

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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2001 AUG -2 P 12:31

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: BOARD OF MINER TRAINING, EDUCATION
AND CERTIFICATION TITLE NUMBER: TITLE 48

RULE TYPE: LEGISLATIVE CITE AUTHORITY: 22A-7-8

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: SERIES 7

TITLE OF RULE BEING AMENDED: RULES AND REGULATIONS GOVERNING THE STANDARDS
FOR CERTIFICATION OF COAL MINE ELECTRICIANS

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

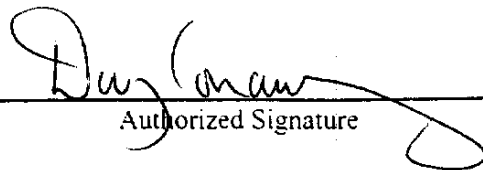
IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON SEPTEMBER 4, 01 AT 4:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

1615 WASHINGTON STREET EAST

CHARLESTON, WV 25311-2126

ATTN: 48 CSR 7 COMMENTS

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



STATE OF WEST VIRGINIA
BOARD OF MINER TRAINING, EDUCATION, AND CERTIFICATION
1615 WASHINGTON ST. EAST
CHARLESTON, WEST VIRGINIA 25311

In a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the Federal Mine Safety and Health Review Commission rendered a decision which invalidated a long-standing interpretation of the Federal Mine Safety and Health Administration (MSHA) with respect to coal mine electrician certification in which low/medium-voltage qualifications for electricians were segregated from high-voltage qualifications through the utilization of a bifurcated testing program that differentiated between the voltage qualifications. The Commission's decision immediately prohibited MSHA and the West Virginia Office of Miners' Health, Safety and Training from any further testing and certifying of individuals as "low/medium-voltage" electricians, since a person is either considered qualified to perform electrical work or not, immaterial of voltage. Consequently, all coal mine electricians in West Virginia who were certified as "low/medium-voltage" only prior to the Commission's written decision (June 30, 2000) must attain high-voltage qualification by December 31, 2001, to be considered certified electricians by MSHA. This emergency rule, which was passed unanimously by the Board of Miner Training, Education and Certification on July 27, 2001, revises the existing Coal Mine Electrical Certification/Qualification Program agreement between West Virginia and MSHA and provides a means for the affected individuals to transition to the appropriate qualification in a timely manner.

A copy of the Commission's decision is included in this filing.

FILED

TITLE 48
 LEGISLATIVE RULE
 BOARD OF MINER TRAINING, EDUCATION, AND CERTIFICATION -2 P 12: 31

SERIES 7
 OFFICE WEST VIRGINIA
 RULES AND REGULATIONS GOVERNING THE STANDARDS SECRETARY OF STATE
 FOR CERTIFICATION OF COAL MINE ELECTRICIANS

§48-7-1. General.

1.1. Scope. -- This legislative rule establishes standards for certification of persons performing electrical work in coal mines.

1.2. Authority. -- W. Va. Code ~~§22-1-15~~ 22A-7-8.

1.3. Filing Date. -- ~~May 1, 1987~~.

1.4. Effective Date. -- ~~May 1, 1987~~.

§48-7-2. Definitions.

2.1. Electrical work -- The term "electrical work" ~~shall mean~~ means work consisting primarily of electrical construction, installation, testing, inspection, maintenance and repair tasks on electrical coal mining equipment, apparatus, circuits, and/or distribution circuits used in or around a coal mine.

(a) Listed below are examples of work that are required to be performed by a certified electrician or apprentice electrician, under the supervision required by Section 4.1(d) of these rules:

- (1) Locating faults in cables;
- (2) Installation of couplers on the end of cables;
- (3) Repair of electric components of electrically powered portable, mobile or stationary equipment;
- (4) Installation of electric wiring (excluding mine trolley wire);
- (5) Electrical maintenance of permissible equipment;
- (6) Any type of work performed inside transformers, power centers, rectifiers, switch boxes, switch houses, panels and other enclosures of electrical equipment or conductors;
- (7) Electrical troubleshooting and testing.

(b) Listed below are examples of work ~~that is~~ which are not required to be performed by a certified electrician or apprentice electrician:

- (1) Operation of electric equipment;
- (2) Normal operation of control switches, switch boxes, or circuit breakers; ~~provided~~ Provided

That no energized parts or conductors are exposed;

- (3) Operation of cutout switches in trolley circuits;
- (4) Hanging or removing fuse nips on or from trolley wires;
- (5) Changing bits;
- (6) Lubrication;
- (7) Handling energized trailing cables;
- (8) Inserting low and medium-voltage cable couplers from receptacles;
- (9) Transportation of electric equipment and cables;
- (10) Mechanical repairs on electrically powered equipment: **Provided**, That no energized parts or conductors are exposed;
- (11) Installation and repair of equipment and circuits in which shock hazards do not exist (having a normal rating of 40 volts or less when energized): **Provided**, That such equipment is not required to be permissible;
- (12) Installation, repair and guarding of trolley feeder wires when deenergized;
- (13) ~~Reinsulate or tape~~ Reinsulating or taping cables when there are no conductors or bare wires showing ~~are exposed~~; and,
- (14) ~~Replae~~ Replacing blown fuses on trolley poles and nips.

2.2. Work Area -- The term "work area" means within five-hundred (500) feet in any direction of the area in a mine where electrical work is being performed.

2.3. Certified Electrician -- The term "certified electrician" means ~~an individual~~ any person who is :

(a) qualified as a mine electrician, and who has passed an examination administered by the Department of Energy Office of Miners' Health, Safety and Training and has satisfactorily completed a coal mine electrical training program approved by the Department of Energy; or, any person who

(b) has at least three (3) years of experience in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and who has satisfactorily completed a coal mine electrical training program approved by the Office of Miners' Health, Safety and Training; or

(c) any person who is qualified as a mine electrician in any state that recognizes certified electricians licensed in West Virginia.

2.4. Direct Supervision -- The term "direct supervision" means the supervision of an apprentice

electrician by a certified electrician in the work area where electrical work is being performed.

2.5. Immediate Supervision -- The term "immediate supervision" means the physical presence of a certified electrician with the apprentice electrician.

2.6. Certified Person -- The term "certified person" when used to designate the kind of person to whom the performance of duty in connection with the operation of a mine shall be assigned, means a person who is qualified under the provisions of the law to perform such duty. (Refer to W. Va. Code §~~22A-1A-1~~ 22A-1-2(d)(3)).

2.7. Qualified Person -- The term "qualified person" means a person who has completed an examination and is considered qualified on record by the ~~Department of Energy~~ Office of Miners' Health, Safety and Training. (Refer to W. Va. Code §~~22A-1A-1~~ 22A-1-2(d)(6)).

2.8. Approved -- The term "approved" means in strict compliance with mining law, or in the absence of law, accepted by a recognized standardizing body or organization whose approval is generally recognized as authoritative on the subject. (Refer to W. Va. Code §~~22A-1A-1~~ 22A-1-2(3)).

2.9. Apprentice Electrician -- The term "apprentice electrician" means an individual who is the holder of an apprentice electrician's card, and is in training to perform maintenance work on electrical circuits or electrically operated equipment.

2.10. Certification Examinations -- The term "certification examinations" means the examinations in specific categories within these regulations which have been approved by the Board of Miner Training, Education, and Certification, and which are administered by the ~~Department of Energy~~ Office of Miners' Health, Safety and Training.

§48-7-3. Qualifications for Classifications of Electrical Certification.

3.1. Qualifications Classifications of Certification -- After the effective date of these rules and regulations, electrical certification shall be in the following categories issued only for low, medium and high voltage.

(1) ~~Electrician (Low, medium and high voltage)~~

(2) ~~Electrician (Low and medium voltage)~~

Apprentice electricians may become certified electricians ~~in any or all of the above categories~~ by the methods of certification as provided in Section 4 of these rules ~~and regulations.~~

§48-7-4. Qualifications.

4.1. Apprentice Electrician. A person becoming an apprentice electrician ~~to be trained to perform work on electrical circuits or electrically operated equipment~~ shall be issued an apprentice electrician's card by the Office of Miners' Health, Safety and Training upon verification by the employer that the individual person has attended an eight (8) hour classroom training course in the hazards of electricity, and is to be trained in accordance with these rules ~~and regulations~~ for the next twelve (12) months.

(a) During the twelve (12) month training period the apprentice electrician shall complete an approved forty (40) hour classroom training program ~~concerning the subjects of~~ comprised of the following subjects:

- (1) State and Federal mining laws which apply to electricity;
- (2) Permissibility;
- (3) AC and DC theory;
- (4) Basic electricity;
- (5) Schematic reading;
- (6) Gas detection and fire prevention; and,
- (7) National Electric Code.

(b) Twenty percent (20%) of the twelve (12) month training shall be ~~directly~~ involved directly with electrical work.

(c) All ~~types of the apprentice electrician's~~ training experience shall be logged and kept by the operator ~~specifically for apprentice experience~~ with the operator and apprentice both validating the experience by signatures. Records verifying an apprentice's electrical experience shall be presented prior to testing for electrical certification.

(d) All electrical work performed by an apprentice electrician in the work area shall be examined by a certified electrician prior to any work being performed, and again prior to the circuits or equipment being

energized and returned to service. Testing and/or troubleshooting electrical problems on energized electrical circuits may be performed by an apprentice electrician under the immediate supervision of a certified electrician.

4.2. Electrician (Low, medium and high voltage). A person may become certified as a low, medium, and high voltage electrician when ~~such~~ the person has at least twelve (12) months of experience in performing electrical work as an apprentice electrician, has worked with low, medium, and high voltage, (at least twenty (20%) percent of the required electrical experience during the twelve (12) month training program shall be directly related to high voltage) and has satisfactorily passed a the electrical certification examination. The low, medium and high voltage certified electrician is permitted to perform all types of electrical work at any mining operation.

4.3. Electrician (Low and medium voltage). ~~A person may become certified as a low, medium, and high voltage electrician when such person has at least twelve (12) months experience in performing electrical work as an apprentice electrician, has worked with low, medium, and high voltage, (at least 20% of the required electrical experience during the twelve (12) month training program shall be directly related to high voltage) and has satisfactorily passed a certification examination.~~

~~(NOTE: The low, medium, and high voltage certified electrician is permitted to perform all types of electrical work at any mining operation).~~

On and after the first day of July, two-thousand one, the Office of Miners' Health, Safety and Training will no longer issue electrical certifications for the "low and, medium voltage" classification. Persons holding certification as "low and medium voltage" electricians must upgrade their electrician certification to "low, medium and high voltage" by the thirty-first day of December, two thousand one (December 31, 2001), either by the method provided in subsection four, section four (4.4) of this series, or by completing a high-voltage training program prescribed by the Board of Miner Training, Education and Certification and approved by the Director of the Office of Miners' Health, Safety and Training.

4.4. Low and Medium Voltage Certification to Low, Medium, and High Voltage Electrician Certification. A person certified as a low and medium voltage electrician shall have four (4) months of experience, at least ten (10) percent of which must be in performing high voltage work, and shall satisfactorily pass that portion of the "dangers of high voltage" portion of the electrician certification examination with a score of at least eighty (80%) percent. ~~period of time the low and medium voltage electrician is working on high voltage, he shall work under the direct supervision of a certified low, medium, and high voltage electrician. The high voltage electrical work performed by the low and medium voltage electrician shall be examined by a certified low, medium and high voltage electrician before the circuits or equipment are energized and returned to service. The high voltage electrical work performed by a certified low and medium voltage electrician shall be directly supervised by a certified low, medium and high voltage electrician who shall inspect the high voltage electrical work prior to energizing and returning the high voltage circuits or equipment to service.~~

The high voltage electrical experience of the low and medium voltage electrician shall be logged by the operator in a record book specifically for that purpose during the four (4) month training period.

4.5. Degree in Electrical Engineering. A person who has a Bachelor's Degree or Associate Degree in electrical engineering from an accredited college or university, and has at least six (6) months of experience in performing electrical work under the supervision of a certified electrician may be permitted to become certified as an electrician ~~(low, medium, and high voltage, or low and medium voltage)~~ when such the person has satisfactorily passed a the electrician certification examined for such category examination.

4.6. Electrical Training Programs Already in Effect. All person in training to become certified

electricians prior to the effective date of these rules and regulations, shall be allowed to continue training and become certified as an electrician after the completion of one years experience in performing electrical work under the supervision of a certified electrician and after successful passage (at least eighty (80%) percent score) of the certification examination.

Any person starting training to become a certified electrician on or after the effective date of these rules ~~and regulations~~, shall comply with the applicable provisions of these rules ~~and regulations~~.

4.7. Prior Certification. All valid electrical certifications issued by the Department of Mines or the Department of Energy prior to the effective date of these regulations shall remain valid.

Any person holding a prior certification and wishing to be certified in another category must:

(1) document his experience;

(2) successfully pass any other portion of the electrical certification examination not previously taken for ~~low and medium voltage~~ or low, medium, and high voltage as required in Section 5 of these regulations; rules; and,

(3) successfully pass the hands-on (skill) portion of the electrical certification examination.

~~(EXAMPLE: Prep plant to low, medium, and high voltage).~~

§48-7-5. Examinations.

~~5.1. Electrical examinations for Low, Medium Voltage. Examinations for low and medium voltage electrician certifications shall consist of seven parts:~~

~~(a) Direct current theory and application;~~

~~(b) Alternating current theory and application;~~

~~(c) Electric equipment and circuits;~~

~~(d) Permissibility of electric equipment;~~

~~(e) Legal requirements — State and Federal law;~~

~~(f) National Electrical Code; and~~

~~(g) Hands-on (skill).~~

~~In order to pass the electrical certification examination, an applicant must score at least eighty percent (80%) on parts (a) through (f), and must pass part (g). The hands-on (skill) part (g), is graded on a pass/fail basis only.~~

~~An applicant who fails to pass the examination must reapply to take the examination within thirty (30) days after notification of a failing score. An applicant who fails the examination two (2) times, must receive at least forty (40) hours of additional classroom training, as provided in Section 4.1(a) of these regulations, prior to retaking the examination. An applicant who fails the examination the third time must repeat the~~

~~twelve (12) month apprentice program as required in Section 4.1 of these regulations.~~

~~5.2~~ 5.1. Electrician examination for low, medium, and high voltage. Examinations for low, medium, and high voltage electrician certification shall consist of eight (8) parts:

- (a) Direct current theory and application;
- (b) Alternating current theory and application;
- (c) Electric equipment and circuits;
- (d) Permissibility of electric equipment;
- (e) Legal requirements -- State and Federal laws;
- (f) National Electric Code;
- (g) Dangers of high voltage; and
- (h) Hands-on (skill).

In order to pass the electrical certification examination, the applicant must score at least eighty percent (80%) in parts (a) through (g), and must pass part (h). The hands-on (skill) part (h), is graded on a pass/fail basis ~~only~~.

An applicant who fails to pass the examination must reapply to take the examination within thirty (30) days after notification of a failing score. An applicant who fails the examination two (2) times must receive at least forty (40) hours of additional classroom training as provided in Section 4.1(a) of these ~~regulations~~ rules prior to retaking the examination. An applicant who fails the examination the third time must repeat the twelve (12) month apprentice program as required in Section 4.1 of these ~~regulations~~ rules.

§48-7-6. Certification Procedures.

6.1. Application for certification. Prior to taking an examination for certification ~~in any of the categories listed in Section 3.1 of these regulations~~, an individual must submit an application to the Department of Energy Office of Miners' Health, Safety & Training to take ~~such the~~ the examination ~~in the form provided in Appendix A of these regulations~~. ~~Such~~ The application must be submitted to the Department of Energy Office of Miners' Health, Safety and Training within thirty (30) days of completion of the apprentice training program.

Upon receipt of an application for examination, the ~~Department of Energy~~ Office of Miners' Health, Safety and Training shall provide for the applicant to be examined at the next available examination which is at least fifteen days from receipt of the application, and shall inform the applicant of the time and place for examination. Within fifteen days after the completion of the examination, the ~~Department of Energy~~ Office of Miners' Health, Safety and Training shall inform the applicant of ~~this~~ his or her score ~~upon the~~ examination.

6.2. Certification. Upon determination that an applicant for certification has satisfactorily passed ~~an~~ the examination for certification ~~in any category listed in Section 3.1 of these regulations~~, and has presented proper documented electrical experience, the ~~Department of Energy~~ Office of Miners' Health, Safety and Training shall promptly issue electrical certification to ~~such individual a certificate indicating that he has~~

been certified in the particular category for which he has applied the applicant.

6.3. Effect of certification. Except where otherwise provided in these ~~regulations~~ rules, no person shall may perform electrical work:

- (a) until such person has become a certified electrician to perform such work; or,
- (b) unless such work is performed by an apprentice electrician under the direct supervision or immediate supervision of a certified electrician; or,
- (c) unless such work is performed on circuits of forty (40) volts or less.

This provision does not prohibit a person already being trained prior to the effective date of these rules and ~~regulations~~, to continue to perform electrical work under the direct supervision of a certified electrician until he has met the experience requirements. ~~(See Section 4.)~~

§48-7-7. Exceptions.

7.1. Mining equipment manufacturer's service representatives are not required to be certified as mine electricians or apprentice electricians in order to perform work on equipment which is manufactured or serviced by the company they are representing. Such individuals are considered to be persons trained to perform electrical work and to maintain electrical equipment. When work is performed by manufacturer's service representatives who are not a certified electrician or an apprentice electrician, such work shall be performed under the direct supervision of a certified electrician and the completed work is to be examined by a certified electrician before the machine or equipment is placed in service.

7.2. Certification from other States. Any person holding a mine electrician certification issued by any other state may act in the capacity of electrician until the next available electrical certification examination is held by the Department of Energy, but for a period not to exceed a maximum of ninety (90) days.

§48-7-8. Criteria for Apprentice Electrical Training Program.

8.1. Apprentice electrician card. An apprentice electrician card shall be issued by the ~~West Virginia Department of Energy~~ Office of Miners' Health, Safety and Training when applied for by the miner, with a statement from the mine operator stating that the ~~miner~~ applicant will be in an approved electrical training program for the next twelve (12) months. The apprentice electrician card will be issued for twelve (12) months and may be extended for valid reasons by the ~~Department of Energy~~ Office of Miners' Health, Safety and Training.

8.2. Approved electrical training program. A minimum of forty (40) hours of classroom training is required, and shall cover the following subjects:

- (a) State and Federal laws which apply to electricity;
- (b) Permissibility;
- (c) AC and DC theory;
- (d) Basic electricity;
- (e) Schematic reading;

(f) Gas detection.

The twelve (12) month training program will ~~shall~~ include electrical and mechanically related work, with twenty percent (20%) of the twelve (12) months being ~~directly involved directly~~ with electrical work. ~~(NOTE: Twelve (12) month training is at least eighty percent (80%) of all regularly scheduled days in twelve (12) months.)~~ The apprentice must attend at least eighty (80%) percent of all regularly scheduled days during the twelve (12) month training program.

8.3. Failure to complete apprentice training. If for valid reasons accepted by the ~~Commissioner~~ Director, an apprentice electrician is unable to complete the twelve (12) month apprentice training program ~~with within~~ twelve (12) consecutive months, the ~~Commissioner~~ Director may permit ~~such~~ the individual a time extension ~~of such apprentice care to complete the required training:~~ Provided, however, that the ~~such~~ time period extension ~~shall~~ may not exceed two (2) years.

§48-7-9. Annual Training.

9.1. Electrical ~~retraining~~ refresher training. In order to maintain electrical certification, an individual must complete ~~an annual~~ annually an approved eight (8) hour refresher course. The course ~~will~~ shall include but not be limited to permissibility, state and federal law, safety in job performance and training on equipment applicable to the card holders' work. ~~A minimum of eight (8) hours of refresher training will be required regardless of the number of cards held.~~

9.2. Failure to maintain electrical certification. An individual who fails to attend the required annual refresher training ~~annually will be~~ is required to retake the electrical certification examination and the hands-on (skill) portion of the examination. Upon scoring at least eighty percent (80%) on each subject of the initial examination, and successful passage of the hands-on portion of the examination, the individual will be issued a new electrical certification card.

This provision will not apply to an individual who was unable to take the annual electrical refresher training for valid reasons accepted by the ~~Commissioner~~ Director. The individual must, however, complete eight (8) hours of refresher training within ninety (90) days after returning to work.

EMERGENCY RULE QUESTIONNAIRE

DATE: AUGUST 2, 2001

TO: **LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

FROM: (Agency Name, Address & Phone No.) BOARD OF MINER TRAINING, EDUCATION AND CERTIFICATION

1615 WASHINGTON STREET EAST

CHARLESTON, WV 25311

EMERGENCY RULE TITLE: RULES AND REGULATIONS GOVERNING THE STANDARDS FOR
CERTIFICATION OF COAL MINE ELECTRICIANS

1. Date of filing AUGUST 3, 2001
2. Statutory authority for promulgating emergency rule:
22A-7-8
3. Date of filing of proposed legislative rule: AUGUST 3, 2001
4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? THIS EMERGENCY RULE AMENDS A CURRENT LEGISLATIVE RULE
(48 CSR7) AND ADOPTS NEW LANGUAGE.
5. Has the same or similar emergency rule previously been filed and expired?
THE SAME OR SIMILAR EMERGENCY RULE HAS NOT BEEN FILED PREVIOUSLY,
THEREBY PRECLUDING THE POSSIBILITY OF ITS EXPIRATION.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION RULED THAT MSHA'S
BIFURCATED ELECTRICAL CERTIFICATION PROGRAM CREATED ANOMALIES HAVING
THE IMMEDIATE POTENTIAL TO COMPROMISE MINER HEALTH AND SAFETY, AND
THEREFORE, THE PUBLIC'S HEALTH AND SAFETY. A COPY OF THE COMMISSION'S
DECISION IS INCLUDED IN THIS FILING.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

1) 30 CFR 75.153 MANDATORY SAFETY STANDARDS - UNDERGROUND COAL MINES;

ELECTRICAL WORK; QUALIFIED PERSONS; 2) 30 CFR 77.103 MANDATORY SAFETY STANDARDS - SURFACE COAL MINES; ELELCTRICAL WORK; QUALIFIED PERSON;

3) LETTER OF NOTIFICATION FROM MSHA, DATED NOVEMBER 2, 2000, REQUIRING REVISIONS TO THE CURRENT CERTIFICATION PROGRAM. COPIES OF THE MSHA REGULATIONS AND THE LETTER OF NOTIFICATION ARE INCLUDED IN THIS FILING.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

IN THAT ALL MINES REQUIRE CERTIFIED ELECTRICIANS AS A PREREQUISITE TO OPERATE, IT IS POSSIBLE THAT SEVERAL MINING OPERATIONS STATE-WIDE WOULD BE IDLED FOR INDEFINITE PERIODS OF TIME UNLESS LOW/MEDIUM VOLTAGE QUALIFIED ELECTRICIANS ARE AFFORDED THE OPPORTUNITY TO TRANSITION TO THE FEDERALLY MANDATED HIGH-VOLTAGE QUALIFICATION. THIS EMERGENCY RULE IS CONSISTENT WITH THE LEGISLATURE'S DECLARATION THAT THE CONTINUED PROSPERITY OF THE COAL MINING INDUSTRY IS OF PRIMARY IMPORTANCE TO THE PUBLIC INTEREST.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: RULES AND REGULATIONS GOVERNING THE STANDARDS FOR CERTIFICATION OF COAL MINE ELECTRICIANS

Type of Rule: Legislative Interpretive Procedural

Agency: OFFICE OF MINERS HEALTH SAFETY AND TRAINING

Address: 1615 WASHINGTON STREET EAST

CHARLESTON, WV 25311-2126

558-1425

1. Effect of Proposed rule: TO REVISE THE COAL MINE ELECTRICAL CERTIFICATION/QUALIFICATION PROGRAM.

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	NO	CHANGE	\$1,500.00	\$0.00	\$0.00
PERSONAL SERVICES	NO	CHANGE	NO	CHANGE	
CURRENT EXPENSE	NO	CHANGE	NO	CHANGE	
REPAIRS & ALTERATIONS	NO	CHANGE	NO	CHANGE	
EQUIPMENT	NO	CHANGE	NO	CHANGE	
OTHER	NO	CHANGE	NO	CHANGE	

2. Explanation of Above Estimates: THERE WILL BE A ONE-TIME CHARGE OF \$15.00 PER EACH AFFECTED ELECTRICIAN TO COVER THE COST OF ADMINISTERING THE HIGH-VOLTAGE PORTION OF THE EXAMINATION AND OF ISSUING NEW CERTIFICATION CARDS.

3. Objectives of These Rules: TO ATTAIN COMPLIANCE WITH FEDERAL RULING. THIS RULE IS REVENUE-NEUTRAL.

Rule Title:

RULES AND REGULATIONS GOVERNING THE STANDARDS FOR CERTIFICATION
OF COAL MINE ELECTRICIANS

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government: NONE

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:
COAL MINE ELECTRICIANS WHO ARE RATED FOR LOW/MEDIUM VOLTAGE ONLY WILL BE REQUIRED TO PAY A \$15.00 FEE TO TAKE THE HIGH VOLTAGE PORTION OF THE EXAMINATION AND TO BE ISSUED AN UPGRADED CERTIFICATION CARD.

C. Economic Impact on Citizens/Public at Large. NONE

Date: AUGUST 3, 2001

Signature of Agency Head or Authorized Representative:



J. DOUGLAS CONAWAY

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 30, 2000

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

v.

BLACK MESA PIPELINE, INC.

:
:
:
:
:
:
:

Docket Nos. WEST 97-49
WEST 97-172

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Black Mesa Pipeline, Inc. ("Black Mesa"), seeks review of Administrative Law Judge Jacqueline Bulluck's determinations that it violated 30 C.F.R. § 77.502, which requires that electrical equipment be frequently examined by a qualified person, and a related record-keeping provision, 30 C.F.R. § 77.800-2, and that the violation of section 77.502 was significant and substantial ("S&S").¹ 20 FMSHRC 666, 672-77, 678-79 (June 1998) (ALJ). The Secretary of Labor seeks review of the judge's determination that the violation of section 77.502 was not attributable to Black Mesa's unwarrantable failure.² *Id.* at 677. For the reasons that follow, we reverse the judge's findings of violations.

¹ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

I.

Factual and Procedural Background

Black Mesa's Pipeline Preparation Plant ("prep plant"), located near Kayenta, Arizona, receives coal mined at the nearby Black Mesa Coal Mine, which it crushes into powder, mixes with water, and dispatches as coal slurry for transport by pipeline to an electric power plant 200 miles away. 20 FMSHRC at 667; Tr. 134. Prep plant equipment includes very large pump stations, crushing mills, belts, various motors using between 110 volts and 4160 volts, and other high-voltage equipment such as breakers, control circuits, disconnects, cables, and safety equipment. 20 FMSHRC at 667. Among 36 prep plant employees are seven electricians. *Id.* at 667, 668.

On June 25, 1996, Peter Saint, an electrical inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted his first electrical inspection of the prep plant. *Id.* at 668. Inspector Saint's review of the prep plant's record book of monthly examinations on high-voltage electrical equipment ("high-voltage book") revealed that examinations were being performed by electricians he considered only qualified to work with low and medium-voltage electrical equipment. *Id.*³ The inspector also observed an electrician working with a high-voltage motor and was told that prep plant electricians handled high-voltage switchgear units. *Id.*

Reviewing the qualifications of prep plant electricians, the inspector discovered that, while all held MSHA cards identifying them as surface low/medium-voltage qualified, none had a card showing qualification to work on high-voltage equipment. *Id.*; Tr. 37, 46-47. From subsequent conversations with electricians and prep plant officials, Saint further learned that, for approximately 18 years, the prep plant's electricians had been performing all electrical work on the property, including high-voltage work. 20 FMSHRC at 668. The electricians and officials also related to the inspector their belief that the electricians were qualified to perform high-voltage work because they had passed five tests given by MSHA and did not work on energized high-voltage circuits or lines. *Id.*

Inspector Saint told the Black Mesa personnel that only electricians MSHA recognized as qualified to work with high voltage are authorized to examine and maintain high-voltage equipment and sign the high-voltage book. *Id.* According to Saint, Black Mesa electricians

³ MSHA considers voltage of 660 volts and lower "low voltage," voltage between 661 volts and 1000 volts "medium voltage," and voltage above 1000 volts "high voltage." Tr. 29, 286.

lacked high-voltage qualification because MSHA considered them to have passed only four of the five tests administered to electricians seeking qualification by testing. Tr. 147-48.⁴

After two telephone discussions with Donald Gibson, the electrical supervisor for MSHA District 9, Inspector Saint advised Black Mesa that to comply with the agency's testing program, it could either use qualified outside contractors to perform high-voltage work at the prep plant, or qualify its electricians for high-voltage work through MSHA testing. 20 FMSHRC at 668; Tr. 281. The inspector informed Black Mesa officials of several upcoming test dates and said that he would not be returning to the prep plant for approximately 3 months, so as to give the electricians the opportunity to study for and pass the high-voltage test given each month as part of the series of five qualification tests. 20 FMSHRC at 668; Tr. 78-80. Consistent with this grace period, Inspector Saint cited Black Mesa only for violating the record-keeping provision, section 77.800-2, a citation Black Mesa did not contest. 20 FMSHRC at 668; Gov't Ex. 5.

When Saint returned to the prep plant, on September 12, 1996, he was told that none of its electricians were high-voltage qualified under the MSHA testing program. 20 FMSHRC at 668; Tr. 82. Consequently, Saint issued Black Mesa a section 104(a) citation alleging a violation of the regulation which sets forth the electrician qualification process, 30 C.F.R. § 77.103, on the ground that no electrician at the prep plant was certified to perform inspections, maintenance, or repairs on high-voltage equipment. 20 FMSHRC at 669; Gov't Ex. 1. In a meeting the following day with Black Mesa officials and a union representative, Inspector Saint learned that Black Mesa intended to seek adjudication of the issue of electrician qualification. 20 FMSHRC at 669.

On Inspector Saint's next visit to the prep plant, on January 9, 1997, he learned that all of the electricians still lacked MSHA high-voltage certification, and that one had been performing monthly high-voltage equipment examinations and signing entries in the record book. *Id.*; Tr. 119-20, 123-24. Consequently, Saint issued a section 104(d)(1) citation alleging an S&S violation of section 77.502 on the ground that monthly inspections and maintenance of high-voltage equipment required by that regulation were not being done by a person qualified to work on high-voltage equipment. 20 FMSHRC at 669-70; Gov't Ex. 2. He also cited Black Mesa again for violating the record-keeping regulation, section 77.800-2. 20 FMSHRC at 670; Gov't Ex. 3. On March 4, 1997, three prep plant electricians passed the MSHA high-voltage examination and became high-voltage qualified. 20 FMSHRC at 670.

When the matter came before Judge Bulluck for hearing, the Secretary argued that bifurcating the testing system between low/medium-voltage qualification and high-voltage

⁴ MSHA witnesses testified that while section 77.103(b)(5) requires the Secretary to test on the "[r]equirements of Subparts F through J and S of . . . Part 77[,]" the requirements of Subpart I - Surface High Voltage Distribution are tested separately. Testimony indicated they are the subject of the fifth test, which is taken by an electrician seeking high-voltage qualification and is only administered to him after he has passed the first four tests and obtained low/medium-voltage qualification. Tr. 140-41, 256-57, 316-17, 321-22.

qualification is a reasonable interpretation of her qualification-by-testing regulation. 20 FMSHRC at 672. The judge subsequently affirmed the January 1997 citations for alleged violations of sections 77.502 and 77.800-2, and in the process upheld the Secretary's interpretation of section 77.103 on which those citations were based. *Id.* at 673-75, 678-79.⁵ According to the judge, section 77.103 is ambiguous with respect to the question of whether the Secretary can differentiate between electricians "qualified" to work on low/medium-voltage equipment and those who can work on high-voltage equipment. *Id.* at 673. The judge noted the language of section 77.103 does not distinguish between levels of qualification and found the Secretary's "bifurcated" program of requiring applicants to become low/medium qualified before they can become qualified to do high-voltage work was a reasonable interpretation of the regulation. *Id.* at 673-74. Because she found that high-voltage motors and switchgears were being worked on at the prep plant by electricians not qualified to do so, she affirmed both the citation alleging a violation of section 77.502 (*id.* at 675), and the related record-keeping violation of section 77.800-2, finding that the required monthly inspections entered in the record book were not performed by a high-voltage qualified electrician. *Id.* at 679.

The judge agreed with the Secretary that the violation of section 77.502 was S&S, but rejected the Secretary's charge that the violation was due to Black Mesa's unwarrantable failure. *Id.* at 675-77. The judge decreased the Secretary's proposed penalty from \$2,500 to \$400 for the section 77.502 violation, on the ground that the Secretary, who had initially assessed the penalty at \$150, was impermissibly seeking to punish Black Mesa for not acceding to the Secretary's interpretation of 77.103. *Id.* at 677-78. The judge also assessed a \$100 penalty for the section 77.800-2 violation. *Id.* at 679. Black Mesa and the Secretary cross-petitioned for review before the Commission, which granted both petitions.

II.

Disposition

Black Mesa contends that the qualification-by-testing terms of section 77.103 cannot be lawfully interpreted to support the Secretary's bifurcated system of qualification. BM Br. at 11-13. According to Black Mesa, nothing in the relevant regulatory scheme indicates that qualification for high-voltage work is to be separate and apart from low and medium-voltage qualification. *Id.* at 12-13.

The Secretary responds that the judge properly upheld the Secretary's interpretation of section 77.103 as an ambiguous regulation to which deference is owed because the interpretation is a reasonable one. S. Resp. Br. at 5-22. The Secretary maintains that because the regulation does not explicitly designate how qualification for high-voltage work should be tested in relation to qualification for low voltage, the regulation is ambiguous with respect to whether the Secretary

⁵ In a ruling that has not been appealed, the judge vacated the September 1996 citation charging Black Mesa with a violation of section 77.103. 20 FMSHRC at 672.

can institute a bifurcated qualification system. *Id.* at 10. The Secretary contends she has adopted qualification levels based on different voltage levels because of the greater degree of danger posed by high-voltage equipment. *Id.* at 19-22.

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Section 77.502 states in pertinent part that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions[.]” Section 77.502-1 explains that “[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103.” Qualification under section 77.103 can be accomplished in three different ways — by virtue of holding a state qualification, by completing an approved training program, or through testing. Section 77.103 specifies the method of qualification by testing as follows:

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:

....

(3) He has at least 1 year of [mine industry] experience . . . and he attains a satisfactory grade on each of the series of five written tests approved by the Secretary as prescribed in paragraph (b) of this section.

(b) The series of five written tests approved by the Secretary shall include the following categories:

- (1) Direct current theory and application;
- (2) Alternating current theory and application;

- (3) Electric equipment and circuits;
- (4) Permissibility of electric equipment; and,
- (5) Requirements of Subparts F through J and S of this Part 77.

There is nothing in the language of section 77.103, or in the regulatory scheme of which it is a part, which even hints that the drafters of the regulation left open the question of whether there could be more than one level of electrician qualification. Under the plain language of the regulation, a person is either considered "qualified" for electrical work thereunder or is not.⁶ Consequently, we disagree with the judge and the Secretary and find absolutely no ambiguity in the language of the regulations.

The Secretary's enforcement action here is based upon her interpretation of the regulation as permitting a distinction between high and low/medium-voltage qualification. It is undisputed that MSHA recognized Black Mesa prep plant electricians as qualified for electrical work under section 77.103, albeit for low/medium voltage. It is only because MSHA did not recognize them as high-voltage qualified that the Secretary cited Black Mesa. *See* Gov't Ex. 2, at 2 (January 1997 citation issued because "no examinations were done by a person qualified to make High Voltage checks"), 3 (citation terminated the day following its issuance because required checks were "made by a certified person, qualified to make High voltage examination").

We thus have before us an alleged violation of a policy that the Secretary has based entirely upon an ambiguity in section 77.103 that does not exist. Section 77.103 contains no language that distinguishes low/medium-voltage qualification from high-voltage qualification, and the Secretary's bifurcated administration of section 77.103 has no basis in the regulation. Under these circumstances, we cannot affirm the citation and allow MSHA to prosecute an operator for supposedly violating a policy that is at odds with the regulation the policy attempts to implement. Because it is not grounded in the plain language of the pertinent regulations, the citation is invalid and the judge's decision to the contrary must be reversed.

We recognize that the larger implication of our holding today is to invalidate that part of the Secretary's present electrician qualification-by-testing program based upon two distinct levels of qualification. However, our holding is required by the plain meaning of the regulations, and we may not go beyond that plain meaning, regardless of the inconvenience it may work on the parties. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996); *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989).⁷

⁶ A separate regulation, 30 C.F.R. § 77.104, addresses qualification to work on energized high-voltage lines.

⁷ The dissent states that we "seem[] to believe" that "[r]ejection of the Secretary's bifurcated testing program . . . nullif[ies] the effect of the existing electrician qualification regulations." Slip op. at 12 n.1. We do not hold any such view. To the contrary, we are upholding the plain meaning of section 77.103(b). It is the Secretary's *policy* implementing the

More importantly, we are not convinced that the Secretary's current practice of bestowing a lesser qualification status on electricians who have not passed the high-voltage qualification test is a reasonable interpretation of the regulation that promotes safety. The Secretary's approach instead appears to have the opposite effect and is entirely inconsistent with the language of the regulation. In fact, application of the Secretary's bifurcated testing system creates various anomalies that we believe have the potential to expose electricians in the mining industry and their fellow miners to extremely hazardous situations.

First, under the Secretary's bifurcated testing policy, those seeking low/medium certification, either underground or surface, are not tested on any regulations pertaining to high voltage, as set forth in Part 75 Subpart I (Underground High Voltage Distribution) or Part 77 Subpart I (Surface High Voltage Distribution). This means that individuals considered by the Secretary to be "qualified" can nevertheless work near high-voltage equipment without ever having to demonstrate any knowledge of the hazards associated with high voltage. A lack of knowledge regarding the hazards of high voltage could expose purportedly qualified "electricians" to extreme hazards of the type that only those conversant with the Secretary's high voltage regulations might appreciate. This is the case, for example, with respect to such an important function as determining whether a high-voltage line has been deenergized. See 30 C.F.R. § 77.704-1. It thus makes perfect sense that, contrary to the Secretary's policy, neither section 75.153 nor section 77.103 make any distinction between low/medium-voltage and high-voltage qualifications.

A second inconsistency in the Secretary's testing scheme involves the important area of permissibility. Section 77.103 requires an applicant to attain a satisfactory grade on a series of five written tests. Included in this series of required tests is permissibility of electrical equipment. 30 C.F.R. § 77.103(b)(4). In spite of the clear mandate of section 77.103(b)(4), under the Secretary's bifurcated scheme only individuals seeking *underground* low/medium certification are required to be tested on permissibility. As MSHA witnesses admitted at trial, surface low/medium-voltage qualification is obtained without testing on permissibility. Tr. 263-64, 320, 403, 409-10. In place of a permissibility test, the Secretary has unilaterally implemented testing on the National Electrical Code ("NEC") for individuals seeking the low/medium-voltage surface certification.

The Secretary argues that testing on the NEC is the equivalent of the permissibility testing required by section 77.103(b)(4), and that NEC provisions are better suited to surface electricians because they deal with things such as draw-off tunnels, silos, and preparation plants that are common to surface facilities. S. Resp. Br. at 22 n.11; Tr. 409. At first glance this appears to be a reasonable approach. However, a scheme that tests underground and surface low/medium-voltage applicants differently on the section 77.103(b)(4) requirement leads to troubling results when the Secretary then accords a *common* high-voltage qualification to members of both groups who pass the high-voltage test. According to MSHA, the only prerequisite for taking the

regulation that we find untenable.

common high-voltage qualification test is to be low/medium qualified either *underground or surface*. Tr. 427-36. Granting electricians a common underground and surface high-voltage qualification premised on low/medium voltage surface *or* low/medium voltage underground qualifications based on different criteria could compromise miner safety for the reasons that follow.

First, under the Secretary's testing scheme, a *surface* low/medium-voltage electrician who has passed the common high-voltage test can work as a high-voltage electrician *underground* without ever being tested on his understanding or knowledge of permissibility. This is particularly significant today because of the industry's trend towards utilizing high-voltage electric power in longwall mining operations. See 57 Fed. Reg. 39,036 (1992) (notice of proposed rulemaking on approval requirements for high-voltage electrical equipment operated in longwall face areas of underground mines); 64 Fed. Reg. 72,760 (1999) (limited reopening of record for submission of comments). We find it hard to conceive of a more serious threat to miner health and safety than an MSHA-sanctioned qualification process that allows an electrician to perform high-voltage electrical work on longwall equipment without first demonstrating his understanding of electrical permissibility with respect to either low/medium or high voltage. In addition, the Secretary's bifurcated testing scheme qualifies the underground low/medium-voltage electrician, who has passed the common high voltage test, to work as a high-voltage surface electrician without ever being tested on the NEC regulations. This scenario raises serious questions about the safety of the work performed by these individuals, particularly given MSHA's position that testing on the NEC is more appropriate for electricians working on the surface than is testing on permissibility.

Despite our dissenting colleagues' assertion that the "real-world ramifications" of the majority's approach are "alarming" (slip op. at 13), we are far more concerned about the real world consequences on the health and safety of miners in the industry resulting from the Secretary's bifurcated qualification scheme. In fact, the existing data confirms that the risk of death or injury to miners as the result of electrical problems is not merely a hypothetical concern. Accident data compiled by MSHA from 1980 to 1997 indicate that during that period, there were 106 accidents involving overhead electrical lines alone; 32 of these accidents resulted in fatalities. *Mark the Power Line*, Holmes Safety Ass'n Bull., Mar./Apr. 2000, at 3. Contrary to the suggestion of our dissenting colleagues (slip op. at 13), we do not believe that section 77.103(b) is itself tainted. Rather, it is the policy developed by the Secretary for implementing the testing requirements embodied in section 77.103(b) that in our view creates a situation where, although miners are "qualified" electricians under the Secretary's program, in reality, these miners have not met the plainly stated requirements of the regulation. The Secretary's bifurcated testing policy, which finds no support in the language of the regulation itself, is not entitled to any deference from this Commission. See *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000) (Department of Labor opinion letter regarding employer's policy on use of compensatory time not entitled to deference).

Our dissenting colleagues state that we are "mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation." Slip op. at 12 n.1. We

hold no such belief. In fact, we agree in principle with the dissent that there are cases where it would be appropriate to find a violation based on the plain meaning of a standard even if such a rationale was not a part of the Secretary's theory of the violation. In *Bluestone Coal Corp.*, for example, the Commission found a violation based on the plain meaning of a cited standard even though the Secretary argued that the standard was ambiguous and her interpretation of it was due deference. 19 FMSHRC 1025, 1028-29 (June 1997). But in *Bluestone*, a violation of a standard was at issue, not a violation of an interpretive policy as is the case here. In this case, we find that we must nullify the policy on which the Secretary based her enforcement action because the Secretary's administration of the qualification-by-testing terms of section 77.103 is simply untenable. She must replace it with a program that ensures miner safety by comporting with the requirements of the regulation.

Given our reversal of the judge's determination that Black Mesa violated section 77.502, we also reverse her determination that Black Mesa violated the related record-keeping regulation, section 77.800-2.⁸ We do not reach the questions whether substantial evidence supports the judge's determinations that the section 77.502 violation was S&S but not unwarrantable. Because our reversal also nullifies the penalty assessed for the violation, there is no need to take up Black Mesa's request that we "address" the judge's finding that the Secretary, by increasing the penalty she assessed for the violation of section 77.103, sought to punish the operator for seeking a Commission interpretation of that regulation. BM Br. at 26-29; BM Reply Br. at 9-11.⁹

⁸ Section 77.800-2 provides that "[t]he operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary." Although Black Mesa may not have directly contested the section 77.800-2 violation in its PDR, we are not precluded from reversing the judge's finding of a violation of this record-keeping requirement since it is a direct and logical outgrowth of our reversal of the finding of a violation of section 77.502.

⁹ We simply note that the Commission has already spoken on this question. In *Thunder Basin*, the Commission observed that "litigant[s] should not be exposed to greater punishment for forcefully exercising due process rights." 19 FMSHRC 1495, 1505 (Sept. 1997).

III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Black Mesa violated sections 77.502 and 77.800-2.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Like our colleagues in the majority, we believe the language of the regulations at issue is plain. We also agree with them that the miners in this case “have not met the plainly stated requirements of the regulation.” Slip op. at 8. However, unlike our colleagues, we believe that since Black Mesa failed to comply with the plain language of the standards, the citation charging a violation of section 77.502 should be upheld. Accordingly, we would affirm the judge’s finding that this violation occurred (though on different grounds than those on which the judge relied). We would also affirm the judge’s finding that the violation was significant and substantial, and reverse her determination that it was not the result of an unwarrantable failure.

We begin with the language of the regulation, which of course is the starting point for its interpretation. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Section 77.502 requires that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.” Thus, we must decide whether the electrician who performed the monthly inspections of high-voltage equipment at Black Mesa in late 1996 can be considered a “qualified person” under this standard.

To do so, we look to section 77.103, as section 77.502-1 states that “[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103.” Section 77.103 provides three methods of qualifying. The one Black Mesa relies on is a testing program, set forth in section 77.103(b). Thus, for us to answer the question of whether the Black Mesa electrician was a “qualified person,” we must ascertain whether he received a satisfactory grade on the tests described in section 77.103(b).

That section provides, in no uncertain terms, that there must be five written tests which “shall include the following categories:

- (1) Direct current theory and application;
- (2) Alternating current theory and application;
- (3) Electric equipment and circuits
- (4) Permissibility of electric equipment; and,
- (5) Requirements of Subparts F through J and S of this Part 77.”

If the electrician did not satisfactorily pass all five of these written tests, which must have included all of the above subjects, he cannot be considered qualified under the regulations. The language could not be clearer. Under the plain terms of this regulation, *all* qualified individuals must pass *all* five written tests. The regulations provide no leeway here — a scheme to differentiate among

types of electricians by permitting some of them to be qualified by passing less than all five of the mandated written tests is simply not contemplated by the wording of this standard.

In this regard, we agree with our colleagues in the majority, who recognize that “[u]nder the plain language of the regulation, a person is either considered ‘qualified’ for electrical work thereunder or is not.” Slip op. at 6. Consequently, we also agree with them that the Secretary’s bifurcated testing program is not consistent with the standard, and that the judge erred in finding the regulation to be ambiguous. We part ways with our colleagues, however, when they conclude that the citations in this case should not be affirmed. Slip op. at 6. With all due respect to our colleagues, we find it somewhat difficult to declare the regulation that underlies the Secretary’s enforcement action in this case to be unambiguous, acknowledge that the operator did not meet the regulation’s requirements, and then refuse to uphold the violation. Our task, after all, is to ascertain whether the citation should be upheld by determining whether, under the plain meaning of the standard, a qualified person performed the inspections at issue.¹

We answer this question by simply ascertaining whether any Black Mesa electrician passed all five of the tests. The testimony is uncontraverted that at the time the citation issued, none of the prep plant electricians had even taken the fifth and final test, which contains material on the high voltage aspects of Subparts H and I of section 77. Tr. 140-41, 256, 321-22, 412.²

¹ The majority is mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation. See *BethEnergy Mines, Inc.*, 15 FMSHRC 981, 985 (June 1993) (appellee can urge affirmance (and by implication, Commission can therefore affirm) judge’s determination on any ground that does not attack that determination or enlarge rights under that judgment). Rejection of the Secretary’s bifurcated testing program does not, as the majority seems to believe, nullify the effect of the existing electrician qualification regulations.

² The citation describes the “condition or practice” at issue, as

[e]lectric equipment was not being frequently examined, tested, and properly maintained by a qualified person to assure safe operation at the Black Mesa pipeline preparation plant. High Voltage (4160 volts) motors and circuit breakers are located within the coal preparation plant. Management has failed to provide a qualified person as defined in part 77.103 subpart I to conduct the required examination.

Gov’t Ex. 2, at 1. This clearly tracks the requirement of section 77.103(b)(5) that a “qualified person” pass a test on “[r]equirements of subparts F through J . . . of this Part 77.”

Consequently, we would affirm the judge's determination that Black Mesa violated section 77.502.³

We are troubled by the practical implications of the majority's decision, which acknowledges that it invalidates the Secretary's current electrician qualification-by-testing program but refuses to uphold a citation based on an operator's failure to meet the requirements set forth in the plain language of section 77.103(b). Slip op. at 6. The real-world ramifications of this approach are alarming. Apparently, the majority will refuse to affirm any citation issued by the Secretary based on a violation of section 77.103(b), because that regulation is tainted by the Secretary's bifurcated qualification-by-testing program. Conceivably, electricians who are deficient not only in the area of permissibility (a concern expressed by the majority) but in all of the subjects currently being tested, could be utilized by operators, as it is now futile for the Secretary to cite operators with unqualified electricians. We do not believe that a moratorium on citations in this area is the most effective way of remedying the situation while still protecting miner safety.

We turn now to the question of whether that violation was significant and substantial. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made

³ Our colleagues in the majority reverse the judge's determination that Black Mesa violated section 77.800-2, the record-keeping regulation. Slip op. at 9. Black Mesa failed to raise this issue in its PDR. BM PDR at 9. Accordingly, it is not properly before us. 29 C.F.R. § 2700.70(d).

assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).⁴

We would affirm the judge's finding that Black Mesa's violation of section 77.502 was S&S, finding its arguments (which focus on the second and third prong of the *Mathies* test) unpersuasive. Substantial evidence in the record supports the judge's determination that

[b]ased on the cumulative testimony regarding the bridging capabilities and destructive, unforgiving peculiarities of high-voltage electricity, and the potential danger of even the slightest mistake or unclean work-habit, I find that the violation created a discrete safety hazard. Based on the lack of training specific to the intricacies of work on high-voltage equipment, I find that there was a reasonable likelihood of serious injury, including death, to an unqualified electrician serving high-voltage electrical equipment, or to others working around or coming into contact with the equipment.

20 FMSHRC at 676-677.

The inspectors provided forceful testimony about the discrete safety hazard created when unqualified electricians work on high-voltage equipment, with descriptions of hazards caused by electrical shock, Tr. 89, burns, Tr. 108-09, and fire and toxic fumes, Tr. 109. Inspector Saint testified that the possibility of surviving a contact with high voltage "is near none," Tr. 89, noting that "[y]ou don't get a second chance in high voltage." Tr. 96.

Black Mesa contends that the failure of its electricians to be high-voltage qualified under the regulations was not shown to contribute to a discrete safety hazard, because their failure to qualify under MSHA's regulations was not tantamount to being unqualified to work on high-voltage equipment, and their actual work on that equipment was not shown to present a hazard. BM Br. at 23. However, the judge did not merely assume that the prep plant electricians were unqualified based on their failure to complete the high-voltage qualification process. Rather, she found that they lacked "training specific to the intricacies of work on high-voltage electrical

⁴ Black Mesa alleges the S&S allegation to be defective because it was reinstated by Inspector Saint, at the direction of the Secretary's counsel, after having been deleted as the result of a Health and Safety Conference between Black Mesa and a representative of the MSHA District Manager. BM Br. at 25. Regardless of how the S&S allegation was handled internally by the Secretary and MSHA prior to trial, the Secretary, through her representatives, tried the allegation below, and we can see nothing that prevents the Secretary from proceeding with the allegation.

equipment” as well as “current training in high voltage electricity” (20 FMSHRC at 676-77), and substantial evidence supports those conclusions.⁵

First, even qualified electricians must take an annual retraining program, in order to keep current with technological changes. Tr. 100; *see* 30 C.F.R. § 77.103(g).⁶ Not being high-voltage qualified, the prep plant electricians did not receive the annual high-voltage retraining. Gov’t Ex. 16 (report of prep plant electricians’ qualification history).

Moreover, the experience of the prep plant electricians in trying to become high-voltage qualified after the section 77.502 citation was issued provides further evidence that they were in fact unqualified to work on high-voltage equipment at the time of the citation. Only three of the seven prep plant electricians took the high-voltage test, and all three needed to take it twice before receiving a passing grade. Tr. 370-72. Most significantly, one of the three was Castillo, whose checks on the high-voltage equipment led to the citation at issue. Tr. 543-44. In these circumstances we feel that the judge’s finding that the electricians’ lack of high-voltage qualification contributed to a discrete safety hazard is supported by substantial evidence.

Substantial evidence also supports the judge’s finding that there was a reasonable likelihood that the hazard contributed to would result in an injury. Inspectors Saint and Gibson testified that a high-voltage accident could kill or permanently disable an individual. Tr. 130, Tr. 380-81; *see also* Gov’t Ex. 8 (accident investigation report of a fatal high-voltage accident).

Black Mesa argues that the lack of a high-voltage equipment accident during the 15 or more years in which the prep plant electricians worked on such equipment without high-voltage qualification under the regulations demonstrated there was no reasonable likelihood that an injury-producing event would result. BM Br. at 24. However, simply because a condition or practice has yet to result in injury does not preclude a finding that the condition or practice constitutes a

⁵ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ “An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary.” In fact, electrical supervisor Castillo, who was initially high-voltage qualified by virtue of “grandfathering in” under the regulations, failed to take high-voltage refresher training and thus lost his high-voltage qualification in 1982. Tr. 350-52; Gov’t Ex. 16.

violation that is S&S. *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996); *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (Oct. 1994).

We next address the question of whether the violation was the result of unwarrantable failure. On this question, we would reverse the judge and remand for reassessment of the penalty, as the record compels the finding that the citation was the result of the operator's unwarrantable failure.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The record evidence in this case compels only one conclusion — that Black Mesa engaged in intentional misconduct. The operator deliberately refused to comply with the qualification standard after repeated warnings by MSHA. In fact, plant manager Andrew Mikesell testified that management "made a conscious decision that we were not going to pursue a high voltage qualification." Tr. 504. *See also* Tr. 583 (the decision not to comply was agreed to by management). Although it used an electrician who was high-voltage qualified to perform work that was necessary to abate citations, Black Mesa returned to using a low/medium-voltage qualified electrician on the ground that it would not accede to MSHA's interpretation of the regulations while it challenged that interpretation.⁷ 20 FMSHRC at 669; Tr. 127, 129-30, 507.

⁷ We are fully aware that Black Mesa disagreed with the Secretary's interpretation of what constituted a "qualified person" as defined by the regulations. 20 FMSHRC at 668. In fact, after receiving the September citation, Black Mesa made clear that it intended to seek adjudication of the electrical qualifications issue. *Id.* at 669. Instead of doing so, however, it simply proceeded to continue to utilize unqualified individuals.

We recognize an operator's right to come to the Commission for a ruling about the proper interpretation of an MSHA standard. *See, e.g., Akzo Nobel Salt, Inc.*, 21 FMSHRC 846 (Aug. 1999), *vacated and remanded on other grounds*, No. 99-1370 (D.C. Cir. May 26, 2000). We also recognize that to obtain a Commission ruling, the operator must violate MSHA's view of the regulation so as to receive a citation the Commission can review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). However, the mere fact that an operator is proceeding with a legal test case cannot insulate it from a finding of unwarrantable failure if the operator fails to proceed in good faith and in a reasonable manner. *See New Warwick Mining Co.*, 18 FMSHRC 1365 (Aug. 1996) (affirming unwarrantable failure determination when the operator asserted that it was attempting a good faith challenge of MSHA's interpretation of a regulation and wished to have

The judge based her finding of no unwarrantable failure on her view that Black Mesa held a reasonable belief that it was not violating the regulation. The judge relied on Black Mesa's argument that it was in compliance with the regulations as long as its electricians did not work on energized high-voltage equipment. 20 FMSHRC at 677.⁸ In accepting Black Mesa's belief as reasonable, the judge apparently relied solely on evidence that previous MSHA inspectors had failed to cite Black Mesa when presented with its belief regarding the regulations. *See id.*⁹ However, the judge failed to consider the fact that the unwarrantability allegation is contained in a citation that was issued only after Inspector's Saint's third visit to the prep plant. On each previous inspection he had explained to Black Mesa that he, as MSHA's representative, did not agree with Black Mesa's reading of the regulations, and that its electricians were performing work in violation of those regulations. *See* 20 FMSHRC at 668-69, 669-70. Moreover, on his first visit to the prep plant Saint confirmed with his supervisor that this was MSHA's view as well (*id.* at 668), and on his second visit Black Mesa was a party to a telephone conference with MSHA electrical supervisors in two different locations during which that point was reiterated. *Id.* at 669; Tr. 366-70. Consequently, this is not just a case of one MSHA inspector taking a different position than previous inspectors.

Black Mesa deliberately thwarted the clear instructions of MSHA officials regarding compliance with this standard. Its intentional refusal to comply with the regulatory requirements which had been painstakingly communicated by MSHA constitutes unwarrantable failure.

Finally, we address the penalty issue raised by Black Mesa. It asks the Commission to address the ALJ's finding that the Secretary, in increasing the penalty she assessed for the violation of section 77.502 from the initial \$150 to \$2,500, sought to punish the operator for seeking an interpretation at the Commission of section 77.103. BM Br. at 26-29; BM Reply Br. at 9-11.¹⁰ Black Mesa maintains that review is called for because the issue "presents a substantial question of law, policy or discretion which should be addressed by the Commission[.]" and that the conduct of the Secretary "warrants more than a mere passing observation by the [ALJ]." BM Br. at 26, 29.

the issue clarified by receiving a citation, but the operator's actions were not reasonable).

⁸ While Black Mesa urged this interpretation of the regulations to the judge in its defense of the citation (*see* 20 FMSHRC at 674-75), it repeats the defense on appeal only to the extent it is relevant to the issue of unwarrantability.

⁹ The judge states that her finding on the reasonableness of Black Mesa's belief is based "in part" on this evidence, but discusses no other evidence. *See* 20 FMSHRC at 667.

¹⁰ The judge also noted that the \$1,500 penalty the Secretary ultimately assessed for the section 77.103 citation the judge vacated was initially assessed at \$50. 20 FMSHRC at 678.

While Black Mesa's first contention accurately states the grounds on which the Commission may grant review under Mine Act section 113(d)(2)(A)(ii) (*see* 30 U.S.C. § 823(d)(2)(A)(ii)), Mine Act section 113(d)(2)(A)(i) clearly specifies that petitions for review on such grounds may only be filed by a "person adversely affected or aggrieved by a decision of the [ALJ]." 30 U.S.C. § 823(d)(2)(A)(i). It is equally clear that the judge's finding to which Black Mesa refers worked to Black Mesa's benefit. The judge not only concluded that an operator's "[f]ailure to cooperate is not a valid basis to conclude that a violation is more hazardous or that its occurrence is attributable to a higher degree of negligence, warranting an elevation in penalty[.]" (20 FMSHRC at 678), but she also determined that a penalty of \$400, not \$2,500, was appropriate. *Id.*

Because Black Mesa does not contend that the judge should have reduced the penalty even further, we do not believe that, with respect to the penalty issue it raises, it can be considered "adversely affected or aggrieved" under the Mine Act. *See Asarco, Inc.*, 20 FMSHRC 1001 (Sept. 1998) (vacating grant of review of adverse determination requested by party that nevertheless prevailed below), *aff'd*, 206 F.3d 720 (6th Cir. 2000).¹¹

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

¹¹ In one respect Black Mesa's grounds for review are even weaker than the case presented by the petition for review in *Asarco*, because below Black Mesa was the prevailing party on the issue on which it seeks review.

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that person continues to satisfy the requirements for qualification or certification and is employed at the same coal mine or by the same independent contractor.

[35 FR 17890, Nov. 20, 1970, as amended at 43 FR 12320, Mar. 24, 1978; 54 FR 30514, July 20, 1989]

§ 75.150 Tests for methane and for oxygen deficiency; qualified person.

(a) The provisions of Subpart D—Ventilation of this part and § 75.1106 require that tests for methane and for oxygen deficiency be made by a qualified person. A person is a qualified person for this purpose if he is a certified person under § 75.100.

(b) Pending issuance of Federal standards, a person will be considered a qualified person for testing for methane and for oxygen deficiency:

(1) If he has been qualified for this purpose by the State in which the coal mine is located; or

(2) The Secretary may qualify persons for this purpose in a coal mine in which persons are not qualified for this purpose by the State upon an application and a satisfactory showing by the operator of the coal mine that each such person has been trained and designated by the operator to test for methane and oxygen deficiency and has made such tests for a period of 6 months immediately preceding the application. Applications for Secretarial qualification should be submitted to the Health and Safety Activity, Mine Safety and Health Administration, Certification and Qualification Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225.

[35 FR 17890, Nov. 20, 1970, as amended at 43 FR 12320, Mar. 24, 1978]

§ 75.151 Tests for methane; qualified person; additional requirement.

Notwithstanding the provisions of § 75.150, on and after January 1, 1971, no person shall be a qualified person for testing for methane unless he demonstrates to the satisfaction of an authorized representative of the Secretary that he is qualified to test for methane with a portable methane detector approved by the Bureau of Mines or the Mine Safety and Health Admin-

istration under part 22 of this chapter (Bureau of Mines Schedule 8C).

§ 75.152 Tests of air flow; qualified person.

A person is a qualified person within the meaning of the provisions of Subpart D—Ventilation of this part requiring that tests of air flow be made by a qualified person only if he is a certified person under § 75.100 or a person trained and designated by a certified person to perform such tests.

§ 75.153 Electrical work; qualified person.

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of §§ 75.511 and 75.512 to perform electrical work (other than work on energized surface high-voltage lines) if:

(1) He has been qualified as a coal mine electrician by a State that has a coal mine electrical qualification program approved by the Secretary; or,

(2) He has at least 1 year of experience in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and has satisfactorily completed a coal mine electrical training program approved by the Secretary; or,

(3) He has at least 1 year of experience, prior to the date of the application required by paragraph (c) of this section, in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and he attains a satisfactory grade on each of the series of five written tests approved by the Secretary and prescribed in paragraph (b) of this section.

(b) The series of five written tests approved by the Secretary shall include the following categories:

(1) Direct current theory and application;

(2) Alternating current theory and application;

(3) Electric equipment and circuits;

(4) Permissibility of electric equipment; and,

(5) Requirements of subparts F through K of this part 75.

(c) In order to take the series of five written tests approved by the Secretary, an individual shall apply to the District Manager and shall certify that he meets the requirements of paragraph (a)(3) of this section. The tests will be administered in the Coal Mine Safety and Health Districts at regular intervals, or as demand requires.

(d) A score of at least 80 percent of each of the five written tests will be deemed to be a satisfactory grade. Recognition shall be given to practical experience in that 1 percentage point shall be added to an individual's score in each test for each additional year of experience beyond the 1 year minimum requirement specified in paragraph (a)(3) of this section; however, in no case shall an individual be given more than 5 percentage points for such practical experience.

(e) An individual may, within 30 days from the date on which he received notification from the Administration of his test scores, repeat those on which he received an unsatisfactory score. If further retesting is necessary after this initial repetition, a minimum of 30 days from the date of receipt of notification of the initial retest scores shall elapse prior to such further retesting.

(f) An individual who has, prior to November 1, 1972, been qualified to perform electrical work specified in §§75.511 and 75.512 (other than work on energized surface high-voltage lines) shall continue to be qualified until June 30, 1973. To remain qualified after June 30, 1973, such individual shall meet the requirements of either paragraph (a) (1), (2), or (3) of this section.

(g) An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary.

[37 FR 22376, Oct. 19, 1972, as amended at 44 FR 9380, Feb. 13, 1979; 47 FR 23641, May 28, 1982]

§75.154 Repair of energized surface high voltage lines; qualified person.

An individual is a qualified person within the meaning of §75.705 for the purpose of repairing energized surface high voltage lines only if he has had at least 2 years experience in electrical maintenance, and at least 2 years experience in the repair of energized high voltage surface lines located on poles or structures.

§75.155 Qualified hoisting engineer; qualifications.

(a)(1) A person is a qualified hoisting engineer within the provisions of subpart O of this part, for the purpose of operating a steam-driven hoist in a coal mine, if he has at least 1 year experience as an engineer in a steam-driven hoisting plant and is qualified by the State in which the mine is located as a steam-hoisting engineer; or

(2) If a State has no program for qualifying persons as steam-hoisting engineers, the Secretary may qualify persons for this purpose if the operator of the coal mine in which such persons are employed, or the independent contractor, makes an application and a satisfactory showing that each such person has had 1 year experience in operating steam-driven hoists and has held the position of hoisting engineer for a period of 6 months immediately preceding the application. A person's qualification is valid for as long as this person continues to satisfy the requirements necessary for qualification and is employed at the same coal mine or by the same independent contractor.

(b)(1) A person is a qualified hoisting engineer within the provisions of subpart O of this part, for the purpose of operating an electrically driven hoist in a coal mine, if he has at least 1 year experience operating a hoist plant in a mine or maintaining electric-hoist equipment in a mine and is qualified by the State in which the mine is located as an electric-hoisting engineer; or

(2) If a State has no program for qualifying persons as electric-hoisting engineers, the Secretary may qualify persons for this purpose if the operator of the coal mine in which such persons are employed, or the independent contractor, makes an application and a satisfactory showing that each such

obtain the certification and is employed at the same coal mine or by the same independent contractor. The mine operator or independent contractor shall make an application which satisfactorily shows that each such person has had at least 2 years experience at a coal mine or equivalent experience, and that each such person demonstrates to the satisfaction of an authorized representative of the Secretary that such person is able and competent to test for oxygen deficiency with a permissible flame safety lamp, or any other device approved by the Secretary and to test for methane with a portable methane detector approved by the Bureau of Mines, MESA, or MSHA, under Part 22 of this Chapter (Bureau of Mines Schedule 8C), and to perform such other duties for which application for certification is made. Applications for certification by the Secretary should be submitted in writing to the Mine Safety and Health Administration, Certification and Qualification Center, P.O. Box 25367, Denver Federal Center, Denver, Colorado 80225.

[36 FR 9364, May 22, 1971, as amended at 43 FR 12320, Mar. 24, 1978; 54 FR 30515, July 20, 1989]

§ 77.101 Tests for methane and for oxygen deficiency; qualified person.

(a) The provisions of Subparts C, P, R, and T of this Part 77 require that tests for methane and for oxygen deficiency be made by a qualified person. A person is a qualified person for these purposes if he is a certified person for such purposes under § 77.100.

(b) Pending issuance of Federal standards, a person will be considered a qualified person for testing for methane and oxygen deficiency:

(1) If he has been qualified for this purpose by the State in which the coal mine is located; or

(2) If he has been qualified by the Secretary for these purposes upon a satisfactory showing by the operator of the coal mine that each such person has been trained and designated by the operator to test for methane and oxygen deficiency. Applications for Secretarial qualification should be submitted in writing to the Mine Safety and Health Administration, Certification and Qualification Center, P.O.

Box 25367, Denver Federal Center, Denver, Colo. 80225

[36 FR 9364, May 22, 1971, as amended at 43 FR 12320, Mar. 24, 1978]

§ 77.102 Tests for methane; oxygen deficiency; qualified person, additional requirement.

Notwithstanding the provisions of § 77.101, on and after December 30, 1971, no person shall be a qualified person for testing for methane and oxygen deficiency unless he has demonstrated to the satisfaction of an authorized representative of the Secretary that he is able and competent to make such tests and the Mine Safety and Health Administration has issued him a current card which qualifies him to make such tests.

§ 77.103 Electrical work; qualified person.

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:

(1) He has been qualified as a coal mine electrician by a State that has a coal mine electrical qualification program approved by the Secretary; or,

(2) He has at least 1 year of experience in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and has satisfactorily completed a coal mine electrical training program approved by the Secretary; or,

(3) He has at least 1 year of experience, prior to the date of the application required by paragraph (c) of this section, in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and he attains a satisfactory grade on each of the series of five written tests approved by the



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Mr. Ronald L. Harris, Director
Department of Energy
Division of Mines and Minerals
State of West Virginia
1615 Washington Street, East
Charleston, West Virginia 25311



Dear Mr. Harris:

Enclosed is a copy of the adverse decision, Federal Mine Safety and Health Review Commission (FMSHRC) in Black Mesa Pipeline, Inc., Docket No. WEST-97-49. As a result of this decision, the Agency must revise the existing Coal Mine Electrical Certification/Qualification Program agreement between the State of West Virginia and the Mine Safety and Health Administration. We anticipate this will take some time to finalize. Any future tests to become a qualified individual that the State of West Virginia administers must include all five written tests outlined in the Title 30, Code of Federal Regulations, Sections 77.103 and 75.153.

The change to the Coal Mine Electrical Certification/Qualification Program agreement is required because the Commission concluded that under the plain language of Sections 77.103 and 75.153, a person is either considered "qualified" for electrical work or is not qualified for electrical work. The Commission concluded that Sections 77.103 and 75.153 contain no language that distinguishes low- or medium-voltage qualification from high-voltage qualification. Therefore, to be qualified an individual must pass all five written tests that are spelled out in our regulations and be competent to work around high-voltage.

We will be contacting you with the proposed changes to the agreement within the next 3 months. If you have any questions, please contact Robert L. Phillips at (703) 235-1915.

Sincerely,

Marvin W. Nichols, Jr.

Administrator

for Coal Mine Safety and Health

Enclosure

cc: Timothy Thompson
Edwin P. Brady