No. 11-9525

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINLINE ROCK & BALLAST, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

and

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

Respondents.

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

BRIEF FOR RESPONDENT SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor
W. CHRISTIAN SCHUMANN
Counsel, Appellate
Litigation

CHERYL C. BLAIR-KIJEWSKI
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, Virginia 22209
Telephone: (202) 693-9327
Fax: (202) 693-9361

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF RELATED CASES.....1

STATEMENT REGARDING JURISDICTION.....2

STATEMENT OF THE ISSUES PRESENTED.....3

STATEMENT OF THE CASE.....3

A. Nature of the Case, Course of Proceedings, and Disposition Below.....3

B. Statutory Background.....5

C. Regulatory Background.....7

D. Statement of the Facts.....7

E. The Decision of the Administrative Law Judge.....14

SUMMARY OF ARGUMENT.....17

ARGUMENT

I. STANDARD OF REVIEW 18

II. THE JUDGE PROPERLY FOUND THAT MAINLINE VIOLATED 30 C.F.R. § 56.14107(a) BECAUSE THE RETURN ROLLERS ON THE GRIZZLY CONVEYOR BELT WERE NOT GUARDED.....20

A. The Violation.....20

B. Mainline's Argument that Section 56.14107(a) Was Insufficiently Specific to Provide Adequate Notice of What Action Was Required Is Without Merit.....27

C. The Judge's Finding of High Negligence Is Supported By Substantial Evidence.....30

III. THE JUDGE PROPERLY FOUND THAT MAINLINE VIOLATED 30 C.F.R. §50.10 BECAUSE IT FAILED TO TIMELY NOTIFY MSHA THAT AN ACIDENT HAD OCCURRED AT THE MINE 32

CONCLUSION.....38

CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(A)(7)

CERTIFICATE OF DIGITAL SUBMISSION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES Page

Adamson v. Unum Life Insurance Co. of America,
455 F.3d 1209 (10th Cir. 2006).....20

Alan Lee Good, doing business as Good Construction,
23 FMSHRC 955 (Sept. 2001).....28

Bell Atlantic Telephone Companies v. FCC,
131 F.3d 1044 (D.C. Cir. 1997).....19

Bluestone Coal Corp.,
19 FMSHRC 1025 (June 1997).....29

City of Tacoma, Washington v. FERC,
331 F.3d 106 (D.C. Cir. 2003).....18

Consolidation Coal Co.,
11 FMSHRC 1935 (Oct. 1989).....32, 33, 37

Consolidation Coal Co.,
18 FMSHRC 1903 (1996),
aff'd, 136 F.3d 819 (D.C. Cir. 1998).....29

Cougar Coal Co.,
25 FMSHRC 513 (Sept. 2003).....33

Emery Mining Co.,
744 F.2d 1411 (10th Cir. 1984).....29

Extra Energy Inc.,
20 FMSHRC 1 (Jan. 1998).....33, 37

Fluor Daniel v. OSHRC,
295 F.3d 1232 (11th Cir. 2002).....28

Freeman United Coal Mining Co. v. FMSHRC,
108 F.3d 358 (D.C. Cir. 1997).....27, 28

Grayned v. City of Rockford,
408 U.S. 104 (1972).....27

Halverson v. Slater,
129 F.3d 180 (D.C. Cir. 1997).....18

Honeyville Grain, Inc. v. NLRB,
444 F3d 1269 (10th Cir. 2006),
pet. for cert. denied, 549 U.S. ___; 127 S.Ct. 1251;
167 L.Ed.2d 74 (U.S., Feb. 20, 2007.....20

Joy Technologies, Inc. v. Secretary of Labor,
99 F.3d 991 (10th Cir. 1996),
cert. denied, 520 U.S. 1209 (1997).....19

Martin v. OSHRC,
499 U.S. 144 (1991).....19

National Wildlife Federation v. Browner,
127 F.3d 1126 (D.C. Cir. 1997).....18

Nolichuckey Sand Co.,
22 FMSHRC 1057 (2000).....29

Olson v. FMSHRC,
381 F.3d 1007 (10th Cir. 2004).....19

Ozark-Mohoning Co.,
8 FMSHRC 190 (1986).....28

RAG Cumberland Res. LP v. FMSHRC,
272 F.3d 590 (D.C. Cir. 2001).....19

San Juan Coal Co.,
29 FMSHRC 125 (March 2007).....29

Secretary of Labor on behalf of Wamsley v. Mutual
Mining, Inc., 80 F.3d 110 (4th Cir. 1996).....6

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994).....19

Thompson Brothers Coal Co.,
6 FMSHRC 2094 (Sept. 1984).....21, 22, 24, 33

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994).....6

Udall v. Tallman,
380 U.S. 1 (1965).....19

United States v. Corrow,
119 F.3d 796 (10th Cir. 1997),
cert. denied, 522 U.S. 1133 (1998).....28

Utah Power & Light Co. v. Secretary of Labor,
951 F.2d 292 (10th Cir. 1991).....18, 28

Walker Stone Co. v. Secretary of Labor,
156 F.3d 1076 (10th Cir. 1998).....19, 20, 27, 28

STATUTES AND CODES

Federal Mine Safety and Health Act of 1977,
30 U.S.C. 801 et seq.....5

Section 2(c), 30 U.S.C. 801(c).....5
Section 3(e), 30 U.S.C. 802(e).....36
Section 101, 30 U.S.C. 811.....5
Section 103, 30 U.S.C. 813.....5
Section 103(a), 30 U.S.C. 813(a).....6
Section 104, 30 U.S.C. 814.....6
Section 105, 30 U.S.C. 815.....6
Section 105(a), 30 U.S.C. 815(a).....6
Section 105(d), 30 U.S.C. 815(d).....2
Section 106(a)(1), 30 U.S.C. 816(a)(1).....2, 3, 20
Section 110(a), 30 U.S.C. 820(a).....6
Section 113, 30 U.S.C. 823.....6
Section 113(d), 30 U.S.C. 823(d).....2
Section 301, 30 U.S.C. 861.....5

29 C.F.R. §2700.72.....25
30 C.F.R. 100.3(d).....30, 31
30 C.F.R. §77.400(a).....21, 33
30 C.F.R. §50.10.....3, 4, 5, 7, 17, Passim
30 C.F.R. §56.14107(a).....3, 4, 5, 7, 17, Passim

MISCELLANEOUS

53 Fed. Reg. 32509 (Aug. 25, 1988).....21

Black's Law Dictionary 1188 (7th ed. 1999).....33

MSHA's Guide to Equipment Guarding (OT 3 revised 2000).....21

Webster's Third New International Dictionary 1175 (1993).....33

STATEMENT OF RELATED CASES

A copy of the notice of the Federal Mine Safety and Health Review Commission on review before the Court and dated March 9, 2011, is attached to Mainline's brief as Joint Appendix ("JA") 740-41. A copy of the decision of the administrative law judge before the Commission, 33 FMSHRC 307 (Jan. 28, 2011), is attached to Mainline's brief as JA 704-727.

The Secretary is aware of no other related cases pending in this Court or any other Court at this time.

STATEMENT REGARDING JURISDICTION

The Court has jurisdiction over this proceeding for review of a decision of the Federal Mine Safety and Health Review Commission ("the Commission") under Section 106(a)(1) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 816(a)(1). The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d).

The Secretary of Labor ("the Secretary") issued Mainline Rock & Ballast ("Mainline") the citations at issue on April 22, 2009, and April 23, 2009, respectively. The administrative law judge issued his decision affirming the citations on January 28, 2011. Mainline filed a petition for discretionary review with the Commission on February 28, 2011. The Commission issued a notice declining to grant the petition for discretionary review or otherwise direct review, effectively making the judge's decision, a final Commission decision on March 9, 2011. Mainline filed a timely petition for review of the Commission's decision with this Court on April 7, 2011.

Mainline has standing to appeal the Commission's decision under Section 106(a)(1) of the Act, 30 U.S.C. § 816(a)(1). The Commission's decision represents a final Commission order that disposes of all of the parties' claims.[1]

STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge properly found that Mainline violated 30 C.F.R. § 56.14107(a) when it failed to guard the moving parts of a return roller into which a miner was pulled while performing his regular duties.[2]

2. Whether the judge properly found that Mainline violated 30 C.F.R. § 50.10 when it failed to timely notify MSHA that an accident had occurred at its mine.[3]

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This proceeding arose out of an accident at Mainline's Torrance Quarry in which a miner, Edelberto Avitia, was seriously injured. The Secretary issued a citation to Mainline alleging a violation of 30 C.F.R. § 56.14107(a). The mandatory

---

1 References to the Secretary's Supplemental Appendix are designated "SA." References to the Joint Appendix are designated "JA."

2 This issue was raised at SA 158-165 of Mainline's brief to the judge and ruled on at JA 120-127 of the judge's decision.

3 This issue was raised at SA 165-170 of Mainline's brief to the judge and ruled on at JA 127-130 of the judge's decision.

safety standard at Section 56.14107(a), entitled Moving machine parts, states:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

The Secretary interprets Section 56.14107(a) as requiring that all exposed moving parts of mine machinery that can cause injury be guarded. Mainline contested the citation and the associated penalty, and a hearing on the violation was scheduled before a Commission administrative law judge.

The Secretary also issued a citation to Mainline alleging a violation of 30 C.F.R. § 50.10. The mandatory standard at Section 50.10, entitled "Immediate notification", states:

> The [mine] operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death; (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) Any other accident.

In pertinent part, the definition of "accident" in 30 C.F.R. § 50.10 repeats the foregoing language. The Secretary interprets Section 50.10 as requiring that all serious accidents be immediately reported to MSHA. Mainline contested the citation and the associated penalty, and a hearing was scheduled before an administrative law judge.

On September 28, and 29, 2010, a hearing on the two citations was held, and on January 28, 2011, the judge issued a decision finding that Mainline violated both Section 56.14107(a) and Section 50.10 and affirming both citations in their entirety. JA 107 (2011).

On February 28, 2011, Mainline filed a petition for review with the Commission, and on March 9, 2011, the Commission declined to direct review. Mainline then filed a petition for review with this Court on April 7, 2011.

B. Statutory Background

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the 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).

Title III of the Mine Act established interim mandatory safety standards applicable to all underground coal mines until superseded by standards promulgated by the Secretary. 30 U.S.C. § 861. Section 101 of the Act authorizes the Secretary to promulgate mandatory safety and health standards for all of the Nation's mines. 30 U.S.C. § 811. Section 103 of the Act

authorizes the Secretary to conduct regular inspections of the Nation's mines. 30 U.S.C. § 813. 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).

Section 104 of the Mine Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814. Sections 105(a) and 110(a) of the Act provide for the proposal and assessment of civil penalties for violations of the Mine Act or of standards promulgated by the Secretary. 30 U.S.C. §§ 815(a), 820(a).

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate review in cases arising under the Acts. 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). A mine operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. A party adversely affected or aggrieved by an administrative law judge's decision may appeal to the Commission; if the Commission declines to direct review, the judge's decision becomes a final Commission decision. 30 U.S.C. § 823.

C. Regulatory Background

The mandatory standards at issue in this case, 30 C.F.R. §§ 56.14107(a) and 50.10, are set forth above.

D. Statement of the Facts

On April 21, 2009, Miner Edelberto Avitia was pulled into a return roller at the Torrance Quarry. SA 21-22; JA 81.[4] Mr. Avitia began working at the mine in 2006 or 2007, approximately three years before the accident at issue in this case. SA 15-16. He began as a loader man and then became an oiler. SA 14, 93. As an oiler at the mine, Mr. Avitia was responsible for getting the production process started each day: for starting up the generators, turning on the water for the entire mine, checking the tunnel to determine whether it was dirty, maintaining the mine while it was in non-production status, and oiling the equipment. SA 17-18, 22-24, 69-72, 93-94; JA 33.[5] Mr. Avitia was also responsible for housekeeping duties such as cleaning up spills at the mine, which were performed by using either a shovel or a small loader. SA 57, 93-94; JA 33, 61.

---

4 At the facility, Mainline crushes rock, called ballast, which is used by railroads along railroad tracks or in switchyards. JA 46, 57.

5 The tunnel is the area where dirt and small rocks are ejected from the screen. SA 24. It is part of the crushing portion of the production. SA 24.

Jeremiah Carpio, the mine's crusher operator, gave Mr. Avitia daily instructions regarding the work Mr. Avitia was to perform. SA 19-20; JA 24.[6] Although Mr. Carpio was not a supervisor, the directions he passed on to Mr. Avitia came directly from Mike Harris, the crusher superintendent and Mr. Carpio's immediate supervisor. SA 20-21, 68. Mr. Harris also gave direct instructions to Mr. Avitia two to three days each week. SA 20.

On the morning of the accident, Mr. Avitia saw Mr. Harris enter and leave the control room. SA 24-25.[7] Approximately 20 minutes after Mr. Harris' departure, Mr. Avitia went to get water in the control room and asked Mr. Carpio whether Mr. Harris left any instructions as to where he should be working. SA 24-25. Mr. Carpio responded that Mr. Harris wanted Mr. Avitia to shovel in front of the hitch where the wheels were located. SA 25, 63-64; JA 75. Mr. Avitia understood that instruction to mean that he was to remove any accumulation that would cause the conveyor belt to stop working. SA 26.[8]

---

6 The plant or crusher operator runs the plant, quarry, and crusher. SA 68.

7 The crusher operator works in the control room, where many of the controls for the crushing portion of production, including all of the conveyors, are located. SA 25, 73-74.

8 During routine production, dirt would often stick to the water on the belt when it emptied from the feeder and would fall from the conveyor. SA 32; JA 61. When the dirt piled up on the

At the time of the accident, Mr. Avitia was shoveling underneath the grizzly conveyor as part of his job duties. SA 66-67. He dug with his shovel using the same kneeling position in the same general area of the accident approximately ten times prior to the accident. SA 56-57, 60.[9] He also dug with his shovel at other locations around the plant, including the screens. SA 26-27. This was done regardless of whether the under rollers on the equipment were guarded. SA 65. Mr. Avitia had not previously dug in the exact location of the accident while the belts were operational, but had dug around other conveyors while the belts in those locations were operational. SA 27.

After receiving Mr. Carpio's instruction to clean the area, Mr. Avitia returned to the equipment, greased the jaw crusher, and dug with the shovel on the jaw side before moving to the

---

ground under the conveyor, it often became rock-hard and stopped the conveyor from running. SA 32, 56, 80; JA 35. The spillage, or piles, sometimes consisted of rock. JA 61. To prevent accumulations from occurring, it was necessary to routinely remove the piles. SA 32, 57; JA 35, 77. Sometimes Mr. Avitia was told by a supervisor or other employees to clean the dirt from under the conveyor, and sometimes he did it on his own. SA 56-57.

9 Mainline reconfigured the equipment to the layout as it existed on the day of the accident only a few weeks before the accident. JA 69. During the few weeks after the configuration change and prior to the accident, Mr. Avitia used a shovel to remove dirt in the same area as where the accident occurred, one to two times a week. SA 27-28.

grizzly conveyor to dig. SA 30, 53; JA 75.[10] In order to shovel under the grizzly conveyor, Mr. Avitia knelt while putting his arms and hands underneath the conveyor along with the shovel in order to remove the dirt and place it on the side of the machinery. SA 30-31, 33-34. He testified that he did not put either his shoulders or his head under the conveyor as he dug. SA 31, 35. This technique is a common practice at the mine; indeed, it is one of the recommended methods for shoveling because it puts less pressure on the miner's back while requiring little energy to complete the task. SA 124. It is also a common and accepted practice among both the miners and the supervisors at the mine to use tools such as shovels and rakes to remove piles of dirt and rock buildup from under the mine's conveyor belts even when the conveyors are operational. SA 149; JA 40, 51.[11] While Mr. Avitia knelt and dug under the conveyor, Mr. Harris drove by on a dozer, passing between 300 and 500 meters away, clearly within eyesight. SA 53-54.

---

10 In the beginning of the crushing process, the raw materials are loaded into a feeder that dumps rock into the jaw crusher. SA 66; JA 82. The jaw crusher then breaks down the rock before dumping it onto the jaw conveyor below. JA 37, 82. The rock then goes through the grizzly box before being dumped onto the grizzly conveyor. JA 37, 82.

11 Oilers undertake this task daily, as do other mine employees, regardless of whether the return rollers have physical guarding. SA 58-59; JA 40.

Mr. Avitia does not know how he was pulled into the return roller but believes that either his coveralls or his shovel became caught in the conveyor, which was operational at the time. SA 35-35, 54. He does not recall attempting to dislodge a rock that was stuck or having to fix a belt that was misaligned. SA 54-55, 60. He recalls only shoveling under the conveyor, simply to remove dirt, when he heard a loud noise. SA 36, 55. He was pulled from where he knelt toward the direction of the screen. SA 36. He felt a strong impact and became unconscious. His next memory came with the realization that he was lodged in the roller, face downwards, with the roller at his stomach area and the conveyor belt running along his back. SA 37-39. His head and torso had passed through the roller. SA 39. The belt was still operational: Mr. Avitia could smell the conveyor and motor burning. SA 40.

Mr. Avitia, realizing that he was stuck, tried unsuccessfully to free himself by waving his left arm. SA 39-40. No one saw him. SA 40. He next tried yelling and crying, but when no help came, he hung his head downwards and noticed his radio. SA 40-41. He grabbed his radio by the antenna and dragged it closer to his body. SA 41. He began to plead to Mr. Carpio to "Stop everything . . . I'm dying. I'm stuck in the belt." SA 41. When no response came, he again yelled, this time to Joe [Martinez]. He pleaded, "Tell 'Miah [Carpio] to

stop everything, because I'm stuck in the belt." Still there was no response. SA 41. He tried once again, pleading to Mr. Carpio: "Stop everything. I am going to die." SA 41. Finally, Mr. Carpio heard him over the radio, responded, and immediately stopped all of the belts. JA 40.

Because Mr. Avitia was knocked unconscious, he was unsure as to how long he remained caught in the roller before he was able to attract attention, but he estimates that he was yelling into the radio for 20 minutes before anyone heard him. SA 41, 45. Manuel Torres, a loader operator, testified that he heard a scream over the radio but could not decipher it. SA 85. It was the stopped belt that attracted Mr. Torres' attention. JA 51. Mr. Torres was the first person to reach Mr. Avitia, and was followed immediately by Robert Moyers, another loader operator. Mr. Carpio was next to arrive at the accident scene. SA 42-43, 78-79, 86; JA 40, 51, 52. Mr. Torres found Mr. Avitia trapped between the roller and the conveyor belt. JA 52. Mr. Avitia's position was parallel to the ground, suspended in the air. SA 87-89.

Mr. Avitia lamented that he was going to die there. JA 52. The miners cut the belt in order to free Mr. Avitia, but that was not enough. SA 44; JA 51. They next used a torch to cut the roller, allowing Mr. Avitia to fall to the ground. SA 44, 46; JA 51. As Robert Moyers cut the roller with the torch, Mr.

Carpio called for emergency assistance. SA 45; JA 41. Once Mr. Avitia fell, the others quickly removed him from underneath the roller and began removing his clothing while urging him to stay awake. SA 44, 47; JA 40. They performed no first aid on Mr. Avitia while they waited for medical help to arrive. SA 47.

When Mike Harris, the crusher superintendent, arrived at the accident scene, he administered oxygen to Mr. Avitia. SA 47. Mr. Harris told Mr. Avitia he would be okay, and Mr. Avitia replied: "No, I'm in very bad shape." SA 61. Besides administering oxygen, talking to him, cleaning his face, and blocking the sun, none of the miners on the scene did any other acts to aid Mr. Avitia. SA 48, 76, 86. While emergency personnel were in route, Mr. Avitia stopped breathing more than once. JA 67.

Finally, approximately an hour later, an ambulance arrived and took Mr. Avitia to a helicopter that was waiting at the top of the plant. SA 48-49, 77; JA 76. The helicopter flew Mr. Avitia to University Hospital in Albuquerque, New Mexico, where he received the medical treatment that saved his life. SA 49. Mr. Avitia sustained devastating injuries, requiring two and one-half months of hospitalization and numerous surgeries. SA 49, 147-48.[12]

---

12 He had surgeries on his pelvis and pancreas and surgeries to remove his spleen and to give him a tracheotomy. SA 50-51.

There is no dispute, and Mainline has stipulated, that Mr. Avitia sustained serious injuries as a result of the accident. SA 52. At the time of the trial, almost one and a half years after the accident, Mr. Avitia still had not been released by his medical team and given permission to return to work. SA 53.[13]

The supervisor and the employees who came to Mr. Avitia's aid first became aware of the accident at approximately 12:50 p.m. on April 21, 2009. JA 76. Dewayne Olsen, the loadout superintendent, called MSHA to report the accident at approximately 2:35 p.m., 105 minutes after the accident occurred and after Mr. Avitia left for the hospital by helicopter. SA 131-32, 134-35; JA 76.

E. The Decision of the Administrative Law Judge

The judge affirmed both Citation No. 7885926 and Citation No. 7885927, and increased the civil penalty proposed by the Secretary for Citation No. 7885927. JA 107, 111. In so doing, the judge determined that the accident did not occur in the manner that either the Secretary or the operator envisioned. JA 119-10. Rather, the judge found that Mr. Avitia became

---

He then had surgery to remove ground-up flesh from his hip. SA 51. His kidneys were permanently damaged; all of his ribs, his arm, and his collarbone were broken and had to be repaired. SA 51.

13 Mr. Avitia was still receiving workers' compensation at the time of the trial. SA 53.

"ensnarled in the return rollers [as he dug] underneath the metal support frame and was . . . under the conveyor belt when the accident occurred." JA 110. The judge determined further that while he was attempting to dislodge "a rock or other material" that had become stuck between the belt and I-beam frame, "Mr. Avitia's shovel got caught between the belt and the return roller and, in an instant, that action caused Mr. Avitia to become drawn into it before he could release his grip on the shovel." JA 120-21.

The judge noted that the return roller did not have a physical guard on it at the time of the accident because the operator considered the roller to be "guarded by location." JA 110, 116.[14] The judge found, however, that the return roller was not guarded by location because it was easily accessible and did not require crawling to gain access to it. JA 121. As Mr. Avitia learned when he "purposefully stuck his shovel near the moving roller in order to remove a rock, the return roller . . . was of a class of such moving parts that, when not guarded, can, and in this case did, cause injury." JA 124.

The judge rejected the operator's contention that fair notice was not given that a guard was required at the accident

---

14 An area that is "guarded by location" would have no access, and cannot be accidentally entered. Rollers that are located close to the ground -- 36 inches or less –- are considered to be guarded by location. JA 116.

location prior to the issuance of the citation. JA 125.[15] Rather, the judge concluded that the operator "knew or should have known of the violative condition or practice and that no mitigating circumstances were present." He also concluded that the operator's negligence was "high," especially because the operator was advised some two months prior to the accident of the necessity to guard approximately 30 return rollers at the mine. JA 126.[16]

The judge next determined that the operator violated Section 50.10 when it failed to timely notify MSHA that an accident had occurred at the mine. In so doing, the judge reviewed the testimony of Dwayne Olsen, the superintendent at the mine and the manager responsible for notifying MSHA that an accident had occurred. JA 127-30. The judge found Olsen's behavior to be “remarkably non-inquisitive about Avitia's condition and injuries,” especially because . . . “a reasonable person would have concluded that the call was required at the time that Olsen viewed Avitia at the accident scene.” JA 130. The judge concluded that “[o]ne does not have the discretion to

---

15 The operator asserted that the standard was "vague and broadly worded, that the PPM provisions contradict the Secretary's position in this litigation and that MSHA had not issued any prior violations for unguarded bottom rollers in its previous inspections." JA 125.

16 The judge affirmed the specially assessed $60,000 civil penalty proposed by the Secretary. JA 130.

remain uninformed about the circumstances of the accident and then assert that the reasonable potential for the accident to cause death was unknown." JA 130. As a consequence, the judge characterized the operator's negligence as high and increased the penalty from the $5,000 proposed by the Secretary to $6,000. JA 130.

SUMMARY OF ARGUMENT

This case requires the Court to interpret 30 C.F.R. § 56.14107(a), the Secretary's mandatory safety standard requiring that moving machine parts be guarded to protect miners from contacting them. The judge determined that Mainline violated the standard because its failure to provide adequate guarding on its equipment resulted in a miner being seriously injured.

This case also requires the Court to interpret 30 C.F.R. § 50.10 which mandates that an operator immediately contact MSHA in the event of an accident. The judge determined that Mainline neglected to do so, found the operator's negligence to be high, and increased the penalty proposed by the Secretary.

Substantial evidence supports the judge's conclusion that the return roller at issue was not guarded at the time of the accident (JA 113); that the return roller was a moving machine part of the type covered by the standard (JA 120); that cleaning up and shoveling material deposited around the conveyors were a

normal parts of Mr. Avitia's work duties (JA 120); and that sometimes rocks or accumulated materials cause the conveyor system to become blocked and that such a blockage prompted Mr. Avitia to purposefully stick his shovel near the moving roller in an attempt to unblock the machinery, with unfortunate results. JA 120, 124. Substantial evidence also supports the fact that the operator knew or should have known that a call to MSHA was necessary as soon as a manager recognized that Mr. Avitia was hurt. JA 130.

ARGUMENT

I

STANDARD OF REVIEW

The Court decides legal matters under a de novo standard of review. Utah Power & Light Co. v. Secretary of Labor, 951 F.2d 292, 293 n.3 (10th Cir. 1991). In determining whether a regulation's or statute's meaning is plain, the 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 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) (both involving construction of statutes), and National Wildlife Federation v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (involving construction of a regulation). Plain meaning is to

be determined, not by reading specific words in isolation, but by reading specific words in the context of related provisions. Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (interpreting statute).

If a regulation's meaning is plain, the regulation cannot be interpreted to mean something different from that plain meaning. Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1080 (10th Cir. 1998); Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997). If a regulation's meaning is not plain, the Court should give deference to the interpretation of the agency entrusted with administering the regulation so long as the interpretation is permissible. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Walker Stone, 156 F.3d at 1080; Joy Technologies, 99 F.3d at 995. This is so even where the Court finds an alternative interpretation to be equally or even more reasonable. Joy Technologies, 99 F.3d at 995. Deference is at its highest when an agency is interpreting its own regulation, Udall v. Tallman, 380 U.S. 1, 15 (1965); when the regulation pertains to a complex and technical regulatory program, Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 514 (1994); and when the Secretary and the Commission both interpret the regulation identically. RAG Cumberland Res. LP v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001). See also Olson v. FMSHRC, 381 F.3d 1007,

1010 (10th Cir. 2004) (when the Secretary and the Commission agree on an interpretation of the Mine Act, the Court will defer to a reasonable interpretation). All three conditions exist here.

The Court will uphold the Commission's findings of fact if they are "supported by substantial evidence on the record considered as a whole." Walker Stone, 156 F.3d at 1085 (quoting 30 U.S.C. § 816(a)(1)). "Substantial evidence is of the sort that a reasonable mind could accept as sufficient to support a conclusion." Adamson v. Unum Life Insurance Co. of America, 455 F.3d 1209, 1212 (10th Cir. 2006). If the agency below "has made a plausible inference from the evidence," the Court will "not overturn its findings, although if deciding the case de novo [it] might have made contrary findings." Honeyville Grain, Inc. v. NLRB, 444 F.3d 1269, 1273 (10th Cir. 2006), pet. for cert. denied, 549 U.S. ____; 127 S.Ct. 1251; 167 L.Ed.2nd 74 (U.S., Feb. 20, 2007).

II

THE JUDGE PROPERLY FOUND THAT MAINLINE VIOLATED 30 C.F.R. § 56.14107(a) BECAUSE THE RETURN ROLLERS ON THE GRIZZLY CONVEYOR BELT WERE NOT GUARDED

A. The Violation

The questions before the Court in this case are of fundamental importance to miner safety. Historically, MSHA has recognized that "if space is provided between a guard and a

hazard, someone will eventually go there and be exposed to the hazard." MSHA's Guide to Equipment Guarding (OT 3, Rev. 2000). The purpose of a guarding standard is clear: it requires "the installation of guards to protect persons from coming into contact with hazardous moving machine parts." 53 Fed. Reg. 32509 (August 25, 1988). "The standard clarifies that the objective is to prevent contact with these machine parts. The guard must enclose the moving parts to the extent necessary to achieve this objective." 53 Fed. Reg. 32509 (Aug. 1988). In reviewing the statistics in which persons working in mines have lost hands, arms, legs, and their lives to moving machine parts, in most of those instances the persons were "performing deliberate or purposeful work-related actions with the machinery. Guards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." Id. (Emphasis added).

In Thompson Brothers Coal Co., 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission discussed an analogous guarding standard, 30 C.F.R. § 77.400(a), as follows:

> [T]he most logical construction of [a guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. . . . Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as

> noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis. (Emphasis added).

The Commission recognized that even a "minimal possibility" of contact may be within the realm of a "reasonable possibility" of contact. Id. at 2097.

In this case, substantial evidence supports the judge's finding that there was a reasonable possibility of contact and injury, and hence a need for guarding.

The testimony of Mainline's witnesses, Mike Harris and Aaron Fitting, the operator's mine superintendent and manager, respectively, effectively describes the manner in which the return roller moves in order to support the belt, while the belt is operational. SA 103-127, 140-46; JA 9.

In addition, Mr. Avitia testified that he was shoveling under the grizzly conveyor in order to remove a buildup of material, as part of his normal daily work duties, when the accident occurred. He described in great detail how he knelt next to the conveyor belt while placing his hands and shovel under the belt in order to remove accumulated dirt. Such actions clearly constituted exposure to moving machine parts within the meaning of the standard. SA 137. Mr. Avitia's testimony was corroborated by that of Mr. Torres, a loader operator, who testified that there would regularly be spillage at the return rollers, and by that of Mr. Harris and Mr.

Fitting, who demonstrated how an experienced oiler effectively shovels under a belt. SA 80, 149-52; JA 51, 78.

The accident occurred while Mr. Avitia was in an area of the mine where he routinely performed cleanup work around the very machinery that caused his injuries. This was corroborated by Mr. Harris, who admitted that he was aware that miners, such as Mr. Avitia, knelt next to the conveyors in order to remove buildup underneath moving conveyors. JA 77, 78. Mr. Harris was well aware that any conveyor at the mine had the potential to routinely have a miner kneeling in very close proximity to its moving return rollers.

In addition, Mainline was aware that part of an oiler's job description is to ascertain when an accumulation needed to be removed, and to remove it. JA 61. Indeed, according to Mr. Harris, the oilers "know about" the areas where buildups occur. JA 61. Significantly, Mr. Torres observed Mr. Avitia shoveling behind the jaw and thought nothing of it –- it was just a typical production day, and Mr. Avitia was doing what he was expected to do. SA 81-84; JA 51. Mainline expected oilers to use their judgment when determining where to shovel, and did not find it necessary to place any physical signals, such as signs or barriers, to warn miners to keep away from the rollers.[17]

---

17 By contrast, there are areas of the mine in which signs clearly state that miners are forbidden to enter. SA 128, 136.

Without affirmatively taking steps to clearly demarcate the area as a "no work zone," Mainline could not be surprised that a miner attempted to complete the task he was hired to do.

In sum, substantial evidence supports the judge's finding that, in acting as he acted, Avitia "responded in a manner that would not be difficult to predict." JA 120.

Mainline argues that Section 56.14107(a) was inapplicable in this case because, in acting as he did, Mr. Avitia acted intentionally. Br. at 19-23, 29-32. Neither the standard nor the Commission's case law, however, contains any indication that the standard applies only to unintentional conduct. On the contrary, the Commission stated in Thompson Brothers that in determining whether the standard is applicable, one must take into consideration "all relevant exposure and injury variables" -- including both "work duties" and "the vagaries of human conduct." 6 FMSHRC at 2097. The question in this case is simply whether substantial evidence supports the judge's finding that, in acting as he did, Mr. Avitia acted predictably. It does.

In any event, Mainline's focus on intentional conduct misses the mark. The judge did not, as Mainline suggests, find that Mr. Avitia intentionally came into contact with the roller. Rather, the judge found that Mr. Avitia intentionally dug with his shovel under the metal support frame, and that his shovel

got caught between the belt and the roller and pulled him into the roller. JA 110.[18] Even if the standard is inapplicable to intentional contact, the accident in this case did not involve intentional contact.[19]

Mainline also argues that the roller was "guarded by location" -- i.e., that the roller was situated in such a way that there was no reasonable possibility of contact. Br. at 22-24. The judge, however, rejected that argument and found that it was "comparatively easy" to access the roller. JA 117. The judge explained:

> Once under the conveyor frame, as shown by R's Ex 7, one could pick his head and be subject to the roller's action, as happened to Avitia. In the Court's view, the Respondent's own exhibits, R5, 6 and 7, undo its claim that the return roller was guarded by its location. R6, with Mr. Harris standing at the point of Avitia's access, shows that the metal frame is at the top of his legs. That frame, as reflected in R 5, leaves a 33 inch access space but, of more significance than the measurement, R 7 shows how easily one can gain access to the return roller. That same photo also shows the relative positions of Harris' buttocks and the conveyor I beam frame and it demonstrates that, while access would have to be intentional, it would require little effort to achieve

---

18 Mainline itself recognizes that the judge found that it was Mr. Avita's conduct in digging under the metal support frame, not the contact itself, that was intentional. Br. at 16-17.

19 In support of its argument, Mainline cites a series of administrative law judge's decisions discussing the standard. Unreviewed judge's decisions, however, are not binding precedent on the Commission. Commission Procedural Rule 72, 29 C.F.R. § 2700.72. In any event, the cited judge's decisions all speak in terms of intentional contact -- an element this case does not involve.

> such access by merely bending at the waist. (Footnotes omitted).

Substantial evidence thus supports the judge's finding that the roller was not "guarded by location."

Finally, Mainline argues that the standard was inapplicable to the roller because the Secretary failed to establish that the roller was a "similar moving part" within the meaning of the standard. Br. at 25-26. Mainline's argument is specious. The judge specifically found that the roller was a "moving machine part of the type covered by the standard." JA 120. That finding is supported by substantial evidence because the return roller was (a) an easily accessible operational piece of machinery that did not require crawling to gain access to it;[20] (b) hazardous by nature, as evidenced by the life-threatening injuries sustained by Avitia after contacting the machinery; (c) similar in design and purpose to other adequately guarded, hazardous machinery in the vicinity where miners were assigned to work; and (d) not included in the seven-foot exception where the machinery was separated from walking and working faces.[21]

---

20 As the judge noted, ". . . in terms of ease of access, [there are] only relatively minor differences between the fully guarded tail pulley and the return roller which ensnarled Avitia." JA 121.

21 The only exception to the standard is contained in Section 56.14107(b) which states that "[g]uards shall not be required where the exposed moving parts are at least seven feet away from walking or working faces."

B. Mainline's Argument that Section 56.14107(a) Was Insufficiently Specific to Provide Adequate Notice Of What Action Was Required is Without Merit

Mainline's assertion that the Secretary's interpretation of Section 56.14107(a) is impermissibly vague, is without merit. Br. at 33-4. Mainline's assertion that MSHA had never placed Mainline on notice that "rollers that can only be accessed intentionally" must be guarded is similarly without merit. JA 125; Br. at 38.

"In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997). See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). This Court has recognized, however,

> that regulations cannot specifically address the infinite variety of situations which employees may face and that by requiring regulations to be too specific, [the Court] open[s] loopholes, allowing conduct which the regulation is intended to address to remain unregulated.

Walker Stone, 156 F.3d at 1083. Therefore, standards should be found to satisfy due process "so 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." Walker Stone, 156 F.3d at 1083-84 (citing Freeman United, 108 F.3d at 362). Accord Utah Power & Light Co., 951 F.2d at 295 n.11 (rejecting void-for-vagueness argument under the Mine Act because meaning of mandate was "plainly intelligible to an experienced and capable mine management"). See also United States v. Corrow, 119 F.3d 796, 803 (10th Cir. 1997) (proponent of vagueness argument who engaged in clearly proscribed conduct "cannot complain of the vagueness of the law as applied to the conduct of others" (citation and internal quotation marks omitted)), cert. denied, 522 U.S. 1133 (1998).

Section 56.14107(a) is precisely the type of safety standard that is "drafted in general terms in order to be broadly adaptable to the myriad circumstances in a mine." Ozark-Mahoning Co., 8 FMSHRC 190, 191 (1986). See 28 FMSHRC at 510. Further, the fact that an agency has not issued a citation in a comparable situation before is merely one of the elements to be weighed in evaluating a fair notice defense. Fluor Daniel v. OSHRC, 295 F.3d 1232, 1238-39 (11th Cir. 2002); Alan Lee Good, doing business as Good Construction, 23, FMSHRC 955, 1004-06 (Sept. 2001). In addition, a fair notice defense based solely on the fact that the agency has not issued a citation before amounts to an estoppel-by-inaction defense –- and the government cannot be estopped by inaction from enforcing the

law. Emery Mining Corp., 744 F.2d 1411, 1416-17 (10th Cir. 1984); Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (2000). Finally, the Commission has recognized that actual notice may be provided in a variety of ways, including meetings with MSHA personnel where discussions about a problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. San Juan Coal Co., 29 FMSHRC 125, 129-36 (March 2007); Consolidation Coal Co., 18 FMSHRC 1903, 1907 (1996) aff'd, 136 F.3d 819 (D.C. Cir. 1998).

Assuming arguendo, that MSHA had not previously specifically notified Mainline that the return rollers needed to be guarded, the plain language of the standard would have been sufficient to provide fair notice. See Bluestone Coal Corp., 19 FMSHRC 1025, 1029 (June 1997).

In this case, moreover, the evidence is clear that Mainline was placed on notice that it had extensive guarding deficiencies on its return rollers, leading Mainline to immediately install 20 to 30 roller guards. JA 74.[22] In addition, during the February 2009 inspection, MSHA informed the operator that it had guarding deficiencies, and specifically addressed the necessity

---

22 Two months before Mr. Avitia's accident, MSHA informed Mainline that between 20 and 30 return rollers on its conveyors needed to be guarded. JA 74. Shortly after this notification, Mainline changed the configuration of the conveyors, but failed to evaluate and guard the return rollers that then exposed miners to moving machine parts.

to guard return rollers. SA 138-39; JA 61, 74. Mainline was clearly aware of its miners' work practices and thus knew that the area in which Mr. Avitia shoveled would be considered a working surface. Mainline therefore had sufficient information in its possession to independently determine that the return roller, a moving machine part, was operational in close proximity to Mr. Avitia's work area and needed to be guarded.

The judge found that, in light of the requirements of the standard and the circumstances under which Mainline was mining, Mainline had fair notice. The judge observed that Mainline was "advised two months before the accident of the need to guard some 20 or 30 rollers." JA 125-26. The judge also observed that "one would be hard pressed to explain how it was clear that the tail pulley so obviously needed to be guarded but yet the return roller, with nearly the same access, did not." JA 126.

The judge properly relied on the foregoing evidence in support of his finding that Mainline violated the standard. Mainline's assertion that the judge erred in his evaluation of the evidence is without merit.

B. The Judge's Finding of High Negligence is Supported By Substantial Evidence

30 C.F.R. 100.3(d) defines negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the

risk of harm." Section 100.3(d) further defines “high negligence” as occurring when "[t]he operator knew or should have known of the violative condition or practice, but [when] there are no mitigating circumstances." 30 C.F.R. 100.3(d). Mitigating circumstances "may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." Id.

The judge found that Mainline "knew or should have known of the violative conditions . . . and that no mitigating circumstances were present." JA 125-26. The judge found, in addition, that two months before the accident, Mainline was advised of its guarding deficiencies, and even though the operator's experienced a reconfiguration of the conveyors subsequent to notification by MSHA, that "does not insulate [the] operator from the duty to assess the need for guards at every location where moving machine parts may be contacted and cause injury." JA 126. As a consequence, the judge determined Mainline's negligence to be high. Id.

Mainline alleges that the judge's findings are improper, contrary to the evidence of record, and based upon erroneous evidence. Br. at 38-39.

The Secretary asserts that Mainline failed to meet the standard of care imposed by the Mine Act in that it did not heed the warning from MSHA that its guarding system was deficient,

and was mistaken and misguided in its belief that moving machine parts can be guarded by their proximity to the ground.[23] As such, there are no mitigating circumstances and Mainline's conduct is appropriately characterized as high negligence.

ARGUMENT

III

THE JUDGE PROPERLY FOUND THAT MAINLINE VIOLATED 30 C.F.R. §50.10 BECAUSE IT FAILED TO TIMELY NOTIFY MSHA THAT AN ACCIDENT HAD OCCURRED AT THE MINE

Section 50.10 of 30 C.F.R. states in pertinent part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . (b) An injury of an individual at the mine which has a reasonable potential to cause death[.]" In Consolidation Coal Co., 11 FMSHRC 1935 (Oct. 1989), the Commission analyzed the similarly-worded predecessor version of Section 50.10 as follows:

> Although the regulation requires operators to report immediately certain accidents as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable accidents within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous

---

23 The operator incorrectly assumed that the return roller that injured Mr. Avitia was too low to the ground to cause injury.

> action. The immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

11 FMSHRC at 1938 (emphasis added). See also Extra Energy, Inc., 20 FMSHRC 1, 7-8 (Jan. 1998) (mine superintendent's failure to "vigorously continue his investigative efforts until he discovered the circumstances of [the accident]" did not demonstrate "good faith" and "prompt, vigorous action" required under Consolidation Coal).

The ordinary dictionary definition of the noun "potential" is "something that exists in a state of potency or possibility . . . ." Webster's Third New International Dictionary 1175 (1993). Accord Black's Law Dictionary 1188 (7th ed. 1999) (defining the adjective "potential" as "[c]apable of coming into being; possible"). The Commission has indicated that something has a "reasonable possibility" of occurring even if it has only a "minimal" possibility of occurring. Thompson Brothers Coal Co., 6 FMSHRC at 297 (applying the phrase "may cause injury" in 30 C.F.R. § 77.400(a)).

In evaluating whether an injury has a reasonable potential to cause death, one must evaluate the injury in the context of the accident from which it resulted. Cougar Coal Co., 25 FMSHRC 513, 520 (Sept. 2003) (rejecting judge's test distinguishing between "the act of injury and the damages suffered as a result

of the act," and approving inspector's view that one cannot separate the injuries from the accident in which they were sustained). A reasonably prudent person would evaluate a loss of consciousness that resulted from overexertion on a hot humid day differently than one that resulted from a powerful blow to the head. A reasonably prudent person would evaluate a nosebleed that resulted from bumping into a door differently than one that resulted from a head-first twenty-foot fall.

In sum, in evaluating whether a mine operator has violated Section 50.10, one should apply three fundamental principles: (1) that an injury has a reasonable potential to cause death if it has a reasonable possibility of causing death; (2) that an injury must be evaluated in the context of the accident from which it resulted; and (3) that a mine operator has a good-faith duty to conduct a prompt and vigorous investigation into what occurred.

In this case, the judge's finding of a Section 50.10 violation is supported by what mine officials knew or should have known about what occurred as of 12:50 p.m., the time at which Loadout Superintendent Olsen arrived at the scene and the time at which the judge found Mainline's duty to report the accident arose. Although Mr. Olsen may not have known the full extent of Mr. Avitia's injuries, he knew that Mr. Avitia had been hurt, and soon thereafter, learned that Mr. Avitia had been

pulled through a seven-inch space between the roller and the metal conveyor frame. JA 39.[24] A reasonably prudent person would know that injuries resulting from such an accident have a reasonable potential to cause death. That is especially so in Mr. Olsen's case because Mr. Olsen had seen MSHA fatalgrams describing accidents in which miners died as a result of being pulled into moving machine parts. SA 136-37; JA 56.[25]

Similarly, Crusher Superintendent Harris should have known that Mr. Avitia's injuries had a reasonable potential to cause death. Mr. Harris testified that he was scared because Mr. Avitia stopped breathing on more than one occasion, and that he was aware that Mr. Avitia had chest injuries and "bad head trauma." JA 67. Mr. Harris had also seen MSHA fatalgrams describing accidents in which miners died as a result of being pulled into moving machine parts. JA 77. That knowledge,

---

24 When Mr. Olsen arrived at the accident scene, Mr. Avitia had already been extricated from the conveyor belt and was on the ground being tended to by Robert Moyers and Manual Torres -- one was at his head and the other was supporting his back. JA 39. Mr. Olsen testified that Mr. Avitia looked “pale” and “[h]is face was kind of swollen a little bit. It looked like he was swelling.” JA 39. Mr. Olsen concluded that Mr. Avitia’s head was misshaped “probably because of the swelling.” It was obvious that “something had happened to him because he was starting to swell up.” JA 39. Mr. Olsen specifically learned that Mr. Avitia had been pulled into the roller less than an hour later. JA 43.

25 Fatalgrams issued by MSHA are descriptions of fatal accidents that occurred at mines along with recommendations and best practices to help other miners avoid similar accidents.

combined with Mr. Harris' training in first aid, his previous experience as an EMT paramedic (JA 65), and his extensive knowledge of the conveyors at the mine (SA 90-101), should have made Mr. Harris aware that Mr. Avitia had a reasonable potential of dying from his injuries. Indeed, Mr. Harris' exact words to Mr. Olsen were: "I'll be surprised if Edel [Avitia] lives to make it to the hospital." JA 25.[26]

The judge's finding of a Section 50.10 violation is also supported by what Mr. Olsen did in response to what he knew. During the nearly two hours between the time he knew about the accident at approximately 12:50 p.m. and the time he reported the accident to MSHA at approximately 2:35 p.m., Mr. Olsen telephoned the corporate office to speak with in-house counsel Mike McKinney and company compliance officer Vern Scoggin to report that the accident had occurred and that a helicopter was being called for; called 911 to report the accident and call for

---

26 Mainline focuses exclusively on what Superintendent Olsen, who was in charge of safety and compliance at the mine, knew. JA 61; Br. 41-42, 44-45. Superintendent Harris, however, was also an agent of Mainline and was therefore also responsible for promoting compliance with Section 50.10 and other MSHA standards. See 30 U.S.C. § 802(e) (defining "agent" for Mine Act purposes). The fact that Mr. Olsen was in charge of compliance did not absolve Mr. Harris of the responsibility to tell Mr. Olsen what he knew -- and it most certainly did not absolve Mr. Olsen of the responsibility to ask him. Stated differently, the fact that Mr. Olsen was in charge of compliance did not absolve Mr. Harris of responsibility for compliance -- it only heightened Mr. Olsen's responsibility for compliance.

an ambulance; telephoned the land owners to call them to the site; and telephoned Operations Manager Aaron Fitting to inform him of the accident. SA 141-42; JA 41, 43, 48, 126-29. Mr. Olsen's response to the accident contradicts the notion that Mr. Olsen had no reason to think that Mr. Avitia's injuries had a reasonable potential to cause death. Indeed, Mr. Scoggins, the mine owner, and Mr. Fitting all asked Mr. Olsen whether he had telephoned MSHA -- something Mr. Olsen did not do until, at approximately 2:35 p.m., when the helicopter EMT told him that Mr. Avitia "was in tough shape and had some internal bleeding." SA 133, 141; JA 43, 45, 126-29.

Finally, and most strikingly, the judge's finding of a Section 50.10 violation is supported by what Mr. Olsen did not do in response to what he knew. In effect, for purposes of Section 50.10, Mr. Olsen did not do anything. Although he knew that Mr. Avitia had been pulled into a roller, Mr. Olsen did not question Mr. Harris or any of the miners who were present -- even though, if questioned, they could have told him that Mr. Avitia said he was dying, had chest injury and head trauma, stopped breathing more than once, and required oxygen. What the judge described as Mr. Olsen's "remarkably non-inquisitive behavior" (JA 128) fell far short of the vigorous action called for under Commission case law. See Consolidation Coal, 11 FMSHRC at 1938; Extra Energy, 20 FMSHRC at 7-8.

In essence, Mainline argues that the judge erred in finding a Section 50.10 violation because Mr. Olsen did not know the extent of Mr. Avitia's injuries. Br. at 41-45. Mr. Olsen did not know because Mr. Olsen made no effort to know. As the judge observed, "One does not have the discretion to remain uninformed about the circumstances of the accident and then assert that the reasonable potential for the accident to cause death was unknown." JA 128-29.

CONCLUSION

For the reasons stated above, the Secretary requests that the Court deny Mainline's petition for review and affirm the decision of the judge, as effectively affirmed by the Commission.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel for Appellate Litigation

/s/ Cheryl C. Blair-Kijewski
CHERYL C. BLAIR-KIJEWSKI
Attorney
U.S. Department of Labor
1100 Wilson Blvd., 22nd Fl.
Arlington, VA 22209
Telephone: (202) 693-9327
Fax: (202) 693-9361
E-Mail: blair-kijewski.cheryl@dol.gov
Attorneys for the Secretary of Labor

CERTIFICATE OF COMPLIANCE
UNDER FED. R. APP. P. 32(A)(7)

I certify that this brief has been prepared using Courier New, twelve point, monospaced typeface in the Microsoft WORD word processing system.

Exclusive of the table of contents, table of authorities and this certificate of compliance, the brief contains 8,874 words.

/s/ Cheryl C. Blair-Kijewski
CHERYL C. BLAIR-KIJEWSKI
Attorney
U.S. Department of Labor

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Brief of Respondent Secretary of Labor, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee VirusScan Enterprise + Antispyware Enterprise 8.8 and according to the program, is free of viruses.

/s/ Cheryl C. Blair-Kijewski
CHERYL C. BLAIR-KIJEWSKI
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

This will certify that I, Cheryl C. Blair-Kijewski, electronically filed the foregoing motion into the Court's record of this action on September 14, 2011, by using the Court's CM/ECF Electronic Filing System, which will send notice to:

Ralph Henry Moore II, Esq.
Jackson Kelly PLLC
401 Liberty Ave., Suite 1340
Pittsburgh, PA 15222
hmoore@jacksonkelly.com
Attorney for Petitioner

Christopher Glen Paterson, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2140
Denver, CO 80202
cgpeterson@jacksonkelly.com
Attorney for Petitioner

John T. Sullivan, Esq.
Federal Mine Safety and Health
Review Commission
601 New Jersey Ave., NW, Suite 9500
Washington, DC 20001-2021
jsullivan@fmshrc.gov

/s/ Cheryl C. Blair-Kijewski
CHERYL C. BLAIR-KIJEWSKI
Attorney
U.S. Department of Labor