

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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**APR 29 2015**

MIDWEST FUELS, INC.,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

MIDWEST FUELS, INC.,  
Respondent

**CONTEST PROCEEDINGS**

Docket No. LAKE 2013-0046-RM  
Citation No. 8660952; 09/26/2012

Docket No. LAKE 2013-0056-RM  
Order No. 8660955; 10/09/2012

Mine: Plant No. 32  
Mine ID: 47-02405

**CIVIL PENALTY PROCEEDING**

Docket No. LAKE 2013-0157-M  
A.C. No. 47-02405-307333 V480

Mine: Plant No. 32

**DECISION AND ORDER**

Appearances: Barbara Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Joshua Schultz, Esq., Law Office of Adele Abrams, P.C., Beltsville, MD for Respondent

Before: Judge L. Zane Gill

This case arises from a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). It involves one 104(a) citation, Citation No. 8660952, and one 104(b) order, Order No. 8660955,<sup>1</sup> issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Midwest Fuels, Inc. (“Midwest Fuels” or “Respondent”) at the Plant No. 32 mine. 30 U.S.C. § 814(a), (b). The parties presented testimony and documentary evidence at the hearing held in La Crosse, Wisconsin on April 1, 2014.<sup>2</sup>

<sup>1</sup> Order No. 8660955 is a non-assessable 104(b) order.

<sup>2</sup> At the end of the Secretary’s case-in-chief, Midwest Fuels moved to dismiss the case. (Tr. 76:22-24) I denied the motion. (Tr. 79:6-23)

For the reasons listed below, I vacate both Citation No. 8660952 and Order No. 8660955.

### **Stipulations**

At the hearing, the following stipulations were incorporated into the record by reference:  
(Tr. 13:1-11)

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.
2. The individual whose signature appears in Block 22 of the Citation at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
3. A duly authorized representative of the Secretary served the Citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the Citations and terminations may be admitted into evidence to establish their issuance.
4. On September 26, 2012, MSHA Inspector James Alan Hines (“Hines”) issued Citation No. 8660952 to Midwest Fuels (The company’s legal name Midwest Industrial Fuels, Inc., a Wisconsin corporation) pursuant to Section 104(a) of the Mine Act at Plant #32. It alleged a violation of 30 C.F.R. § 46.9(a).
5. Plant #32, Mine ID No. 47-02405, is a portable crushing plant owned by Milestone Materials, a division of Mathy Construction Company, a Wisconsin corporation (“Mathy”). On September 25, 2012, Plant #32 was stationed in a quarry owned by Mathy near Rochester, Minnesota, named the Hammond Quarry.
6. Under the heading and caption “Condition or Practice” the citation alleged as follows:

Records of training have not been provided for a miner fueling mining related equipment while on an active mine site. These records were either New Miner or Experienced Miner training forms depending on whichever one is appropriate and annual refresher and task training records. These records have been requested and confirmed to be non-existent through Corporate Counsel and the Corporate Safety Officer. Without these records, MSHA cannot confirm compliance with this standard.
7. The citation was designated non-significant/substantial, the occurrence of injury or illness deemed “no likelihood” and “no lost workdays,” and the operator’s alleged negligence determined to be moderate.

8. Midwest Fuels delivers various fuels, including propane, home heating oil, diesel fuel, gasoline, kerosene, and lubricants and fuels equipment at private residences, businesses, farms, mines, construction sites and trucking companies.
9. Travis Pearson ("Pearson") is a fuel delivery truck driver employed by Midwest Fuels. Pearson began his employment with Midwest Fuels on May 3, 2010. His job is to deliver fuel and fuel equipment to private residences, businesses, farms, mines, construction sites and to trucking companies, in and around Rochester, Minnesota. The delivery sites are regulated by either OSHA or MSHA.
10. On September 25, 2012, the day of the MSHA inspection, Pearson was delivering fuel to various types of equipment and tanks, located in and around Rochester, Minnesota, including equipment in the Hammond Quarry. At the time, Pearson was one of four Midwest Fuels employees responsible for delivering and fueling equipment in the Hammond Quarry. Pearson and the three other Midwest Fuels employees who fuel equipment performed substantially the same tasks.
11. While stationed at the Hammond Quarry in September of 2012, Plant #32 was operating five days a week and was fueled each day. During that same time at the Hammond Quarry, Plant #59, a Wash Plant, located 100 to 150 yards from Plant #32, was operating five days a week and was being fueled every other day. Also, a stripping crew operated, when needed, and was fueled as needed.
12. When Pearson arrived to deliver fuel at the Hammond Quarry, he regularly stopped at the scale house to sign in and notify the Foreman that he was on the property. Upon entering the quarry, Pearson, who had a two-way CB radio in his fuel delivery truck, communicated with not only the miners in the Hammond Quarry, but also the customer trucks picking up product at the quarry.
13. Pearson had received Site Specific Hazard Awareness Training for the Hammond Quarry, in accordance with 30 C.F.R. § 46.11, on August 29, 2012.
14. On September 25, 2012, when Pearson arrived to fuel mining-related equipment at Plant #32, he drove into the pit unaccompanied for approximately ½ mile.
15. Customers and visitors who have received Site Specific Hazard Awareness Training travel into the pit unaccompanied.
16. The Hammond Quarry does not have a central fuel receptacle or storage tank, so Pearson parked in a central location in the Hammond Quarry, a distance of 40 to 50 feet from Plant #32, where vehicles would approach him to receive fuel. The vehicles, such as loaders and haul trucks, would park and the motors would be turned off during fueling. Then, if necessary, Pearson would travel from Plant #32 to Plant #59, approximately 100 to 150 yards, to reposition his delivery vehicle in order to fill that equipment.

17. On September 25, 2012, there were five miners present in the Hammond Quarry. Foreman Don Smith was operating Plant #32, with Loader Operators Brandon O'Connor and Steve Mueller. One loader was the Feed Loader, which was charging Plant #32 with previously blasted rock, while the other loader, which was the Take Away Loader was pushing material off the bench for the crusher. At the time, Plant #32 was crushing wash feed which was being transferred up to Wash Plant #59. There were no customer trucks near Plant #32. Meanwhile, Quarry Loader Jerome Blogett who was not assigned to either Plant was helping load wherever he was needed. Wash Plant #59 was being operated by Foreman Justin Hedger. After the material was washed it was stockpiled according to size. It was these stockpiles where customer trucks were loaded with material.
18. Customer trucks that picked up product from the stockpiles used the same roadways as Midwest Fuel employees who were delivering and fueling equipment.
19. When Pearson fueled Plant #32, he unrolled the hose from a reel on his delivery vehicle and stretched the hose about 40 feet to the fuel cap of Plant #32. The hose is a 1 <sup>3</sup>/<sub>8</sub> inch wide rubber hose. Pearson hooked the hose on a hose hangar located on the side of the Plant and then climbed up a four-rung ladder. He then lifted the hose up to the fuel cap. The Plant was in operation while it was being fueled. At the time all of the moving parts on Plant #32 were guarded. The trough-shaped conveyor belt is approximately 5 feet away from the fuel cap. It took Pearson approximately 30 to 45 minutes total to fuel Plant #32.
20. On September 25, 2012, Pearson also fueled the generator by stepping up the stairs, with handrails, while carrying an industrial fuel hose into the trailer of the generator. The generator was operating while Pearson delivered fuel to it. The generator contains a diesel powered engine which requires fuel to operate. There are electrical connections in cabinets inside the generator trailer.
21. Prior to September 25, 2012, Pearson had received the U.S. Department of Transportation ("DOT") HazMat driver training to prepare commercial truck drivers to transport hazardous materials, annual DOT Facility & Transportation Security, DOT Driver Training, DOT HAZMAT Rail Training, DOT Function Specific Training and DOT Hazardous Materials General Awareness Training.
22. Prior to September 25, 2012, Pearson had also received OSHA training annually covering the following subjects: First Aid, Fall Protection and Prevention, Respiratory Protection, Personal Protective Equipment, Powered Industrial Truck, Hazardous Energy Control (Lockout/Tagout), Confined Space, Hearing Conservation, Hazard Communication Standards, Fire Prevention, Electrical general Safety Awareness, Storm Water Training, Shop and Welding Safety, Incident Reporting, General Safety Awareness (weather), Vehicle Safety, Avoiding Falls and Slip Hazards, Housekeeping, Safe Lifting, Using Ladders Safely and Underground Utilities Awareness.

23. Midwest Fuels has not certified either New Miner training pursuant to 30 C.F.R. § 46.5 or Newly-hired experienced miner training pursuant to 30 C.F.R. § 46.6 for Pearson.
24. Pearson does not perform mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; repair of mining equipment; or associated haulage of materials within the mine from these activities.
25. On April 14, 2009, MSHA Inspector James Hines issued Citation No. 6494042 against Milestone Materials Div./Mathy Construction for failing to provide Greg Hall, a fuel delivery truck driver for Midwest Fuels, with 24-hour new miner training in violation of 30 C.F.R. § 46.5. After the hearing was adjourned, but before Judge Barbour issued a decision, the Secretary vacated the citation. From August 4, 2009, through September 26, 2012, Midwest Fuels continued to deliver fuel to various quarries and MSHA has not issued citations to Midwest Fuels for a violation of 30 C.F.R. §§ 46.5, 46.6, 46.8, or 46.9.
26. Pearson performs no duties other than delivering fuel to fuel receptacles and fueling equipment.
27. Pearson's job duties do not include repair of client vehicles or equipment at mine sites or any delivery work sites.

Jt. Stip.

### **The Arguments**

The Secretary argues that under the plain meaning of the cited regulation, Midwest Fuels is liable for failing to produce certification of Pearson's new or experienced miner training. He argues that Pearson should be considered a "miner" because he fuels the crusher, generator, and loaders at an active mine site five days a week, in the same general vicinity as miners engaged in mining operations. (Sec. Br. at 8-9) In doing so, Pearson is exposed to hazards of mining operations, such as slip and fall, electrical hazards, noise, moving machine parts, traffic patterns, and flying material. *Id.*

Alternatively, the Secretary argues that Pearson should be considered a maintenance or service worker. The Secretary argues that Pearson is a service worker, not a mere vendor or delivery worker who is not required to obtain new miner training, because refueling mine machinery is a "service" that Midwest Fuels provides to meet the operational needs of the mine. (Sec. Br. at 15-18) Additionally, the Secretary argues that Pearson's refueling work keeps the machinery in functioning order and is necessary to maintain operations at the plant. *Id.* Thus, Pearson's fueling activities should be considered "maintenance of mining equipment." *Id.*

Because both miners and maintenance or service workers are required to undergo comprehensive new or experienced miner training, the Secretary argues that Midwest Fuels is required to produce records of Pearson's new miner training and is liable for the failure to do so. *Id.*

Midwest Fuels argues that its fuel truck drivers are delivery workers or vendors under the Part 46 regulations, and should not be considered miners. (Resp. Br. at 7-11) Because Pearson was not a miner, the Respondent contends, he was not required to receive new miner training, and Midwest Fuels did not violate the Part 46 training requirements. *Id.* In response to the Secretary's contention that Pearson was a miner because he was exposed to the hazards of mining operations and was on the mine site for frequent and extended periods, Midwest Fuels argues that the training requirements do not apply to vendors and delivery workers, as those terms are defined in section 46.2(g)(2). *Id.* Midwest Fuels further argues that Pearson should not be considered a maintenance or service worker because his work at the mine site was limited to delivering fuel and refueling equipment, which is not maintenance work. *Id.* Finally, the operator argues that the Secretary's attempt to apply the training requirements for miners to Pearson is arbitrary and capricious, and therefore not entitled to deference, because the interpretation is inconsistent with prior history and enforcement. *Id.* at 12-17.

Resolution of this dispute turns on whether the definition of "miner" is clear or ambiguous under 30 C.F.R. § 46.2(g), and whether Pearson's classification as a miner was warranted.

### **Basic Legal Principals**

The Commission has found that when interpreting the Secretary's Regulations:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1990); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

*Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (September 1996). "It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises." *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Further, "the statutory provision underlying the regulation, as well as any related statements

accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning." *Lehigh Southwest Cement*, 2011 WL 7463296, at \*5 (Dec. 2011) (ALJ Paez) (quoting *Lodestar Energy*, 24 FMSHRC at 693). Additionally, "[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation." *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996).

The Supreme Court has said that when reviewing a challenged interpretation of regulatory language, the Secretary's interpretation of his own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." See *Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to "the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

For the reasons set forth below, I find that the meaning of 30 C.F.R. § 46.2(g) is clear and unambiguous, and the Secretary's interpretation of the standard is not entitled to deference.

#### **Definition of "Miner" under 30 C.F.R. § 46**

Midwest Fuels was cited for a violation of 30 C.F.R. § 46.9(a), which requires each operator to "record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each *miner* has received training required under this part." (emphasis added) In order for the Secretary to prevail, he must first prove that Pearson, a fuel delivery truck driver, is a "miner" as defined by 30 C.F.R. § 46.2(g).

In Section 46.2(g) a miner is "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations [...] and [a]ny construction worker who is exposed to hazards of mining operations." 30 C.F.R. § 46.2(g)(1). "Mining operations" cover "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h)

Further, the definition of "miner" "*does not include* scientific workers; *delivery workers*; customers (including *commercial over-the-road truck drivers*); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods." 30 C.F.R. § 46.2(g)(2) (emphasis added).

Persons who are not miners under Section 46.2 are required to receive site-specific hazard awareness training for those areas of the mine property where mining-related activity takes place. Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53080-01, 53126. This includes "office or staff personnel; scientific workers; *delivery workers*; customers, including *commercial over-the-road truck drivers*; construction workers or employees of independent contractors who are not miners under §46.2; maintenance or service

workers who do not work at a mine site for frequent or extended periods; and vendors or visitors.” *Id.* (emphasis added).

The plain language of this regulatory provision is clear and unambiguous. The provisions must be enforced as they are written, and I must look to the ordinary meaning of the terms used in the regulation. *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Lodestar Energy, Inc.*, 24 FMSHRC at 692; *Pfizer Inc. v. Heckler*, 735 F.2d at 1509. The language of 30 C.F.R. § 46.2(g) means exactly what it states. It explicitly excludes “scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors [...] [and] maintenance or service workers who do not work at a mine site for frequent or extended periods” from the definition of a “miner.” This is plain and unambiguous language whose meaning is apparent from any reasonable reading of the regulation. Indeed, in promulgating the regulation, the Secretary made clear what the definition of “miner” included and excluded, and what the definition of “mining operations” included.

According to the Merriam Webster online dictionary, the ordinary meaning of the word “delivery” is the “act of taking something to a person or place,” and “delivery man” means a “person who delivers wholesale or retail goods to customers usually over a regular local route.” <http://www.merriam-webster.com/dictionary/delivery%20man>; <http://www.merriam-webster.com/dictionary/delivery>. Further, the ordinary meaning of “maintain” is “to keep in an existing state (as of repair, efficiency, or validity); preserve from failure or decline,” and “maintenance” is “the upkeep of property or equipment.” <http://www.merriam-webster.com/dictionary/maintain>; <http://www.merriam-webster.com/dictionary/maintenance>.

Despite the plain meaning of the regulation and the ordinary meaning of the words “to maintain” and “maintenance,” the Secretary argues that his interpretation of the “maintenance or service worker” exception to the definition of “miner” is reasonable and must be accorded deference. As discussed below, I have carefully considered the Secretary's arguments in this regard but cannot give them any credence.

#### **A Fuel Delivery Truck Driver, Is Not A “Miner” Under 30 C.F.R. § 46**

The Secretary argues that Pearson should be considered a miner because he works at an active mine site near miners engaged in mining operations, and as such is exposed to the hazards of mining operations. The Secretary proffers that “[a] person’s status as a miner turns on whether he is engaged in, or exposed to the hazards of, ‘mining operations.’” (Sec. Br. at 9) This is not true. While the definition of a “miner” does turn on whether he or she is engaged in “mining operations,” 30 C.F.R. § 46.2(g)(1)(i), it does not turn on whether a “miner” is “exposed to hazards of mining operations.” 30 C.F.R. § 46.2(g)(1)(ii). The only mention of a person being a “miner” by exposure to the hazards of mining operations is when that person is a “construction worker.” 30 C.F.R. § 46.2(g)(1)(ii) At no point in the hearing or in his post hearing brief did the Secretary argue that Pearson was a “construction worker.” The Secretary is trying to improperly conflate two distinct sections of the regulation. I reject the Secretary’s argument that Pearson was a miner because he worked at an active mine site near miners engaged in mining operations, and as such was exposed to the hazards of mining operations.

Additionally, the Secretary stipulated that Pearson did not engage in “mining operations” such as “mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; repair of mining equipment; or associated haulage of materials within the mine from these activities.” (Jt. Stip. at 24 (citing 30 C.F.R. § 46.2(h))). Therefore, under Section 42.2(g)(1), I cannot find that Pearson engaged in “mining operations.”

A fuel delivery truck driver also comes under the exception to the definition of “miner.” The regulation makes it very clear that the definition of “miner” “*does not include* scientific workers; *delivery workers*; customers (including *commercial over-the-road truck drivers*); vendors; or visitors.” 30 C.F.R. § 46.2(g)(2) (emphasis added). These exclusions to the definition of “miner” are included without reference to the exposure of mining hazards. In fact, as plainly written, they are explicit exclusions with no limitations. Indeed, these exclusions in the definition of “miner” in 30 C.F.R. § 46 were described in the Final Rule published by MSHA in September, 1999, where MSHA stated “*we intended to exclude customers and delivery personnel* from the definition of ‘miner’ [...]. Section 42.2(g)(2) also indicates that commercial over-the-road truck drivers may be considered “customers” under the final rule and excluded from the definition of ‘miner.’” 64 Fed. Reg. 53080-01, 53096.

In the stipulations submitted to the court and the testimony heard at the hearing, the Secretary admitted that Pearson was a delivery truck driver employed by Midwest Fuels to deliver fuel to the Hammond Quarry. (Jt. Stip. at 9, 10; Tr. 36:11-21) On September 25, 2012, the day of the MSHA inspection, Pearson was delivering fuel to equipment in the Hammond Quarry.<sup>3</sup> (*Id.* at 10) It took Pearson approximately thirty to forty-five minutes to fuel Plant #32. (*Id.* at 19) During this time, Pearson parked his truck in a central location in the Hammond Quarry where vehicles, such as loaders and haul trucks, approached him to receive fuel. (*Id.* at 16) On the date the citation was issued, Pearson also fueled the diesel powered generator by pulling up to the generator, climbing a ladder with handrails, and hooking up the fuel hose to the fuel intake on the generator. (*Id.* at 20) These actions are clearly consistent with a *delivery* operation, which is purposely excluded from the definition of “miner.” I find that Pearson was a “delivery worker” because he entered the mine property briefly to deliver fuel.<sup>4</sup> As a fuel delivery truck driver, Pearson was not a “miner” under Part 46 of the regulations.<sup>5</sup>

### **Pearson Was Not A “Maintenance or Service Worker” Under 30 C.F.R. § 46**

In Section 46.2(g)(2), the definition of “miner” “does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.” 30 C.F.R. § 46.2(g)(2). Nonetheless, the Secretary argues that Pearson should be considered a maintenance or service worker under Section 46.2(g)(2) because refueling mine machinery is a service that

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<sup>3</sup> At the time, Pearson was one of four Midwest Fuels employees responsible for delivering and fueling equipment in the Hammond Quarry. (Jt. Stip. at 10)

<sup>4</sup> Although not necessary for the purposes of this case, I also find that Pearson was a “commercial over-the-road truck driver” because he was required to have a CDL driver’s license in order to work as a fuel delivery truck driver. (Tr. 92:20-24)

<sup>5</sup> The Respondent also made the argument that Midwest Fuels is a “vendor” and as such also falls under Section 46.2(g)(2). I find it unnecessary to address this point because I found that Pearson is a “delivery worker.”

Midwest Fuels provides to meet the operational needs of the mine. More specifically, fueling is a service performed to keep mine machinery in “functioning order” and is necessary to maintain plant operations. (Sec. Br. at 16) As a result, Pearson’s fueling activities should be considered “maintenance of mining equipment”<sup>6</sup> despite the exclusion mentioned above.<sup>7</sup>

The case law cited by the Secretary in support of categorizing Pearson as a maintenance or service worker involves independent contractors. For example, *Joy Technologies*, 99 F.3d 991 (10 Cir. 1996) refers to construction workers who fall under 46.2(g)(1)(ii) and not (g)(1)(i). Further, both *Joy Technologies* and *Otis Elevator*, 921 F.2d 1285 (D.C. Cir. 1990) equate “service” work with repairing and troubleshooting problems with equipment. *Id.* Additionally, *Musser Engineering*, 32 FMSHRC 1257, 1270 (Oct. 2010), categorized the company in that case as an independent contractor because it performed engineering support, mapping, and surveying services. Despite the fact that the Secretary is not claiming Midwest Fuels is an independent contractor, the work done in the cases cited by the Secretary involve much more than delivering fuel for equipment at a mine, e.g., doing repairs, troubleshooting, providing engineering, mapping, and surveying services. Therefore, I cannot adopt the Secretary’s reasoning that these cases show that Pearson was servicing or maintaining equipment to keep it in functioning order. Delivering fuel and fueling equipment are quite different than doing equipment upkeep, repair, troubleshooting, or any form of engineering or mapping services.

Additionally, MSHA’s Program Policy Manual<sup>8</sup> describes maintenance or repair work as “upkeep or alteration of equipment or facilities. Replacement of a conveyor belt would be considered maintenance or repair.” III MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 46, at 37 (2006). Further, according to MSHA’s Module Number 12 of Instruction Guide Number 43 for surface metal and nonmetal field maintenance of machinery:

Field maintenance is performed by such personnel as mechanics, electricians, and their helpers; and by greasers or oilers, and the operators of various machines. Maintenance/repair work may

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<sup>6</sup> Hines believed Pearson’s activity required new or experienced miner training because of exposure to hazards, time spent on site, and that by fueling the equipment, Pearson went beyond simple delivery of fuel. (Tr. 74:21-72:20) This is because in Hines’ experience, delivery workers at mines go to a designated location, drop off parts, and leave. (Tr. 40:14-22)

<sup>7</sup> The Secretary’s argument is an example of a logical fallacy referred to as *reductio ad absurdum* or *argumentum ad absurdum*. This type of argument seeks to demonstrate that a statement is true by showing that an absurd result would follow from its denial, i.e., the underlying thesis must be accepted because rejecting it would be untenable. <http://www.iep.utm.edu/reductio/>. According to the Secretary’s argument, Pearson provided fuel without which the mining equipment would not work and mine production would cease, therefore Pearson “maintained” the equipment. It is clear that the equipment would not function without fuel, but it does not follow that because Pearson delivered the fuel, he was doing maintenance or service work.

<sup>8</sup> The Commission has long held that the PPM is not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981)). Nevertheless, the PPM is a policy statement that, in this instance, complements the Secretary’s regulation.

involve: 1. Inspecting, troubleshooting, evaluating condition 2. Towing 3. Deenergizing, securing, releasing pressure 4. Removing and replacing guards or safety devices 5. Lubrication 6. Manual or powered materials handling 7. Use of hand and power tools 8. Welding and cutting 9. Changing component parts 10. Inspecting and testing completed work

On-The-Job Training Modules For Surface Metal And Nonmetal Mines Field Maintenance of Surface Machinery, at 2, *available at* [http://www.msha.gov/safetypro\\_in\\_a\\_box/IG%2043%20OJT%20training%20modules%20surface%20MNM/IG%2043%20OJT%20modules%20Surface%20MNM%20Full%20Text.pdf](http://www.msha.gov/safetypro_in_a_box/IG%2043%20OJT%20training%20modules%20surface%20MNM/IG%2043%20OJT%20modules%20Surface%20MNM%20Full%20Text.pdf).

The Secretary stipulated that Pearson performed no duties other than delivering fuel to fuel receptacles and fueling equipment, and his job duties did not include repair of client vehicles or equipment at mine sites or any delivery work sites. (Jt. Stip. at 26-7) At no time had Pearson ever been asked to help fix equipment at the Hammond Quarry, or any quarry. (Tr. 103:12-17) None of the Midwest Fuels truck drivers performed any service or maintenance of mining equipment at the mines, nor were they trained to do so. (Tr. 134:1-6) Willie Hardin,<sup>9</sup> safety director for Mathy, testified that Midwest Fuels drivers did not perform service or maintenance at Milestone Quarries. (Tr. 153:21-23)<sup>10</sup>

From this it is sufficiently clear that Pearson did not engage in the upkeep or preservation of equipment at the Hammond Quarry. A fuel delivery truck driver who delivers fuel and fuels equipment is not a “maintenance or service worker” under the plain meaning of Section 46.2(g)(2)<sup>11</sup> and is not a “miner” under Section 46.2.

## Conclusion

Midwest Fuels was cited for allegedly violating 30 C.F.R. § 46.9(a), which requires each operator to record and certify that each *miner* has received requisite miner training. The Secretary failed to prove that Pearson, a fuel delivery truck driver, was a *miner* as defined by 30

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<sup>9</sup> In September 2012, Hardin was the safety director for Mathy. (Tr. 152:2-11) At the time of the hearing Hardin was semi-retired. (Tr. 152:3-5) Hardin has been Mathy’s safety director for asphalt since 1987 and for aggregate since 1994 or 1995. (152:12-13) At Mathy, Hardin was in charge of over 400 mining facilities. (Tr. 152:15-25)

<sup>10</sup> Hardin understood “service or maintenance” to mean activities that prolong and preserve the life of equipment, or the replacement or modification of equipment. (Tr. 153:24-154:4)

<sup>11</sup> Even assuming *arguendo* that Pearson was a maintenance or service worker, he still would not be covered under Section 46.2 (g)(2). The Secretary claimed that Pearson was at the mine “frequently,” thus meeting the second prong of the definition. While Pearson was present at the mine approximately five days a week, each day he was only on the mine site thirty to forty-five minutes, delivering and fueling the equipment and generator. (Jt. Stip. at 11, 19) Therefore, Pearson was on the mine site for a very short period of time during each visit, and as such, does not fall under the exception to 30 C.F.R. § 46.2(g)(2).

C.F.R. § 46.2(g). Therefore, Midwest Fuels cannot be cited for a violation of 30 C.F.R. § 46.9(a).

**WHEREFORE**, Citation No. 8660952 and Order No. 8660955 are **VACATED**.



L. Zane Gill  
Administrative Law Judge

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