**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**WASHINGTON, DC 20004-1710**

**May 13, 2026**

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA)<br><br>v.<br><br>W.G. YATES & SONS<br>CONSTRUCTION COMPANY, | Docket No. SE 2023-0094 |

BEFORE: Rajkovich, Chair; Jordan and Baker, Commissioners

## DECISION

BY: Commissioners Jordan and Baker

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"), and concerns a citation issued to W.G. Yates and Sons Construction Company ("Yates") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Yates was contracted by PCS Phosphate & Nutrien ("Nutrien") to perform steel repair work at Nutrien's phosphate mine. During the repair work, molten steel slid into an uncovered drain and ignited the rubber-lining of a discharge pipe. The citation alleged that Yates failed to keep ignition sources and combustible materials separate in violation of the mandatory safety standard at 30 C.F.R. § 56.4500.

After a hearing on the merits of the citation, a Commission Administrative Law Judge found a violation and affirmed the significant and substantial ("S&S") designation.[1] 46 FMSHRC 1057 (Dec. 2024) (ALJ).

Yates filed a petition for discretionary review of the Judge's decision, which we granted. For the reasons which follow, we affirm the decision.

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 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." 30 U.S.C. § 814(d)(1).

I.

## Factual and Procedural Background

The fire occurred in the washer building at the Lee Creek Mine. The facility was not operational at the time of the incident, and the water had been turned off. Previously, raw phosphate ore was washed and screened there.

The incident arose on December 6, 2022, when a miner was using an oxygen acetylene torch to cut steel on the third floor of the building. A heated steel shaving ("slag") from the cut fell into a pan, traveled down a drain, through about ten feet of discharge pipe, and ignited the rubber-lining of the pipe's elbow-joint. Black smoke rose out of the drain and through the corrugated metal floors. Miners discharged six fire extinguishers toward the drain, but the spray could not put out the fire. Nutrien's Emergency Rescue Team arrived in a fire truck and sprayed water into the drain extinguishing the fire. The fire burned for approximately 17 minutes.

Prior to the repairs, Nutrien had issued Yates a "hot work" permit, stating that there were no combustible hazards within a 35-foot radius of the work area.[2] Ex. R-4 at 3.

MSHA Inspector Bryan Lee Deaton, who happened to be at the mine investigating a separate incident, observed "thick, heavy, black" smoke from about three miles away and immediately traveled to the building. Tr. 44. He later issued Yates Citation No. 9633680, alleging a violation of the safety standard at 30 C.F.R. § 56.4500 ("[h]eat sources capable of producing combustion shall be separated from combustible materials if a fire hazard could be created.").

The Judge determined that Yates violated the safety standard, concluding that the heat source was clearly not separated as required. 46 FMSHRC at 1065. The Judge also affirmed the S&S designation and assessed an $800 civil penalty.

On review, Yates argues that the Judge erred in concluding that the rubber-lining in the discharge pipe was a "combustible material" in accordance with 30 C.F.R. § 56.2. Yates also argues that the Judge erred in his S&S analysis, maintaining in part that the smoke did not present a hazard because it was ventilated up and out through the corrugated metal floors.

The Secretary maintains that the Judge's decision is supported by the facts and is consistent with the law. We agree and affirm the decision of the Judge.

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[2] Nutrien required combustible hazards to be "wet down" or covered with a fire blanket. Yates covered nearby rubber conveyor belts with "fire blankets" and was also using a fire blanket in the immediate area of its cuts.

## II.

## Disposition

### A. Yates Violated the Requirements of the Safety Standard.

On review, Yates does *not* argue that the Judge erred in finding that the operator failed to "separate" the hot slag and the rubber.[3] 46 FMSHRC at 1065 ("the hot slag made contact with the rubber lining of the elbow section of the discharge pipe, igniting the fire."); 30 C.F.R. § 56.4500 ("[h]eat sources capable of producing combustion shall be separated from combustible materials if a fire hazard could be created.").

Instead, Yates argues that the rubber-lining in the pipes was not a "combustible material" in accordance with 30 C.F.R. § 56.2 ("material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion, or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials."). PDR at 12-17.

Specifically, Yates contends that the phrase "under the conditions anticipated" in section 56.2 requires that the Secretary demonstrate that an operator was able to anticipate the presence of the combustible material. Yates argues that here it was unable to anticipate the presence of rubber, noting that: Nutrien issued it a "safe work permit" which certified that there were no combustible hazards nearby; the pipe's interior could not be visually observed; no witness at the hearing was aware of the rubber-lining; and Yates had performed similar tasks five times without incident. According to Yates, because the rubber-lining did not fall within the definition in section 56.2, it did not violate the safety standard at section 56.4500.

The Secretary argues that requiring her to demonstrate that the operator had prior knowledge of the combustible material in order to demonstrate a violation of section 56.4500 is inconsistent with the general strict liability framework of the Mine Act.

We agree with the Secretary. Mine operators, including independent contractors performing services at a mine, are strictly liable for violations of mandatory safety standards. The provision in section 110(a) of the Mine Act, 30 U.S.C. § 820(a), that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary . . . ." imposes liability for a violation without regard to fault. *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988), *aff'd on other grounds,* 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd,* 868 F.2d 1195 (10th Cir. 1989).

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[3] Accordingly, the Judge's findings that Yates failed to "separate" the heated slag and the rubber is not before us. *See* 30 U.S.C. § 823(d)(2)(A)(iii) ("review shall be limited to the questions raised by the petition."). Before the Judge, Yates had argued that the heat source and rubber were separated in accordance with section 56.4500. Yates Post-Hearing Br. at 14-15.

The Commission has consistently stated that "[l]ack of knowledge is not a defense to liability in light of the strict liability nature of the regulations." *Nally & Hamilton Entes., Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011) (citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act "imposes strict liability on mine operators . . . regardless of whether the operator has knowledge" of hazard)); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998) ("[k]nowledge and culpability, however, are not relevant to the determination of whether there was a violation. As we have observed, the [Mine Act] imposes 'a kind of strict liability on employers to ensure worker safety'") (citation omitted)). Although irrelevant to a determination of liability, what an operator knew or should have known at the time of the violation is relevant when determining negligence and the civil penalty in accordance with section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

For example, in *Nally and Hamilton*, the Commission concluded that the operator violated a safety standard at 30 C.F.R. § 77.410(c) (requiring that it maintain warning devices in functional condition), because an inspector observed a truck's back-up alarm was not working. 33 FMSHRC at 1763-64. The operator contended that because the alarm was operational when it performed the pre-shift examination, it did not violate the safety standard's requirement. *Id*. at 1761. The Commission concluded "what [the operator] knew at the time the citation was issued is only relevant to determining [the operator's] degree of negligence and the resultant penalty."[4] *Id*. at 1764.

For this reason, we find that the Judge did not err in the case at hand.[5] It would be inconsistent with the strict liability principles of the Mine Act to read "under the conditions anticipated" as requiring the Secretary to demonstrate that the mine operator should have known that rubber was present in order to prove that it was a "combustible material." The phrase "under the conditions anticipated" in section 56.2 is more naturally understood in context with the surrounding language as referring to the work being performed at the mine. Here, that would include the steel repair work. Accordingly, we find the meaning of section 56.2 to be plain.[6] We affirm the Judge's determination of violation.

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[4] Similarly, the mandatory safety standard at 30 C.F.R. § 75.202(a) requires that in "areas where persons work or travel [the mine roof] shall be supported." In *Jim Walter Resources*, the Commission interpreted this standard by stating that under "the strict liability approach governing Mine Act violations, the Secretary . . . need only show (1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls." 37 FMSHRC 493, 495 (Mar. 2015).

[5] The Judge found that Yates' negligence was mitigated by its use of a fire blanket in the immediate cutting area, its lack of knowledge of the rubber-lining, and the fact that the operator had previously performed the same task five times without problems. 46 FMSHRC at 1073. Yates did not appeal the ALJ's negligence determinations.

[6] Where the language of a regulatory provision is clear, the terms 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. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation

We reject Yates' argument that our interpretation leads to absurd results and will require operators to disassemble piping systems in search of combustible materials. Section 56.4500 requires "separation" of heat sources from combustible materials. *See* Safety Standards for Fire Prevention and Control at Metal and Nonmetal Mines, 50 Fed. Reg. 4,022, 4,030 (Jan. 1985) ("MSHA intends 'separated' to mean a heat source is either insulated or removed a sufficient distance from combustible material in the areas so that it is no longer constitutes an ignition source."). Yates could have complied with the standard, in this instance, by covering the drain with an insulating fire blanket, as it did with other areas. Tr. 39, 63.

**B. The Violation is Significant and Substantial.**

The Judge concluded that the violation was S&S. 46 FMSHRC at 1066-1071 (the violation caused a fire, and the fire was reasonably likely to result in a reasonably serious injury). In reaching his determination, the Judge applied the Commission's S&S test set forth in *Peabody Midwest Mining*, 42 FMSHRC 379, 383 (June 2020).

After the Judge issued his decision, the Commission overturned the *Peabody* S&S test. In *Consol Pennsylvania Coal Company*, 47 FMSHRC 793, 816-820 (Sept. 2025), the Commission stated that, moving forward, to substantiate an S&S designation, the Secretary must demonstrate that the violation: (1) could make a significant and substantial contribution to a mine hazard and (2) that miners are exposed or would be exposed to that hazard during continued mining operations.[7]

On review, Yates argues that the Judge's S&S findings are not supported by substantial evidence in the record.[8] PDR at 22-28.

We conclude that the record evidence supports the Judge's findings. For purposes of review, we consider the Judge's S&S findings under the *Consol* framework.[9] First, the *Consol*

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omitted)); *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc*., 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc*., 19 FMSHRC 1761, 1765 (Nov. 1997).

[7] *See* 30 U.S.C. § 814(d)(1) (distinguishing as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.").

[8] When reviewing a 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)).

[9] The parties' briefs concern the Judge's application of the *Peabody* test. Our concurring colleague also applies the *Peabody* test. In doing so, the concurrence argues that the *Consol* test would make "virtually all non-technical violations could be designated as S&S, which is definitely contrary to the Mine Act's graduated enforcement scheme." Slip op. at 9. In *Consol*, the majority expressly disavowed any intent to increase (or decrease) the number of S&S citations, but instead sought to fairly apply the plain language of the Act. *Consol*, 47 FMSHRC at 824. As the analysis *infra* will demonstrate, the *Consol* analysis is a fact-based inquiry into

test asks: could the violation make a significant and substantial contribution to a mine safety hazard? Here, it is axiomatic that the violation—contact between a heat source and a combustible material—*caused* a fire. Inspector Deaton testified that the fire produced "thick, heavy, black smoke." Tr. 44. One of the miners stated to Inspector Deaton he had to leave the building because "the smoke was too bad." Tr. 69. Nutrien's Safety Specialist Johnny O'Neal corroborated Inspector Deaton's testimony, noting that the fire produced "a good amount of . . . black smoke." Tr. 106, 111. O'Neal also testified that he believed that the black smoke indicated that it was a hot fire. Tr. 110. Substantial evidence supports the Judge's finding that the violation contributed to a hazard.[10]

Second, the *Consol* test asks: were miners exposed, or would miners be exposed, to hazards during continued mining operations? Substantial evidence demonstrates that miners were exposed to hazards. 46 FMSHRC at 1069 (the Judge found that "it is reasonably likely that the fire could have resulted in a miner inhaling smoke and, or toxic fumes, enduring burns from the fire's heat, or falling into the openings in the third floor due to obscured vision from the thick, black smoke."). Approximately 14 miners were working in the building at the time the fire occurred. Ex. P. Miners attempted to put out the fire with fire extinguishers, putting themselves in proximity to the fumes. Tr. 61 (Inspector Deaton testified that "[t]he smoke produced from the rubber burning is a toxic fume. It can result in lung injuries."). The Commission has recognized that common sense indicates that a fire presents a risk of smoke or gas inhalation to miners. *See The American Coal Co*., 39 FMSHRC 8, 18 (Jan. 2017) (citation omitted). Additionally, the fire could have also resulted in burn injuries, or the smoke could have impaired a miner's vision, contributing to trip and fall hazards which were especially concerning because there were openings in the floor. Tr. 61-62.[11]

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the conditions cited, rather than an automatic finding. What's more, we note further that the overturned *Peabody* analysis preferred by the concurrence collapsed the graduated enforcement scheme set forth in the Mine Act by conflating S&S with the statutory concept of imminent danger. *See Consol,* 47 FMSHRC at 819-820.

[10] Yates argues that the Judge erred when he failed to consider that, given the circumstances, the occurrence of a fire was improbable. PDR at 17-22. We disagree. It is not error for a Judge to consider that a hazard *actually occurred*, when considering whether a violation would contribute to a mine safety hazard.

[11] Our concurring colleague cites to Merriam-Webster's Dictionary for the proposition that an analysis of the term "hazard" requires a finding that miners were exposed to an injury. However, this argument simultaneously misreads the dictionary and the statute. Merriam-Webster's Dictionary defines the term "hazard" as a "source of danger" and "danger" as "exposure or liability to injury, pain, harm, or loss." *Merriam-Webster's Online Dictionary*, https://www. Merriam-webster.com/dictionary/danger and https://www.merriam-webster.com/dictionary/hazard (last accessed May 8, 2026). By omitting the portions of the definition of the term "danger" after the word "injury" that are linked by the disjunctive "or" the concurrence implies that a danger necessarily indicates exposure to an injury. But the full definition makes clear that a danger can also be exposure to "harm." Our analysis above, considering the particular facts and circumstances cited, expressly analyzes miners' exposure to the harms of smoke inhalation and fire. This is a fact-specific analysis of the actual conditions

Yates argues that the Judge should have credited Superintendent Matt Rousch's testimony over Inspector Deaton's testimony. Rousch testified that miners were not exposed to hazards because the smoke was ventilated up and out through the facility's grated floors.[12] PDR at 24; Tr. 150-55.

We decline to reweigh the evidence or rely upon alternative testimony in the record. A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2770 (Dec. 1981) ("to the extent the [J]udge's conclusion reflects a credibility determination . . . that credibility determination should be given deference."). The Commission has also recognized that, because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096 (D.C. Cir. 1998).

Yates further maintains that the fact that no miners were injured in the event contradicts the Judge's findings. PDR at 22-27. We reject this argument. The Commission has never required the Secretary to demonstrate that miners were actually injured in order to demonstrate that a violation was S&S. *See Youghiogheny & Ohio Coal Co*., 9 FMSHRC 673, 678 (Apr. 1983).

In summary, we conclude that substantial evidence in the record supports the Judge's findings and demonstrates that the violation was S&S pursuant to the *Consol* test.

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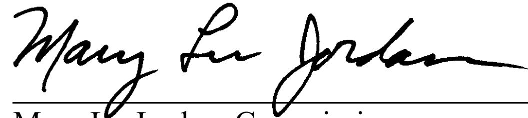
present and miners' exposure to those conditions. Further, as set forth in detail by the majority in *Consol*, the word "injury" is not included in section 104(d) of the Mine Act, despite the fact that Congress freely used that term when it intended to do so. *Consol*, 47 FMSHRC at 818, n.22 (Sept. 2025). We decline, again, to add words not included into the Act.

[12] Additionally, Yates argues that miners were too far removed from the discharge pipe to be exposed to the smoke. Yates also argues that the risks of burn hazards and trip and fall hazards were remote; the pipe was inaccessible and holes in the floor were inaccessible due to barricades.

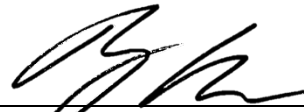
## III.

## **Conclusion**

For the reasons discussed above, we affirm the Judge's decision.



Mary Lu Jordan, Commissioner



Timothy J. Baker, Commissioner

Chair Rajkovich, concurring:

I concur with the majority in affirming Citation No. 9633680. The citation alleges that Yates failed to separate a heat source from a combustible material, in violation of 30 C.F.R. § 56.4500. On appeal, Yates claims that the rubber lining at issue was not a combustible material.

A combustible material is one that, "in the form in which it is used and under the conditions anticipated, will ignite." 30 C.F.R. § 56.2. Rubber is listed as an example. *Id.* Here, the rubber ignited in the form in which it was used, and nothing in the record suggests that this occurred under unanticipated conditions. The Judge properly concluded that the rubber lining was a combustible material. As that was Yates' sole basis for appealing the fact of the violation, I therefore affirm the violation.

Yates argues that it did not "anticipate" the presence of a combustible material. However, I agree with the majority that "under the conditions anticipated" more reasonably refers to the work being performed at the mine, *i.e.,* expected working conditions, rather than an operator's actual knowledge. Slip op. at 4. Here, the anticipated conditions were steel welding work in a washer building with the water turned off, and the ignition occurred under those conditions.

With respect to the "significant and substantial" ("S&S") analysis, I reject the majority's *Consol* test for the reasons set forth in *Canyon Fuel Co., LLC*, 48 FMSHRC 2, 22-23 (Jan. 2026) (Rajkovich, concurring in part). I would review this matter under the Commission's traditional *Mathies/Peabody* test, which provides a more complete analysis.

Under the Commission's traditional test, a violation is properly designated as S&S if, "based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or illness of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Peabody Midwest Mining, LLC*, 42 FMSHRC 379 (June 2020) (refining *Mathies* test). The *Consol* test explicitly removes any consideration of injury from the analysis, narrowing the focus to whether a miner was exposed to a "danger" or "hazard." *Consol Pennsylvania Coal Company*, 47 FMSHRC 793, 818 (Sept. 2025).

But how are we to decide if conditions are dangerous or hazardous without considering the likelihood of injury? A hazard is simply a "source of danger," while danger is defined as "exposure or liability to injury." *Merriam-Webster's Online Dictionary*, https://www. Merriam-webster.com/dictionary/danger and https://www.merriam-webster.com/dictionary/ hazard (last accessed May 8, 2026). We must determine what *effect* a cited condition will have, to know if it is hazardous. A violation only contributes to a *hazard*, i.e., a *danger* to miners, if it could expose miners to *injury*. If the concept of injury is removed from the definition of a hazard, as proposed in *Consol*, then as previously noted, "virtually all non-technical violations could be designated as S&S, which is definitely contrary to the Mine Act's graduated enforcement scheme." *Canyon Fuel*, 48 FMSHRC at 23. Accordingly, the Commission's traditional test, which considers likelihood and likely severity of injury, provides a more complete analysis of the relevant hazards.

Here, although the Judge properly applied the *Mathies/Peabody* framework, I find some weaknesses in the Judge's analysis. Specifically, I question the Judge's reliance on generalities rather than the "particular facts" surrounding the violation. Ultimately, however, I find sufficient evidence to support the Judge's decision under the traditional S&S test and therefore concur with the majority in affirming the S&S designation.

The Judge found that the smoke caused by the violation was reasonably likely to result in three types of injury: smoke and toxic fume inhalation, burns, and falls due to impaired visibility. 46 FMSHRC at 1069. The problem is that in reaching this conclusion, he repeatedly rejected Yates' mine-specific arguments in favor of broad precedents and truisms.

Regarding smoke inhalation, Yates argued that smoke would not have accumulated in the building because it would have been directed straight up through a shaker screen and into the sky. In rejecting this argument, the Judge cited caselaw for the proposition that normal mining conditions "could include different ventilation patterns" causing smoke to drift in the building, without reference to any actual ventilation patterns in the washer building. *Id.* The Judge also cited Commission precedent that smoke inhalation is a "common sense conclusion" in the event of a fire. *Id.*, *citing Am. Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017). However, that case involved an underground mine, which implies a more enclosed space than the surface building at issue.

Nevertheless, the majority notes testimony that one miner had to leave the building because "the smoke was too bad" (slip op. at 6, *citing* Tr. 69), which provides at least some support for the Judge's finding of accumulated smoke. And if miners *were* reasonably likely to be exposed to smoke inhalation, the record supports the Judge's finding that the resulting injury would be reasonably serious. The Judge noted testimony from both the MSHA Inspector and a safety specialist that smoke from burning rubber is toxic and can cause lung damage. 46 FMSHRC at 1070, *citing* Tr. 61, 110-12.

As for the burn risk, Yates argued that the elbow of the pipe where the fire occurred was barricaded and therefore inaccessible. The Judge countered that smoke would rise from the elbow and pose a burn hazard to miners at the top of the drainage pipe. The Judge relied solely on "common knowledge that smoke rises," with no evidentiary support for the proposition that the smoke would *still be hot enough to cause burns* after traveling the 10 feet from the elbow to the mouth of the pipe. 46 FMSHRC at 1069. However, in finding that the resulting burns would be serious, the Judge did note testimony from the safety specialist that the smoke was black, and "the blacker the smoke, the hotter the fire." *Id.* at 1070, *citing* Tr. 110-12.

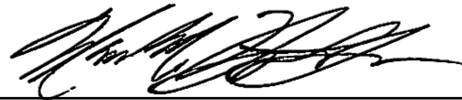
The Judge's decision *does* present circumstance-specific evidence in support of a fall hazard. He credited the inspector's testimony that the fire produced "thick, heavy, black smoke" that would impair miners' visibility and cause them to stumble into the open grating on the third floor, resulting in strains or broken bones. *Id.*, *citing* Tr. 44-45, 62. As the majority notes, a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co*., 14 FMSHRC 1537, 1541 (Sept. 1992).

Much of the Judge's rationale in finding the violation S&S is divorced from the "particular facts surrounding that violation," contrary to the requirements of the Commission's traditional S&S test. *Mathies*, 6 FMSHRC at 3. However, the Judge did credit testimony from the inspector and the safety specialist that the fire produced thick, heavy, black smoke (sufficient

to make at least one miner flee the building), of a type that causes lung damage, and which would have impaired miner visibility, in turn causing miners to stumble in the open grating on the third floor.[1]

In light of the weight given to a Judge's credibility determinations, I would affirm the Judge's S&S determination under the Commission's traditional and comprehensive *Mathies/Peabody* framework.

For the reasons above, I concur in affirming the fact of the violation and the S&S designation for Citation No. 9633680.



Marco M. Rajkovich, Jr., Chair

[1] All of these potential sources of injury (smoke and toxic fume inhalation, burn risk and fall risk), which are key considerations in determining whether a violation is significant and substantial, would apparently not be reached under the *Consol* test.

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