No. 13-15360-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIKE SUMPTER and REX HARTZELL,
employed by OAK GROVE RESOURCES, LLC,

Petitioners,

v.

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

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

On Petition for Review of A Decision of the
Federal Mine Safety and Health Review Commission

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, MSHA

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

ROBIN ROSENBLUTH
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., Suite 2200
Arlington, VA 22209-2296
Telephone: (202) 693-9347
Fax: (202) 693-9361
Rosenbluth.robin@dol.gov

CERTIFICATE OF INTERESTED PERSONS AND STATEMENT REGARDING PETITIONERS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the persons and entities listed in petitioners' Certificate of Interested Persons and Corporate Disclosure Statement, the following have an interest in the outcome of this case:

Main, Joseph, Assistant Secretary of Labor for Mine Safety and Health

Perez, Thomas, Secretary of Labor

Smith, Patricia M., Solicitor of Labor

Strassler, Heidi W., Associate Solicitor of Labor for Mine Safety and Health

Sullivan, John, Office of the General Counsel, Federal Mine Safety and Health Review Commission

STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests that the Court hold oral argument in this case. The case raises a significant enforcement issue under the Mine Act: whether Section 110(c) of the Mine Act, 30 U.S.C. § 820(c), which provides for the imposition of individual liability on agents of corporations who knowingly commit safety or health violations under the Act, applies to agents of limited liability companies. This is the first time the issue has been litigated before a United States Court of Appeals, and the Secretary believes that oral argument could assist the Court in deciding the issue.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

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STATUTES AND CODES

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STATEMENT OF SUBJECT MATTER AND APPELLATE 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) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 816(a). 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 decision of the administrative law judge in this case was issued on September 18, 2013. JA 514. Pursuant to Section 113(d)(2)(A)(ii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(ii), petitioners Mike Sumpter and Rex Hartzell timely filed with the Commission a petition for discretionary review of the judge's decision on October 16, 2013. The Commission denied the petition. Pursuant to Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1), the decision of the administrative law judge became the final decision of the Commission forty days after it was issued, i.e., on October 28, 2013. Sumpter and Hartzell timely filed a petition for review of the Commission's decision with the Court on November 21, 2013. The Commission's decision represents a final Commission order that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the Commission properly accepted the Secretary's interpretation of Section 110(c) of the Mine Act as applying to agents of limited liability companies.

2. Whether substantial evidence supports the judge's finding that Sumpter and Hartzell were liable for Oak Grove's violation of 30 C.F.R. § 75.334(d).

3. Whether the judge correctly held that 30 C.F.R. § 75.334(d) is not duplicative of 30 C.F.R. § 75.364(a)(2)(iii).

STATEMENT OF THE CASE

A. Statutory Framework

The Federal Mine Safety and Health Act ("the Mine Act") was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c).

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

health standards for the Nation's mines. 30 U.S.C. § 811.

Section 303(o) of the Mine Act requires every operator of an underground coal mine to adopt “a ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine” and “approved by the Secretary.” 30 U.S.C. § 863(o). The Secretary must exercise his independent judgment in determining whether the ventilation system developed by the operator will protect miners. *Mach Mining, LLC v. Secretary of Labor,* 728 F.3d 643, 650 (7th Cir. 2013), *cert. pet. filed* (Nov. 25, 2013). Ventilation plans are to be used not to impose general requirements on mine operators, but "rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 407 (D.C. Cir. 1976). The provisions of mine-specific ventilation plans are enforceable as mandatory standards. *Id.* at 409.

Section 103 of the Mine Act authorizes the Secretary to conduct 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 Mine Act and MSHA standards. 30 U.S.C. § 813(a). Under Section 103(i) of the Act, MSHA must

make frequent “spot” inspections of mines that liberate excessive amounts of methane. 30 U.S.C. § 813(i).

Section 104 of the Mine Act provides for the issuance of citations and orders for violations of the Mine Act or MSHA standards. 30 U.S.C. § 814. If an MSHA inspector discovers a violation of the Mine Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or Section 104(d) of the Mine Act. 30 U.S.C. §§ 814(a) and 814(d). If the MSHA inspector finds that a violation of a standard is "of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard,” or if he finds the violation “to be caused by an unwarrantable failure of [the] operator to comply,” he must include such findings in the citation. 30 U.S.C. § 814(d). Designation of a violation as “significant and substantial” or an “unwarrantable failure” is a precondition for certain enhanced enforcement actions under the Mine Act. For instance, violations that are both “significant and substantial” and caused by an "unwarrantable failure"[1] to comply will result in issuance of a Section 104(d)(1) citation,

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[1] An operator's failure to comply with a standard is "unwarrantable" if it is caused by "'aggravated conduct constituting more than ordinary negligence.'" *RAG Cumberland Resources v. FMSHRC*, 272 F.3d 590, 592 n.1 (D.C. Cir. 2001) (quoting *Emery Mining Corp. v. Secretary of Labor*, 9 FMSHRC 1997, 2004 (1987)).

and subsequent unwarrantable failure violations will result in issuance of a Section 104(d)(1) withdrawal order and, potentially, Section 104(d)(2) withdrawal orders. 30 U.S.C. § 814(d). *See RAG Cumberland Resources LP v. FMSHRC*, 272 F.3d 590, 592-93 and n.4 (D.C. Cir. 2001) (explaining the "D-chain" sequence of actions commenced by the issuance of a Section 104(d)(1) citation).

Sections 105(a) and 110(a) of the Mine Act provide for the proposal and assessment of civil penalties for violations of the Mine Act or MSHA standards. 30 U.S.C. §§ 815(a) and 820(a). Under Section 110(c) of the Act, “[w]henever a corporate operator violates a mandatory health or safety standard,” “any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried such violation" may be assessed a penalty for the violation. 30 U.S.C. § 820(c). The operator and the director, officer, or agent may contest the penalty assessment before an administrative law judge of the Commission. Sections 105 and 113 of the Act, 30 U.S.C. §§ 815 and 823.

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204, 114 S.Ct. 771, 7715 (1994); *Secretary of Labor v. Mutual Mining, Inc.*, 80 F.3d 110, 113-14

(4th Cir. 1996).

B. Regulatory Framework

The Secretary's ventilation standards for underground coal mines are set forth in 30 C.F.R. §§ 75.300 *et. seq.* 30 C.F.R. § 75.370 requires that every underground coal mine operator develop and follow a mine ventilation plan approved by the Secretary. 30 C.F.R. § 75.334(b)(1) requires that, during pillar recovery, a bleeder system be used to "control the air passing through the area and to continuously dilute and move methane-air mixtures * * * ." 30 C.F.R. § 75.364(a)(2)(iii) requires that, at least once every seven days, a qualified examiner travel at least one entry[2] of each bleeder system in its entirety and perform “measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction” at the measurement point

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[2] "Bleeder entries" are

> panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways. They are maintained, after mining is completed, in preference to sealing the completed workings.

Dictionary of Mining, Mineral, and Related Terms 55 (2d ed. 1997).

locations ("MPLs") specified in the mine ventilation plan to determine the effectiveness of the bleeder system. 30 C.F.R. § 75.334(d) –- the standard cited in this case –- states:

> If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

The ventilation plan in this case required that the effectiveness of the bleeder system be determined by taking air direction, air quantity, and air quality measurements at specific MPLs. J.A. 317.

C. Course of Proceedings and Nature of the Case

This case arises out of MSHA's January 6, 2010, issuance of an order under Section 104(d)(2) of the Mine Act to Oak Grove ("the underlying order") alleging a significant and substantial and unwarrantable failure violation of 30 C.F.R. § 75.334(d). JA 290. Oak Grove contested the order before the Commission. On February 12, 2010, a Commission administrative law judge issued a decision affirming the order. JA 482. Oak Grove appealed the judge's decision to the Commission. On November 10, 2011, the Commission issued a decision affirming the judge's decision. JA 498.

On April 13, 2012, MSHA filed petitions for assessment of individual civil penalties against Mike Sumpter, Acting Superintendent of the Oak Grove Mine, and Rex Hartzell, General Foreman of the Oak Grove Mine, alleging that Sumpter and Hartzell were liable for Oak Grove's violation of Section 75.334(d) under Section 110(c) of the Act, 30 U.S.C. § 820(c). JA 7-20. Sumpter and Hartzell contested the proposed penalty assessments, and the matter was heard before the Commission administrative law judge who presided over the underlying proceeding against Oak Grove. On September 18, 2013, the judge issued a decision holding that Sumpter and Hartzell were liable for the violation. JA 514. Sumpter and Hartzell filed a petition for discretionary review of the judge's decision with the Commission. The Commission denied the petition for discretionary review on October 25, 2013, and the judge's decision became a final Commission order forty days after it was issued, i.e., on October 28, 2013.

D. Statement of the Facts

Oak Grove operates the Oak Grove Mine, an underground coal mine in Jefferson County, Alabama. Oak Grove is a Delaware limited liability company ("LLC"). JA 462. During the relevant period, Mike Sumpter was the Acting Superintendent of the Oak

Grove Mine. JA 262, 2013 Tr. 188.[3] Rex Hartzell was the General Mine Foreman, in charge of all underground work. JA 272, 2013 Tr. 226.

The Oak Grove Mine liberates over a million cubic feet of methane every 24 hours and is therefore subject to MSHA spot inspections under Section 103(i) of the Mine Act, 30 U.S.C. § 813(i). JA 29, Tr. I 30. There were five methane ignitions at the mine in the year preceding the events in question. JA 328-354 (reports of ignition investigations); JA 36, 37, 41, 42-43, 60, 115, Tr. I 60, 63, 80, 83-86, 156-57, II 170-71. Although the ignitions were not on the production longwall, two ignitions in December 2009 were in the area of the longwall. JA 46, 60, Tr. I 99-100, 156-57. Although mined-out areas continue to generate methane, the greatest amount of potentially explosive methane gas is released when coal is cut during production mining. *See* JA 115, Tr. II 170-71; JA 483.

The mine uses the longwall mining method and, during the relevant period, the panel being mined was designated the 11 East LW38 ("the 11 East panel"). JA 516. The longwall shearer

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[3] The hearing in this case was held January 28 through January 29, 2013. References to the hearing are designated "2013 Tr." The hearing in the underlying case against Oak Grove was held in 2010. The transcript and exhibits in the underlying proceeding were made a part of the record in this case. That hearing was conducted over three days. References to the hearing transcript volumes in the underlying proceeding, which were numbered sequentially for each day, are designated by hearing day (I, II, or III), followed by page number.

takes cuts of coal approximately 750 feet wide. JA 74, Tr. II 8. At the time of the underlying violation, the panel had been mined approximately 6,000 feet. JA 516; JA 448, 449. The mined-out area of the 11 East panel ("the gob")[4] was ventilated by a centrifugal exhaust fan ("the No. 6 fan"), which pulls air through the bleeder entries that run along the eastern side of the old longwall panels. JA 499, 380 (map)); JA 131, Tr. II 237.

The ventilation system is designed to continuously dilute and move bad air through the gob and into the bleeder entries, where the air is diluted and pulled out of the mine by the No. 6 fan. JA 85, 116, 248, Tr. II 53, 174, 2013 Tr. 130. *See also* 30 C.F.R. § 75.334(b)(1). MSHA Inspector Edward Boylen explained that when the longwall is in production, there has to be a positive flow of ventilation across the longwall face, through the gob of the operating longwall, and through the network of the bleeder system. JA 248, 2013 Tr. 130.[5] Boylen testified that an unrestricted bleeder system is critical to the safe operation of the longwall. JA 248, 2013 Tr. 133. Boylen explained that if ventilation controls are disrupted, there is

[4] The gob is any mined-out area behind the longwall or adjacent to it. JA 248, 2013 Tr. 131.

[5] As the judge found, MSHA Inspector Boylen had considerable experience involving the design, set-up, and operation of longwall mining systems. JA 484; JA 27-28, Tr. I 25-26.

the potential at any time to have an ignition or an explosion. JA 247-48, 2013 Tr. 129-30.

The bleeder entry for the 11 East panel was low in height, requiring the entry's examiner to travel its distance largely by "duck-walking." JA 483. To control accumulating water, Oak Grove positioned air pumps in the bleeder entries. Around mid-December 2009, Oak Grove began experiencing problems with the pumps. JA 483, 499; JA 174, Tr. III 79. As a result of an order MSHA had issued relating to potentially hazardous atmospheres behind seals located several miles from the 11 East panel, Oak Grove was unable to access the pumps for repairs for several days. JA 483 n.1. By the end of December 2009, there were significant water accumulations in the bleeder entries, to the extent that mandatory weekly bleeder examinations could no longer be completed. JA 500; JA 174, Tr. III 78-80; JA 830 (map).

On December 30, 2009, MSHA Inspector Derek Busby issued Oak Grove a Section 104(a) citation, Citation No. 6698645 ("the citation"), alleging a violation of 30 C.F.R. § 75.364(a)(2)(iii) consisting of failure at least once every seven days to examine the 11 East bleeder in its entirety. JA 391; JA 176-77, Tr. III 88-90.

At the time the citation was issued, the 11 East longwall was not operating. JA 188, Tr. III 136. In issuing the

citation, Inspector Busby set the abatement time for December 31, 2009. JA 391.[6] Oak Grove, however, began longwall mining after receiving the citation and, without informing MSHA, performed longwall mining over several shifts on January 4 (two shifts), January 5 (two shifts), and January 6 (one shift). JA 322; JA 37, 188, 193, Tr. I 63-64, III 137, 154-55.

On the morning of January 5, 2010, Inspector Boylen began a regular inspection of the mine. JA 28, Tr. I 29. Oak Grove was operating the longwall at the time. JA 322 (longwall record showing production mining on January 4, 5, and 6); JA 37, Tr. I 63-64. Boylen went underground intending to travel to the longwall and conduct a spot methane inspection. JA 518. After encountering water accumulations, however, Boylen was unable to complete his physical inspection of the bleeder. JA 30, Tr. I 34. Boylen was concerned that he could not access the MPLs that the mine's approved ventilation plan required Oak Grove to examine to determine the effectiveness of the bleeder system. JA 60, Tr. I 157.

Boylen’s concern increased when, after returning to the surface and examining the fan charts for the No. 6 fan, he

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[6] When Oak Grove ran into a number of technical problems in achieving abatement of the violation, MSHA extended the abatement time, extending it on January 14 until January 29. JA 391; JA 50, 96, 185, Tr. I 114-15, II 94-95, III 122.

discovered that the fan's pressure differential[7] had almost doubled since December 15, 2009, indicating a decreasing quantity of air passing through the fan and a significant restriction in the bleeder system air flow. JA 518; JA 393 (fan chart); JA 30, 36-37, 51, 54-57, Tr. I 34-36, 60-63, 119, 132-44. *See also* JA 129, 130, Tr. II 226-27, 232 (testimony of MSHA Ventilation Expert Tom Morley).[8] Boylen believed that the accumulated water in the bleeder entries was restricting the air flow. JA 37, Tr. I 63. After his inspection, Boylen told MSHA Field Officer Jacky Shubert that there were water accumulations preventing passage through the bleeders, that the fan charts indicated a problem in the system, and that he believed that Oak Grove was operating the longwall, but that he had been unable to reach and examine the longwall because of the water accumulations. JA 30, 51, Tr. I 36, 119.

Also on January 5, MSHA Assistant District Manager Joseph O'Donnell Jr. met with representatives of the United Mine Workers of America, the union representing miners at Oak Grove.

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[7] The pressure differential at the fan is essentially the vacuum created by the exhaust fan and is recorded in inches of water, referred to as the water gauge. Before December 15, the water gauge was averaging about 20 inches. By January 12, it rose to a level of above 30 inches. JA 490 n.10; JA 355.

[8] MSHA Ventilation Expert Tom Morley explained that a restriction in the bleeder system could be caused by water accumulations that had "roofed out," i.e., reached the roof. JA 129, Tr. II 226-27.

JA 518; JA 50, 67, 77, 102, Tr. I 117, 183, II 18, 26, 118. The union expressed concerns relating to the safety of miners working in deep water to enable Oak Grove to pump water from the bleeder system. JA 518; JA 76-77, 102, Tr. II 17-18, 119.

In response to the meeting, O'Donnell telephoned Field Office Supervisor Shubert and advised Shubert of the union's complaint. JA 77, 82, Tr. II 18-19, 39, 180. Shubert, in turn, telephoned Oak Grove and stated that the longwall should not be operated while the bleeder system was flooded and blocked -- a message that was relayed to Safety Director Tim Thompson. JA 51, 82, 103, 178, Tr. I 119-20, II 39-41, 125, III 94.

Oak Grove shut down the longwall, but complained to MSHA that there was no need to shut down the longwall, objected that it was improper procedure to shut down the longwall orally, and asserted that to issue an order MSHA had to have observed the condition. JA 83, Tr. II 44-5. After discussing the matter, Assistant District Manager O'Donnell and District Manager Richard Gates concluded that because there was no closure order in place, and because the directive was based on information provided during MSHA's meeting with the union, MSHA needed to go to the mine to observe conditions. JA 83, Tr. II 42-44. O'Donnell then telephoned Safety Director Thompson and told him to disregard the earlier call from Shubert. JA 83, Tr. II 43-44. Thompson replied that the mine would be running the

longwall. O'Donnell told Thompson that they would see him "bright and early" in the morning and to "make sure you're up on the requirements of the law." JA 83, Tr. II 42-44. *See also* JA 51-52, 103, 179, Tr. II 124-25, III 99-01. Thereafter, Oak Grove resumed longwall production mining. JA 179, Tr. III 100.

On the morning of January 6, 2010, Inspector Boylen, accompanied by Field Office Supervisor Shubert, conducted an inspection of the 11 East panel bleeder system. JA 30, 52, 180, Tr. I 36, 123, III 102. From mine records, they determined that the last complete examination of the bleeder system had been performed on December 14, 2009, more than three weeks earlier. JA 31, Tr. I 36-39. *See also* JA 318, 502. The mine was idle on December 21. On December 29 and January 4, two MPLs on the headgate side of the bleeder system could not be examined because the entries were impassable as the result of a roof fall, and no measurements had been taken at nine other MPLs designated in the mine's ventilation plan. JA 318; JA 30-31, Tr. I 37-40. General Mine Foreman Hartzell had countersigned the examination books. JA 240, 245, 261, 275, 2013 Tr. 101, 120, 185, 239-40; JA 465 (examination books sheets).

Inspector Boylen testified that because of the high amount of methane liberated by the mine, the failure to check the 11 MPLs presented a "very alarming" situation. JA 241, 2013 Tr. 102. Boylen testified that without checking the MPLs, no one

could know how much methane would be encountered. JA 238, 2013 Tr. 93. Boylen testified that roof falls and water accumulations in the bleeder entries can cause a "major ventilation change" resulting in methane accumulations in the gob, with the potential for methane to migrate over the longwall. JA 38, Tr. I 66-67. Ventilation expert Morley similarly testified that because of high water levels, he was concerned that parts of the bleeder system did not have sufficient airflow to prevent methane accumulations. JA 137, Tr. II 260-61.

Consistent with Inspector Boylen and expert Morley's testimony, the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor statute to the Mine Act, "reflects congressional concern for the danger of explosions resulting from ignition of undetected accumulation of methane in coal mines." *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 513 (6th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982). The history recognizes that:

> The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts. Methane can be ignited with relatively little energy and there are, even under the best mining conditions, numerous potential ignition sources always present * * * .

H.R. Rep. No.91-563, 91st Cong., 1st Sess. 21, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Part

I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1051 (1975) ("1969 *Leg. Hist.*")) (cited and quoted in *Blue Diamond,* 667 F.2d at 513).

Before Inspector Boylen and Field Officer Shubert went underground on January 6, they met with Acting Mine Superintendent Sumpter, General Mine Foreman Hartzell, and Safety Director Thompson. JA 247, 2013 Tr. 126-28. During the meeting, Sumpter advised Boylen that Oak Grove had not checked 11 MPLs since the water blockage. JA 247, 2013 Tr. 126. Sumpter told Shubert that they would encounter water higher than boot level. JA 269, 2013 Tr. 216.

Consistent with Sumpter's warning, Shubert and O'Donnell, while trying to travel the tailgate side of the bleeder system, encountered several areas of accumulated water -- including areas where water was chest high. JA 292 (Inspector Boylen's notes); JA 34, 85, Tr. I 51-53, II 50-51. *See also* JA 128, Tr. II 224, and JA 376 (discussing January 22 letter indicating water had roofed). Once Boylen and Shubert reached MPL 476, where water accumulations were waist-to-chest high for a distance as far as a cap light could shine, they stopped. JA 519. The water extended to the roof inby MPL 483. JA 485. Because of the low roof and the water accumulations, travel underground was arduous and it took nearly fourteen hours to

return to the surface. JA 33, 36, 83, Tr. I 36, 47, II 46-47, 131-32.

On January 6, Inspector Boylen issued Oak Grove a Section 104(d)(2) order,[9] Order No. 6698830, alleging an unwarrantable failure violation of 30 C.F.R. § 75.334(b). JA 290; JA 28, 36, 38, 66, Tr. I 27-28, 59-61, 67-69, 181. Boylen testified that the hazard that concerned him was inherent in Oak Grove's running coal on the longwall without being able to check the effectiveness of the bleeder system at the designated MPLs. JA 37-38, Tr. I 65-67. Boylen testified that the violation was unwarrantable because of the extensive area involved and the mine's history of methane liberation and ignitions, and because it was obvious that the 11 East panel bleeder system was not doing what it was designed to do. JA 46, 60, Tr. I 99-100, 156-57. Under the order, Oak Grove was required to stop longwall production mining. JA 290; JA 84, Tr. II 46.

After conducting an investigation, the Secretary, on April 15, 2012, filed petitions for assessment of individual civil

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[9] The underlying Section 104(d)(1) order was issued on October 21, 2003. Since that time, Oak Grove had not had a "clean inspection," i.e., an inspection without any violations that were not caused by Oak Grove's unwarrantable failure. JA 485 n.6; JA 307. *See also RAG Cumberland*, 272 F.3d at 593 and n.4 (explaining that under Section 104(d) of the Act, once a Section 104(d)(1) citation is issued, an operator will be issued a withdrawal order under Section 104(d)(2) for every unwarrantable failure violation until such time as an inspection of the mine discloses no unwarrantable failure violations).

penalties under Section 110(c) of the Act, 30 U.S.C. § 820(c), against Acting Mine Superintendent Sumpter and General Mine Foreman Hartzell for knowingly authorizing, ordering, or carrying out the violation. Boylen testified that given the mine's significant efforts to address the water problem, management plainly knew or should have known that the required weekly examinations were not being performed. JA 240, 245, 2013 Tr. 101-102, 120-21. Boylen also pointed out that Hartzell countersigned examination books indicating that the MPLs were not examined. JA 240, 245, 261, 2013 Tr. 101, 120, 185. *See also* JA 275, 2013 Tr. 239-41 (Hartzell acknowledging he signed examination books); JA 465. Consistent with Boylen's testimony, both Sumpter and Hartzell acknowledged at the hearing that they knew that the effectiveness of the bleeder system could not be evaluated as required by Section 75.364 because examiners could not travel to MPLs designated in the ventilation plan, and knew that Oak Grove was violating Section 74.334(d). JA 542; JA 271, 273, 274, 276, 2013 Tr. 222-23, 231, 237, 242-44; *see also* JA 246, 247, 2013 Tr. 122; 126-27. Hartzell further acknowledged that, based on the No. 6 fan pressure chart, he knew that there was significant restriction in the bleeder system. JA 276, 2013 Tr. 245.

The underlying order was terminated on February 9, 2010, after the water was pumped down, the bleeder was examined and

determined to be effective, and the pressure differential at the No. 6 fan had leveled off at 20 inches. JA 541 n.29 (citing, Supplemental Appendix 2 (termination sheet added after hearing)).

E. The Judge's Decision

Citing the Commission's decision in *Bill Simola, employed by United Taconite LLC*, 34 FMSHRC 539 (2012), the judge first rejected Sumpter and Hartzell's argument that they were not subject to liability under Section 110(c) because Oak Grove is an LLC. JA 537 n.22.

The judge then rejected their argument that the underlying January 6, 2010, order alleging a violation of Section 75.334(d) was impermissibly duplicative of the December 30, 2009, citation alleging a violation of Section 75.364(a)(2)(iii). JA 542. In so doing, the judge determined that the standards impose separate and distinct legal duties. JA 540. Noting that each standard can be violated without violating the other standard, the judge also found that the requirements of Section 75.364(a)(2)(iii) are not subsumed in the requirements of Section 75.334(d). *Id.* In addition, the judge rejected the argument that the standards are duplicative because the same action was required for abatement under both standards. The judge concluded that the fact that particular circumstances may provide the operator an opportunity to abate two citations in

the same way should not be a basis for finding that the two standards are duplicative. JA 541.

Finding that Sumpter and Hartzell knew of Oak Grove's violation of Section 75.334(d) and that they engaged in aggravated conduct constituting more than ordinary negligence, the judge then found that they were liable for the Section 75.334(d) violation under Section 110(c). JA 542-47. In so finding, the judge noted that Sumpter and Hartzell acknowledged that they knew that the effectiveness of the bleeder system had not been evaluated as required by Section 75.364, and knew that operating the longwall and failing to seal the worked-out areas was a violation of Section 75.334(d). JA 542.

The judge rejected the agents' argument that MSHA's previous conduct in not requiring sealing of the bleeder when evaluations were temporarily prevented in the past justified the agents' conduct. JA 543. The judge found that the fact that MSHA took no action in the past when MPLs in the bleeder system could not be reached for a day or two bore little relationship to the facts of this case, where substantial parts of the bleeder system could not be examined for three weeks and there was evidence of serious restrictions in the air flow. *Id.*

The judge also rejected the agents' assertion that air changes made to the bleeder system before the longwall was operated justified the agents' conduct. In so doing, the judge

highlighted Hartzell's acknowledgement that the increase in the water gauge pressure differential at the No. 6 fan showed that there was a "significant restriction" in the bleeder system, and pointed out that the changes had no positive effect on that differential. JA 543.

Rejecting the argument that the agents' actions were mitigated by the fact that the December 30, 2009, citation did not indicate that mining on the longwall was prohibited, the judge noted that the operator's business plan contemplated that the longwall would not operate until at least January 1, 2010, a fact that may have been known to the inspector when he issued the citation. JA 543-44. The judge also noted that the initial time set for abatement of the violation was December 31, before any potential resumption of mining. JA 544. The judge then found that at the time of the violation, operation of the longwall on January 4 was not sanctioned by or consistent with the citation. *Id.*

The judge also rejected the argument that the January 5 telephone conversations between MSHA and Oak Grove constituted a mitigating factor. In so doing, the judge relied on the fact that the longwall had been operating even before the conversations, that MSHA gave no explicit approval of operating the longwall during the conversations, and that MSHA retracted the oral directive to stop operating the longwall after Oak

Grove had raised a legitimate concern regarding the propriety of issuing an oral shutdown order. *Id.*

Assuming without deciding that even when an agent knows that conduct is violative, an agent's reasonable belief that the conduct is safe constitutes a defense under Section 110(c), the judge discounted as unconvincing Sumpter's and Hartzell's testimony that they believed that the bleeder system was effective. JA 545. The judge also found that any such belief would not have been objectively reasonable. *Id.*

In so finding, the judge relied on the fact that both Sumpter and Hartzell knew that there were clear violations of Sections 75.364(a)(2)(iii) and 75.334(d), and that the Section 75.334(d) violation was designated by MSHA to be one of "high gravity." The judge also pointed out that the mine liberated substantial amounts of methane, and that operation of an ineffective bleeder system posed a serious threat of injury to the entire mining crew. JA 545. In addition, the judge relied on the fact that air changes made before operation of the longwall did not affect the air pressure differential readings at the No. 6 fan showing significant restriction in air flow. *Id.*

Rejecting the agents' asserted reliance on an alternative method to measure the effectiveness of the bleeder system, the judge pointed out that the asserted alternative method was

implemented unilaterally. *Id*. The judge inferred that if Sumpter and Hartzell were convinced that the alternative method was viable, the method would have been proposed to MSHA before production was restarted production. *Id.* The judge also found that there were several reasons to doubt that the alternative method accurately demonstrated the effectiveness of the bleeder system. *Id.*

F. Standards of Review

The question of whether an agent of a LLC can be held liable for a violation under Section 110(c) of the Mine Act is a question of law for the Court to decide de novo. *See, e.g., Lasche v. George W. Lasche Basic Profit Sharing Plan*, 111 F.3d 863, 865 (11th Cir. 1997) (the Court decides "all questions of law * * * under the *de novo* standard of review"). "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 7281-82 (1984). Courts use the traditional tools of statutory construction in determining whether the meaning of a statutory provision is plain, including the text of the statute and its stated purpose. *Miami-Dade County v. U.S.E.P.A., 529 F.3d 1049, 1063* (11th Cir. 2008). In addition, courts look to the legislative history of the statute.

Miccosukee Tribe of Indians of Florida v. United States, 566 F.3d 1257, 1273-74 (11th Cir. 2009).

If the Mine Act is silent or ambiguous on an issue, the Secretary's interpretation is owed deference and is entitled to affirmance as long as it is reasonable. *Pattison Sand Co. v. FMSHRC,* 688 F.3d 507, 512 (8th Cir. 2012); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994); *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (all according the Secretary's statutory interpretation advanced in litigation before the Commission *Chevron* deference). *See also North Fork Coal Co. v. FMSHRC*, 691 F.3d 735, 742-43 (6th Cir. 2012) (according *Skidmore* deference); *Vulcan Materials Cons. LP v. FMSHRC*, 700 F.3d 297, 314 (7th Cir. 2012) (according *Skidmore* deference because the interpretation in question was not embodied in a citation and therefore did not constitute an exercise of the agency's delegated lawmaking powers).[10] "Where, as

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[10] Although the Secretary's interpretation in this case was not embodied in a citation, it was embodied in a petition for penalty assessment. As a result, like an interpretation embodied in a citation, it "assume[d] a form expressly provided for by Congress" *(see* 30 U.S.C. § 815*)* and was "as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *See Vulcan*, 700 F.3d at 314 (*citing and quoting Martin v. Occupational Safety & Health Review Comm'n),* 499 U.S. 144, 157, 111 S.Ct. 1171, 1179 (1991)).

The Secretary submits that the Sixth Circuit's suggestion in *North Fork* that the Secretary's litigating position before the Commission is not entitled to *Chevron* deference is incorrect

here, the Secretary and the Commission agree, there is no question but that [the Court] must accord deference to their joint view." *RAG Cumberland Resources, LP v. FMSHRC*, 272 F.3d 590, 596 (D.C. Cir. 2001).

Not only is the Secretary's interpretation entitled to *Chevron* deference because it was advanced in litigation before the Commission; it is also entitled to *Chevron* deference because it went through notice and comment. In 2006, the Secretary published his interpretation in the Federal Register. 71 Fed. Reg. 38902 (July 10, 2006). Although the Secretary's interpretation took the form of an Interpretive Bulletin rather than a regulation, it was the product of a process in which the Secretary published his interpretation in proposed form and solicited, received, and responded to comments from the regulated community. *See Miccosukee Tribe*, 566 F.3d at 1272-73 (an agency interpretation published in a Handbook was entitled to *Chevron* deference because it "was created following the same administrative procedures that official regulations undergo").

The question of whether the record supports the judge's finding that Sumpter and Hartzell knowingly violated 30 C.F.R. §

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because, unlike the other cases cited above, it fails to take account of the Mine Act's split-enforcement scheme. Under that scheme, the Secretary cannot conduct formal adjudication himself; he can only initiate formal adjudication by the Commission by issuing a citation and litigating it before the Commission.

75.334(d) and were liable for the violation under Section 110(c) of the Mine Act is a question of fact to be reviewed under the substantial evidence test. Section 106(a) of the Mine Act provides that "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 30 U.S.C. § 816(a). "`[S]ubstantial evidence *** means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459 (1951) (citation omitted).

The question of whether a reasonable belief that violative conduct is safe constitutes a defense under Section 110(c) of the Mine Act is a question of law for the Court to decide *de novo. Lasche*, 111 F.3d at 865.

The question of whether the December 30, 2009, citation was duplicative of the January 6, 2010, order is a question of law for the Court to decide *de novo. Id.*

SUMMARY OF ARGUMENT

The Court should accept the Secretary's interpretation of Section 110(c) of the Mine Act as applying to agents of LLCs because the Secretary's interpretation is consistent with the language of Section 110(c), the purpose of Section 110(c), and the history of Section 110(c). Because LLCs were not in existence at the time the Mine Act was passed, interpreting

Section 110(c) to apply to agents of LLCs is also consistent with the general principle that statutes should be read with a contemporary gloss.

Substantial evidence supports the judge's finding that Sumpter and Hartzell knowingly violated Section 75.334(d). Given the extreme danger posed by an ineffective bleeder system, substantial evidence supports the judge's findings that the agents engaged in aggravated conduct by allowing the longwall to run when the effectiveness of the bleeder system had not been determined using the required method. Substantial evidence also supports the judge's findings that there were no mitigating factors.

Section 75.334(d) is not impermissibly duplicative of Section 75.364(a)(2)(iii) because the standards impose separate and distinct duties on the mine operator. Section 75.364(a)(2)(ii) sets forth duties relating to performance of weekly bleeder system examinations. Section 75.334(d) sets forth duties relating to what an operator must do if its bleeder system is not functioning effectively or if it cannot be determined whether the bleeder system is functioning effectively using the required method.

I.

THE COMMISSION PROPERLY ACCEPTED THE SECRETARY'S INTERPRETATION OF SECTION 110(c) AS APPLYING TO AGENTS OF LIMITED LIABILITY COMPANIES

The LLC is a business entity first recognized in 1977 by the State of Wyoming. *See* Ribstein, *The Emergence of the Limited Liability Company*, 51 Bus. Law.1 (1995). LLCs are hybrid business entities that are corporate in nature in that members of an LLC, like owners of a corporation, have limited liability. *Id*. at 1-3; Bishop and Kleinberger, *Limited Liability Companies: Tax and Business Law*, ¶ 1.01 (2012); *United States v. ADT Security Services, Inc.*, 522 Fed. Appx. 480, 486-87 (11th Cir. 2013) (unpublished). *See also Abrahim & Sons Enterprises v. Equilon Enterprises, LLC*, 292 F.3d 958, 962 (9th Cir. 2002) (applying California law and stating that "the purpose of forming [both LLCs and corporations] is to limit the liability of their shareholders and members"). Like corporations, LLCs have a legal existence separate from their owners. *See* Bishop and Kleinberger, Limited Liability Companies, *supra* at ¶ 1.01.

The status of LLCs under Section 110(c) is a significant issue under the Mine Act because, in recent years, the number of mine operators organized as LLCs has steadily increased. *See* 71 Fed. Reg. 38902 (July 10, 2006) (noting that 782 of the Nation's

7,287 active mine operators –- approximately 10 percent –- identified themselves as LLCs, and noting that the number actually may be significantly greater). In view of the increasing number of operators organized as LLCs, and in order to make the public aware of the Secretary's interpretation of Section 110(c), the Secretary published an interpretive bulletin on July 6, 2006, setting forth his interpretation that Section 110(c) applies to agents of LLCs. *Id*.[11]

Section 110(c) of the Mine Act applies when a "corporate operator" violates a Mine Act standard and a director, officer, or agent "of such corporation" knowingly authorized, ordered, or carries out the violation. As the Commission recognized in *Simola*, the terms "corporate operator" and "corporation" are not defined in the Mine Act. 34 FMSHRC at 544. When a statute does not expressly define a term, courts look to the dictionary definitions of terms to determine their common usage. *See Koch Foods, Inc. v. Secretary of Labor,* 712 F.3d 476, 480 (11th Cir. 2013). *Webster's Third New International Dictionary* (2002) at 510 defines the term "corporation" to mean "a group of persons * * * treated by the law as an individual or unity having rights

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[11] Although the Secretary published his interpretation in 2006, he has interpreted Section 110(c) to apply to agents of LLCs for a much longer period. *See, e.g., Wayne Jones, employed by United States Mining Company LLC,* 20 FMSHRC 1267 (1998); *Sterling Ventures, LLC and Chris Pullan*, 22 FMSHRC 264 (2000); *Enos Little, employed by Coastal Coal Company, LLC,* 26 FMSHRC 210 (2004).

and liabilities distinct from those of the persons * * * composing it * * * "); *Dictionary.com* defines the term "corporation" to mean "an association of individuals, created by law or under authority of law, having a continuous existence independent of the existences of its members, and powers and liabilities distinct from its members." http://dictionary.reference.com/browse/corporation?s=t (retrieved March 25, 2014).

Interpreting the terms "corporate operator" and "such corporation" in Section 110(c) to include LLCs is therefore consistent with the language of Section 110(c). It is also consistent with the general principle that courts should "construe * * * word[s] * * * as * * * judgment instructs [that] the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." *Vermilya-Brown v. Connell*, 335 U.S. 377, 387, 69 S.Ct. 140, 146 (1948). *See also People of Puerto Rico v. Shell Co.*, 302 U.S. 253, 258, 58 S.Ct. 167, 169-70 (1937) (interpreting a word expansively to include something that did not exist at the time the statute in question was enacted and stating that "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a

consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed"); *Browder v. United States*, 312 U.S. 335, 339, 61 S.Ct. 559, 602 (1941) ("Old crimes, however, may be committed under new conditions. Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms") (footnote omitted); *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."); *University of Texas Medical Branch at Galveston v. United States,* 557 F.2d 438, 455 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (*"*Statutes can be read * * * with a gloss of contemporary time and clime").

As the Commission recognized in *Simola*, courts have applied the foregoing principles to interpret the term "corporation" expansively to include LLCs when, as here, such an interpretation is consistent with the purpose of the provision in question. 34 FMSHRC at 548 (*citing Meyer v. Oklahoma Alcoholic Beverage Laws Enforcement Comm.*, 890 P.2d 1361, 1362-64 (Okla. Ct. App. 1995) (treating LLCs as corporations under a state constitutional provision prohibiting corporations from

obtaining liquor licenses because LLCs share the corporate characteristic of limiting the liability of its members). *See also Preferred Real Estate Invs., L.L.C. v. Lucent Techs., Inc.*, No. 2:07-CV-05374, 2008 WL 2414968, at *2 (D.N.J. June 11, 2008) (treating an LLC as a corporation under a state writ of attachment statute because another interpretation would permit LLCs to avoid attachment by transferring assets); *Halo Tech Holdings, Inc. v. Cooper, Civ. No.* 3:07-C489 (AHN), 2008 WL 877156 at *8 (D. Conn. Mar. 26, 2008) (holding that a foreign corporation long-arm statute applies to LLCs). Because the language of Section 110(c) can be read to include LLCs, because LLCs were not in existence at the time the Mine Act was enacted, and because, as discussed below, interpreting Section 110(c) to apply to agents of LLCs is plainly consistent with the purpose and history of Section 110(c), the principle that statutes should be read with a contemporary gloss should be applied here.

Section 110(c) was carried over without significant change from Section 109(c) of the Federal Coal Mine Health and Safety Act of 1969. *See* 30 U.S.C. § 819(c)(1969). In enacting Section 109 of the Coal Act, Congress explained that the provision was intended “to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him." H.R. No. 563, 91st Cong., 1st Sess. 11 (1969), *reprinted in 1969 Leg. Hist*. at 1041. Congress made clear its

intent “to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield." *Id.* at 12, 1969 *Leg. Hist.* at 1042.

In re-enacting Section 109 of the Coal Act in Section 110(c) of the Mine Act Congress likewise stated:

> Civil penalties are not a part of the enforcement scheme of the Metal Act, but they have been part of the enforcement of the Coal Act since its enactment in 1969. The purpose of such civil penalties, of course, is not to raise revenues for the federal treasury, but rather, is a recognition that: “[s]ince the basic business judgments which dictate the method of operation of a coal mine are made directly or indirectly by persons at various levels of corporate structure, [the provision for assessment of civil penalties is] necessary to place the responsibility for compliance with the Act and the regulations, as well as the liability for violations on those who control or supervise the operation of coal mines as well as on those who operate them.” In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. 95-191, 95th Cong., 1st Sess. 40-41 (1977), *reprinted in* Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 628-29 ("Legislative History") (quoting S. Rep. No. 411, 91st Cong. 1st Sess. at 39 (1969)).

Congress’ enactment of Section 110(c) thus reflected Congress’ recognition that because a corporation generally

serves as a shield against personal liability, corporate directors, officers, and agents generally are not personally liable for legal violations committed by the corporation. Corporate mine operators would therefore have a reduced incentive to comply with Mine Act standards because a corporation would shield the individuals who control and supervise the mine –- the corporation's directors, officers, and agents –- from personal liability.

To address that concern, Section 110(c) imposes liability for Mine Act violations directly on the individuals responsible for the violations. *Secretary of Labor v. Kenny Richardson*, 3 FMSHRC 8, 26 (1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). As the Sixth Circuit Court of Appeals has explained:

> In a practical sense, any non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of "operator." In a larger, corporate structure, the decision-maker may have authority over only a part of the mining operation. [Section 110(c)] assures that this makes him no less liable for his actions. In a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operator. [Section 110(c)] attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act.

Richardson v. Secretary of Labor, 689 F.2d 632, 633-34 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord United States v. Jones*, 735 F.2d 785, 793 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984) ("Congress may have believed that in a noncorporate coal mining operation the threat of criminal sanctions against the operator personally would provide a sufficient incentive to comply with the mandatory safety standards. By contrast, in a corporate mining operation, those who are in control might be insulated from criminal responsibility, the corporation being an impersonal legal entity.").

"[G]iven the similar liability shields that are provided by corporations and LLCs to their respective owners, emerging caselaw illustrates that situations that result in a piercing of the limited liability veil are similar to those that warrant piercing the corporate veil." *NetJets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168, 175 (2d Cir. 2008) (internal quotations omitted) (citing and quoting J. Leet, J. Clarke, P. Nolkamper & P. Whynott, *The Limited Liability Company*, § 11.130, at 11-7 (rev. ed. 2007)(internal quotation marks omitted). *See also id.* at 379 ("Every state that has enacted LLC piercing legislation has chosen to follow corporate law standards and not develop a separate LLC standard") (citing and quoting Leet, Clarke, Nolkamper & Whynott at 11-9)); *Spanish Tiles, Ltd. v. Hensey,* 2009 WL 86609 at *2 (Del. Super. 2009) (unpublished)

(The “personal participation doctrine,” which attaches liability to corporate officers for torts that they direct, order, ratify, approve, or consent to, applies to LLCs). Because the same situations that warrant going behind the corporate shield warrant going behind the LLC shield, and because the same reasons exist today for enacting Section 110(c) as existed when Congress enacted the provision, Congress’ purpose in enacting Section 110(c) can only be achieved if the provision is interpreted to apply both to agents of corporations and to agents of LLCs.

The courts have recognized that the federal government may not be bound for some purposes by a state’s classification of a business entity. *See Littriello v. United* States, 484 F.3d 372, 378-79 (6th Cir. 2007), *cert. denied*, 552 U.S. 1186 (2008) (deferring to the Internal Revenue Service’s interpretation of the Internal Revenue Code’s definition of “corporation” and stating that “[t]he federal government has historically disregarded state classifications of businesses for some federal tax purposes”); *McNamee v. Department of the Treasury, IRS*, 488 F.3d 100, 111 (2nd Cir. 2007) (same); *Northern Securities Co. v. United States,* 193 U.S. 197, 350, 24 S.Ct. 436, 462 (1904) (“no state can endow any of its corporations, or any combination of its citizens, with authority to * * * disobey the national will as manifested in legal enactments of Congress”). The federal

government should not be so bound for purposes of Section 110(c). It cannot be that, after the enactment of Section 110(c), states are able to defeat Congress' intent to pierce the corporate veil by creating a new hybrid business entity that retains the distinguishing characteristic of a corporation that led Congress to enact Section 110(c) in the first place. Effective and uniform enforcement of the Mine Act on a nation-wide basis cannot be thwarted by the fact that states may allow business entities to organize as LLCs, and some mine operators may choose to organize as LLCs, when the differences between LLCs and corporations have nothing to do with the purpose of Section 110(c). *See United Electrical, Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1092 (1st Cir. 1992) ("[I]n federal question cases, courts are wary of allowing the corporate form to stymie legislative policies.")

Sumpter and Hartzell's reliance on cases holding that an LLC should not be treated as a corporation for diversity purposes under 28 U.S.C. § 1332 is misplaced. *See* Br. at 25-26, 27 (citing *Ferrell v. Express Check Advance of SC, LLC*, 591 F.3d 698 (4th Cir. 2010); *General Tech v. Exro*, 388 F.3d 114, 121 (4th Cir. 2004), *GMAC v. Dillard,* 357 F.3d 827, 828 (8th Cir. 2004), and *Cosgrove v. Bartolotta,* 150 F.3d 729, 731 (7th Cir. 1988)). Because those cases involve principles of diversity

jurisdiction -- and also because they do not involve *Chevron* deference to agency interpretations –- they are inapposite. *See People of Puerto Rico v. Shell*, 302 U.S. at 258, 58 S.Ct. at 170 (recognizing that words in different acts have different meanings depending on the "character and aim of the act").[12]

Sumpter and Hartzell's assertion that the Commission's decision in *Donald Guess, employed by Pyro Mining,* 15 FMSHRC 2440 (1993), *aff'd,* 52 F.3d 1123 (D.C. Cir. 1995), is inconsistent with interpreting Section 110(c) to apply to agents of LLCs is likewise unpersuasive. *See* Br. at 24-25. In *Guess*, the issue was whether Section 110(c) applied to a partnership whose members consisted of two corporations. 15 FMSHRC at 2440. In *Simola*, the Commission correctly distinguished that question from the question presented in this case, recognizing that "although LLCs are hybrid entities, it is undisputed that LLCs

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[12] The cited cases rely on a line of Supreme Court cases in which the Court, after interpreting the word "citizen" in the federal diversity statute to include corporations, declined to expand its interpretation to include other business organizations. *See Carden v. Arkoma*, 494 U.S. 185, 189, 110 S.Ct. 1015, 1019 (1990) (explaining history). Significantly, the Court determined that the "doctrinal wall" against expanding its interpretation to include business organizations other than corporations should "not be breached" because to do so would be inconsistent with Congress' intent to limit diversity jurisdiction -- an intent expressed in legislation enacted after the Court broadly construed the statute to include corporations. *See United Steel Workers of America, AFL-CIO v. Bouligny, Inc.*, 382 U.S. 145, 148, 86 S.Ct. 272, 274 (1965) (explaining history). The present case presents precisely the opposite situation. As explained above, interpreting Section 110(c) to include LLCs is plainly consistent with Congress' intent.

possess the distinctive corporate quality of limited liability, which Congress specifically intended to address when it enacted section 110(c)." 34 FMSHRC at 544. Partnerships do not possess that quality. Moreover, partnerships, unlike LLCs, were in existence in 1977 when the Mine Act was enacted. Accordingly, "the word 'corporation,' as used in the statute, cannot reasonably be read to include partnerships, but it can reasonably be read to include LLCs." *Id.*

Also unpersuasive is Sumpter and Hartzell's suggestion that the Secretary's interpretation should be rejected because Congress amended the Mine Act in 1990 and 2006 but did not amend Section 110(c) to include LLCs. *See* Br. at 28-30. It is well established that where "the record of congressional discussion preceding reenactment makes no reference to the * * * [provision] at issue, and there is no other evidence to suggest that Congress was even aware of the [agency's] interpretive position [,] '* * * [courts] consider the * * * reenactment to be without significance.'" *Legal Environmental Assistance Foundation, Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1477 (11th Cir. 1997) (citing and quoting *Brown v. Gardner*, 513 U.S. 115, 121, 115 S.Ct. 552, 556-57 (1994)). Neither the 1990 amendment nor the 2006 amendment had anything to do with the scope of Section 110(c)'s personal liability provisions. Nor is there anything in the Congressional Record, or anywhere else, indicating that

at the time of either amendment, Congress was aware of any controversy in applying Section 110(c) to agents of LLCs.

To circumvent that fact, Sumpter and Hartzell unpersuasively assert that Congress was presumptively aware of the Secretary's interpretation because the interpretation was published in the Federal Register shortly before the Mine Act was amended in 2006, and, as a general matter, publications in the Federal Register give legal notice of their content. Br. at 29 (*citing Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386, 68 S.Ct. 1, 3 (1947). In *Merrill,* the Court held that a party affected by a regulation published in the Federal Register is legally charged with notice of the regulation. 332 U.S. at 385, 68 S.Ct. at 3. *See also*, 44 U.S.C. § 1507 (unless otherwise provided by law, publication of a document required to be published in the Federal Register gives notice to persons subject to or affected by the document). Deeming a regulated party or other affected person to have constructive knowledge of an interpretation through publication in the Federal Register is hardly the same as showing that Congress, in reaffirming legislation, actually was aware of the interpretation and considered it.[13]

[13] Even if there were evidence that Congress was aware of the Secretary's interpretation in 2006, the fact that Congress did not amend the provision, would tend to show, if anything, that

Finally, even if the terms "corporate agent" and "such corporation" in Section 110(c) cannot reasonably read to include LLCs -- and they can -- courts, when confronted with a question of statutory application with respect to which Congress could not have expressed an intent when it enacted the statute, have treated the question as one the resolution of which was delegated to the agency Congress authorized to administer the statute. *See NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 632-33 (7th Cir. 1995); *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 904-07 (5th Cir. 1997) (where resolution of the question was not delegated to any agency, the court itself filled the void created by Congressional silence by examining the underlying policy concerns). Inasmuch as Congress could not have expressed a specific intent with respect to agents of LLCs because LLCs did not exist at the time the Mine Act was enacted, the question becomes whether an interpretation that Section 110(c) is applicable to agents of LLCs is reasonable. *See Chevron*, 467 U.S. at 842-43; *Excel Mining,* 334 F.3d at 6. For the reasons stated above, the Secretary submits that it is.

Congress accepted the Secretary's interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870 (1978).

II.

SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGE'S FINDING THAT SUMPTER AND HARTZELL WERE LIABLE FOR OAK GROVE'S VIOLATION OF 30 C.F.R. § 75.334(d)

A. Applicable Legal Principles

The proper inquiry in determining liability under Section 110(c) is whether the individual knew or had reason to know of the violative conduct. *Kenny Richardson*, 3 FMSHRC at 16; *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363-64 (D.C. Cir. 1997). The Secretary need prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Freeman United*, 108 F.3d at 364; *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (1992). Under Commission case law, a Section 110(c) "knowing" violation requires aggravated conduct rather than ordinary negligence. *Freeman United*, 108 F.3d at 364; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (1992). "Aggravated conduct" includes "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *See, e.g.*, *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (1987) (cited in *BethEnergy Mines*, 14 FMSHRC at 1245).[14] Of particular importance in this case, the

[14] Sumpter and Hartzell incorrectly contend that the Court in *Freeman United* held that "high negligence" is insufficient to establish aggravated conduct. *See* Br. at 31. In reality, the

fact that the violative conduct poses a high degree of danger to miners supports a finding of aggravated conduct. *See Rock of Ages Corp. v. Secretary of Labor,* 170 F.3d 148, 163 (2d Cir. 1999*) (*violative conduct potentially creating "extreme danger" was aggravated for purposes of Section 104(d)(1)); *Warren Steen*, 14 FMSHRC at 1129 (finding agent liable for violation where he knew or should have known that working near powerlines was hazardous); *BethEnergy*, 14 FMSHRC at 1244 (finding agents liable for violation when they had reason to know that unsaddled beams "presented a danger" to miners entering the area).

B. Substantial Evidence Supports the Judge's Finding That There Were Aggravating Factors

In this case, substantial evidence plainly supports the judge's findings that Sumpter and Hartzell knew of Oak Grove's violation of Section 75.334(d) and that they engaged in aggravated conduct.

As the judge correctly recognized, both Sumpter and Hartzell readily acknowledged at the hearing that they knew that measurements were not being taken at the designated MPLs and that Oak Grove was violating Section 75.334(d). JA 542; JA 271, 273, 274, 276, 2013 Tr. 222-23, 231, 237, 242-44; *see also* JA

Court held that when there is no finding that an agent knew or had reason to know of a violative condition, and the record would not support such a finding, a finding of "high negligence" alone is insufficient to establish liability under Section 110(c). 108 F.3d at 364.

246, 247, 2013 Tr. 122; 126-27.[15] Despite that acknowledgment, Sumpter and Hartzel assert that the judge erred in finding them liable for the violation because they did not know that operating the longwall was violative of Section 75.334(d). The assertion is unavailing. To establish the agents' liability under Section 110(c), the Secretary was not required to show that the agents knew that operating the longwall was violative of the standard. *Freeman United*, 108 F.3d at 364.

In any event, regardless of whether Sumpter and Hartzell knew that operating the longwall was violative of the standard, Sumpter and Hartzell plainly knew, or had reason to know, that operating the longwall when the effectiveness of the bleeder system could not be determined as required by Section 75.334(d) posed a serious risk to miner safety. JA 508; JA 37-38, 241, Tr. I-65-69, 2013 Tr. 102. "The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts." H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 21, *reprinted in* 1969

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[15] Sumpter and Hartzell misstate the evidence when they state that they believed that they were in compliance with Section 75.334(d). Br. at 37 (citing JA 178, Tr. III-96; JA 267-68, 2013 Tr. 209-10; JA 274, 2913 Tr.-233-34). In the cited testimony, they testified that they believed that the bleeder system was functioning effectively, not that they believed that they were in compliance with Section 75.334(d). Indeed, they acknowledged that they did not believe that they were in compliance. JA 271, 273, 274, 276, 2013 Tr. 222-23, 231, 237, 242-44.

Leg. Hist. (cited and quoted in *Blue Diamond,* 667 F.2d at 513). The Oak Grove Mine liberates over a million cubic feet of methane every 24 hours and is therefore subject to spot inspection under Section 103(i) of the Mine Act, (JA 29, 46, Tr. I 30, 99-100), and there had been five methane ignitions at the mine in the preceding year (JA 36, 37, 41-43, 46, 60, 115, Tr. I 60, 63, 80, 83-86, 156-57, 99-100, 156-57). Running the longwall significantly increases the amount of methane liberated. JA 115, Tr. II 170-71; JA 483. Moreover, the pressure differential at the No. 6 fan had steadily increased by approximately 50 percent in the preceding weeks, indicating significant restriction in the bleeder system. JA 518, JA 393 (fan chart); JA 30, 36-37, 51, 54-57, Tr. I 34-36, 60-63, 119, 132-44. *See also* JA 129, 130, Tr. II 226-27, 232 (testimony of MSHA Ventilation Expert Morley); JA 276, 2013 Tr. at 245 (Hartzell's acknowledgement that he knew from the pressure chart that there was significant restriction in the bleeder system). Under the circumstances, Sumpter and Hartzell's conduct in allowing the longwall to operate when, for a period of several weeks, the effectiveness of the bleeder system had not been determined as required by the standard evidenced a callous disregard of miner safety and plainly constituted aggravated conduct warranting imposition of Section 110(c) liability. *See, e.g., Rock of Ages Corp.,* 170 F.3d at 162 (finding aggravated

conduct sufficient to support an unwarrantable failure designation "[i]n light of the extreme danger posed by * * * [the operator's conduct] evidenc[ing] a disregard for the safety of its miners").

C. Substantial Evidence Supports the Judge's Finding That There Were No Mitigating Factors

Substantial evidence supports the judge's rejection of Sumpter and Hartzell's assertion that the decision to operate the longwall was mitigated by Inspector Busby's December 30, 2009, citation alleging a non-significant and substantial violation of Section 75.364(a)(2)(ii) because the citation did not preclude operation of the longwall. *See* Br. at 34, 35. As the judge noted, the longwall was not operating on December 30, 2009, and, under Oak Grove's business plan, it would not have operated until at least January 1, 2010. JA 543-44; JA 188, Tr. III 136-37; JA 266, 2013 Tr. at 203. Busby set the abatement time for early on December 31, 2009, before any scheduled resumption of mining. JA 544. Although Oak Grove did not comply with the abatement order, and resumed longwall mining on January 4, 2010, MSHA was not informed of the resumption. When MSHA agreed to extend the abatement time on January 14, 2010, the longwall was shut down by the underlying January 6, 2010, Section 104(d)(2) order. *See* JA 392.

Substantial evidence likewise supports the judge's rejection of the agents' asserted reliance on earlier uncited incidents when bleeder MPLs could not be accessed and the longwall was operating as a mitigating factor. *See* Br. at 35. Hartzell testified that there were occasions in the past when, because of roof falls or water accumulation, Oak Grove could not examine the bleeders in their entirety, and that those conditions had been noted in examination books. JA 273, 2013 Tr. at 232-34. Although Hartzell responded "yes" when asked whether those were the type of things that MSHA would know about because it conducts quarterly inspections and examines books, Hartzell's testimony suggests, as the judge found (JA 543), that MSHA only learned of possible technical violations after they occurred and after examination books apparently showed that the bleeder systems were functioning effectively. JA 543, JA 273, 2013 Tr. at 233. Moreover, even if MSHA had had contemporaneous knowledge of the violative conditions, nothing in Hartzell's testimony establishes, as the judge recognized, that the incidents were comparable to the circumstances in this case, where the MPLs had not been examined for three weeks; a significant number of MPLs (eleven) had not been examined; MSHA considered three of the unexamined MPLs to be critical (JA 79, 80, 107, 115, Tr. I 196, II 32-34, 140, 171); and the pressure differential reading at the No. 6 fan showed significant

restriction in the bleeder system that had developed over a period of two weeks. JA 276, 2013 Tr. at 245.

Contrary to Sumpter and Harztell's argument, substantial evidence also supports the judge's rejection of the agents' asserted reliance on changes to ventilation that occurred on January 1 and on January 3 as mitigating factors. *See* Br. at 36. Sumpter acknowledged that Oak Grove knew that when a panel mines out about 3,000 feet, the gob tightens up so that air has to be enhanced. JA 266, 2013 Tr. at 204. By mid-December, the panel had mined out approximately 6,000 feet. JA 516, JA 448, 449. Thus, the changes would have been made regardless of the restrictions in the bleeder system. Moreover, as the judge pointed out, the air changes had no positive effect on the No. 6 fan differential (JA 543) -- a differential that indicated significant restrictions in the bleeder system. *E.g.,* JA 129, Tr. II 226-27, 237. Accordingly, as the judge found, any reliance on the changes as a basis for assuming that the bleeder system was effectively diluting and moving away methane would not have been reasonable. JA 543, 545 n. 37.

Similarly, the judge properly rejected Sumpter and Hartzell's asserted reliance on efforts taken to pump out the accumulated water before the underlying order was issued as a mitigating factor. *See* Br. at 32. Oak Grove began operating the longwall before the effectiveness of the bleeder system

could be determined as required by Section 75.334(d). Sumpter and Hartzell could not have reasonably believed that efforts to abate the December 30 citation gave Oak Grove warrant to operate the longwall when doing so substantially increased the danger posed by an ineffective bleeder system. Indeed, the fact that Sumpter and Hartzell were involved in the efforts to remove the water only underscores their knowledge that the effectiveness of the bleeder system could not be determined using the approved method because access to the designated MPLs was blocked.

Hartzell and Sumpter argue that the judge erred because the evidence establishes that they had a good-faith reasonable belief that the bleeder system was functioning effectively. Br. at 31. Their argument is unavailing for several reasons.

First, contrary to the agents' argument, the Commission has never held that a belief that violative conduct is safe is a defense to Section 110(c) liability.[16] Nor is it. If a belief

[16] To support their argument, Sumpter and Hartzell cite the Commission's decision in *IO Coal Co.*, 31 FMSHRC 1346, 1356 (2009) (citing *Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 463 (1997)). *See* Br. at 31. In *IO Coal,* however, the Commission held, in considering whether a violation was an unwarrantable failure, that conduct is not aggravated if the operator has a good-faith and objectively reasonable belief that the conduct is in compliance with the standard. 31 FMSHRC at 1357. Believing that conduct is in compliance is not the same as believing that conduct is safe. *See also Kellys Creek*, 19 FMSHRC at 463 (holding that an operator's good-faith and objectively reasonable belief that its conduct is in compliance is a defense to an unwarrantable failure finding).

that violative conduct is safe were a valid defense, agents could effectively re-write standards and ventilation plan requirements based on their personal beliefs about miner safety without risking enhanced sanctions. Such a result would be antithetical to the purpose of Section 110(c), to the concept of notice-and-comment rulemaking, and to the ventilation plan approval process. Such a result would be particularly inappropriate in the context of violations of ventilation standards. Given the extreme danger of inadequate ventilation in underground mining, and given the technical complexity of achieving effective underground ventilation, permitting mine officials to avoid enhanced sanctions when they knowingly disregard ventilation standards and plan requirements under the guise of believing that their actions are safe would create an unacceptable risk of extreme danger to miners –- as Sumpter and Hartzell's conduct did here.

Sumpter and Hartzell also cite a Commission ALJ's decision, *Rinker Materials*, 30 FMSHRC 104, 119 (2008), as support for their argument. Br. at 31. Although it is true that the judge in *Rinker* noted that the agent believed that his violative conduct was safe, a fair reading of the decision indicates that the primary basis for the judge's conclusion that the agent was not liable under Section 110(c) was that the language of the standard was confusing and the agent did not have notice of the standard's requirements. *See id*. at 115-19. In any event, to the extent that the decision could be read as supporting the agents' argument, the Commission's procedural rules specify that ALJ decisions are not binding precedent. 29 C.F.R. § 2700.72.

Even if an agent's good-faith and objectively reasonable belief that a violative condition is safe were a valid defense to Section 110(c) liability, substantial evidence plainly supports the judge's finding that Sumpter and Hartzell did not have any such belief. The judge, who observed Sumpter and Hartzell's demeanor, indicated that he was not convinced by their testimony that they had a good-faith belief that the bleeder system was functioning effectively and that operation of the longwall was safe. J.A. 545. The judge noted that any contemplated changes in the method of evaluating the effectiveness of the bleeder system had to be approved by the Secretary before implementation. *See* 30 C.F.R. § 75.364(a). From that, the judge inferred that if Sumpter and Hartzell genuinely believed that the alternative method of determining the effectiveness of the bleeder system was viable, they likely would not have waited until after the longwall was shut down to propose the method to MSHA. JA 545.[17] As the judge recognized,

[17] After the underlying Section 104(d)(2) order was issued and the longwall was shut down, Oak Grove submitted to MSHA on January 8, 2010, a request to amend its ventilation plan to substitute an alternative method to the approved plan's requirement that the designated MPLs be used to evaluate the effectiveness of the bleeder system. JA 356. There is no evidence of any such request before the order was issued. *See* JA 545 n.38. MSHA and Oak Grove engaged in protracted negotiations from January 8 to January 22 regarding Oak Grove's proposed alternative method. MSHA disapproved all proposed formulations of Oak Grove's alternative as insufficient to

their delay suggests they anticipated problems in obtaining approval. *Id.*

Moreover, even if Sumpter and Hartzell had a good-faith belief that the bleeder system was functioning effectively, the judge properly found that any such belief would not have been objectively reasonable. *Id.* Sumpter and Hartzell knew that the highly gassy Oak Grove Mine was in violation of two critical ventilation standards and that operating the longwall with an ineffective bleeder system, or a system whose effectiveness could not be determined, posed a serious threat to all miners underground. JA 545. Further, the No. 6 fan showed that significant restriction through the bleeder had developed between December 15 and January 2, and that the pressure differential remained after the ventilation changes on January 1 and 3. *Id.*

The judge also properly found that there were reasons to doubt that the alternative method on which the agents relied accurately demonstrated that there was sufficient air flow out of the tailgate entries of the panel at the back of the gob. JA 545. Under the alternative method (referred to as "the subtraction method"), one measures the quantity of air at the No. 6 fan, and subtracts from that number the air entering the

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provide the data necessary to assure complete ventilation of the gob and safe longwall mining. *See* JA 356-376, JA 487-90.

11 East Headgate and the amount of air in the old bleeder entry for the Old East Bleeder. JA 122, Tr. II 201. As MSHA Ventilation Expert Morley explained, the assumption is that the remaining amount of air is the air that is being ventilated through the 11 east worked-out area. *Id.* As Morely testified, however, the problem with using the subtraction method to verify the quantity of air ventilating the 11 East Bleeder is that it is impossible to know where the air coming out of the fan is coming from. JA 114-115, Tr. II 166-170. Morley explained that the amount of air Oak Grove characterized as coming through the tailgate side through the East Bleeders could have been coming from the 10 East Headgate side through a cut-through depicted on Government Exhibit G-34A. JA 123, Tr. II 204-05. *See also, JA 111-15, 138-39, Tr. II 157-70, 265-67.* Morley further explained that if air passed through the cut-through as MSHA feared, then, under the subtraction method, that amount of air would have to be subtracted from the total amount of air exiting the mine to approximate the flow through the 11-East entry. JA 493. The judge credited Morley's testimony that it was impossible to know whether the air entering from the 10-East headgate was going through the cut-through, and therefore impossible to know whether the subtraction method was accurate. JA 496 (citing JA 203, Tr. III-196).

Sumpter and Hartzell argue that it was reasonable for them to rely on the subtraction method because the method was "common sense," pointing out that the Secretary "had to bring in an expert" to explain why the methodology was flawed. Br. at 37. The argument underscores the unreasonableness of Sumpter and Hartzell's asserted reliance on the alternative method. The very purpose of requiring operators to have ventilation plans that are approved by the Secretary is that ventilation of underground mines is highly complex and requires technical expertise to be performed safely. Given those complexities, and given the danger of an ineffective bleeder system, it would have been unreasonable for Sumpter and Hartzell to rely on an untested and unapproved methodology.

Finally, substantial evidence supports the judge's rejection of Sumpter and Hartzell's asserted reliance on telephone conversations between MSHA and Oak Grove on January 6, in which MSHA first directed Oak Grove to shut down the longwall and then retracted the directive, as a mitigating circumstance. *See* Br. at 34. As the judge correctly recognized, Oak Grove was operating the longwall during two shifts on January 4 and on January 5, showing that the second January 6 phone conversation was not the basis for its decision to operate the longwall. JA 544 and n. 35; JA 322, JA 37, 188, 193, Tr. I 63-64, III 137, 154-55. Moreover, MSHA did not approve of operating the

longwall during the second January 6 conversation. Quite the opposite: MSHA's retraction of its oral directive to shut down the longwall came only after Oak Grove complained to MSHA that it was improper for MSHA to order that the longwall be shut down without observing the situation. JA 83, Tr. II 44-45. Significantly, in retracting its directive, MSHA stressed to Safety Director Thompson (1) that MSHA would be inspecting the bleeder system "first thing in the morning" -- implying that an appropriate order would be issued in writing at that time, if warranted -- and (2) that Oak Grove should be aware of the requirements of 30 C.F.R. § 75.334, any reading of which could only underscore the inappropriateness of operating the longwall in the absence of a determination that the bleeder system was functioning effectively based on air measurements at the designated MPLs. JA 83, Tr. II at 42-44. *See also* JA 51-52, 103, 179, Tr. II 124-25, III 99-01.

III.

THE JUDGE CORRECTLY HELD THAT 30 C.F.R. § 75.334(d) IS NOT DUPLICATIVE OF 30 C.F.R. § 75.364(a)(2)(iii)

The Commission has long held that, although MSHA may not issue duplicative citations, citations are not impermissibly duplicative if the standards cited impose separate and distinct duties on the mine operator. *Cumberland Coal Resources*, 28 FMSHRC 545, 553 (2006); *El Paso Rock Quarries, Inc.*, 3 FMSHRC

35, 40 (1981). *See also Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378-79 (1993) (although multiple violations may have emanated from the same events, the citations were not duplicative because the standards cited imposed distinct duties on the operator); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463 (1982) (although multiple transgressions arose out of a single series of events, the operator committed separate violations).

Here, Section 75.364(a)(2)(iii), under which the citation was issued on December 30, 2009, and Section 75.334(d), under which the order was issued on January 6, 2010, are not duplicative because they imposed separate and distinct duties on Oak Grove. Section 75.364(a)(2)(iii) relates to performance of weekly bleeder system examinations and requires that the operator travel in its entirety "[a]t least one entry of each set of bleeder entries used as part of a bleeder system" and evaluate air quantity and quality at designated MPLs. Section 75.334(d), in contrast, relates to what an operator must do *if* its bleeder system is not functioning effectively *or if* it cannot be determined that its bleeder system is functioning effectively using the approved methodology: "the worked out area shall be sealed." Thus, Oak Grove is incorrect in asserting that both standards impose the same duty of traveling the bleeder system, or, alternatively, that the examination duties of Section 75.364(a)(2)(iii) are "subsumed" into the duties to

either operate an effective bleeder system or seal the gob. *See* Br. at 41-44.

Viewed another way, an operator might fail to perform a complete examination of its bleeder system, but not have a bleeder incapable of performing the function it was designed to perform or incapable of being completely examined. Similarly, an operator whose bleeder system is incapable of performing as intended or incapable of being completely examined as required in its ventilation plan may choose to seal the gob in compliance with Section 75.334(d) -- in which case the potential for being cited for failing to conduct examinations would cease to exist. Here, Oak Grove did not examine the bleeder system *and* did not seal the gob, violating *both* of the distinct duties imposed by Section 75.364(a)(2)(iii) and Section 75.334(d), respectively.

Citing *Western Fuels*, 19 FMSHRC 994, 1003 (1997), Sumpter and Hartzell assert that the violations were duplicative because they were both abated by pumping out water. Br. at 44. The assertion fails for two reasons.

First, the actions taken to abate the two violations were not the same. The Section 75.364(a)(2)(iii) violation was abated when Oak Grove travelled the bleeder in its entirety *and* Oak Grove took the measurements at the MPLs that the standard required Oak Grove to take. The Section 75.334(d) violation was abated when it was determined, based in part on measurements

that Section 75.364 required Oak Grove to take, that the bleeder system was functioning effectively. *See* JA 541, Supplemental Appendix 2 (subsequent action to terminate Order No. 6698830). If, after Oak Grove pumped out the water, traveled the bleeder system, and took measurements at the required MPLs, it could not be determined that the bleeder system was functioning effectively, the violation of Section 75.364(a)(2)(iii) would have been abated, but the violation of Section 75.334(d) would not have been abated, and Oak Grove would still have been required to either make the bleeder system function effectively or seal the gob.

In any event, contrary to Sumpter and Hartzell's characterization, the Commission in *Western Fuels* held that the two standards in question in that case were duplicative not because they were abated in the same way, but because "the two standards did not impose separate and distinct duties on Western Fuels." 19 FMSRHC at 1004 and n.12.

Sumpter and Hartzell's reliance on the opinion of two Commissioners in *Spartan Mining Co.*, 30 FMSHRC 699 (2008), 2008 WL 4287784 is likewise unavailing for several reasons. *See* Br. at 45. First, because the Commission in *Spartan* evenly split on the issue, the opinion of the two Commissioners is not binding precedent. *See Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992). Second, as the

judge recognized, MSHA does not specify the action necessary to abate a violation, and the fact that particular circumstances may provide an opportunity to abate two citations in the same way should not be a basis for finding that the standards are duplicative. JA 45 and n.27.

Even the two Commissioners' opinion in *Spartan* on which Sumpter and Hartzell rely stated that the controlling question was whether the actions the operator was "required to take" to abate the two violations were "somehow different." 30 FMSHRC at 729. In this case, they were. To abate the violation of Section 75.364(a)(2)(iii), Oak Grove could have pumped down the water, travelled the bleeder in its entirety, and taken the measurements at the MPLs, or Oak Grove could have obtained MSHA's approval of an alternative method of evaluating the bleeder system, or Oak Grove could have sealed the gob. To abate the violation of Section 75.334(d), Oak Grove could have determined the effectiveness of the bleeder system using the methodology set forth in the ventilation plan; *or* could have obtained MSHA's approval of an alternative method of evaluating the bleeder system and, using that method, determined that the bleeder system was effective; *or* Oak Grove could have sealed the gob.

CONCLUSION

For the all the foregoing reasons, the Court should affirm the judge's decision.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

/s/ Robin Rosenbluth

ROBIN ROSENBLUTH
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., Rm. 2228
Arlington, VA 22209
(202) 693-9347
(202) 693-9361 (fax)
rosenbluth.robin@dol.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Eleventh Circuit Rule 32-4, I hereby certify that this Response Brief for the Secretary of Labor contains 13,948 words as determined by the word count of the word processing system used to prepare the brief.

/s/ Robin Rosenbluth
ROBIN ROSENBLUTH
Attorney

CERTIFICATE OF SERVICE

This will certify that on March 28, 2014, service of the foregoing brief was made by overnight mail and by using the Electronic Filing System on the following:

John Thomas Sullivan, Esq.
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave., NW
Suite 520N
Washington, D.C. 20004-1710

R. Henry Moore, II Esq.
Patrick W. Dennison, Esq.
Jackson Kelly PLLC
Three Gateway Center
Suite 1500
401 Liberty Ave
Pittsburgh, PA 15222

/s/ Robin Rosenbluth
ROBIN ROSENBLUTH
Attorney
U.S. Department of Labor

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Section 110(c) of the Mine Act, 30 U.S.C. § 820(c)

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

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

(a)(1) The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

(2) The proposed ventilation plan and any revision to the plan shall be submitted in writing to the district manager. When revisions to a ventilation plan are proposed, only the revised pages, maps, or sketches of the plan need to be submitted. When required in writing by the district manager, the operator shall submit a fully revised plan by consolidating the plan and all revisions in an orderly manner and by deleting all outdated material.

(3)(i) The mine operator shall notify the representative of miners at least 5 days prior to submission of a mine ventilation plan and any revision to a mine ventilation plan. If requested, the mine operator shall provide a copy to the representative of miners at the time of notification. In the event of a situation requiring immediate action on a plan revision, notification of the revision shall be given, and if requested, a copy of the revision shall be provided, to the representative of miners by the operator at the time of submittal;

(ii) A copy of the proposed ventilation plan, and a copy of any proposed revision, submitted for approval shall be made available for inspection by the representative of miners; and

(iii) A copy of the proposed ventilation plan, and a copy of any proposed revision, submitted for approval shall be posted on the mine bulletin board at the time of submittal. The proposed plan or proposed revision shall remain posted until it is approved, withdrawn or denied.

(b) Following receipt of the proposed plan or proposed revision, the representative of miners may submit timely comments to the district manager, in writing, for consideration during the review process. A copy of these comments shall also be provided

to the operator by the district manager upon request.

(c)(1) The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision. A copy of this notification will be sent to the representative of miners by the district manager.

(2) If the district manager denies approval of a proposed plan or revision, the deficiencies of the plan or revision shall be specified in writing and the operator will be provided an opportunity to discuss the deficiencies with the district manager.

(d) No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

(e) Before implementing an approved ventilation plan or a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions.

(f) The approved ventilation plan and any revisions shall be--

(1) Provided upon request to the representative of miners by the operator following notification of approval;

(2) Made available for inspection by the representative of miners; and

(3) Posted on the mine bulletin board within 1 working day following notification of approval. The approved plan and revisions shall remain posted on the bulletin board for the period that they are in effect.

(g) The ventilation plan for each mine shall be reviewed every 6 months by an authorized representative of the Secretary to assure that it is suitable to current conditions in the mine.

(a) Worked-out areas where no pillars have been recovered shall be--

(1) Ventilated so that methane-air mixtures and other gases, dusts, and fumes from throughout the worked-out areas are continuously diluted and routed into a return air course or to the surface of the mine; or

(2) Sealed.

(b)(1) During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

(2) After pillar recovery a bleeder system shall be maintained to provide ventilation to the worked-out area, or the area shall be sealed.

(c) The approved ventilation plan shall specify the following:

(1) The design and use of bleeder systems;

(2) The means to determine the effectiveness of bleeder systems;

(3) The means for adequately maintaining bleeder entries free of obstructions such as roof falls and standing water; and

(4) The location of ventilating devices such as regulators, stoppings and bleeder connectors used to control air movement through the worked-out area.

(d) If the bleeder system used does not continuously dilute and move methane-air mixtures and other gases, dusts, and fumes away from worked-out areas into a return air course or to the surface of the mine, or it cannot be determined by examinations or evaluations under § 75.364 that the bleeder system is working effectively, the worked-out area shall be sealed.

(e) Each mining system shall be designed so that each worked-out area can be sealed. The approved ventilation plan shall specify the location and the sequence of construction of proposed seals.

(f) In place of the requirements of paragraphs (a) and (b) of this section, for mines with a demonstrated history of spontaneous combustion, or that are located in a coal seam determined to be susceptible to spontaneous combustion, the approved ventilation plan shall specify the following:

(1) Measures to detect methane, carbon monoxide, and oxygen concentrations during and after pillar recovery, and in worked-out areas where no pillars have been recovered, to determine if the areas must be ventilated or sealed.

(2) Actions that will be taken to protect miners from the hazards of spontaneous combustion.

(3) If a bleeder system will not be used, the methods that will be used to control spontaneous combustion, accumulations of methane-air mixtures, and other gases, dusts, and fumes in the worked-out area.

(a) Worked-out areas.

(1) At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

(2) At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

(i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.

(ii) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in the proper direction shall be made immediately before the air enters a return split of air.

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

(iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

(b) Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

(2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

(3) In each longwall or shortwall travelway in its entirety, so that the entire travelway is traveled.

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

(5) In each escapeway so that the entire escapeway is traveled.

(6) On each working section not examined under § 75.360(b)(3) during the previous 7 days.

(7) At each water pump not examined during a preshift examination conducted during the previous 7 days.

(8) Weekly examinations shall include examinations to identify violations of the standards listed below:

(i) §§ 75.202(a) and 75.220(a)(1)--roof control;
(ii) §§ 75.333(h) and 75.370(a)(1)--ventilation, methane;
(iii) §§ 75.400 and 75.403--accumulations of combustible materials and application of rock dust; and

(iv) § 75.1403--maintenance of off track haulage roadways, and track haulage, track switches, and other components for haulage;

(v) § 75.1722(a)--guarding moving machine parts; and

(vi) § 75.1731(a)--maintenance of belt conveyor components.

(c) Measurements and tests. At least every 7 days, a certified person shall--

(1) Determine the volume of air entering the main intakes and in each intake split;

(2) Determine the volume of air and test for methane in the last open crosscut in any pair or set of developing entries or rooms, in the return of each split of air immediately before it enters the main returns, and where the air leaves the main returns; and

(3) Test for methane in the return entry nearest each set of seals immediately after the air passes the seals.

(d) Hazardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Any violation of the nine mandatory health or safety standards found during a weekly examination shall be corrected.

(e) The weekly examination may be conducted at the same time as the preshift or on-shift examinations.

(f)(1) The weekly examination is not required during any 7 day period in which no one enters any underground area of the mine.

(2) Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days.

(g) Certification. The person making the weekly examinations shall certify by initials, date, and the time that the examination was made. Certifications and times shall appear at enough locations to show that the entire area has been examined.

(h) Recordkeeping. At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by theoperator. If made by a person other than the examiner, the examiner shall verify the record by initials and date by or at

the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(i) Retention period. Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.