

U.S. Department of Labor

Office of the Solicitor
Division of Mine Safety & Health
1100 Wilson Boulevard
Arlington, Virginia 22209-2296



ON APPEAL TO
THE COMMISSION

VIA U.S. MAIL

September 30, 2013

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health
Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

Re: Sec'y of Labor v. Lewis-Goetz and Company, Inc., WEVA 2012-1821

Dear Ms. Boyd:

Enclosed for filing please find the original and six copies of the Secretary's opening brief.

Thank you for promptly bringing this matter to the attention of the Commission.

Sincerely,


Sara L. Johnson
Attorney

cc: John B. Bechtol, Esq.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)
MINE SAFETY AND HEALTH)
ADMINISTRATION (MSHA),) Docket No. WEVA 2012-1821
)
Petitioner,)
)
v.)
)
LEWIS-GOETZ AND COMPANY, INC.,)
)
Respondent.)
)

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

SARA L. JOHNSON
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., 22nd Fl.
Arlington, VA 22209-2296
(202) 693-9332
(202) 693-9361 (fax)
johnson.sara.l@dol.gov

Attorneys for the
Secretary of Labor, MSHA

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ISSUES	5
STATEMENT OF FACTS	5
PROCEDURAL HISTORY	6
THE JUDGE'S DECISION	10
ARGUMENT	
THE SUMMARY DECISION STANDARD	12
THE SECRETARY'S INTERPRETATION OF SECTION 77.1710	15
I. THE JUDGE ERRED IN REJECTING THE SECRETARY'S STRICT LIABILITY INTERPRETATION OF SECTION 77.1710(g) AND THEREBY DENYING THE SECRETARY'S MOTION FOR SUMMARY DECISION	18
A. Section 77.1710(g) Requires Miners to Actually Wear Fall Protection Because the Phrase "Shall Be Required to Wear" Means Shall Be Required to Wear By the Standard, Not By the Operator	18
B. In the Alternative, Section 77.1710(g) Requires Miners to Actually Wear Fall Protection Because the Phrase "Shall Be Required to Wear" Means That the Operator Shall <u>Compel</u> the Miner to Wear	22
C. The Mine Act's Strict Liability Scheme Further Supports the Secretary's Strict Liability Interpretation	23
D. Even if the Standard Is Ambiguous With Regard to the Strict Liability Question, the Commission Owes Controlling <u>Auer</u> Deference to the Secretary's Interpretation	25

II.	EVEN UNDER THE COMMISSION'S INTERPRETATION OF SECTION 77.1710 IN <u>SOUTHWESTERN I</u> AND <u>II</u> , THE JUDGE ERRED BY CONCLUDING THAT LEWIS-GOETZ WAS ENTITLED TO SUMMARY DECISION AS A MATTER OF LAW	26
A.	The Judge Omitted a Critical Component of the Commission's Legal Test	26
B.	The Judge Mischaracterized the Secretary's Stipulations	28
C.	The Judge Misallocated the Burden of Proof	29
D.	The Judge Drew Impermissible Inferences in Favor of the Moving Party	30
III.	THE JUDGE'S MANAGEMENT OF THE SUMMARY DECISION PROCEDURES WAS INCONSISTENT WITH THE COMMISSION'S SUMMARY DECISION AND SIMPLIFIED PROCEEDING RULES	31
A.	Standard of Review	31
B.	Ordering Cross-Motions for Summary Judgment Was Inconsistent With Simplified Proceedings	31
C.	The Judge Erred As a Matter of Law By Deciding the Cross-Motions for Summary Decision Without Permitting Filings in Opposition	32
	CONCLUSION	35

INTRODUCTION

This appeal and the associated appeal in Nally & Hamilton Enterprises, Docket No. KENT 2011-434, present the Commission with the challenge of choosing between two long-standing interpretations of 30 C.F.R. § 77.1710: the Secretary's and the Commission's. Section 77.1710 is MSHA's mandatory safety standard governing miners' use of personal protective equipment in surface coal mines. It states: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below." 30 C.F.R. § 77.1710 (emphasis added). It then lists personal protective equipment, including fall protection (at issue in this case), seatbelts (at issue in Nally & Hamilton), eye protection, protective clothing, gloves, hardhats, footwear, and life jackets, and identifies the circumstances under which each type of gear "shall be worn" by miners. See id.

The Secretary interprets Section 77.1710 to be a strict liability standard, i.e., a standard that is violated whenever a miner fails to actually wear the specified gear. For example, under the Secretary's interpretation of Section 77.1710(g), which addresses fall protection, the Secretary establishes a violation when he proves that a miner failed to wear a safety belt and line where there was a danger of falling. The

operator's efforts to require employees to wear protective gear - whether through safety policies, training, or progressive discipline - are relevant to the operator's degree of negligence and the appropriate civil penalty, but are not relevant to determining whether a violation occurred.

In contrast, the Commission has interpreted Section 77.1710 to create an exception to the Mine Act's strict liability scheme. Under the Commission's interpretation of the standard, an operator avoids liability if it proves that (1) it has a safety system in place requiring miners to use protective gear; (2) the system includes site-specific guidelines and supervision on the subject of actual dangers; and (3) it adequately enforces the system. Southwestern Illinois Coal Corp., 5 FMSHRC 1672, 1674-67 (1983) ("Southwestern I"); Southwestern Illinois Coal Corp., 7 FMSHRC 610, 612-13 (1985) ("Southwestern II"). The Commission's interpretation is premised on reading Section 77.1710's phrase "shall be required to wear" to mean that the operator need only "require" the miner to wear the gear to satisfy its obligation under the standard.

In Southwestern I, the Commission rejected the Secretary's strict liability interpretation of the standard even though it ultimately ruled in the Secretary's favor on liability and concluded that the operator had failed to prove that its safety policies and enforcement were adequate. 5 FMSHRC at 1676.

Likewise, in Southwestern II, the Commission reversed the judge and entered summary decision in the Secretary's favor, again finding that the operator had failed to prove its affirmative defense. 7 FMSHRC at 612-13. Having received favorable rulings on liability in both cases, the Secretary had no reason or standing to challenge the Commission's contrary interpretation of Section 77.1710 in a Court of Appeals. See, e.g., Mathias v. WorldCom Technologies, Inc., 535 U.S. 682, 684 (2002) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous.").

Recently, however, in this case and in Nally & Hamilton, Commission administrative law judges vacated MSHA's Section 77.1710 citations, citing the Commission's decisions in Southwestern I and II. The Commission granted the Secretary's petitions for discretionary review. Consistent with his long-standing interpretation, the Secretary again advances the position that Section 77.1710 is a strict liability standard. The Commission therefore must again apply the traditional tools of regulatory interpretation, along with modern principles of Auer deference, to determine the validity of the Secretary's interpretation.

In this case, the MSHA inspector issued a citation to Lewis-Goetz and Company, Inc. ("Lewis-Goetz") after observing what he deemed a violation of Section 77.1710(g) at a coal

preparation plant near Mt. Storm, West Virginia. Lewis-Goetz does not dispute that the miner was not wearing fall protection where there was a danger of falling. On cross-motions for summary decision, the judge vacated the citation, relying on the Commission's decision in Southwestern I.

The Secretary urges the Commission to reconsider its existing interpretation of Section 77.1710, reverse the judge's order, grant summary decision in the Secretary's favor, and remand to the judge to consider the S&S designation and the appropriate civil penalty.

In the event that the Commission declines to reconsider its existing interpretation of Section 77.1710, the Secretary alternatively urges the Commission to vacate the order on the cross-motions for summary decision and to remand to the judge to conduct further proceedings in accordance with regular Commission procedural rules. Even if the Commission reaffirms the interpretation of Section 77.1710 adopted in Southwestern I, the judge erred in granting summary judgment to Lewis-Goetz because the judge made multiple and mutually reinforcing errors when applying that precedent under the Commission's summary decision standard.

ISSUES

- I. Whether the judge erred in rejecting the Secretary's strict liability interpretation of Section 77.1710(g) and thereby denying the Secretary's motion for summary decision.
- II. Whether the judge erred in granting summary decision to Lewis-Goetz even under the Commission's interpretation of Section 77.1710 in Southwestern I and II.
- III. Whether the judge failed to follow Commission Procedural Rules 10 and 67 when she ordered the parties to submit cross-motions for summary decision and then ruled on the cross-motions without permitting filings in opposition.

STATEMENT OF FACTS

Lewis-Goetz is an independent contractor that offers conveyor belt fabrication and repair services to mines. Dec. at 2. On December 18, 2011, MSHA Inspector W. Carol Ensminger was inspecting the Dobbin Ridge Prep Plant near Mt. Storm, West Virginia. Id. Inspector Ensminger observed Lewis-Goetz hourly employee Jesse Brown performing belt splicing and vulcanizing services on the elevated No. 2 raw coal belt. Id. The belt was approximately 30 inches wide, wet from the falling snow, and located approximately 10 to 12 feet above the ground. Joint Stips. at #16-20. Brown was walking and squatting down on the wet, narrow, and elevated coal belt, and was not wearing a safety belt or tag line. Id.

Inspector Ensminger determined that Brown was in imminent danger of falling and issued Section 107(a) Imminent Danger Order No. 8036267 and Section 104(a) Citation No. 8036268, the action at issue here. The citation alleged that Lewis-Goetz had violated 30 C.F.R. § 77.1710(g). The citation also alleged that it was highly likely that a fatal injury would occur as a result of a fall; that the violation was significant and substantial ("S&S"); and that one miner was affected. Joint Stip. #25. The citation was initially issued with a designation of "high" negligence, but MSHA later modified the operator's negligence to moderate. Joint Stip. #26.

After Inspector Ensminger ordered Brown to descend from the coal belt, Brown stated that he was aware he was supposed to wear a safety belt and tagline but, due to the severe cold weather, he was in a hurry to get the work done and decided not to wear the belt. Joint Stip. #23. After being removed from the elevated beltline, Brown retrieved a safety belt and tagline from a tool bag located in the maintenance truck. Joint Stip. #21. Brown told Inspector Ensminger that the devices were available to him and that he had been trained in their use. Joint Stip. #24.

PROCEDURAL HISTORY

MSHA proposed a civil penalty of \$ 971, and Lewis-Goetz filed a notice of contest.

On December 12, 2012, the Chief Judge designated the docket for simplified proceedings. Because the case was designated for simplified proceedings, the parties did not conduct formal discovery. See 29 C.F.R. § 2700.107.

On June 17, 2013, after a series of status calls with the assigned judge, the parties filed joint exhibits, including the citation and proposed assessment of penalty, the inspector's notes and pictures, Lewis-Goetz's training records, and Lewis-Goetz's disciplinary program. See Joint Exs. A-D. The parties also filed joint stipulations to the undisputed facts. See Joint Stips. #1-28. Finally, the parties submitted competing proposed findings of fact addressing the factual issues upon which they had not reached agreement. See Respondent's Proposed Findings of Fact; Sec'y's Proposed Findings of Fact.

The next day, the judge's Attorney Advisor, Maggie Palmer, sent the parties an e-mail stating: "Good afternoon, Judge Rae requests that you file short briefs, with supporting legal authority for your positions, by 5:00p.m. EST on July 5, 2013." App. A. (emphasis in original).¹ Four hours later, Ms. Palmer sent another e-mail stating: "To clarify, the briefs to be submitted on July 5, 2013 by 5:00pm EST are briefs on summary decision. Best regards, Maggie." Id.

¹ The e-mail correspondence between the judge's Attorney Advisor and the parties is attached to this brief for the Commission's convenience.

The parties complied with the request, notwithstanding the designation of the case for simplified proceedings. On July 3, 2013, Lewis-Goetz submitted a Brief in Support of Notice of Contest requesting that the judge vacate the citation under the theory that (1) under the plain language of Section 77.1710(g), the Secretary must prove that the operator "does not require its employees to wear safety belts"; (2) the Commission's case law is consistent with that reading of the standard; and (3) the Secretary could not prove that the Lewis-Goetz does not "require" its employees to wear belts because Lewis-Goetz has a training program on the use of safety belts and a disciplinary program that punishes violations. Lewis-Goetz Mot. at 4-7 (emphasis in original).

On July 5, 2013, counsel for the Secretary submitted a Motion for Summary Decision and Determination of Penalty requesting that the judge affirm the citation and the S&S designation and assess a civil penalty of \$ 971. The Secretary's motion relied on the theory that (1) 30 C.F.R. § 77.1710(g) is a strict liability standard; (2) the Secretary establishes that a violation occurred under the standard by proving that a miner was not wearing a safety belt or tag line where there was a danger of falling; and (3) it is undisputed that Brown was not wearing a safety belt or tag line where there was a danger of falling. See Sec'y's Mot. at 7-8.

On July 16, 2013, eight business days after Lewis-Goetz's filing, counsel for the Secretary filed an opposition to the contractor's motion for summary decision. See App. B (cover note). Though the filing was titled "Secretary's Reply Brief in Further Support of His Motion for Summary Decision and Determination of Penalty," the content of the filing was in essence a filing in opposition to Lewis-Goetz's motion for summary judgment, as it addressed the case law cited by Lewis-Goetz but not addressed by the Secretary's July 5, 2013, motion. See Sec'y's July 16 Br. at 1-7.

The next day, Ms. Palmer responded via e-mail, stating: "Judge Rae did not authorize reply briefs and will not be accepting them." App. C.

Counsel for the Secretary replied with an e-mail, dated July 17, 2013, that explained that the judge had ordered the parties to file motions for summary decision and that Commission Procedural Rule 10(d) permits parties to file an opposition to any written motion within eight business days of being served with the opposing party's motion. App. C. Counsel further explained that she had filed the second brief understanding that a responsive filing was contemplated by the rules and therefore did not require the prior authorization of the judge. Id.

THE JUDGE'S DECISION

On July 17, 2013, the judge's Attorney Advisor rejected the Secretary's request that the judge reconsider her position on the filing of oppositions. Ms. Palmer's e-mail stated: "Good afternoon, Judge Rae will not consider any reply briefs." App. C.

Five days later, on July 22, 2013, the judge issued a signed Decision and Order on Cross Motions for Summary Decision. The decision denied the Secretary's motion for summary decision, granted the operator's motion for summary decision, and vacated Citation No. 8036268. Dec. at 6. The decision did not revisit the decision to reject the Secretary's opposition filing and did not refer to any of the arguments the Secretary had made in that filing. See Dec. at 1-6.

The judge first concluded that the Secretary properly asserted MSHA jurisdiction over Lewis-Goetz. See Dec. at 3-4. In effect, though not explicitly, the judge therefore granted partial summary decision in the Secretary's favor on the jurisdictional issue.

The judge then considered whether Lewis-Goetz violated 30 C.F.R. § 77.1710(g) when Brown worked without a safety belt or line, and concluded that the contractor had not violated the standard. Dec. at 4-6. The judge noted the Secretary's position that a violation had occurred because Section 77.1710(g) imposes strict liability on operators. Id. at 5.

The judge also noted Lewis-Goetz's position that the standard only requires an operator to impose a requirement for employees to use fall protection, and to take reasonable measures to ensure that the requirement is enforced. Id. at 4-5. The judge concluded, based on the Commission's 1983 decision in Southwestern I, that the duty the standard imposes on the operator is to "have a safety system in place requiring employees to use safety gear and that [the operator] diligently seek[s] to enforce that requirement through such avenues as training, supervision, and disciplinary measures for failure to comply." Id. at 5.

The judge summarized the evidence in the record, stating that the Secretary stipulated that (1) Lewis-Goetz has a written policy that all miners must wear fall protection; (2) Lewis-Goetz offers at least yearly refresher training on the policy; (3) by company policy, a violation of the requirement to wear fall protection is subject to graduated disciplinary measures, including termination; and (4) Brown admitted to the inspector that he was "well aware of the requirement to wear the equipment but he intentionally ignored the policy" and that "[t]he gear was readily available to him in his tool bag." Dec. at 5.

The judge noted that summary decision would be inappropriate if the parties disputed whether Lewis-Goetz's efforts to enforce its policy regarding fall protection were

adequate. Dec. at 5 n.3. The judge concluded, however, that the parties "had stipulated to the contrary." Id.

Despite finding that the parties' stipulations had resolved the issues presented, the judge nonetheless made additional findings, stating: "Based upon the facts mutually agreed upon, I find that Lewis-Goetz did have an adequate policy in place requiring employees to wear fall protection and [that it] took adequate measures to enforce that policy." Dec. at 5.

After granting Lewis-Goetz's motion for summary decision and denying the Secretary's motion for summary decision, the judge vacated Citation No. 8036268 and dismissed the matter. Dec. at 6.

ARGUMENT

THE SUMMARY DECISION STANDARD

Commission Procedural Rule 67 establishes procedures for Commission administrative law judges to resolve cases through summary decision. Under the Commission's rule, a judge may only grant a party's motion for summary decision "if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. 2700.67(b). The Commission has noted that summary decision is an "extraordinary procedure" that should only be employed when the

rule's exacting standards are satisfied by the moving party.

See Energy West Mining Co., 16 FMSHRC 1414, 1419 (1994).

Commission Procedural Rule 67 contemplates a minimum of two filings before the judge renders summary decision in favor of a party. First, the party seeking summary decision must file a motion accompanied by a legal memorandum and a statement of undisputed material facts. See 29 C.F.R. § 2700.67(c). Second, the opposing party may file an opposition to the motion that includes a legal memorandum and a statement of any disputed material facts. See 29 C.F.R. § 2700.67(d).

When faced with cross-motions for summary decision, a judge must rule on each party's motion on an individual and separate basis, determining, with respect to each side, whether the party has established both that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. See, e.g., Podberesky v. Kirwan, 38 F.3d 147, 155-158, amended on denial of reh'g, 46 F.3d 5 (4th Cir. 1994). The fact that one party fails to satisfy its burden does not indicate that the opposing party has satisfied its burden and should be granted summary decision on its cross-motion. Wright, Miller, Kane, Marcus & Steinman, 10A Fed. Prac. & Proc. Civ. § 2720 (3d ed.). This is especially true where the movants advance different legal theories in support of their motions. Id.

The Commission's application of Rule 67 is informed by the Supreme Court's interpretation of Federal Rule of Civil Procedure 56. Hanson Aggregates New York, Inc., 29 FMSHRC 4, 9 (2007). Under the Supreme Court's standard, the judge must view the record in the light most favorable to the party opposing the motion, and all inferences must be drawn in favor of the non-moving party. Id.

When a legal question at issue on summary decision turns on MSHA's interpretation of its own standard, the Commission and its judges must apply the deferential standard of review required by Auer v. Robbins, 519 U.S. 452 (1997), to MSHA's interpretation. If the standard is unambiguous, the standard's clear meaning is controlling. See Nolichecky Sand Co., 22 FMSHRC 1057, 1060 (2000). On the other hand, if the standard permits more than one meaning, the Commission must defer to MSHA's interpretation unless that interpretation is "plainly erroneous or inconsistent with the regulation." Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003).

The Commission reviews a judge's summary decision order de novo, under the same standard employed by the judge. Hanson Aggregates, 29 FMSHRC at 9.

THE SECRETARY'S INTERPRETATION OF SECTION 77.1710

Section 77.1710 governs miners' use of personal protective equipment when working in a surface coal mine or in the surface work areas of an underground coal mine. It states in full:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

- (a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.
- (b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.
- (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
- (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
- (e) Suitable protective footwear.
- (f) Snug-fitting clothing when working around moving machinery or equipment.
- (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
- (h) Lifejackets or belts where there is danger from falling into water.

- (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

30 C.F.R. § 77.1710.

The Secretary has consistently interpreted Section 77.1710 to be a strict liability standard, i.e., to require that miners actually wear the requisite protective gear, rather than only directing that operator require miners to wear it. MSHA's Program Policy Manual ("PPM") expresses the agency's strict liability interpretation:

Paragraph (g) of this Section requires that safety belts and lines shall be worn at all times by all miners working in positions where there is a danger of falling, except where safety belts and lines may present a greater hazard or are impractical. . . . The objective of this policy is to insure that miners working where there is a danger of falling are always protected.

V U.S. Dep't of Labor, MSHA, Program Policy Manual, Part 77, Subpart R at 208-09 (Feb. 2003) (emphasis added). This interpretation has been in place without substantive changes since Volume V of the PPM was originally issued.

Moreover, the Secretary has argued his strict liability position in litigation even after the Commission adopted its conflicting interpretation in Southwestern I. See, e.g., Peabody Coal Corp., 6 FMSHRC 612, 625 (1984) ("The Secretary, in his post trial brief, is aware of the Commission decision in [Southwestern I]. But the Secretary claims the majority

decision violates the long line of strict liability cases imposed by the Act. Further, the Secretary argues that the minority view is more persuasive.").

Thus, both MSHA's policy manual and the Secretary's litigation position reflect that the Secretary has not acquiesced in the Commission's conflicting interpretation of Section 77.1710. See generally Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989) (discussing agency nonacquiescence with judicial decisions of the Courts of Appeals).

The policy underlying the Secretary's strict liability interpretation is reflected in the many Commission and court decisions to consider other aspects of the Mine Act's strict liability scheme. Strict liability incentivizes operators under the Mine Act "to take all practicable measures to ensure the workers' safety." Allied Products Co. v. FMSHRC, 666 F.2d 890, 894 (5th Cir. 1982). In other words, as Congress recognized in enacting the Mine Act, "liability without fault . . . promote[s] the highest degree of operator care." Western Fuels-Utah, Inc., 10 FMSHRC 256, 261 (1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989).

I. THE JUDGE ERRED IN REJECTING THE SECRETARY'S STRICT LIABILITY INTERPRETATION OF SECTION 77.1710(g) AND THEREBY DENYING THE SECRETARY'S MOTION FOR SUMMARY DECISION

The judge in this case, and the Commission in Southwestern I and II, erred in rejecting the Secretary's strict liability interpretation of Section 77.1710. The phrase "shall be required to wear" in Section 77.1710's introductory paragraph creates some ambiguity, but that ambiguity is easily resolved when one reads the standard as a whole and in light of the purpose and structure of the Mine Act. Reading the standard as a whole, the phrase "shall be required to wear" must mean either (1) that the miner shall be required to wear the gear by the standard, not by the operator; or (2) that the operator shall compel the miner to wear the gear. Both of these readings support the Secretary's strict liability interpretation because both make the standard's strict liability scheme clear. Moreover, even if the Commission concludes that the standard as a whole is ambiguous with regard to the strict liability question, controlling Auer deference is owed to the Secretary's permissible interpretation of the standard.

A. Section 77.1710(g) Requires That Miners Actually Wear Fall Protection Because the Phrase "Shall Be Required to Wear" Means Shall Be Required to Wear By the Standard, Not Shall Be Required By the Operator

Section 77.1710's introductory paragraph states that "Each employee . . . shall be required to wear protective clothing and

devices as indicated below." 30 C.F.R. § 77.1710 (emphasis added). Because the phrase "shall be required to wear" uses the passive voice, it does not resolve the question of by whom or what each employee shall be required to wear the protective gear: by the standard itself, or by the employer. See, e.g., E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 128-29 (1977) (Federal Water Pollution Control Act, which used passive voice in describing effluent limitations, was ambiguous as to who was supposed to establish the limitation: the administrator or the permit issuer); see generally Anita S. Krishnakumar, Passive-Voice References in Statutory Interpretation, 76 Brook. L. Rev. 941, 943-44 (2011) (noting that four Supreme Court cases "stand for the uncontroversial presumption that a statute written in the passive voice leaves the identity of the relevant statutory actor indeterminate. . . . [and] creates interpretive ambiguity").

After the introductory paragraph, Section 77.1710 contains an enumerated list of personal protective equipment that miners must wear in various circumstances. The very first item in the list uses the phrase "shall be worn." See 30 C.F.R. § 77.1710(a) ("Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.") (emphasis added). The phrase "shall be worn," like the phrase

"shall be required," uses the passive voice - but, unlike "shall be required," "shall be worn" is unambiguous because there is only one possible unnamed subject of the requirement: the miners. Thus, Section 77.1710's use of "shall be worn" in subsection (a) resolves the ambiguity in the introductory paragraph because it clarifies that miners shall wear the protective gear: it is not enough that the operator requires that miners wear it.

Subsections (b) through (i), including subsection (g), must be read in parallel with subsection (a). Employing parallel construction for an enumerated list is grammatically proper, and grammatically proper readings are favored when interpreting statutes and regulations. See, e.g., Barnhart v. Thomas, 540 U.S. 20, 26 (2003) (construing a statute in accord with the grammatical "rule of the last antecedent").

Indeed, even though subsections (b) through (i) do not expressly repeat subsection (a)'s phrase "shall be worn," the repetition of the phrase throughout the enumerated list is implied:

- Subsection (c) implies the repetition of the phrase "shall be worn" throughout the enumerated list because that subsection includes an explicit exception to the requirement that miners wear protective gloves when handling materials or performing work which might cause

injury to the hands. See 30 C.F.R. § 77.1710(c)

("however, gloves shall not be worn where they would create a greater hazard") (emphasis added). The exception proves the existence of the rule.

- Subsection (g) also implies the repetition of the phrase "shall be worn" throughout the enumerated list because, in addition to the requirement that miners must wear safety belts and lifelines, it requires that "a second person shall tend the lifeline when bins, tanks or other dangerous areas are entered." 30 C.F.R. § 77.1710(g) (emphasis added). The elaboration similarly proves the existence of the rule because it would be illogical for the subsection to elaborate on a rule that does not exist.

Thus, the exception in subsection (c) and the elaboration in subsection (g) demonstrate that the only way to reconcile the ambiguous introductory paragraph with the enumerated list that follows it is to read "shall be required to wear" in the introductory paragraph to mean "shall be required to wear by the standard," not "shall be required to wear by the operator," and to read subsections (b) through (i) as implicitly incorporating subsection (a)'s phraseology of "shall be worn."

Similarly, the introductory paragraph must be read as referring to requirements imposed by the standard rather than by

the operator because the introductory paragraph must be interpreted to carry the same meaning throughout. See, e.g., Erlenbaugh v. U.S., 409 U.S. 239, 243 (1972) (The canon of in pari materia reflects that "a legislative body generally uses a particular word with a consistent meaning in a given context."). To read the introductory paragraph to mean that the standard merely imposes a duty on the employer to require the use of fall protection, rather than imposing a strict-liability duty on the employer to ensure that all miners wear it, would be to give the words "shall be required to wear" in the introductory paragraph one meaning for subsection (a) and a different meaning for subsections (b) through (i) - a result that would be contrary to well-established canons of statutory and regulatory construction.

B. In the Alternative, Section 77.1710(g) Requires Miners to Actually Wear Fall Protection Because the Phrase "Shall Be Required to Wear" Means That the Operator Shall Compel the Miner to Wear

In the alternative, Section 77.1710(g) requires miners to actually wear fall protection because the phrase "shall be required to wear" means that the operator shall require the miner to wear the protective equipment, and to "require" means to compel compliance to the point that every miner always wears the protective gear identified in the standard.

To "require," in the strong sense of the word, is to compel. See Webster's Third New International Dictionary 1929 (2002) (defining "require" as, inter alia, "to impose a compulsion or command upon (as a person) to do something," "[to] demand of (one) that something be done or some action taken," and "[to] enjoin, command, or authoritatively insist (that someone do something)").

If the ambiguity in Section 77.1710's introductory paragraph is resolved to mean that the operator must require each employee to wear, rather than to mean that the standard requires each employee to wear, the strong meaning of the word "require," i.e., to compel, must be used to reconcile the introductory paragraph with the enumerated list that follows. To give the word "require" a less forceful meaning - for example, to "instruct" - would be inconsistent with the meaning of the enumerated list, because the enumerated list states that the equipment "shall be worn," not that the operator shall instruct that it be worn. See 30 C.F.R. § 77.1710(a).

C. The Mine Act's Strict Liability Scheme Further Supports the Secretary's Strict Liability Interpretation

In addition to the textual support for the Secretary's interpretation, the purpose and structure of the Mine Act also support reading Section 77.1710 as a strict liability standard. The Commission and the courts have recognized that Congress

intended the Mine Act to operate as a strict liability scheme to maximize employer compliance with the Act and its mandatory safety and health standards. See, e.g., Rock of Ages Corp. v. Sec'y of Labor, 170 F.3d 148, 156 (2d Cir. 1999) (concluding that standard at issue imposed strict liability on mine operators and noting that "[o]ther circuits have similarly held that mine operators may be held liable for violations of mandatory safety rules under the Mine Act even if they did not have knowledge of facts giving rise to the violation."); Allied Products Co. v. FMSHRC, 666 F.2d at 894 (concluding that Congress intended to create a strict liability scheme to incentivize operators under the Mine Act "to take all practicable measures to ensure the workers' safety"); Western Fuels-Utah, Inc., 10 FMSHRC at 261 ("In enacting the Mine Act, Congress formulated a national policy that mine operators were in the best position to further health and safety in the mining industry and that liability without fault would promote the highest degree of operator care.").

The Commission should interpret Section 77.1710 in harmony with the statute's strict liability orientation. See Sec'y of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 320 (D.C. Cir. 1990) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.") (internal quotation marks omitted);

Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1414-15 (10th Cir. 1984) ("[A]ny ambiguity in the regulation disappears immediately when the statute is consulted.").

D. Even if the Standard Is Ambiguous With Regard to the Strict Liability Question, the Commission Owes Controlling Auer Deference to the Secretary's Interpretation

Even if the Commission concludes that Section 77.1710 is ambiguous with regard to the question of strict liability, the Commission owes controlling Auer deference to the Secretary's interpretation. The Secretary's interpretation is neither "plainly erroneous" nor "inconsistent with the regulation." Excel Mining, 334 F.3d at 6. To the contrary, as discussed, the Secretary's interpretation of the standard is consistent both with the text and structure of the standard and with the purpose and structure of the Mine Act as a whole.

Moreover, given that the Secretary's interpretation has long been reflected in MSHA's Program Policy Manual as well as in his litigating positions before the Commission, there can be no doubt that it "reflect[s] the agency's fair and considered judgment on the matter in question." Christopher v. SmithKline Beecham Corp., 567 U.S. ---, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks and citations omitted).

II. EVEN UNDER THE COMMISSION'S INTERPRETATION OF SECTION 77.1710 IN SOUTHWESTERN I AND II, THE JUDGE ERRED BY CONCLUDING THAT LEWIS-GOETZ WAS ENTITLED TO SUMMARY DECISION AS A MATTER OF LAW

Even if the Commission rejects the Secretary's strict liability interpretation of Section 77.1710, the judge still erred in granting summary decision to Lewis-Goetz because the judge's decision contained multiple and mutually reinforcing errors: it omitted a critical component of the Commission's legal test in Southwestern I and II, mischaracterized the Secretary's stipulations, misallocated the burden of proof, and drew impermissible inferences in the moving party's favor. The Commission should therefore vacate the order at least insofar as it granted summary decision to Lewis-Goetz.

A. The Judge Omitted a Critical Component of the Commission's Legal Test

The judge first erred by omitting a critical component of the Commission's legal test for a violation under Section 77.1710(g). The judge concluded, based on the Commission's decision in Southwestern I, that the duty the standard imposes on the operator is to "have a safety system in place requiring employees to use safety gear and that [the operator] diligently seek[s] to enforce that requirement through such avenues as training, supervision, and disciplinary measures for failure to comply." Dec. at 5.

The test as summarized by the judge failed to acknowledge the Commission's more detailed holding in both Southwestern I and II that general safety policies and procedures are not enough to insulate an operator from liability if they "[leave] the decision to wear a safety belt largely to the miner," or if they fail to include "site-specific guidelines and supervision on the subject of actual fall dangers." See Southwestern II, 7 FMSHRC at 612 (citing Southwestern I, 5 FMSHRC at 1676). Indeed, in both Southwestern I and II, the Commission rejected the Secretary's strict liability reading of the standard but affirmed the violations at issue, concluding that the operator's training, supervision, and enforcement were insufficient to insulate it from liability for the employees' failure to wear the specified equipment. Southwestern I, 5 FMSHRC at 1677; Southwestern II, 7 FMSHRC 612-13.

The judge's omission was reversible error because the facts in both Southwestern I and II are nearly identical to the situation presented here. In both cases, the operator had a progressive discipline program for safety violations and gave employees general fall protection training. The Commission concluded, however, that those facts were insufficient to relieve the operator of liability for the miners' failure to wear the fall protection.

Here, likewise, the existence of a progressive discipline program and general training are not enough to meet the requirements of Southwestern I and II. Lewis-Goetz's safety policy, submitted as Joint Exhibit D, contains only general statements that "failure to wear required PPE" is a safety violation. Nothing in the record establishes that Lewis-Goetz maintained or communicated site-specific guidelines on fall dangers, or that Lewis-Goetz supervised miners for compliance with such guidelines. Summary decision in Lewis-Goetz's favor was therefore unwarranted, because the undisputed facts do not meet the Southwestern I and II test, and thus do not establish that Lewis-Goetz is legally entitled to summary decision.

B. The Judge Mischaracterized the Secretary's Stipulations

The judge also erred by mischaracterizing the Secretary's stipulations. The judge stated that the Secretary stipulated that (1) Lewis-Goetz's safety policies were "adequate," see Dec. at 5; and (2) that Lewis-Goetz made a "diligent effort to enforce its policy regarding fall protection," see Dec. at 5 n.3. Neither of those characterizations of the Secretary's stipulations is correct. The Secretary only stipulated to the following:

- The existence and authenticity of the disciplinary program submitted by Lewis-Goetz. See Joint Stips. #10, #14.

- That Brown, the employee at issue, had been trained in the use of fall protection devices. See Joint Stips. #13, #22.
- The authenticity of the training records submitted by Lewis-Goetz. See Joint Stip. #13.
- That Brown had a safety belt and tagline available to him. See Joint Stip. at #21.
- That Brown acknowledged to the inspector that he should have been wearing the fall protection equipment. See Joint Stip. #23.

These stipulations did not concede the adequacy of the safety program or Lewis-Goetz's diligence in enforcing it, and the judge erred in stating that they did.

C. The Judge Misallocated the Burden of Proof

The judge compounded the first two errors by misallocating the burden of proof. Under the Commission's decisions in Southwestern I and II, the burden of proof is on the operator to provide sufficient evidence of its "specific enforcement actions" and its "diligence in site-oriented enforcement of its safety belt rule." See Southwestern I, 5 FMSHRC at 1676 (reinstating citation after concluding that operator's evidence after trial "f[ell] short of demonstrating due diligence in enforcement"); Southwestern II, 7 FMSHRC at 612 (reversing judge and granting summary decision in the Secretary's favor where sufficient evidence of enforcement was lacking from the record).

In other words, the Commission has treated Section 77.1710(g)'s exception to strict liability as an affirmative defense that the operator must plead and prove. Under the Commission's precedent, operators are responsible for proving that their training and supervision were adequate; the Secretary need not prove that the operator's training and supervision were inadequate. Here, instead of properly placing the burden of proof on Lewis-Goetz to submit evidence of adequate enforcement, the judge concluded that the lack of evidence showing diligent enforcement should be counted against the Secretary rather than Lewis-Goetz. See Dec. at 5.

D. The Judge Drew Impermissible Inferences in Favor of the Moving Party

Finally, the judge erred by drawing impermissible inferences in Lewis-Goetz's favor. See Dec. at 5. Under the Commission's summary decision standard, the judge must draw any inferences from the undisputed facts in favor of the nonmoving party. Hanson Aggregates, 29 FMSHRC at 9. Here, instead of concluding that the limited evidence in the record about Lewis-Goetz's safety policies and training was insufficient for the contractor to establish its affirmative defense, the judge inferred from the minimal safety efforts in the record that any additional, unproven facts would provide further support for Lewis-Goetz's defense. Such inferences in the moving party's

favor are impermissible under the exacting standard for summary decision.

III. THE JUDGE'S MANAGEMENT OF THE SUMMARY DECISION PROCEDURES WAS INCONSISTENT WITH THE COMMISSION'S SUMMARY DECISION AND SIMPLIFIED PROCEEDING RULES

A. Standard of Review

The Commission's standard of review for pretrial procedural rulings depends on the nature of the ruling in question. Though the Commission may not "merely substitute its judgment for that of the administrative law judge," the Commission must still determine (1) "whether the judge correctly interpreted the law"; (2) whether the judge "abused his discretion"; and (3) "whether substantial evidence supports his factual findings." Marfork Coal Co., 29 FMSHRC 626, 634-35 (2007). Where the pretrial issue in question is legal in nature, it is subject to the Commission's de novo review. Contractors Sand & Gravel, Inc., 20 FMSHRC 960, 967 (1998), rev'd on other grounds, 199 F.3d 1334 (D.C. Cir. 2000).

B. Ordering Cross-Motions for Summary Judgment Was Inconsistent With Simplified Proceedings

The judge acted inconsistently in managing the course of the proceedings when she ordered the parties to submit cross-motions for summary decision while still operating under simplified proceedings. Both motions practice and briefing are discouraged under the Commission's simplified proceeding rules.

See 29 C.F.R. §2700.100(b)(2) ("Motions are eliminated to the greatest extent practicable); see also 29 C.F.R. § 2700.100(b)(7) ("The parties will argue their case orally before the Judge at the conclusion of the hearing instead of filing briefs."). Moreover, the Commission's rules regarding eligibility for simplified proceedings suggest that the relaxed procedures are inappropriate for cases that present complex issues of law or in which legal issues predominate. See 29 C.F.R. § 2700.101(c), (g). Thus, when the judge became aware that the dispute between the parties was purely or largely a legal dispute over the proper interpretation of Section 77.1710(g), the better practice would have been to discontinue the simplified proceedings pursuant to Commission Procedural Rule 104(a), rather than ordering the parties to submit cross-motions for summary judgment. See 29 C.F.R. § 2700.104(a). ("If it becomes apparent at any time that a case is not appropriate for Simplified Proceedings, the Judge assigned to the case may . . . discontinue Simplified Proceedings and order the case to continue under conventional rules.").

C. The Judge Erred As a Matter of Law By Deciding
the Cross-Motions for Summary Decision Without
Permitting Filings in Opposition

In any event, once the judge ordered the cross-motions for summary judgment, it was legally erroneous for the judge to then issue an order deciding the cross-motions without permitting

responsive filings. Commission Procedural Rules 10 and 67 do not give judges discretion to decide whether parties will be permitted to file in opposition to another party's motion for summary decision: as a matter of law, the rules guarantee such an opportunity.

Commission Procedural Rule 10, which governs motion practice before Commission administrative law judges, expressly provides that a party is entitled to an opportunity to respond in opposition to a motion filed by another party:

A statement in opposition to a written motion may be filed by any party within 8 days after service upon the party. . . . Where circumstances warrant, a motion may be ruled upon prior to the expiration of the time for response; a party adversely affected by the ruling may seek reconsideration.

29 C.F.R. § 2700.10(d). Though the rule contemplates that a judge can rule on a procedural motion before the time for filing an opposition expires, it does not contemplate that a judge will reject filings in opposition on dispositive motions such as motions for summary decision, where reconsideration by the judge is not available under Commission rules. See 29 C.F.R. § 2700.69(b) ("Except to the extent otherwise provided herein, the jurisdiction of the judge terminates when his decision has been issued.").

Commission Procedural Rule 67, which governs motions for summary decision, likewise expressly provides that a party may

file a statement in opposition to the opposing party's motion for summary decision. See 29 C.F.R. § 2700.67(d). Indeed, the rule in effect requires a statement in opposition, because a party that fails to file such an opposition waives its objections to the moving party's arguments. See id. ("If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.").

The Commission, while emphasizing the broad discretion that administrative law judges possess to regulate the conduct of the proceedings before them, has also emphasized that "such conduct must comply with the Commission's procedural rules and applicable provisions of the APA." Shamokin Filler Company, Inc., 34 FMSHRC 1897, 1910 (2012), appeal docketed on other grounds (3d Cir. No. 12-4457) (emphasis added). The judge plainly failed to comply with Commission procedural rules when she rejected the Secretary's second filing.

Moreover, the judge's refusal to follow the Commission's procedural rules prejudiced the Secretary. The Commission has noted that "legally recognizable prejudice must be 'material' - i.e., affect issues necessary to a meaningful opportunity to defend." Roy Farmer & Others, 13 FMSHRC 1226, 1231 (1991). The judge's refusal to consider the opposition filing deprived the Secretary of a meaningful opportunity to rebut Lewis-Goetz's affirmative defense because the Secretary did not have an

opportunity to present legal argument that Lewis-Goetz was not entitled to summary decision as a matter of law.

The Commission should reject any argument that the Secretary's motion for summary decision filed on July 5, 2013, provided such an opportunity. The purpose of the Secretary's July 5, 2013, motion was to argue that the Secretary was entitled to summary decision as a matter of law - not to argue that Lewis-Goetz was not entitled to summary decision. Moreover, the fact that Lewis-Goetz filed its motion for summary decision on the day before the July 4 holiday, rather than on July 5 (the day it was due), cannot serve to deprive the Secretary of his right to oppose Lewis-Goetz's dispositive motion by the regular deadline set by the Commission's procedural rules.

CONCLUSION

For the above reasons, the Secretary urges the Commission to reverse the judge's order and remand to the judge to consider the S&S designation and the appropriate civil penalty. In the alternative, the Secretary urges the Commission to vacate the order on the cross-motions for summary decision and remand to the judge to conduct further proceedings in accordance with regular Commission procedural rules.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation



SARA L. JOHNSON
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., 22nd Fl.
Arlington, VA 22209-2296
(202) 693-9332
(202) 693-9361 (fax)
johnson.sara.l@dol.gov

Attorneys for the
Secretary of Labor, MSHA

Appendix A

From: Maggie Palmer
To: Bechtol, John; Castillo, M Pilar - SOL
Subject: RE: Lewis Goetz WEVA 2012-1821
Date: Wednesday, June 19, 2013 4:37:58 PM
Attachments: image001.png

To clarify, the briefs to be submitted on July 5, 2013 by 5:00 pm EST are briefs on summary decision.

Best regards,
Maggie

Maggie Palmer
Attorney Advisor to Judge Rae
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
202-233-4015
mpalmer@fmshrc.gov

From: Maggie Palmer
Sent: Tuesday, June 18, 2013 12:28 PM
To: Bechtol, John; Castillo, M Pilar - SOL (Castillo.M.Pilar@dol.gov)
Cc: Maggie Palmer; Priscilla Rae
Subject: RE: Lewis Goetz WEVA 2012-1821

Good Afternoon,

Judge Rae requests that you file short briefs, with supporting legal authority for your positions, by **5:00 p.m. EST on July 5, 2013.**

Maggie Palmer
Attorney Advisor to Judge Rae
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
202-233-4015
mpalmer@fmshrc.gov

From: Bechtol, John [<mailto:JBechtol@metzlewis.com>]
Sent: Tuesday, June 18, 2013 10:50 AM
To: Maggie Palmer
Cc: Castillo, M Pilar - SOL (Castillo.M.Pilar@dol.gov)
Subject: Lewis Goetz WEVA 2012-1821

Ms. Palmer – Now that the submissions are in your hands I will await the Judge's briefing schedule. Thank you for your cooperation in this matter. John

John B. Bechtol, Esquire
jbechtol@metzlewis.com
Direct Dial: (412) 918-1115



Metz Lewis Brodman Must O'Keefe LLC
535 Smithfield Street, Suite 800
Pittsburgh, PA 15222
www.metzlewis.com

CONFIDENTIALITY NOTICE The information in this e-mail may be confidential and/or privileged. This e-mail is intended to be reviewed by only the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this email and its attachments, if any, or the information contained herein is prohibited. If you have received this e-mail in error, please notify the sender by return e-mail and delete this e-mail from your system. Thank you

Please note: We have moved to a new Pittsburgh location – 535 Smithfield Street, Suite 800, Pittsburgh, PA 15222. Please update your records. Thank you.

IRS CIRCULAR 230 DISCLAIMER: This communication (including attachments) may contain federal tax advice. Applicable IRS regulations require us to advise you that any discussion of federal tax issues in this communication is not intended or written to be used, and cannot be used by any person, for the purpose of (1) avoiding any penalty that may be imposed under federal tax law, or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein. Only formal, written tax opinions meeting these IRS requirements may be relied upon for the purpose of avoiding tax-related penalties. Please contact one of the Firm's tax partners if you have any questions regarding federal tax advice. **CONFIDENTIALITY NOTICE** The information in this email may be confidential and/or privileged. This email is intended to be reviewed by only the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this email and its attachments, if any, or the information contained herein is prohibited. If you have received this email in error, please notify the sender by return email and delete this email from your system. Thank you.

Appendix B

From: [Criniti, Francesca - SOL](#)
To: prae.flings@fmshrc.gov
Cc: jbechtol@metzlewis.com; [Castillo, M Pilar - SOL](#)
Subject: Secretary v. Lewis-Goetz and Company, Inc.
Date: Tuesday, July 16, 2013 3:30:29 PM
Attachments: [Secretary v. Lewis-Goetz.PDF](#)

Attached please find the Secretary's Reply Brief in Further Support of His Motion for Summary Decision and Determination of Penalty in the above-referenced matter.

*Francesca Criniti
U.S. Department of Labor
Office of the Solicitor
Suite 630E, The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106
(215) 861-5154
(215) 861-5162 (fax)*

CONFIDENTIAL: This message may contain information that is privileged and exempt from disclosure under applicable law. Do not disclose without consulting the Office of the Solicitor. If you think you have received this e-mail in error, please notify me immediately by e-mail or by phone at 215-861-5154.

U.S. Department of Labor

Office of the Regional Solicitor
Suite 630 East
The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106-3306



Reply to the Attention of: Sol # 1301067
Telephone: (215) 861- 5186

Facsimile:
(215) 861-5162

July 16, 2013

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Honorable Priscilla M. Rae
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W. Suite - 520N
Washington, D.C. 20004

Re: Secretary v. Lewis-Goetz and Company Inc.
Docket No. WEVA 2012-1821

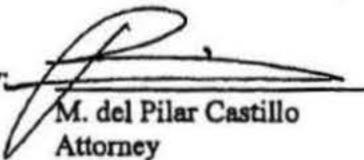
Dear Judge Rae:

Enclosed please find the Secretary's Reply Brief in Further Support of His Motion for Summary Decision and Determination of Penalty in the above-captioned matter.

Thank you for your attention to this matter.

Respectfully submitted,

Catherine Oliver Murphy
Regional Solicitor

By: 
M. del Pilar Castillo
Attorney

Enclosure

cc: John B. Bechtol, Esquire

SOL:MPC:fc

REGIONAL COPY

	INITIALS	DATE
ATTORNEY	PC	7/16/13
COUNSEL		
REG. SOL.		

From: Maggie Palmer
To: Castillo, M Pilar - SOL; Criniti, Francesca - SOL; Bechtol, John
Cc: prae filings
Subject: RE: Lewis-Goetz- WEVA 2012-1821
Date: Wednesday, July 17, 2013 1:59:32 PM

Good Afternoon,

Judge Rae will not consider any reply briefs.

Maggie Palmer
Attorney Advisor to Judge Rae
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
202-233-4015
mpalmer@fmshrc.gov

From: Castillo, M Pilar - SOL [mailto:Castillo.M@dol.gov]
Sent: Wednesday, July 17, 2013 12:30 PM
To: Maggie Palmer; Criniti, Francesca - SOL; Bechtol, John
Cc: prae filings
Subject: RE: Lewis-Goetz- WEVA 2012-1821

Dear Ms. Palmer,

Thank you for your email this morning and for providing Judge Rae's position on Reply Briefs. It was not the Secretary's intention to contravene the Order regarding briefs. Judge Rae's Order, conveyed to the parties via electronic correspondence on June 28, 2013, stated: "Judge Rae requests that you file short briefs, with supporting legal authority for your positions, by 5:00 p.m. EST on July 5, 2013." The Secretary interpreted this to require motions for summary decision on the record. According to 30 C.F.R. § 2700.10(d), "[a] statement in opposition to any written motion may be filed by any party within 8 days after service upon the party." The Secretary believed that pursuant to § 2700.10(d) and the Judge's Order, which did not address the issue Reply Briefs, he was permitted to respond to the Respondent's Motion for Summary Decision. The Secretary received Respondent's Motion on July 3, 2013, and filed the Reply Brief 8 days after service as per the regulation.

Therefore, the Secretary respectfully requests that the court reconsider and accept the Secretary's Reply Brief. Of course, if the Secretary's Reply Brief is accepted, we would have no objection to the Respondent also filing a Reply Brief in this matter. Please let me know if you have any questions. Thank you for your consideration.

Sincerely,

Pilar Castillo
U.S. Department of Labor
Office of the Solicitor
Suite 630E, The Curtis Center

170 S. Independence Mall West
Philadelphia, PA 19106
(215) 861-5186
(215) 861-5162 (fax)

CONFIDENTIAL: This message may contain information that is privileged and exempt from disclosure under applicable law. Do not disclose without consulting the Office of the Solicitor. If you think you have received this e-mail in error, please notify me immediately by e-mail or by phone at 215-861-5186.

From: Maggie Palmer [<mailto:MPalmer@fmshrc.gov>]
Sent: Wednesday, July 17, 2013 9:53 AM
To: Criniti, Francesca - SOL; Bechtol, John; Castillo, M Pilar - SOL
Cc: prae filings
Subject: Lewis-Goetz- WEVA 2012-1821

Judge Rae did not authorize reply briefs and will not be accepting them.

Maggie Palmer
Attorney Advisor to Judge Rae
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
202-233-4015
mpalmer@fmshrc.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, a copy of the foregoing opening brief was served by first-class U.S. mail on:

John B. Bechtol, Esq.
Metz Lewis Broadman Must O'Keefe LLC
535 Smithfield Street, Suite 800
Pittsburgh, PA 15222
(412) 918-1199 (facsimile)

 _____