

ORAL ARGUMENT SCHEDULED FOR MARCH 5, 2012

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1303

AMES CONSTRUCTION, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASE

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and its administrative law judge and in this Court are listed in the brief for Ames.

(B) Rulings Under Review. References to the rulings at issue appear in the brief for Ames.

(C) Related Cases. This case has not previously been before this Court or any other Court. Counsel are unaware of any related cases currently pending before this Court or any other Court.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Ames	Ames Construction, Inc.
Br.	Brief for Ames
Coal Act	Federal Coal Mine Health and and Safety Act of 1969
Commission	Federal Mine Safety and Health Review Commission
J.A.	Joint Appendix
Judge	Administrative Law Judge
Kennecott	Kennecott Utah Copper Corporation
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Orton	Bob Orton Trucking
Secretary	Secretary of Labor
SHEAP	Safety Health and Environmental Action Plan

STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary") is satisfied with the jurisdictional and standing statements set forth in Ames' brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Ames, as a mine operator that "control[led] or supervise[d] a mine" under Section 3(d) of the Act, is liable under the no-fault liability scheme of the Mine Act for a violation of 30 C.F.R. § 56.9201's requirement that equipment and supplies be unloaded safely when Ames controlled the unloading area and supervised the unloading process.

2. Whether substantial evidence supports the Commission's finding that Ames supervised the unloading process and the judge's finding that Ames controlled the unloading area.

3. Whether Ames had constitutionally adequate notice that it was liable for the violation.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Framework

The Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") was enacted to improve and promote safety and health

in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines . . . in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and the prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Act and with standards. 30 U.S.C. § 813(a). If an MSHA inspector discovers a violation of the Mine Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or 104(b) of the Mine Act to the "operator." 30 U.S.C. §§ 814(a) and 814(b).

The predecessor statute to the Mine Act, the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"), defined the term "operator" as "any owner, lessee, or other person who operates,

controls, or supervises a coal mine." 30 U.S.C. §§ 802(d) (1976). Independent contractors that controlled or supervised parts of mines were "operators" under the Coal Act. Ass'n of Bituminous Contractors Inc. v. Andrus, 581 F.2d 853, 862 (D.C. Cir. 1978) (citing with approval Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240, 246 (4th Cir. 1977) ("BCOA")). In enacting the Mine Act, Congress amended the definition of "operator" by adding the underlined phrases:

"operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

30 U.S.C. § 802(d) (emphases added). The amendment was intended to give statutory expression to the BCOA decision. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 535 (D.C. Cir. 1986).

Section 104(d) of the Act provides for increasingly severe sanctions if, among other things, the Secretary finds that a violation has been "caused by an unwarrantable failure of [the] operator to comply" with a standard. 30 U.S.C. § 814(d).

Section 110(a) of the Mine Act provides for the assessment of civil penalties against "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard." 30 U.S.C. § 820(a). Section 110(i) of the Act

requires that, in determining what penalty is to be imposed under Section 110(a), consideration be given to, among other things, "whether the operator was negligent." 30 U.S.C. § 820(i).

An operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an administrative law judge and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996).

B. Facts and Procedural History

This case arises out of a fatal accident at the Tailings Facility of the Kennecott Utah Copper Mine in Utah.¹ On October 29, 2008, truck driver William Kay was crushed to death after he loosened straps securing nine plastic pipes loaded on his flatbed truck, causing one of the pipes to fall off the truck

¹ Tailings consist of "[t]he gangue and other refuse material resulting from the washing, concentration, or treatment of ground ore. Dictionary of Mining, Mineral, and Related Terms, 561 (2d ed. 1997). Wastewater from the mining operation was solidified and stored in the Tailings Facility. See Tr. at 36-37.

and crush him. 32 FMSHRC at 348-9, J.A. 178-79; J.A. 273-74; Stip. 17, J.A. 9². Each of the pipes weighed approximately three thousand pounds and was approximately 50 feet long. Id.; Stip. 7, J.A. 9. Mr. Kay was 81 years old. 32 FMSHRC 348, J.A. 178; J.A. 35.

Truck driver Kay was employed by Bob Orton Trucking ("Orton"). 32 FMSHRC at 348, J.A. 178; J.A. 273; J.A. 36. On the morning of the accident, Kay arrived at the Tailings Facility of the Kennecott Utah Copper Mine at around 7:30 a.m. to deliver the pipes. 32 FMSHRC at 348, J.A. 178; J.A. 273; J.A. 62. The Kennecott Utah Copper Mine is owned and operated by Kennecott Utah Copper Corporation ("Kennecott"). The pipes were procured by Kennecott. J.A. 178; J.A. 80.

Ames, an independent contractor for Kennecott, was responsible for the construction of a tailings dam, the raising of the tailings dam, the pipe and roadways at the Kennecott Tailings Facility. 32 FMSHRC at 347, J.A. 177; J.A. 272; J.A. J.A. 79-80; Stip. 4, J.A. 8. Ames had been continuously used by Kennecott since 1987, and had been doing work at the Tailings Facility relating to the construction of the tailings dam for at least a decade. J.A. 79-80. As part of the construction work,

² J.A. 7-12 contains the Secretary's proposed stipulations. Ames agreed to the stipulations at the hearing. J.A. 10-11.

Ames was responsible for continuously raising the pipelines for the tailings deposition. J.A. 110.

On arriving at the mine, Mr. Kay stopped at the Ames mine office. J.A. 273; J.A. 52. Ames Tailings Superintendent Douglas Lunsford, who oversaw the Ames pipe crew, asked the pipe crew, which consisted of Ames employees Greg Davis, James Hilton, and Juan Florez, to escort Mr. Kay to the pipe unloading area. J.A. 52.

While walking to retrieve a truck to escort Mr. Kay to the unloading area, Ames pipe crew member Davis noticed that the dunnage intended to keep the pipes in place on Mr. Kay's truck looked hazardous because the pieces of wood were too small. J.A. 73; J.A. 65.³ MSHA Mechanical Engineer Phillip McCabe testified that the dunnage on Mr. Kay's truck was made of a material that was not strong enough for the load of pipes. J.A. 48. Pipe crew member Davis also noticed that there were no chocks securing the pipes, creating a rolling hazard. J.A. 65.⁴ Davis acknowledged, however, that he never mentioned his

³ Dunnage in this case consisted of planks of wood that were placed between the pipes and were intended to keep the pipes in place. Tr. at 129-132; 204.

⁴ Chocks are wedge-shaped devices that are used to prevent round objects from rolling. J.A. 47.

concerns to fellow pipe crew member Florez or to truck driver Kay. J.A. 65.

Consistent with Superintendent Lunsford's directive, the pipe crew drove approximately eight miles to the unloading area in a pickup truck. Mr. Kay followed in his flatbed truck. 32 FMSHRC 349, J.A. 179; J.A. 273; J.A. 53.

When the two trucks reached the unloading area, pipe crew member Davis told pipe crew member Florez to wait with Mr. Kay while the other two pipe crew members went to get a forklift. J.A. 55. Ames' Job Safety Analysis, which is used to train employees who are unloading pipe, indicates that forklift operators must make sure that a load is secured before straps are loosened or any other action is taken. J.A. 278; J.A. 125. Davis instructed Kay to "stay right here" until he returned. 32 FMSHRC at 349, J.A. 179; J.A. 273; Stip. 13, J.A. 9.

Ames was responsible for unloading the pipes from Mr. Kay's truck. 32 FMSHRC 349, J.A. 179; J.A. 277-78; J.A. 32, 80. Truck drivers normally do not unload the truck on their own; however, drivers generally loosen the straps securing the pipes. 32 FMSHRC at 349, J.A. 179; J.A. 273; J.A. 37, 43.

Ames pipe crew member Florez testified that he thought it was his responsibility to keep Kay safe. J.A. 56. Ames pipe crew member Davis likewise testified that he expected Florez to

watch Kay so Kay would not get hurt. J.A. 63. Ames Tailings Superintendent Lunsford testified that the members of his pipe crew were lead men who had authority to stop unsafe work. J.A. 76. Both Superintendent Lunsford and pipe crew member Hilton acknowledged that in the past they had ordered truck drivers not to take specific actions that were unsafe. J.A. 278; J.A. 68, 71. Pipe crew member Florez testified that if he had known Kay was removing the straps, he would have directed Kay to stop. J.A. 61. Orton drivers are instructed to follow the instructions of the supervisor of the unloading process. J.A. 82.

Although Ames received many deliveries of pipes every month (32 FMSRHC at 348, J.A. 179; J.A. 71), pipe crew member Florez had assisted in unloading pipe only two times before -- both times on October 28, 2008, the day before the accident. J.A. 49; 51. Because the forklift was already at the unloading site for those two deliveries, Florez had no experience waiting with a truck driver while a forklift was retrieved. J.A. 51. Florez testified that neither pipe crew member Davis nor pipe crew member Hilton instructed Florez on his responsibilities while waiting for the forklift with Mr. Kay. J.A. 51.

While pipe crew member Florez waited with Mr. Kay, Florez went across the street for a minute or two to relieve himself.

J.A. 273; J.A. 55. Florez then returned to the passenger side of Kay's truck. J.A. 56. Florez testified that while he was waiting with Kay, he saw Kay near his toolbox and thought that Kay was getting ready to perform his job. J.A. 56.

Pipe crew member Florez testified that while he was looking down the road to see whether Davis and Hilton were returning with the forklift, he "heard [a] crack and then a boom, and then [Mr. Kay's] hardhat rolled over . . . behind his truck." J.A. 58. Mr. Florez walked around the truck and saw that a pipe had fallen off the truck, crushing Mr. Kay. 32 FMSHRC at 349, J.A. 179; J.A. 274; J.A. 58.

MSHA investigated the accident and determined that Mr. Kay had loosened the straps securing the pipes, causing the pipe to roll off the truck. J.A. 274; Stip. 17, J.A. 10. As a result of its investigation, MSHA issued a citation to Ames alleging a violation of 30 C.F.R. § 56.9201's requirement that "equipment and supplies shall be . . . unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies."⁵ J.A. 1. MSHA also issued a citation to Orton

⁵ 30 C.F.R. § 56.9201 provides:

Equipment and supplies shall be loaded, transported, and unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies.

alleging a violation of Section 56.9201. Orton stipulated that it violated the standard. Stip. 11, J.A. 12; J.A. 274 n.3.

Ames contested the citation and a hearing was held before a Commission administrative law judge.

C. The Judge's Decision

The judge held that the pipes were not unloaded safely as required by Section 56.9201, and that Ames was strictly liable for the violation. 32 FMSHRC at 351-54, J.A. 181-183. In so holding, the judge made several key factual findings. First, the judge found that once truck driver Kay was escorted to the loading area and Ames left pipe crew member Florez with Mr. Kay, Ames was responsible for the safe unloading of the pipes. 32 FMSHRC at 349, 351, J.A. 179, J.A. 181. The judge further found that Ames controlled the property where the pipes were unloaded. 32 FMSHRC at 350, J.A. 180. In addition, the judge found that the unloading process included parking the truck in the correct location so that the pipe crew and the truck driver could begin removing pipe from the truck. 32 FMSHRC at 351, J.A. 181.

In determining that Ames violated Section 56.9201, the judge rejected Ames' argument that it was not responsible for the actions of Mr. Kay, an Orton employee. 32 FMSHRC at 351-52; J.A. 181-82. In so doing, the judge stated that Orton was a subcontractor of Ames and cited Commission case law holding

that, under the strict liability scheme of the Mine Act, an independent contractor performing construction or services at a mine is responsible for the actions of its subcontractor regardless of whether the contractor is at fault. 32 FMSHRC at 351-52, J.A. 181-82 (citing Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359 (1991)).

D. The Decision of the Commission

Although recognizing that, as the Secretary conceded, the judge's finding that Orton was a subcontractor of Ames was not supported by the record, the Commission affirmed the judge's decision in result. J.A. 275. The Commission held that because Ames was an operator of the mine and was responsible for the unloading of the pipes, Ames was liable without regard to fault for the violation that occurred during the unloading process. J.A. 276-78.

Finding that, as a contractor constructing a tailings dam at the mine, Ames squarely fell within Section 3(d)'s definition of "operator," the Commission noted that the courts and the Commission have long held that Section 110(a) of the Act imposes liability for violations of standards on operators without regard to fault. J.A. 276 (citing Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982); Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Western Fuels-Utah,

Inc., 10 FMSHRC 256, 260-61 (1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989); Asarco, Inc., 8 FMSHRC 1632, 1634-36, aff'd, 868 F.2d 1195 (10th Cir. 1980)).

Citing this Court's decision in Secretary of Labor v. National Cement Co. of Cal., Inc., 573 F.3d 788, 795 (D.C. Cir. 2009), the Commission held that liability without regard to fault does not mean liability for things that occur outside one's control or supervision. J.A. 276. The Commission then held that because Ames supervised and controlled the process of unloading pipes, Ames was liable without regard to fault for the violation that occurred during that process. J.A. 276, 277.

In finding that Ames supervised the unloading process, the Commission determined that the judge's finding that Ames was responsible for the unloading process was supported by substantial evidence. In doing so, the Commission noted evidence establishing that Ames had the authority to stop unsafe work and evidence that Ames had the authority to prevent Orton from proceeding with the unloading. J.A. 278.

Agreeing with the judge's analysis that the unloading process began with the first steps necessary to that process, the Commission rejected Ames' argument that the pipes were not being unloaded at the time of the accident. J.A. 278. In so doing, the Commission noted that the pipes were on the truck

before Mr. Kay unloosened the straps, and that Mr. Kay's action in loosening the straps caused one of the pipes to come off the truck. The Commission stated that it would "defy logic" to conclude that Mr. Kay's action did not constitute unloading. Id.⁶

SUMMARY OF ARGUMENT

It is settled law that multiple operators may be present at a mine and that multiple operators are jointly liable under the Act. E.g., Int'l Union, UMWA v. FMSHRC, 840 F.2d 77, 82-84 (D.C. Cir. 1988). It also settled law that persons that control or supervise a mine, or part of a mine, are operators within the meaning of Section 3(d) of the Act. E.g., Association of Bituminous Contractors, 581 F.2d at 861-62. It is also settled law that mine operators are liable for violations occurring in their mines without regard to fault when the operator controls or supervises the mine or part of a mine. National Cement, 573 F.3d at 795.

The Secretary reads Section 3(d) of the Act and the liability provisions of the Act as plainly meaning that the no-fault liability scheme of the Mine Act applies to operators that

⁶ Commissioner Duffy dissented, concluding that an operator should be allowed to assert an affirmative defense against a citation if a non-employee engages in unforeseeable conduct that violates the Act or its standards. He encouraged Ames to appeal on that basis. J.A. 281.

"control[] or supervise[] a mine" even when the operators are independent contractors performing construction or services at the mine. The Secretary's plain meaning reading is consistent with the language, the history, and the purpose of the Act. On the other hand, Ames' interpretation, that would read into the Act's no-fault liability scheme an exception for operators that "control or supervise a mine" when the operators are also "independent contractors performing services or construction at a mine," is inconsistent with the language, the history, and the purpose of the Act. As a result, it must be rejected.

The Court is without jurisdiction to consider Ames' argument that the Secretary's Rule on Independent Contractors, 30 C.F.R. Part 45, supports Ames' interpretation because the argument was never raised before the Commission. See 30 U.S.C. § 816(a)(1). In any event, the Secretary's Independent Contractor Rule does not purport to govern the scope of independent contractor liability under the Act and the history of the rule makes clear the Secretary's interpretation that she has the authority to cite independent contractors for third party violations and that she has reserved her discretion to do so.

Further, Ames' activities at the mine brought it squarely within the rule's definition of "production-operator." 30

C.F.R. 45.2. The accompanying enforcement policy makes clear the Secretary's interpretation that production-operators are liable without fault for violations occurring in the mine.

Substantial evidence supports, and indeed compels, the Commission's finding that as part of Ames' responsibilities at the mine, Ames supervised the unloading process during which the violation occurred, and the judge's finding that Ames controlled the unloading area where the violation occurred. Ames' assertion that before the judge it did not have notice that control and supervision were at issue is unsupported by the record. In any event, Ames has failed to support its claim that it was prejudiced by the asserted lack of notice.

Ames' assertion that it did not have constitutionally adequate notice of the Secretary's theory of liability is equally unavailing. It is settled law that the Mine Act imposes liability on operators without regard to fault for violations in parts of mine that they control or supervise. Nothing in the language, the history, or the purpose of the Act, or in the decisions interpreting the Act, suggests that this principle does not apply to operators like Ames that control or supervise a mine, because they are also independent contractors performing services or construction at the mine. Nor does anything in the Secretary's Independent Contractor Rule or enforcement policy.

ARGUMENT

I.

AMES, AS A MINE OPERATOR THAT "CONTROL[LED] OR SUPERVISE[D] A MINE" UNDER SECTION 3(d) OF THE MINE ACT, IS LIABLE UNDER THE NO-FAULT LIABILITY SCHEME OF THE ACT FOR A VIOLATION OF 30 C.F.R. § 56.9201'S REQUIREMENT THAT EQUIPMENT AND SUPPLIES BE UNLOADED SAFELY WHEN AMES CONTROLLED THE UNLOADING AREA AND SUPERVISED THE UNLOADING PROCESS

A. Standards of Review and Applicable Legal Principles

1. Statutory and regulatory interpretation under the Mine Act

This case presents questions of statutory and regulatory interpretation in the administrative context. The Court decides legal questions under a de novo standard of review. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1099 (D.C. Cir. 1998).

If the meaning of a statute is plain and unambiguous, the Court must "'give effect to the unambiguously expressed intent of Congress.'" Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003); Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous with respect to the question presented, the Secretary's interpretation of the provision is

owed full deference and is entitled to affirmance as long as it is reasonable. Cannelton, 867 F.2d at 1435. Accord National Cement, 573 F.3d at 792; Excel Mining, 334 F.3d at 5. When the Commission agrees with and has ratified the Secretary's interpretation of a statutory provision, that interpretation should be emphatically deferred to. Indeed, the Commission's interpretations of the Mine Act are generally upheld when they accord with the Secretary's interpretations. RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001); Energy West Mining Co. v. FMSHRC, 111 F.3d 900, 903 (D.C. Cir. 1997); Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). "In the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard, and is therefore deserving of deference." Excel Mining, 334 F.3d at 6 (internal quotation marks and citations omitted). Accord National Cement Co., 573 F.3d at 792.

In determining whether the meaning of a statutory provision is plain and unambiguous, courts use all the traditional tools of statutory construction. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001); Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044, 1047

(D.C. Cir. 1997). Those tools include the statutory text, the legislative history, the overall structure and design of the statute, and the purpose of the provision in question. Arizona Public Service, 211 F.3d at 1288; Bell Atlantic, 131 F.3d at 1047. See also City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003), and Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997). "[I]t is beyond cavil that the first step in any statutory analysis, and [the Court's] primary interpretive tool, is the language of the statute itself." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568 (D.C. Cir. 1987). See also Cyprus Emerald, 195 F.3d 40, 45 (D.C. Cir. 1999).

In determining the meaning of a regulation, a court must give due deference to the agency's interpretation of its own regulation. Excel Mining, LLC, 334 F.3d at 5-6. If a regulation's meaning is plain, the regulation cannot be interpreted to mean something different from that plain meaning. Exportal LTDA v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). In determining whether a regulation's meaning is plain, a court should apply all the traditional tools of construction, including both the particular regulatory language at issue and

the language and design of the regulatory scheme as a whole. See National Wildlife Federation v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997).

If a regulation's meaning is not plain, a reviewing court should give deference to the interpretation of the agency entrusted with administering the regulation as long as the interpretation is a permissible one. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Udall, 380 U.S. at 16-17; Secretary of Labor v. Excel Mining, LLC, 334 F.3d at 5-6; Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994). Accordingly, a court must accept the Secretary's interpretation of a regulation unless it "'is plainly erroneous or inconsistent with the [regulation]'" (Excel Mining, 334 F.3d at 5-6 (quoting Akzo Noble Salt, Inc. v. FMSHRC, 212 F.3d 1301, 1303 (D.C. Cir. 2000)) -- that is, as long as it "fits... within the terms of [the regulation] and is compatible with its purpose." Cold Spring Granite Co. v. FMSHRC, 98 F.3d 1376, 1378 (D.C. Cir. 1996). Accord Martin, 499 U.S. at 150-51.

2. The substantial evidence test

The Court reviews the Commission's factual findings under the substantial evidence test. If they are supported by substantial evidence, the Commission's findings are conclusive

upon the Court. RAG Cumberland, 272 F.3d at 599 (citing 30 U.S.C. § 816(a)(1)).

B. Ames Is Liable Without Regard to Fault for the Unloading Violation Because Ames Controlled the Unloading Area and Supervised the Unloading Process

1. The Secretary's interpretation is consistent with the language of the Act

It is settled law in this and other courts that, under Section 3(d) of the Act, there can be more than one "operator" at a mine. Int'l Union, UMWA v. FMSHRC, 840 F.2d at 82-84 (discussing cases). Accord Cathedral Bluffs, 796 F.2d at 535; Speed Mining, Inc. v. FMSHRC, 528 F.3d 310, 315 (4th Cir. 2008); Association of Bituminous Contractors, 581 F.2d at 861-62 (interpreting the Mine Act's predecessor statute, the Coal Act).

It is also settled law that a person that "operates, controls or supervises" part of a mine is an operator under Section 3(d). Ass'n of Bituminous Contractors, 581 F.2d at 863 ("If a coal mine owner or lessee contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within [the definition of operator]"); Speed Mining, 528 F.3d at 315 ("[b]ecause the entities listed in Section 3(d) are not mutually exclusive - for instance, an independent contractor may 'control' or 'supervise' all or part of a mine that has a

completely separate 'owner' - . . . multiple 'operators' [can] be present at a single . . . mine simultaneously" (citing and quoting BCOA, 547 F.2d at 246-47)).

Under Section 3(d) of the Act, Ames was an operator of the mine not merely, as Ames asserts, because it was an "independent contractor performing services or construction" at a mine (see e.g., Br. at 18), but also because it "operate[d], control[ed], or supervise[d]" part of a mine. See 30 U.S.C. § 802(d); Speed Mining, 528 F.3d at 315 (4th Cir. 2008); Association of Bituminous Contractors, 581 F.2d at 862. Cf. Blattner v. Secretary of Labor, 152 F.3d 1102, 1107 (9th Cir. 1998) (interpreting the term "any independent contractor performing services or construction at such mine" in Section 3(d) "as referring only to those independent contractors who did not already qualify as operators under the statute's 'other person[s]' provision - and not to all of the independent contractors, including those who control or supervise the operation of a mine and who were already covered by the phrase 'other person[s]'").

It is settled law in this and other courts that "multiple operators are jointly liable under the Act" (UMWA, 840 F.2d at 83-84 (discussing cases)) and that mine operators are liable for violations occurring in their mines without regard to fault.

National Cement, 573 F.3d at 795 (accepting as reasonable the Secretary's interpretation of Section 3(d) and the liability provisions of the Mine Act as holding a non-owner operator liable without fault for violations by persons over whom it exercises control); Western Fuels-Utah, Inc. v. FMSHRC, 870 F.2d 711, 716 (D.C. Cir. 1989) ("the Mine Act clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator"); Speed Mining, 528 F.3d at 315 ("multiple operators may be present at a single mine simultaneously, and . . . those operators can be held liable without regard to fault") (internal quotation marks and citation omitted); Allied Products, 666 F.2d at 893-94 (an operator is liable for violations of the Act regardless of fault); Miller Mining Co. v. FMSHRC, 713 F.2d 487, 491 (9th Cir. 1983) (holding an owner-operator liable for the conduct of an unrelated third party).

In interpreting the Mine Act to impose liability on mine operators for violations occurring in the mine without regard to fault, the courts have relied on Sections 110(a) and 111 of the Act. See Secretary of Labor v. Twentymile Coal Co., 456 F.3d 151, 155 (D.C. Cir. 2006); Allied Products, 666 F.2d at 893-94; Sewell Coal, 686 F.2d at 1071; Speed Mining, 528 F.3d at 315 (citing BCOA, 547 F.2d at 240). This Court has also relied on

the language of Section 104(d) and Section 110(i) of the Act. Western Fuels-Utah, Inc., 870 F.2d at 716 (holding that the plain meaning of the Mine Act as a whole, including Sections 104(d), 110(a), and 110(i), is that operators are vicariously liable for violations, and stating that the Court would be "hard-pressed" to conclude that the same provisions do not impose a regime of strict liability).

Contrary to Ames' interpretation, no language in any of the provisions relied on by the courts in determining that the Act imposes a no-fault liability scheme on operators for violations occurring in an area of the mine that they control -- or in any other provision of the Act -- remotely suggests that the no-fault liability scheme does not apply to entities who are operators, like Ames, because they are "other person[]s who operate[], control[], or supervise[]" a mine when those operators are also independent contractors performing services at a mine. See, e.g., Br. at 18. Ames' attempt to engraft into the Act such an exception is impermissible because it would "read a limitation into the [provision] that has no basis in the [provision's] language." Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995) (citation and internal quotation marks omitted) (interpreting a statutory provision). Accord Hercules Inc. v. EPA, 938 F.2d 276, 280 (D.C. Cir. 1991)

(rejecting an interpretation that “read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose”). See also Tug Allie-B, Inc. v. United States, 273 F.3d 936, 944 n.7 (11th Cir. 2001) (defenses to strict liability schemes should be narrowly construed).⁷

Ames’ assertion that its interpretation is supported by the fact that Section 110(a) refers to “the operator” and “[t]he term ‘the’ implies singularity and specificity” is inconsistent with the holdings of all the courts that have held that multiple operators may be liable for a violation. See UMWA, 840 F.2d at 83-84, and cases cited above. It is also inconsistent with Ames’ acknowledgement that the term “the operator” in Section

⁷ Significantly, in other strict liability statutes, Congress included language specifically enumerating the type of third-party defense exception Ames suggests should be read into the Act. See e.g., 42 U.S.C. § 9607(b)(3) (third-party defense exception to the strict liability provisions of the Comprehensive Environmental Response, Compensation, and Liability Act if the damages were caused by “an act or omission of a third party other than an employee or agent of the defendant, or [] one whose act or omission occurs in connection with a contractual relationship . . . with the defendant”); 33 U.S.C. § 2703(a)(2) (third-party defense exception to the strict liability provisions of the Oil Pollution Act of 1990); 16 U.S.C. § 1443(a)(3)(A) (third-party defense exception to the strict liability provisions of the Marine Protection, Research and Sanctuaries Act); 33 U.S.C. § 1321(f)(1) (third-party defense exception to the strict liability scheme of the Federal Water Pollution Control Act). If Congress had intended to include such an exception in the Mine Act, it would have included language explicitly creating such an exception in the Act. It did not.

110(a) refers to both the owner-operator and the specific operator who committed the violation. Br. at 19.

Ames' assertion also violates the cardinal principle that, when a court is charged "with understanding the relationship between two different provisions within a statute, [it] must analyze the language of each to make sense of the whole." Bell Atlantic, 131 F.3d at 1047 (rejecting a "plain meaning" argument that read the language of one provision in isolation from that of related provisions). Indeed, this Court has specifically recognized that the liability scheme of the Mine Act must be interpreted by "examin[ing] not a particular section divorced from its context, but the Mine Act as a whole, including § 104 and § 110, as well as other provisions with which they interact." Western Fuels-Utah, 870 F.2d at 716.

Ames' assertion that the term "the operator" in Section 110(a) implies singularity is also incorrect because it ignores the principle that, in "determining the meaning of any Act of Congress, unless the context indicates otherwise, words importing the singular include and apply to several persons, parties, or things.'" United States v. Vargas, 393 F.3d 172, 174 (D.C. Cir. 2004), cert. denied, 546 U.S. 1011 (2005) (citing the Dictionary Act, 1 U.S.C. § 1). Here, the context does not indicate otherwise.

Ames' argument that the Secretary's interpretation is unreasonable because it renders independent contractors liable for all violations that occur at a mine is likewise unpersuasive. See Br. at 17. In rejecting a similar argument, this Court in National Cement agreed with the Secretary's interpretation of Section 3(d) and the liability scheme of the Act that, under the Act's liability without fault scheme, an operator cannot be cited for things that occur outside the operator's control or supervision. 573 F.3d at 788 (citing W. Page Keeton, Prosser & Keeton on the Law of Torts 534 (5th ed. 1984)).

Attempting to avoid that holding, and relying on Congress' use of the word "or" in the "or any independent contractor" clause in Section 3(d), Ames interprets Section 3(d) as establishing two mutually exclusive categories of operators; one consisting of "owners, lessees, or other persons who operate, control, or supervise a coal or other mine," and the other consisting of "independent contractors performing services or construction at such mine." Thus, Ames asserts, because an independent contractor-operator falls into the latter category, it cannot be found to exercise control or supervision over a mine. See Br. at 17-18. Ames' interpretation, however, is directly contrary to settled law under the Act recognizing the

reality that an independent contractor can operate, control, or supervise a mine. Speed Mining, 528 F.3d at 315 (citing Bituminous Coal Operators' Ass'n, 547 F.2d at 246-47); Association of Bituminous Contractors, 581 F.2d at 862; Blattner, 152 F.3d at 1107.⁸

In any event, if the Court determines that Ames is correct that the two categories of "operators" in Section 3(d) are mutually exclusive, the Secretary, like the Ninth Circuit, would interpret Section 3(d) to include independent contractors that control or supervise a mine, like Ames, to fall in the "owner, lessee, or other person who operates, controls, or supervises a mine" category. See Blattner, 152 F.3d at 1107. Any other interpretation would mean that in expanding the definition of operator in the Mine Act, Congress also limited the liability of independent contractors, like Ames, who control or supervise a mine. Neither the language, the history, nor the purpose of the Act supports such an interpretation.

Ames also asserts that the Commission's decision is unsupported by the language of the Act because it holds Ames liable for a violation occurring during a process that Ames

⁸ Thus, contrary to Ames' interpretation, the term "or" in the "or any independent contractor" clause is not used in the disjunctive. It is an instance when "or" means "and," just as the term "or" in the "or other person" clause in Section 3(d) means "and." See Ass'n of Bituminous Contractors, Inc., 581 F.2d at 862.

supervised, and "the word 'process' is not mentioned once in the Act." Br. at 26. Ames' assertion is unpersuasive.

Ames is an operator under the Mine Act because it "control[led] or supervise[d]" a mine. 30 U.S.C. § 802(d). The term "supervise" means "to oversee (a process, work, workers, etc.) during execution or performance, superintend; have the oversight and direction of"). Dictionary.com Unabridged. Random House, Inc. 12 Dec. 2011. <Dictionary.com <http://dictionary.reference.com/browse/supervise>> (emphasis added). See also Familia Rosario v. Holder, 655 F.3d 739, 748 (7th Cir. 2011) ("`supervise' is to `oversee with the powers of direction and decision'" (citing Webster's Third New International Dictionary 1372 (1993))). Thus, although Section 3(d)'s definition of the term "operator" speaks in terms of persons that "supervise a mine," "supervis[ing] a mine" entails "oversee[ing] [] a process, work, or workers []" in a mine "during execution or performance." Imposing liability based on Ames' supervision of the unloading process is entirely consistent with the language of the Act.

2. The Secretary's interpretation is consistent with the history of the Act

The Secretary's interpretation that non-owner operators like Ames are liable without regard to fault for violations in areas of the mine which they control and during processes which

they supervise is also supported by the legislative history of the Mine Act. In the Conference Report accompanying the Coal Act, Congress stated, "[T]he conference agreement provides liability for violation of the standards against the operator without regard to fault." Conf. Rep. No. 761, 91st Cong., 1st Sess. 81 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 1515 (1975) (emphasis added).

The Senate Report accompanying the Mine Act explained that the definition of "operator" was amended to "include individuals or firms who are . . . engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction process" S. Rep. No. 95-181, 95th Cong., 1st Sess., at 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 ("*Leg. Hist.*") at 602 (1978). Congress also made clear its intent that "in enforcing this Act, the Secretary should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine." Id. (emphasis added). Congress then noted that "this concept has been approved by the federal circuit court in Bituminous Coal

Operators' Assn. v. Secretary of Interior, 547 F.2d 240 (C.A. 4, 1977).” Id. (emphasis added). Accordingly, the legislative history of the Act indicates Congress’ intent that operators, like Ames, that control or supervise a mine or part of a mine are liable without fault for violations in the mine.⁹

3. The Secretary’s interpretation is consistent with the purpose of the Act

Imposing liability without fault on an operator for violations occurring in an area of the mine it controls and during a process it supervises is consistent with the purpose of the Mine Act.

As the Fifth Circuit recognized in Allied Products:

It is a common regulatory practice to impose a kind of strict liability on the employer as an incentive for

⁹ Ames’ attempt to read this part of the history as supporting its interpretation because in the phrase “against the owner, operator, or lessee of the mine” Congress did not specifically refer to persons who control or supervise a mine, is unpersuasive. See Br. at 17-18. When read in context, Congress’ inclusion of the term “operator” in the phrase can only logically be read as a short-hand reference to “other person[s] who operate[], control, or supervise[]” a mine because the sentence is referring to the definition of “operator” and the term otherwise makes no sense.

Also unpersuasive is Ames’ attempt to distinguish BCOA by highlighting the alternative holding in which the Court relied on the statutory definition of “agent.” See Br. at 21. As the above-quoted history makes clear, Congress cited with approval BCOA’s interpretation that the Coal Act’s definition of “operator” included independent contractors that control or supervise part of a mine.

him to take all practicable measures to ensure the workers' safety, the idea being that the employer is in a better position to make specific rules and to enforce than the agency.

666 F.2d at 893. Operators that control an area of the mine and supervise a process in the mine are in the best position to protect miner safety in those areas and during those processes. Just as holding an employer liable for violations by employees creates an incentive for the employer to take all practicable measures to ensure workers' safety, so holding an operator liable for violations occurring in the area of the mine it controls and during a process it supervises creates an incentive for that operator to take all practicable measures to protect miners working in the area or on the process.

The facts of this case perfectly illustrate this point. There were a number of measures Ames reasonably could have taken that would have enhanced workers' safety during the unloading process and tended to prevent the accident in this case. Holding Ames liable for violations that occur during the unloading process creates an incentive for Ames to take such measures.

Ames frequently received deliveries of pipes. In 2008, it received approximately 60 or 70 loads of pipe. J.A. 71. Ames Tailings Superintendent Lunsford testified that almost every time a load of pipes was delivered, Ames would take the truck

driver to an unloading area where the driver would have to wait for a forklift to be brought to the area. J.A. 71. Lunsford acknowledged that "a lot of times truck drivers are in a big hurry." J.A. 71.

Despite the frequency of pipe deliveries and the fact that truck drivers were often in a hurry to complete the unloading process, Superintendent Lunsford acknowledged that Ames did not have a written policy under which Ames was required to instruct truck drivers not to loosen straps until a forklift was in place. J.A. 71. Ames' Job Safety Analysis, although it requires that a forklift be positioned to secure the load before loosening straps, does not address what a truck driver should do while waiting for a forklift. J.A. 125. Moreover, in this case, Ames pipe crew members Davis and Hilton left pipe crew member Florez with truck driver Kay without advising Florez about his responsibilities while waiting with Kay, and even though Florez had never waited with a truck driver before. J.A. 49, 51.

Further, although Ames pipe crew member Davis testified that when truck driver Kay arrived at the mine office Davis noticed that the dunnage intended to keep the pipes in place looked hazardous (J.A. 65), and also noticed that there were no chocks securing the pipes, creating a rolling hazard (J.A. 65),

Davis acknowledged that he never mentioned his concerns to fellow pipe crew member Florez or to truck driver Kay. J.A. 65. If Davis had done so, truck driver Kay might have waited to loosen the straps. If Davis had done so, pipe crew member Florez also might have been inclined to watch Kay more closely when he saw Kay near his toolbox and thought Kay was getting ready to perform his job. See J.A. 56.

Ames Industrial Division Manager Robert Parker acknowledged that it was Ames' responsibility to hold safety meetings with the truck drivers before the unloading began. J.A. 80. Parker testified, however, that the meetings were held after the forklift was brought to the unloading area. Id. If safety meetings had been held as soon as the truck driver was brought to the unloading area, and before the fork lift was retrieved, the truck drivers could have been warned early on not to loosen the straps until the pipes were secured by the forklift. Moreover, truck drivers and crew members could have been alerted early on to situations, like the situation in this case, where the pipe was loaded in a hazardous manner. J.A. 273; J.A. 53, 65-66.

In addition, Ames pipe crew member Davis acknowledged that because the pipes in this case were loaded without chocks, the pipes could only be safely unloaded by using two pieces of

equipment: either two forklifts, or a forklift and a front-end loader. J.A. 65-66. Davis also acknowledged that, under such circumstances, he needed to get permission from a supervisor to use two pieces of equipment to unload the pipes. J.A. 66. Davis admitted, however, that he had not made any plans to unload the pipe with two pieces of equipment. Ibid. If Davis had followed the proper procedures, the other pipe crew members and truck driver Kay might have been alerted about the unsafe nature of the pipes, and Mr. Kay might not have loosened the straps before the pipes were secured.

Thus, contrary to Ames' argument, and as the facts of this case illustrate, holding independent contractors liable without fault for violations occurring in areas they control or processes they supervise plainly furthers the purposes of the Act by encouraging them to take all practicable measures to protect miner safety.

4. The Secretary's interpretation is consistent with the Secretary's Independent Contractor Rule and the accompanying enforcement policy

For the first time in this case, Ames argues that its interpretation is supported by the Secretary's Independent Contractor Rule, 30 C.F.R. Part 45, and by the rule's accompanying enforcement policy. Br. at 22-25, 38-39.

Ames, however, never raised this argument to the Commission. See J.A. 211-229, 256-270. Accordingly, the Court has no authority to consider it. See 30 U.S.C. § 816(a)(1) (“No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”)

In any event, the argument is unpersuasive. In so arguing, Ames latches on to a sentence in the rule stating that the rule is intended to “facilitate implementation of MSHA’s enforcement policy of holding independent contractors responsible for violations committed by them and their employees.” Br. at 22-23. Ames suggests that the sentence represents an interpretation by the Secretary that independent contractor liability under the Act is limited to violations committed by the independent contractor. Id.

Contrary to Ames’ characterization, however, the Secretary’s Independent Contractor Rule does not purport to govern independent contractor liability under the Act. Instead, the rule “sets forth information requirements and procedures for independent contractors to obtain an MSHA identification number and procedures for service upon independent contractors.” 30 C.F.R. 45.1. Particularly given the narrow focus of the rule,

the statement cannot reasonably be read as limiting the Secretary's discretion to cite independent contractors for violations by them or their employees. See Cathedral Bluffs, 796 F.2d at 538 (the courts and the Commission "must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.")

Moreover, the part of the rule Ames relies on is a reference to the Secretary's enforcement policy accompanying the rule. It is settled law that the enforcement policy is not binding on the Secretary. Cathedral Bluffs, 796 F.2d at 535. Accordingly, even if the policy reflected an interpretation of the Secretary's authority over independent contractors that was inconsistent with the Secretary's interpretation in this case -- which, as discussed below, it plainly does not -- that interpretation would not be binding on the Secretary and any asserted reliance on that interpretation would not be reasonable.

In any event, Ames' interpretation overlooks the fact that, as part of Ames' responsibility at the Tailings Facility, Ames supervised the unloading process and controlled the unloading area. Those activities at the mine brought Ames squarely within the rule's definition of a "production operator." Section

45.2(d) -- which tracks the Coal Act's definition of "operator"

-- states:

"Production-operator" means any owner, lessee, or other person who operates, controls or supervises a coal or other mine.

30 C.F.R. 45.2(d). As the Ninth Circuit has recognized, "independent contractors who operate, control, or supervise mines . . . qualify as 'production-operators' under the rule. Blattner and Sons, 152 F.3d at 1107. The enforcement policy referred to in the rule states:

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors. As a result, independent contractors and production-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors.

45 Fed. Reg. 44497 (July 31, 1980). Thus, the Rule and the accompanying enforcement guidelines make clear the Secretary's interpretation that she has the authority to cite entities like Ames that "operate[], control[], or supervise[]" a mine for violations by independent contractors in the mine, like Orton.

The Secretary's interpretation of the rule and the enforcement policy, unlike Ames' interpretation, is fully

consistent with the history of the rule. Part 45 was promulgated after the Secretary abandoned the proposed rule's scheme under which the Secretary would have classified certain independent contractors (depending primarily on whether the contractor effectively had control of an area of the mine) as "operators" that could "be cited for violations of the act and all applicable standards and regulations occurring within the area of the mine under their control." 44 Fed. Reg. 47746 (Aug. 14, 1979). Independent contractors that were not classified as "operators" "generally" would not have been responsible for compliance. 45 Fed. Reg. 44494 (July 31, 1980). See also, Cathedral Bluffs, 796 F.2d at 535 (discussing history of rule).

In the Preamble to the final rule, the Secretary, while abandoning the scheme under which certain independent contractors would be liable for all violations within their area of the mine, specifically reserved her "broad discretion to define the respective compliance responsibilities of owners, lessees or other persons who operate, control or supervise mines [production-operators] and independent contractors working at mines" and stated that she would make enforcement decisions "on the basis of the facts pertaining to each particular case." 45 Fed. Reg. at 44494-5. Thus, the history of the rule reflects that the Secretary has long interpreted the Act as authorizing

her to cite independent contractors for violations committed by third parties and that, in Part 45, the Secretary specifically reserved her discretion to do so. This interpretation is consistent with subsequent enforcement actions in which the Secretary exercised that discretion to cite independent contractors for violations that were not committed by the independent contractor or its employees. See e.g., Bulk Industries, 13 FMSHRC at 1359 (upholding a citation issued to an independent contractor for a violation by a subcontractor of the independent contractor). Ames' newly-asserted reliance on the Secretary's Independent Contractor Rule and the Secretary's enforcement policy to support its interpretation, is therefore unavailing.

For the reasons set forth above, the Court should affirm the Secretary's reading of the statute without regard to deference because it conforms to the "'unambiguously expressed intent'" of Congress that operators that control or supervise a mine are liable without regard to fault for violations in areas they control and during processes they supervise, even when the operator is also an independent contractor performing construction or services at the mine. Excel Mining, LLC, 334 F.3d at 6; Cannelton, 867 F.2d at 1435. The Secretary's reading of the rule is supported by the language, the history, and the

purpose of the statute, as well as by settled law interpreting the statute, and nothing in the Secretary's Independent Contractor Rule or her accompanying enforcement policy indicates that the Secretary limited her discretion to cite operators that control or supervise a mine for violations that occur in the mine.

If the Court finds that the statute is ambiguous on the question presented, the Secretary's interpretation should be affirmed because it is eminently "reasonable." See National Cement, 573 F.3d at 792; Excel Mining, 334 F.3d at 5; RAG Cumberland, 272 F.3d at 596; Energy West, 111 F.3d at 903. Nothing in the Secretary's Independent Contractor Rule or the accompanying enforcement policy is inconsistent with that interpretation.

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT AMES SUPERVISED THE UNLOADING PROCESS AND THE JUDGE'S FINDING THAT AMES CONTROLLED THE UNLOADING AREA

Substantial evidence supports, and indeed compels, the Commission's finding that Ames supervised the unloading process and the judge's finding that Ames controlled the unloading area.

Ames was responsible for the construction of a tailings dam, the raising of the tailings dam, the pipe and roadways at the Kennecott Tailings Facility. 32 FMSHRC at 347, J.A. 177;

J.A. 272; J.A. 79-80; Stip. 4, J.A. 7. Ames had worked for Kennecott since 1987, and had done construction work at the Tailings Facility for more than a decade. J.A. 79-80. During the construction of the facility, Ames was required to extend a pipeline used to transport waste product (J.A. 272; J.A. 28), and Ames frequently received deliveries of pipe. Ames received approximately 60 to 70 loads of pipe in 2008. J.A. 272.

Upon arriving at the tailings facility, truck drivers were required to stop at the main entrance gate that was located near the Ames office. J.A. 28, 52. Drivers would contact security, which in turn would contact Ames. J.A. 28. Ames was responsible for checking with each driver to ensure that the driver held a hazard card, indicating that he had received hazard training. J.A. 273; J.A. 28. Ames would then escort the truck driver to the unloading area. J.A. 28.

Based on his investigation of the accident, MSHA Inspector Shane Julien testified that Ames assumed control of the unloading operation when the Ames pipe crew escorted Mr. Kay to the unloading site. J.A. 32-33.

Ames Tailings Superintendent Lunsford, who oversaw the Ames pipe crew, testified that Kennecott, Ames, and the Orton truck driver jointly shouldered the burden of making sure the pipes were unloaded safely. J.A. 72. Robert Parker, Ames Industrial

Division Manager, testified that Ames was responsible for unloading the pipes. J.A. 80. Industrial Division Manager Parker acknowledged that it was Ames' responsibility to hold safety meetings with the truck drivers before the unloading began. Id. Superintendent Lunsford also acknowledged that Ames was responsible for protecting the truck driver from mine site hazards. J.A. 73. Similarly, Ames pipe crew member Florez testified that he thought it was his responsibility to keep truck driver Kay safe. J.A. 56. Ames pipe crew member Davis likewise testified that he expected fellow pipe crew member Florez to watch truck driver Kay so Kay would not get hurt. J.A. 63.

Superintendent Lunsford further testified that the members of the Ames pipe crew were lead men who had the authority to make sure work was performed safely and to stop unsafe work. J.A. 76. Consistent with Lunsford's testimony, Ames stipulated that Orton truck drivers were instructed to "follow the instructions of the supervisor of the unloading process." J.A. 82. Ames also stipulated that Orton drivers were "instructed to follow the policies and procedures of the recipient regarding safety and the unloading process." J.A. 82.¹⁰ Superintendent

¹⁰ Ames unpersuasively suggests that the fact that Orton instructed Mr. Kay to follow Ames' direction is inconsistent with a finding that Ames supervised the unloading process. See

Lunsford testified that under its agreement with Kennecott, Ames accepted delivery of the pipes. J.A. 80.

In addition, a Safety, Health, and Environmental Action Plan (SHEAP) -- a safety plan detailing Ames' safety requirements (J.A. 278; J.A. 74) -- states that "[s]upervisors, foremen and safety supervisors are authorized to stop work that would place employees, equipment or property in immediate danger, and to ensure that all unsafe conditions are corrected." J.A. 113. The SHEAP also states that "safety management has the authority and responsibility to stop work in progress, which is, in their opinion, unsafe, until corrections have been made." J.A. 114.

The quoted statements appear in a section entitled "Ames Construct Safety Management - Authority." J.A. 113. The authority to decide that work is unsafe and to stop it implies supervisory authority (see J.A. 278), as does the authority and responsibility to ensure that all unsafe conditions are corrected. See, e.g., Familia Rosario, 655 F.3d at 748 (to "'supervise' is to 'oversee with the powers of direction and decision'" (citing Webster's Third New International Dictionary

Br. at 32. It is entirely reasonable to infer that Orton instructed Mr. Kay to follow Ames' instructions precisely because Ames had supervisory authority over drivers delivering pipe to the Tailings Facility.

1372 (1993)). The authority to ensure that all unsafe conditions are corrected also implies control over the area. See id. ("To `control' a thing is to `exercise restraint or direction over; dominate, regulate or command.'" (citing Webster's College Dictionary 297 (1991))).

Ames' assertion that the fact that Ames' authority was imposed by Kennecott on Ames in the SHEAP "calls into question Ames' `control' at the mine" is illogical. See Br. at 33. The reality is that the way in which lessees, independent contractors, or other persons obtain control or supervisory authority over a mine is through a grant of authority from the owner-operator. In any event, there is no indication in the record that the SHEAP was "imposed" on Ames by Kennecott. Indeed, the record indicates that the SHEAP was implemented by Ames and that, as part of the implementation process, it was "accept[ed]" by Kennecott. See J.A. 11, 114.

Moreover, contrary to Ames' assertion (Br. at 33 (citing J.A. 113)), the fact that the SHEAP also provides that "[a]ny employee may refuse to do work that he or she considers unsafe" does not detract from the fact that Kennecott granted Ames' management the authority and responsibility to stop unsafe work performed by others and to ensure that all unsafe conditions

were corrected -- authority that, as stated, implies supervisory authority and control.

Consistent with Ames' authority as set forth in the SHEAP, Superintendent Lunsford acknowledged that in the past he had ordered truck drivers delivering pipe not to take specific actions that were dangerous. J.A. 71. He also acknowledged that Ames had the authority to reject loads of pipe. J.A. 76. Ames pipe crew member Hilton similarly testified that if forklifts are not in place and truck drivers "move towards unstrapping their truck[,] we would tell [the truck driver] not to." J.A. 68. Ames pipe crew member Florez acknowledged that if he had heard truck driver Kay taking the straps off the pipe, he would have stopped Kay. J.A. 61. Pipe crew member Davis testified that when truck drivers "show up at a site and there's three or four of us there, . . . we generally would tell the truck driver to stay back, keep clear until we give him direction where to go and what to do." J.A. 65.

Finally, Ames acknowledged in its post-hearing brief that it "asserted its control of the unloading process when Greg Davis instructed Mr. Kay to "Wait right here. We'll be right back with a forklift to unload you," and Mr. Kay responded "Okay." J.A. 152 (citing J.A. 63).

Substantial evidence thus plainly supports and indeed compels the findings that Ames controlled the area where the accident occurred and supervised the unloading process.¹¹

Perhaps recognizing as much, Ames asserts that it was deprived of the opportunity to put on evidence relating to the question of supervision and control because the Secretary's theory that Ames supervised the unloading process and controlled the unloading area was not at issue at trial. Br. at 35-37. Ames is incorrect.

As the Commission found, "[t]he Secretary litigated the case before the judge on the theory of Ames's strict liability for the violation based on its control of the pipe unloading area and supervision of the unloading area and supervision of the unloading process." J.A. 275, n.4.

Contrary to Ames' assertion, Ames' own actions in seeking dismissal of the citation reflect that Ames' understood, early on, that control was an issue. Shortly after the citation was issued, in January 2009, Ames urged MSHA to dismiss the citation

¹¹ Because the Commission found that Ames supervised the unloading process, it did not reach the issue of whether the judge's finding that Ames controlled the unloading area was supported by substantial evidence. J.A. 276 n.5. It is well established, however, that a party that prevailed below may urge on appeal an argument that supports the decision below, even if the decision making body below declined to reach that argument. Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970).

because "Ames was not responsible and had no control of the loading or transporting of the load of pipes, . . . and [Orton] had sole and exclusive control of load from the time was loaded and transported until Ames begins unloading process, which had not began at the time of the accident." J.A. 133.

The Secretary also made clear that control and supervision were at issue. In the Secretary's prehearing statement, the Secretary indicated that a key disputed issue was "when Ames became legally responsible for the safe unload of William Kay's pipe." J.A. 3.

In the Secretary's opening statement, after making clear that "the dispositive issue is determination of the point in time when Ames assumed legal responsibility for the pipes on Mr. Kay's truck," counsel for the Secretary indicated that "a few key facts in this regard" were that "Ames had assumed direction over Mr. Kay's truck, it had given him directions on where to go on the mine, and left a person with Mr. Kay," that "Mr. Florez was in position to prevent this accident from occurring" and that "Mr. Kay was on mine property that was under Ames control." J.A. 19-20.

The hearing testimony of MSHA Inspector Julien also made clear the Secretary's theory of liability. When asked, "What was the conduct that Ames Construction engaged in that caused

you to issue the citation, what did they do?," Inspector Julien testified: "Well, again, they were in control of the operation at that point" J.A. 32. When asked, "if Mr. Orton [sic] undid the straps, why issue Ames a citation," Julien testified: "Ames is still - they have ultimate responsibility under the law at that mine site When they go out and they pick up this vehicle and they escort this gentleman . . . Ames Construction is basically directing the driver where to go and, you know, to unload." J.A. 33-34.¹²

Thus, contrary to Ames' argument, Ames plainly had notice before the judge that control and supervision were at issue. In any event, Ames has failed to show prejudice from the asserted lack of notice. As a result, its lack of notice claim fails. See e.g., Burkhart v. Washington Metro. Transit Area Auth, 112 F.3d 1207, 1214 (D.C. Cir. 1997) ("The burden of demonstrating prejudice requiring reversal rests with the party asserting error" (internal citations and quotation marks omitted)).

¹² Ames is thus wrong in suggesting that Inspector Julien issued the citation based on a misunderstanding of the law. Br. at 27, 28. Inspector Julien's legal basis for issuing the citation to Ames was exactly right -- Ames was legally responsible under the Act for the violation because Ames had control over the mine and supervisory authority over the unloading process.

Ames states that if it were on notice that control and supervision were at issue it would have put on additional evidence detracting from the findings that it controlled the unloading area and supervised the unloading process. See Br. at 37. The specific type of evidence Ames asserts it would have introduced, however, would not have detracted from those findings.

The first type of evidence Ames asserts it would have introduced is evidence that, after the accident, owner-operator Kennecott excluded Ames from the accident investigation and from the mine. See Br. at 37. The fact that, after the accident, Kennecott may have exercised its control over the mine and authority over Ames and taken back the authority it had granted Ames does not mean that, at the time of the accident, Ames did not control the unloading area and supervise the unloading process.

The other types of evidence Ames asserts it would have introduced -- evidence that Mr. Kay was using his own equipment and that Orton previously trained Kay on unloading (see Br. at 37) -- would not have detracted from the control and supervision findings for two reasons. First, undisputed evidence that Kay owned the equipment he was using and that Orton trained Kay on unloading was already in the record. See J.A. 273 (the

Commission finding that "the delivery truck was owned by Orton . . ."); J.A. 69 (pipe crew member Hilton testifying that the truck driver owns the equipment bar used to loosen the straps); J.A. 82 (the parties stipulating that Orton's policy required the drivers to "follow the instructions of the supervisor of the unloading process," "not to unstrap their straps from the load unless the load is braced and secured," and "not to remove or loosen their straps until they are instructed to undo straps by the supervisor of the unloading process").

Moreover, the violation in this case did not result from Mr. Kay's equipment, and the fact that Orton owned the equipment Mr. Kay was using therefore does not detract from the finding that Ames is liable for the violation because it controlled the unloading area and supervised the unloading process. Similarly, the fact that Orton trained Mr. Kay on the unloading process does not mean that Ames did not control the unloading area or supervise the unloading process, particularly given that, as part of the training, Kay was told to follow Ames' instructions. See J.A. 82.

Accordingly, and because of the significant evidence supporting the control and supervision findings -- including Ames' concession that it "asserted its control of the unloading process when Greg Davis instructed Mr. Kay to "Wait right here.

We'll be right back with a forklift to unload you," J.A. 152) -- Ames' claim of lack of notice, even if it were otherwise viable, would fail because any lack of notice was harmless.

III.

AMES HAD CONSTITUTIONALLY ADEQUATE NOTICE

Ames' related assertion, that it did not have constitutionally adequate notice of the Secretary's "new policy of enforcement against third parties," is equally flawed. Br. at 39. As the Commission correctly observed, "the imposition of liability on a contractor for violations that occur during a process supervised by the contractor is not a new policy. It is entirely consistent with . . . the Mine Act's fundamental imposition of responsibility for activities undertaken, controlled, or supervised by any contractor as an operator regulated under the Act." J.A. 277 n.6 (citing 30 U.S.C. § 802(d)). As the Commission also correctly recognized, this case simply involved application of that well-established legal principle to a novel set of facts. Id.

As set forth above, consistent with the language, the history, and the purpose of the Mine Act, it is settled law that the Mine Act imposes liability on operators without regard to fault for violations in parts of mines that they control or supervise. Nothing in the language, history, or purpose of the

Act, or in the decisions interpreting the Act, suggests that that principle does not apply to independent contractors, like Ames, that control or supervise part of a mine. Nor, as also set forth above, could Ames have reasonably relied on anything in the Secretary's Independent Contractor Rule, the accompanying guidelines, or the Secretary's enforcement history to conclude otherwise. As a result, Ames' due process argument fails. See Rose v. Locke, 423 U.S. 48, 53 (1975) (rejecting a due process notice claim because the defendant "[could] make no claim that [the statute] afforded no notice that his conduct might be within its scope"). See also United States v. Lanier, 520 U.S. 259, 266 (1997) ("[Due process bars courts from applying a novel construction of a []statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (regulations "satisfy due process as long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require").

CONCLUSION

For the reasons set forth above, the Court should affirm the Commission majority's decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(c) and 32(a)(1), I certify that this Brief for the Secretary of Labor contains 11,529 words as determined by Word, the processing system used to prepare the brief.

/s/
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Section 3(d) of the Mine Act, 30 U.S.C. § 802(d)

For the purpose of this chapter, the term--

* * *

(d) “operator” means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;

Section 104(d) of the Mine Act, 30 U.S.C. § 814(d)

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Section 110 of the Mine act, 30 U.S.C. § 820

(a) Civil penalty for violation of mandatory health or safety standards

(1) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 813(j) of this title (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5,000 and not more than \$60,000.

(3)(A) The minimum penalty for any citation or order issued under section 814 (d)(1) of this title shall be \$2,000.

(B) The minimum penalty for any order issued under section 814(d)(2) of this title shall be \$4,000.

(4) Nothing in this subsection shall be construed to prevent an operator from obtaining a review, in accordance with section 816 of this title, of an order imposing a penalty described in this subsection. If a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection.

(b) Civil penalty for failure to correct violation for which citation has been issued

(1) Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than \$ 5,000 for each day during which such failure or violation continues.

(2) Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(1) or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than \$250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than \$500,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both.

(f) False statements, representations, or certifications

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than five years, or both.

(g) Violation by miners of safety standards relating to smoking

Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than \$250 for each occurrence of such violation.

(h) Equipment falsely represented as complying with statute, specification, or regulations

Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (f) of this section.

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information

available to him and shall not be required to make findings of fact concerning the above factors.

(j) Payment of penalties; interest

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

(k) Compromise, mitigation, and settlement of penalty

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

(l) Inapplicability to black lung benefit provisions

The provisions of this section shall not be applicable with respect to subchapter IV of this chapter.

Section 111 of the Mine Act, 30 U.S.C. § 821

If a coal or other mine or area of such mine is closed by an order issued under section 813 of this title, section 814 of this title, or section 817 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 814 of this title or section 817 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 813 of this title, section 814 of this title, or section 817 of this title, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of Title 5.

30 C.F.R. § 45.1

This part sets forth information requirements and procedures for independent contractors to obtain an MSHA identification number and procedures for service of documents upon independent contractors. Production-operators are required to maintain certain information for each independent contractor at the mine. The purpose of this rule is to facilitate implementation of MSHA's enforcement policy of holding independent contractors responsible for violations committed by them and their employees.

30 C.F.R. § 45.2

As used in this part:

(a) Act means the Federal Mine Safety and Health Act of 1977, Pub.L. 91-173, as amended by Pub.L. 95-164;

(b) District Manager means the District Manager of the Mine Safety and Health Administration District in which the independent contractor is located;

(c) Independent contractor means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; and,

(d) Production-operator means any owner, lessee, or other person who operates, controls or supervises a coal or other mine.