September 2025

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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

September 11, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. KENT 2022-0079
v.	Docket No. KENT 2022-0084
NALLY & HAMILTON ENTERPRISES, INC.	

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

These matters, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"), concern a decision of an Administrative Law Judge to vacate an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Nally & Hamilton Enterprises, Inc. ("Nally & Hamilton") for an alleged failure to comply with a mandatory on-shift examination requirement. The order was issued following an accident at a surface coal mine in which a tree fell from the edge of a highwall and crushed a truck traveling below. One miner was killed, and a second miner was seriously injured.

The order cites the mandatory safety standard at 30 C.F.R. § 77.1713(a), which states that "[a]t least once during each working shift . . . each active working area [of a surface coal mine] . . . shall be examined by a certified person . . . for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator." After a hearing on the merits, the Judge found that the operator did not violate the safety standard. The Judge concluded that the area above the highwall where the trees were located was not an active working area at the time of the accident. Thus, the operator had no duty to examine the trees from the top of the highwall. He concluded that an examination conducted solely from the vantage point of the main mine road complied with the requirement of § 77.1713(a). Furthermore, because an examiner could only be required to report hazards that could be observed from the main mine road, and because the danger the trees created could not be perceived from the main mine road, the Judge held the failure to report that hazard did not constitute a violation of the inspection requirement in § 77.1713. 46 FMSHRC 209, 231 (Apr. 2024) (ALJ). Accordingly, the Judge vacated the order.

The Secretary filed a petition for review, which the Commission granted. For the reasons which follow, we reverse the Judge and conclude that an adequate examination under § 77.1713(a) must be capable of detecting conditions that could pose a danger to miners in the active working areas. In other words, at this mine, an adequate on shift examination had to be capable of assessing whether or not the stand of trees located on top of the highwall created a danger to miners traveling on the main haul road below.

I.

Factual and Procedural Background

The accident occurred on January 11, 2022, at Nally & Hamilton's Colmar Surface Mine in Bell County, Kentucky. Two miners were traveling in a truck carrying blasting materials on the mine's main haul road when a tree fell from the highwall and crushed the truck, killing one miner and seriously injuring the other. The tree on top of the highwall was approximately 67 feet tall. The highwall itself was adjacent to the haul road and was approximately 50 feet tall. 46 FMSHRC at 210-14. The fallen tree had been one of a small group of trees left standing between the edge of the highwall and an access road farther back from the edge. At the bottom of the highwall, material intended for reclamation formed an approximately 53-foot-wide berm between the base of the wall and the main haul road. The access road atop the highwall was no longer used regularly, and pit mining in the area below had concluded a few months prior to the accident. However, the main haul road was still traveled daily. *Id.*

A provision of the mine's approved ground control plan requires that "[u]nless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall." Ex. S-7 at 5. The operator was aware of the plan's requirements. Tr. I:193-94. Witnesses agreed that the tree stand was "close" or "fairly close" to the edge of the highwall. Ex. S-10; Tr. I:59 (dozer operator John Brown testified that he could see from the road that the trees were "close" to the edge); Tr. II:38-39 (Dayne Willis, consulting engineer agreed that the trees were "fairly close" to the edge); Tr. I:87 (MSHA inspector Silas Brock testified that the tree was "right on the edge"); Tr. I:191 (Foreman Jody Brock testified that the tree was "back five or six feet"). Foreman Brock, the mine's regular MSHA inspector David Faulkner, and the injured miner, Joshua Pendleton, testified that the stand of trees did not attract notice or raise concerns prior to the incident. Tr. I:37-38, 191, 213-19; II:78.

On-shift examination reports for the 11 days leading up to the accident marked the highwall as "stable." Ex. S-6. Foreman Brock explained that he would glance up at the highwall from the road as part of his regular on-shift examination of the area to check for loose rocks or material leaning over the wall but conceded that he paid more attention to active working areas.

As a result of the accident, MSHA issued Order No. 9138189, alleging a failure to "identify, report, and correct the trees that created hazardous highwall conditions" in on-shift examinations conducted between January 1-11, 2022. Ex. S-2. The violation was designated as significant and substantial, attributable to high negligence, and the result of an unwarrantable failure to comply with a mandatory standard.[1] *Id.* After the hearing, the Judge vacated the order, concluding that "[t]here was no duty to include the area above the highwall in the operator's daily on-shift examinations, and there is no credible record evidence showing that the danger here could or should have been perceived from the main mine road where miners regularly travel[ed]." 46 FMSHRC at 230.

II.

Disposition

Section 77.1713(a) governs the on-shift examination requirement for surface coal mines and requires that a certified person examine "each active working area" for hazardous conditions at least once during each working shift, and that any such hazardous conditions be reported and corrected. 30 C.F.R. § 77.1713(a).[2]

In confining the on-shift examination requirement to active working areas, the Judge applied a narrow and literal reading of the regulation. In this case, that approach winds up undermining the very purpose of the standard.

Common sense dictates that the purpose of the standard in question is to identify and correct hazardous conditions that might harm miners in the active working areas. In most cases this goal is accomplished by conducting an examination focused on potential hazards located in those active working areas. However, sometimes miners cannot be assured of a safe work environment unless the on-shift examination is expanded to include a location that is outside the active working areas. Such is the situation in the case at hand.

At this mine, at the top of a highwall with no drop bench, there was a particular stand of trees that created a potential hazard for miners traveling on the main haul road below. The operator was aware of this potential danger, as its ground control plan specifically required that "trees and other vegetation will need to be removed a safe distance from the top of the highwall" unless a drop bench was provided. Ex. S-7 at 5; Tr. I : 193-94. Whether the trees were a safe distance from the top of the highwall could not be determined by an examination that was conducted solely from the vantage point of the active working areas below. Such examination

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

[2] "Active working area" is not defined in the statute or regulations. However, as the Judge noted, the Secretary has previously suggested that "active working area" should be equated with "active workings," which is defined in 30 C.F.R. § 77.2(a) as "any place in a coal mine where miners are normally required to work or travel" (46 FMSHRC at 229 n.14). It appears the Judge treated the phrases as analogous and we will also do so for the purposes of this opinion.

did not include the top of the highwall, where the trees were located. Though there was an access road at the top of the highwall behind the trees, the location was not considered an active working area since miners did not work or travel there. Although the trees were not located in an active working area, there was a known danger that they could fall into the active working area, thereby posing a direct threat to miners in the active working areas. This would include the miners who traveled on the main haulage road adjacent to the bottom of the highwall.

Foreman Brock explained that he conducted his examination by glancing up at the highwall from the road below to check for loose rocks or material leaning over the wall. Tr. I:189-90; Tr. II:66. Conducting the examination this way is problematic because as the Judge concluded, "evidence presented at the hearing establishes a reasonably prudent miner could have not perceived the danger of the trees on the highwall from the vantage point of the mine road." 46 FMSHRC at 230.

Whether and to what extent the trees posed a danger could only be determined by an examination conducted from a vantage point that allowed one to assess the condition of the trees and their proximity to the edge of the highwall. Moreover, the record reveals that the potential hazard posed by the trees was not a static situation. Rain and snow fell in the subject area in the weeks leading up to the accident. Ex. 5-6. Witnesses consistently testified to the destabilizing effect that such freeze/thaw cycles can have on the integrity of the ground on and around highwalls: soil expands and contracts as it freezes and thaws, which can create fissures, separate soil from tree roots, and lead to mud slides. Tr. I:68-69, 182-84, 223; Tr. II:43-44. The foreman conceded that highwalls are more susceptible to damage in poor weather conditions and that he conducts a closer examination during the winter months. Tr. I:183-84. Nevertheless, the Judge held that "the area above the highwall where the trees were located is not an active working area under section 77.1713(a), and Respondent had no duty to examine the trees from the top of the highwall." 46 FMSHRC at 229.

The Judge explained that he reached his decision "under the logic of *Black Castle*." *Id*. at 229 (citing *Black Castle Mining Co*., 36 FMSHRC 323 (Feb. 2014)). We find *Black Castle* to be inapposite to the case at hand. Unlike the instant case, *Black Castle*'s holding, restricting the examination to active work areas, did not leave the miners in the active work area exposed to a potential hazard arising from outside the active work area.

In *Black Castle*, a bulldozer ran over and ruptured a buried unmarked gas line, fatally injuring the driver. MSHA issued the operator a citation alleging that the unmarked gas line was a hazardous condition which should have been reported and corrected as part of the on-shift examination. The Commission affirmed the Judge's decision to vacate the citation, finding that the record supported the Judge's conclusion that the accident site was not an assigned work area and the operator had no reason to anticipate that any miner would be in the proximity of the gas line. The Commission found the operator had "no reason to anticipate" that miners would be in the area where the accident occurred; therefore, it was not a working area and examiners were not required to note whether that portion of the gas line was adequately marked. 36 FMSHRC at 325-26. The Commission further held that if the miner had not unforeseeably gone to this non-working area, the gas line would have posed no risk to miners in the active working area. *Id*. at

326. Therefore, there was no corresponding obligation to perform an on-shift examination of the site for hazardous conditions.

We consider our decision in *Sunbelt Rentals, Inc.* to be a more relevant precedent for the case at hand. 38 FMSHRC 1619 (Jul 2016).[3] In *Sunbelt*, a cement plant contracted with a company to perform annual maintenance of its pre-heat tower. The maintenance company in turn contracted with another company to erect scaffolding within the pre-heat tower. While an employee of the scaffolding company was working in the tower, material fell from above, struck him, and knocked him unconscious. During the accident investigation, an MSHA inspector climbed an exterior staircase on the tower, looked through a door and observed a build-up of material on the tower walls directly above the area where the miner had been working. The on-shift examiner had not availed himself of this perspective and thus did not identify the hazardous condition during the examination.

The MSHA inspector issued citations alleging failures to perform adequate on-shift examinations. The Commission held that an examination "must be adequate in the sense that it identifies conditions which may adversely affect safety and health that a reasonably prudent competent examiner would recognize." *Id*. at 1627. In a subsequent decision after remand, the Commission held that when performing an on-shift examination an examiner must use the vantage points that are "reasonably necessary" to check the working area for hazards to miners—including, where relevant, the hazard of objects falling from above. *Sunbelt Rentals Inc.*, 42 FMSHRC 16, 24 (Jan. 2020) (separate opinion of Commissioners Young and Althen, joined by Commissioner Jordan). An examination of a working area is inadequate if it does not allow for

[3] We recognize that *Sunbelt Rentals, Inc*. concerned a metal/nonmetal examination standard (30 C.F.R. §56.18002(a)) rather than the surface coal standard at issue here. However, for the purpose of determining an operator's duty regarding examining hazards in active workings, we believe the precedent in *Sunbelt Rentals* is applicable. Commission case law supports, indeed dictates, such a parallel construction of coal and metal/non-metal regulations. The Commission has found that "[t]here is no logical reason why . . . coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *see also Solar Sources, Inc.*, 37 FMSHRC 218, 221 (Feb. 2015).

The legislative history of the Mine Act further confirms this approach. A fundamental purpose of the Act was to provide a standard for safety for metal/non-metal miners as comprehensive and protective as the standards provided for coal miners. The Senate Report on the Mine Act notes that the Coal Act was more comprehensive in scope and reach than the Metal Act. It states that one reason why enactment of the Mine Act was an absolute necessity was that there would be "one statute for both coal and metal/nonmetal mines, affording equal protection for all miners and a common regulatory program for all operators." S. Rep. No. 95-181, at 9 (1977), reprinted in S. Subcomm. on Labor, Comm. on Human Res., Legis. History of the Fed. Mine Safety and Health Act of 1977, at 597 (1978). Consequently, it would be illogical and at odds with the purpose of the Mine Act to construe coal regulations in a manner achieving less protection for coal miners than the protection afforded metal/nonmetal miners.

the evaluation of all the potential hazards to which miners in the active work areas might reasonably be expected to be exposed.

As demonstrated by the circumstances of the accident, conditions atop a highwall can create dangers for the miners working or traveling on the haul road below. There is no dispute that the haul road is an active work area that is regularly traveled. Tr. I:28. An adequate on-shift examination of the haul road therefore must include an evaluation of potential fall hazards from *all* vantage points reasonably necessary for the discovery and correction of those hazards. *See Sunbelt*, 42 FMSHRC at 24. Had that been done here, the operator would have identified and corrected the 67-foot-tall tree located close to the edge of the highwall.

Jody Brock, the mine foreman that conducted the examination, conceded that he was tasked with removing trees that were too close to the edge of the highwall. Tr. I:174. Furthermore, the witnesses agreed that the subject stand of trees was either fairly close to the edge or at most six feet away from the edge. *See* Ex. S-10; Tr. I:59; Tr. I:191; Tr. II:38-39, 68.

Foreman Brock acknowledged that freeze/thaw cycles were to be expected in January, and that he would look “closer” at the highwall during freezing and thawing conditions because material is more likely to fall. Tr. I:182-84. Indeed, such freeze/thaw cycles had in fact occurred in the days and weeks preceding the accident. A reasonably prudent examiner would have recognized (and sought to evaluate) the increased hazard of material falling from the highwall onto miners in the working area during the winter months.

Finally, as in *Sunbelt*, the examiner’s vantage point here was insufficient to check for all hazards imperiling the working area. 42 FMSHRC at 24. Foreman Brock conducted his examination by observing the trees on the highwall from the haul road below. The mine foreman conducted daily on-shift examinations of the area where the accident occurred, which included glancing up at the highwall from the haul road to check for loose rocks or vegetation leaning over the wall. Tr. I:189-90; Tr. II:66. The Judge found that using this vantage point “a reasonably prudent miner could have not perceived the danger of the trees on the highwall.”[4] 46 FMSHRC at 230; Tr. I:189-93. The examination reports did not identify the hazardous conditions in the days leading up to the accident. Ex. S-6. However, for the examination to be sufficient, the examination should have been conducted from a vantage point capable of discovering this foreseeable hazard.

It is axiomatic that when interpreting regulations, we take into account common sense, the purposes of statutes and regulations, and the practical consequences of those interpretations. *See Condon v. Bowen*, 853 F.2d 66, 72 (2nd Cir. 1988) (citations omitted); *see also Central Sand & Gravel Co.*, 23 FMSHRC 250 (Mar. 2001) (holding that a regulation must be read in accordance with the protective purposes of the applicable safety standards and the Mine Act—to

[4] There was an access road near the stand of trees atop the highwall. 46 FMSHRC at 210-14. Though we do not lay out any specific requirements for how the examiner should have conducted the examinations, other than to ensure he could reasonably perceive hazards to miners, we note that if the examiner could not view the hazard from the haul road he could have examined it from the access road above.

protect miners from hazards).[5] We find guidance in the Commission's previous holdings and determine that the Judge engaged in an improperly narrow reading of the regulation, which would lead to an absurd result.

[5] *Central Sand & Gravel Co.*, 23 FMSHRC 250 (Mar. 2001), involved a citation issued by MSHA to the operator for a failure to maintain adequate clearance under a high-voltage powerline in violation of the safety standard at 30 C.F.R. § 56.12045 ("[o]verhead high-potential powerlines shall be installed as specified by the National Electrical Code."). A sand and gravel stockpile stood 10 feet higher than powerlines and the west side was less than 2 feet from the lines. The citation was issued following the electrocution of an eleven-year-old child who reached out and touched a powerline while playing on the stockpile, after working-hours.

The Commission Judge determined that the operator violated the safety standard and the NEC, which required clearance of 8 vertical feet and 5-1/2 horizontal feet.

On review before the Commission, the operator argued that the literal terms of the safety standard only requires that the overhead power lines "be installed" in accordance with the NEC. The Commission rejected this construction finding that it "would negate much of [the safety standard's] protective intent" and "would lead to the plainly absurd result of permitting mining operations to take place without adherence to many provisions in the [Code] intended to safeguard persons from the obvious post-installation hazards of overhead high-potential powerlines." 23 FMSHRC at 254.

III.

Conclusion

For the reasons above, we find that a violation of 30 C.F.R. § 77.1713(a) has been established. Accordingly, the Judge's decision vacating Order No. 9138189 is reversed. We remand for the determination of whether the violation was significant and substantial and caused by an unwarrantable failure to comply with the standard, and for the assessment of a civil penalty after application of the factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 17, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of TIMOTHY BARNES v. WARRIOR MET COAL MINING, LLC	Docket No. SE 2021-0152
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of BRANDON HALL v. WARRIOR MET COAL MINING, LLC	Docket No. SE 2021-0155

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION APPROVING SETTLEMENT

BY THE COMMISSION:

These proceedings arise under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2024) ("Act" or "Mine Act"). They involve complaints of discrimination and interference filed by Timothy Barnes and Brandon Hall ("Complainants") against Warrior Met Coal Mining, LLC ("Warrior Met") pursuant to section 105(c)(2) of the Mine Act.[1]

[1] Section 105(c)(1) of the Mine Act provides in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because of the exercise by such miner . . . of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

Under section 105(c)(2) of the Act, a miner may file a complaint with the Secretary of Labor alleging discrimination or interference in violation of section 105(c)(1), and the Secretary is required to investigate the complaint. If, upon such investigation, the Secretary determines that a violation has occurred, the Secretary is required to file a complaint on behalf of the miner with the Commission. 30 U.S.C. § 815(c)(2).

On January 10, 2025, after a hearing on the merits, a Commission Administrative Law Judge issued a joint decision and order holding that Warrior Met had discriminated against the Complainants in violation of section 105(c) of the Mine Act. 47 FMSHRC 40 (Jan. 2025) (ALJ).

The Judge ordered that Warrior Met reinstate Mr. Hall to the position he would have held but for the discharge, or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties, and awarded backpay in the amount of $24,711.65. He awarded Mr. Barnes backpay in the amount of $22,320.20. Both miners were to be paid quarterly interest at the Federal underpayment rate through the date of payment to them. The Judge assessed civil penalties in the sum of $40,000 ($20,000 for each violation) against the operator for the two section 105(c) violations. Finally, the Judge ordered Warrior Met to completely expunge all references to the circumstances involved in this matter from Hall's and Barnes' employment records and required all members of Warrior Met's management personnel to participate in a training course on the rights protected under section 105(c) of the Mine Act.

Warrior Met subsequently filed a petition for discretionary review of the Judge's decision. On February 13, 2025, the Commission issued a direction for review, granting the petition. On March 10, 2025, to provide the parties with additional time to reach a potential settlement of the cases, the Commission granted Warrior Met's unopposed motion for a forty-five-day extension of time to file its opening brief.

After previously being granted a 45-day extension to reach settlement, on May 6, 2025, the Secretary of Labor filed an unopposed motion to suspend the briefing schedule and hold this appeal in abeyance while the parties continued their settlement discussions. The Commission issued an order granting the motion on July 3, 2025.[2] On August 22, 2025, the Secretary filed an unopposed motion to approve settlement agreement in these discrimination proceedings.

The Commission has previously provided oversight of proposed settlements in discrimination cases. *See, e.g.*, *Sec'y on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998) (citing *Sec'y on behalf of Hopkins v. ASARCO, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (Mar. 1993); *Sec'y on behalf of Gabossi v. Western Fuels–Utah, Inc.*, 11 FMSHRC 134, 135 (Feb. 1989); *Sec'y on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 197, 198 (Feb. 1987)); *see also Wilson, Greenwell and Shemwell v. Armstrong Coal Co., Inc.*, 40 FMSHRC 973, 974 (July 2018).

Having reviewed the terms of the proposed settlement agreement, the Commission grants the parties' motion for approval of settlement. Warrior Met is hereby ordered to make monetary payments to Complainants in accordance with the terms of the Settlement Agreement within 30 days of the date of this decision, as well as meet the remaining non-monetary terms of the

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[2] Despite the Commission's July 3, 2025 Order, the parties erroneously state that the Secretary's unopposed motion to suspend the briefing schedule and hold the appeal in abeyance remained pending at the time of filing the motion for settlement on August 25, 2025. Sec'y's Unopposed Motion to Approve Settlement Agreement at 3.

settlement as agreed upon by the parties. Warrior Met is further ordered to pay civil penalties totaling $6,000 to the Secretary of Labor within 30 days of the date of this decision. Payment of the penalties should be made electronically at Pay.Gov, a service of the U.S. Department of the Treasury at https://www.pay.gov/public/form/start/67564508. These proceedings are dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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September 19, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL CO.	Docket No. PENN 2021-0084

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY: Baker and Marvit, Commissioners

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"), involves two citations issued to Consol Pennsylvania Coal Company ("Consol") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation, Citation No. 9204245, alleges that the operator committed a significant and substantial ("S&S") contribution violation by failing to maintain a longwall shield in safe operating condition because a horizontal "keeper" pin in the shield was missing, in violation of the mandatory safety standard at 30 C.F.R. § 75.1725(a). The second citation, Citation No. 9204250, was also designated an S&S contribution violation and concerned the operator's failure to maintain a continuous miner in permissible condition because four light globes on the continuous miner were cracked, in violation of the mandatory safety standard at 30 C.F.R. § 75.503.

Consol challenged the citations in its petition for discretionary review ("PDR"). After a hearing on the merits, a Commission Administrative Law Judge issued a decision on June 9, 2022, affirming the 104(d)(1)[1] findings for each citation. 44 FMSHRC 450 (June 2022) (ALJ). The Judge affirmed the citations and designations of gravity, and determined both violations were S&S contribution violations. The Judge assessed a $383 penalty for Citation No. 9204245

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[1] Section 104(d)(1) provides in relevant part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, . . . he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1).

and $355 for Citation No. 9204250. Consol filed a petition for discretionary review. The Commission granted the petition for review.

For the reasons that follow, we affirm the Judge's order.

I.

Factual and Procedural Background

Consol owns and operates the Bailey Mine, an underground coal mine in Greene and Washington counties, Pennsylvania. The subject citations were issued in March 2021 as part of MSHA spot inspections.[2]

A. Citation No. 9204245 (Pin Violation)

MSHA Inspector Walter Young issued Citation No. 9204245 alleging that Consol failed to maintain a longwall shield in safe operating condition. The mandatory safety standard at 30 C.F.R. § 75.1725(a) requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The inspector designated the gravity as reasonable likelihood of injury, the violation as S&S, and as demonstrating the operator's low negligence.

During his inspection, Inspector Young discovered that a horizontal pin on company number 3 gate shield located on the 8L Longwall Working Section was missing from the clevis.[3] The purpose of a horizontal pin is to keep the vertical pin in the proper position if it were to break. Tr. 33. The vertical shear pin connects the relay bar to the clevis of the longwall shield, which hooks to the pan line or pan conveyor.[4] Tr. 32; GX 3. The vertical pin drops into a hole in the clevis and the entrance to the hole is located between two little ears on top of the clevis. Along the longwall at issue, there were 274 longwall shields and each shield was 1.75 meters wide. The shield at issue exerted more than 30 tons of pressure. The inspector cited the operator for failing to maintain a "gate shield located on [a] Longwall Working Section in safe operating condition. The Horizontal Keeper Pin to retain the vertical (breakaway) pin in place was missing.

[2] Spot Inspections are conducted pursuant to section 103(i) at mines that "liberate excessive quantities of methane or other explosive gases during operations" or at mines where a methane ignition occurred that resulted in death or serious injury in the last five years. 30 U.S.C. § 813(i). The Baily Mine is on a 5-Day spot inspection cycle, the most aggressive required by law.

[3] In Exhibit GX 3, the clevis is the u-shaped component. The keeper (horizontal) pin slides through two ears on top of the clevis.

[4] "Pan conveyor" is defined as "a conveyor comprising one or more endless chains or other linkage to which usually overlapping or interlocking pans are attached to form a series of shallow, open-topped containers. Bureau of Mines, U.S. Department of the Interior, *Dictionary of Mining, Minerals & Related Terms*, 790 (1968).

This condition will permit…pieces of the vertical breakaway pin to become airborne and injur[e].” GX 1. None of the vertical pins were missing from the longwall shields during Inspector Young’s inspection.

The Judge credited Inspector Young’s testimony that a pin could become a projectile and was known to create a hazard. 44 FMSHRC at 456-57. Inspector Young testified that on almost every shift, at least one of the longwall vertical shield pins shear or break. Tr. 47. The operator agreed that the purpose of the vertical pin was to shear or break to protect the shield system. Tr. 32, 142. The inspector testified that in the absence of the horizontal pin, a vertical pin could break and become an airborne projectile that could hit people if within eight feet of the shield. Tr. 44, 66. In addition, he testified that this hazard had been present several times in the past and could result in serious eye or neck injury. Tr. 42-43, 51. He provided details of one incident involving a miner named Tim Farrell, who allegedly suffered a cut to his cheek by a piece of shear pin from a longwall shield. Tr. 60-61.

The Judge affirmed the gravity, negligence, and S&S contribution designations of the citation. Citing to the reasonably prudent miner standard the Commission has adopted for recognizing a hazard in the unsafe operation of machinery or equipment, the Judge concluded that the Secretary had demonstrated the presence of a hazard due to the missing component, a horizontal keeper pin. 44 FMSHRC at 456.

Regarding the Secretary’s assertion that the hazard was reasonably likely to occur, the Judge “found that credible evidence exists to support that the hazard—a projectile shear pin—could occur[.]” *Id.* at 457. The Judge also affirmed the citation’s negligence designation as “a reasonably prudent person in their position should have known about the violation condition and acted to remedy it.” *Id.* at 461.

With respect to the S&S determination, the Judge applied the current iteration of the *Mathies Coal Co.* test and found that the violation had occurred, satisfying the first step. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (“*Mathies*”). Per the second step of the *Mathies* test, the Judge found the violation was reasonably likely to result in a discrete safety hazard. 44 FMSHRC at 457. The Judge determined that the vertical shear pin breaking and becoming a projectile due to being unsecured by a horizontal pin was a hazard. Then, he found that the hazard was reasonably likely to occur. *Id.* Despite contrary assertions from the respondent, the Judge gave substantial weight to the inspector’s testimony of past events. The Judge then concluded that the hazard was likely to result in an injury, per step 3 in the *Mathies* analysis, because “one or more miners would have been at risk of injury from the discrete hazard.” 44 FMSHRC at 459-60. Finally, the Judge found that it was reasonably likely that such an injury would be of a reasonably serious nature because “the Secretary provided credible, undisputed testimony that the hazard could result in lacerations or eye damage[,]” in line with the fourth step of the analysis. *Id.* at 461.

B. Citation No. 9204250 (Globes Violation)

Inspector Young also issued Citation No. 9204250 alleging that four orange plastic protective covers (globes) over light bulbs on the side of the continuous miner were cracked.

Section 75.503 requires that an operator "maintain in permissible condition all electric face equipment required…to be permissible which is [used in certain areas of the mine]." 30 C.F.R. § 75.503. The purpose of permissibility requirements is to prevent an ignition inside an enclosure from escaping to, and igniting, the general atmosphere. Inspector Young designated the citation as reasonably likely to result in injury, as low negligence, and as an S&S contribution violation.

The globes at issue were permissible explosion-proof enclosures for the bulbs. Tr. 74. In the citation, the inspector wrote that the

> Continuous Miner…in [a] Working Section…was not maintained in permissible condition. Four 120 A.C. volt area light globes were cracked. The 2 area lights inby the side bolters contained one or more cracks which ranged from 1.5 to 3 inches in length…The double ended area light (2 globes) directly below the rib bolter on the operators [sic] side were badly damaged by being covered with cardboard and had overheated. These light globes contained numerous, large spider web…cracks going in multiple directions, one contained a hole measuring 0.25 inches wide by 0.375 inches long…

GX 4 at 2. The inspector also noted that the mine liberated "10,835,416 cubic feet of methane every 24 hours." GX 4. The methane monitor on the continuous miner was improperly calibrated; when tested with a concentration of 2.5% methane, it incorrectly registered the methane concentration at 1.7%. GX 5. However, the monitor was set to turn off the power of the continuous miner at 1.5%, so under the incorrect calibration, the power was turned off during the test. *Id.* (citation No. 9204251).

The inspector testified that moisture, erosion, vibration from the continuous miner, or simply age could cause a light fixture within a globe to fail, which could lead to an ignition within the enclosure. Tr. 75. The inspector did not know the type of bulb used in the globes. Tr. 87. The operator's witness asserted that most mining machines used LED bulbs. Tr. 163. In its post-hearing brief, the operator asserted that all four lightbulbs inside the cracked globes were LED. Resp't Post-Hearing Br. at 15. The operator provided a photograph taken after the inspection depicting an LED bulb. Tr. 174, R-7 at Consol 0041. The operator's witness testified that LED bulbs are far more efficient than other types of bulbs because they "produce less heat." Tr. 160-61. The operator asserted that the bulbs did not need to be replaced to abate the citation. According to the operator's witness, LED bulbs are more efficient and "nearly intrinsically safe." However, the operator conceded that the light fixtures frequently fail and a hole in the globe might allow ignition. Tr. 174-76. The Secretary did not address the operator's assertion that LED bulbs do not create enough energy to ignite methane.

The Judge affirmed the gravity, likelihood, and S&S contribution designations of the citation. The Judge found that the potential ignition of the general mine atmosphere outside the four cracked globes on the continuous miner constituted the hazard. The Judge further found that a light fixture failure must be "assumed to be able to ignite methane that naturally enters the enclosure." 44 FMSHRC at 465. The Judge also found that LED bulbs could still provide a potential source of ignition and that there was no evidence that the LED bulbs were being used at the time of the inspection, rejecting the photographic evidence of the bulbs taken after the inspection that the operator submitted. *Id*. The Judge found that it was reasonably likely that the ignition within the globes would escape into and ignite the general mine atmosphere outside the globe, finding that the mine was gassy and represented a "constant threat[.]" *Id.* at 466.

II.

Disposition

For the pin violation, Consol challenges the Judge's finding of a violation and the Judge's negligence, gravity findings, and S&S contribution findings. The operator challenges the Judge's finding that the violation was reasonably likely to result in a projectile hazard and that the projectile hazard was reasonably likely to result in injury to miners. For the globes violation, the operator does not dispute the finding of a violation or negligence finding, but does challenge the gravity and S&S contribution findings. The operator particularly challenges the finding that the violation was reasonably likely to result in an ignition hazard.

For the reasons discussed below, we affirm the Judge's findings. Due to an extensive discussion and review of the history of section 104(d)(1) and the original statutory purpose of the S&S designation, we address the Judge's S&S findings separately, after addressing all other relevant findings.

A. Standard of Review

The Commission is bound by the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The substantial evidence test is highly deferential. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1028 (D.C. Cir. 2013). "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)). The Commission must "consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 710 (Aug. 2008) (quoting *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997)). However, the possibility of "two inconsistent conclusions" to be drawn from evidence does not prevent a conclusion that a finding is supported by substantial evidence. *Sec'y of Labor on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996). The Commission applies a *de novo* review standard for legal issues. *See, e.g.*, *James M. Ray, employed by Leo Journagan Constr. Co., Inc.*, 20 FMSHRC 1014, 1022 (Sept. 1998).

B. Citation No. 9204245 (Pin Violation)

1. Violation

As discussed above, Citation No. 9204245 was issued for a missing horizontal pin on a longwall shield, which could allegedly result in an unsecured vertical pin becoming a projectile hazard. The Judge found a violation of section 75.1725(a). The operator has appealed the finding on the grounds that it was unlikely that the pin would become a projectile hazard and that the inspector's testimony was not credible.

Substantial evidence supports the Judge's finding of a violation of section 75.1725(a). The longwall shield was a piece of equipment that was not maintained in safe operating condition and that was not removed from service immediately. In affirming the violation, the Judge found that the circumstances of the pin violation were "sufficiently similar" to recent decisions involving broken or missing components and that the component, in this case the horizontal pin, was indeed missing. 44 FMSHRC at 456. Furthermore, he credited testimony from the inspector that this condition posed a hazard to miners and was therefore unsafe. *Id.* at 456-57, 461. We agree with the Judge.

The operator argued that "even with a missing horizontal pin, vertical shear pins, more often than not, remain in place" and "when vertical shear pins break, the bottom and center pieces typically fall out of the hole onto the ground, while the top piece remains in the hole and does not fly out as a projectile." PDR at 13. That is, the operator alleged that the condition was not unsafe.

We disagree. Consol did not dispute that the horizontal pin was missing. The violation concerns whether the missing component poses a hazard rather than the likelihood of a danger occurring. *See Alabama By-products Corp.*, 4 FMSHRC 2128, 2131 (Dec. 1982) (noting that in the context of a section 75.1725 violation that "whether an unsafe condition existed" is a separate question from the gravity of the violation, and that "upon observing the defective equipment at issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action"). Furthermore, the Commission's test for whether machinery or equipment violates section 75.1725(a) is "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Id.*, 4 FMSHRC at 2129. The Judge credited the inspector's testimony that, in his experience, this condition could pose a hazard to miners. 44 FMSHRC at 456-57, 459. A judge's credibility determination is "entitled to great weight and may not be overturned lightly." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1739 (Aug. 2012) (citations omitted); *see also*, *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *citing Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984) ("Since the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination."). The Judge's determination in the instant case is supported by substantial evidence.

The operator characterized the inspector's testimony as "self-serving" and "uncorroborated." PDR at 14-15. Again, we must disagree. As noted, the (Commission assigns great weight to a judge's decision to credit the testimony of a witness and it cannot be overturned lightly. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). The Commission reviews a judge's credibility determinations under an abuse of discretion standard and there must be "compelling reasons" to take the "extraordinary step" of reversing a judge's determination. *KenAmerican Res., Inc.*, 42 FMSHRC 1, 3 (Jan. 2020) (citations omitted). We have further stated that is "reasonable for [a] Judge to rely on [an] experienced inspector's testimony." *Consol Penn Coal Co., LLC*, 43 FMSHRC 145, 151 (Apr. 2021).

Inspector Young testified to two instances where a miner was injured by a vertical projectile, and other instances where a pin became a projectile but miners were not injured. Tr. 42-43, 60-61. The Judge credited the inspector's testimony and found that the "Secretary has presented credible evidence that the shear pins, which are designed to break, have been projected from the clevis upon breaking. The [MSHA] inspector noted one known injury where he was present and multiple reports from other miners of the hazard occurring without causing injury." 44 FMSHRC at 456. The Judge was within his rights to rely on that testimony and the operator provided no basis for us to overturn that determination.

We conclude that the missing horizontal pin presented a safety hazard and it was reasonable for the Judge to rely on an experienced inspector's testimony.[5]

2. Negligence

Inspector Young determined that the operator's degree of negligence was low and the Judge affirmed. The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Newton Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016) (quoting *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). The Commission also uses the reasonably prudent person test to determine whether an operator met its duty of care. *Id.* (citations omitted); *see also Spartan Mining Co.*, 30 FMSHRC at 708 (considering negligence inquiry to be circumscribed by scope of duties imposed by regulation violated).

In the instant case, the Judge concluded that the operator "must work to continually . . . maintain the machinery in a safe operating condition," and a reasonably prudent person in the operator's position "should have known about the violative condition." 44 FMSHRC at 461. The Judge noted "that these pins consistently break, and that the condition could have occurred between the last inspection and the violation." *Id*. The operator argued that no one knew about the pin therefore negligence was not demonstrated. Br. at 30. The Judge did not explain how a person would have known about the violative condition. The inspector testified that "the [violative] condition could have occurred after the [fore]man did his pre-shift or even after the foreman walked by." Tr. 46.

However, we disagree with the operator's implication that negligence requires actual knowledge. The Commission has recognized that "an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *The American Coal Co.*, 38 FMSHRC 2062, 2083 (Aug. 2016). The Commission has also "long recognized that mine management should be held to an even higher standard of care . . . . The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on

[5] Inspector Young became an inspector in 2006 and worked in the mining industry for 22 years as a longwall foreman. Tr. 24-28.

operators, with the assistance of their miners." *Newton Energy, Inc.*, 38 FMSHRC at 2047 (citing 30 U.S.C. § 801(e)). As the inspector testified, the horizontal keeper pin in the No. 3 gate shield was missing and miners are directed to replace pins wherever they are missing. Tr. 55, 61; *see also The Ohio County Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018) (approving modification to low negligence for failure to fix equipment defect). Substantial evidence supports the Judge's finding of violation and that the operator should have known about the missing pin. We therefore affirm the Judge's holding that the operator's violation was of low negligence.

3. Gravity

Inspector Young designated the citation as reasonably likely to result in injury and the Judge affirmed. 44 FMSHRC at 457. The operator appeals.

Consol again takes issue with the Judge's credibility findings and contends that "there would have to be unusual and adverse conditions at the cited shield to cause the vertical pin to work loose and break and that there was no evidence of adverse conditions at the time of the inspection or projected future mining." Br. 24-25. The operator also argues that there were no miners near the shields during the inspection that found a component to be missing in the machinery. *Id.* at 27-28. The Judge credited the MSHA inspector's testimony that the vertical pin could become a projectile and cause "injuries such as lacerations or eye injuries." 44 FMSHRC at 454.

The inspector testified that a miner would need to be within eight feet of the shield to be struck with a projectile vertical pin. Tr. 66. However, the operator alleges that miners would rarely be within eight feet of the shield because they would follow the operator's "required practice [policy] of . . . being at least two shields away." PDR at 19; *see also* Tr. 115-16. The operator also alleges that "there was no . . . evidence of any injury ever occurring from the vertical pins breaking, becoming airborne, [and] hitting . . miners." PDR at 20.

The operator asserts that being two shields away means that miners must be eleven feet away from the shields. PDR at 19. The Judge noted that "[a]ll witnesses . . . testified that miners at this mine generally operate shields . . . from two shields away at a distance of seven-to-eleven feet." 44 FMSHRC at 460. Therefore, the operator and Judge disagree as to the distance between a miner and a shield if the miner was "two shields away"—the operator claims such distance would be eleven feet, out of the eight foot range of a projectile pin, while the Judge found such distance would be seven to eleven feet, potentially within the range of the projectile pin.

One of the operator's witnesses testified that if a miner was "two shields away," he would be seven to ten feet from the shield, potentially within the range of the projectile pin. Tr. 116 (Q: "And approximately how far would you be from the shield that you're moving if you're two shields away?" A: "That would be roughly seven to ten feet."). This testimony by the operator's own witness constitutes substantial evidence supporting the Judge's determination that a miner would be within the eight feet range of the projectile hazard.[6]

Assuming miners always follow company policy and exercise appropriate caution is contrary to Commission precedent. The Commission has noted that "[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators . . . to prevent unsafe working conditions." *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) (quotation omitted). Similarly, the Commission has "emphasized that . . . the vagaries of human conduct cannot be ignored." *Id.* at 1901 n.17. Therefore, under continued mining operations, miners may not always exercise caution or follow policy.

The Commission has held that the "focus of the seriousness of the violation is . . . on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). While the Judge did not explain the inconsistency in his description of the appropriate analysis,[7] he credited the inspector's testimony regarding instances of injuries due to pins becoming projectiles upon breaking. 44 FMSHRC at 456-57. As we have said, this determination is afforded substantial weight. Therefore, the Judge's finding of gravity is affirmed.

C. Citation No. 9204250 (Globes Violation)

1. Gravity

Inspector Young designated the globes violation as reasonably likely to result in injury. The Judge affirmed this designation,. finding that "credible evidence exists to support the potential ignition in a light fixture penetrating a compromised globe." 44FMSHRC at 464. The operator now appeals.[8]

Citing *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014), the Judge noted in his analysis of the violation that "[p]ermissibility requirements 'ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the

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[6] The record does indicate that each shield was 1.75 meters wide. Tr. 149. Accordingly, the width of two shields would be 3.5 meters or approximately 11 feet. However, this measure simply raises the possibility of drawing a different conclusion from the evidence, which "does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y of Labor on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

[7] In his decision, the Judge discussed the gravity analysis as focused on the likelihood "of the expected resulting injury" assuming "the occurrence of the hazard." 44 FMSHRC at 452. Later, the Judge noted that "the Secretary asserts that the hazard is reasonably likely" and concluded that "credible evidence exists to support that the hazard—a projectile shear pin—could occur." *Id.* at 457.

[8] The operator does not challenge the Judge's finding of a violation.

mine atmosphere.'" 44 FMSHRC at 463. The Judge then analyzed the likelihood of an explosion as part of step 2 of the *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) test. 44 FMSHRC at 465.

The Judge credited the inspector's testimony that one could not predict when an electrical circuit will fail as a result of "moisture, erosion, vibration, or just age." 44 FMSHRC at 465. The Judge rejected the operator's arguments that "there would have to be a failure in the light fixture on the nonprotected side of the light's ballast [to cause an ignition]," "that there was no evidence of electrical issues with lights," and "that the LED lights allegedly present are nearly intrinsically safe." *Id*. The Judge found that these arguments rested on incorrect assumptions that a light fixture could not ignite methane and that continued normal mining operations did not exist, and on an unproven assertion that LED lights were "nearly intrinsically safe." *Id.* The Judge further found that "nothing in the record prov[ed] that LED bulbs were in fact present at the time of the citation." *Id.*

As to an ignition within the globes escaping to, and igniting, the general mine atmosphere, the Judge assumed "a constant threat of explosive methane in a gassy mine," finding, in relevant part, that the mine was "gassy" and liberated more than ten million cubic feet of methane every 24 hours. *Id.* at 466. The Judge also noted that the methane monitor was improperly calibrated. *Id.* at 467; *see* Tr. 78, 123; GX-5. In relevant part, the Commission has concluded that a finding that a "mine liberated more than one million cubic feet of methane in a twenty-four-hour period, and [that] there had been a methane ignition . . . in the year preceding the hearing" might be sufficient to uphold an S&S designation. *Knox Creek,* 36 FMSHRC. at 1136 (citing *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1284 (Sept. 1986)). We note also that this level of methane led to the mine being on a 5-day spot inspection cycle and, in fact, Inspector Young was at the mine to conduct a spot inspection at the time this citation was issued. Tr. 71; *see* 30 U.S.C. § 813(i).

Here, the mine liberated much more than one million cubic feet of methane in a twenty-four-hour period. Therefore, assuming continued mining operations, it is reasonably likely that a sufficient amount of methane for an atmospheric ignition would exist in the future. Similarly, assuming continued mining operations, the methane monitor, which was improperly calibrated at the time of the MSHA inspection, would be reasonably likely to be improperly calibrated in the future, and thus fail to accurately detect the level of methane in the atmosphere. Accordingly, the Judge's finding that "credible evidence exists to support the potential ignition in a light fixture penetrating a compromised globe" is supported by substantial evidence. 44 FMSHRC at 464.

Assuming a light fixture failure, such a circuit failure must produce sufficient energy for an ignition. The operator's witness testified that "most of the [operator's] mining machines use LED bulbs." Tr. 163. In contrast, the MSHA inspector testified that he did not know the specific type of bulbs in the light fixtures in the defective globes ("I don't know if it was LED or not"). Tr. 87. Moreover, the operator provided a photograph, taken some time after the MSHA inspection, depicting a globe with LED bulbs on the machine at issue. Tr. 166, 174; R-7 at Consol 0041. Relatedly, the operator claims that "no lights were replaced to abate the [c]itation," implying that the same bulbs present during the MSHA inspection were represented in the photograph taken afterwards. Br. at 33.

The Judge made a finding that "there [was] nothing in the record [to demonstrate] that LED bulbs were in fact present at the time of the citation." 44 FMSHRC at 465. A "determination as to the substantiality of evidence supporting a challenged finding 'must take into account whatever in the record fairly detracts from its weight.'" *Consol Pennsylvania Coal Co., LLC,* 44 FMSHRC 37, 43 (Feb. 2022) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The operator in its PDR states that "photographs depicting [the continuous mining machine at issue] taken when the machine was removed from underground showed LED lights present." PDR at 24; *see* R-7 at Consol 0038-0041. However, given that the photograph was taken some time "after the globes had been replaced," the Judge found that the photograph might represent different bulbs from those present during the MSHA inspection. 44 FMSHRC at 465; Tr. 174.

The Judge did not address testimony that most of the operator's mining machines use LED bulbs, or the contention that the bulbs in the defective globes did not need to be replaced to abate the citation. However, 30 C.F.R. § 18.2 defines the phrase "intrinsically safe" as "incapable of releasing enough electrical or thermal energy under normal or abnormal conditions to cause ignition of a flammable mixture of methane or natural gas and air of the most easily ignitable composition." This definition is consistent with testimony during the hearing defining "intrinsically safe" as "the point where you can guarantee [the] methane air mixture will not ignite." Tr. 172. Therefore, if a bulb inside a globe is intrinsically safe, it is virtually impossible for a failure in the circuit to result in an ignition inside the globe, even assuming an explosive level of methane inside the globe.

In contrast, the operator characterizes the LED bulbs it alleged to be in the continuous miner globes as "nearly intrinsically safe." *See* PDR at 11. There is no definition in the Mine Act or its related regulations for a "nearly intrinsically safe" piece of equipment. The operator provides no quantum for measuring "nearly intrinsically safe" equipment or a legal framework for considering it. Therefore, we find that operator's characterization irrelevant. And, for these reasons, we affirm the Judge's gravity determination.

D. Significant and Substantial Contribution

On appeal, the operator explicitly argues that the Judge's decision to uphold the S&S designations for both citations was erroneous, contrary to law, and not supported by substantial evidence. PDR at 17, 21; *see* 30 U.S.C. § 823(d)(2)(A)(ii). It takes issue with the Judge's holding that "[the] inspector's conclusion that a possible injury is of a reasonably serious nature is sufficient for *Mathies* Step 4 (ALJ 11)." PDR at 9. The operator argues that the Judge ignored evidence that miners would not be struck with "force substantial enough and in an area reasonably likely to result in injury." *Id.* Furthermore, it argues that the Judge erred in applying the second step of *Mathies* by ignoring "unusual and adverse conditions at the cited shield to cause the vertical pin to work loose and break." *Id.* at 18.

The Commission has reviewed issues on appeal because they are implicitly raised below or so intertwined with matters before the judge that they may be considered.[9] *See Oak Grove Resources, LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011) (citing *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007), *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984)). In the instant case, reviewing the Judge's S&S analysis—especially with respect to the issue of likelihood, which goes to the heart of the appropriateness of the statutory interpretation contained in *Peabody*—requires us to determine whether the Commission's *Newtown/Peabody* reformulation of the *Mathies* test comports with the language of the Mine Act.[10]

We recognize that the following discussion on *Mathies*, *Newtown*, and *Peabody* might be more than a bit confusing. As will be demonstrated herein, the confusion goes to the very heart of the Commission's longstanding and shifting jurisprudence regarding section 104(d)(1) of the Act. The Commission's changes to the S&S analysis have created significant confusion among judges, MSHA, and the mining industry, and have created a test that is barely connected to the original text of the Mine Act. The Mine Act is the Commission's lodestar and, where our jurisprudence has become contrary or inconsistent with the Act, it is incumbent upon us to return to the language of the Act and Congress's intent in drafting it.

The Mine Act categorizes violations of mandatory safety standards on a gradient of increasing severity, from normal section 104(a) citations, to S&S citations, to unwarrantable failure and withdrawal orders. 30 U.S.C. § 814(d); *see Emery Mining Corp*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citations omitted). The Commission has previously explained in detail the Mine Act's gradual enforcement scheme for violative conditions:

> As an incentive for operator compliance, the Act's enforcement scheme provides for increasingly severe sanctions for increasingly serious violations or operator behavior. Sections 104(a) and 110(a) provide that the violation of any mandatory standard requires the issuance of a citation and assessment of a monetary civil penalty. Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed. 30 U.S.C. §§ 814(b) and 820(b). Under section 104(d), if an inspector finds a violation and also finds that the violation is of a significant and substantial nature and has resulted from the operator's unwarrantable failure to comply with the standard, a citation noting those

[9] *See, e.g.*, *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007) (considering on appeal unwarrantable failure factors not specifically argued by a party or analyzed by the Judge because they were intertwined with evidence relating to factors that were addressed); *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (concluding that points made by the Secretary to Commission, while not identical to those made to the Judge, were sufficiently related to those below to permit the Commission to consider them under 30 U.S.C. § 823(d)(A)(iii)); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (accepting an argument as sufficiently related to one made below because it enlarged the one made below).

[10] As discussed below, the operator raises several arguments concerning the Judge's analysis with regards to likelihood in Citation No. 9204250.

findings is issued. This "section 104(d) citation" carries enforcement consequences potentially more severe than section 104(b) sanctions. If further unwarrantable failure violations occur within 90 days of the citation issued under section 104(d), unwarrantable failure withdrawal orders are triggered. Issuance of the withdrawal orders does not cease until an inspection of the mine discloses no unwarrantable failure violation.

Nacco Mining Co., 9 FMSHRC 1541, 1545 (Sept. 1987) (citations and quotation marks omitted).

The "significant and substantial contribution" designation contained in section 104(d)(1)[11] represents an initial step on the ladder of progressive enforcement, beyond issuing a citation for a simple violation of a safety standard. An S&S contribution designation generally increases the civil penalty proposed for the violation, and can provide the basis for a "pattern of violations" designation and possible future withdrawal orders.[12] 30 U.S.C. § 814(e); 30 C.F.R. § 100.3. The failure to abate the violative condition cited in any citation can also result in a withdrawal order and enhanced civil penalties. 30 U.S.C. §§ 814(b), 820(b).

Section 104(d)(1) also provides that within 90 days after the issuance of an S&S contribution citation, if an inspector finds another violation of any mandatory safety standard and finds such violation to be also caused by an unwarrantable failure to comply, he shall issue a withdrawal order causing miners to be withdrawn from the area until the inspector determines such violation has been abated. 30 U.S.C. § 814(d)(1). The Mine Act provides additional sanctions to compel compliance for more egregious or imminently dangerous hazards. 30 U.S.C. § 820(b)(2) (defining a "flagrant" violation as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury"); 30 U.S.C §§ 817(a) 802(j) (providing an inspector the authority to issue a withdrawal order when he observes an imminent danger, i.e., "the existence of any condition or

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[11] *See* 30 U.S.C. § 814(d)(1), *supra* note 1.

[12] Section 104(e) provides MSHA with the ability to issue withdrawal orders in situations in which a mine operator has demonstrated a pattern of S&S violations. Section 104(e) of the Mine Act provides that:

> If an operator has a pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. § 814(e)(1). Any operator so notified is subject to an order requiring the immediate withdrawal of miners, if an inspection within 90 days discovers any additional significant and substantial violations at the operator's mine. Any subsequent inspections that reveal significant and substantial violations will result in further withdrawal orders, until the mine achieves an inspection with no such violations. 30 U.S.C. §§ 814(e)(1), (2), (3).

practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated") (emphasis added).

When Congress passed the Federal Mine Safety and Health Act in 1977 and enacted section 104(d)(1), it did so in order to highlight the way in which a violation would *contribute* to the risk of a hazard. 30 U.S.C § 814(d)(1). While the Commission, MSHA, and the industry have traditionally referred to this requirement by the shorthand of "S&S," this shorthand may misconstrue Congress's intent and the statutory language itself. Below, we review Commission precedent on section 104(d)(1), the statutory language, and legislative history, and conclude that Congress intended the Commission to apply the S&S designation to violations where the violation "could significantly and substantially contribute" to the risk of a mine safety or health hazard.

We turn next to the ways in which the language now contained in section 104(d)(1) has been interpreted by the Commission through the years to reach the recent and problematic *Peabody/Newtown* formulation.

1. The Commission's Erroneous *Peabody* Significant and Substantial Test

Below we review the history of section 104(d)(1), the evolution of the language that it contains starting with its appearance in 1966, and the Commission's various iterations of its practical implementation starting with the 1984 *Mathies* test and culminating in the current *Peabody* test from 2020. This overview leads us to conclude that over forty years of tinkering has resulted in an awkward and cumbersome standard divorced from the statutory text and the reality of how MSHA inspectors, acting as the Secretary's representatives per the statute, analyze S&S in practice. The *Peabody* test runs afoul of the statutory text and Congress's desire to enact an enhanced penalty for violations that contribute to a risk of hazard. Congress never intended the language in section 104(d)(1) to be an abstract and contested bar to enhanced enforcement. Instead, as the Senate and House Reports demonstrate, the Mine Act's drafters included section 104(d)(1) as a practical tool to reduce risk of injury.

a. The History of Section 104(d)(1) and its Interpretation

i. Origin of the "Significant and Substantial" Designation

The phrase "significantly and substantially contribute" entered federal mining regulation in the Federal Coal Mine Safety Act Amendments of 1965. Pub. L. 89-376, 80 Stat. 84 (1966), amending the Federal Coal Mine Safety Act of 1952, Pub. L. 82-552, 66 Stat. 692 (1952). Specifically, the amendment required representatives of the Bureau of Mines to note a violation of a safety provision if it was of "such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident." Sec. 3(a), § 203, 80 Stat. at 85. The amended provision did not define "significantly and substantially" or provide for monetary penalties; instead, the statute made such a determination a baseline finding for future withdrawal orders. *Id*.

Congress partially carried over and expanded this language in the passage of the Federal Coal Mine Health and Safety Act of 1969. Pub. L. 91-173, 83 Stat. 742 (1969). Under that Act, a representative of the Secretary was required to note a violation of a health or safety standard if "such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard."[13] §104(c)(1), 83 Stat. at 751. As with the 1965 Amended Act, the Coal Act of 1969 did not define the term "significantly and substantially." The legislative history of the Coal Act contained little in the way of guidance. The conference report showed the language in the section-by-section analysis but did not provide any information that could aid in the interpretation of the language. H.R. Rep. 91-761, at 67 (1969) (Conf. Rep.). The House report was equally opaque. *See* H.R. Rep. 91-563 (1969).

However, during debate on the bill, Congressman Carl D. Perkins of Kentucky further elaborated on the problems that Congress hoped to fix with the 1969 Act:

> The 1952 law was directed only at the prevention of major disasters. The day-to-day accidents, which still cause roughly 90 percent of all coal mines (sic) fatalities, were not to be a concern of the Federal Government. Despite a record which showed that the States were not discharging their responsibilities and were unlikely to do so, despite their weak standards and weaker enforcement, the chief responsibility for mine safety was left with the States.
>
> . . .
>
> The Federal Coal Mine Health and Safety Act of 1969 which we are considering today deals comprehensively with both the health and safety problems of the mines. It corrects the deficiencies of the 1952 Act, takes account of past experience and provides for the development and implementation of safeguards against hazards that may develop in the future.

Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong. 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1124-25 (1975).

The Secretary of the Interior, under the auspices of the Interior Board of Mine Operations Appeals ("IBMA"), was charged with interpreting the S&S language for practical implementation. Pub. L. 91-173, 83 Stat. 742, § 105. Even though the IBMA only heard cases for a few short years, it made several attempts to interpret this statutory language. The first case in which the IBMA interpreted the S&S language of the Coal Act was *Eastern Associated Coal Corp.*, 3 IBMA 331 (Sept. 1974). Specifically, the IBMA defined the phrase "of such nature as

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[13] While the language is somewhat similar to the 1965 Amended Act, the previous limitation of the significant and substantial language to violations that contribute to "a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident" was removed. Instead, the provision in the 1969 Act applied to any violation that contributed to a "mine safety or health hazard." The broadening of the language in this section mirrored Congress's general expansion of federal authority found throughout the Coal Act.

could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" to mean "conditions or practices, constituting violations, which pose a probable risk of serious bodily harm or death short of imminent danger and where there is a degree of fault, greater than ordinary negligence, which may be aggravated by repetition." *Id*. at *7. Later in the decision, the Board made it clear that the phrase probable risk of bodily harm or death short of imminent danger was the practical definition of the statutory phrase "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." *Id*. at *9.

The IBMA later reiterated and clarified its *Eastern Associated Coal Corp.* holding in *Ziegler Coal Co.*, wherein it noted that the clause which reads "could significantly and substantially contribute to the cause and effect" states a "probability requirement, designed . . . to prevent application of section 104(c) to largely speculative 'hazards.'" 4 IBMA 139, **8 (May 1975).

However, the *Eastern Associated Coal Corp.* standard did not last long. Shortly after its issuance, *Ziegler Coal Co.* was overturned by the D.C. Circuit on grounds unrelated to the S&S definition. *See UMWA v. Kleppe*, 523 F.2d 1403 (D.C. Cir. 1976). Nonetheless, the IBMA decided to reinterpret the S&S definition after the Court's decision. In *Alabama By-Products Corp.*, the IBMA instead stated that a violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard when it posed a risk of injury that was more than "remote or speculative." 7 IBMA 85, **4 (Nov. 1976). That is, taking *Eastern Associated Coal Corp.* and *Alabama By-Products* together, citations are broken into two broad categories: purely technical violations—which are not S&S— and violations that could serve as the source of an injury, even if that injury is not serious or is unlikely to occur.

This was, obviously, a major shift in interpretation. Now, instead of applying only to violations that posed a probable risk of bodily harm or death short of an imminent danger, S&S would be applied to all "non-technical" violations. The gulf between the tests announced in *Eastern Associated* and *Alabama By-Products* demonstrates opposing interpretations of the statutory language under the Coal Act of 1969. The distance between those two interpretations still represents the outer limits of S&S interpretations to this day.

When Congress passed the Federal Mine Safety and Health Act in 1977, it had a choice to make between these divergent interpretations of the S&S language, and it made its choice clear. The section of the statute concerning the term "significantly and substantially" in the Coal Act, section 104(c)(1), was maintained unchanged, but was moved to section 104(d)(1). Pub. L. No. 95-164, sec. 201, § 104, 91 Stat. 1290, 1301 (1977). In doing so, Congress for the first time signaled its intent as to the meaning of the phrase "significantly and substantially" contributing to the hazard language. Importantly, the Senate report contained in the Legislative History of the 1977 Mine Act expressly rejected the heightened narrow standard in the IBMA's *Eastern Associated Coal Corp.* decision and explicitly endorsed the broad standard contained in the

IBMA's subsequent *Alabama By-Products Corp.* standard (that is, an S&S citation is any non-technical violation). S. Rep. 95-181 (1977). It stated in pertinent part:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the 'gravity test' and has required that the violation be so serious as to very closely approach a situation of 'imminent danger,' *Eastern Associated Coal Corporation*, 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in *Alabama By-Products Corp.*, 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).
>
> The Board there held that 'an inspector need not find a risk of serious bodily harm, let alone death' in order to issue a notice under Section 104(c)(1).
>
> The Board's holding in *Alabama By-Products Corporation* is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when 'technical' violations do pose a health or safety danger to miners, and are the result of an 'unwarranted failure' the unwarranted failure notice will be issued.

Id. at 31.

Furthermore, the ramifications of significant and substantial citations and orders were expanded under the Mine Act. Congress added other enhanced penalties that underscored how section 104(d)(1), containing the significant and substantial statutory language, was meant as an initial step in the progressive enforcement scheme. A new section, 104(e), created the new concept of "pattern of violations" triggered by S&S violations.[14] The pattern of violations sanction is among the most stringent in mine regulation and the desire to avoid such a designation is a major incentive to operators to ensure compliance.

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[14] Specifically, that section states:

> (e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have *significantly and substantially* contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could *significantly and substantially* contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could *significantly and substantially* contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.
>
> (3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could *significantly and substantially* contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.
>
> (4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

30 U.S.C. § 814(e) (Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 at §104(e)) (emphasis added).

a. The Commission's evolving interpretation of section 104(d)(1)

Despite Congress's express endorsement, the Commission never adopted the *Alabama By-Products* standard. Instead, the Commission developed a new test in 1981, which did not last long. The Commission has never really settled on a test and has instead made continuous attempts to clarify the meaning of the phrase "significantly and substantially," for purposes of adjudication. Unfortunately, those attempts have often strayed further and further from the statutory language and Congressional intent, resulting in the currently problematic *Peabody* test. Thus, *Peabody* is the culmination of four decades of Commission attempts to translate the statutory language into a practical test for the adjudication of the disputes before it without reaching a workable, statutorily grounded solution.

The Commission's first attempt to interpret Section 104(d)(1) came in *Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (Apr. 1981). In that case, the Commission implicitly rejected the *Alabama By-Products* standard, stating that it was inconsistent with the statutory enforcement scheme, would turn every citation into an S&S citation (and thereby cause every mine to constantly be on POV status), and would eliminate the ability of inspectors to use their judgment in determining whether a citation was S&S.[15] *Id*. at 825, 828-29, 829 n.9. The Commission stated that the proper legal standard for an S&S violation "falls between [ ] two extremes—mere existence of a violation, and existence of an imminent danger." *Id*. at 828. That is, the Commission neatly restated the two extreme positions from the IBMA's *Eastern Associated* and *Alabama By-Products* cases and placed the "proper" analysis somewhere in the wide gulf between them.

The Commission concluded that a violation is S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Id*. at 825.[16] However, later in the same decision, the Commission defined the word "hazard" to denote "a measure of danger to safety or health" and found that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation *could* be a major cause of a danger to safety or health. *Id*. at 827 ("In other words, the contribution to cause and effect must be significant and substantial.").

The inconsistency of these two definitions in the same decision is readily apparent: Is a violation S&S if there is a reasonable likelihood that the hazard contributed to will result in

[15] A review of the actual use of patterns of violations by MSHA over 50 years shows that the Commission's concerns were misplaced. MSHA rarely cites operators under the pattern of violation standard no matter what the Commission's standard is for S&S contribution to a hazard.

[16] It is important to note that the term "reasonably serious" was created in *National Gypsum* without discussion. The statute does not discuss "reasonably serious" injuries and the Commission made no effort, at that time, to explain its decision to include it. This is especially relevant as the current Commission test from *Peabody* is replete with references to "reasonableness."

serious injury or illness, or if the violation could be a major cause of a danger? Those two questions will not necessarily have the same answers. For example, an operator may be cited for failing to adequately support a rib in a rarely traveled portion of the mine. Utilizing the first definition, failure to support a rib could be a major cause of a rib failure and rock fall, which would be a danger. Therefore, someone might reasonably conclude that the violation was S&S. However, utilizing the second definition, a rock fall in a rarely traveled portion of the mine might not be "reasonably likely" to result in an injury. Therefore, someone else might reasonably conclude that the violation was not S&S. Sometimes, the answer to both inquiries may lead to the same conclusion, but that conclusion would be reached through different inquiries and would consider different facts.

In an attempt to resolve this ambiguity, the Commission in *Mathies Coal Co.*, returned to the definition of S&S. However, rather than choose between the two previous definitions in *National Gypsum* (the "hazard contributed to is reasonably likely to cause an injury" definition and the "could be a major cause" definition), the Commission strayed further from the language and intent of the Mine Act and made them two separate inquiries in a four-step analysis, thereby subtly changing each.

Specifically, the Commission held that a violation of a mandatory safety standard significantly and substantially contributes to the cause and effect of the hazard when there is: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety[17]—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. The end result was that the attempt to clarify the test resulted in a change in the nature of the test, adding elements not required by the statute and creeping towards the imminent danger standard.

Furthermore, in applying its new test, the Commission appears to have muddied the waters and created confusion about how the analysis should be conducted. A common-sense reading of these second and third factors of *Mathies* would imply that someone conducting the second step must establish that the violation contributes to a hazard. Then, in the third step, the analysis shifts so that the violation is no longer being considered but, instead, the question is whether the hazard identified would be reasonably likely to result in an injury.

For example, if the violation at issue was a 5% concentration of methane, the second step would establish that such a concentration contributes to an explosion hazard. Then, the third step would not ask whether this particular 5% concentration of methane – the violation itself – was reasonably likely to cause an injury, but instead whether an explosion – the hazard created – would be reasonably likely to cause injury.

[17] This formulation, which was intended to clarify, has only added to the confusion through its attempt at concision and the use of words with multiple meanings. A clearer definition for "hazard" under the *Mathies* formulation would be the *degree* of danger to a *miner's* health or safety.

However, a close reading of the *Mathies* decision shows that the Commission seems to have misapplied the very test it had just established. The facts in *Mathies* concerned a citation written for a defective "sander" used to slow a railway mantrip. 6 FMSHRC at 4. In analyzing the second step, the Commission noted that the violative condition there contributed to a hazard of sliding derailment or collision with objects on a mantrip track. *Id*. To support this holding, the Commission noted that brakes alone could not stop the machine, that the mine was damp, that the track was wet, and that there were curves and grades on the route. *Id*. Following the language of the test, the third factor should have asked only whether a sliding derailment or collision (the hazard) was reasonably likely to result in injury. Instead, in the third step the Commission essentially reviewed the same evidence from the second step again, including the fact that the route encompassed curves and grades and that it was wet. *Id*. It held that "[i]f the dampness, curves, or grades had necessitated use of the defective sander, the absence of sanding capacity could have been a major cause of . . . derailment." *Id*. It then stated that because miners were on the machine, they would be seriously injured in such a derailment. *Id*.

The problem with the Commission's application is apparent. The wording of the test implies that the correct step three inquiry was whether a derailment or collision would be reasonably likely to cause injury. Instead, the Commission seemed to be determining whether the violation (defective sanders) would be reasonably likely to cause injury. While the Commission concluded, "we concur with the judge that the hazard contributed to by the violation created a reasonable likelihood of injury," it did so only after confusing the nature of the test. Instead, the Commission could have simply asked whether the violation was reasonably likely to cause an injury, thereby resolving both steps 2 and 3 at the same time. While major changes have since been made to the *Mathies* test, the formal structure of the *Mathies* S&S test continues to be used by both the Commission and the Courts, and ambiguities remain.[18]

In *Musser Engineering, Inc.,* 32 FMSHRC 1257 (Oct. 2010), the Commission attempted to clarify that the "Secretary need *not* prove a reasonable likelihood that *the violation itself* will cause injury." *Id*. at 1281 (emphasis added). The Commission held that the proper inquiry according to *Mathies* is whether "there is a reasonable likelihood that *the hazard* contributed to by the violation . . . will cause injury." *Id*. (emphasis added). The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. In *Musser*, the violation at issue was the failure of the mine operator to have an accurate map. The hazard was the danger of breaking through to an adjacent mine and the resulting water inundation. *Id.* at 1280-81. The Commission specifically rejected the operator's claim that the Secretary must prove the inaccurate map (the violation) would be reasonably likely to cause an injury. *Id*. at 1281.

The Commission's decision in *Musser*, however, did not conclusively determine how *Mathies* was to be applied. A year later, finding that the holding in *Musser* was still not clear, the Commission issued *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011). In that case, the

[18] For example, in *Sec'y of Labor v. Jim Walter Res*., 111 F.3d 913, 917 (D.C. Cir. 1997), the D.C. Circuit clarified that *Mathies* Step 2 contains two separate inquires: (1) whether there is a hazard to which the violation might contribute and, if so, (2) whether the violation significantly and substantially contributes to that hazard.

Commission noted that under *Musser*, the inquiry is whether there was a reasonable likelihood that the relevant hazard would cause injury, not the violation itself. *Id*. at 2366. It noted that judges err when they consider the likelihood that an emergency might occur, rather than assuming the occurrence of an emergency when conducting the S&S analysis. *Id*. The Commission stressed that Judges must not conflate "violation" with "hazard," hoping to clear up the confusing and unwieldy *Mathies* test, which the Commission struggled to consistently apply.

In *Cumberland Coal Res*., 717 F.3d 1020, 1026 (D.C. Cir. 2013), the D.C. Circuit considered arguments as to whether *Mathies* Steps 2 and 3 allowed the assumption of an emergency when evaluating the S&S designation involving an emergency safety standard. The D.C. Circuit rejected the operator's arguments that the *Mathies* test required the evaluation of the probability of an emergency. *Id.* at 1026-7. Instead, the D.C. Circuit accepted the Secretary's argument that the word "could" in section 104(d)(1) "refers to the violation's intrinsic capacity to contribute to the hazard, not to any specific probability that it will." *Id.* at 1026. The D.C. Circuit held that the Secretary need not demonstrate in the context of an emergency standard the likelihood that a violation would result in a hazard. *Id*. at 1027. As the court explained, "The hazard here is delayed escape from an emergency, but there can be no delayed escape, unless there is an emergency in the first place. Similarly, if there is no emergency, then there can be no resulting injury. *Id.*

Circuit courts were, generally, deferential to the Commission's *Musser* and *Cumberland* formulation of *Mathies*. In *Knox Creek Coal Corp. v. Secretary of Labor*, the Fourth Circuit analyzed the *Mathies* test to determine whether one should presume the occurrence of the hazard at step three. The Fourth Circuit reasoned:

> Given the language and structure of the *Mathies* test taken as a whole, this approach makes sense. In its first key opinion interpreting the statute's S & S provision, 30 U.S.C. § 814(d)(1), the Commission identified two sensible considerations—"likelihood and gravity"—that rendered a violation S & S. *Sec'y of Labor v. Nat'l Gypsum Co.,* 3 FMSHRC 822, 828 (1981). In short, the Commission reasoned that a violation should be considered S & S when it is reasonably *likely* to result in *serious* harm. *See id.* The later-developed *Mathies* test, at its core, also reflects a dual concern for both likelihood and gravity. In our view, the second prong of the test, which requires the showing of a "discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation," *Mathies,* 6 FMSHRC at 3, primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.
>
> By contrast, we think that *Mathies'* third and fourth prongs, which the Commission expected would "often be combined in a single showing," *Mathies,* 6 FMSHRC at 4, are primarily concerned with *gravity*—the seriousness of the expected harm. To the extent that the third and fourth prongs are concerned with likelihood at all, they are concerned—by their very terms—with the likelihood that the relevant hazard

> will result in serious injury. *Id.* at 3–4. Requiring a showing at prong three that the violation itself is likely to result in harm would make prong two superfluous.

811 F.3d 148, 162 (4th Cir. 2016). The Fourth Circuit explicitly rejected the operator's argument that a reasonable likelihood of the hazard is relevant at step three, and instead endorsed the analysis in *Musser*. *Id*. at 164. ("However, that position is flatly contradicted by more recent Commission precedent, *Musser,* 32 FMSHRC at 1281, by the unanimous voice of federal appellate courts, *see Peabody Midwest,* 762 F.3d at 616; *Cumberland Coal,* 717 F.3d at 1025–27; *Buck Creek,* 52 F.3d at 135; *Austin Power,* 861 F.2d at 103–04, and by the various considerations outlined above. Accordingly, the scales still tip decidedly in the Secretary's favor.").

Despite court approval, the Commission amended the *Mathies* test yet again following the Fourth Circuit's *Knox Creek Coal* decision, in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2039 (Aug. 2016) ("the Fourth Circuit['s] discuss[ion] [of] the necessity of a likelihood element in step two simply emphasizes that a review of the likelihood of the occurrence of the hazard is required."). Though the Fourth Circuit only required some likelihood that a hazard would result in harm, the *Newtown* Commission rewrote Step 2 to instead require the violation create a "reasonable likelihood of the occurrence of the hazards." *Id*. at 2038 ("[B]ased 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.").

Four years later, the Commission remained unsatisfied with the application of the *Mathies* test, reformulating it again in *Peabody Midwest Mining, LLC*, 42 FMSHRC 379 (Jun. 2020). In *Peabody*, the Commission purported to place the *Newtown* analysis within the framework of the *Mathies* test. *Id*. at 383. Specifically, the Commission recast the *Mathies* test to require: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Id*.[19]

Once again, while stating that it was clarifying the *Mathies* test, the Commission changed it in significant ways. As one Commission Judge observed, this has essentially split *Mathies* Step 2 into a "two-step process," thereby adding a fifth step to the *Mathies* four-step test. *Consol Pennsylvania Coal Company, LLC*, 45 FMSHRC 774, 784 (Aug. 2023) (ALJ Lewis). Specifically, the second step of the analysis now requires an ALJ to:

> (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016). The Secretary

[19] More recently, in *Consol Pennsylvania Coal Company, LLC*, 44 FMSHRC 691 (Dec. 2022), the Commission affirmed a Judge's S&S decision, citing both the *Mathies* test and the *Newtown* language, while omitting mention of the *Peabody* test.

> need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

Id.

After *Peabody*, the Commission attempted to sum up its interpretation of 104(d)(1) in a single sentence in a way that captured the entire, tortured history of its jurisprudence, stating that "significant and substantial violations…[are] violations that that create a cause and effect resulting in a reasonable likelihood of a reasonably serious injury." *Northshore Mining Company*, 43 FMSHRC 1, 12 (Jan. 2021).

The final product is a Commission-created transmogrification of the *Mathies* test, which was supposed to clarify the statutory language, into a different, more stringent test that is unmoored from the language of the statute or the explicit intent of Congress. The effect of the higher standard is illustrated through *Musser*, in which the Commission stated that the Secretary need only show the inaccurate mine map *contributed to the danger* of a mine inundation. According to *Peabody*, the Secretary must now demonstrate that the inaccurate mine map would be *reasonably likely to cause* the mine inundation. As we recounted above, the Commission in *National Gypsum* stated that S&S "falls between [ ] two extremes – mere existence of a violation, and existence of an imminent danger." 3 FMSHRC at 828. In *Peabody*, the Commission swung towards announcing that S&S is the same as the existence of an imminent danger.

b. Problems with *Peabody* S&S Test

For the reasons discussed below, we conclude that the current *Peabody* S&S test contradicts the plain language of section 104(d)(1) of the Mine Act.

i. The language of the *Peabody* S&S test contradicts the language of section 104(d)(1) of the Mine Act.

Section 104(d)(1) requires a representative of the Secretary to designate a violation as "significant and substantial" if the violation "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). Step 1 of the *Peabody* S&S test is superfluous as it asks whether there is an "underlying violation of a mandatory safety standard." *Peabody*, 42 FMSHRC at 383. Of course, there must first be a violation of the standard before an S&S designation occurs.

Step 2 of the *Peabody* S&S test asks whether "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Id*. Notably, section 104(d)(1) of the Mine Act only requires that the violation "could significantly and substantially *contribute to the cause* and effect of [a safety or health hazard]." 30 U.S.C. § 814(d)(1). Requiring the Secretary to demonstrate that the violation would "cause the occurrence" of a hazard deviates in impermissible ways from the language of section 104(d)(1), which only requires a "contribut[ion]." Moreover, the D.C. Circuit has issued multiple decisions stating that the Secretary must demonstrate that the violation could *contribute* to a hazard.[20] *See Sec'y of Labor v. Jim Walter Res*., 111 F.3d at 917 (requiring that the Secretary demonstrate the violation significantly and substantially contributes to the hazard); *see also Cumberland Coal Res*., 717 F.3d at 1026-27 (requiring a showing that the violation has an intrinsic capacity to contribute to the hazard). The Commission's role must always be to interpret the language of the Mine Act, rather than creating a new standard not found anywhere in the law.

As the Commission has previously observed, "it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Sec'y of Labor v. Youghiogheny & Ohio Coal Co*., 9 FMSHRC 673, 677 (Apr. 1987) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)) (emphasis added). This means the language is about the degree to which a violation adds to the existence of a hazard, not how likely it is for a hazard to exist. While the exact difference between those terms may not be entirely clear, it is unquestionable that "reasonably likely to cause" establishes a higher standard than "could significantly and substantially contribute to," the language contained in the Mine Act.

In *Carmeuse Lime*, one Commission Judge cogently described the extra-textual nature of the *Mathies* second step analysis:

> The *Newtown/Peabody* reformulation is inconsistent with the Mine Act's definition of S&S, which focuses on violations that could significantly and substantially contribute to a hazard. 30 U.S.C. § 814(d)(1). This aspect is satisfied if the violation "could" contribute to the hazard. Section 104(d)(1) of the Mine Act expressly uses the term "could," and the Fourth and Seventh Circuits have rejected the idea that step two requires proof of reasonable likelihood. *See Knox Creek Coal Corp. v. Sec'y of Lab.*, 811 F.3d 148, 164 (4th Cir. 2016) (noting that at step two, "the Secretary must establish that the violation contributes to a discrete safety hazard," and at steps three and four, "that the hazard is reasonably likely to result in a serious injury"); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014) ("the question is not whether it is likely that the hazard … would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result"). The legislative history of the Mine Act also "suggests that Congress intended all except 'technical violations' of mandatory standards to be considered significant and substantial." *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987); *accord Knox Creek*, 811 F.3d at 163 ("Congress did not intend for the S & S determination to be a particularly burdensome threshold for the Secretary to meet"). In addition, this analysis is consistent with the

[20] While Court of Appeals have applied the Commission's S&S test, none have expressly adopted it or analyzed whether it is consistent with the Mine Act.

> Commission's own understanding of step two of the *Mathies* test up until Newtown. *See, e.g., Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280 (2010).

45 FMSHRC 500, 517 n.12 (Jun. 2023) (ALJ Moran); *see also Saiia Construction Company, LLC*, 46 FMSHRC 452, 461 n.5 (Jul. 2024) (ALJ Lewis) ("This Court notes the mounting criticism of the Commission's *Newtown/Peabody* reformulation of the second step of the *Mathies* test.").

Accordingly, Step 2 of the recently amended *Peabody* test both ignores the language of the Mine Act and Court precedent as to how that language is to be applied.

Step 3 of the *Peabody* S&S test requires that "the occurrence of that hazard would be reasonably likely to cause an injury." However, section 104(d)(1) of the Mine Act does not require the Secretary to demonstrate any "injury." Nothing in the statutory language refers to injuries. Instead, it refers only to the *contribution* to a mine safety or health hazard. It has been suggested that consideration of injuries is implied because section 104(d) discusses the "cause and effect" of a hazard and an injury is an "effect" of a hazard. However, that is not a particularly natural reading. The most obvious "effect" of a hazard in the context of this section would be a miner's exposure to a danger, not necessarily an injury. You can be exposed to a hazard without being injured, and Congress was immensely concerned about exposure. Indeed, many mine safety and health dangers, such as respiratory hazards and examination standards, stem from repeated exposure or the general risks associated with undiscovered exposures to danger.[21] Congress could have stated it was concerned with injuries in this section if it so desired, as it did with imminent dangers and other sections of the Mine Act, but chose to simply discuss the creation of hazards.[22]

The Commission has previously recognized the need to eliminate conditions that contribute to a hazard but do not necessarily create an immediate injury. For example, the Secretary has adopted mandatory health standards pursuant to the Mine Act aimed at protecting miners against respirable dust in underground coal mines. *See, e.g.*, 30 C.F.R. § 70.100. The Commission recognized both that Congress was concerned with "the potentially devastating consequences" of respiratory illnesses and that exposure to respirable hazards may be so gradual as to not result in injury until many years after prolonged exposure, remarking that "the development of respirable dust induced disease is insidious, furtive and incapable of precise

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[21] It is difficult to see how any examination violation, for instance, could ever be S&S under the *Peabody* standard. And yet, examinations are central to the Mine Act's statutory scheme for preventing injury and illness to miners.

[22] When Congress was concerned about injury or potential injury, it knew how to address that issue. For instance, in section 110(b)(2) of the Mine Act, Congress defined a "flagrant" violation as, "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). If Congress wanted the S&S language to address injuries or even the reasonable potential for injuries, it could have used similar language in 104(d).

prediction." *Consolidation Coal Co.*, 8 FMSHRC 890, 898-99 (June 1986), *aff'd,* 824 F.2d 1071 (D.C. Cir. 1987). Therefore, the Commission held that the third prong of the *Mathies* test was presumed to be established if the Secretary proved that "overexposure to respirable dust" had occurred. *Id.* at 899. As the Commission later wrote, the presumption was adopted "because of the virtual impossibility of determining the contribution of a single incident of overexposure to respirable dust to the development of respiratory diseases, including pneumoconiosis." *Manalapan Mining Company, Inc*., 18 FMSHRC 1375, 1380 (Aug. 1996). Exposure, not likelihood of injury, was understood as the guiding principle.

Further, section 104(d)(1) does not contain the phrase "reasonably likely," which is a common standard in the law and which Congress could have used if it intended to do so. It is further notable that Congress chose not to use the phrase "reasonably likely" or any variation of that phrase in any provision of the Mine Act, and it would be wrong for the Commission to write it in here. Qualifying that the sanction can only be used, if and when the hazard would be *reasonably likely* to result in an *injury*, further demonstrates that the test is unmoored from the statute.

Finally, Step 4 of the *Peabody* S&S test asks whether "there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature." 42 FMSHRC at 383. Yet, section 104(d)(1) does not instruct the Secretary to treat violations that contribute to hazards that would result in minor injuries any differently than hazards that would result in major injuries. Why then does the Commission S&S test measure the seriousness of the injury which is likely to result? It is impossible to peg this step to any language contained in the Act. And, in fact, this step of the analysis (like the first) is often rendered superfluous: any injury is reasonably serious.

ii. **The *Peabody* S&S standard impermissibly overlaps with the Mine Act's "imminent danger" standard.**

Perhaps the clearest example of the *Peabody* S&S test's conflict with statutory language is illustrated by a comparison of the test with the Mine Act's definition of an "imminent danger." 30 U.S.C. § 802(j). Specifically, the current test is identical to the higher standard of imminent danger, making it such that any violation found to be S&S would of necessity also be an imminent danger, thereby collapsing the careful scheme of enforcement and sanctions that Congress created.

As established, the Mine Act categorizes violations of mandatory safety standards on a gradient of increasing severity. *See Emery Mining Corp*, 9 FMSHRC at 2000 (Dec. 1987) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC at 828 (the Mine Act's overarching enforcement scheme promotes mine operator's compliance with its requirements by providing "increasingly severe sanctions for increasingly serious violations or operator behavior.")). The S&S designation must be understood within the context of the Mine Act's "increasingly severe sanctions." An S&S designation is the initial designation (beyond a simple violation) within the progressive enforcement scheme.

The Mine Act expressly provides that an S&S violation is less serious than an "imminent danger." *See* 30 U.S.C. § 814(d)(1) (stating that an S&S standard is appropriate for violations that "do not cause imminent danger"). An "imminent danger" is "the existence of any condition or practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated." 30 U.S.C. § 802(j) (emphasis added). If the inspector discovers an "imminent danger," he is authorized to withdraw all miners from the affected area pursuant to section 107(a) of the Mine Act. The issuance of an S&S citation ordinarily does not result in the withdrawal of miners, but instead the assessment of a proposed civil penalty. 30 U.S.C. § 815(a).

Despite Congress' clear instructions that an S&S violation is for situations when "such violation [does] not cause imminent danger" the *Peabody* S&S test makes little distinction between the two designations.[23] The *Peabody* S&S test requires that a violation be reasonably likely to lead to significant injury in order to be S&S. However, the Mine Act states explicitly that any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated," is an "imminent danger." 30 U.S.C. 803(j). For all practical purposes, these two tests are identical, with both standards directing a Judge to determine whether a violation is reasonably likely to cause harm. The two tests each functionally require that the Secretary demonstrate a reasonable likelihood of serious or fatal injuries, and it is difficult to imagine a situation where a violation would be S&S under the Peabody test and not also be an imminent danger. Accordingly, the *Peabody* S&S test directly contradicts Congress' edict that an S&S violation is appropriate only when "such violation [does] not cause imminent danger." 30 U.S.C. § 814(d)(1).

The Senate Report that accompanied the Mine Act, includes a critique of the Commission's predecessor, the Interior Board of Mine Operations Appeals ("IBMA"), for interpreting an identically worded "significant and substantial" provision in a manner that closely resembled the definition of an "imminent danger." S. Rep. No. 95-181, at 31 (stating that the Board interpreted the applicable language in "an unnecessarily and improperly strict view . . . and has required that the violation be so serious as to very closely approach a situation of 'imminent danger'").[24] By drifting further and further from the language of the Mine Act, the Commission has allowed that same strict view to prevail. It appears that history has repeated itself.

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[23] When Congress uses a term in one section of a statute but a different term in another, that difference is presumed to be intentional. *See, e.g.*, *Village of Barrington, Ill v. Surface Transp. Bd*., 636 F.3d 650, 661 (D.C. Cir. 2011) (citing *Russello v. U.S*., 464 U.S. 16, 23 (1983)).

[24] Specifically, in *Eastern Associated Coal* the Board had required that the Secretary demonstrate that a violation "posed a probable risk of serious bodily harm or death." 3 IBMA at 334.

iii. A Return to the Statutory Framework to Analyze Significant and Substantial Sanctions

The Commission has for decades expanded and tinkered with a test that was too removed from the language of the Mine Act and too confusing to ever function as intended. As has been shown above, the multiple S&S tests that the Commission created usually led to more confusion than clarification. Furthermore, though they had the appearance of legal tests, they failed to function as such. Various steps were redundant or unnecessary, while the operative steps were often so imprecise that the same facts led to contradictory results when applied by different judges. A test that does not provide a reliable answer is not a test. Indeed, the Supreme Court wrestled with this very issue last year when it issued its landmark decision in *Loper Bright Enterprises v. Raimondo*, explaining that it was overturning the Chevron doctrine in part because what had been intended to be a simple two-step test had become unworkable. 603 U.S. 369, 375 (2024). According to the Court, *Chevron* deference was inappropriate and failed to provide a clear or easily accessible standard:

> Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron's* unworkability, transforming the original two-step into a dizzying breakdance. *See Adams Fruit Co.*, 494 U.S. at 649–650, 110 S.Ct. 1384; *Mead*, 533 U.S. at 226–227, 121 S.Ct. 2164; *King*, 576 U.S. at 486, 135 S.Ct. 2480; *Encino Motorcars*, 579 U.S. at 220, 136 S.Ct. 2117; *Epic Systems*, 584 U.S. at 519–520, 138 S.Ct. 1612; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. *See, e.g., Cargill v. Garland*, 57 F.4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff'd, 602 U. S. 406, 409 (2024).
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> Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." Marbury, 1 Cranch at 177. And its continuing import is far from clear.
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> . . .
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> Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. Post, at 2298, n. 1 (opinion of KAGAN, J.) (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 261, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U.S. at 927, 138 S.Ct. 2448 (quoting *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 186, 138

S.Ct. 2080, 201 L.Ed.2d 403 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them. History has proved neither bet to be a winning proposition.

Id. at 409-410. The Supreme Court could easily be discussing the Commission's S&S test, for the reasons we have outlined. The Commission's S&S test is neither clear nor simple. In fact, attempts to clarify the Secretary's burden have instead added to the tests overall unworkability, ultimately producing a test that further complicates the issue and no longer reflects the language of section 104(d)(1). Accordingly, our S&S test is an impediment to, rather than a tool for, applying the law.

For the reasons stated herein, we find that *Peabody* is not consistent with section 104(d)(1).[25] Section 104(d)(1)'s plain language should be applied directly by the Commission and its judges when reviewing cases that involve the Secretary's use of the S&S designation. We believe that in drafting the language of section 104(d)(1) Congress made its intent clear so that the Commission could interpret the use of S&S by its own stated and plain terms and not through an entirely separate (and non-textual) formulation.

Though the Commission has acted in good faith over the decades in modifying and clarifying the S&S test, it has become clear that a formalized test does more to confuse the statutory provision and has led us to a point where the test bears very little relationship to the statutory language. Therefore, rather than trying to create a new test or modify the string of old ones—a move that history has shown will lead to further straying from the statute—we find that a formalized test for S&S is unnecessary and problematic. Instead, we will simply define the terms of the provision and allow MSHA and administrative law judges to apply the statutory language as defined to any given citation. The Commission must return to applying the law as written in section 104(d)(1) and as interpreted by appellate courts. That is, whether the violation cited, "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C § 814(d)(1).

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-33 (2000) (citations omitted). Considering the syntax of section 104(d)(1), it is clear that the phrase "significantly and substantially" modifies the term "contribute." *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC at 677 ("It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.").

[25] Our decision here is limited to the S&S test and does not concern other aspects of the Commission's S&S caselaw. For example, Commission cases stating the necessity of assuming the existence of an emergency when considering an emergency standard or cases stating the analysis should be conducted assuming continued normal mining operations are not impacted. We are simply reformulating the interpretation of section 104(d)(1) to follow the statutory language.

In determining the meaning of statutory terms, the Commission and courts have also considered the dictionary definitions of common terms. *See, e.g., CalPortland Co., Inc.*, 839 F.3d 1153, 1163 (D.C. Cir. 2016) (finding a dictionary definition of the term "reinstatement" in section 105(c)(2), 30 U.S.C. § 815(c)(2), of the Mine Act clarified Congressional intent). Here, the common dictionary definition of terms used in section 104(d)(1) clarify its meaning. 30 U.S.C. § 814(d)(1) ("could significantly and substantially contribute to the cause and effect" of a hazard.). Merriam-Webster defines "contribute" as "to play a significant part in bringing about an end or result." *Merriam-Webster Collegiate Dictionary* 252 (10th ed. 1999). A "cause" is "a reason for an action or condition" or "something that brings about an effect or a result." *Id*. at 182. An "effect" or "something that inevitably follows an antecedent (as cause or agent)." *Id*. at 367. When these terms are read together – "contribute" "cause" and "effect" – and their ordinary definitions are considered, it is clear that Congress was concerned about violations to which a miner could be exposed that could *result* in a hazard.[26]

The inclusion of the term "could" indicates that section 104(d)(1) does not require that the Secretary demonstrate that the hazard would be "reasonably likely" to occur. Rather, the term "could" refers to violations that have the potential to contribute to a mine safety and health hazard. *See also Cumberland Coal Res*., 717 F.3d at 1026-27 (D.C. Cir. 2013) (a judge must consider whether a violation has an intrinsic capacity to contribute to a hazard).

In sum, in order to affirm an S&S designation, the plain language of section 104(d)(1) dictates that the Secretary must demonstrate that the violation to which miners are exposed *could* make an S&S contribution to a mine safety or health hazard. This is consistent with the initial portion of the Commission's original *Mathies* test (without the surplusage of Step 3 and Step 4). 6 FMSHRC at 3-4 (Step 2 requires a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation). Importantly, it is also consistent with the D.C. Circuit's decision in *Sec'y of Labor v. Jim Walter Res*., 111 F.3d at 917.[27] In *JWR*, the D.C. Circuit clarified that *Mathies* Step 2 contains two separate inquires: (1) whether there is a hazard to

[26] For a hazard to "effect" miners, the Secretary must demonstrate that miners could be exposed to the hazard during continued mining operations.

[27] In *JWR*, the operator was cited for an S&S violation of a mandatory safety standard prohibiting the accumulation of combustible materials in "active workings," *i.e.*, "any place in a coal miner where miners are normally required to work or travel." *Id*. at 916. A ventilation curtain ran across the cited trash pile, dividing it and placing the bulk of the pile outside of active workings. *Id*. The Commission concluded that the trash outside of active workings was not relevant to the S&S analysis. The D.C. Circuit agreed, stating that "[b]y focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards." *Id*. at 917. Stated another way, the S&S analysis requires the Judge to focus solely on the violative conditions, and if those conditions "significantly and substantially" contribute to any hazard that "might" exist. *See* 30 U.S.C. § 814(d)(1) ("[I]f he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.").

which the violation might contribute and, if so, (2) whether the violation significantly and substantially contributes to that hazard. *Id*.

Notably, the Mine Act's graduated enforcement scheme contains a variety of tools for MSHA to issue increasingly severe enforcement such as section 104(d)'s "unwarrantable failure" designations and section 104(e)'s "pattern of violations" designation. 30 U.S.C. § 814(d)(1);30 U.S.C. § 814(e). The "significant and substantial" designation is but an initial step on the ladder of a progressive enforcement system and should be interpreted consistently within its statutory role.[28]

Finally, the Commission's intention in reformulating the S&S analysis is not to change the frequency with which Section 104(d) is cited by MSHA inspectors. That is a public policy question for the Secretary of Labor to decide and for conditions in the nation's mines to dictate. Our only role is to ensure the test used by the Commission is consistent with the language of section 104(d)(1) of the Mine Act and can be consistently applied.

2. Application of the Statutory Language in Section 104(d)(1) to the Judge's S&S Findings

The Judge affirmed the S&S designations for both violations at issue in this appeal. Below we review the facts of the case through the statutory test contained in section 104(d)(1) pursuant to the definitions and conclusions we reached above. For the reasons below, we find that for both violations the Judge's findings are supported by substantial evidence and establish that the violations significantly and substantially contributed to a mine safety or health hazard within the meaning of Section 104(d)(1).

a. Citation No. 9204245 (Pin Violation)

The inspector testified that the cited condition, a missing horizontal pin from the gate shield, could play a significant and substantial role in exposing miners to the hazard of a vertical

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[28] The D.C. Circuit has previously instructed that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are deliberately changed not casually ignored." *Lone Mountain Processing, Inc*., 709 F.3d 1161, 1164 (D.C. Cir. 2013) (citing *Greater Boston Television Corp*., 444 F.2d 841, 852 (D.C. Cir. 1970)). Our decision here today reflects the plain meaning of section 104(d)(1) and is consistent with the decisions of the D.C. Circuit.

For instance, ALJs should continue to analyze citations in the context of continued mining operations and without consideration of redundant safety measures. Similarly, citations of emergency standards should still be considered in light of an emergency situation.

We also note that the effect of our decision should not be to either increase or decrease the number of S&S citations. That is a public policy question for the Secretary of Labor to decide and for conditions in the nation's mines to dictate. Our only role is to ensure the S&S test used by the Commission is consistent with the language of section 104(d)(1) of the Mine Act.

pin becoming a projectile and striking a miner. Tr. 42-53, 61. The Judge credited the inspector's testimony and found that the "Secretary has presented credible evidence that the shear pins, which are designed to break, have been projected from the clevis upon breaking." 44 FMSHRC at 456. Equally important to the Judge's finding that the violation could contribute to a mine hazard is that he found miners were within the area where the vertical pin would be airborne. 44 FMSHRC at 460. ("All witnesses . . . testified that miners at this mine generally operate shields . . . from two shields away at a distance of seven-to-eleven feet."). That is, they would be exposed to any hazard.[29] The Judge applied the *Mathies* and *Peabody* tests to find that the violation was S&S. While the Judge's application of the *Mathies* and *Peabody* tests was not in error at the time his decision was issued, we take the opportunity now to apply the plain-language reading of the statute that we announced above.[30]

As the inspector testified, a miner within eight feet of the shield could be struck with a projectile and that several such incidents had occurred in the past. 66-67. The operator alleged instead that a miner would be at least two shields away, a distance of eleven feet, and that there had been no injuries ever recorded. Tr. 68. The Judge reasonably credited the inspector's testimony and affirmed his S&S designation. 44 FMSHRC at 460. On review, we find that the mine safety or health hazard was a flying projectile to which miners could be exposed. A missing pin in a gate shield where miners are present could significantly and substantially contribute to a flying pin hazard. As the Commission has previously observed, "[i]t is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Sec'y of Labor v. Youghiogheny & Ohio Coal Co*., 9 FMSHRC at 677. This standard is met by the evidence in the record.

Substantial evidence supports the Judge's determination that the violative condition could significantly and substantially contribute to the hazard of a miner being struck by a vertical pin. Further, substantial evidence supports the Judge's determination that miners were exposed to this hazard (or would have been exposed under normal continuing mining operations). As a result, we affirm the Judge's determination that the citation was properly cited as having an S&S contribution.

b. Citation No. 9204250 (Globes Violation)

The operator argued that the Judge erroneously found that an "explosion within the enclosure was reasonably likely (ALJ 15-16)." PDR at 10. The operator argued that the Judge ignored testimony that "several unlikely events would have to occur simultaneously for any hazard related to the alleged condition to occur." PDR at 22. The operator also objected to the

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[29] Had the Judge credited the operator's testimony that miners were not in the area where the vertical pin would be airborne under continued normal mining conditions, this citation would not have been S&S under the plain language of section 104(d)(1). However, substantial evidence supports the Judge's determination.

[30] While we apply the interpretation of section 104(d)(1) announced above we note, in the alternative, that even if we applied the now-discarded *Peabody* test, we would have affirmed the Judge's findings with respect to both citations for the reasons set forth in his decision.

Judge's finding that that "there was nothing in the record proving that LED bulbs were in fact present at the time of the citation[.]" PDR at 23.

For the reasons outlined extensively above, we have rejected the *Newtown* and *Peabody* analyses. As a result, the Judge was not required to determine whether an explosion was reasonably likely to occur. *See Cumberland Coal Res*., 717 F.3d at 1026-27 (D.C. Cir. 2013) (Section § 104(d)(1) "refers to the violation's intrinsic capacity to contribute to the hazard, not to any specific probability that it will."). Instead, we again apply the plain statutory language to the facts in this matter. The inspector testified that the cited condition, cracks in the light fixture globes, could play a significant and substantial role in exposing miners to the hazard of a methane explosion. Tr. 72-81; Sec. Ex. 4. In determining this hazard, the inspector noted that the mine liberated considerable amounts of methane and had suffered methane ignitions in the past. The Judge credited the inspector's testimony and found that that a light fixture failure must be "assumed to be able to ignite methane that naturally enters the enclosure." 44 FMSHRC at 465. The Judge found the ignition within the globes could escape into and ignite the general mine atmosphere outside the globe, finding that the mine was gassy and represented a "constant threat[.]" *Id*. at 467. Finally, in the event of a methane ignition, any miners in the area would be exposed to the hazard.

Further, the Judge properly disregarded the operator's evidence that the violative condition could not expose miners to a hazard because it alleged that the continuous miner had LED lights. As the Judge determined, there is no evidence in the record that this particular miner, in fact, had LED lights. Furthermore, even if it did, nothing in the record supports the operator's contention that LED bulbs are "nearly intrinsically safe" or that they could not cause a methane ignition. *Id*. at 465.

As discussed above, the proper inquiry is whether the violation could have significantly and substantially contributed to the cause and effect of a hazard. Here, substantial evidence supports the Judge's determination that the violative condition could significantly and substantially contribute to the hazard of a methane explosion. Further, substantial evidence supports the Judge's determination that miners were, or would have been, exposed to this hazard. As a result, we affirm the Judge's determination that the citation was properly cited as having an S&S contribution.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision and direct Consol to pay the civil penalties ordered by the Judge.

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

Chair Jordan concurring, in result:

I join my colleagues in affirming the Judge's findings and conclusion that Consol Pennsylvania Coal Company violated the mandatory safety standard at 30 C.F.R. § 75.1725(a) and that the violative condition was the result of a low degree of negligence.

I also affirm the Judge's decision upholding the "significant and substantial" ("S&S) designation accorded the violations of the safety standards at 30 C.F.R. § 75.1725(a) and 30 C.F.R. § 75.503. While I do not join the majority in their S&S analysis, I appreciate their concern that the standard necessary to support an S&S designation may have evolved so as to now approach the standard applied to an imminently dangerous condition, and I have on occasion noted what I perceived to be inconsistencies between the Commission's S&S standard and Circuit Court case law. *See Peabody Midwest Mining*, 42 FMSHRC 379, 393-99 (June 2020) (dissenting opinion); *Newtown Energy*, 38 FMSHRC 2033, 2051-53 (Aug. 2016) (concurring and dissenting opinion).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 3, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. DOE RUN RESOURCES DBA DOE RUN COMPANY	Docket No. CENT 2025-0280 A.C. No. 23-01800-617163

BEFORE: Jordan, Chair; and Baker, Commissioner

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On May 22, 2025, the Commission received from the Doe Run Company ("Doe Run") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 8, 2025, and became a final order of the Commission on May 8, 2025. Doe Run asserts that, on April 18, 2025, the mine's Safety Supervisor forwarded the assessment sheet noting the citations it intended to reopen, to its counsel. However, counsel for Doe Run was out of the office with intermittent access to cellular phone service and "does not recall seeing" this communication. Counsel received the final termination of the four citations on May 13, 2025, at which point he confirmed that the citations had become final orders on May 8, 2025.

According to Doe Run, the Safety Supervisor and Doe Run's counsel have since discussed and agreed to an improved process to ensure that future penalties are timely contested. Specifically, once the Safety Supervisor sends an assessment to counsel he will confirm that it has been received if he receives no confirming email. When counsel receives an assessment from the mine's office, he will confirm receipt and include a reminder of the date when a contest is due and will have his legal assistant add that to the calendar the assistant maintains. Thus, the operator asserts that it has established improvements in its office procedures to ensure that the dates for future filings are not missed.

The Secretary does not oppose the request to reopen. She confirms that Doe Run has no delinquent penalties and has a good history of timely contesting penalties in the past. Further, she acknowledges that once Doe Run and its counsel realized that the citations had become final orders, Doe Run filed its motion to reopen 9 days later. Despite not opposing the motion to reopen, however, the Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Doe Run's request and the Secretary's response, we find that the operator has demonstrated good cause to justify reopening, in particular because it has explained what steps it has taken to ensure future errors will not occur. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054-55 (Dec. 2012) (holding that operators must explain in detail what steps they have taken to ensure errors will not occur, to justify relief). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting,

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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September 3, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HARD ROCK SAND AND GRAVEL	Docket No. CENT 2025-0288 A.C. No. 16-01553-613150

BEFORE: Jordan, Chair; and Baker, Commissioner

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 2, 2025, the Commission received from Hard Rock Sand and Gravel ("Hard Rock") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 17, 2025, and became a final order of the Commission on February 17, 2025. A delinquency notification was mailed to the operator on April 3, 2025.

Hard Rock asserts that its failure to timely file the notice of contest was due to it waiting to see the impact of previous citations from June of 2024 that it had contested. According to the operator, once it learned the outcome of those citations, it agreed that it needed to contest the citations in question from November of 2024. Hard Rock separately claims that it missed an email from its bookkeeper, which would have let them know that it received the proposed assessment for November of 2024. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

We hold that the reasons Hard Rock has provided in support of its motion to reopen are not sufficient to justify reopening. By Hard Rock's own admission, it did not decide to contest when the proposed penalties were received but changed its mind after the seeing the impact of previously contested citations. Certainly, "[a] change of mind is not adequate grounds to reopen a final judgement pursuant to Rule 60(b)." *Cold Spring Granite*, 36 FMSHRC 1559, 1560 (June 2014), *citing Brzeczek v. Centerior Energy*, 221 F.3d 1333, 1333-34 (6th Cir. 2000). *See, e.g., Ackermann v. United States*, 340 U.S. 193, 198 (1950).

To the extent that the operator claims its delay is attributable to a "missed" email from its bookkeeper, we find that the operator failed to provide adequate justification to support reopening. In *Higgins Stone Co*., the Commission held that

> [a]n operator seeking to reopen a proceeding . . . bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. The operator must also identify which specific citations or orders in the assessment it wishes to contest

upon reopening. Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

32 FMSHRC 33, 34 (Jan. 2010). Operators must also explain in detail what steps they have taken to ensure errors will not occur. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3055 (Dec. 2012). Hard Rock has offered no evidence about how it missed an email from its bookkeeper nor how it has adjusted its internal processes to ensure timely contest of any penalties from MSHA.

Accordingly, we deny Hard Rock's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in Belt Tech, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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September 3, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HEIDELBERG MATERIALS US CEMENT LLC	Docket No. LAKE 2025-0129 A.C. No. 12-00063-609727

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY: Jordan, Chair; and Baker, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On February 3, 2025, the Commission received from Heidelberg Materials US Cement LLC ("Heidelberg") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 14, 2024, and became a final order of the Commission on December 16, 2024. A delinquency notification was mailed to the operator on January 29, 2025.

Heidelberg's safety manager claims that the operator never received the Proposed Assessment at the mine. The Secretary opposes the request to reopen. She asserts that MSHA sent the Proposed Assessment to Heidelberg's address of record and offers proof of delivery confirmation and other documentation.

We note that MSHA's Legal ID Report shows the address of record for the mine and operator to be 200 Mill Creek Road, Mitchell, IN 47446, and that the last effective date for Operator's address was August 15, 2024. *See* Attachment D of Secretary's response. MSHA records do not evidence any undeliverable or returned mail for Operator. U.S.P.S. records also reflect that Heidelberg's plant manager signed for the delivery of the Assessment. *See* Attachment B, D.

Operators must give specific reasons and detailed explanations for their failure to file timely contests. *See, e.g.*, *Potter South East, LLC*, 45 FMSHRC 152, 153-54 (Mar. 2023). Providing vague or cursory explanations is reason enough to deny a motion to reopen. *Southwest Rock Prods, Inc.*, 45 FMSHRC 747, 748 (Aug. 2023) ("a grant of relief under Rule 60(b) requires more than 'general assertions or conclusory statements as to why an operator failed to timely contest'"). We find that Heidelberg's stated justification for reopening is cursory and contradicted by the evidence. This is insufficient to justify relief under Rule 60(b).

Accordingly, we deny Heidelberg's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, concurring:

I write to agree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in Belt Tech, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority denies reopening in its opinion because the operator has not alleged good cause or provided a factual accounting for its failure to timely contest the penalties. Though I believe the Commission lacks the authority to consider motions to reopen, I concur with the Majority in denying reopening in this matter.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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September 3, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. GENTRY MOUNTAIN MINING, LLC,	Docket No. WEST 2025-0285 A.C. No. 42-02263-616004

BEFORE: Jordan, Chair; and Baker, Commissioner

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On June 17, 2025, the Commission received from Gentry Mountain Mining, LLC ("Gentry") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the Proposed Assessment was delivered on March 10, 2025, and became a final order of the Commission on April 9, 2025. Gentry asserts that extraordinary circumstances justify reopening due to a lack of timely notice, contending that MSHA sent the

Proposed Assessment Form to an outdated address in Salt Lake City rather than the operator's current address in Huntington, UT.

According to Gentry, the form was sent to an old Salt Lake City address of Gentry Mountain Mining, LLC. Gentry's current address, P.O. Box 300, Huntington, UT 84528, is registered with MSHA and has been used in all recent correspondence for the last few years. The operator insists it was unaware that the Proposed Assessment Form had been sent to Salt Lake City on March 10th, 2025. Gentry states that it is unsure why the Proposed Assessment Form was sent to the wrong address. The new address has been used for several years now and the Proposed Assessment Forms for other dockets have been sent to the new address for many years now. The operator claims that it asked MSHA why the Proposed Assessment Form was sent to the old address, and that MSHA stated that a new employee had started working for MSHA and sent the Proposed Assessment Form to the old address. Gentry did request a hearing within 30 days of when it became aware of the Proposed Assessment.

According to the Secretary, the address to which MSHA had sent the Proposed Assessment (the Salt Lake City address) was one of several addresses provided by Gentry on its Legal Identity Report, Form 2000-7, that was effective at the time the Proposed Assessment was sent to Gentry. Gentry has since updated its Legal ID Report and no longer lists the Salt Lake City address. For these reasons, the Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Gentry's request and the Secretary's response, we find that the the operator acted in good faith and with excusable neglect. We take particular note of the fact that the operator has updated its Legal ID Report to no longer list the Salt Lake City address, to help ensure that future Proposed Assessments are received. We also emphasize that Gentry's attempt to contest the Proposed Assessment was only one day late, on April 10, 2025. *See* Sec'y Resp. at Attachment C (letter from MSHA to operator explaining reasons for denying hearing request). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting,

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in *Belt Tech*, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc.*, 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in *Explosive Contractors*. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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September 3, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. MINGO LOGAN COAL, LLC	Docket No. WEVA 2025-0371 A.C. No. 46-09029-617426

BEFORE: Jordan, Chair; and Baker, Commissioner

ORDER

BY: Chair Jordan and Commissioner Baker

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On May 20, 2025, the Commission received from Mingo Logan Coal, LLC ("Mingo Logan") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 8, 2025, and became a final order of the Commission on May 8, 2025.

According to Mingo Logan, it's failure to contest a 104(b) Order arose from a misunderstanding it had regarding whether MSHA would necessarily assess a penalty when issuing the 104(b) Order and whether it would process the penalty with the underlying citation.

The operator states that, on February 10, 2025, it requested a settlement conference, which occurred on February 25, 2025. During the conference, Mingo Logan contested the facts asserted in the order in question and explained the actions it took to correct the cited conditions. MSHA subsequently informed the operator that it elected to sustain the Order as issued. Importantly, MSHA notified Mingo Logan that "[p]articipation in this conference did not waive [its] right to a formal hearing with the Federal Mine Safety and Health Review Commission concerning these citations and/or orders."

Upon receiving this notification, the operator believed the Order would be contested along with the related citation when the penalty was assessed. On April 2, 2025, MSHA issued a Proposed Assessment for Citation 9595090. The Proposed Assessment noted that a section 104(b) order was associated with the citation, but it did not identify the order or propose a penalty for it. Mingo Logan contested the Proposed Assessment on April 17, 2025, and later retained counsel in anticipation of the civil penalty proceeding, docketed as WEVA 2025-0309. At that point, Mingo Logan learned that the validity of the Order would not be addressed in that proceeding.

Mingo Logan explains that, before consulting counsel, it did not realize MSHA sometimes issues 104(b) orders without assessing a penalty, which causes them to become final after 30 days. The operator states it was surprised by this practice and maintains it fully intended to contest Order No. 9595091. In fact, it requested a conference shortly after the order was issued. Mingo Logan asserts that had it understood the procedure, it would have filed a contest within 30 days under 30 U.S.C. § 815(d). To avoid similar mistakes, the operator has committed to contesting any future 104(b) orders within the statutory deadline. See Mann Affidavit, Exhibit A, ¶ 11.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Mingo Logan's request and the Secretary's response, we find that the operator has provided facts sufficient to justify relief. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

Commissioner Marvit, dissenting:

I write to disagree with the Majority in this case for the reasons set forth below.

In *Explosive Contractors*, 46 FMSHRC 965 (Dec. 2024), I dissented and explained that Congress did not grant the Commission the authority to reopen final orders under section 105(a) of the Mine Act. The Commission's repeated invocation of Federal Rule of Civil Procedure 60(b) cannot overcome the statutory language. However, in Belt Tech, I explained in my concurrence that "the Act clearly states that to become a final order of the Commission, the operator must have received the notification from the Secretary." 46 FMSHRC 975 (citing *Hancock Materials, Inc*., 31 FMSHRC 537 (May 2009)). Taken together, these opinions stand for the proposition that the Commission may not reopen final orders under its statutory grant, but an operator may proceed if it has not properly received a proposed order.

In the instant case, as the Majority recounts, the Commission's order became final under the language of section 105(a). The Majority, however, votes to reopen the case. The Mine Act has not granted us authority to reconsider final orders of the Commission as I set out more fully in Explosive Contractors. To the contrary, it has limited our authority to do so. Therefore, I respectfully dissent and would deny reopening.

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CONSOL PENNSYLVANIA COAL COMPANY, LLC	Docket No. PENN 2025-0041 A.C. No. 36-10045-603901

BEFORE: Jordan, Chair; Baker, and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). On November 20, 2024, the Commission received from Consol Pennsylvania Coal Company, LLC ("Consol") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Consol received a proposed penalty assessment from the Secretary on October 10, 2024, and filed a notice of contest with the Secretary thirty-two days later, on November 11, 2024. Consol asserts that the assessment was timely contested prior to a November 12 deadline and therefore did not become a final order.[1] The Secretary counters that the assessment became a final order on November 9 and was therefore not timely contested.

Section 105(a) provides an operator with thirty days from receipt of a proposed penalty assessment to notify the Secretary that it wishes to contest the proposed assessment. If the operator fails to timely provide such notification, the assessment becomes a final order of the Commission. 30 U.S.C. § 815(a). Notably, however, the Mine Act does not specify a method of computing time. Therefore, computation of this thirty-day contest window is governed by Rule 6(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 6(a).

Rule 6(a) states in relevant part that if the last day of a prescribed period "is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a

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[1] Consol argues in the alternative that it *reasonably believed* its contest was timely, therefore reopening the final order is justified consistent with Rule 60(b) of the Federal Rules of Civil Procedure. The Secretary asserts that the assessment became a final order but takes no position as to whether reopening that final order is justified. Consol also claims that it did not receive the assessment until October 14, 2024, however, U.S. Postal Service records confirm that the assessment was delivered to an individual on October 10.

Saturday, Sunday, or legal holiday."[2] Fed. R. Civ. P. 6(a)(1)(C). Accordingly, a proposed penalty assessment becomes a final order of the Commission if an operator fails to contest the assessment by the thirtieth day, *or, if that thirtieth day is a weekend or federal holiday*, if an operator fails to contest the assessment by the close of the next business day.

Here, the thirtieth day after receipt of the assessment was Saturday, November 9, 2024. Furthermore, a federal holiday occurred on Monday, November 11, 2024. Accordingly, the contest period would have continued to run until the close of Tuesday, November 12, 2024.

We conclude that the proposed penalty assessment did not become a final order of the Commission, because Consol timely contested the proposed assessment on November 11, 2024. This obviates any need to invoke Rule 60(b), under which the Commission may relieve a party from a final order. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

[2] This is generally consistent with Commission Procedural Rule 29 C.F.R. § 2700.8(c).

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September 22, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. MORTON SALT, INC.	Docket No. CENT 2022-0176

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act"). The proceeding concerns a decision of a Commission Administrative Law Judge to vacate the "significant and substantial" ("S&S")[1] designations associated with two citations issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Morton Salt, Inc. 45 FMSHRC 530 (June 2023) (ALJ).

The Secretary filed a petition for discretionary review of the Judge's decision with the Commission, which we granted. Thereafter, the parties filed briefs with the Commission in accordance with Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a). On January 28, 2025, the Commission held oral argument and a subsequent open meeting on the captioned matter.

The Secretary has now filed a notice of withdrawal, which we construe as a motion in accordance with Commission Procedural Rules 10 and 11, 29 C.F.R. §§ 2700.10 and 2700.11, seeking to withdraw her petition for discretionary review. The Secretary represents that Morton does not oppose.

[1] The S&S terminology is taken from section 104(d)(1) of the Mine 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).

Having considered the Secretary's filing, we grant the Secretary leave to withdraw the petition. *See Speed Mining, Inc.*, 27 FMSHRC 286 (Mar. 2005) (granting the operator's unopposed motion to withdraw its petition for discretionary review). The proceeding is now dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/ Timothy J. Baker
Timothy J. Baker, Commissioner

/s/ Moshe Z. Marvit
Moshe Z. Marvit, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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September 30, 2025

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. HARRISON COUNTY COAL RESOURCES, INC. Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2024-0205 A.C. No. 46-01318-594156 Mine: Harrison County Mine

DECISION

Appearances: David J. Casserly, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Petitioner; Christopher D. Pence, Esq., Pence Law Firm PLLC, Charleston, WV for Respondent.

Before: Judge Paez

This case comes before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("Mine Act"). In dispute are three citations issued under section 104(a) of the Mine Act to Harrison County Coal Resources, Inc. ("HCCR"), as owner and operator of the Harrison County Mine in Wallace, West Virginia.

To prevail, the Secretary must prove a cited violation "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The Secretary issued HCCR seven citations under section 104(a) of the Mine Act for alleged violations of health and safety standards. The parties settled four of the seven citations per my Decision Approving Partial Settlement issued January 7, 2025. Three section 104(a) citations remain at issue: (1) Citation No. 9587773, which alleges a violation of 30 C.F.R. § 75.1722(a) for failing to maintain the CN41 shuttle car's guard with a proposed penalty of $172.00; (2) Citation No. 9587893, which alleges a violation of 30 C.F.R. § 75.202(b) for allowing a person to work or travel under an unsupported roof with a proposed penalty of

$357.00; and (3) Citation No. 9587919, which alleges a violation of 30 C.F.R. § 75.333(h) for failing to maintain a permanent ventilation control with a proposed penalty of $305.00.

I held a hearing on January 15, 2025, in Morgantown, West Virginia. The Secretary presented testimony from two witnesses—MSHA Inspector Douglas William Moyer and MSHA Inspector Richard W. Miller. HCCR presented testimony from six witnesses—HCCR Safety Inspector Jonah Stackpole; Section Foreman Allan Stewart; Mine Supervisor James Alexander Pancost; Maintenance Foreman Mark Burns; HCCR Safety Inspector Eric Scott Sublett; and Mine Engineer Kevin Burton. The parties each filed post-hearing briefs and reply briefs.[1]

II. ISSUES

The Secretary argues that I should affirm the three citations as issued along with their proposed penalties. (Sec'y Br. at 1; Sec'y Reply at 1.) HCCR contested the penalties and argues that all three citations should be vacated. (Resp't Br. at 1; Resp't Reply at 1.)

Accordingly, I determine that the following issues are before me: (1) whether HCCR failed to adequately guard moving parts in the cable reel compartment of the CN41 shuttle car in violation of 30 C.F.R. § 75.1722(a) as alleged in Citation No. 9587773; (2) whether a person worked or traveled under unsupported roof in violation of 30 C.F.R. § 75.202(b) as alleged in Citation No. 9587893; (3) whether HCCR failed to maintain a permanent ventilation control in violation of 30 C.F.R. § 75.333(h) as alleged in Citation No. 9587919; (4) whether the Secretary properly designated the gravity determinations for these alleged violations; (5) whether the Secretary properly designated the negligence determinations for these alleged violations; and (6) whether the Secretary's proposed penalties for these alleged violations are appropriate.

For the reasons set forth below, Citation Nos. 9587773 and 9587893 are **AFFIRMED**, and Citation No. 9587919 is **MODIFIED**.

III. PARTIES' STIPULATIONS

At the hearing the parties stipulated in a joint exhibit to the following items verbatim:

1. The Respondent was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 802(d), at the mine at which the citations at issue in this proceeding were issued.

2. At all times relevant to these proceedings, Harrison County Mine, (ID 46-01318) is a "mine" as defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).

[1] The hearing transcript, the Secretary's exhibits, HCCR's exhibits, the Secretary's Post-Hearing Brief, HCCR's Post-Hearing Brief, the Secretary's Reply Brief, and HCCR's Reply Brief are abbreviated, respectively, as: "Tr.," "Ex. S–#," "Ex. R–#," "Sec'y Br.," "Resp't Br.," "Sec'y Reply," and "Resp't Reply." The parties' joint stipulations are noted as "Ex. Jt.–1."

3. Operations of the Respondent at the Harrison County Mine at which the citations were issued are subject to the jurisdiction of the Mine Act.

4. This 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.

5. Harrison County Mine is operated by the Respondent.

6. Payment of the total proposed penalty in this matter will not affect the Respondent's ability to continue in business.

7. MSHA Inspectors Douglas William Moyer and Richard W. Miller were acting in an official capacity and as authorized representatives of the Secretary of Labor when the citations were issued.

8. True copies of each of the citations that are at issue in this proceeding were served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated in the citations, as required by the Act.

9. Exhibit "A" attached to the Secretary's Petition in Docket No. WEVA 2024-0205 contains authentic copies of the citations at issue in this matter with all modifications or abatements, if any.

(Ex. Jt.–1; Tr. 7:24–8:19.)

IV. FINDINGS OF FACT, ANALYSIS, PRINCIPLES OF LAW, AND CONCLUSIONS OF LAW – CITATION NO. 9587773

A. Facts Relevant to Citation No. 9587773 – Inadequate Mechanical Guarding on the CN41 Shuttle Car

HCCR utilizes electric powered shuttle cars to bring coal from the working face—where active coal mining occurs—to a conveyor belt that carries the raw coal out of the mine. (Tr. 31:23–32:3.) Each shuttle car receives power from a trailing cable that winds and unwinds via a chain-driven cable reel located in the cable reel compartment of the shuttle car. (Tr. 32:23–33:23.) The cable reel automatically winds up the cable as the car moves towards the conveyor belt and releases the cable as the car moves towards the working face. (Tr. 32:23–33:23.)

The cable reel includes two moving parts—(1) the spool or reel, and (2) the chain that drives the spool. (Tr. 50:2–51:9.) The spool—a large, metal double wheel about 3-feet-wide with a radius of 14 to 16 inches—sticks out slightly above the frame of the cable reel compartment. (Tr. 39:13–40:6, 40:22–41:12, 42:24–43:3; Ex. S–5.) The chain sits below the spool and several inches away from the edge of the shuttle car. (Tr. 46:6–47:19; Ex. S–5.) A typical shuttle car has a metal lid over the cable reel compartment that sits above the spool, and the lid rests on brackets such that it avoids contact with any moving parts inside the cable reel compartment. (Tr. 40:22–41:12, 81:1–25; Ex. S–5.)

On October 5, 2023, MSHA Inspector Douglas William Moyer traveled to the Harrison County Mine as part of a standard quarterly inspection to examine the equipment in the 7 North Mains section of the mine. (Tr. 28:7–29:12; Ex. S–2.) HCCR Safety Inspector Eric Scott Sublett accompanied Moyer on his inspection. (Tr. 29:13–22, 242:24–243:4.) Moyer examined two of HCCR's shuttle cars, including the CN41 shuttle car. (Ex. S–2; Tr. 29:23–30:2.)

MSHA Inspector Moyer noticed the CN41 shuttle car lacked the typical metal lid and, instead, had a piece of rubber belting jerry-rigged to serve as a lid to cover the cable reel spool and chain pulley. (Ex. S–2; Tr. 40:9–44:2.) Moyer observed that, unlike the typical metal lid, the rubber belting cover did not fully shield the cable reel compartment, as two or three 3-inch- wide by 5- or 6-inch-long openings existed between the edge of the rubber belting cover and the shuttle car's frame. (Tr. 45:7–18, 46:3–18, 48:2–49:22, 52:20–54:18, 257:9–260:4, 263:25–264:13; Ex. S–2.) Additionally, Moyer noticed a 5-inch-long hole cut into the rubber belting cover, exposing the top inch or two of one of the metal wheels of the cable-reel spool which was poking through the rubber belting cover. (Tr. 41:2–12, 42:9–44:20, 45:18–23, 48:24–49:1, 51:11–52:19, 76:13–78:11, 238:5–17, 260:5–13; Ex. S–2.) HCCR cut this hole in the rubber belting cover because the rubber belting sat directly on the cable-reel spool, instead of resting on brackets above it, causing the spool to wear through the rubber belting. (Tr. 42:9–44:20, 51:11–18, 81:1–25, 238:5–17, 260:5–13; Ex. S–2.)

Based on these observations, MSHA Inspector Moyer issued Citation No. 9587773 to HCCR on October 5, 2023, citing the CN41 shuttle car for "not being maintained in a safe operating condition" as required by section 75.1725(a), because "[t]he metal lid covering the cable reel and chain pulley is missing and a section of rubber belting has been installed to replace the lid." (Ex. S–2; Tr. 171:5–10.) He explained that "the [rubber] belting . . . is not sufficient to cover the outer section of cable reel," that "the chain pulley [] is exposed along the top and top side for a total of 3 inches each[, and that t]he cable reel has worn into the belting for approximately [5] inches." (Ex. S–2.) However, some three months later, on January 16, 2024, Inspector Moyer modified Citation No. 9587773 to indicate a violation of section 75.1722(a)—a guarding violation—rather than section 75.1725(a), "because the belting did not adequately cover the rotating cable reel and the moving chain pulley to prevent a miner from becoming entangled in it." (Ex. S–2.) Moyer designated the violation as "unlikely" to result in a "permanently disabling" injury to one person and determined that HCCR exhibited a "low" level of negligence, which he reiterated in his modification of Citation No. 9587773. (Ex. S–2.)

B. <u>Analysis and Conclusions of Law: Citation No. 9587773 – CN41 Shuttle Car</u>

1. Violation of 30 C.F.R § 75.1722(a) – Inadequate Mechanical Guarding on the CN41 Shuttle Car

The Secretary argues that HCCR violated section 75.1722(a), a mandatory safety standard requiring "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." (Sec'y Br. at 11); 30 C.F.R § 75.1722(a). Specifically, the Secretary alleges that HCCR violated the safety standard by installing a rubber belting cover on the CN41 shuttle car's cable reel that insufficiently guarded the moving parts from miners and may have caused injury. (Sec'y Br. at 11.) In response, HCCR makes several arguments that I address below.

a. Whether the CN41 shuttle car falls within the scope of 30 C.F.R § 75.1722(a)

Initially, HCCR takes a different tack and argues that Citation No. 9587773 should be vacated because the CN41 shuttle car is electrically powered "face equipment" and, therefore, not within the scope of section 75.1722(a). (Resp't Br. at 21; Resp't Reply at 5.) In support, HCCR points to *Island Creek Coal Co.*, 22 FMSHRC 823, 827–28 (July 2000), where the Commission held the Secretary incorrectly applied a "locked and tagged out" electrical safety standard to mechanical, "non-electrical work." (Resp't Br. at 21.) HCCR argues that the Secretary is incorrectly applying a mechanical safety standard to the CN41 shuttle car, a piece of electrical equipment. (Resp't Br. at 21.)

HCCR's argument fails for two reasons. First, *Island Creek Coal* is easily distinguishable from this case because it does not address section 75.1722(a) or shuttle cars. *Island Creek Coal Co.*, 22 FMSHRC at 825–27. Second, although the CN41 shuttle car runs on electric power from a trailing cable, it moves by using tension generated through a mechanical, chain-driven cable reel. (Tr. 32:17–34:10.) In addressing the applicability of section 75.1722(a), the Commission has held that the standard "applies to the specific machine parts listed plus other exposed moving machine parts similar to those listed." *Mathies Coal Co.*, 5 FMSHRC 300, 302 (Mar. 1983). Indeed, section 75.1722(a) states that "chains" and other "similar exposed moving machine parts which may be contacted by persons" need to be guarded. 30 C.F.R. § 75.1722(a). As MSHA Inspector Moyer explained, the shuttle car is electrically powered via a trailing cable that winds and unwinds around a large spool from *a chain-driven cable reel* in a compartment on the shuttle car. (Tr. 32:23–33:23.) The evidence of record thus establishes that the CN41 shuttle car contains moving mechanical parts specifically listed in section 75.1722(a). Accordingly, I determine that the CN41 shuttle car comes within the scope of section 75.1722(a), because it contains a mechanical chain that pulls a moving reel that spools and unspools the trailing cable while it shuttles coal between the working face and the conveyor belt.

b. Whether the moving machine parts of the CN41 shuttle car "may be contacted by persons" per 30 C.F.R § 75.1722(a)

Next, HCCR looks to the language of section 75.1722(a) to attack the citation. (Resp't Br. at 18, 21–22.) HCCR does not dispute MSHA Inspector Moyer's observation that the rubber belting cover on the CN41 shuttle car did not fully cover the cable reel compartment. (Resp't Br. at 17.) Rather, HCCR argues that Citation No. 9587773 should be vacated because under normal mining conditions no reasonable possibility exists that the mechanical moving parts of the cable reel would be "contacted by persons" for purposes of section 75.1722(a); therefore, the rubber belting cover sufficiently guarded against injury. (Resp't Br. at 21–22; Resp't Reply at 6.)

In response, the Secretary reiterates that the rubber belting used to cover the CN41 shuttle car's cable reel compartment insufficiently guarded the moving parts from miners, which could lead to injury. (Sec'y Br. at 11; Sec'y Reply at 8.) The Secretary asserts that MSHA Inspector Moyer established two possible instances—reeling in the cable after a maintenance inspection and shuttling coal between the working face and the conveyor belt—where a miner could contact the CN41 shuttle car's moving parts and thereby be exposed to injury. (Sec'y Br. at 10–13.)

i. Chain for cable reel and exposed spool of the CN41 shuttle car entangling a miner during maintenance

The Secretary focuses on a "whipping" hazard in which a miner contacting the cable reel could become entangled as the cable reels back into the shuttle car. (Sec'y Br. at 4, 11–12; Sec'y Reply at 7.) At the hearing, MSHA Inspector Moyer described the "whipping" hazard that arises when a shuttle car is stationary for maintenance. (Tr. 54:21–55:25.) Moyer explained that after pulling off the cable to inspect it, any miner near the jerry-rigged rubber belting cover could slip or fall, place a hand or arm through the gaps in the rubber belting cover, and become entangled in the chain or other moving parts when the equipment is activated and the chain reels the cable back on to the spool. (Tr. 54:21–55:25.) The Secretary argues that a shuttle car's cover is closed during cable reeling, as the photograph in Exhibit S–5 shows no latch or prop to hold the cover up, and asserts that Inspector Moyer testified that operators do not leave the cover open during cable reeling. (Sec'y Br. at 11–12; Ex. S–5.)

During equipment maintenance of shuttle cars like the CN41, a foreman inspecting the shuttle car's electric trailing cable must first engage the diversion valve to manually pull the cable off the spool. (Tr. 34:11–20, 37:2–38:1, 40:9–25, 54:21–55:25, 60:5–61:9, 233:19–235:14.) While the foreman pulls the cable off the spool, the shuttle car's lid is down. (Tr. 40:16–21.) After the foreman fully pulls out and inspects the cable, he energizes the shuttle car so the chain can reel the cable back onto the spool, akin to a measuring tape snapping up as it reels in. (Tr. 38:12–39:2, 60:11–61:9, 233:19–235:14.) To accomplish this, the foreman lifts the lid to disengage the diversion valve and energizes the shuttle car. (Tr. 37:2–38:1, 40:9–25, 54:21–55:25, 60:5–61:9, 233:19–235:14.)

Although MSHA Inspector Moyer stated that the lid for the cable reel compartment is down when the cable is pulled out for maintenance, his testimony is unclear as to whether the lid is closed when the cable is reeled in. (Tr. 40:16–21.) In contrast, Maintenance Foreman Mark Burns clearly stated, as confirmed by counsel for the Secretary on cross-examination, that the shuttle car's lid is open when the cable is being reeled in so the foreman can confirm that the cable is properly spooled and is functioning. (Tr. 233:19–235:149, 236:24–237:16.) Indeed, for the shuttle car's lid to function as a mechanical equipment guard, it must be closed; however, I note section 75.1722(c) permits the removal of mechanical guarding to examine for physical defects and functionality. 30 C.F.R § 75.1722(3); *see Arch of Kentucky Inc.*, 13 FMSHRC 753, 757–58 (Nov. 1989). Given the insufficiency of Inspector Moyer's testimony on this point, I determine that the Secretary fails to establish how a typical metal lid—as opposed to the insufficient rubber belting cover—on the CN41 shuttle car would guard against the potential hazard of a miner becoming entangled in the moving parts of the CN41 cable reel compartment while reeling in the trailing cable during maintenance.

ii. Chain for the cable reel and exposed spool of the CN41 shuttle car entangling a miner while running coal

MSHA Inspector Moyer determined that gaps in the rubber belting covering the moving CN41 shuttle car's cable reel compartment exposed miners to the risk of a hand or arm getting caught in the chain for the cable reel or exposed spool. (Tr. 57:19–60:15; Ex. S–2.) Moyer explained that miners often walk behind and near shuttle cars, carrying tubes and other items while shuttle cars transport coal from the working face to the conveyor belt. (Tr. 57:19–60:15.) Specifically, Moyer testified that due to the unevenness of the mine floor, a miner walking near the moving CN41 shuttle car could slip and fall, potentially thrusting their arm through the gaps in the rubber belting cover due to the pliability of the rubber belting. (Tr. 55:5–25, 57:19–60:15.) Thus, a miner's hand or arm could potentially get caught in the chain for the cable reel or exposed spool, leading to entanglement and injury. (Tr. 57:19–60:15; Ex. S–2.)

HCCR—in support of its contention that no reasonable possibility exists that the mechanical moving parts of the cable reel compartment would be "contacted by persons" under section 75.1722(a)—highlights the relatively small size of the gap between the rubber belting cover and the shuttle car frame while noting that the gap is at "shoulder height." (Resp't Br. at 20–22.) Indeed, HCCR Safety Inspector Sublett who is six-feet tall said the gap was "really close to shoulder height on [him]," as described and discussed in relation to Exhibit S–5. (Tr. 264:14–22, 265:23–267:11.) However, both MSHA Inspector Moyer and Sublett testified that the photos in Exhibit S–5 are not representative of the CN41 shuttle car or even of all the other shuttle cars at the Harrison County Mine. (Tr. 31:12–18, 40:9–41:25, 79:17–22, 256:15–257:5; Ex. S–5.) Thus, it is unclear whether Sublett was testifying about the height of the CN41 shuttle car. Further, when speaking of the photos in Exhibit S–5, Sublett noted the variations of the terrain, and he specifically noted the uphill incline of the mine floor that elevated the miner in the first photo in Exhibit S–5 such that the shuttle car was around his chest or waist height. (Tr. 264:20–265:1, 265:23–267:2.)

MSHA Inspector Moyer made similar statements regarding the mine floor when he said, "a lot of times in a mine surface, in a floor . . . there are parts of areas along ribs and stuff that get elevated, where a person's arm and stuff would be above . . . [the cable reel compartment]." (Tr. 55:5–17.) Moyer admitted on cross-examination that he did not know the height of the CN41 cable reel compartment's frame; but when pressed Moyer said, "I can speculate" and "I know the frame . . . is not even above your waist." (Tr. 85:2–86:23.) Moyer's statement on the waist height of the frame indicates that miners could come into contact with the moving parts inside the CN41 shuttle car's cable reel compartment, given its relatively low height in combination with the "two or three large[,] [3-inch] openings" that were "[5-] or [6]-inches long" between the rubber belting cover and the frame. (Tr. 45:7–18, 46:3–18, 48:2– 49:22, 52:20–54:18; Exs. S–2, S–5.) Even if the frame of the CN41 shuttle car was chest high or "really close to shoulder height" as stated by Sublett, Sublett also noted that the varied terrain of the mine floor could allow a miner to be at waist height against the frame, as he explained to the Court regarding the photos in Exhibit S–5. (Tr. 263:14–19, 265:23–267:2.) Sublett's testimony coupled with Inspector Moyer's observation that the CN41 shuttle car frame was at waist height, demonstrates that, depending on where the CN41 shuttle car was located while moving, a miner who tripped or fell could be sufficiently above the cable reel compartment to have their hand or arm go through the gaps between the rubber belting cover and the frame and become entangled with the CN41's moving parts. Therefore, a possibility exists, no matter how unlikely, of a miner contacting the moving parts of the CN41 shuttle car.

Finally, the MSHA Program Policy Manual in discussing section 75.1722(a) states that mechanical equipment guards must "[b]e of such construction that openings in the guard are too small to admit a person's hand" and "[b]e of sufficient size to enclose the moving parts and exclude the possibility of any part of a person's body from contacting the moving parts while such equipment is in motion." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Subpart R, at 155–56 (2015). The 3-inch gaps of 5- to 6-inches in length observed by MSHA Inspector Moyer are large enough for a miner's hand to slip through them and become entangled in the chain-driven cable reel and spool of the CN41 shuttle car. However, Moyer recognized the low degree of this possibility and reasoned that "[e]ven though it's minimal exposure and it was unlikely, there's still exposure there to a moving part or piece of equipment." (Tr. 54:21–55:4, 74:9–75:21.) Therefore, Moyer cited the likelihood of injury or illness for Citation No. 9587773 as "unlikely." (Tr. 75:7–19; Ex. S–2.) In considering Moyer's nineteen years of combined experience as a coal miner and MSHA inspector, I credit his reasonable explanation of the potential hazards to miners of contacting the moving parts in the CN41 shuttle car's cable reel compartment while it is running coal.

Based on the discussion above, I determine that the gaps along the make-shift rubber belting cover on the CN41 shuttle car's cable reel compartment created a possibility that a miner who trips or falls could have their hand or arm slip through the gaps and contact the chain of the cable reel or exposed spool. Therefore, I determine that the rubber belting cover on the CN41 shuttle car's cable reel compartment did not guard against injury, as a miner could come in contact with the moving machine parts within the cable reel compartment.

Accordingly, I conclude that HCCR violated section 75.1722(a).

2. Gravity Designations for Citation No. 9587773

HCCR does not dispute the Secretary's gravity determinations for Citation No. 9587773. (Resp't Br. at 21–22; Resp't Reply at 5–6; Ex. S–2.) MSHA Inspector Moyer determined that one miner could be affected by the violation, and they could suffer entanglement, lacerations, or amputations as a result of the violation, which could lead to "permanently disabling" injuries. (Ex. S–2; Tr. 54:21–55:4, 57:19–60:9, 60:5–15, 62:13–63:2, 82:20–83:24.) Based on Moyer's testimony, I conclude that the injuries most likely to result from an incident involving the violative conditions would be "permanently disabling" and affect one person. Additionally, as discussed above, I conclude that Moyer properly determined that an accident occurring as a result of the violative conditions was "unlikely." *See* discussion *supra* Part IV.B.1.b.ii.

3. Negligence Designation for Citation No. 9587773

MSHA Inspector Moyer designated HCCR's negligence as "low," which HCCR does not dispute. (Resp't Br. at 21–22; Resp't Reply at 5–6; Ex. S–2.) Moyer stated that HCCR was not mining at the time of the violation and estimated that the rubber belting cover could only have been in place for a few days due to the wear on the rubber from the cable reel. (Tr. 63:3–21; Ex. S–2.) Additionally, Moyer stated that HCCR preemptively identified the belting as requiring replacement in a safety audit the day prior to the citation and intended to replace the rubber belting cover. (Tr. 63:3–21, 260:14–261:1; Ex. S–2.) Thus, if ordinary mining operations had continued, the cover likely would have been replaced within a few days. (Tr. 63:3–21, 260:14–261:1.)

The Commission evaluates the degree of negligence using "a traditional negligence analysis" that considers what actions a reasonably prudent person familiar with the mining industry would have taken under the same circumstances, the relevant facts, and the protective purpose of the regulation. *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016) (citation omitted)); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Based on the totality of the evidence, I conclude HCCR's negligence to be low.

4. Penalty Assessment for Citation No. 9587773

The Commission is not bound by the Secretary's proposed penalty and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposes a penalty of $172.00 for Citation No. 9587773. (Ex. S–1.) HCCR is a large operator, mining 7,049,832 tons of coal at the Harrison County Mine in 2023. *Mine Data Retrieval System*, MSHA, https://www.msha.gov/data-and-reports/mine-data-retrieval-system (last visited Sept. 25, 2025). In the fifteen months preceding the issuance of this citation, MSHA issued to HCCR's Harrison County Mine nine violations of section 75.1722(a) that became final orders of the Commission. *Id.* The parties stipulated that the proposed penalties would not adversely affect HCCR's ability to continue in business. (Ex. Jt.–1.) I concluded that HCCR exhibited a low level of negligence. *See* discussion *supra* Part IV.B.3. Regarding gravity, I concluded that the violation was unlikely to result in a permanently disabling injury to one person. *See* discussion *supra* Part IV.B.2. Finally, HCCR demonstrated good faith in timely abating Citation No. 9787773 by replacing and installing the correct metal lid for the CN41 shuttle car. (Ex. S–2; Tr. 231:18–24.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $172.00.

V. FURTHER FINDINGS OF FACT, ANALYSIS, PRINCIPLES OF LAW, AND CONCLUSIONS OF LAW – CITATION NO. 9587893

A. Facts Relevant to Citation No. 9587893 – Work or Travel Under Unsupported Roof

On November 8, 2023, MSHA Inspector Richard W. Miller traveled to the Harrison County Mine to perform an annual survey in the 6-West section of the mine. (Tr. 89:17–92:7.) HCCR Representative Cody Pierce accompanied Inspector Miller for the survey, and Miller inspected each section's face as part of the survey. (Tr. 92:8–17, 96:20–97:4.)

When MSHA Inspector Miller arrived at the Number 1 Entry of the 6-West section of the mine, he observed beyond the last line of roof bolts a full footprint and two partial footprints that appeared to go around a ventilation curtain that hung on the last strap along the line of roof bolts. (Tr. 96:20–97:23.) Miller recognized the markings on the ground as footprints because he saw clear tread marks from boots. (Tr. 97:25–98:25.) Alongside the footprints, Miller saw an indentation in the ground left by an automated temporary roof support ("ATRS"), as well as tire tracks from a center bolting machine. (Tr. 100:10–101:10, 109:23–111:7.) An ATRS is a machine that temporarily supports a mine's roof while a center bolting machine installs roof bolts into the mine's ceiling. (Tr. 99:2–101:10, 104:15–21, 109:13–110:13, 133:15–20.)

MSHA Inspector Miller noticed the indentations from the ATRS and center bolting machine were covered in white rock dust, whereas the footprints revealed the black coal dust base of the mine floor. (Tr. 97:25–98:25, 100:10–101:10.) HCCR employs a multistep roof support process involving sequential bolting, debris removal, and rock dusting. (Tr. 98:6–101:10, 109:23–110:24, 129:8–131:12, 131:17–25, 214:3–215:3, 291:24–294:6.) Based on the order of HCCR's roof support process and the contrast of the white rock dust covering the indentations from the ATRS and center bolting machine, but not the footprints, Miller concluded that whoever left the footprints in the white rock dust did so after the ATRS and center bolting machine were moved out of the entry. (Tr. 100:25–101:10.)

Inspector Miller then took a small rock and dropped it from a roof strap that ran between the last row of roof bolts, to use gravity as an aid, in measuring how far past the last row of roof bolts the full footprint was located. (Tr. 101:11–19, 102:3–21, 106:7–22.) Using his tape measurer, Miller measured the distance between the mark left by the rock in the rock dust and the nearest edge of the full footprint that ran parallel to the roof strap as 12 inches. (Tr. 101:11–19, 102:3–21, 106:7–22.) HCCR Representative Pierce observed Miller as he underwent this process and did not object to Miller's measurement method or his conclusion that the full footprint was 12 inches from the last row of roof bolts. (Tr. 101:20–102:5.)

Inspector Miller subsequently issued Citation No. 9587893 to HCCR based on his observation of "foot prints [*sic*] measuring 12 inches beyond the last permanent support." (Ex. S–3.) Miller designated the violation as "unlikely" to result in a "fatal" injury to one person and determined that HCCR exhibited a "low" level of negligence. (Ex. S–3.)

B. Analysis and Conclusions of Law: Citation No. 9587893 – Work or Travel Under Unsupported Roof

1. Violation of 30 C.F.R § 75.202(b) – Work or Travel Under Unsupported Roof

The Secretary argues that HCCR violated section 75.202(b), a mandatory safety standard requiring that "[n]o person shall work or travel under unsupported roof unless in accordance with this subpart." (Sec'y Br. at 13); 30 C.F.R § 75.202(b).

HCCR points to Mine Supervisor James Alexander Pancost's testimony that, after receiving notice that MSHA Inspector Miller intended to issue the citation, he went to the cited location with Miller and only saw irregularities caused by machine tracks in the mine floor. (Resp't Br. at 11, 15; Tr. 215:21–217:17, 218:11–22, 219:8–15, 221:12–19, 222:15–24.) Pancost, however, admits he was not present when Miller first observed the alleged violation. (Tr. 215:21–216:17.) On the other hand, Miller observed the ATRS and center bolting machine track indentations covered in white rock dust, which contrasted with the footprints that revealed the black coal dust base of the mine floor following a path around the ventilation curtain that hung on the last roof bolt strap. (Tr. 96:20–97:23, 97:25–98:25, 100:10–101:10.) Miller said HCCR Representative Pierce acknowledged the footprints during his inspection and did not dispute their identification as such. (Tr. 108:22–109:8.) Lastly, Miller's testimony is consistent with his contemporaneous notes that the markings he observed were clearly footprints. (Tr. 96:20–97:23, 98:6–14; Ex. S–3.) Miller has eighteen years of experience as a coal miner and an additional seventeen years as a mine inspector for MSHA. (Tr. 89:10–91:9.) In considering the evidence before me, I credit Miller's testimony and find that the cited markings he observed were footprints.

a. Whether the footprints were past the last row of roof bolts

HCCR argues that Citation No. 9587893 should be vacated because MSHA Inspector Miller's measurement method was unreliable and, therefore, the Secretary cannot establish that the full-sized footprint was past the last row of roof bolts. (Resp't Br. at 11–12, 15–16.) Specifically, HCCR argues that Miller's measurement did not account for the angle Miller dropped the rock from and the undulations of the mine floor and roof. (Resp't Br. at 11–12.) Additionally, HCCR points to Mine Supervisor Pancost's testimony that he could not conclude that the irregularity—i.e., the "footprint"—was actually inby the last row of permanent supports. (Resp't Br. at 12; Tr. 221:12–19.) In response, the Secretary contends that HCCR "misunderstands basic physics" and maintains that Miller's testimony reliably establishes that the footprint was beyond the last row of roof bolts. (Sec'y Reply at 5.)

MSHA Inspector Miller explained that he dropped the rock from the last roof strap to account for the floor's slope and then measured from where it landed to the footprint—a method that HCCR Representative Pierce observed without objection. (Tr. 101:11–102:21.) First, a falling rock would not vary by angle but would follow the same trajectory if dropped from the spot Miller used. Second, even if I assume the undulations of the mine floor could affect Miller's precise measurement of the distance between the mark left by the rock and the footprint, the measurement is still generally reliable and establishes the footprints were beyond the last row of roof bolts.

Inspector Miller's identification of footprints past the last row of roof bolts is also consistent with his contemporaneous notes. (Tr. 96:20–98:14; Ex. S–3.) Although Mine Supervisor Pancost testified he could not conclude whether the irregularity in the mine floor—i.e. the footprint—was located inby the last row of roof bolts, he contradicted himself shortly afterward, stating the "irregularity" was located in "the area where [Miller] . . . was claiming [there] was a footprint, inby and outby there." (Tr. 221:12–19, 222:15–24.) Thus, Pancost's testimony on the location of the footprint is unclear. Miller, in addition to explaining his observations and measurement methods, has extensive experience in the coal mining industry and as an inspector. (Tr. 89:10–91:9.) Considering all the evidence on this issue, I determine that Miller's method of dropping a rock from the last roof strap was sufficient to measure the distance between the full-sized footprint and the last row of roof bolts. Accordingly, I find that the partial and full-sized footprints were located past the last row of roof bolts, meaning a miner worked or traveled beyond the last permanent roof support.

b. Whether the footprints were made while roof was supported by an ATRS

In the alternative, HCCR argues that Citation No. 9587893 should be vacated because the cited footprints could only have been made while the roof was temporarily supported by an ATRS. (Resp't Br. at 10, 15–16.) In response, the Secretary argues that MSHA Inspector Miller's testimony establishes that the footprints were made after the ATRS was removed from the area and, therefore, while the roof was unsupported. (Sec'y Br. at 15; Sec'y Reply at 4.)

HCCR installs its roof supports in a three-phase cycle. First, HCCR utilizes a continuous miner machine to mine a path through the entry. (Tr. 109:23–110:13, 129:8–130:15, 214:18–215:3; Ex. R–2.) As the continuous miner progresses, roof bolting equipment attached to the continuous miner installs two outside bolts to create an initial row of roof bolts ten feet apart. (Tr. 99:2–100:18, 109:23–110:13, 129:8–130:15; Ex. R–2.) As this occurs, a loader machine removes any debris in the continuous miner's wake and "rock dusts"—i.e., spreads white lime rock dust to prevent coal dust from triggering an explosion—in the area behind the continuous miner, including the mine floor. (Tr. 98:15–25, 110:3–24, 130:12–19, 214:3–215:3; Ex. R–2.) Once the rock dusting is completed, the continuous miner and loader machine are removed from the mine pathway and the second phase of the bolting process begins. (Tr. 109:23–110:13, 130:24–131:12; Ex. R–2.) Here, HCCR utilizes an ATRS to temporarily support the mine roof while a center bolting machine installs center bolts to complete the row of roof bolts. (Tr. 99:2–100:23, 109:23–110:13, 130:24–131:12, 133:15–20; Ex. R–2.) HCCR then removes the ATRS and center bolting machine from the mine pathway and moves on to the third and final phase of the mining cycle. (Tr. 99:2–12, 100:25–101:5, 109:23–110:19; Ex. R–2.) During this third phase, HCCR typically utilizes a "flinger duster" to again thoroughly cover the black, dusty coal mine floor, ribs, and roof with white lime rock dust. (Tr. 98:6–99:12, 110:14–24, 131:17–25.)

MSHA Inspector Miller noted that the tread marks from the boots contrasted against the surrounding white lime rock dust as the tread marks were black, because of "coal exposed underneath the rock dust" as "indication of the footprint." (Tr. 97:9–98:25.) Miller observed indentations and tire tracks next to the footprints, which he recognized as having been created by the center bolting machine and ATRS. (Tr. 100:10–101:10.) Miller saw that the indentations in the mine floor from the machines were coated in white lime rock dust, whereas the full-sized boot print was not covered in any white lime rock dust. (Tr. 100:10–101:10.) From this, Miller inferred that HCCR must have rock dusted the area after the center bolting machine and ATRS had been moved out of the entry. (Tr. 100:10–101:10.) Miller stated that the area where he observed the cited footprints was freshly rock dusted to such a degree it was obvious HCCR had used a "flinger duster" to rock dust the area. (Tr. 98:6–99:12, 131:22–132:17.) Therefore, Miller concluded that the cited footprint must have been made after HCCR used the "flinger duster," and not while the ATRS temporarily supported the roof. (Tr. 100:10–101:10.)

In contrast, HCCR cites Mine Supervisor Pancost's testimony that the white lime rock dust present at the time of the citation came from the loader machine's initial rock dusting, and the area had not yet received its final dusting. (Resp't Br. at 10–11, 15–16; Resp't Reply at 4; Tr. 213:13–214:17, 215:12–20.) However, as outlined in the timeline above, additional rock dusting occurs only after the roof has been center-bolted and both the ATRS and center bolting machine have been removed from the area. (Tr. 98:6–99:12, 100:25–101:5, 109:23–19, 110:3–24, 130:12–19, 131:17–25, 214:3–215:3.) Thus, indentations left by the ATRS and center bolting machine would only be covered by white lime rock dust during the final phase of rock dusting, after both machines are removed from the entry. Hence, if white lime rock dust covered indentations left by the ATRS and center bolting machine but not the cited footprints, the footprints could only have been made after the third phase of the mining cycle, and thus, after the machines' removal from the area. Accordingly, I find that the cited footprint was made after the center bolting machine and ATRS were removed—i.e., when no temporary roof support existed.

c. <u>Whether the area past the last row of roof bolts is supported roof</u>

HCCR argues section 75.202(b) does not specify that miners cannot work or travel inby the last permanent roof support but, rather, only restricts miners from working and traveling under unsupported roof. (Resp't Br. at 12–13, 16.) In support, HCCR highlights a distinction between sections 75.210(a) and 75.202(b) in which the term "permanent support" is used in section 75.210(a), whereas the term "unsupported roof" is used in section 75.202(b). (Resp't Br. at 12–13, 16.) Relying on Mine Engineer Kevin Burton's testimony that the area beyond the last row of roof supports was not "unsupported roof," HCCR argues that Citation No. 9587893 should be vacated. (Resp't Br. at 12–16; Tr. 284:5–300:2; Exs. R–1, R–2.)

In response, the Secretary argues that under section 75.202(b) any area beyond the last line of roof bolts qualifies as "unsupported roof." (Sec'y Br. at 14; Sec'y Reply at 5–6.) The Secretary asserts that interpreting section 75.202(b) otherwise would create an unworkable rule such that miners would need to assess the roof's structural integrity to determine where the support ends. (Sec'y Br. at 9, 14; Sec'y Reply at 5–6.) The Secretary notes that ALJs have consistently upheld citations issued under section 75.202(b) for miners going past the last row of roof bolts. (Sec'y Br. at 14.) The Secretary also asserts that HCCR's distinction between sections 75.210(a) and 75.202(b) lacks any significance when the sections are read in their entirety and in conjunction with one another. (Sec'y Reply at 5–6.)

The entirety of section 75.202(b) states that "[n]o person shall work or travel under unsupported roof *unless in accordance with this subpart*." 30 C.F.R § 75.202(b) (emphasis added). The only exceptions in the subpart—section 75.210(a) and (d)—state respectively that "[w]hen manually installing temporary support, only persons engaged in installing the support shall proceed beyond permanent support," and "[o]nce temporary supports have been installed, work or travel beyond permanent roof support shall be done between temporary supports and the nearest permanent support or between other temporary supports." 30 C.F.R § 75.210(a), (d). The regulation makes no exception for work or travel beyond permanent supports without temporary supports in place, even if the roof is considered "supported" under HCCR's contention. Although section 75.202(b) uses the term "unsupported roof" rather than "permanent support," HCCR's focus on this distinction misses the forest for the trees.

Indeed, other roof regulations offer guidance on what qualifies as "unsupported roof" and whether work or travel is permitted beyond permanent roof supports. For example, section 75.208 requires that, "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel beyond permanent support." 30 C.F.R § 75.208. In the preamble to section 75.208, MSHA suggests that operators could comply with the standard by hanging a reflective device "*on the last row of roof bolts* or other permanent roof support." Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2,354-01, 2,361–62 (Jan. 27, 1988) (emphasis added). If, as HCCR contends, section 75.202(b) allows work or travel beyond the last row of roof supports without a temporary support in place, then requiring operators to install warning signs or barriers to prevent such travel would be illogical.

The regulatory history of section 75.202(b) similarly illustrates MSHA's intent. In the preamble to section 75.202(b), MSHA explains that while the "primary objective of the final rule is to reduce the incidence of these accidents by prohibiting miner exposure to unsupported roof . . . [,] a prohibition against all exposure to unsupported roof would be impractical since some exposure is inherent *when temporary supports are manually installed* in unsupported areas." 53 Fed. Reg. at 2355 (emphasis added). Evidently, MSHA did not want to take a draconian approach by preventing all travel beyond permanent supports, because "some exposure is inherent when temporary supports are manually installed in unsupported areas." *Id.* Other than the exceptions outlined in the roof support regulations, MSHA sought to continue the "existing general prohibition against work or travel under unsupported roof." *Id*.

Both the regulatory history of section 75.202(b) and the broader framework of roof control regulations support the Secretary's long-established interpretation of section 75.202(b) that any work or travel beyond the last row of roof support, without a temporary support in place, is considered work or travel under unsupported roof and is therefore a violation of the standard. *See, e.g.*, *Wilcoal Mining, Inc.*, 35 FMSHRC 700, 712 (Mar. 2013) (ALJ) (finding a violation of section 75.202(b) because "centerline paint extending four feet beyond the last row of roof bolts together with visible footprints on the floor under that paint made the violation very obvious" that a miner walked under "unsupported roof"); *Doss Fork Coal Co., Inc.*, 16 FMSHRC 797, 812–13 (Apr. 1994) (ALJ) (holding "it is clear that [a] violation [of section 75.202(b)] is proven as charged," as the roof bolter operator was exposed to unsupported roof by having his entire body beyond the roof strap and his head 6 inches inby the last roof bolt).

Notably, even Mine Engineer Burton—cited by HCCR to support its claim that the area beyond the last row of roof bolts was "supported"—never trains miners to believe it is safe to step beyond the last row of roof support bolts. (Tr. 303:17–20.) Therefore, in considering the evidence, case law, and regulatory history, I reject HCCR's argument and determine that, under section 75.202(b), any work or travel beyond the last row of roof support, without a temporary support in place, is considered work or travel under unsupported roof.

Accordingly, based on my findings that a miner worked or traveled beyond the last row of roof bolts with no temporary roof support present (*see* discussion *supra* Part V.B.1.a), I conclude that HCCR violated section 75.202(b).

2. Gravity Designations for Citation No. 9587893

HCCR does not dispute the Secretary's gravity determinations for Citation No. 9587893. (Resp't Br. at 15–16; Resp't Reply at 3–5.) MSHA Inspector Miller assessed the likelihood of injury or illness to be "unlikely," because the roof above the area where the footprints were found "appear[ed] to be solid with no signs of roof failure." (Ex. S–3; Tr. 108:5–10.) Miller also determined the violation could result in a "fatal" injury to one person because several mines have experienced fatalities from falling roofs. (Ex. S–3; Tr. 106:23–108:4.) He further noted that if the unsupported roof collapsed while a miner was beneath it, serious injury or death could occur as it does not "take a very big piece of rock to break somebody's neck" if it drops from that height. (Ex. S–3; Tr. 107:24–108:4.) I agree with Miller's assessment and conclude that an incident involving the violative conditions was unlikely to cause a fatal injury to one person.

3. Negligence Designation for Citation No. 9587893

MSHA Inspector Miller designated HCCR's negligence as "low" which HCCR does not dispute. (Resp't Br. at 15–16; Resp't Reply at 3–5.) The Secretary asserts that "given the lack of any indication that the miner knew they were past the last row, the lack of prior violations, [HCCR]'s compliance with its roof control plan, and the presence of required warning reflectors," HCCR exhibited a "low" degree of negligence. (Sec'y Br. at 15.) The Commission evaluates the degree of negligence using a traditional negligence analysis. *See* discussion *supra* Part IV.B.3. In consideration of the Secretary's assertions, and based on the totality of the evidence, I conclude that HCCR exhibited a low degree of negligence.

4. Penalty Assessment for Citation No. 9587893

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty. *See* discussion *supra* Part IV.B.4. The Secretary proposes a penalty of $357.00 for Citation No. 9587893. (Ex. S–1.) HCCR is a large operator, mining 7,049,832 tons of coal at the Harrison County Mine in 2023. *Mine Data Retrieval System*, MSHA, https://www.msha.gov /data-and-reports /mine-data-retrieval-system (last visited Sept. 25, 2025). In the fifteen months preceding the issuance of this citation, MSHA did not issue any violations of section 75.202(b) to HCCR's Harrison County Mine. *Id.* The parties stipulated that the proposed penalties would not adversely affect HCCR's ability to continue in business. (Ex. Jt.–1.) I concluded that HCCR exhibited a low level of negligence. *See* discussion *supra* Part V.B.3. Regarding gravity, I concluded that the violation was unlikely to result in a fatal injury to one person. *See* discussion *supra* Part V.B.2. Finally, HCCR demonstrated good faith in abating Citation No. 9787893 by holding a safety discussion for all three mine shifts to discuss travel under unsupported roofs and the cited violation. (Ex. S–3.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $357.00.

VI. FURTHER FINDINGS OF FACT, ANALYSIS, PRINCIPLES OF LAW, AND CONCLUSIONS OF LAW – CITATION NO. 9587919

A. Facts Relevant to Citation No. 9587919 – Failure to Maintain a Permanent Ventilation Control

MSHA requires mine operators to follow an approved ventilation plan that establishes a minimum airflow rate for each mine. HCCR's ventilation plan requires it to maintain proper air pressure differentials to ensure clean air flows in the intended direction. (Tr. 200:15–201:17, 275:24–276:17.) As part of its ventilation plan, HCCR uses block stoppings—a permanent ventilation control made of 8-inch-thick cinder blocks. (Tr. 113:23–114:4.) The purpose of block stoppings is to separate intake air (i.e., clean air from outside) from return air (i.e., dirty air containing gases and dust that has swept the mine face). (Tr. 114:5–17, 122:11–16, 149:8–25, 153:24–154:6, 275:25–276:17.) If too much clean air is diverted before reaching the face, the face will be insufficiently ventilated. (Tr. 114:18–115:4, 275:25–276:17.) As part of the mining process, miners often create holes in block stoppings to allow a fan's cable to pass through it. (Tr. 115:18–23, 152:25–153:15, 180:1–12.) When HCCR does this, it seals the area around the cable using partial cinder blocks and plaster to prevent air leakage. (Tr. 115:18–116:4, 197:6–22, 204:4–9, 205:23–206:7.)

On January 6, 2024, MSHA Inspector Miller travelled to the Harrison County Mine to perform a routine methane inspection in the 7-Tailgate section of the mine. (Tr. 112:4–17, 169:12–23; Ex. R–3.) HCCR Safety Inspector Jonah Stackpole and Union Representative John Taylor accompanied Miller on his inspection. (Tr. 116:15–23, 174:4–13; Ex. S–4.) At the time of the inspection, HCCR was not actively mining but undergoing a "belt and power move"—a process that involves relocating equipment such as conveyor belts, fans, shuttle cars, and other miscellaneous machinery. (Tr. 112:18–113:14, 171:17–22, 180:7–12, 192:15–20.)

As MSHA Inspector Miller inspected the 7-Tailgate section, he noticed a cable going through a 4-by-4.5-inch hole in the upper left corner of one of HCCR's block stoppings, about 7-1/2 feet above the ground. (Tr. 115:5–17, 179:7–16, 180:19–22, 186:11–16; Ex. S–4.) The hole was clearly visible, positioned just in front of the date board where the pre-shift examiner conducts inspections. (Tr. 120:3–25, 197:6–13; Ex. S–4.) Additionally, dust had accumulated around the perimeter of the hole. (Tr. 121:6–17, 152:5–14.)

To assess the air flow through the hole, MSHA Inspector Miller clapped dust into the air and traced its path. (Tr. 117:3–14.) The dust—and thus, the air—traveled through the hole, meaning the hole allowed air from the intake side to mix with the mine's return air. (Tr. 117:3–14, 202:1–15, 203:5–18.) Miller then took methane and air flow readings at the mine face, which were normal, indicating the hole did not have a measurable effect on the mine's ventilation. (Tr. 117:15–23, 176:18–177:9.)

Accordingly, MSHA Inspector Miller issued Citation No. 9587919 to HCCR citing "[t]he permanent ventilation control, (block stopping) separating the intake and return air at 14 block outby the 7Tg section" for "not [being] maintained to serve the purpose for which it was built. [As t]here is a 4″ by 4 1/2″ hole in the top left corner." (Ex. S–4.) Miller designated the violation as "unlikely" to result in "lost workdays or restricted duty" for one person and determined that HCCR exhibited a "moderate" level of negligence. (Ex. S–4.)

B. Analysis and Conclusions of Law: Citation No. 9587919 – Failure to Maintain a Permanent Ventilation Control

1. Violation of 30 C.F.R § 75.333(h) – Hole in Block Stopping

The Secretary argues that HCCR violated section 75.333(h), a mandatory safety standard requiring that "[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built." (Sec'y Br. at 16); 30 C.F.R § 75.333(h). Specifically, the Secretary alleges that HCCR violated section 75.333(h) by failing to maintain a block stopping—a permanent ventilation control—for the purpose for which it was built, by leaving a 4″x 4.5″ hole in it. (Sec'y Br. at 1, 16–18; Sec'y Reply at 2–4.) In response, HCCR makes several arguments that I address below.

a. Purpose of a permanent ventilation control

HCCR argues that according to the regulatory history of section 75.333, a hole in a permanent ventilation control does not "violate the standard as long as ventilation is maintained inby and the pressure differentials are maintained causing the air to course in the proper direction," which was the case here. (Resp't Br. at 3, 6.) In support of its assertions, HCCR cites the preamble of section 75.333(h) which states, "MSHA agrees that to properly direct the flow of air and provide for adequate face ventilation, temporary controls, as well as all permanent ventilation controls, must be installed and maintained in an adequate manner to control leakage." (Resp't Br. at 6–7); Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,784 (Mar. 11, 1996). HCCR contends this language "contemplates that an operator will control leakage, not eliminate it." (Resp't Br. at 7.) Accordingly, HCCR argues that the cited hole in the block stopping was simply "leakage" that did not need to be eliminated to comply with section 75.333(h). (Resp't Br. at 3–4, 7–9.)

HCCR's "leakage" arguments fail for three reasons. First, HCCR notes that holes in block stoppings can be made to ventilate battery chargers and thus allow air to pass through it. (Resp't Br. at 3–4; Resp't Reply at 2.) But MSHA Inspector Miller explained that creating such holes changes the block stopping (i.e., a permanent ventilation control) into a "regulator" which falls under different regulations. (Tr. 147:1–148:18.) Thus, the argument is immaterial.

Second, under HCCR's interpretation of section 75.333(h), a violation would only occur when leakage in a permanent ventilation control became so severe that an insufficient amount of clean intake air reached the mine face. As the Secretary points out, in applying HCCR's interpretation of section 75.333(h), an inspector could only find a violation of the standard by measuring a drop in air pressure at the mine face. (Sec'y Br. at 16–17; Sec'y Reply at 2.) Yet, in such circumstances, an inspector could already cite an operator under section 75.325—the standard that establishes minimum air pressure requirements throughout the mine. (Sec'y Reply at 2); 30 C.F.R. § 75.325. Therefore, HCCR's interpretation of section 75.333(h) renders it duplicative of section 75.325. Moreover, HCCR's strained interpretation would not only lead to confusion in practice but would court disaster, as it is akin to saying a fire hose is sufficient only until so many holes appear that the water barely reaches the flames.

Third, the preamble to section 75.333 states that the purpose of a permanent ventilation control is to "provide ventilation to working sections and other areas where it is needed to dilute methane, respirable coal mine dust and other contaminants." 61 Fed. Reg. at 9,782. Logically, a block stopping fulfills its purpose when it is "correctly constructed [and] maintained" to separate clean intake air from dirty return air, thereby helping to dilute methane, respirable coal mine dust, and other contaminants. *Id.* Commission Judges have found likewise. *See, e.g.*, *Consol Pennsylvania Coal Co., LLC*, 41 FMSHRC 626, 687–91 (Oct. 2019) (ALJ) (affirming inspector's finding that a wall stopping was not maintained to serve the purpose for which it was built because the wall stopping had a hole measuring 3 inches by 7 inches); *Twentymile Coal Co*., 2012 WL 7761935, 1, 18–19 (Aug. 2012) (ALJ) (holding that a block stopping was not maintained to serve the purpose for which it was built because it had unfilled cracks). Despite HCCR's claims that the stopping was correctly maintained, I find its arguments unpersuasive because the hole in the block stopping undisputedly allowed air to pass through it, defeating its purpose of separating intake air from return air. (Resp't Br. at 5–6; Tr. 117:3–14, 202:1–15, 203:5–18.)

Notably, in *Twentymile Coal Co*., 33 FMSHRC 1885, 1892–93 (Aug. 2011) (ALJ), a Commission Judge found the operator failed to maintain a block stopping in violation of section 75.333(h) due to a 4- by 2-inch hole in the block stopping. HCCR attempts to distinguish *Twentymile Coal* from this case by noting that the cited hole in HCCR's block stopping was created during a "belt and power move" to remove a fan's power cable that ran through the block stopping. (Resp't Br. at 6, 8–9; Resp't Reply at 3; Tr. 112:18–113:14, 171:17–22, 180:7–12, 192:15–20.) Yet, this distinction is unpersuasive since "[u]nder section 110(a) of the Mine Act . . . the operator of a coal mine faces strict liability for any violation of a mandatory safety standard." *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 360 (D.C. Cir. 1997). Thus, the fact that the cited hole was created during a belt and power move has no bearing on whether HCCR violated section 75.333(h). Rather, the consideration of the belt and power move goes towards the determination of HCCR's negligence, not the fact of a violation.

b. <u>Whether HCCR violated 30 C.F.R. 75.333(h)</u>

Neither party disputes that the cited block stopping is a permanent ventilation control that is supposed to separate intake air from return air. (Resp't Br. at 1, 5–6; Sec'y Br. at 7; Sec'y Reply at 1–2.) Furthermore, HCCR does not contest that it created a hole in the block stopping which allowed air to flow through it. (Resp't Br. at 1, 5–6.) Therefore, based on my determination that the purpose of block stoppings is to separate intake air from return air by preventing airflow through it, I determine that HCCR's creation of a hole in the block stopping that allowed air to pass through it constitutes a failure to maintain the block stopping for its intended purpose. *See* discussion *supra* Part VI.B.1.a. Accordingly, I conclude that the Secretary has established that HCCR violated section 75.333(h).

2. Gravity Designations for Citation No. 9587919

HCCR does not dispute the Secretary's gravity determinations for Citation No. 9587919. (Resp't Br. at 6–9; Resp't Reply at 1–3.) MSHA Inspector Miller concluded that the hole in the block stopping did not pose an immediate hazard, but he determined it could lead to a "lost workdays or restricted duty" injury if allowed to persist, given holes in block stoppings can lead to air recirculation or insufficient intake air at the mine face. (Tr. 118:13–120:2.) Insufficient intake air can allow return air to recirculate through the mine causing dust inhalation that can lead to Black Lung Disease or pneumoconiosis. (Tr. 122:11–25.) Without enough clean intake air to dilute the methane expelled during mining, methane can also accumulate at the face and become a hazard due to ignition sources. (Tr. 122:11–25; Ex. S–4.) Here, I agree with Miller's reasoning and conclude that the violative conditions were "unlikely" to cause injury to a miner resulting in "lost workdays or restricted duty."

3. Negligence Designation for Citation No. 9587919

The Secretary argues that MSHA Inspector Miller correctly assessed HCCR's negligence as "moderate" because HCCR has repeatedly forgotten to patch holes in block stoppings; HCCR was aware of the hole in the stopping; and the cited hole was in plain view of Section Foreman Allan Stewart. (Sec'y Br. at 17–18.) HCCR does not directly dispute the Secretary's designation of "moderate" negligence. (Resp't Br. at 6–9; Resp't Reply at 1–3.)

MSHA Inspector Miller pointed out that the cited block stopping was located in a frequently traveled area where the pre-shift examiner responsible for maintaining ventilation controls in the 7-Tailgate section of the mine conducts his pre-shift examinations. (Tr. 120:3–25, 121:23–25; Ex. S–4.) Miller did not know exactly how long the cited hole in the block stopping had been left unsealed, but he estimated it had been present since at least the last pre-shift examination—which occurs every eight hours—based on the accumulation of dust outside the hole's perimeter. (Tr. 120:3–121:13.) However, Section Foreman Stewart testified that the cited hole in the block stopping was created the same day Miller issued the citation, shortly after the start of the afternoon shift at 4:30 p.m., when Stewart instructed miners to make the hole so they could move the cable for the belt and power move. (Tr. 197:6–22, 198:9–20.) Because Miller simply estimated the length of time the hole in the block stopping was present, whereas Stewart directly ordered the creation of the hole, I credit Stewart's testimony regarding the length of time the cited hole existed. Therefore, since Miller issued Citation No. 9587919 at 6:25 p.m., I determine that the violation was present for at most two hours. (Ex. S–4.)

Additionally, HCCR Safety Inspector Stackpole and Section Foreman Stewart confirmed that HCCR was conducting a belt and power move, requiring it to create a hole in the block stopping to remove the power cable running through it. (Tr. 112:18–113:14, 171:17–22, 180:7–12, 192:15–20); *see* discussion *supra* Part VI.B.1.a. However, MSHA Inspector Miller testified that when a cable in a block stopping is removed, the operator should immediately seal the hole to prevent any leakage. (Tr. 115:18–116:4.) Indeed, Stewart testified that a hole in a block stopping should be immediately sealed once the fan's cable is removed. (Tr. 197:6–22, 204:4–9, 205:23–206:7.) Although I determine HCCR's creation of the hole in the block stopping as part of a belt and power move to be a mitigating factor towards its level of negligence, I give it less weight because Stewart acknowledged the hole should have been patched immediately.

Based on the discussion above, I determine that HCCR's creation of the hole in the block stopping as part of a belt and power move, and the short amount of time that the hole was present, are mitigating factors towards HCCR's negligence. Therefore, after weighing all the evidence, I conclude that HCCR exhibited a low degree of negligence.

4. Penalty Assessment for Citation No. 9587919

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty. *See* discussion *supra* Part IV.B.4. The Secretary proposes a penalty of $305.00 for Citation No. 9587919. (Ex. S–1.) HCCR is a large operator, mining 7,049,832 tons of coal at the Harrison County Mine in 2023. *Mine Data Retrieval System*, MSHA, https://www.msha.gov /data-and-reports/mine-data-retrieval-system (last visited Sept. 25, 2025). In the fifteen months preceding the issuance of this citation, MSHA issued to HCCR's Harrison County Mine thirteen violations of section 75.333(h) that became final orders of the Commission. *Id.* The parties stipulated that the proposed penalties would not adversely affect HCCR's ability to continue in business. (Ex. Jt.–1.) I concluded that HCCR exhibited a low level of negligence. *See* discussion *supra* Part VI.B.3. Regarding gravity, I concluded that the violation was unlikely to cause an injury resulting in lost workdays or restricted duty to one person. *See* discussion *supra* Part VI.B.2. Finally, HCCR demonstrated good faith by patching the hole in the cited block stopping, a repair confirmed by MSHA Inspector Moyer five days after MSHA Inspector Miller issued the citation. (Ex. S-4.) In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of $200.00.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 9587773 and 9587893 are **AFFIRMED** as written. It is further **ORDERED** that Citation No. 9587919 is **MODIFIED** from "moderate" to "low" negligence and is otherwise **AFFIRMED** as written.

Respondent is **ORDERED** to pay a combined civil penalty of **$729.00** for Citation Nos. 9587773, 9587893, and 9587919, within 40 days of this decision.[2]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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