner or later was going

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

77

1 to go out of control, you wouldn't have berms at all,
2 right?

3 MR. MOORE: Well, you have berms -- I mean,
4 as Commissioner Duffy pointed you, you have a
5 standard of driver control. I don't think it's
6 necessarily an assumption. It's one of a number of
7 protections that are in place. And I don't think
8 you're necessarily assuming they're out of control.

9 CHAIRMAN JORDAN: But I don't know how you
10 make the determination of if you don't assume a
11 driver may at some point go out of control, lose
12 control of a vehicle, do you stand there?

13 I'm the inspector. Do I determine the
14 likelihood of a driver going out of control? I might
15 sit there and go, "Well, at this mine, I mean, if
16 it's Joe, he's probably not going to get out of
17 control."

18 So then you get into, "Well, maybe it
19 depends on the driver of the truck that week. I
20 mean, some are better than others." You know, it's
21 like, "Gee, how do you start to even make that
22 first" -- and do you wind up then, sort of, "Gee, why

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

78

1 do you need berms?" Isn't there some underlying --

2 MR. MOORE: I think that's the obligation of
3 the Agency, Commissioner, to make those
4 determinations. I hear at every hearing that I'm
5 ever in about how much training the inspectors
6 receive. And if that's the case, then let's let them
7 use that training to make that a proper evaluation
8 rather than what we have here.

9 And I think what we can all agree, whether
10 the Judge's decision is unclear or not, that is, at
11 least in part, the product of an inspector who was
12 pretty much all over the wad, as I see it. And I
13 recognize the Secretary views it as, "Well, he was
14 clear." Perhaps I was reading a different
15 transcript. I don't know.

16 But the Secretary has got a burden here.
17 And part of that burden is showing it's reasonably
18 likely to result in an injury. And I don't think
19 he's done it in any of these three cases.

20 COMMISSIONER DUFFY: Counsel, it would be an
21 entirely different case if instead you had evidence
22 that the truck was 18 feet from the edge; and instead

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

79

1 you have, rather, tire marks 3 feet from the edge.
2 Assuming that there was no remnant berm or anything
3 else, assuming the inspector's characterization, that
4 would be a whole different case.

5 MR. MOORE: That would be a different
6 situation.

7 COMMISSIONER DUFFY: AND that would lean a
8 little more to the likelihood aspect --

9 MR. MOORE: Well, since there had been a
10 berm on the -- I'm not -- you know, the problem is
11 establishing the facts.

12 If there's nothing further, that's all I
13 have. Thank you.

14 CHAIRMAN JORDAN: Thank you very much,
15 Counsel. Thank you to both counsels for their
16 excellent presentations and taking the time to answer
17 the Commissioners' questions. And this case is
18 submitted for decision.

19 (Whereupon, at 11:31 a.m., the proceedings
20 were adjourned.)

21
22

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

80

1 CERTIFICATE OF NOTARY PUBLIC

2 I, CHRISTINA S. HOTSKO, the officer before whom
3 the foregoing deposition was taken, do hereby certify
4 that the witness whose testimony appears in the
5 foregoing deposition was duly sworn by me; that the
6 testimony of said witness was taken by me in
7 stenotypy and thereafter reduced to typewriting under
8 my direction; that said statement is a true record of
9 the proceedings; that I am neither counsel for,
10 related to, nor employed by any of the parties to the
11 action in which this statement was taken; and,
12 further, that I am not a relative or employee of any
13 counsel or attorney employed by the parties hereto,
14 nor financially or otherwise interested in the
15 outcome of this action.

16

17

18

19

CHRISTINA S. HOTSKO
Notary Public in and for the
District of Columbia

20

21 My commission expires:

22 September 14, 2016

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 1

<p><u>1</u></p> <p>10 4:20</p> <p>10:00 1:17</p> <p>100 22:2</p> <p>10-million 16:19,22 17:2</p> <p>11:31 79:19</p> <p>1100 2:3</p> <p>12-2258-150575 1:6</p> <p>1340 2:8</p> <p>14 80:22</p> <p>15222 2:8</p> <p>16 11:1</p> <p>1605(k) 29:17</p> <p>17 11:1</p> <p>18 5:5 16:11 17:3 20:20 37:4 40:11,12,13 42:6 52:15 76:3,18,19 78:22</p> <p>1909 30:5</p> <p><u>2</u></p> <p>200 4:16 42:4,12,14,17</p> <p>20001 1:15</p> <p>2008-477 1:6 3:7</p> <p>200-foot-wide 20:15</p> <p>2012 1:9 3:5</p> <p>2016 80:22</p> <p>202 2:4</p> <p>21 8:1</p> <p>22209 2:4</p> <p>2228 2:3</p>	<p>23 1:9 3:5</p> <p>24 25:5</p> <p>25 17:3 42:16,17 66:13</p> <p>27 20:7</p> <p>29 37:6</p> <p><u>3</u></p> <p>3 13:5 23:19 79:1</p> <p>30 3:12</p> <p><u>4</u></p> <p>401 2:8</p> <p>412 2:9</p> <p>434-8055 2:9</p> <p><u>5</u></p> <p>5 3:14 4:5 13:5</p> <p>5-foot 7:18</p> <p>5-foot-high 6:22</p> <p><u>6</u></p> <p>6 23:20</p> <p>60 7:21</p> <p>601 1:14</p> <p>66 7:21</p> <p>693-9344 2:4</p> <p>6-foot 49:20</p> <p><u>7</u></p> <p>7 35:5</p> <p>75 55:3</p> <p>75.400 69:8,10</p> <p>75-foot 54:22</p> <p><u>8</u></p>	<p>85 60:7</p> <p>8-foot-long 6:16</p> <p><u>9</u></p> <p>90 60:7</p> <p>9500 1:14</p> <p><u>A</u></p> <p>a.m 1:17 79:19</p> <p>aberrant 67:4</p> <p>ability 11:6</p> <p>able 24:14 51:12</p> <p>above-captioned 1:12</p> <p>absence 52:12</p> <p>absolutely 37:7 45:19</p> <p>AC 1:6</p> <p>accept 9:15</p> <p>accepted 14:1</p> <p>accepting 11:16</p> <p>accommodate 24:6</p> <p>according 41:18 56:7</p> <p>acknowledged 57:5,12</p> <p>across 6:8 58:18,22 64:18</p> <p>Act 50:10 51:13 71:8,21</p> <p>action 24:21 29:12 80:11,15</p> <p>activity 41:20,22 42:2</p> <p>Act's 64:6</p>	<p>actual 60:11</p> <p>actually 8:5 52:21 55:8 66:16 71:21,22 73:7,17</p> <p>addition 61:21</p> <p>address 4:12 16:7 29:8 39:4 52:8 53:21 55:14 64:20,21 65:4,7,21 72:13,16</p> <p>addressed 16:9 52:5 65:17</p> <p>addresses 53:22</p> <p>addressing 38:2 53:19 69:13</p> <p>adequacy 40:5</p> <p>adequate 7:12 8:15 38:11 40:5 57:2</p> <p>adequately 65:16</p> <p>adjourned 79:20</p> <p>ADMINISTRATI ON 1:4</p> <p>admit 38:9</p> <p>admits 40:15</p> <p>adopted 10:7</p> <p>advance 6:14</p> <p>advocate 54:4</p> <p>afforded 51:8,15</p> <p>Agency 60:22 69:2,12 78:3</p> <p>aggravated 57:21 60:13</p> <p>ago 46:4</p> <p>agreed 34:21</p> <p>aimed 47:18</p>
--	--	--	---

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

Page 2

<p>alert 21:11</p> <p>ALJ 16:12 19:11 21:4 22:11 26:20 34:16 35:21 37:10 38:8,12,21 39:18 44:2 52:4,7,11 54:20 55:14 56:2 62:7,10 65:7 66:6</p> <p>ALJ's 22:20 32:4 34:19 35:5 37:8</p> <p>allocated 3:12</p> <p>allowed 18:5</p> <p>allusions 60:18</p> <p>alone 30:5 61:8</p> <p>already 23:19 39:15</p> <p>alternative 29:16 30:7,11</p> <p>am 71:1 74:17 80:9,12</p> <p>ambiguity 35:6</p> <p>amend 30:7</p> <p>amendment 29:15</p> <p>among 19:8 60:4</p> <p>amount 6:3</p> <p>analogize 36:8</p> <p>analogous 64:7</p> <p>analysis 44:4,7 72:2 73:17</p> <p>answer 43:5 79:16</p> <p>anybody 26:14 48:1 66:15</p> <p>anymore 14:7 57:15</p> <p>anything 8:3 20:11</p>	<p>43:12 76:10 79:2</p> <p>apologize 32:8</p> <p>apparently 11:16</p> <p>appear 41:3</p> <p>appeared 5:15 6:19 11:7 14:19</p> <p>appears 80:4</p> <p>application 70:19</p> <p>applies 70:17</p> <p>apply 51:9,10,11 72:2 73:17</p> <p>applying 44:7 45:9 54:17</p> <p>approximately 1:16 5:5 37:3 41:17</p> <p>area 11:4 14:16,18 18:17 25:8 26:17 33:13 34:12,13,15 35:17 41:7,8,9 58:4</p> <p>areas 24:16</p> <p>area-wide 50:5</p> <p>aren't 14:6 64:7</p> <p>argue 59:4</p> <p>argued 5:13 70:12</p> <p>arguing 59:5</p> <p>argument 3:5,12,13 6:3 13:20 25:10 30:13 56:9 64:19 70:9 74:3,5,6,10</p> <p>arguments 5:13</p> <p>Arlington 2:4</p> <p>arm 50:20</p> <p>arose 61:19</p>	<p>arrives 40:6</p> <p>articulation 53:6</p> <p>aside 71:6</p> <p>aspect 79:8</p> <p>assertion 60:1</p> <p>assess 73:5 75:7,17</p> <p>assessing 63:17</p> <p>assume 12:19 15:11,15,19 23:21 37:12 46:1,8,20,21 47:17,19 50:19 51:4 59:3 72:9 74:3,11,12,14 75:15,21 76:5,6,10,22 77:10</p> <p>assumed 26:16 32:11</p> <p>assuming 15:16 45:17 47:12 50:14 52:16 54:2 75:22 76:2,3,8,9 77:8 79:2,3</p> <p>assumption 54:5,7 75:21 76:9 77:6</p> <p>attention 50:22 69:19</p> <p>attorney 80:13</p> <p>Avenue 1:14 2:8</p> <p>avert 50:7</p> <p>aware 59:17 61:4</p> <p>away 16:22 20:22 40:13 69:20 76:4,19</p> <p>awfully 56:11</p> <hr style="width: 50%; margin: 0 auto;"/> <p style="text-align: center;">B</p> <hr style="width: 50%; margin: 0 auto;"/>	<p>background 59:22</p> <p>backing 55:19</p> <p>backtrack 47:1</p> <p>bad 26:21 45:17 59:15</p> <p>bank 20:17</p> <p>banks 37:5</p> <p>bare 12:3</p> <p>based 24:13 35:7 63:22 66:7</p> <p>basic 19:19</p> <p>basically 37:15</p> <p>basis 22:18</p> <p>Beauty 1:7 3:7,13,19 39:20 40:3,15 56:7 58:5 59:8</p> <p>Beauty's 38:9 55:5 56:9</p> <p>begin 21:22</p> <p>beginning 1:16</p> <p>behalf 2:2,6</p> <p>behind 24:11 44:19</p> <p>belabor 5:8</p> <p>believe 8:17 9:12 19:15,16 21:2,3,10 26:7 36:20 63:11 72:22 73:20</p> <p>believes 52:9</p> <p>bench 4:15 5:5,9,13 6:4,8,18 8:5,20 9:1 10:5 11:2 12:22 15:7 18:9,15,21 19:14 20:15,16 21:8 25:7 34:3 36:1,4</p>
---	---	--	---

(866) 448 - DEPO

www.CapitalReportingCompany.com © 2012

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
Page 3

<p>37:2,5 42:4 54:22 55:7 56:17 66:14 67:6,12 72:7,8 76:7,19 benefit 44:3 49:16 benefits 49:15 berm 8:13 10:21,22 11:4,15,16,21 13:5,6,9 14:5,15,17,19 15:4,6 16:16 22:6,13 24:1,2,6,17 31:3 34:13,15 35:14,17 36:1,3,6,17 37:2 38:11,15,16,18 39:7,16,21 40:4 42:8 43:7,10,11,15 47:22 48:4,8,20 49:7,14 51:14 52:13 54:8,11 55:1,2,3,6,11,20 56:6,16 57:2 58:5,9,11,13,14, 19 60:3 68:18 72:6,8,9,10,12 73:3,19 76:3 79:2,10 bermed 33:13 berms 4:7 5:14,17,22 6:1,2,19,22 7:4,8,11,14,19 8:3,7,11 11:8,17 12:5,6,12,13,17, 19 13:2,9,16 14:1,2,18 15:3,17 17:19 21:6,9 32:12 33:1</p>	<p>34:8,9,10,11,17, 18,22 35:2,4,12,18 40:9 41:9 42:7 43:17 50:11 56:20 57:16 63:21 67:8 69:21 70:2,3,6 77:1,3 78:1 beside 33:9 besides 26:14 61:14 better 19:17 71:4 77:20 beyond 22:4 43:20 bit 48:22 Black 1:7 3:6,13,19 38:9 39:20 40:3,15 55:5 56:7,9 58:5 59:8 blade 24:1 blocks 33:1 bottom 6:13 55:2 Boulevard 2:3 box 70:18 breaks 40:1 41:15 bridge 54:16 brief 20:7 39:3 45:22 46:4 59:1 66:11 74:5 briefed 44:2 53:3 54:15,16 briefly 25:1 briefs 5:15 44:5 bright 49:4 bring 23:19</p>	<p>brings 50:6 broadest 29:14 brought 16:19 18:3 build 49:9 building 42:7 57:12 70:2,3 built 5:20 25:2 bulldozer 8:3 23:22 bumper 33:1 bumpy 9:4 burden 13:12 27:11 36:8 76:11 78:16,17 <hr style="width: 20%; margin: 0 auto;"/> cable 68:1 cables 67:1 Capital 1:16 care 35:19 careful 69:3 carry 27:11 case 4:6 7:10 8:9 10:4 17:16,22 19:16 21:10 27:22 28:2 33:7 35:16 39:22 44:2 47:19 48:5 51:10 52:2,5,7,10 54:15,16 55:17 56:13,16 57:5 59:14 60:16 61:16 72:18,21 73:19 78:6,21 79:4,17 cases 54:18 58:18 59:11 60:10</p>	<p>64:18 78:19 catastrophes 50:8 cause 28:13 74:20 Center 2:7 certain 46:10 76:21 certainly 9:13 49:18 CERTIFICATE 80:1 certify 80:3 cetera 59:13 Chairman 3:2,8,21 4:2 5:10 6:10,19 7:2,17 9:18,20 10:1 17:21 18:3,16 22:22 23:6,8,11,15 29:8 32:9 33:20 40:21 43:8,14 63:6 66:9 67:3,15 71:22 73:22 74:4,8,13,16 75:6,14 77:9 79:14 challenge 12:2 changed 29:18 changes 50:5 characterization 79:3 Christina 1:15 80:2,19 circumstance 22:5 50:15 circumstances 26:3,6,7 27:22 28:22 51:22</p>
---	--	--	---

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
Page 4

<p>52:18 54:10 citation 4:13 11:10 16:8 20:12 30:8 35:8 37:1 38:6 61:2 64:11 71:11 citations 21:5,15,19 59:4,7,12 60:1,8,12 61:15,18 71:18 cited 21:20 29:17 60:3 69:8 Civil 1:5 claiming 23:1,8 61:16 clarified 13:8 clarify 37:11 72:1 clarity 12:15 13:12,13,14 clear 5:12 10:12 22:22 38:6,7 55:20 56:14 64:21 70:15 78:14 cleared 36:18 clearest 55:17 clearing 14:18 close 56:11 closer 42:9,10,13,21 coal 1:7 3:7,20 21:21 69:12 70:2 Cohen 3:9 10:15,20 13:7,15,19 14:3 20:5 25:9,15 27:4,7,14 28:1,10,16 29:5 32:10,14,18,22</p>	<p>33:6 39:5,12 52:21 53:13,15,21 63:6,8 64:17 65:2,8,12,15 70:21 73:10 74:22 Coliseum 14:5 15:1 Columbia 80:20 comes 14:11 37:8 48:4 51:16 52:14 76:6 coming 27:21 58:6 comment 63:9,15 70:8 commission 1:1,13 3:3,11 4:4,11 10:7 15:11,13 30:15 33:22 37:9 38:21 39:1 52:6 55:14 62:1 65:20 66:2,3 70:11 80:21 Commissioner 3:8,9,10 6:6 10:15,20 12:4,10 13:7,15,19 14:3,4,13 15:5 16:21 17:6,16 19:1 20:5 23:13 24:3,8,15,19 25:9,15 27:4,7,14 28:1,10,16 29:5 32:10,14,18,22 33:6 35:11 36:2,7,22 37:12,19,21 38:1,14 39:5,12 40:7,11,17,20 41:1 42:4,18</p>	<p>43:2,6,11 45:8,16,20,21 46:7,13,19 47:1,4,6,9,11,15 48:7,14,17,22 49:11,18 50:1 51:2 52:21 53:13,15,21 57:4 58:11 59:1 60:21 62:12,20 63:3,6,8 64:2,17 65:2,8,12,15 68:4,14 70:21 73:10 74:22 76:12 77:4 78:3,20 79:7 Commissioners 79:17 Commission's 43:22 56:13 66:6 71:4 Committee 70:22 71:2,19 common 41:14 56:1 69:7 company 1:7,16 3:7,20 21:16 59:4 compelling 54:19 completed 18:22 completely 50:6 compliance 63:20 64:10 comply 56:5 59:20 component 59:13 compounded 6:16 compressed 17:7 compressing 17:10 concede 75:9</p>	<p>conceivable 45:10 51:5 concern 17:18 24:16 concerned 5:4 conclude 62:7 conclusion 52:12 54:21 61:5 conclusions 34:20 condition 28:6,8 32:7 33:14 40:16 42:20 conditions 14:17 19:4,6 29:3 33:17 69:18 75:16 conduct 57:21 60:13 conflict 37:16 confused 7:5 34:16 37:10 38:8 confusion 5:11 37:8 congruent 57:11 connected 19:9 consider 21:22 65:21 72:8,11,17,22 considerable 70:7 considered 21:14 32:21 33:4 71:15 consistent 36:2 37:7 consistently 15:22 constitute 1:11 63:12 contending 7:6</p>
---	---	---	---

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

Page 5

<p>contested 62:3</p> <p>context 11:22 26:6 35:18</p> <p>continuing 31:18</p> <p>continuous 70:4</p> <p>contractors 22:2 45:12</p> <p>contribute 28:11</p> <p>contributed 27:15 53:8</p> <p>contributes 25:18</p> <p>control 44:15,16,18,20 45:1,5 48:1,2,5,18 51:17,18 52:17 54:8,12 55:11 60:6 72:14 73:7 74:11,15 75:5,8,10,11,16, 18,22 76:2,3 77:1,5,8,11,12,1 4,17</p> <p>convened 3:4</p> <p>converted 56:19</p> <p>correct 14:8 33:14 47:14 65:1</p> <p>correcting 33:17</p> <p>correctly 63:11 73:1</p> <p>counsel 3:16 4:2 5:10 12:4 13:8 40:21 43:9 59:1 66:9 67:3 71:22 72:2,4,5 78:20 79:15 80:9,13</p> <p>counsels 79:15</p> <p>country 20:21</p> <p>couple 12:11 20:7</p>	<p>34:4 59:2 66:12</p> <p>course 11:10 16:3 17:5 24:22 37:10 55:14 61:8 69:1</p> <p>covers 68:1</p> <p>create 6:18 21:9</p> <p>creates 6:15</p> <p>credibility 30:10</p> <p>credited 35:10 38:12</p> <p>crediting 34:19</p> <p>cross-examined 13:10</p> <p>Cumberland 15:14 43:22 44:4,8 45:9 46:8,13,14 50:3 52:3,22 70:9,11,12,19</p> <p>curious 8:17</p> <p>cuts 24:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C 1:9,15</p> <p>danger 25:18 42:8 43:1 50:16,18 53:8</p> <p>day 61:8</p> <p>days 41:18,21 62:4</p> <p>deal 26:21</p> <p>dealing 18:12 30:2</p> <p>death 71:15</p> <p>decide 38:22 72:19</p> <p>decided 53:2</p> <p>decides 59:10</p> <p>decision 11:13 15:3,8,13 16:1</p>	<p>20:6 34:19 35:5,12,13 36:19 37:9 39:19 43:22 44:4 52:4,21 53:1,5 71:4 78:10 79:18</p> <p>decisions 53:13</p> <p>deficiency 10:12</p> <p>define 28:2 74:22</p> <p>defined 41:2</p> <p>Denver 30:5</p> <p>Department 2:3</p> <p>depend 28:1</p> <p>depends 77:19</p> <p>deposition 80:3,5</p> <p>depth 36:13</p> <p>derived 52:22</p> <p>described 36:12</p> <p>description 53:10</p> <p>designated 3:15 4:14</p> <p>designed 47:22 48:2 50:7 72:16</p> <p>Despite 38:14</p> <p>determination 77:10</p> <p>determinations 78:4</p> <p>determine 52:1 77:13</p> <p>determining 59:13 64:21</p> <p>detriment 19:15</p> <p>development 19:12</p> <p>difference 73:21</p>	<p>74:1</p> <p>different 13:20 15:14 18:6 20:17 34:17 36:9 41:12 54:14,21 58:1 62:21 63:18 73:8 78:14,21 79:4,5</p> <p>difficult 54:20 55:12</p> <p>difficulty 45:8,22</p> <p>directed 44:8</p> <p>direction 67:10 80:8</p> <p>directly 52:22</p> <p>disagree 11:6 36:22 46:12</p> <p>disagrees 55:14</p> <p>discuss 74:19</p> <p>discussed 59:17 66:6</p> <p>discussion 9:22 34:1,2 35:3 38:3 68:22</p> <p>discussions 21:16,17</p> <p>dispute 7:3 8:10 22:10 26:12 31:6 57:16 72:1</p> <p>disputed 7:10 22:16</p> <p>disputes 72:19</p> <p>disputing 57:19</p> <p>disregard 57:22</p> <p>distance 10:21 20:22 37:3 55:12 70:5</p> <p>distinct 22:9</p> <p>distinction 28:17</p>
--	--	---	---

(866) 448 - DEPO

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 6

<p>50:2 73:16 District 80:20 Dock 3:7 Document 30:4 done 10:2 12:22 16:1 78:19 door 70:13,14 double 55:2 60:4 dozer 24:20 30:1,21 31:1,19,21 32:1 33:9 dragline 4:15,18 5:1,2,16,18 6:11,12,14 7:14,20 8:2,5,7,18,19 9:8,11 12:18,21 14:11,12 17:7 18:4,9,10 21:7 22:6,14,18 23:18 24:14 34:2,15 37:2 38:11 39:6,15,16,19,21 ,22 41:14,15,17,19,2 1,22 42:15,16 55:7 56:17,18 57:13,15,17 58:7,18,22 66:14,17,22 67:13,14,22 68:12 72:7 76:18 draglines 20:3 draw 51:3,7,12 drawing 12:1 18:13 69:19 drill 25:4,5,6 54:22 drive 8:20 9:3,4</p>	<p>19:15,16,19 20:14 42:13 50:20 66:15,22 67:2 68:2,3,9,11 driven 41:4 67:7 driver 42:11 44:15,16,18 45:1,3,5 48:4 51:16,18 52:16 54:7 73:6 75:8,10,11,15,18 76:22 77:5,11,14,19 drives 23:22 68:6 driving 19:14 20:16,18,19 40:11 41:7 42:5 49:19 76:20 drop-off 48:12 49:5 drove 9:3 67:10 Duffy 3:9 12:4,10 37:12,19,21 38:1,14 43:6,11 45:8,16,20,21 46:7,13,19 47:1,4,6,9,11,15 48:7,14,17,22 49:11,18 51:2 59:1 60:21 62:12,20 63:3 77:4 78:20 79:7 dug 9:1 duly 80:5 dump 4:7 29:12,18,19,21 30:22 31:14 33:10 55:18 56:22 dumped 30:2</p>	<p>dumping 30:1 31:7,20 33:18 55:16 68:17 during 6:3 7:2,12 42:1 57:17 Dust 60:7 <hr style="width: 20%; margin: 10px auto;"/> <p style="text-align: center;">E</p> <hr style="width: 20%; margin: 10px auto;"/> earlier 62:4,6 73:9 easier 9:6 13:4 Ed 3:22 edge 5:6 16:11,13 17:1,3,4,13 20:13,14,18,19 22:6,14 33:12,16,17 40:12,14 42:6,13,17,22 43:12 44:14,17 45:7 47:20 51:20 52:15,20 54:3,6,12 55:13,21 66:13,18 67:12 72:15 75:12,19 76:20 78:22 79:1 EDWARD 2:2 effort 63:20 efforts 56:5 59:20 64:10 eight 60:7 either 30:7 76:15 electrical 4:21 18:4,5,12,20 19:1 60:5 element 45:3 46:15,16,19 elevated 25:19 40:8,9 41:8</p>	<p>44:14 53:9 57:21 else 26:14 37:14 43:12 68:13 79:3 elsewhere 35:13 emergency 44:18,21 45:1,14 46:11 50:4,5 51:4,10 employed 80:10,13 employee 13:4 80:12 enforce 66:3 enforcement 24:21 29:11 64:6 enlightening 44:1 enlightenment 44:3 enter 24:19 entire 15:7 38:11 entirely 78:21 entitled 3:6 environment 50:6 75:17 equipment 4:19 9:10 41:4 67:1 equivalent 32:12 33:4 errors 14:18 escapeway 36:11,12 ESQUIRE 2:2,6 essential 40:3 essentially 4:7 6:5 23:9 establish 13:13,14</p>
--	---	--	---

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 7

<p>establishes 20:11 establishing 79:11 estimated 11:1 et 59:12 evaluate 74:18,20 evaluation 15:21 78:7 event 15:16 25:22 39:1 44:14 45:2,4 51:16 events 46:5 everybody 32:11 38:17 68:13 everyone 37:14 evidence 10:12 13:17,21 14:14 17:15,16 19:7 21:17 26:14 27:1 37:19 55:8 60:19 61:16,17 66:19 67:11,16 78:21 exactly 36:17 49:3 55:8 examining 10:22 example 14:22 26:22 69:12 71:10,13 76:19 excellent 79:16 except 18:19 excuse 8:14 10:15 26:15 36:21 67:3 Exhibit 37:1 exist 25:4 75:16 existed 26:9 65:9 existence 6:20 48:14 72:18 73:1 exists 46:21</p>	<p>expect 70:6 expected 68:3 experience 20:21 experienced 24:20 experiences 39:6 expires 80:21 explanation 8:22 explosion 15:17 extend 17:12 extended 11:2 extending 15:7 extensiveness 65:9 extent 22:12 35:6 extra 29:9</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 6:7,16 7:11 16:18 19:13 20:13,20 21:5,7 22:13,20 26:9 28:7 32:7 38:14 56:3,9 58:3,8 60:3 62:1 67:16 factor 13:2 factors 62:10 64:20 65:7,17 66:1,5,7 facts 23:11 26:2 31:6 45:9 47:12 51:21 52:10 58:17 72:12 76:14 79:11 fails 43:7 failure 4:9 35:3,19 59:11,14 61:2 65:18,22 66:4 failures 4:14 11:11</p>	<p>32:5 fair 12:5 34:19 falling 25:20 familiar 4:19 71:1 fashion 11:8 30:6 fatalities 69:14 favor 37:17 feature 50:10 February 1:9 3:5 Federal 1:1,13 feet 4:16 5:5 6:13,17 13:5 16:11 17:3,4 20:20 23:19,20 36:14 37:5 40:12,13 42:5,6,12,14,16, 17 52:14,15 55:3 66:13 76:3,7,18,19 78:22 79:1 figuring 68:5 financially 80:14 finding 15:6 22:12,20 32:5 59:19 66:7 findings 9:16 fine 43:13 46:7 finish 32:1 fire 15:17 46:8,21 47:7 firm 3:19 first 3:14 4:13,15 23:15 34:6 44:9 57:18 62:5 63:9,14 66:12 75:7 76:18 77:22</p>	<p>five 22:2 60:7 62:4 flat-out 11:17 flaw 47:21 focus 69:6,18 foregoing 80:3,5 foreseen 19:5 41:3 forget 60:6 forth 34:3,18 56:5 61:18 63:20 fourth 5:3 53:20 frame 59:9 frankly 9:2 16:17 26:20 frequently 21:20 69:8,11 front 6:15 fruition 27:21 46:18 fully 51:6 53:2 fundamental 28:7 50:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gap 33:13 55:1 Gateway 2:7 Gee 77:21,22 gets 41:7 68:7 getting 63:14 given 12:18 28:2 29:10 52:2 54:10 60:20 61:22 gives 49:4 giving 16:15 gone 19:3 55:21 67:12,17 74:11,15</p>
--	---	--	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 8

<p>gotten 44:10 grain 11:18 grasping 41:5 great 26:21 71:14 greater 56:5 59:20 63:20 64:10 ground 15:2 16:15 17:18 30:2 43:15,16,18 guardrail 48:8 49:3,13 guards 50:11 guess 10:19 24:3 65:15</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 55:5,6,11 happen 16:5 45:18 52:1 happened 23:9,10,21 47:19 happens 12:10 haul 56:20 58:7 haulage 6:8 7:20 having 41:5 49:13 72:19 hazard 25:21 26:2,4,8 27:8,9,12,15,20 28:2,6,12,13,21, 22 29:1 42:6 44:12,13,17 46:15,17 47:18 53:10 72:12,13,15 73:11,12 74:19,21 75:1,3 hazarding 29:2</p>	<p>hazards 26:5 headed 68:17 heading 60:13 health 1:1,4,13 45:13 hear 3:5 60:15 78:4 heard 63:10 74:7 hearing 30:7 37:7 78:4 he'd 27:1,2 31:1,4 33:8 height 7:8,15,21 8:1,13 23:2,5 held 1:12 57:6 65:20 help 49:19 helpful 44:6 48:15 72:3 75:7 helping 21:13 Henry 2:6 3:18 hereby 3:4 80:3 hereto 80:13 he's 16:4 27:3 33:10,11,12,14,1 7 40:11 50:21 76:2,3,7 77:16 78:19 high 21:11 49:20 high-alert 69:4 high-degree 50:16 highlighted 30:17 highway 48:9,11 53:9 hill 33:13 histories 71:6</p>	<p>history 59:12 61:3 62:14,15 Hoehler 41:13 hold 9:18 hooks 33:1 hope 72:22 Hotsko 1:15 80:2,19 hours 25:2,5 humans 13:3 hundred 76:7 hyperbole 11:13 hyperbolic 11:8</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>I'd 23:18 63:14 71:22 identical 56:11,14 57:2,6 identified 12:16 34:11 identify 11:20 44:11 46:15 ignorant 21:14 Ignoring 37:19 I'll 38:9 illustrate 74:1 illustrative 21:6 I'm 4:10 10:1,18 17:4 20:15,18 22:22 25:9 26:22 27:7,19 29:6 32:22 37:21,22 38:17 41:5,13 43:4,9,16,21 48:7 49:11,12 59:9 63:10,14 64:11 65:6,15</p>	<p>67:9 68:3,5,20 72:22 73:8,15 74:6 76:18 77:13 78:4 79:10 implementation 50:9 important 29:14 44:8,9 58:10,12,14 71:3,8 importantly 9:13 impossible 14:17 inadequacy 17:19 inadequate 11:16 34:9,10,18 35:2 72:10 inappropriate 30:15 76:13 inches 7:21 8:1 11:1 incident 25:11 41:2 incidents 20:4 incline 25:20 including 50:11 inconsistent 9:16,17 11:14 35:14,15 70:22 incorrect 11:3 45:20 increase 64:3 increasing 63:21 64:4 indent 6:17 independent 45:12 indicated 6:21 20:18 58:4</p>
--	--	--	---

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 9

<p>indicates 70:10</p> <p>Indicating 40:15 42:15</p> <p>indication 18:18 21:1</p> <p>induce 45:14</p> <p>industry 33:4 71:16</p> <p>infrequent 76:16</p> <p>initially 29:17</p> <p>injury 28:9,14 29:4 53:17 74:20 78:18</p> <p>inquire 46:16</p> <p>inspector 5:1,3 8:4,21 9:7 10:13 11:9 12:2,13 14:16 16:3 18:8,10 20:2 21:4,14 22:11 31:7,10 32:15 34:6,7,21 35:9 36:16 37:16,17 38:12,19,20 42:21 43:4 55:18 59:10,15 61:1,12 62:14 68:16 77:13 78:11</p> <p>inspectors 36:10 78:5</p> <p>inspector's 8:12,14 9:15 16:12 21:12 29:20 31:16 37:6,13 38:4,5 68:20 79:3</p> <p>instability 16:20 17:8,15,17</p> <p>instance 44:13</p> <p>instead 61:17</p>	<p>78:21,22</p> <p>intended 15:18 49:8 51:15 58:4 72:13</p> <p>intention 14:9</p> <p>interested 4:12 80:14</p> <p>interim 7:8</p> <p>internally 35:14</p> <p>interpret 12:7 15:2</p> <p>introduce 3:16</p> <p>involved 42:8 50:18</p> <p>involves 4:6,15 29:12</p> <p>irrational 62:7</p> <p>irrelevant 16:16</p> <p>isn't 13:12 16:9,20 20:10 27:11 29:1 32:5 40:4,13 64:16 66:19 78:1</p> <p>issue 4:11 10:11,16 15:10,12 16:18 18:12 19:13 22:3,8,16 24:21 25:1 26:12 27:5 29:13 35:3 39:4 52:5 54:21 56:1,2 59:10 63:18,19 64:1,8,15 66:16 69:5,21</p> <p>issued 21:6 60:8 69:13</p> <p>issues 4:6,8 29:10 55:22 61:1</p> <p>iteration 71:4</p>	<p>it's 5:9,13 6:11 7:6,10 8:17 9:4,6,13,16 13:4,19 14:10 16:13,15 22:15 23:13,21 24:5,16 25:2,4 26:11 28:5 29:1,2,19,20,21 30:9 31:13,14,20 32:3 36:7,18 38:18 40:8,14,17,18,19 41:20,22 42:1 43:6,7 44:18 45:15 48:1,9,11 49:6,12,18 54:2 55:5,12 57:14,19 58:8,17 59:14 61:20 62:6 64:14,19 65:20 69:10 70:7,15 71:14,18 74:19 77:5,6,16,20 78:17</p> <p>I've 32:8 59:15,16 74:7</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Jackson 2:7 3:19</p> <p>Jersey 1:14</p> <p>job 13:13,14</p> <p>Joe 77:16</p> <p>Jordan 3:2,8,21 4:2 5:10 6:10,19 7:2,17 9:18,20 10:1 17:21 18:3,16 22:22 23:6,8,11,15 29:8 32:9 33:20 40:21 43:8,14 63:6 66:9 67:3,15 71:22</p>	<p>73:22 74:4,8,13,16 75:6,14 77:9 79:14</p> <p>Judge 10:3 13:20,22 14:15 20:2 25:11,13 37:16 64:20,21 65:3,16,20</p> <p>judges 15:22</p> <p>judge's 9:16 11:13 15:2 16:1 20:6 25:16 36:19 53:5,6 78:10</p> <p>judiciously 71:9</p> <p>justify 61:15</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kelly 2:7 3:19</p> <p>kinds 50:11</p> <p>knew 22:8 30:20,21 31:1,4</p> <p>knowledge 32:6 61:13</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>Labor 1:3 2:3 3:6</p> <p>lack 17:19 35:4,12,15,18 36:3 72:9,10 73:3</p> <p>lacks 12:14</p> <p>Lake 1:6 3:7</p> <p>large 4:19</p> <p>lastly 70:8</p> <p>later 52:4 53:15 76:22</p> <p>law 3:18 19:16</p>
---	---	--	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 10

<p>21:10 56:13 lean 79:7 least 17:9 55:6 57:11,18 61:5 62:4 65:4,21 78:11 leave 35:20 leaving 18:20 26:17 71:6 led 59:18 legislative 71:6 length 15:7 55:4 65:9 73:2 less 11:6 19:20 42:22 43:2,3 let's 30:20 59:3 65:8 72:7,9 75:7,10,15,16,17 ,21 78:6 level 60:14 76:21 Liberty 2:8 lifeline 15:16 48:6 lifelines 46:9 likelihood 47:2 53:17 73:6 75:5,8,10,11,17 77:14 79:8 likely 15:21 17:12 20:12 21:2 25:12 26:10 27:9,10,13,16,17 ,21 28:8,13,16 29:4 45:6 46:17 52:19 67:2 74:20 75:18 76:15 78:18 line 48:21 49:4,21 51:3,7</p>	<p>lines 51:12 list 69:14,15,16 little 7:5 48:22 79:8 live 69:13 loading 31:3,19,22 32:2 located 36:15 logic 47:21 logical 10:8 long 10:4 20:3 31:13 36:5 40:12,13 42:18,19 50:18 longer 46:5 loop 68:9 lose 48:2 71:19 73:7 77:11 loses 44:15,16,18 45:1,5 48:4 51:16,18 55:10 75:15 losing 48:1 72:13 75:18 loss 71:21 lost 41:8 43:12 44:20 52:17 54:7 lot 10:8 44:5 46:4 54:15 lower 14:9,10 22:13,21 23:1,4 24:1 lowered 5:18 7:5,17,18 14:19 lowering 22:5 lows 24:2</p>	<p style="text-align: center;">————— M —————</p> <p>machine 16:19,22 17:2 50:20 machinery 50:12 maintain 7:7 malfunctions 19:12 20:1 Management 30:4 manager 41:14 maneuver 5:19 7:14 22:17 maneuverability 14:12 mark 16:2 marks 79:1 material 6:14 17:6,10,11 25:6 29:22 33:11,12 Mathies 16:7 27:9,14 28:5,10 44:4,7 45:4 46:15 50:17 53:20 54:13 71:4 75:2 matter 1:12 3:6 24:12 60:22 may 3:14 4:4,5 10:8,11 12:6 33:22 69:19 74:9 75:10 77:11 maybe 40:14 60:17 63:13 74:12 77:18 mean 14:13 17:7 23:7 37:15 40:20 42:6 43:16,20 45:14 49:8 50:13 51:19 65:19</p>	<p>71:17 74:4 76:1 77:3,15,20 meaning 70:15,16 71:12,14 means 35:15 71:5,20 meant 12:9 13:9 51:9,10 measures 50:7 mechanical 39:6 meet 7:9 16:2 mention 65:22 66:4 mentions 38:15 mere 66:4 messy 6:12 mid-axle 7:9,15,21,22 23:2,5 middle 20:16 33:18 76:6 mile 34:12,22 36:6 37:3 38:18 52:13 million 4:20 mind 5:11 8:20 20:2 24:19 59:9 73:17 mine 1:1,4,13 10:9 20:3 22:7 24:6,8 41:20 46:9 47:2 50:5,10 51:13 61:3 64:6 70:2,6 71:8,15,21 77:15 miners 37:4 42:7 mines 22:7 36:10 60:4 69:12 mine-wide 50:4</p>
---	--	---	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 11

<p>minimum 12:3 mining 50:6 minute 46:4 minutes 3:12,14 4:5 misconduct 57:21 mishearing 74:9 missing 68:20 momentum 19:20 Moore 2:6 3:18 4:4 6:5,11 7:1,16,18 9:19 10:3,18 11:5 12:8,12 13:11,18,22 14:8,21 15:8 17:2,14 18:2,7,18 19:6 20:5,10 23:4,7,10,12,17 24:7,10,18 25:13 26:1 27:6,12,19 28:3,15,20 29:6,11 32:13,16,20 33:3,7 53:4,19 57:4 60:2 63:10,11 64:11,12,19 66:11 67:9,19 68:11,15 71:1 73:20 74:2,6,9,14,17 75:13,20 77:3 78:2 79:5,9 morning 3:3 move 5:16 6:1,2,3,7,20 7:3,13,20 8:7 14:12 18:22 23:18 24:14 25:3</p>	<p>41:19,21 45:3 46:9 57:13,18 60:5 moved 8:2 25:3 30:5 39:17,21 41:17 43:19 movement 31:18 moves 6:11 12:21 21:7 22:6 39:19 42:1 59:16 moving 4:18 10:18 20:3 22:14 34:14 58:18,22 MSHA 1:4 3:22 30:11 33:5 61:11,17 MSHA's 21:21 39:7 muddled 29:21 mushing 28:19 Musser 53:1,2 myself 3:8 5:21</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>Nakamura 3:10 nature 51:21 54:10 necessarily 10:10 41:3 48:9 65:3 70:21 77:6,8 necessary 22:21 41:17 52:10 negligence 27:4 neither 44:1 52:4 62:3 80:9 nine 30:6 Nobody 43:3 non 16:14</p>	<p>nonetheless 58:8 non-existent 15:4 non-S&S 70:1 nor 44:2 52:4 80:10,14 normal 19:4,6 32:5 normally 6:21 67:6 Northwest 1:14 Notary 80:1,19 notes 11:19 12:1,3 nothing 12:2 14:10 19:22 35:15 64:14 79:12 notice 49:5 56:2,4,13,15 57:7 58:19 59:3,5,20 60:2,11 61:16 62:8,9 63:12,19 64:9,14,15 69:4 notify 49:10</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>obligation 78:2 obliterate 25:7 obstructions 36:11,15 obviously 4:6,11 5:7 8:10 9:8 15:12 22:2 29:13 31:6 51:2 60:15 obviousness 65:10 occasions 59:2,18 occur 50:9 76:15 occurred 46:20 47:13 62:4 67:5</p>	<p>76:15 Office 30:5 33:20 officer 80:2 Oh 49:2 okay 6:10 12:17 14:3 20:10 23:6 25:15 29:5,11 31:14 33:6 40:18 46:22 47:5,8,9,15 74:8 76:1 ones 65:11 69:22 ongoing 30:9,10 open 3:4 opening 68:18 70:13,14,18 operator 7:5,6,11 24:20 30:1,20,21 31:1,2,4,19 32:1,6 43:9 56:4 58:19 59:5,19 60:2 61:22 62:3 63:19 64:5,9 69:6,18 operator's 60:13 opinion 25:16 opposed 49:20 oral 3:5,12 order 3:3,11 5:18 25:14 30:18 61:2 68:16 73:5 orders 11:10 16:8 Ordinarily 52:6 organization 61:12,13 others 77:20 otherwise 71:12 80:14</p>
---	---	---	---

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
Page 12

<p>ought 60:1 61:2 outcome 80:15 outer 22:6,14 37:5 outlined 65:17 overtaken 46:5 overtravel 15:12,18,19,22 16:5 25:12 46:2 49:12 74:12 overturning 73:13</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P4 37:1 page 20:7 35:5 37:6 pages 1:11 Pandora's 70:18 particular 4:11 8:9 16:10 20:12 26:6,7 28:22 30:18 41:19 45:9 67:6 69:6,18 particularity 36:13 particularly 46:6 particulars 73:1,14 parties 44:2 52:5 80:10,13 passed 10:17 39:15 54:16 56:18 past 10:18 44:10 59:12 pattern 60:10 71:9,11,13 paying 50:21</p>	<p>PBS 53:1 Peabody 57:5 penalties 64:14 penalty 1:5 63:18,22 64:3,4 71:15 Pennsylvania 2:8 people 18:5 21:13 percent 60:8 perfectly 38:6 perhaps 11:5 16:13 36:9 68:20 72:14 78:14 person 61:11 perspective 49:19 Petitioner 1:5 2:2 phrase 7:7 34:10 35:1,4 physical 33:2 physics 19:19 pick 6:13 piece 4:19 Pittsburgh 2:8 places 10:8 12:16 14:6 20:7 play 48:4 50:6 51:16 54:9 plead 29:15 30:7,11 pleading 30:12 please 3:16 4:4 33:22 73:22 PLLC 2:7 3:19 point 5:8 16:16 30:16 31:16 34:4 35:2 38:3 39:16</p>	<p>43:9,17 44:6 47:11 50:13 51:1 53:10 57:9,10,20 77:11 pointed 34:13 39:18 74:22 77:4 pointing 35:16 points 66:12 policy 60:22 position 11:3 39:7 possible 17:9 24:16 potential 19:11 26:8 74:18 pound 16:19,22 17:2 pounds 4:20 practice 12:19 22:13,19,21 24:13 41:15 precise 28:10 precisely 53:10 precision 24:4,15 predated 15:13 preexisted 7:19 premise 50:4 present 3:8 14:20 presentation 3:13 presentations 79:16 presenting 70:10 presupposes 40:7 pretty 20:21 29:21 36:4 54:18 55:20 56:14 59:18 64:19 78:12 prevent 15:18</p>	<p>47:18,22 48:10 49:12 previous 21:5 52:22 56:8,10,16 58:2,20 61:10,15,18 principle 51:11 prior 5:16 6:1,7,20 21:15 39:8 59:3,6 60:1 62:2 69:22 priors 63:12 probably 17:8 41:11 77:16 problem 16:3,6,8 17:17 18:4,20 19:2,4,21 26:4 30:3,9,10 31:17 39:20 46:8 59:17 69:10 70:10,13 75:20 76:8 79:10 problems 4:21 28:4 39:6 59:16 61:4 proceed 3:14 4:3,10 Proceeding 1:5 proceedings 1:11 79:19 80:9 process 4:17 6:12 56:19 70:4 product 78:11 progressive 64:6 promulgated 51:13 prong 16:7,9 27:17,20 44:11 53:20,22 54:13 proof 36:8 76:11</p>
---	---	---	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 13

<p>proper 78:7</p> <p>properly 10:2</p> <p>proportional 58:16</p> <p>prospect 44:22</p> <p>protect 42:7 48:2</p> <p>protection 48:3 51:8,15</p> <p>protections 54:8 77:7</p> <p>protective 67:1 68:1</p> <p>proved 56:9 63:5</p> <p>provided 40:2</p> <p>Public 80:1,19</p> <p>pull 33:8,9</p> <p>pulled 66:16</p> <p>purpose 43:14 48:20 49:3 56:12</p> <p>purposes 41:10 56:15 63:17</p> <p>pushes 6:14</p> <p>pushing 17:10 33:11</p> <p>puts 21:11 58:19</p> <p>putting 56:4 71:10</p> <p>puzzled 26:22</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualified 34:3 43:5</p> <p>quantify 75:1,3,4</p> <p>quantifying 75:4</p> <p>question 5:7 23:16 24:3 31:17 32:10 43:4,20,21 45:2,4,10 51:8 52:18 53:20</p>	<p>54:1,9 59:3 63:7 64:17 71:7</p> <p>questioning 29:10</p> <p>questions 39:2 53:4 79:17</p> <p>quick 65:14 68:18</p> <p>quite 56:3</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>radio 19:9</p> <p>ramp 24:22 25:2,3 30:19 32:4</p> <p>rate 76:20</p> <p>rather 13:5 23:18 78:8 79:1</p> <p>reach 54:20</p> <p>reached 34:21</p> <p>reaches 62:15</p> <p>reaching 29:15 61:5</p> <p>reading 5:12 20:6 34:19 78:14</p> <p>real 19:12 29:2</p> <p>realize 48:11</p> <p>really 16:9,14 20:1 22:15 24:4,16,18 30:17 32:8 33:16 34:16 39:19 44:6,17 50:2,17</p> <p>rearrange 31:3</p> <p>reason 19:8 49:16</p> <p>reasonable 52:11 53:16 57:8 73:6</p> <p>reasonably 15:21 20:12 21:2 25:12 26:9 27:8,10,13,16,17 ,21 28:8,13,16</p>	<p>29:3 45:5 46:17 52:19 54:20 74:19 78:17</p> <p>reasoning 24:11</p> <p>reasons 49:13</p> <p>rebuild 21:8 23:17,18 24:6</p> <p>rebuilt 39:8</p> <p>rebuttal 3:15 4:5</p> <p>recall 65:6</p> <p>receive 78:6</p> <p>recently 56:4</p> <p>recognize 32:14 53:1 70:1 78:13</p> <p>recognizes 35:22</p> <p>recollection 11:12</p> <p>record 3:2,17 6:21 7:3 8:22 9:22 12:11 19:13,22 20:11 24:12 37:20 41:18 70:5 72:20 80:8</p> <p>recorded 9:21</p> <p>recording 10:2</p> <p>recurring 41:20,22 64:15</p> <p>redirected 44:4</p> <p>reduce 7:13</p> <p>reduced 39:8 80:7</p> <p>reducing 8:6</p> <p>reestablish 39:21</p> <p>referenced 14:1 16:12 19:11</p> <p>referred 60:3 64:12</p> <p>regard 21:12</p>	<p>regarding 34:1 39:2</p> <p>registration 45:11</p> <p>regular 24:8</p> <p>regulation 64:12</p> <p>reinstall 13:2,4</p> <p>related 4:6 80:10</p> <p>relative 80:12</p> <p>relatively 26:12</p> <p>relied 21:4 22:12 56:2 62:10</p> <p>rely 22:20</p> <p>remainder 7:8</p> <p>remaining 7:4</p> <p>remand 37:11 52:7 55:15 66:5</p> <p>remember 65:13 69:15</p> <p>remnant 8:10,13 11:15 12:13 14:2,5,15 15:3,6 34:17 35:13 36:1,3 38:11,15,16,18 40:4 76:2 79:2</p> <p>remnants 14:22</p> <p>remove 26:5</p> <p>removing 70:3</p> <p>reoccurrence 37:20</p> <p>reoccurring 42:2</p> <p>repair 12:22 41:4</p> <p>repairs 39:7,10,13 41:16 42:1</p> <p>repeat 63:17</p> <p>repeated 21:1 22:1</p>
--	---	---	--

Capital Reporting Company
Secretary of Labor vs. Black Beauty Coal Company 02-23-2012

<p>63:22 64:13 repeats 21:22 Reporting 1:16 representing 3:19,22 require 12:7 49:9 66:5 required 50:10 62:1 requires 42:8 75:3 reserve 4:5 resolve 35:7 respect 15:9 39:3 61:6 62:5,6 63:21 64:10 respectfully 36:22 respond 65:5 Respondent 1:7 2:6 response 46:10 73:10 rest 39:3 restore 58:5 restored 40:5 result 28:8 29:4 69:14 78:18 resulted 14:18 resume 58:4 Review 1:1,13 risk 50:13 road 5:2 18:13 20:21 26:11,13 27:1,2,3 37:2 40:15,17,19,22 41:1,6,10 42:20 48:15 49:4,6,19,21</p>	<p>50:21 52:15 55:4,6,7,10 56:20 57:19 70:3 73:4,5 roadway 5:8,9,14,22 6:4,6,9 7:13 9:12,15 10:6 13:1 21:8,9 23:13 24:5 25:19 29:18 34:1,4 40:8,9 43:20 44:14 57:13,14 roadways 4:8 10:10 rolled 47:20 rolling 25:19 53:9 Roman 14:5 15:1 room 5:19 22:17 rough 6:18 8:20 routine 50:9 rubber 10:4 rules 21:21 69:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S&S 4:8,14 10:11 15:10 25:1,10 39:4 43:19 54:21 70:15 71:3,5,7,12,17,2 0 72:2 73:17 safely 8:8 24:14 safety 1:1,4,13 22:16 33:1 45:12 47:17,18 50:7,10 salt 11:18 saw 5:1 8:12,13 22:11 31:7 scalped 24:17</p>	<p>scenario 36:9 50:8 scheme 64:6 scope 51:20 54:10 second 20:8 24:21 25:17 27:18 28:12,17,20 44:11,20 46:14,19 53:7 56:22 65:8 69:15 Secretary 1:3 3:6 4:1 13:8 15:10 19:13 27:10 29:15 33:21 35:22 39:3 51:6 52:9 54:4 70:9 72:5 75:14 76:11 78:13,16 Secretary's 10:13 13:11,14 54:19 55:3 59:22 72:3 74:2,10 section 6:4 72:10 seem 46:1 57:16,22 seemed 5:12 38:3 57:10 seems 28:18 32:11 38:20 45:14 47:16 56:9 60:10 61:1 64:18 seen 27:2 50:8 Senate 70:22 71:2,19 send 41:5,16 sense 11:21 12:20 16:14 29:14 32:4 71:3 separate 26:2 September 80:22</p>	<p>sequitur 16:14 seriatim 4:10 serious 69:20 serve 3:14 13:16 49:3 56:12 service 8:15 9:8 23:2 34:14 37:4 40:2,6 58:7 servicing 40:1 session 3:4 setting 3:11 26:21 seven 41:18,21 several 59:18 she's 11:14,15 15:3 26:4 35:17 short 8:18,19,21,22 26:12 short-term 25:3 shot 25:7 shovel 30:1 31:2,19,22 32:1 showing 57:22 78:17 shown 18:13 61:17 76:17 shows 21:2 61:18 67:17 sic 32:6,7 sides 27:3 significant 26:18 50:15 71:21 signs 16:20 17:14 similar 30:6 32:19,21 56:3 61:15,19 62:2</p>
---	--	---	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 15

<p>similarity 56:8</p> <p>simply 14:10 19:22 20:2,10 24:12 34:10 49:12 59:22 68:12</p> <p>single 41:2</p> <p>sit 6:17 73:18 77:15</p> <p>site 8:11 29:12,18,19,22 30:22 31:14 57:1</p> <p>sited 69:11</p> <p>sites 4:8</p> <p>situation 15:15 20:17 26:8 32:3 41:12 46:20 50:2 58:1,21 73:6,18 76:13,16 79:6</p> <p>situations 61:19 69:19</p> <p>six 22:1 63:13</p> <p>size 7:4 8:7</p> <p>slow 39:19 76:4,20</p> <p>slower 19:15,17,19</p> <p>slowly 9:5</p> <p>smaller 58:9,12,14</p> <p>smoke 46:8</p> <p>smoothing 8:5</p> <p>Solicitor's 30:5</p> <p>solid 59:19</p> <p>solidified 36:18</p> <p>solved 18:20</p> <p>somebody 20:13 26:16 31:11 48:2 49:5,9,10 50:19 57:7,22 63:3,4,5</p>	<p>71:9 72:13</p> <p>somehow 38:5</p> <p>somewhat 4:10</p> <p>somewhere 51:3</p> <p>sooner 76:22</p> <p>sorry 10:1 37:21 41:13 64:12</p> <p>sort 24:11 45:14 55:2 59:9 60:11 67:4 77:22</p> <p>speak 26:2,5 28:20</p> <p>speaking 14:21,22 15:3 25:21 26:4</p> <p>speaks 28:21</p> <p>specific 11:20 15:6 39:2 51:10 61:13</p> <p>specifically 34:13</p> <p>specify 36:17</p> <p>speculate 12:8 24:18</p> <p>speculation 68:5</p> <p>speed 76:4,20</p> <p>spoil 20:17 25:20</p> <p>spoiling 53:9</p> <p>spot 55:19</p> <p>spotted 31:8</p> <p>spotter 31:13,14 32:12,20 33:3,8 57:1</p> <p>spotting 30:22</p> <p>stabilize 43:15,18</p> <p>stable 42:22 43:2,3</p> <p>stand 63:2 70:11 77:12</p> <p>standard 7:9 10:6,7 12:6</p>	<p>20:21 21:20 29:1 32:16 45:11,13 47:18,22 49:7,17 51:5,9,14 64:11 69:7,9,11 70:14,15 72:15 77:5</p> <p>standards 47:17 51:12 54:8 56:6 60:3 69:13</p> <p>standing 18:8</p> <p>standpoint 14:14 22:19 57:20</p> <p>start 32:2 72:21 73:5 77:21</p> <p>started 26:20 34:17</p> <p>starting 73:15</p> <p>starts 27:2</p> <p>state 73:4</p> <p>stated 11:5,7</p> <p>statement 80:8,11</p> <p>stating 72:22</p> <p>stayed 67:13</p> <p>stenotypy 80:7</p> <p>step 28:12,17,18,20,2 1 72:17 75:2</p> <p>steps 46:10</p> <p>stick 15:1 50:20</p> <p>stop 33:2</p> <p>stopped 4:20 8:18,19,21,22 31:12 55:18</p> <p>stopping 19:22</p> <p>strictly 66:3</p> <p>stronger 60:16</p>	<p>61:21</p> <p>structure 49:9</p> <p>Stumbo 10:20 11:3 12:5 34:7 59:6 61:3,8 69:1</p> <p>Stumbo's 11:17 34:6,20 38:12 67:13</p> <p>subject 71:7</p> <p>submit 10:6</p> <p>submitted 79:18</p> <p>subpoena 69:3</p> <p>subsequent 5:19</p> <p>substantial 13:17,21 50:16</p> <p>sufficient 66:8</p> <p>suggest 52:6</p> <p>suggested 71:19</p> <p>suggesting 53:5 63:13 69:5</p> <p>suggestion 66:12,15 68:15</p> <p>suggests 19:16</p> <p>Suite 1:14 2:3,8</p> <p>supervising 62:19</p> <p>supervisor 21:16 26:14,19 31:9 61:9 62:18 69:1</p> <p>supervisors 22:9,10</p> <p>supports 20:1</p> <p>suppose 28:3</p> <p>supposed 30:22</p> <p>sure 9:19,20 10:2 22:17 29:19 40:4 43:9,16 48:7 49:16 63:10 67:9</p>
--	---	--	---

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 16

<p>73:8 surface 6:15,18 21:21 60:4 70:2 surrounding 51:22 sustain 76:11 SUV 8:14 swallow 51:4 sworn 80:5 System 30:4</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>taking 29:22 79:16 talk 21:21 36:14 talked 12:13 34:9 69:22 talking 7:19,22 27:19 35:17 36:5,11,13 53:6 57:17,20 63:16,21 64:3 69:11 76:18 talks 37:20 tear 8:6 technical 71:18 technological 29:10 temporary 41:20 ten 60:4 tend 53:18 tended 12:14 tendency 11:12 tenth 21:20 terminology 38:9 terms 3:11 34:17 64:5 70:19 73:2</p>	<p>terrible 40:16 42:20 terrifying 44:22 test 27:9 50:17 54:17 75:3,21 testified 10:14,20 16:4 22:10 32:15 35:9 41:14 68:17 testify 69:2 testifying 16:5 testimony 9:15 12:14 16:4,12 17:5 21:12 22:15 29:21 34:6,20 37:6,14 38:4,5,10,13 42:21 60:18 68:19,20 80:4,6 Thank 3:21 4:2 32:9 33:18,20 66:9,10 75:6 79:13,14,15 that's 6:5 7:7 13:5,11 16:7 18:6,13 20:17 23:7,9,10,15,19, 22 25:13 26:12 27:4 28:3 29:19 31:2 32:15,16 33:18 35:4,14 37:22 38:17,19,21 40:4,10 42:18,19,22 43:13,14,17,21 44:8,21,22 45:19 46:13 47:3,11,14 48:16,19 49:8,16 50:10 51:11 52:1,9 53:19 54:11,14 55:17 56:1,2 57:2</p>	<p>58:16,21 62:12,20 63:22 65:13 66:2,5,8 67:1,22 68:3,7 70:20 71:6 72:15 73:8 75:2,6 76:5,8 78:2,6 79:12 themselves 60:12 theoretical 29:1,2 73:12 thereafter 80:7 therefore 5:14 54:8 there's 5:17 6:1 7:3 12:16 14:9,16 17:4 19:16,22 20:22 26:13 27:1 28:17 35:6,12 36:17 37:15 38:18 42:20 44:17 46:21 48:11,22 49:5,15 50:2,18 53:16 55:8,11,22 59:13 60:7,9,17 75:15 79:12 they'll 25:5,6 they're 13:1 16:21 19:9 24:20 36:10,12,13,15 41:21 57:14,17,19 77:8 they've 9:10 20:3 third 16:7,9 27:17,20 28:12,18,21 29:9,11 45:3 46:16 53:22 54:12 55:16 57:3 62:6 68:16 69:16</p>	<p>75:2 third-leg 28:5 thousand 52:14 throughout 70:6 Thursday 1:9 3:4 tire 10:4 79:1 to-and-from 6:8 today 72:6 74:7 top 8:14 24:2 55:1 60:4 topic 4:7 torn 52:15 total 35:4,12,15,18 36:3 totally 73:12 touch 24:22 toward 11:12 20:16 60:13 68:18 towards 17:12 34:14 55:19 tracks 26:16 traditional 15:20 traffic 18:21 24:9 26:18 76:17 training 45:11 78:5,7 transcript 37:7 78:15 transmute 41:9 travel 18:16 19:2 37:2 41:2 traveled 10:5 37:4 traveling 18:14 58:4 Traylor 8:11,18</p>
---	---	--	---

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 17

<p>9:7 10:22 38:10 41:12,13 trouble 41:5 troubled 62:13 truck 5:3,4 8:12,16 9:8,9 17:3,21,22 18:8,9,17,19 19:3 23:2 31:4,7,8,18 33:2,9 34:14 37:4 39:9 40:2,6 41:7,16 42:11 47:19 52:14,17,19 53:16 54:2,5,11 55:10,12,13,18,2 1 58:6,7,8,9,12,14, 18,22 66:16 67:5,7,10,19,20 68:4,6,17 72:14 73:7 76:5,6,22 77:19 78:22 trucks 4:22 7:20,22 24:6 30:22 31:3,11,12,20,22 32:2 42:2 56:20 58:3 67:17 true 27:11 35:21 45:12 48:16,19 58:20,21 61:20 65:20 80:8 trying 16:21 33:14 38:17 65:6 tub 6:12 two-tenths 34:12,22 36:5 37:3 38:18 52:13 two-thirds 55:4,11</p>	<p>tying 47:16 type 19:4 typewriting 80:7 typically 36:12 <hr/> <p style="text-align: center;">U</p> <hr/> U.S 2:3 ultimately 65:15 unable 7:6 23:1 unclear 15:8 34:7 38:5 78:10 uncomfortable 9:3 unconsolidated 17:11 underground 36:10 46:9 60:5,8 underlying 50:4 78:1 underneath 17:6 understand 35:1 51:1 54:14 61:7 62:17 72:5 74:2,10 understanding 57:8 unequivocal 34:8 uneven 6:15 9:2 unfair 76:13 unfortunately 44:1 52:3 unless 39:1 44:15 56:10 unstable 16:13,14,15 17:18 33:14 43:6,16</p>	<p>unwarrantable 4:8,14 21:4 22:12 35:3,19 55:22 59:11,14 61:2,5 62:11,16 64:22 65:18,22 upper 25:6 useful 46:6 usually 59:14 <hr/> <p style="text-align: center;">V</p> <hr/> vague 60:17 valative 32:6,7 value 71:20 veering 25:19 53:8 vehicle 10:4,9 11:2 12:17 16:11 18:5,6 25:18 41:5 44:15,16,19,20 45:1,5,6 48:1,3,5,18 51:17,19 53:8 72:14 73:13 74:3,11,15 76:16,17 77:12 vehicles 18:11 vehicular 41:2 ventilation 59:16 60:5 verbal 60:17,19 61:21 Versus 3:6 view 12:14 31:16 54:19 55:4,5 71:16 72:1,3 views 78:13 violated 45:18 violation 9:14</p>	<p>10:16 20:8 25:17,18 26:9 27:15 28:11 29:9 34:2 44:10 45:13,15 51:21 53:7 54:11 55:16,17 56:10,12,15,21 57:3,18 58:3 59:12 62:6 72:6 76:19 violations 22:1 39:2,4 54:18 56:1,3,8,17 57:7 61:10 62:2,5 63:17,22 64:13,15 65:7 71:10,11,14 Virginia 2:4 virtually 47:17 57:2 vs 1:6 <hr/> <p style="text-align: center;">W</p> <hr/> wad 78:12 waiting 32:1 Waldman 2:2 3:22 33:22 35:21 36:4,21 37:18,21 38:2,16 39:11,14 40:10,13,18 41:11 42:14,19 43:3,13,19 45:15,19 46:3,12,22 47:3,5,8,10,14,2 1 48:13,16,19 49:2,15,22 51:1 53:12,14,18 54:1 58:2,13 60:15 61:7 62:17 63:1,4,16 64:8</p>
---	--	--	--

Capital Reporting Company
 Secretary of Labor vs. Black Beauty Coal Company 02-23-2012
 Page 18

<p>65:1,6,11,13,19 66:10 walk 9:7 walked 72:4 walking 57:15 walks 31:15 wall 40:14 49:20 walls 14:6 27:3 warned 59:15,16 warning 60:12,17,20 61:22 Washington 1:9,15 wasn't 13:9 19:7 21:17 25:21 56:8 58:7 61:8 69:14,15 water 36:11,14 54:15 week 77:19 weeks 62:5 weighs 4:20 weight 26:21 65:4 welding 5:4 9:9,10 18:1,7,9,19 67:5,7,9,20 we'll 20:9 29:9 we're 7:19,22 9:1 13:17 29:19 30:13 36:5 43:20 63:21 69:11 75:22 we've 30:12 43:19 50:8 65:2,17 69:21 whatever 28:6</p>	<p>41:16 what-have-you 69:5 wheel 44:20 wheels 8:14 whereas 39:22 52:12 64:11 Where's 42:5 Whereupon 79:19 whether 15:21 28:5 29:3 31:7,8,17 34:3 46:17 48:17 52:1 63:19 64:8 66:4,20 69:16 72:1 73:5 74:19,21 75:18 78:9 white 48:21 49:20 whole 69:4 79:4 whom 80:2 whose 80:4 wide 4:16 42:5 55:7,9 width 20:20 73:4 Wilson 2:3 win 30:12 wind 77:22 witness 38:10 80:4,6 wonder 73:15 wondering 5:21 32:22 work 9:10 18:6 31:21 42:12,15,17 66:13 68:7</p>	<p>working 33:12 works 71:21 world 29:2 worried 23:14 worry 24:4 worse 50:8 worse-case 50:7 written 35:8 44:5 71:12 wrong 68:6 wrote 38:20 53:11</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yet 56:20 Young 3:9 14:4,13 15:5 16:21 17:6 19:1 23:13 24:3,8,15 35:11 36:2,7,22 40:7,11,17,20 41:1 42:4,18 43:2 50:1 57:4 58:11 64:2 68:4,14 76:12 yourselves 3:17 you've 14:11 30:13 42:12,16 44:10,19,22 51:20 54:22 55:1,2</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 11:8,17 12:12,19 13:9,16 14:1 23:20 34:11</p>
--	--	---