

FEDERAL MINE SAFETY AND HEALTH  
REVIEW COMMISSION

WADE SAND & GRAVEL CO., INC.            )  
  )  
  Petitioner,        )       SE 2013-120-M  
  )       A.C. No. 01-00052-306167  
  v.                    )  
  )  
SECRETARY OF LABOR,                    )  
MINE SAFETY AND HEALTH                )  
ADMINISTRATION (MSHA)                )  
  )  
  Respondent        )

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH  
Solicitor of Labor

HEIDI W. STRASSLER  
Associate Solicitor

W. CHRISTIAN SCHUMANN  
Counsel, Appellate Litigation

SARA L. JOHNSON  
Attorney

U.S. DEPARTMENT OF LABOR  
Office of the Solicitor  
Mine Safety and Health Division  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, Virginia 22209-2296  
202-693-9332 (phone)  
202-693-9361 (fax)  
johnson.sara.l@dol.gov (e-mail)

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION .....	1
ISSUES .....	2
STATUTORY AND REGULATORY BACKGROUND .....	3
STATEMENT OF FACTS .....	5
THE JUDGE'S DECISION .....	8
STANDARD OF REVIEW .....	10
ARGUMENT	
I.    SECTION 100.3(c) IS AMBIGUOUS WITH REGARD TO THE DATE MSHA WILL USE WHEN CALCULATING THE HISTORY OF PREVIOUS VIOLATIONS .....	11
A.    Section 100.3(c)'s Text Is Ambiguous .....	11
B.    Section 100.3(c)'s Regulatory History Is Likewise Inconclusive and Therefore Underscores the Regulation's Ambiguity .....	14
II.   THE SECRETARY'S INTERPRETATION OF THE REGULATION IS PERMISSIBLE AND ENTITLED TO CONTROLLING DEFERENCE .....	16
A.    The Secretary's Interpretation Is Not Only Permissible, It is Logical and Consistent with the Purpose of Civil Penalties Under the Mine Act .....	16
B.    The Interpretation Reflects the Agency's Fair and Considered Judgment .....	18
III.  MSHA'S PERMISSIBLE INTERPRETATION OF SECTION 100.3(c) WAS NOT REQUIRED TO GO THROUGH NOTICE-AND- COMMENT RULEMAKING .....	19
CONCLUSION .....	22

## INTRODUCTION

This case involves a routine penalty proposal for a single guarding violation that the Mine Safety and Health Administration ("MSHA") made in accordance with 30 C.F.R. § 100.3's regular assessment penalty formula. On appeal, Wade Sand & Gravel Company, Inc. ("WSG") does not dispute the occurrence of the violation, MSHA's application of five of the six statutory civil penalty criteria, or the administrative law judge's de novo penalty assessment. WSG argues only that MSHA's penalty proposal itself was improper because MSHA's interpretation of 30 C.F.R. § 100.3(c) disregards the regulation's plain language.

Section 100.3(c) implements the "history of previous violations" civil penalty criterion found in Section 110(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). It provides that an operator's history of violations is based on the violations "in a preceding 15-month period":

History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history . . . .

30 C.F.R. § 100.3. The Secretary interprets Section 100.3(c)'s phrase "violations . . . in a preceding 15-month period" to permit MSHA to count toward an operator's history of violations

all violations that have become final orders of the Commission within the preceding 15 months. WSG contends that the regulation permits MSHA to count only those violations that both occurred and became final orders of the Commission within the preceding 15 months.

The administrative law judge ruled in the Secretary's favor on cross-motions for summary decision. The judge concluded that Section 100.3(c) is ambiguous with regard to the operative date for counting previous violations and that the Secretary's interpretation of Section 100.3(c) is reasonable and entitled to controlling deference. Exercising de novo authority, the judge then assessed MSHA's proposed penalty of \$ 1,026. In denying WSG's motion, the judge also rejected the operator's argument that the Secretary violated the Administrative Procedure Act's notice-and-comment rulemaking requirements. The Commission should affirm.

#### ISSUES

Whether the judge correctly concluded that MSHA properly calculated the proposed penalty for WSG's guarding violation because:

- 30 C.F.R. § 100.3(c) is ambiguous with regard to which date the agency will use when identifying which previous violations are included in an operator's 15-month history of violations: the date the MSHA inspector observed and

cited the operator's condition or practice as an alleged violation under the Act, or the date MSHA's penalty assessment became a final order of the Commission;

- the Commission owes deference to the Secretary's permissible decision to use the final order date; and
- the Secretary was not required to go through notice-and-comment rulemaking to adopt his interpretation of 30 C.F.R. § 100.3(c).

#### STATUTORY AND REGULATORY BACKGROUND

Under existing regulations and precedent, the Secretary proposes a penalty under Section 110(a) of the Mine Act, and the Commission, on a de novo basis, assesses a penalty under Section 110(i). 30 C.F.R. § 100.1; Sellersburg Stone Co., 5 FMSHRC 287, 292 (1982), aff'd, 736 F.2d 1147 (7th Cir. 1984). The Mine Act identifies six statutory criteria that the Secretary and the Commission must consider when proposing and assessing civil penalties:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. §§ 815(b)(1)(B), 820(i).

MSHA's civil penalty proposals are governed by regulations codified at 30 C.F.R. Part 100. Section 100.3(c) establishes MSHA's methodology for evaluating the degree to which an operator's "history of previous violations" should lead to a higher penalty. The regulation addresses (1) what length of time the Secretary should consider when evaluating an operator's history; (2) whether the Secretary should consider contested citations as part of an operator's history prior to resolution of those citations before the Commission; and (3) the relative importance of an operator's general history of violations versus an operator's history of violating the same standard. See 30 C.F.R. § 100.3(c).

The existing Section 100.3(c) was published as a Final Rule on March 22, 2007, and was effective as of April 23, 2007. Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 (Mar. 22, 2007) ("2007 Final Rule"). The 2007 version of Section 100.3(c) reflected two substantive changes to the rule that are relevant to this dispute: MSHA reduced the relevant time period from 24 months to 15 months, and MSHA inserted the phrase "or have become final orders of the Commission" into the second sentence of the regulation. Id.

Before 2007, MSHA used the violation occurrence date when calculating an operator's history of previous violations. When

implementing Part 100 as revised, MSHA interpreted the new Section 100.3(c) to permit the agency to use the final order date as the operative date instead. MSHA announced its new interpretation in the preamble to the 2007 Final Rule, implemented the interpretation through MSHA's civil penalty assessment procedures, published the interpretation on MSHA's website, and incorporated the interpretation into MSHA's Program Policy Manual. Gov't Exs. B, C, D.

#### STATEMENT OF FACTS

WSG mines, crushes, and sells stone in Birmingham, Alabama. WSG PDR at 2. On September 24, 2012, MSHA Inspector Charles Gortney issued Citation No. 8549940 to WSG for failure to guard moving machine parts on a welding machine in violation of 30 C.F.R. § 56.14107. Gov't Ex. A. The citation alleged that the side guard panel on the welder was missing, exposing the engine cooling fan and other moving parts. Id.

On November 26, 2012, MSHA sent WSG notice of a proposed penalty of \$ 1,026.00. WSG PDR Appendix A-1.<sup>1</sup> The penalty proposal reflected MSHA's evaluation of the alleged violation in light of the six statutory penalty criteria. See id. With

---

<sup>1</sup> For the Commission's convenience, the Secretary refers to the page numbering of the appendices attached to WSG's bound PDR/opening brief. The Secretary only relies, however, on those documents that were also submitted by one of the parties to the administrative law judge. See 30 U.S.C. § 823(d)(2)(C) (limiting materials to be considered by the Commission upon appellate review).

regard to history of previous violations - the only criterion at issue here - MSHA determined that WSG's history of violations per inspection day warranted 25 out of a possible 25 penalty points, and that WSG's history of repeat violations per inspection day warranted 17 out of a possible 20 penalty points. Id.; 30 C.F.R. § 100.3(c) (Tables VI and VIII).

- Violations per inspection day: WSG's history of violations as identified by MSHA's Mine Data Retrieval System included 67 prior violations over 23 inspection days, for a total of 2.91 violations per inspection day. WSG Appendix A-1, A-2. MSHA assesses the maximum of 25 penalty points for any number over 2.1 violations per inspection day. 30 C.F.R. § 100.3(c) (Table VI).
- Repeat violations per inspection day: WSG's history of violations as identified by MSHA's Mine Data Retrieval System included nine violations of the same standard over the same 23 inspection days, for a total number of .39 repeat violations per inspection day. WSG PDR Appendix A-1, A-2. MSHA assesses 17 (out of a possible 20) penalty points for repeat violations per inspection day over 0.3 up to 0.4. 30 C.F.R. § 100.3(c) (Table VIII).

MSHA therefore assigned WSG a total of 42 penalty points for the history of previous violations criterion.

WSG contested MSHA's penalty proposal, and the Secretary filed a petition for assessment of civil penalty. Dec. at 1. Soon thereafter, WSG moved for summary decision. Id. WSG conceded the occurrence of the violation and MSHA's application of five of the six statutory penalty criteria. Dec. at 2. WSG's only objection to the proposed penalty was that MSHA had miscalculated its history of previous violations by including citations that were issued prior to June 24, 2011, but that became final orders of the Commission between June 24, 2011, and September 23, 2012. WSG Mot. for Summ. Dec. at 4-5, 12. According to WSG, 62 of the 67 violations and 8 of the 9 repeat violations should not have been included in its history because the occurrence date of those violations predated the 15-month time period identified in 30 C.F.R. § 100.3(c). Id.

At all times since the effective date of the 2007 rule, MSHA has used the final order date to calculate operators' history of previous violations. See Dec. at 5. In other words, when proposing civil penalties, MSHA looks at validated violations - i.e., violations that have become final orders of the Commission in the last 15 months - regardless of when the violation occurred or when MSHA issued the citation. Thus, as WSG contended, MSHA in this case identified 62 citations - eight of which alleged repeat violations of 30 C.F.R. § 56.14107 - that became final orders in the 15 months preceding the

September 24, 2012, citation, but were issued before that 15-month period. See WSG PDR Appendix A-2.

The Secretary opposed WSG's motion for summary decision and cross-moved for summary decision, arguing that MSHA's penalty proposal was proper because MSHA had relied on a permissible interpretation of the ambiguous regulation when identifying the relevant violations as part of WSG's history. Dec. at 3. The Secretary urged the judge to assess a penalty of \$ 1,026 as MSHA had proposed. Id.

#### THE JUDGE'S DECISION

On April 1, 2013, the judge denied WSG's motion for summary decision, granted the Secretary's cross-motion for summary decision, and assessed a civil penalty of \$1,026. Dec. at 2, 8.

The judge first held that Section 100.3(c) is ambiguous with regard to the date MSHA should use when calculating a mine's 15-month history for purposes of the regulation. Dec. at 4-5. The judge agreed with the Secretary that Section 100.3(c) is ambiguous because the regulation permits two interpretations:

"(1) that assessed violations that have become final orders of the Commission will be included in determining an operator's history as of the date they become final; or (2) that such violations are only counted if they occurred, were cited as violations, and became final in the preceding 15-month period."

Id. at 5. The judge noted that ambiguity is inherent in the

regulation because the regulation "does not spell out what date MSHA should use when evaluating a mine's 15 month history." Id.

The judge next held that the Secretary's interpretation - that the final order date should be used when calculating the 15-month history - was reasonable and entitled to controlling deference, insofar as the interpretation applies to the Secretary's own penalty proposals. Dec. at 5-6. The judge concluded that the Secretary's interpretation was reasonable because: (1) the interpretation can "reasonably be gleaned from the language" of the regulation; (2) MSHA has consistently relied upon the interpretation since the promulgation of the 2007 rule; (3) the language of the preamble to the rule expressed MSHA's intent to use the final order date when calculating history; and (4) to accept WSG's interpretation would "lead to an absurd result" because it would allow an operator to "avoid all accountability" for its history. Id.

In denying WSG's motion for summary judgment and holding that the Secretary's penalty proposal was proper, the judge implicitly rejected WSG's argument that the Secretary should not have adopted his interpretation of Section 100.3 without going through notice-and-comment rulemaking. See Dec. at 6; WSG Mot. for Summ. Dec. at 5-6, 11.

Finally, the judge noted that "the Commission, not the Secretary is the final authority on the amount of penalty to be

assessed." Dec. at 6. Exercising the Commission's de novo authority to assess a civil penalty, the judge assessed MSHA's proposed penalty of \$ 1,026. Dec. at 8.

#### STANDARD OF REVIEW

The Commission gives de novo review to an administrative law judge's conclusions of law. Contractors Sand & Gravel, Inc., 20 FMSHRC 960, 966-67 (1998), aff'd, 199 F.3d 1335 (D.C. Cir. 2000). When a legal question turns on MSHA's construction of its own regulation, however, the Commission must apply the deferential standard of review required by Auer v. Robbins, 519 U.S. 452 (1997). If the regulation is unambiguous, the regulation's clear meaning is controlling. See Nolicheckey Sand Co., 22 FMSHRC 1057, 1060 (2000). On the other hand, if the regulation permits more than one meaning, the Commission must defer to MSHA's regulatory interpretation unless the interpretation is "plainly erroneous or inconsistent with the regulation." Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003). Under the statutory scheme of the Mine Act, the Commission owes deference to the Secretary's interpretation of a regulation even when the interpretation is presented in a litigation position before the Commission. Id. at 6.

The Commission reviews a judge's de novo civil penalty assessment for abuse of discretion. See Spartan Mining Co., 30 FMSHRC 699, 723, 2008 WL 4287784 (2008). That standard of

review is not relevant here, however, because WSG does not challenge the judge's penalty assessment - it only challenges the judge's legal conclusion that MSHA's proposed penalty was proper. See WSG PDR at 1-2; 29 C.F.R. § 2700.71(g) ("If a petition is granted, review shall be limited to the issues raised by the petition, unless the Commission directs review of additional issues pursuant to § 2700.71.").

#### ARGUMENT

#### I. SECTION 100.3(c) IS AMBIGUOUS WITH REGARD TO THE DATE MSHA WILL USE WHEN CALCULATING THE HISTORY OF PREVIOUS VIOLATIONS

A regulation is ambiguous when it is "open to alternative interpretations" or "is capable of being understood by reasonably well-informed persons in two or more different senses." Island Creek Coal Co., 20 FMSHRC 14, 19 (1998). When evaluating whether a regulation is ambiguous, the Commission looks at the regulation in the context of its history, purpose, and function. See, e.g., Wolf Run Mining Co., 32 FMSHRC 1669, 1680 (2010) ("[W]e ascertain the meaning of regulations not in isolation, but rather in the context in which those regulations appear.").

##### A. Section 100.3(c)'s Text Is Ambiguous

As noted, Section 100.3(c) states that "[a]n operator's history of previous violations is based on . . . the total number of violations . . . in a preceding 15-month period."

This statement is ambiguous because it does not specify the operative date that MSHA will use when counting previous violations: the date the MSHA inspector observed and cited the operator's condition or practice as an alleged violation under the Act, or the date MSHA's penalty assessment became a final order of the Commission.

Under the Mine Act's enforcement provisions, the progression of a "violation" begins with an MSHA's inspector's allegations and ends with a final order of the Commission. See 30 U.S.C. §§ 814, 815, 820, 823. Section 104(a) of the Act states that an inspector must issue a citation when he "believes that an operator has violated" the Mine Act or its standards. 30 U.S.C. § 814(a) (emphasis added). Similarly, Section 104(a) requires the inspector to describe with particularity the provision or standard "alleged to have been violated." Id. (emphasis added). The citation, based on such allegations and beliefs, may later be vacated by either the Secretary or the Commission. See 30 U.S.C. §§ 814(h), 815(d). Or, those allegations may be legally validated by a final Commission order when the operator does not timely contest the citation, see 30 U.S.C. § 815(a); the Commission approves a settlement agreement reached by the parties, see 30 U.S.C. 820(k); or the Commission adjudicates an operator's penalty contest, see 30 U.S.C. § 823(d).

Section 100.3(c)'s interpretive difficulty arises because the phrase "violations . . . in a preceding 15-month period" uses the noun "violations" and the preposition "in" without any intervening word specifying the relevant moment in a violation's progression from allegation to final order. For example, the regulation could have specified "violations [occurring] in," "violations [cited] in," "violations [contested] in," or "violations [becoming final orders] in" a preceding 15-month period - but it does not. Thus, Section 100.3(c)'s first sentence permits multiple meanings. On the one hand, a violation could be "in" the preceding 15-month period because a condition or practice violated the Mine Act's standards and was cited by an MSHA inspector within the preceding 15 months. On the other hand, a violation could be "in" the preceding 15-month period because the allegedly violative practice or condition was legally validated as a violation when the operator declined to contest the penalty within 30 days of receiving the penalty proposal, or the Commission affirmed that the condition or practice in question did violate the law.

Section 100.3(c)'s second sentence does not resolve the ambiguity: it, too, can be interpreted in at least two ways. It can be read to suggest, as WSG advocates, that MSHA should start with the universe of violations identified by the occurrence date, and then eliminate from consideration any citation that

has not been legally validated by a final order of the Commission. See WSG PDR at 12. Alternatively, because the sentence states that MSHA will only consider final Commission orders (including paid violations, adjudicated violations, or violations that have otherwise become final), it can be read to suggest that MSHA should use the final order date, rather than the occurrence date, when compiling the initial list of all violations falling "in" the 15-month time period.

The plain text of Section 100.3(c) permits multiple interpretations: it forecloses neither WSG's interpretation nor the Secretary's.

B. Section 100.3(c)'s Regulatory History is Likewise Inconclusive and Therefore Underscores the Regulation's Ambiguity

The regulatory history does not resolve the ambiguity inherent in Section 100.3(c)'s text. Indeed, the inconclusive regulatory history contains conflicting clues that support the conclusion that the regulation is ambiguous. Cf. Citizens Coal Council v. Norton, 330 F.3d 478, 484 (D.C. Cir. 2003) ("Taken together, as is so often the case, legislative history on which both parties rely is at best inconclusive as to either interpretation. . . . This inconclusiveness underscores our conclusion that the statute is ambiguous on the question [at issue].").

As the judge noted, the preamble to the 2007 Final Rule strongly supports the Secretary's interpretation of Section 100.3(c). That preamble, in addressing some commenters' concerns, explained that MSHA intended to count contested penalties in an operator's history of violations as of the date they become final. MSHA explained:

Several commenters expressed concern with the Agency's proposal to use violations that have become final orders of the Commission, stating that this will encourage operators to increase penalty contests to avoid counting the violation in an operator's history. MSHA included the insertion of the phrase "final orders of the Commission" to clarify the Agency's practice, in existence since 1982, to use only violations that have become final orders of the Commission in determining an operator's history of violations. This practice will continue to provide a measure of fairness by not including in an operator's history those violations that are in the adjudicatory process which may ultimately be dismissed or vacated. As each penalty contest becomes final, however, the violation will be included in an operator's history as of the date it becomes final.

72 Fed. Reg. at 13,604 (emphasis added).

In contrast, other aspects of the regulatory history can be interpreted to bolster WSG's interpretation. As WSG notes, prior to the 2007 Final Rule, MSHA used the occurrence date rather than the final order date when calculating an operator's history of violations. MSHA did not announce that it intended to change its interpretation of Section 100.3(c) in either the 2006 Proposed Rule or the hearings held to discuss the Proposed Rule. See Criteria and Procedures for Proposed Assessment of

Civil Penalties, 71 Fed. Reg. 53,054 (Sept. 8, 2006) ("2006 Proposed Rule"); WSG PDR at 16-18. Until MSHA included the preamble statement about the final order date in the 2007 Final Rule, one could have interpreted MSHA's silence to mean that MSHA planned to interpret the revised Section 100.3(c) in the same manner as it had interpreted the previous versions of Section 100.3(c).

The competing indications within the regulatory history do not conclusively clarify Section 100.3(c)'s ambiguous text; they reinforce the conclusion that the provision is indeed ambiguous. In other words, the regulatory history as a whole is consistent with the Secretary's position here: that Section 100.3(c) is ambiguous because it permits at least two interpretations.

II. THE SECRETARY'S INTERPRETATION OF THE REGULATION IS PERMISSIBLE AND ENTITLED TO CONTROLLING DEFERENCE

A. The Secretary's Interpretation Is Not Only Permissible, It is Logical and Consistent with the Purpose of Civil Penalties Under the Mine Act

The Commission must give controlling Auer deference to the Secretary's interpretation of 100.3(c)'s phrase "violations . . . in a preceding 15-month period" because that interpretation is not "plainly erroneous or inconsistent with the regulation." Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2261 (2011); see also Nolichuckey Sand Co., 22 FMSHRC 1057, 1060 (2000).

The Secretary's interpretation is not only permissible under the deferential Auer standard, it is logical because it ensures that all violations validated by final Commission orders will count at some point in time toward an operator's history of violations. Under WSG's interpretation of Section 100.3, in contrast, an operator could evade ever accumulating a violation history simply by contesting citations: for the first 15 months, a citation's contest status would justify the exclusion of the citation from an operator's history; thereafter, the time elapsed since MSHA issued the citation would prevent it from counting toward the operator's history. Although uncontested violations may become final within three months, see 72 Fed. Reg. at 13,604, contested violations typically take more than fifteen months to resolve, see Gov't Ex. B (demonstrating that in 2009, 89 percent of contested citations would never have been counted toward the operator's history of violations under WSG's interpretation because they took more than fifteen months to become final orders of the Commission). To accept WSG's interpretation would therefore unacceptably diminish the effect and purpose of the regulation. Cf. Sec'y of Labor v. Twentymile Coal Co., 411 F.3d 256, 261 (D.C. Cir. 2005) (rejecting the operator's interpretation of a regulation when that interpretation would render the regulation "a nullity" and "meaningless").

Indeed, MSHA's interpretation is arguably compelled by the D.C. Circuit's analysis of the legislative purpose and history in Coal Employment Project v. Dole, 889 F.2d 1127, 1133 (D.C. Cir. 1989). In that case, the D.C. Circuit rejected part of an earlier version of MSHA's civil penalty regulations because the regulatory provision at issue, the single penalty provision, excluded some violations from the agency's consideration of an operator's history of violations. Id. at 1136-39. In particular, the regulations resulted in MSHA's exclusion of previous single penalty assessments and certain violations that were not designated as "significant and substantial" ("S&S"). Id. The court held that the Mine Act's history of violations criterion and the associated legislative history required MSHA to consider all violations, including single penalty violations and non-S&S violations. See id. at 1138. It explained that Congress "was intent on assuring that the civil penalties provide an effective deterrent against offenders with records of past violations" and that "the civil penalty regulations must not run contrary to that intent." Id. at 1133. The same logic applies here: excluding contested violations from ever being considered as part of an operator's history of violations simply because an operator chose to file a notice of contest would contravene Congress's intent that an operator should be

penalized in accordance with the seriousness of its accumulated violation history.

B. The Interpretation Reflects the Agency's Fair and Considered Judgment

The Commission owes deference to the Secretary's interpretation of an ambiguous regulation even when the interpretation is presented in a litigation position before the Commission. See Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003). Here the Secretary's interpretation is more than just a litigating position, because MSHA announced the interpretation in the preamble to the 2007 Final Rule, implemented the interpretation through MSHA's civil penalty assessment procedures, published the interpretation on MSHA's website, and incorporated the interpretation into MSHA's Program Policy Manual. The interpretation is therefore far from a "post-hoc rationalization," but rather "reflect[s] the agency's fair and considered judgment on the matter in question."

Christopher v. SmithKline Beecham Corp., 567 U.S. ---, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks and citations omitted).

III. MSHA'S PERMISSIBLE INTERPRETATION OF SECTION 100.3(c) WAS NOT REQUIRED TO GO THROUGH NOTICE-AND-COMMENT RULEMAKING

WSG's petition for discretionary review presents only one argument to support its claim that MSHA was required to go through notice-and-comment rulemaking: that MSHA's

interpretation is impermissible under the plain meaning of Section 100.3(c), interpreted in light of the regulatory history. See WSG PDR at 24-25. WSG's argument that MSHA violated the APA's notice-and-comment rulemaking requirements therefore rises and falls with the Commission's decisions on the first two issues: namely, whether Section 100.3(c) is ambiguous, and whether deference is owed to the Secretary's interpretation. If the Commission sustains the Secretary's interpretation, there can be no APA violation under WSG's own theory. On the other hand, if the Commission invalidates the Secretary's interpretation, that holding will also resolve the notice-and-comment issue, and the Secretary will have to proceed through rulemaking if he wishes the regulation to mean what he interpreted it to mean when implementing the 2007 rule.

The foregoing should be the end of the matter, because WSG argues only that MSHA's interpretation is impermissible altogether; it does not argue that MSHA substantially changed its prior definitive interpretation. See WSG PDR at 23 ("[I]t is not necessary to inquire as to whether WSG 'substantially and justifiably' relied upon the plain meaning of the regulation; rather, the question is whether the Secretary applied her own regulation properly."); see also WSG PDR at 24 ("The analysis set forth in Exportal governs the instant litigation."). WSG has therefore waived any argument that Alaska Prof'l Hunters

Ass'n, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999), and Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997) (collectively "Alaska Hunters") required notice-and-comment rulemaking even if the Commission sustains the Secretary's interpretation of Section 100.3(c). See Fed. R. App. P. 28(a)(9) (argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); NetworkIP, LLC v. F.C.C., 548 F.3d 116, 128 n.10 (D.C. Cir. 2008) (arguments not made in opening brief subject to waiver).

CONCLUSION

For all of the foregoing reasons, the Commission should affirm the administrative law judge's decision.

Respectfully submitted,

M. PATRICIA SMITH  
Solicitor of Labor

HEIDI W. STRASSLER  
Associate Solicitor

W. CHRISTIAN SCHUMANN  
Counsel for Appellate Litigation



SARA L. JOHNSON  
Attorney

Attorneys for the Secretary  
U.S. DEPARTMENT OF LABOR  
Office of the Solicitor  
Mine Safety and Health Division  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, Virginia 22209-2296  
202-693-9332 (phone)  
202-693-9361 (fax)  
johnson.sara.l@dol.gov (e-mail)

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, a copy of the foregoing brief for the Secretary of Labor was served by facsimile transmission and first-class U.S. mail on:

Todd M. Higey, Esq.  
Richardson Clement PC  
200 Cahaba Park Circle, Suite 125  
Birmingham, Alabama 35242-5091  
Facsimile: 205-572-4199



---