

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 11, 2019

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

v.

CONSOL BUCHANAN MINING
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. VA 2012-0042
A.C. No. 44-04856-269664

Mine: Buchanan Mine #1

DECISION AND ORDER

Before: Judge Rae

I. STATEMENT OF THE CASE

This matter arises from a petition for assessment of civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”) 30 U.S.C. § 815(d). A hearing was held in Kingsport, Tennessee on November 18, 2014, after which the parties submitted post-hearing briefs (“Post-Hr’g Br.”). I rendered a Decision and Order after hearing, assessing the propriety of three citations and their respective S&S designations, contained in Docket Numbers VA 2012-0042 and VA 2013-0192. *Sec’y of Labor v. Consolidation Coal Co.*, 37 FMSHRC 2396 (Oct. 2015)(ALJ) (“*Consolidation Coal*”). In relevant part, I held that Citation No. 8189820, contained in Docket Number VA 2012-0042, was properly issued for a violation of Respondent’s roof control plan, but was not properly designated as S&S.

The Secretary appealed my removal of Citation Number 8189820’s S&S designation to the Commission which affirmed the removal of the S&S designation in a split decision. *Sec’y of Labor v. Consolidation Coal Co.*, 39 FMSHRC 1737 (Sept. 2017) (“*Comm’n Decision*”). The Secretary then appealed the Commission’s affirmation to the D.C. Circuit, which vacated the removal of the S&S designation and remanded this matter for further consideration consistent with its instructions. *Sec’y of Labor v. Consolidation Coal Co.*, 859 F.3d 113, 119 (2018) (“*D.C. Cir. Decision*”). Specifically, the D.C. Circuit instructed that I consider whether Citation Number 8189820 is properly designated as S&S without considering redundant safety measures or miner precaution. *Id.*

II. BACKGROUND AND FACTS OF THE VIOLATION

On remand, the factual record established and credited in my original opinion remains undisturbed. Citation Number 8189820 was issued by Mine Safety and Health Administration (“MSHA”) Inspector William G Ratliff¹ on July 14, 2011 at the Buchanan Mine #1, a large underground coal mine located in Buchanan County, Virginia. The parties have stipulated to the following relevant facts:

1. During all times relevant to this matter, Consolidation Coal Company (“Respondent”) was the operator, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the Buchanan No. 1 mine, Mine ID No. 44-04856.
2. The Buchanan No. 1 mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of the Buchanan No. 1 mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
4. Respondent is large in size, having produced 5,654,353 tons of coal at its Buchanan No. 1 mine in 2011 and 3,506,216 tons in 2012.
5. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. MSHA Inspector William G. Ratliff, whose signature appears in Block 22 of Citation Numbers 8189820, was acting in his official capacity as an authorized representative of the Secretary of Labor when they issued the citations.
7. The citation at issue in this proceeding was properly served by a duly authorized representative of the Secretary of Labor, MSHA, upon an agent of Respondent.
8. The proposed penalty for Citation Number 8189820 will not affect Respondent’s ability to continue in business.

Jt. Ex. 1; Tr. 6.²

Citation Number 8189820 alleges that Inspector Ratliff observed a cut that exceeded the maximum cut length allowed by the mine’s roof control plan in violation of § 75.220(a)(1).³ Ex.

¹ Inspector Ratliff has worked for MSHA as a coal mine inspector since February 2008. He worked in the mining industry as an equipment operator, shop foreman, and fireboss for roughly 24 years before being hired by MSHA in 2007 and subsequently completed approximately one year of field training and coursework at the Mine Academy to become certified as an inspector. He cumulatively had about 28 years of experience in the mine industry at the time he issued Citation Number 8189820. Tr. 225–26.

² In this decision, the abbreviation “Tr.” refers to the transcript of the hearing. The Secretary’s exhibits are numbered S-1 to S-11 and Respondent’s exhibits are numbered R-3 and R-4.

³ The cited standard, § 75.220(a)(1), operates as a mandatory safety standard and

S-6. Specifically, Part 1, Section K, Subsection K.7 of the mine's approved roof control plan limits cut depth to 20 feet in areas of the mine evidencing adverse roof conditions. Ex. S-8 at 4. The extended cut was taken in a crosscut in from the No. 3 to the No. 2 entry. *Id.* As the continuous miner began to breach the rib of the No. 2 entry, creating an eight-foot hole, the remainder of the roof collapsed onto the continuous miner. Tr. 267–68.

Inspector Ratliff issued Citation Number 8189820 at approximately 5:00 AM after traveling to the mine to investigate an unrelated complaint on the morning of July 14, 2011. While traveling the 17 Right development panel accompanied by Company Safety Inspector Robert Baugh, Inspector Ratliff encountered adverse roof conditions and a cut that he suspected exceeded 20 feet in length. Tr. 286, 229. By the time Inspector Ratliff's arrived at the extended cut, miners were in the process of bolting the unsupported roof using six-foot resin bolts, a longer bolt than is normally used in this mine. Tr. 241, 259–60. The miners were bolting in a tighter pattern that required by the mine's roof control plan, installing additional rows of bolts between the regularly spaced bolt-rows. Tr. 312–13. Inspector Ratliff waited until the miners finished bolting the entire cut through to the No. 2 entry before measuring the length of the cut the next day. Tr. 229–30, 244.

In my initial decision, I found that the cut was between 22 and 23.5 feet in length, as measured from the last row of roof bolts installed prior to the cut, and constituted a violation of § 75.220(a)(1). *Consolidation Coal*, 37 FMSHRC 2396, 2409. This holding was not challenged on appeal. *See Comm'n Decision*, 39 FMSHRC 1737; *D.C. Cir. Decision*, 859 F.3d 113.

III. LEGAL PRINCIPLES

A violation is S&S if the violation is “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A S&S designation is appropriate “if, based upon 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.” *Sec’y of Labor v. Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981) (“*Nat’l Gypsum Co.*”).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated as S&S:

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;

provides in pertinent part: “Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine.” 30 C.F.R. § 75.220(a)(1); *Sec’y of Labor v. Martin County Coal Corp.*, 28 FMSHRC 247, 252 (May 2006).

and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984) (“*Mathies*”); accord *Buck Creek Coal, Inc. v. FMSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (“*Buck Creek*”); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). It is “well established that the burden of establishing S&S rests on the Secretary[.]” *Sec’y of Labor v. Topper Coal Co.*, 20 FMSHRC 344, 378 (Apr. 1998) (citing *Mathies*, 6 FMSHRC at 3-4).

The Commission later clarified the relationship between the second and third steps of the *Mathies*’ analysis.⁴ *Sec’y of Labor v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016) (“*Newtown*”). After the judge identifies the hazard at issue, step two requires a judge assess “whether the violation sufficiently contributed to that hazard.” *Id.* at 2038. Specifically, the Commission clarified that “the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* If the violation sufficiently contributes to the occurrence of the hazard under step two, “the Judge then assumes such occurrence” for the analysis of step three. *Id.* Step three is satisfied if, based upon the particular facts surrounding the violation, the occurrence of that hazard “would be reasonably likely to result in an injury.” *Id.*

Analysis of the likelihood of injury step is conducted assuming “continued normal mining operations.” *Sec’y of Labor v. U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Specifically, in assessing whether a hazard poses a reasonable likelihood of injury, judges consider “the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Sec’y of Labor v. Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Sec’y of Labor v. Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Additionally, analysis of the likelihood of injury should not rely on the expectation that miners will protect themselves. *Newtown*, 38 FMSHC at 2044; see also *Sec’y of Labor v. Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (“We reject the judge’s conclusion that the ‘exercise of caution’ may mitigate the hazard.”). Similarly, analysis of the likelihood of injury under step three cannot consider the mitigating effects of redundant safety measures. *Secretary of Labor v. Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313-14 (June 2016); *Sec’y of Labor v. Cumberland Coal Res.*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (“*Cumberland Coal Res.*”); *Buck Creek*, 62 F.3d at 136. Lastly, the Commission has recognized that an MSHA inspector’s judgment is “an important element of an S&S determination.” *Wolf Run*, 36 FMSHRC 1951, 1959; *Mathies*, 6 FMSHRC at 5.

IV. ADDITIONAL FINDINGS OF FACT

In my initial Decision, I held that the first and second steps of the *Mathies* test were satisfied, which was not challenged on appeal. *Consolidation Coal*, 37 FMSHRC 2396, 2409.

⁴ The S&S determination must be based on the particular facts surrounding the violation at issue. *Sec’y of Labor v. Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); see, e.g., *Sec’y of Labor v. Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014) (“*Wolf Run*”).

With respect to the third step of *Mathies*, I held that the Secretary had not satisfied his burden of establishing that a roof fall caused by the extended cut was reasonably likely to injure a miner. *Id.* at 2410. I relied on: (1) the length of time the violative condition would exist in the context of continued mining operations; (2) the use of longer roof bolts and a tighter bolting pattern; (3) the use of an automated temporary roof support system (“ATRS”); and (4) the fact that miners would not go into the unbolted “red zone.” *Id.* at 2409–2410. The D.C. Circuit remanded the issue of whether a roof fall would be reasonably likely to injure a miner with instructions that I not consider the ATRS or miner precaution in my analysis.⁵ *D.C. Cir. Decision*, 895 F.3d 113, 119–20.

The issue of whether a roof fall caused by the extended cut was reasonably likely to injure a miner cannot be discussed until the relevant facts have been culled from the record. Specifically, the Secretary initially argued in his Post-Hearing Brief that a “roof fall would carry back through the adverse conditions to the previous cut where [examiners, car operators, and roof bolters] were working.” Sec’y’s Post-Hr’g Br. at 26. However, the Secretary conceded that while “a roof fall did occur after the majority of the cut was competed” it did not carry back and “break through the bolts in this instance [but] it could have.” *Id.* Accordingly, at the time of my initial decision, it was undisputed that a roof fall did not break through into the bolted area where miners were working. Therefore, there was no need to make a finding on whether a roof fall broke

⁵ The D.C. Circuit directed that settled Commission case law prohibits consideration of redundant safety measures in *Mathies* step three. Accordingly, I do not consider redundant safety measures in this decision. However, the D.C. Circuit specifically noted that it did not address whether redundant safety measures could be considered in *Mathies* step two. *D.C. Cir. Decision*, 859 F.3d 113, 120. I share similar reservations on the blanket refusal to consider compliance with relevant safety measures in any point in an S&S analysis. The policy concern associated with crediting the mitigating effects of redundant safety measures in a S&S analysis recognizes that “[i]f mine operators could avoid S&S liability . . . by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply.” *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148. However, this analysis cuts both ways. Disregarding the effect of redundant safety measures once a hazard has manifested may promote general compliance with safety standards. However, disregarding compliance with safety measures aimed at preventing hazards from manifesting in the first place would, in effect, punish operators for general compliance with such standards by subjecting them to S&S liability. Crediting standards which reduce the likelihood of hazards in occurring in *Mathies* step two would comport with the Mine Act’s objective of removing hazards from mining environments while not providing complete defense to S&S liability by allowing operators to assume away any resultant harm in *Mathies* step three. It is also questionable as to which safety measures should be considered secondary or redundant. The use of ATRS is not similar to a fire extinguisher or a fire retardant belt. As Commissioners Young and Althen point out in their opinion, the “Automated Temporary Roof Support was not in any sense of the word a ‘redundant’ safety feature. Such support was a required and accepted aspect of the roof plan. Failure to use it would have been a violation; certainly, actual use of the prescribed roof control device bears upon the reasonably likely result of a roof fall.” *Consolidation Coal Co.*, 39 FMSHRC 1737, 1751-52 (Sept. 2017). To hold otherwise would lead to absurd results. The Court of Appeals is simply incorrect in its application of this principle as it applies to the instant case.

into the bolted area at the time I rendered my initial decision.

The Secretary maintains his theory, in his Brief on Remand (“Remand Br.”), that a “roof fall that broke through the bolts” would injure a miner. Sec’y’s Remand Br. at 7. However, the Secretary now argues, for the first time before me, “part of the roof actually fell and broke back through the bolts after the deep cut was made.”⁶ *Id.* I am not aware how the factual record could have possibly changed between the time I rendered my initial decision to when this matter was remanded to me from the D.C. Circuit. Nonetheless, it is now necessary to address the Secretary’s newfound interpretation of the record.

The Secretary cites three points of testimony to support the assertion that a roof fall broke back through into and damaged the last row of bolts in the previously roof bolted area. First, the Secretary selectively cites to the testimony of Inspector Ratliff. *Id.* at n. 46. Inspector Ratliff did testify that the “cut actually fell out rock.” Tr. 252. However, the Secretary attempts to conflate the roof fall that occurred at the opposite end of the extended 22 to 23.5 foot cut with a roof fall in the bolted area. This is a strained interpretation of Inspector Ratliff’s testimony as Ratliff referenced the roof fall and said, “[y]ou’ve got quite a bit of rock. . .if this breaks around your roof bolts,” thereby acknowledging that a the referenced “fell out rock” did not actually break around the roof bolts. Tr. 252.

Furthermore, Inspector Ratliff testified specifically that “[t]he roof had not fallen in the area where these bolts were at.” Tr. 234. With respect to the row of damaged roof bolts and location of the rock fall, Inspector Ratliff said:

The bolts were cut, folded over, damaged, the plates were missing, indicates that the miner cut the bolts out instead of the rock fall, which there was no rock that had fallen right there at this location. It was further into the cut. It indicated that the miner cut them out.

Tr. 234. In sum, Inspector Ratliff’s testimony is consistent with the Secretary’s previous position that a rock fall did not occur in the bolted area.

Next, the Secretary cites to the testimony of Terry Hamilton, the Section Foreman of the 17 Right development panel at the time the extended cut was taken. Sec’y’s Remand Br. at 7, n. 46. When asked if there he noticed a problem with the last row of roof bolts after the rock fall, Hamilton responded, “it had fell and *I guess*, dislodged a couple of bolts[.]” Tr. 269 (*emphasis added*). However, in his very next statement Hamilton stated, “I can’t remember exactly if it would have been the miner done it or rock fell around it or what.” *Id.* Hamilton’s testimony indicates that the last row of bolts in the bolted area included damaged bolts.⁷ However, it is

⁶ The Secretary first made this argument that a roof fall broke back into the roof-bolted area on appeal to the Commission, which Commissioners Althen and Young refused to address because the Secretary did not raise advance this argument at the trial level. *Comm’n Decision*, 37 FMSHRC 1737, 174–48.

⁷ Although the last row of roof bolts included damaged bolts, the damage to the bolts did not affect their structural integrity of their effectiveness in supporting the roof strata. Tr. 261.

ambiguous as to whether they were damaged by a rock fall or by mining operations.

Lastly, the Secretary cites to the testimony of Safety Inspector Bough. Sec’y’s Remand Br. at 7, n. 46. When asked if the roof fall damaged the last row of bolts he replied “right.” Tr. 293. However, on the previous page of testimony Bough testified that “one of [the bolts] was damaged by the miner” and that based on his memory, “three of [the bolts] were damaged when the place fell.” While this testimony attributes some of the damaged bolts to a roof fall, it does not indicate that the roof fell within the bolted area nor is it as detailed as Inspector Ratliff’s description of state of the damaged bolts and his explanation of how they became damaged. Additionally, and as the Secretary acknowledges, Inspector Ratliff’s testimony should be afforded great weight due to his training and experience. *See* Sec’y’s Remand Br. at 8. Due to the detailed and unequivocal nature of Inspector Ratliff’s testimony as well as his training and experience, I credit Inspector Ratliff’s testimony that a roof fall did not occur in or break back into the bolted area.

V. ANALYSIS

The issue before me on remand is whether the Secretary has established by a preponderance of the evidence, considering the facts and circumstances surrounding the violation in the context of continued mining operations, that a roof fall was reasonably likely to break back into the bolted area and injure a miner.⁸ If so, then the inquiry turns to whether the resulting injury would be of a reasonably serious nature pursuant to *Mathies* step four. However, consideration of the fourth step of *Mathies* is unnecessary, as the Secretary has failed to meet his burden in demonstrating that a roof fall was reasonably likely to break back into the bolted area and injure a miner.

First, as noted in my initial decision, the Mine was using resin bolts installed in a tighter bolting pattern than was required by the roof plan. Tr. 260, 312–13. In addition, the bolts used in the extended cut were six feet in length - longer than those normally utilized in Buchanan Mine #1. Tr. 260. Employing a tighter bolting pattern and switching to longer bolts in the extended cut reduced the likelihood that a roof fall in the unbolted area would destabilize the roof of previously bolted cut or the newly bolted roof established as the bolting crew advanced.

Second, as also noted in my initial decision, the violative condition was in the process of

⁸ The Secretary does not argue that injury would result from the roof falling on miners working under unsupported roof outside of the roof-bolted area, nor would that be appropriate under settled Commission case law. *See Sec’y of Labor v. FMSHRC*, 111 F.3d 913, 917-18 (D.C. Cir. 1997) (Holding that the Secretary is not to consider “nonviolative surrounding conditions” in analyzing whether a violation significantly and substantially” contributes to a hazard.); *see also Cumberland Coal Res.*, 717 F.3d 1020, 1028 (Stating that “decision makers should not consider facts unrelated to the violation when undertaking a significant and substantial evaluation.”). Accordingly, and consistent with the D.C. Circuit’s remand instruction, miner precaution and Respondent’s use of an ATRS is irrelevant to analysis of the Secretary’s argument before me—that a roof fall would break back into the roof-bolted area and injure a miner—and therefore is not discussed herein.

being corrected when Inspector Ratliff observed the extended cut. Tr. 253. The cut was fully bolted by the time Inspector Ratliff returned the next day to measure the extended cut. Tr. 244, 280. Accordingly, the relatively short period of time that the roof was left unbolted lessens the chance that additional roof falls would occur in the remaining unbolted area, let alone break back into the bolted area.

Third, it is significant that Inspector Ratliff allowed the miners to continue roof bolting the extended cut to completion when he observed the condition. As recognized by the Commission, an inspector's judgement is "an important element of an S&S determination." *Wolf Run*, 36 FMSHRC 1951, 1959. Inspector Ratliff was aware of the adverse roof conditions and believed the cut was of impermissible length at the time he allowed roof bolting to continue. Tr. 252. The Secretary's theory that a roof fall was reasonably likely to break back through the bolted area and injure a miner is inconsistent with Inspector Ratliff's decision to allow roof bolting to continue through the entirety of the extended cut. Otherwise, Inspector Ratliff's decision to let bolting continue would be tantamount to allowing continued exposure of the bolting miners to a reasonable likelihood of reasonably serious harm.⁹

Fourth, roof falls occur in the regular course of mining operations as recognized by the Buchanan Mine #1's approved ventilation plan. *See* Ex. S-3, pt. 1at 1. In the context of a cross cut as is at issue here, the greatest amount of stress rests on the intersection of the cuts over 20 feet away from the bolted area - where the extended cut intersected with the No. 2 entry. Tr. 251; Ex. R-3 at 5. It follows that, if a roof fall is to be assumed in assessing the likelihood of injury, this is the area that a roof fall is most likely to, and did, occur. However, the record contains no evidence that the roof fall that occurred in the final feet of the extended cut was caused by the extended cut.¹⁰

Fifth, the Secretary fails to provide any explanation as to why it is reasonably likely a roof fall at the intersection with the No. 2 entry would travel back into the roof-bolted area besides first alleging it "could happen" and now alleging it did happen. The Secretary does not point to any testimony on the record, expert or otherwise, explaining how characteristics of the cut structure and roof composition would make a roof fall likely outside of the final feet of the extended cut reasonably likely. The occurrence of a roof fall at the intersection with the No. 2 entry does not constitute evidence that additional roof falls are likely to occur in other areas along the crosscut, bolted or unbolted. The Secretary does cite to testimony espousing that roof falls can break into roof-bolted areas, arguing that "a mine's history of roof falls is relevant to whether an injury from a roof fall is reasonably likely." Sec'y's Remand Br. at 7, n. 48, 49. However, the cited testimony is not cabined to the facts of this case and therefore is not probative

⁹ If the Secretary's argument was to be accepted, any time a cut of two to three-and-a-half additional feet is taken, mining in that area would need to cease lest miners be exposed to a reasonably serious likelihood of harm.

¹⁰ Foreman Hamilton testified that when a cut is taken close to an intersection, the last three feet of coal can fall in because of its soft composition. Tr. 281-83. Accordingly, the roof fall that occurred at the end of the cut may have been a result of the low structural integrity of the thin reaming seam of soft coal between the extended cut and the No. 2 entry – not a result of the cut's length.

of whether this deep cut, or any deep cut, is likely to result in a roof fall which breaks back into a roof-bolted area.¹¹

VI. CONCLUSION

The Secretary's allegations that a roof fall breaking back into a roof-bolted area "could happen" in general does not satisfy the Secretary's burden of demonstrating it is reasonably likely to occur and injure a miner under the specific facts of this case. Having found that a roof fall did not occur in the roof-bolted area, the Secretary's allegation of a possible roof fall in a roof-bolted area is all that remains. Logically, all violations of mandatory safety standards could result in injury to miners, hence the reason for their implementation and enforcement. However, to accept the Secretary's argument that a violation is properly designated as S&S because it could result in injury to a miner would effectively allow all non-technical violations to be designated as S&S. This would be inconsistent with the graduated enforcement scheme of the Mine Act and is the very reason that the Secretary must prove, in relevant part, that harm is reasonably likely to result from a violation before it can be designated as S&S.¹² *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825. Here, the Secretary has failed to meet his burden in showing that Respondent's taking an extended cut of an additional two to three-and-a-half feet was reasonably likely to result in harm to a miner. Accordingly, and for the reasons set forth above, I find that Citation Number 8189820 was not properly designated as S&S and therefore remove the S&S designation.

¹¹ The cited testimony of Hamilton and Bough does not speak to a "history of roof falls" that are relevant to the facts before me as the Buchanan Mine #1 has no history of taking extended cuts. Tr. 244-245. Accordingly, the testimony the Secretary relies on to establish a history of roof falls cannot possibly relate to roof falls caused by extended cuts, much less evidence that a roof fall potentially caused by an extended cut will travel back twenty feet into a roof-bolted area. Tr. 244-45.

¹² In *Nat'l Gypsum Co.*, the Commission rejected the Secretary's argument that a violation is properly designated as S&S, regardless of the gravity of the resultant harm, as long as a violation posed "more than a remote or speculative chance that injury . . . will result[.]" *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825. Specifically, the Commission opined that such an interpretation of the S&S provision of the Mine Act would be inconsistent with the Act's "overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior. *Id.* at 828. Here, the Secretary's theory that a roof fall could break back into a roof-bolted area and injure a miner is purely speculative.

ORDER

It is hereby **ORDERED** that the S&S designation associated with Citation Number 8189820 be removed. I incorporate my initial findings with respect to the appropriate civil penalty and **FURTHER ORDER** Respondent pay \$1,500.00 within thirty (30) days of the date of this Decision and Order.¹³



Priscilla Rae
Administrative Law Judge

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¹³See *Consolidation Coal*, 37 FMSHRC 2396, 2410-11. Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.