August 2020

TABLE OF CONTENTS

COMMISSION DECISIONS

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

No review was granted or denied during the month of August 2020.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. JAMES C. SCOTT, employed by MILL BRANCH COAL CORPORATION and DONNIE B. THOMAS, employed by MILL BRANCH COAL CORPORATION	Docket Nos. VA 2018-0103 VA 2018-0104

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), and involve penalties the Secretary of Labor seeks to assess against James C. Scott and Donnie B. Thomas pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c).[1] For the reasons that follow, we vacate the order of the now-retired Judge dismissing the proceedings (41 FMSHRC 563 (July 2019) (ALJ)), and remand the cases to the Chief Administrative Law Judge for its reassignment and the resumption of proceedings.

[1] Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [that provide for operator civil and criminal penalties, respectively].

30 U.S.C. § 820(c).

I.

Factual and Procedural Background

On April 7, 2015, Scott and Thomas were employed by Mill Branch Coal Corporation at its North Fork #6 Mine as Superintendent and a shift foreman, respectively. The Secretary alleges that a dangerous inundation of water in a section of that mine that day was discovered by a Mine Safety and Health Administration ("MSHA") inspector. The next day, MSHA issued four citations and orders to Mill Branch in connection with the inundation, including Order No. 8178613, alleging that the inundation was not reported to MSHA within 15 minutes, as required by 30 C.F.R. § 50.10(d).[1] At the same time, MSHA began investigating the liability of the two miners for at least two of the violations.

Mill Branch later filed timely notices of contest with respect to the four orders and citations. Thereafter, on August 3, 2015, Mill Branch entered into bankruptcy proceedings.

In letters dated October 27, 2015, MSHA's Norton (VA) District Manager informed each of the two miners that MSHA was "proposing to assess an individual civil penalty against you as an agent of Mill Branch" for the violation cited in Order No. 8178613 as well as for violating 30 C.F.R. § 75.1502 (failure to follow the emergency evacuation and fire fighting plan), one of the four cited violations. MSHA went on to explain that "[t]his proposed penalty is based on information obtained during a special investigation conducted under the Mine Act . . . ."[2]

Despite the foregoing letters, MSHA, when it proposed penalties against Mill Branch in January 2016 in Docket Nos. VA 2016-105 & -106 for the four violations connected to the inundation, did not also propose to assess a penalty against either miner. Furthermore, in July 2016, prompted in large part by Mill Branch's pending bankruptcy proceeding, the Secretary and Mill Branch agreed to settle all four of the penalties, including the penalty for Order No. 8178613. Based upon the Secretary's motion for settlement, as well as his subsequent supplemental representations discussed below, a Commission Judge ordered Mill Branch to pay $33,071 for that violation, a reduction of 50 percent from the amount that the Secretary had proposed. *See* Decision Approving Settlement, Docket Nos. VA 2016-105, et al. (Aug. 3, 2016).

Twenty months later, on April 12, 2018, the Secretary proposed penalties against Scott and Thomas of $4,000 and $3,500, respectively. The Secretary alleged that the two miners, as agents of Mill Branch, knowingly authorized, ordered, or carried out the violation of section 50.10(d) set forth in Order No. 8178613. A different Judge was assigned to the miners' cases.

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[1] Section 50.10(d) requires operators to notify MSHA within 15 minutes of the occurrence of an "accident." An "accident" is defined to include "[a]n unplanned inundation of a mine by a liquid or gas." 30 C.F.R. § 50.2(h)(4).

[2] The Secretary did not enter copies of the letters into the record below; rather, they were appended by the Secretary to his reply brief to the Commission. In that same brief, the Secretary also disclosed that later in 2015, the miners had availed themselves of the opportunity MSHA offered in the letters to confer with the agency regarding their roles in the violations.

Upon eventually learning some of the background of the proceedings, the Judge issued a Show Cause Order. In that order, the Judge focused on the timing of the section 110(c) penalty proposals, in relation both to the much earlier settlement of the penalties against the operator and to the issuance of Order No. 8178613, three years previously. The Judge required the Secretary to supply information justifying such a course of conduct in the cases. 41 FMSHRC 227, 229-30 (Mar. 2019) (ALJ). The Secretary replied that the investigation ended on April 4, 2018, and penalties were proposed eight days later on April 12, 2018.

The Judge was not satisfied with the substance of the Secretary's responses. The Judge rejected the Secretary's contention that the Commission can only review the appropriateness of the amount of time that lapsed between the *end* of the MSHA 36-month investigation of the miners and the agency's proposal of penalties against them. Because he found that the Secretary had failed to provide a justification for such a lengthy investigation and that the Secretary had failed to demonstrate that the notices of civil penalty were issued within a reasonable time as contemplated by the Mine Act, the Judge dismissed the proceedings. 41 FMSHRC at 565-66.

The Commission granted the Secretary's subsequent petition for discretionary review of the dismissal order.

II.

Disposition

This case involves an issue that flows from the dual enforcement scheme of the Mine Act. The Secretary is charged with, among other things, inspecting mines, investigating health and safety violations that are discovered, and proposing penalties for those violations. When an operator or miner contests an alleged violation or the penalty proposed for it, the Commission is then tasked with reviewing the proffered violation and proposed penalty, including assuring due process in adjudicating the matter and the ultimate assessment of any penalty.

A. Applicable Law

Section 105(a) of the Mine Act sets out the Secretary's obligations regarding the proposal of penalties, including the timeliness of their proposal, as well as the finality of a penalty not contested.[3] Section 105(d) then explains the role that the Commission is to play in the event of a timely contest of any enforcement action by the Secretary, including the contest of a proposal of a penalty.[4]

One of the primary reasons the Mine Act was enacted was to greatly improve upon the civil penalty assessment, adjudication, and collection procedures of its main predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal

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[3] Section 105(a) states in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, *within a reasonable time after the termination of such inspection or investigation*, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited. . . . . If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a) (emphasis added).

[4] Section 105(d) states:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, . . .or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . , and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. . . . .

30 U.S.C. § 815(d).

Act"). S. Rep. No. 95-181, at 43-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631-33 (1978) ("*Legis. Hist.*"); *see generally Donovan v. Phelps Dodge Corp.*, 709 F.2d 86, 91 (D.C. Cir. 1983). There was no language addressing the timing or timeliness of the assessment process in section 109(a)(1) of the Coal Act, pursuant to which MSHA's immediate predecessor, the Mine Enforcement and Safety Administration of the Department of the Interior, proposed penalties against mine operators. Nor did the Coal Act demand timely action on the part of the predecessor to the Commission, the Board of Mine Operations Appeals, a creation of that same Department. Consequently, the Coal Act penalty procedures were "lengthy, and often repetitive," becoming ones which "encourage[d] delaying the ultimate payment of civil penalties." S. Rep. No. 95-181, at 44, *Legis. Hist.* at 632.

In drafting the Mine Act, the responsible Senate Subcommittee stated that "[t]o be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency. To achieve this objective S. 717 contains a number of significant departures from the present practice under the Coal Act." S. Rep. No. 95-181, at 43, *Legis. Hist.* at 631. Those departures, described as the "means by which the method of collecting penalties is streamlined," included that "civil penalties are to be assessed by the . . . Commission rather than by the Secretary as prevails under the Coal Act . . . . Where a penalty is contested, the normal proceedings for the hearing of cases by the Commission controls." S. Rep. No. 95-181, at 45-46, *Legis. Hist.* at 633-34. In creating the Commission, the Committee stated that it "strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay in acting upon cases." S. Rep. No. 95-181, at 48, *Legis. Hist.* at 636.

At the same time, the legislative history notes that when circumstances cause prompt proposal of a penalty to not be possible, such event should not prevent imposition of a penalty. Thus the Senate Report states, "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, . . . the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34, *Legis. Hist.* at 622. Congress desired expeditious action but also anticipated that speed is not achievable in all circumstances.

In a case interpreting the relevant statutory language, *Secretary of Labor v. Twentymile Coal Co*, 411 F.3d 256 (D.C. Cir. 2005), involving a late-filed penalty proposal, the D.C. Circuit focused on a two-pronged inquiry: (1) was the delay in proposing the penalty a reasonable one; and (2) did the operator demonstrate prejudice from whatever delay in fact occurred? *Id*. at 262. More recently, in *Long Branch Energy*, 34 FMSHRC 1984, 1990 (Aug. 2012), we explained "that Commission enforcement of the filing time limits is a secondary consideration to the primary purpose of section 105(d), i.e., ensuring prompt enforcement of the Act's penalty scheme." *See also Salt Lake Cty. Road Dep't*, 3 FMSHRC 1714, 1716 (July 1981) ("considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself."). In another case we also stated that "[w]hen reviewing a judge's pre-trial rulings," such as the one the Judge made here in dismissing the proceedings, "the appropriate standard of review to apply . . . is abuse of discretion, though any factual determinations he made in arriving at his conclusion are subject to substantial evidence review." *Black Butte Coal Co.*, 25

FMSHRC 457, 459-60 (Aug. 2003). "[T]he Commission cannot merely substitute its judgment for that of the . . . [J]udge . . . . The Commission is required, however, to determine whether the [J]udge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings." *Asarco, Inc.*, 12 FMSHRC 2548, 2555 (Dec. 1990).

B. The Judge's Dismissal for the Alleged Failure to Comply with Section 105(a)

The Secretary argues that the Judge made numerous legal errors in his order dismissing the two section 110(c) cases. He contends that his obligation to propose penalties "within a reasonable time" occurs only "after the termination of [an] inspection or investigation." PDR at 13 (citing 30 U.S.C. § 815(a)). He thus argues that the relevant time period in this case was eight days. The two miners respond that the Judge properly required that the Secretary demonstrate "adequate cause" for why it took three years for the penalties against them to be proposed, and that substantial evidence supports the Judge's conclusion that the Secretary failed to make such a showing. They allege that the delay of more than three years from the issuance of the citation to the operator to the issuance of the section 110(c) penalty proposals has prejudiced them.

The Judge based his dismissal of proceedings on our statement in *Long Branch* that "[i]n addressing timeliness issues, . . . the Secretary is not free to arbitrarily ignore reasonable time constraints that would 'deny fair play to operators' by 'exposing operators to stale claims.'" 41 FMSHRC at 564 (quoting *Long Branch*, 34 FMSHRC at 1989). The Judge applied the remainder of the Commission's *Long Branch* analysis to the facts at hand. Because in the Judge's view, the Secretary failed to provide a justification for not proposing the 110(c) penalties until three years after issuing Order No. 8178613, the Judge dismissed the proceedings. *Id*. at 564-65.[5] This case, however, does not hinge on application of Commission Procedural Rule 28, 29 C.F.R. § 2700.28. The Secretary complied with Rule 28(a). Therefore, Rule 28 was not applicable and does not provide a basis for dismissal.

The primary issue the Judge raised in his Show Cause Order is the timeliness of the Secretary's initial proposal of the section 110(c) penalties. We review his decision by looking first at the statute and then at due process.

The most obvious statutory provision is section 105(a). As seen, it states that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, *within a reasonable time after the termination of such inspection or investigation*, notify

[5] *Long Branch* involved a specific procedural deficiency: a failure by the Secretary to file a penalty petition within 45 days of receiving a timely notice of contest. In *Long Branch*, the Commission expanded upon our earlier decision in *Salt Lake* and held that in such cases, a Judge, before permitting proceedings to go further, can require the Secretary to provide "adequate cause" for his failure to meet the 45-day time limit. 34 FMSHRC at 1989-91. The Commission was careful to point out in *Long Branch* that it was interpreting and applying its own regulation and thus had considerable legal leeway to craft the "adequate cause" standard. *Id*. at 1989.

the operator by certified mail of the civil penalty proposed to be assessed . . . ." 30 U.S.C. § 815(a) (emphasis added).[6]

Regardless of the length of time the Secretary may have taken to investigate the section 110(c) charges here,[7] deference has been accorded the Secretary's interpretation of section 105(a) that the time period subject to the reasonableness requirement in that provision *begins* only upon the *completion* of the investigation necessary to support the penalty proposal. *See Twentymile*, 411 F.3d at 261. Consequently, the Secretary explained that his investigations into the liability of the two individual miners under section 110(c) for the section 50.10(d) violation did not conclude until April 4, 2018. S. Resp. to Order to Show Cause at 1.

Thus, for present purposes, the period subject to the "reasonable time" requirement of section 105(a) began on April 4, 2018 with the conclusion of the section 110(c) investigations and ended with MSHA's proposal of penalties on April 12, 2018 — a period of eight days. PDR at 13-14. There is no question that, for purposes of section 105(a), the eight-day period of time

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[6] The Secretary correctly points out that section 105(a) goes on to refer only to penalties proposed pursuant to section 110(a), which governs penalties imposed upon operators, not individual miners. Given our holding here, we need not resolve the Secretary's contention that, by implication, the terms of section 105(a) do not govern penalties that the Secretary proposes to assess against individual miners pursuant to section 110(c). We note, however, that both the Secretary and the Commission have continually found it necessary to look to other provisions of the Mine Act — such as sections 105(a) and section 105(d) set forth above, along with section 110 — to give effect to the summary provisions of section 110(c).

The Secretary also argues that, notwithstanding its "reasonable time" language, section 105(a) cannot be read to be a statute of limitations, so that by default 28 U.S.C. § 2462 applies to *all* Mine Act civil penalty proceedings. That provision states in pertinent part that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." *See, e.g., 3M Co. v. Browner*, 17 F.3d 1453, 1455 (D.C. Cir. 1994) (holding 28 U.S.C. § 2462 to apply because civil penalty at issue there "contains no provision limiting the time within which the [federal agency] must initiate the administrative action."). Because of our holding here, we leave the resolution of this argument to a future case.

[7] Mine Act investigations are governed by section 103 of the Act, 30 U.S.C. § 813, which contains no timeliness provision. *Cf.* 52 U.S.C. § 30107(a)(9) (providing that the Federal Election Commission is "to conduct investigations . . . expeditiously"). Furthermore, an investigation into a miner's individual liability under section 110(c) for a violation is, in particular, not perfunctory and thus may take time beyond that that is necessary to investigate the operator for the violation. *See Sedgman*, 28 FMHSRC 322, 341 (June 2006) (Commissioners Suboleski and Young) (characterizing as reasonable under section 105(a) the less than 11 months of time between citation issuance and penalty proposal to the operator, given the section 110(c) investigation that was also conducted).

qualifies as "reasonable" for purposes of proposing a penalty. *See Long Branch*, 34 FMHSHRC at 1991 n.11 ("Commission presumes that the Secretary's agents generally act in good faith . . . ."). Consequently, the Judge's order dismissing these proceedings cannot be affirmed at this juncture on the basis of section 105(a).[8]

Turning to the due process issue, the Commission has recognized that the "[t]he fundamental requirement of procedural due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' *appropriate to the nature of the case*." *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999) (emphasis added) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). We note that the circumstances the miners' cases present are undoubtedly unusual.[9] Cases against operators and related cases against individual miners "are often consolidated for reasons of judicial efficiency . . . ." S. Resp. to Show Cause Order at 6. Moreover, the Commission has recognized that there are common elements to operator and individual miner liability cases, such as gravity. *See Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997); *see also Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012) (Judge's "finding that the [operator's] violation was not unwarrantable sufficiently explains why in her view no penalties against the individuals should be assessed . . . ."). Should the miners have suffered actual prejudice attributable to the unusual procedural path this case has traveled to date, it is possible they have been denied due process. We remand this case back to the judge,

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[8] Chairman Rajkovich and Commissioner Althen note, separately, the following observations. The only record of the conduct of the investigation after December 2015 presently before us is the Secretary's statement that MSHA issued the assessment eight days after the Technical Compliance and Investigation Office sent a letter requesting proposal of assessments. Thus, the current record precludes our determination of a number of issues. Those include: whether section 105(a) applies to section 110(c) assessments; whether an investigation terminates in MSHA's absolute discretion; whether any person of interest, or the Commission, may inquire as to when an investigation was concluded for purposes of section 105(a); and, whether (or how) *Long Branch* may affect our evaluation of prejudice versus "reasonable time" in the conduct of investigations pursuant to section 110(c). The fact that we have not addressed those issues, here, has no bearing on their consideration by the Judge on remand or by the Commission in future cases.

[9] Chairman Rajkovich and Commissioner Althen note, separately, the undoubtedly unusual aspect of these cases with the following observations. On October 27, 2015, notification was given to the miners of the intention to propose penalties against them. The violation under investigation was for failing to notify MSHA within 15 minutes of the occurrence of an accident. This would not appear to be a complex matter for investigation; yet the investigation was not reported as completed until more than two years later, on April 4, 2018. In proposing the settlement in the operator's case, the Secretary proffered that the resolution would "conserve scarce resources" such as "inspectors spending time preparing for and appearing at trial." E-mail from Office of Solicitor attorneys to Judge's clerk (July 27, 2016). In the Preliminary Statements in these cases, however, the Secretary identified as potential witnesses the two inspectors who had issued the citations and orders against Mill Branch in the operator's case. Further, there is no evidence that the Judge in the proceeding against the operator was informed that Scott and Thomas were the subjects of an investigation.

where the miners will have the opportunity to provide argument and evidence that they have been denied due process.

We do not find a statute bars the filing in this case, and in the absence of such a finding, the length of time, standing alone, does not bar the assessments. To establish a due process violation, the miners would have to submit on remand evidence of actual prejudice, not just allegations of potential or inherent prejudice.[10] *See Long Branch*, 34 FMSHRC at 1991-93; *see also Twentymile*, 411 F.3d at 262; *Valley Camp Coal Co*., 1 FMSHRC 791, 792 (July 1979) (reversing Judge's decision dismissing penalty contest for failure to timely answer penalty petition because there was no showing that the Secretary had been prejudiced by the delay). The Secretary would then have the opportunity to submit rebuttal evidence to the assigned Judge.

[10] To date, the miners' prejudice arguments have been made solely through argument of counsel, with no supporting evidence, such as affidavits.

III.

Conclusion

For the foregoing reasons we vacate the Judge's order dismissing the proceedings and remand these cases to the Chief Administrative Law Judge for reassignment.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 17, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. M-CLASS MINING, LLC	Docket No. LAKE 2018-0188-R

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is Order No. 9104295, issued to M-Class Mining, LLC ("M-Class") on February 24, 2018 by the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA issued the order under section 103(k) of the Mine Act, 30 U.S.C. § 813(k),[1] after receiving a verbal report from the local police department that a doctor had called reporting that a miner had suffered carbon monoxide poisoning in the mine.

The operator contested the validity of the order after it was terminated, but not vacated, by MSHA. The Secretary argued that the order was valid. The Secretary further argued that because MSHA terminated the order prior to the hearing on the contest, the issue of the validity of the order was moot.

The Judge first determined that the issue was not moot. The Judge then concluded that an "accident" had occurred and affirmed the validity of the section 103(k) order. 41 FMSHRC 1, 11 (Jan. 2019) (ALJ). The operator challenges the Judge's decision that an "accident" had occurred.

Upon review, we affirm the finding that this case is not moot. We further determine that the Judge erred in finding that an accident had occurred, and therefore, we vacate the order.

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[1] 30 U.S.C. § 813(k) states that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

I.

Background

A. Factual Background

On February 24, 2018, miner Mitchell Mullins began his shift at the M-Class #1 underground coal mine in Macedonia, Illinois. Mullins was part of a crew of 14 miners tasked with closing a gap in the mine roof, the result of a roof fall at the Headgate # 6 section of the MC portal of the mine. The miners erected a steel archway to support the roof before using a diesel air compressor to pump foam into the gap in the roof. Gas detectors were mounted in the area, and eight to ten of the miners, including Mullins, carried hand-held gas "spotters" to track the levels of carbon monoxide in the mine.[1]

Mullins arrived underground at 8:00 a.m. Between 9:00 a.m. and 9:30 a.m., he began to suffer from dizziness and a light headache. Later, between 10:00 a.m. and 11:00 a.m., the operator started using the compressor, which was located in proximity to Mullins. Between 11:15 a.m. and 11:30 a.m., Mullins started experiencing chest pains and difficulty breathing. At approximately 3:00 p.m., Mine Superintendent Demitrios Macropoulos transported Mullins from the section. Macropoulos testified that, on his way out of the mine, Mullins "said something about how the flu had been going around his home, and he had it the previous week, and it's probably not all the way out of his system." Tr. 227-28. Mullins also stated he was feeling better while enroute out of the mine.[2] Nevertheless, Mullins was transported to the emergency room at a nearby hospital.

At approximately 6:50 p.m., Dr. Dean Bosley, a physician at the hospital, called the local police, reported that Mullins had suffered carbon monoxide poisoning while working at the mine, and further recommended that the mine be shut down. The police called an MSHA hot-line to report Dr. Bosley's diagnosis and recommendation. The MSHA hot-line employees used this information to create an escalation report that was then sent to the local MSHA field office.

After receiving the escalation report, the MSHA field office supervisor, Bob Bretzman, called Parker Phipps, a senior management official at the mine. Phipps informed Bretzman that he had worked with Mullins in the same area that day, and had not detected any elevated levels of carbon monoxide with his gas spotter. Bretzman did not issue an order to evacuate the mine, but informed Phipps that he was sending an inspector out to investigate. Phipps then sent a miner to inspect the area at issue. The miner did not detect any elevated carbon monoxide levels.

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[1] The handheld gas spotters can record data of carbon monoxide levels throughout a shift or merely the highest ("peak") levels of carbon monoxide detected during a shift. Combined with a tracking system used to locate miners, it is possible to identify where a miner was located during each recording of carbon monoxide levels. Tr. 43, 46-47.

[2] Mullins provided that observation in an interview directly to MSHA field office supervisor Bob Bretzman.

Inspector Brandon Naas was dispatched to the mine. He reviewed the escalation report at the MSHA field office before leaving for the mine. Naas arrived at the mine at 10:43 p.m. Upon his arrival, relying upon the escalation report generated by the doctor's call, Naas immediately issued Order No. 9104295 under section 103(k) of the Mine Act at 10:55 p.m. to suspend operations in the area at issue. While Naas was still on the surface, he reviewed a report from the mounted gas detectors (the monitors) and checked the data from a hand-held gas spotter. In neither case was there any indication of elevated carbon monoxide levels in any area where Mullins had been working. At about midnight, Naas went underground to Headgate # 6 to investigate the area at issue. While he was underground, he used a gas spotter and did not detect any elevated levels of carbon monoxide. He was unable to locate, and therefore check, Mullins' own hand-held gas spotter.

By 1:25 a.m. Naas had completed his investigation. Having not found any high levels of carbon monoxide, he modified his order to release the area for resumption of normal mining operations. Naas then started the air compressor to determine if he could detect an exhaust of carbon monoxide. He did not detect any elevated levels of carbon monoxide from the compressor. Sec'y Ex. 2 at 6-7.[3]

The next day, at 8:15 a.m., Naas again modified the order. The second modification removed the compressor from service pending further investigation. MSHA stated that this modification was made because of a need for further investigation into whether the compressor was a source of elevated carbon monoxide. Sec'y Ex. 1 at 1-3.

Between February 26 and February 28, Naas interviewed Mullins and other miners who had worked with Mullins on February 24. Again, he did not find any evidence that any miners had detected elevated levels of carbon monoxide on the day in question. Naas also did not find any evidence that any other miner who had worked in the area that day had suffered chest pains or breathing difficulties.

Despite the lack of findings, MSHA subsequently required the operator to submit an action plan to prevent exposure to elevated levels of carbon monoxide. On March 1, 2018, the operator submitted its proposed action plan. MSHA rejected this plan on March 7, 2018. The operator responded by proposing another action plan on March 8, 2018. However, the parties were again unable to reach agreement.

Thereafter, on March 15, 2018 the operator filed this action. Over one month later, on April 4, 2018, although the parties had not reached an agreement on a proposed action plan, MSHA terminated the order and returned the compressor to the operator. MSHA never identified elevated levels of carbon monoxide in the area nor any source that would cause elevated levels of carbon monoxide. MSHA never issued a citation related to the order. 41 FMSHRC at 5.

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[3] State inspectors took bottle samples of the air to check for carbon monoxide. The results of those bottle samples were negative, showing 5 ppm, an amount significantly below the regulatory threshold. Tr. 66.

B. Procedural Background

M-Class not only contested the order on March 15, it also filed a motion for an expedited hearing on the order. On March 30, the presiding Judge denied M-Class's motion for an expedited hearing. The operator continued to challenge this order, contending that no accident had occurred.

On July 18, the Judge concluded that the case was not moot. 40 FMSHRC 1288 (July 2018) (ALJ). On September 20, the Secretary filed a petition for interlocutory review of the Judge's order asking the Commissioners to find that the matter was moot. Due to the absence of a quorum, the Commission was unable to consider this petition.[4]

On October 3-4, the Judge held a hearing in this matter. Neither Mullins, the allegedly affected miner, nor Dr. Bosley, the physician who initially phoned the local police recommending that the mine be shut down, testified during the hearing. On January 14, 2019, the Judge determined that an "accident" had occurred on February 24, 2018 and affirmed the order. 41 FMSHRC at 10-11. Subsequently, the operator filed a timely petition for review, which the Commission granted on February 25, 2019.

II.

Judge's Decision

The Judge's order of July 18, 2018, held that the section 103(k) order was not moot, despite having been terminated, because the order posed continuing consequences for the operator. Specifically, the Judge found that the order could impact the operator's reputation. Alternatively, the Judge found that the order fell within the capable-of-repetition-yet-evading-review exception to mootness. 40 FMSHRC at 1291-92.

The Judge went on to decide the case on the merits. In the decision, the Judge held an "accident" had occurred and affirmed the section 103(k) order. 41 FMSHRC at 11.

The Judge reasoned that the event involving Mullins was an "accident" because it was a sudden event which required quick action to ensure safe mining conditions, making it similar in nature to a mine inundation – an event which constitutes an "accident" under section 3(k) of the Mine Act. *Aluminum Co. of America ("Alcoa"),* 15 FMSHRC 1821, 1824 (Sept. 1993). In relevant part, the Judge determined that "Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event . . . [The] evacuation and hospitalization of a miner positively diagnosed with carbon monoxide poisoning constitutes an injury that requires quick action to ensure the safety of other miners." 41 FMSHRC at 7-8.

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[4] The Commission may grant interlocutory review only by "a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission." 29 C.F.R. § 2700.76(a)(2). Therefore, in the absence of a quorum the Commission may not undertake interlocutory review.

Alternatively, the Judge found that Mullins' hospitalization was an injury which constituted an independent basis for an accident. *Id.* at 8.

The Judge implicitly acknowledged that Mullins' harm might not have been caused by mining conditions. He stated that "M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected . . . and that Mullins' original diagnosis may not have risen to the level of carbon monoxide poisoning." *Id.* at 9. The Judge's focus, however, was on MSHA's issuance of the order "in response to the information it possessed at the time," finding that the agency reasonably relied on the escalation report, which "rationally connect[ed] Mullins' injury to a potential . . . elevation of carbon monoxide at the mine." *Id.* at 8. Consequently, the Judge's determination of an "accident" was based upon what MSHA thought *at the time of the issuance* of the order rather than whether an "accident" had *actually occurred.*

In addition, the Judge upheld the second modification to the order, under which the inspector removed the air compressor from service. The Judge held that the second modification was limited in scope, *i.e.,* it only applied to the air compressor, and the inspector reasonably suspected that the compressor was a source of elevated carbon monoxide because the compressor was the only equipment to which the miner was not normally exposed. *Id.* at 10-11.

III.

Disposition

In its Petition for Discretionary Review, the operator lists three assignments of error. First, the operator claims that the Judge erred in finding that an "accident" had occurred under the Mine Act because MSHA was unable to show that "there was carbon monoxide present in the underground mine which injured or sickened a miner." PDR at 13. Second, the operator claims that the Judge erred in finding that the section 103(k) order, which was modified twice, was reasonably tailored in scope. Third, the operator claims that the Judge, by failing to grant the operator's request for an expedited hearing, erroneously denied the operator an appropriate remedy for MSHA's removal of a valuable compressor from service for an extended period.

The Secretary argues on appeal that the section 103(k) order is moot because it has been terminated and therefore does not pose any legal consequences under the Mine Act. In addition, the Secretary claims that the order does not fall within the capable-of-repetition-yet-evading-review exception to mootness.[5]

[5] The Secretary also claims that the Judge erred in using the operator's reputational concerns to find that this matter was not moot. However, as set forth below, the operator has a legally cognizable interest, separate from its reputational concerns, in having the order vacated.

A. The Section 103(k) Order is Not Moot

In *North American Drillers,* we addressed the mootness doctrine as applied to the Commission:

> [W]hile the article III constitutional requirement of "case or controversy" does not literally apply to federal administrative agencies like the Commission, "an agency receives guidance from the policies that underlie the 'case or controversy' requirement of article III …. An agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the article III 'case or controversy' requirement" . . . A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome.

34 FMSHRC 352, 358 (Feb. 2012). In that case, we determined that the Secretary's vacation of the citation combined with the Judge's dismissal of the civil penalty with prejudice meant that the parties no longer had a legally cognizable interest in the outcome. In contrast, here, Order No. 9104295 has been terminated, but not vacated.

In *Wyoming Fuel Co.,* 14 FMSHRC 1282, 1288-89 (Aug. 1992), we determined that termination of a citation/order "is a common administrative function of the Secretary . . . meant only to convey that a violative condition has been abated." Notably, we determined that a terminated order continues to exist for other legal purposes besides abatement, which in turn permits the terminated enforcement action to be contested in subsequent civil proceedings. In contrast, vacation of an order means that the order no longer exists for legal purposes. In this case, the order outlives its termination and continues to indicate on the record that an accident occurred at the mine.

Therefore, we must examine whether the terminated order at issue can pose any legal consequences for the operator. If so, the operator retains a legally cognizable interest in having the order vacated.

We note that the subject section 103(k) order does not currently allege the violation of any health or safety standard. Nevertheless, as noted above, it remains an order finding the occurrence of an "accident." The issuance of any section 103(k) order necessarily initiates an investigation at a mine, which is what occurred in this case. Accident investigations have multiple purposes, including the finding of facts to support allegations of violations, both civil and criminal.

The mere listing of an "accident," in the form of a section 103(k) order, in the compliance history of a mine, is a clear implication to the public that *something* occurred at that mine that affected the health and safety of miners. That has a diminishing effect on the operator's compliance history. Thus, there is legislative legal precedent and reputation is far from a hollow concern.

Moreover, section 103(k) orders can be modified, as was the case here. Such modifications, in general, could allege the violation of a health or safety standard. Our case-law permits the Secretary to make such a modification, even though the order at issue has been terminated, and despite the fact that the order does not currently allege a violation of any standard. First, in *Wyoming Fuel,* 14 FMSHRC at 1288-89, we found that termination of a citation only meant that the violative condition had been abated and did not preclude the citation from subsequently being modified. We have recognized that this principle – that terminated citations can be modified – also applies to withdrawal orders such as those issued under section 103(k) of the Mine Act. *See Ten-A-Coal Co.,* 14 FMSHRC 1296, 1298 (Aug. 1992). Second, we have determined that a withdrawal order which did not allege a violation of a standard could be modified to allege such a violation. *Westmoreland Coal Co.,* 8 FMSHRC 1317, 1328 (Sept. 1986).[6]

Our dissenting colleagues accept that an inspector *must* issue a citation if a violation is discovered. That requirement reinforces the valid premise that section 103(k) orders can lead to the issuance of one or more citations for violations discovered during the course of the investigation. Therefore, if an order is not vacated, the Secretary retains the ability to modify the order to allege a violation of a safety or health standard, which could in turn affect the operator's repeat violation history. In contrast, if the order is vacated, it may not serve as a basis for a citation that would appear in the operator's repeat violation history or affect future penalties assessed against the operator.

Thus, the operator retains a legally cognizable interest in having the terminated order vacated. Accordingly, we find that Order No. 9104295 is not moot

We further find that the order is also within the capable-of-repetition-but-evading-review exception to mootness. In *Performance Coal Co.,* 642 F.3d 234, 237-38 (D.C. Cir. 2011), the Court explained that this exception applies when there is a reasonable expectation that the party seeking to avoid mootness will be subjected to the same action again and the duration of the challenged action is too short for the action to be litigated fully before the action expires. The Court explained that when applying this exception, courts should focus on whether the alleged legal wrong is likely to recur, not whether the precise historical facts are likely to recur. *Id.*

In this case, the Secretary *does not dispute* that the duration of the order was too short for the order to be litigated fully, *i.e.* the Secretary does not contest that the order would evade review. Instead, the Secretary argues that the operator has not shown that it is likely to contest terminated section 103(k) orders and their modifications in the future.

However, under *Performance,* 642 F.3d at 237-38*,* the relevant issue is whether the general legal wrong, not the precise historical facts, is likely to recur. Furthermore, it is

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[6] Despite these precedents our dissenting colleagues apparently disregard *stare decisis* on this point, querying "[w]hether MSHA would have the legal authority to do so is unclear." Slip op. at 21.

sufficient for a party, when claiming the recurrence of a general legal wrong, to assert that it will challenge the same action in the future. *Id.*

Here, the general legal wrong concerns the harmful impact of section 103(k) orders on the operator's ability to use equipment at a mine. This order, as modified on February 26, 2018, prevented the operator from using a diesel air compressor from February 26 until April 4. In other words, the order, as modified, removed a compressor from service for the entire month of March. MSHA does not dispute that in the future, it might issue similar orders under section 103(k). M-Class's contest of the terminated order suggests that the operator will challenge such agency actions in the future, even if they are later terminated, because they restrict the operator's ability to use equipment.

More importantly in this case, the operator was required to comply with the order mandating the lengthy loss of use of equipment as though there had been an accident until it raised a legal challenge to the Secretary's actions. Only at that point did MSHA capitulate and terminate the order. Commissioner Jordan would hold this case moot, and Commissioner Traynor would require that we uphold the continued fiction that an "accident" had occurred (in the absence of any evidence of such), despite the fact that section 103(k) operates prospectively as a limit on the operator's activities. Here, despite the fact that the agency had apparently conducted all of the investigation it intended to undertake and had found no evidence of any "accident," the operator required MSHA approval to regain control of its property and return, formally, to "normal" mining.

In addition to the particular and ongoing harm suffered by the operator, which has been forced to undertake significant trouble and expense to vindicate its constitutional right to maintain control over its property and resume its lawful activities (absent an important government need to prevent it from doing so), there is a general harm. If the agency is not countered here, it may be presumed that it will operate similarly in the future, because there is no means of holding the agency accountable, absent threatening or commencing litigation – at which point the agency will again withdraw and await the next opportunity to act with temporal impunity.

This is the classic paradigm for the exception, in which a government agency terminates an enforcement action when challenged, but retains the ability to file subsequent actions because its enforcement action has not been adjudicated as improper. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (establishing the exception to mootness where a parties' rights, "capable of repetition yet evading review," could be determined by the agency's short-term orders without a chance of redress); *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (the capable-of-repetition exception to mootness applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to *cessation* or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again" (emphasis added; internal quotation marks omitted)); *U.S. v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (party whose actions threaten to moot a case must make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953) (voluntary cessation of illegal

activity will not render case moot unless there is "no reasonable expectation that the wrong will be repeated" (internal quotation marks omitted)).

Therefore, we find there was a continuing existence of an official and potentially legally harmful order finding that an "accident" had occurred at the operator's mine. The general legal wrong posed by Order No. 9104295 is likely to recur*, i.e.* is capable of repetition. Thus, the exception to mootness applies to this case.

B. The Judge's Accident Determination Is Vacated.[7]

Section 103(k) of the Mine Act provides that "[i]n the event of any accident occurring in a . . . mine, [an MSHA inspector], when present, may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine." 30 U.S.C. § 813(k). Therefore, an accident is a prerequisite for a section 103(k) order, as stated in *Aluminum Co. of America ("Alcoa"),* 15 FMSHRC 1821, 1824 (Sept. 1993). Section 3(k) of the Mine Act defines an "accident" as including "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). We have recognized that the definition of "accident" in section 3(k) applies to the entire Mine Act. *Revelation Energy, LLC*, 35 FMSHRC 3333, 3339 (Nov. 2013); *Big Ridge, Inc.,* 37 FMSHRC 1860, 1866 (Sept. 2015).

The federal courts have followed our determination that the term "accident" as used in section 103(k) encompasses events that are similar in nature to or that have a similar potential to cause injury as a mine ignition, mine inundation, mine fire or mine explosion. *See Pattison Sand Co.,* 688 F.3d 507, 513 (8th Cir. 2012) (*citing Alcoa,* 15 FMSHRC at 1825-26). In *Alcoa*, the Commission stated, "Mine explosions, ignitions, fires and inundations typically are sudden events that pose an immediate hazard to miners and require emergency action." 15 FMSHRC at 1826. Therefore, in *Alcoa*, the Commission found the predicate for an accident must be an incident, occurrence, or condition in a mine.[8]

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[7] Commissioner Jordan confined her dissent to the mootness issue. Therefore, our references to the dissent in the following text refer only to Commissioner Traynor.

[8] Curiously, our dissenting colleague finds fault with this logical conclusion drawn from *Alcoa.* In *Alcoa*, the Commission acknowledged that "a mercury release that involves injury to, or causes the death of any person," would qualify as an accident, by the express terms of section 3(k) of the Act. 15 FMSHRC at 1824. We also agreed that "an event . . . 'similar in nature or present[ing] a similar potential for injury or death as a mine explosion, ignition, fire or inundation'" might qualify as an "accident." *Id.* at 1825-26. However, we noted that this determination must be made on a case-by-case basis. Thus, we expressly rejected the limitless scope he would have us impose through this case, in favor of an evidentiary determination grounded on a question of similarity to "events" – "mine explosions, ignitions, fires, and inundations" – that must be recognized as incidents, occurrences or conditions in the mine. *Alcoa* is, in fact, the obverse of the case before us. There, the Secretary presented evidence of a contaminant, but no evidence of any illness resulting from exposure. Here, of course, there is

(continued…)

Our dissenting colleague urges upholding the order on the basis of an expansive construction of the term "accident." Slip op. at 29. But such a construction cannot exceed the boundaries of the Mine Act. MSHA and the Commission have limited jurisdiction over the areas delegated by Congress to our respective stewardship. As such, the Supreme Court's approval of broad, sweeping powers over the activities of persons engaged in mining activities, *Donovan v. Dewey*, 452 U.S. 594, 602-06 (1981), must be limited to the activities within the scope of that authority. Thus, our colleague's suggestion that any "injury" – including any illness from any cause, mining-related or not – may be subject to MSHA's plenary control under Section 103(k) is erroneous. *See Sec'y of Labor v. National Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009) (Mine Act cannot be interpreted in a way that extends its coverage to matters which are not within operator's control or supervision).

This erroneous interpretation not only distorts the meaning of the term "accident," it departs from the stated purpose of Section 103(k), which is "to insure the safety of any person in the coal or other mine." It thus entirely misses the point of designating any incident as an "accident." A fundamental purpose of examining an "accident" is to protect other miners in the mine from whatever harmed the injured. *See* 30 U.S.C. § 813(k) (Secretary's representative "may issue such orders as he deems appropriate to insure [sic] the safety of any person in a coal or other mine, and the operator of such mine shall obtain the approval of such representative" of any plan to recover persons or coal or return affected areas of the mine to normal). It is prospective, in that a Section 103(k) investigation of an "accident" is aimed at preventing the same consequence to other miners post-incident

Such a limitless interpretation of the term "accident" would encompass incidents totally unrelated to mining—for example, complications from diabetes or a bout of influenza. Indeed, our dissenting colleague concludes that, given Mullins' symptoms here while at the mine, "[s]ubstantial evidence supports a finding that Mullins suffered an injury." Slip op. at 29. Thus, our colleague would broaden the term "accident" to encompass *illness* while at work—perhaps even including an upset stomach or an allergic reaction. The clear meaning of Section 103(k) binds the Commission as clear authority in this and future enforcement proceedings.

In analyzing the reactions to Mullins' illness underground, the Judge notes that "Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event similar in nature to those requiring quick action under § 3(k)." 41 FMSHRC at 7. The "sudden event" posited by the Judge in this case was Mullins' feeling ill, not an inundation of carbon monoxide—which was never found. The only rapid event in this incident was the transportation of Mullins off the section when he complained of chest pains. Hopefully the illness of any miner, for any reason, would be met with a rapid response. There is no evidence of

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[8] (…continued)

evidence of an illness, but none whatsoever of any contaminant, or any other incident, occurrence, or condition similar to an explosion, fire, ignition, or inundation. In both cases, the causal nexus between a predicate "event" and a resulting "injury" fails on evidentiary grounds. Our decision today is therefore entirely consistent with *Alcoa* and the terms of the Act as we have interpreted them in our precedents.

any mining event adversely affecting the health or safety of miners on the section. No immediate action was or could be taken on the section to remedy any condition affecting miners because no hazard was found. No citations were ever issued for lack of an appropriate response to any conditions in the mine. Moreover, the section 103(k) order was not issued until nearly eight hours after Mullins got sick on the section. Nothing in the statute equates response time of reactions to a miner's illness as being the determining factor of an "accident."

In *Pattison,* 688 F.3d at 513, the Eighth Circuit recognized that the accident determination should focus on the presence of dangerous mining conditions. In other words, the predicate for an accident as defined by the Mine Act is an event in or condition of the mine. Under *Pattison, Id.* at 512-14, the Judge's determination that an incident in a mine constituted an "accident" must be supported by substantial evidence.[9] The Eighth Circuit found that neither the Mine Act nor our case-law had specified a standard of review for orders issued by MSHA under section 103(k) of the Mine Act. Therefore, the Eighth Circuit held that the Judge should apply the arbitrary and capricious test for any non-factual agency determinations related to a section 103(k) order, 688 F.3d at 513, but noted that the substantial evidence test applied to factual determinations, a point overlooked by our dissenting colleague. *Id.* at 514. Similarly, in *Alcoa,* 15 FMSHRC at 1824, we suggested that the accident determination was "evidentiary in nature" (in this context, we reviewed whether the evidence established that miners were overexposed to mercury vapor or had come into contact with liquid mercury). *Id.*

Our colleague misses and misstates the issue before the Commission. The issue, therefore, is not whether the issuance of the 103(k) order was an abuse of discretion. When a Judge does not find substantial evidence to support a finding that an accident has occurred, the Judge must vacate any such order. In our colleague's line of reasoning, any time a miner gets sick in a mine it would prove an "accident" has occurred regardless of the nature or cause of the sickness. That, of course, is wholly at odds with the plain meaning of accident and the statutory definition.[10]

When reviewing a Judge's factual determination, we are bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). We have defined substantial evidence as "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)).

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[9] In *Friends of Richards-Gebaur Airport,* 251 F.3d 1178, 1184-85 (8th Cir. 2001), the Eighth Circuit distinguished an agency's non-factual determination, which the court reviewed under the arbitrary and capricious standard, from an agency's factual finding, which the court reviewed under the substantial evidence test. Both the Mine Act and the statute at issue in *Friends of RGA* specify that the substantial evidence standard shall be used to evaluate findings of fact.

[10] Our dissenting colleague states that, because in his estimation our interpretation of section 103(k) is plainly wrong, it is not binding precedent and need not be followed. Slip op. at 29. A unanimous decision is no prerequisite for binding precedent.

Accordingly, the proper test for the existence of an "accident," here, is the substantial evidence test.

In his decision, the Judge recognized that "M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected." 41 FMSHRC at 9. Rather than ruling on this basis, the Judge essentially found there was an accident because the inspector had reason to believe there was an accident when he arrived at the mine.[11] Thus, the Judge found that the inspector's *belief*, however unfounded, that there was an accident could validate a section 103(k) order even if the evidence showed no accident *actually occurred*.

Therefore, the case raises two questions. First, did the event involving Mullins constitute an accident? If so, that would be the end of the matter. If not, the second question arises - is a section 103(k) order valid when an inspector issues the order with a good faith belief that an accident occurred when, in actuality, an accident did not occur?

1. The Event Involving Mullins was Not an Accident within the Meaning of the Mine Act.

In his determination of an "accident," the Judge found the event could be classified as an "inundation" of carbon monoxide or as an "injury."[12] Regardless of whether such an event were called an injury, illness, or sickness, the gravamen of an "accident" is that it must arise from a condition, practice or occurrence in the mine.

The one item of evidence—the escalation report (Sec'y Ex. 7)—purportedly supporting an allegation of carbon monoxide poisoning is seriously problematic. That report contains hearsay of a purported telephone call from Dr. Bosley reporting that Mullins suffered carbon monoxide poisoning. A police dispatcher took the call from Dr. Bosley. A police dispatcher named "Amos Abbot," without it being clear whether Mr. Abbot was the same dispatcher who spoke with the doctor, called an unidentified person on the MSHA hotline who, in turn, called the district office. None of this evidence purports to be quoting Dr. Bosley directly. Although

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[11] The Judge determined that an accident had occurred because when the inspector issued the order, he relied on the escalation report, which "rationally connect[ed] Mullins' injury to a potential . . . elevation of carbon monoxide at the mine." 41 FMSHRC at 8-10. Our colleague would hold that Mullins felt sick and that this is sufficient under the Act. Of course, that entirely misses the point of section 103(k) and the definition of an accident. A miner who enters the mine with a broken bone most definitely has suffered an "injury" at some point in the miner's life. However, it would be nonsense to say that when a miner enters the mine with a previously broken bone such entry constitutes an accident within the meaning of section 103(k) justifying closure of a section of the mine.

[12] While section 3(k) of the Mine Act states an "accident includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person," we need not discuss whether carbon monoxide poisoning would constitute an "injury" or would fit within section 3(k) by virtue of Congress' use of the word "includes" in defining an accident because there is no evidence of excess carbon monoxide in the mine at any relevant time.

the gist of what the doctor said may be accurate, there is no certainty that the message passed through four calls accurately reflects Dr. Bosley's statement.

In fact, there is no verification of Dr. Bosley's statement whatsoever. Dr. Bosley was never interviewed by the inspector. The Secretary failed to call Dr. Bosley as a witness. Therefore, the only evidence of a carbon monoxide inundation is quadruple hearsay from a witness who did not testify at the trial and whom MSHA did not interview. Further, as noted, Mullins himself did not testify.

All the other evidence rebuts any indication that Mullins was poisoned by an inundation of carbon monoxide while working in the mine.

- There is no evidence that any other miner who worked with Mullins that day was exposed to any elevated level of carbon monoxide. For example, Parker Phipps used a gas spotter to measure levels of carbon monoxide *while he worked with Mullins* that day. Phipps did not detect any elevated levels of carbon monoxide, as he informed Bob Bretzman, a MSHA field office supervisor, during a phone call later that evening.
- There is no evidence that any other miner who worked with Mullins on February 24 suffered chest pains, breathing difficulties, or any other symptoms consistent with exposure to excessive carbon monoxide.
- After speaking with Bretzman on that February 24 evening call, Phipps sent a miner to inspect the area where Mullins had been working. The miner reported back to Phipps that he did not detect any elevated levels of carbon monoxide in the area.
- On the night of the event, shortly after arriving at the mine, Inspector Naas reviewed the records of the monitoring system and of a gas spotter. The inspector reviewed these records before proceeding underground. He did not find any evidence of elevated carbon monoxide for the time and area at issue.
- During his underground inspection that immediately followed, the inspector used a gas spotter to measure the levels of carbon monoxide in the area at issue. He did not detect any elevated levels of carbon monoxide.
- In the early morning hours of February 25, Inspector Naas started the air compressor, the only machine that was even a possible source of carbon monoxide, to check it while it was running. There was no evidence of carbon monoxide emissions during the inspector's test, or any other evidence indicating that the compressor may have exposed miners to elevated levels of carbon monoxide.
- Mullins carried a gas spotter to measure the levels of carbon monoxide during his work on February 24. Although his gas spotter was not found following the accident, our dissenting colleague fails to observe that Mullins *did inform* the inspector that he *did not detect* any elevated levels of carbon monoxide with his spotter.
- The state enforcement agency took bottle samples of the air in the mine area where Mullins worked. The results were well within permissible limits for carbon monoxide.
- No witness identified any other possible source of carbon monoxide.

- During the hearing, Dr. Michael Mullins,[13] an expert toxicologist, testified as to his review of Mitchell Mullins' medical records while he was hospitalized from February 24 through February 27, particularly regarding the levels of carbon monoxide in the miner's blood following his evacuation from the mine.

    - Mitchell Mullins' initial carboxyhemoglobin concentration, measured at around 4:24 p.m. on February 24, was 4.8%. The next morning, at around 6:18 a.m. on February 25, it had decreased to 3.4%. However, the following morning, at around 5:45 a.m. on February 26, it had increased to 4.2%.
    - Dr. Michael Mullins' testimony was that symptoms of carbon monoxide poisoning occur when the carboxyhemoglobin concentration is above 15%.
    - Mitchell Mullins' initial carboxyhemoglobin measurement at the hospital was only 4.8% – a level too low to cause symptoms.
    - Dr. Michael Mullins also testified that the increased carboxyhemoglobin concentration during the hospital stay suggested that the level of carbon monoxide in Mitchell Mullins' blood was caused by a condition unrelated to the mine, such as a smoking habit.

Dr. Mullins' testimony and interpretation of the carboxyhemoglobin data was not rebutted by any other witness. Consequently, not only was there *no corroboration* whatsoever of the hearsay statement attributed to Dr. Bosley, upon which the Secretary premises an "accident" occurred, but indeed, there is mountainous unrebutted evidence to the contrary. The Judge's finding that there was an inundation of carbon monoxide sickening Mullins is not merely unsupported by substantial evidence. It is rebutted by virtually all the evidence in the case.

In light of this mountainous evidence, our dissenting colleague refrains from making a finding that substantial evidence supports a view that Mullins suffered carbon monoxide poisoning in the mine. That would be clearly erroneous, given the established facts. Instead, a different equally erroneous suggestion is offered—that, whatever the cause, Mullins felt sick, and so an "accident" has occurred. It is our duty to follow the law—it is not our job to expand the law beyond the intent of Congress and common sense.

Moreover, our colleague's dissent contains a number of errors, and statements counter to his position. First, our colleague states that Mullins was working near a compressor and that *"[n]o other* potential cause of the injuries was identified during the investigation" Slip op. at 28 (emphasis added). We agree. Testing by MSHA and the State agency demonstrated that the compressor was not emitting any consequential, much less sickening, levels of carbon monoxide. Consequently, those tests eliminate the compressor as a potential source of injury. It follows, therefore, that there was *no* potential cause of carbon monoxide poisoning to Mullins in the mine.

Our colleague states that "M-Class failed to produce Mullins' gas spotter to investigators." *Id.* Use of the word "failed" leaves an implication that M-Class may have been less than forthcoming. There is no support for such an implication in the record and the

[13] Dr. Michael Mullins is unrelated to Mitchell Mullins, the miner at issue.

Administrative Law Judge did not draw such implication. Again, the Judge found that "Mullins acknowledged that his spotter did not go off while he was working." 41 FMSHRC at 5. Nor did any other miner's spotter alert at any time. *Id.* There is no basis for drawing an adverse inference here, because there is no close evidentiary question at issue. There is no evidence at all, from any source, supporting excessive carbon monoxide at any relevant time. Mullins was transported rapidly from the mine during what was perceived as a medical emergency. A reasonable conclusion from the evidence suggests that Mullins' spotter may have been lost in transit, which is probably why the Judge found the absence of the spotter to be unremarkable.

In a footnote, our colleague states that our opinion may lead to an absurd finding that an "accident" may not arise from an injury or death due to an "unknown origin." Slip op. at 29 n.6. Again, he mischaracterizes our holding and misses the point. The gravamen of an "accident" is that it must arise from a condition, practice or occurrence in the mine. That is the qualification for determination of an accident attributed to any death or injury.

2. A Valid Section 103(k) Order Requires the Occurrence of an Accident

The Judge found the inspector had a reasonable basis to believe an accident occurred when he issued the section 103(k) order. This leads us to our second question. Is a section 103(k) order valid when an inspector issues the order with a good faith belief that an accident occurred when, in actuality, an accident did not occur?

The Commission follows the cardinal rule of statutory interpretation and application. We apply the statute as written, looking first to the ordinary meaning of the words and remaining faithful to the plain words of the statute. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose")(quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)("When terms used in a statute are undefined, we give them their ordinary meaning")(citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). If the words are clear, we may not make any further inquiry. *Schindler Elevator Corp.*, 563 U.S. at 412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Section 103(k) could not be clearer. It states in relevant part that,

> In the event of any *accident occurring* in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate . . . .

30 U.S.C. § 813(k) (emphasis added).

The Mine Act authorizes issuances of orders under section 103(k) "in the event of an accident . . . ." It does not say "if the inspector thinks there is an accident," or "if there might have been an accident." It says plainly and without room for doubt that a section 103(k) order may be issued in the event of an *occurrence* of an "accident." Few legal principles match the clarity of our obligation to apply the words of the Mine Act as they appear in the statute and the

Mine Act clearly and unequivocally authorizes a section 103(k) order "in the event of an accident." Turning again to *Pattison*, the Eighth Circuit found, "Because the Act only provides for issuance of a § 103(k) order '[i]n the event of an[ ] accident,' 30 U.S.C. § 813(k), the Secretary lacked authority to issue the order if the roof fall was not an accident." *Pattison*, 688 F.3d at 513. This holding accords completely with the command that we apply the Mine Act as written and are holding today. We find no basis to suggest that MSHA may issue a valid order when it clearly lacked the authority to do so.

In a footnote, our colleague suggests that our opinion would "narrow the broad discretion Congress intended to provide MSHA to investigate injuries in mines and protect the life and safety of miners." Slip op. at 29 n.6. That is not our holding. When an inspector arriving at a mine has sufficient information to form a good faith belief that an accident has occurred, he may issue an appropriate section 103(k) order. Neither the inspector nor MSHA will suffer any adverse repercussions from an inspector's exercise of a reasonable, good faith judgment, albeit erroneous, in the interest of miner safety.

However, such actions do not sustain an order or a citation when the statutory requirements for issuance of an order or citation do not exist. For example, inspectors issue citations based upon a belief that a violation has occurred. Sometimes the inspector is wrong. No violation has occurred. It would be nonsensical to argue that an erroneous citation must be affirmed because the inspector reasonably thought he was right at the time even though the evidence shows no violation occurred. There would be little purpose to providing a right to contest the government's action. Government edicts issued outside the bounds of statutory authority must be vacated.[14]

Moreover, history tells us that there is no chilling effect to the vacation of erroneously issued citations—inspectors continue to issue them. Likewise, there is no chilling effect from the vacation of an erroneously issued section 103(k) order.

Thus, when an initial belief turns out to be incorrect and an accident did not occur, it behooves MSHA to vacate the order rapidly to permit resumption of operations. When MSHA fails to do so, the operator has a right to contest the validity of the order. Further, when the interruption is significant, an operator should be able to rely upon the availability of an expedited hearing to obtain a speedy adjudication of its right to continue mining.[15]

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[14] Our colleague seems to believe that a 103(k) order must be upheld in the absence of an accident, or that substantial evidence supports a finding of an "accident" in this case. Neither premise is valid, and our reference to citations for violations is intended simply to illustrate the fallacy of his suggestion that a challenged government action may be sustained as "valid" in the absence of a necessary element or substantial evidentiary support.

[15] Commission rules provide for the filing of motions to expedite. 29 C.F.R. § 2700.52. The availability of a motion for expedited hearing provides the route for expedited consideration of orders that may cause significant damage to the operator during their duration. If MSHA insists upon claiming an accident occurred when, as here, substantial evidence does not support such an event, the Commission provides the only source of redress for the operator.

When it turns out the inspector was wrong and an accident did not occur, we cannot affirm an invalid section 103(k) order because the inspector's belief was a good faith mistake. Contrary to Commissioner Jordan's comment, Slip op. at 21, evidentiary questions, such as those raised and unresolved in this case, *are relevant* in subsequent section 103(k) proceedings. In this case, not only is there not substantial evidence of an accident but the evidence compellingly demonstrates the *absence* of an accident. That being the case, there was no "event of an accident" upon which to base a section 103(k) order, and the issued section 103(k) order must be vacated.[16]

C. We Need Not Consider the Second Modification to the Order

On February 25, Inspector Naas modified the section 103(k) order, releasing the area at issue for normal operations. However, on February 26, Inspector Naas made a second modification to the order, removing the air compressor from service. On March 15, the operator requested an expedited hearing on the section 103(k) order, a request the Judge denied on March 30. Throughout this period, MSHA continued to hold the compressor. A few days later, on April 4, MSHA decided to terminate the order. Therefore, the second modification, which removed a compressor from service, remained in effect from February 26 to April 4. There is no evidence in the record regarding whether MHSA did any testing of the compressor after it took control of it, let alone evidence of findings of such testing.[17]

The operator claims that the Judge erred in finding that the second modification to the order was reasonably tailored to the circumstances at issue. In addition, the operator contends that, by denying its request for an expedited hearing, the Judge failed to provide a remedy for MSHA's failure to release the compressor.

The second modification was limited to the removal of a specific piece of equipment, and was subsequently modified permitting the equipment's return to service without restriction prior to the adjudication of the section 103(k) order. Hence, the operator's arguments regarding the modification are subsumed in the general issue of whether the section 103(k) order is valid. For

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[16] M-Class obeyed the order throughout its duration. Therefore, we need not consider application of penalties for disobeying a section 103(k) order while it is in force if the order is later vacated. Case law provides a strong caution to any operator contemplating such ill-advised action. *DQ Fire & Explosion Consultants, Inc.,* 36 FMSHRC 3090 (Dec. 2014) (finding that a citation issued for an operator's non-compliance with a section 103(k) order should be designated high negligence) *aff'd by* 632 Fed.Appx. 622 (D.C. Cir. 2015) (upholding our determination of high negligence). In *Wyoming Fuel,* 14 FMSHRC at 1293, we also found that an invalid imminent danger order did not excuse non-compliance/ disobedience with that order ("we find no indication in the Mine Act . . . that the validity of an imminent danger order is a prerequisite to finding failure to comply with that order").

[17] Of course, a section 103(k) order may not be used improperly to allow MSHA to pursue matters beyond the regular administration of the Mine Act as applied to a specific operator. Misuse of a section 103(k) order would be a serious abuse.

those reasons, and since we have vacated the specific order, we need not address arguments related to the second modification and decline to do so.

IV.

Conclusion

For the foregoing reasons, the Judge's decision finding an accident is reversed, and Order No. 9104295 is vacated.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Commissioner Jordan, dissenting:

The section 103(k) order at issue here has been terminated.[1] Nothing the Commission can say or do will have any concrete effect on the operator or its use of the air compressor. Accordingly, this case is moot, and thus the Commission is without jurisdiction to decide it.

A. This Case is Moot

A case is moot when "the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012), citing *Climax Molybdenum Co.*, 703 F.2d 4476, 451-52 (10th Cir. 1983). Here, because the initial section 103(k) order was terminated and the air compressor was subsequently released back into service with no restrictions on its use, the order does not affect any activities at the mine. In fact, the mine has the right to continue to operate as if the section 103(k) order never existed. The operator's financial interests are not at stake because no penalty was issued. There is simply no justiciable controversy at issue, as the operator has no tangible interest in the outcome. Despite the contentions of my colleagues, even if the Commission were to vacate the order, this would have no practical impact on M-Class.

Nevertheless, the majority claims that the operator has a "legally cognizable interest" in having the terminated 103(k) order vacated. Slip op. at 6-7. But they fail to identify any but the most speculative of legal consequences.

My colleagues acknowledge that the section 103(k) order does not allege a violation of any health or safety standard. Slip op. at 6. Furthermore, the Secretary does not factor the issuance of a section 103(k) order into any of the progressive enforcement mechanisms under the Mine Act, e.g. penalty proposals pursuant to section 110, 30 U.S.C. § 820, or pattern of violations under section 104(e), 30 U.S.C. § 814(e). In addition, because neither this type of order nor an accident that triggers it constitutes a violation, the issuance of such an order is not considered in a mine's history of violations for purposes of MSHA's future proposed penalty assessments.

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[1] Section 103(k) of the Mine Act states:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

Nonetheless, the majority makes the vague assertion that "[t]he mere listing of an 'accident," in the form of a section 103(k) order, in the compliance history of a mine, is a clear implication to the public that *something* occurred at that mine that affected the health and safety of miners." Slip op at 6. My colleagues appear to be suggesting that the Commission should use its resources to decide this case so that M-Class will have the opportunity to vindicate its reputation. However, they fail to persuasively explain what economic, psychic or other harm will befall an operator whose record indicates that it was subject to a section 103(k) order.[2]

Members of the mining community are well aware that, while perhaps not welcome, such orders are not uncommon.[3] They are not a *per se* black mark against an operator's reputation. Even if they were, the majority points to no legal precedent supporting the view that reputational harm is a cognizable interest under the Mine Act. As the D.C. Circuit has cautioned, "[a]t some point . . . claims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness." *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 57 (D.C. Cir. 2001). This is an apt description of the majority's assertions here.

Also speculative is the majority's supposition that MSHA might modify the terminated section 103(k) order to allege a violation of a health or safety standard, which would then adversely affect the operator's repeat violation history. Slip op. at 7. Why MSHA would do so more than two years after this incident occurred is mystifying. Whether MSHA would have the legal authority to do so is unclear. My colleagues cite to no precedent in which, after a hearing and an appeal to the Commission, MSHA has attempted to modify a section 103(k) order to charge a violation.[4]

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[2] As a threshold matter, they also fail to substantiate their implicit premise that members of the public would either be motivated to research M-Class's safety record, or would be scrolling through the Mine Safety and Health Administration's extensive Data Retrieval System (where this information is displayed), and would thereupon determine that M-Class had been subject to a section 103(k) order.

[3] According to the MSHA Mine Data Retrieval System, M-Class received 14 section 103(k) orders in 2018 and 10 in 2019. That system also reveals that approximately 40 accidents occurred at the mine in 2018, but the events of February 24 that led to the section 103(k) order at issue here are not included among them.

[4] The cases they rely on, slip op. at 7, do not even mention the modification of such orders. Rather, in *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288-89 (Aug. 1992), the Commission held that modification of a citation to a different safety standard was not precluded. In *Ten-A Coal Co*., 14 FMSHRC 1296, 1298 (Aug. 1992), we permitted a modification of a citation to a section 104(d) withdrawal order 24 hours after the termination of the original citation. Finally, we recognized the Secretary's right to modify a section 107(d) imminent danger order to allege a violation in *Westmoreland Coal Co.*, 8 FMSHRC 1317, 1328 (Sept. 1986) because the Mine Act explicitly states that the issuance of an imminent danger order shall not preclude the issuance of a citation under section 104. 30 U.S.C. § 817(a).

They also fail to take into account that a mine inspector has no choice but to issue a citation whenever the inspector observes a violation of a mandatory safety standard. 30 U.S.C. § 814(a) ("If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he *shall*, with reasonable promptness, issue a citation to the operator.") (emphasis added). Thus the Secretary *must* issue a citation upon discovery of any violation of a mandatory standard. Thus, operators are cited whenever an inspector finds a violative condition, whether or not a section 103(k) order is in place. Hence, the majority's concern regarding a possible modification of the section 103(k) order to a citation is completely unfounded.

B. The "Capable of Repetition yet Evading Review" Exception to the Mootness Doctrine Does Not Apply in this Case

My colleagues also rely on a frequently-used exception to claims of mootness, concluding that this issue is capable of repetition yet evading review. Slip op. at 7-8. However, a careful examination of the purpose of this exception and the case-law interpreting it demonstrates that it does not apply to this case.

The courts have sensibly carved out this exception in cases where a dispute between the parties is resolved before a ruling can be handed down, and when there is a substantial likelihood that the question will recur. *North American Drillers*, 34 FMSHRC at 358. There is a sound rationale for this doctrine: if a party can establish that the duration of a challenged action is too short to be litigated before it expires and there is a reasonable expectation that the party will be subjected to the same action again, a legal ruling relevant to that future action is a justifiable use of a court's resources. This is so because the ruling will be relevant in subsequent proceedings where the same issue appears. Here though, it is unlikely that the majority's opinion, which is based almost entirely on its analysis of the singular circumstances presented in this proceeding, will be the basis of a ruling in a future case.

Although the majority attempts to characterize this controversy as a legal one, *infra* at 6-7, its ruling is clearly based on my colleagues' view of the evidentiary record. *See S*lip op. at 12-15. The fact-based controversy before us involves specific inquiries such as (1) whether the miner in fact had carbon monoxide poisoning; (2) if he did, was it caused by something in the mine; (3) could the air compressor have caused his illness? Resolution of these questions will in all probability be irrelevant in subsequent section 103(k) proceedings.[5]

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[5] Nonetheless, the majority relies on the concept that a case is not moot when an "agency terminates an enforcement action when challenged, but retains the ability to file subsequent actions because its enforcement action has not been adjudicated as improper." Slip op. at 8. But the only enforcement action the majority adjudicates as "improper" in this case is the Secretary's decision to issue an order under section 103(k) when a miner was hospitalized for carbon monoxide poisoning. I daresay that the chances of this unique situation being repeated in subsequent cases are slim, and even if this fact pattern occurs again, the specific circumstances might lead to a different legal result.

In this regard, this case is similar to *North American Drillers*, 34 FMSHRC at 352. In *North American Drillers*, the operator was charged with violating its shaft plan because it used non-permissible equipment. The Secretary subsequently vacated the citation and the Judge dismissed the proceedings as moot. North American argued that this was erroneous because it faced recurrent harm, given that the Secretary allegedly declared that he would continue to enforce the permissibility regulation against the operator in the future under identical circumstances. The Commission disagreed, stating:

> Shaft plans are mine-specific and are thus designed to address the unique conditions of a particular mine. . . . Therefore, whether North American is cited in the future for use of a non-permissible pump below the shaft collar will have to be considered in the context of the specific language of the plan in question. . . . Thus there is not a substantial likelihood that the question before us will reoccur, causing North American additional harm. Hence, resolution of whether North American violated the shaft plan . . . is not determinative of whether North American will violate some other plan for failure to use permissible equipment.

Id. at 359. *See also Spivey v. Barry*, 665 F.2d 1222, 1234-35 (D.C. Cir. 1981) (concluding that case was moot because "[a] legal controversy so sharply focused on a unique factual context does not present 'a reasonable expectation that the same complaining party would be subjected to the same actions again").

Clearly the series of events here that led to the initial section 103(k) order and the subsequent removal of the air compressor were "idiosyncratic and highly unlikely to recur." *See Marek v. Rhode Island*, 702 F.3d 650, 654 (1st Cir. 2012) (concluding that the exception did not apply in a case in which an opponent of a planned development appealed the issuance of a permit but the permit expired and the development proposal was abandoned); *see also Hamilton v. Bromley*, 862 F.3d 329, 336 (3rd Cir. 2017) (ruling that the case was moot because the '"conduct complained of was . . . necessarily predicated on the *unique* features of [a] particular series of [events]' and '[n]othing on this record apprises us of the likelihood of a similar chain of events.'" (citation omitted)); *Fund for Animals, Inc. v. U.S. Bureau of Land Management,* 460 F.3d 13, 23 (D.C. Cir. 2006) (case could not be saved from mootness because it was "highly dependent upon a series of facts unlikely to be duplicated in the future"); *PETA v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005) (finding a First Amendment challenge moot because "[t]o conclude that a dispute like this would arise in the future requires us to imagine a sequence of coincidences too long to credit. . . . The essential point is that the case before us is highly dependent upon a series of facts unlikely to be duplicated in the future"). Thus a Commission decision as to whether MSHA erred in closing a portion of this mine for a finite period of time will in all likelihood not inform future controversies regarding section 103(k) orders. *See Public Utilities Comm. of the State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot").

Perhaps mindful of the one-of-a-kind fact pattern underlying this case, my colleagues repeatedly invoke the potential reoccurrence of a "general legal wrong," Slip op. at 8, as a rationale for going forward with this matter. They characterize such wrong as "the harmful impact of section 103(k) orders on the operator's ability to use equipment at a mine," and cite to the removal of the air compressor as justifying the adjudication of this matter. Slip op. at 8. Ironically, although they rely on its removal as a reason to go forward with this case, Slip op. at 8, they ultimately conclude that they need not address this issue. Slip op. at 17.

As the D.C. Circuit has cautioned, when defining "the injury that is capable of repetition":

> [t]he opportunities for manipulation are great. The more broadly we define the wrongful conduct, the more numerous are the possible examples, and the greater the likelihood of repetition. . . .[W]here plaintiffs are resisting a mootness claim we think they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief. Cf. *Tallahassee Memorial Regional Med. Ctr. v. Bowen*, 815 F.2d 1435, 1449-50 & n. 28 (11th Cir. 1987) (looking to complaint to determine scope of plaintiff's alleged injury).

Clarke v. U.S., 915 F.2d 699, 703 (D.C. Cir. 1990) (en banc).

My colleagues' reliance on *Performance Coal Co*., 642 F.3d 234 (D.C. Cir. 2011) is also unavailing. That case, which the Court held was not moot, involved the Secretary's modification of a section 103(k) order. The operator sought temporary relief from the restrictions pursuant to section 105(b)(2) of the Mine Act. 30 U.S.C. § 815(b)(2). Before the Court could rule, the Secretary removed the offending protocols. The issue before the Court was one of classic statutory interpretation: does section 105(b) of the Mine Act permit an operator to seek temporary relief from a section 103(k) order? Resolution of this question clearly had ramifications for future cases in which temporary relief is requested under similar circumstances.

Unlike the instant case, in *Performance Coal*, the legitimacy of the section 103(k) order was not at issue. In ruling on the mootness question, the Court made this clear, stating that "[t]he question then is not whether Performance Coal will again be subjected to the precise protocols at issue, but whether it will be subjected to further modifications from which it will seek temporary relief." *Id*. at 237.

In analyzing the "capable of repetition yet evading review" exception, the First Circuit has noted:

> the exception is not a juju, capable of dispelling mootness by mere invocation. Rather, the exception applies only if there is "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1184,

71 L.Ed.2d 353 (1982) (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975)).

Oakville Dev. Corp. v. F.D.I.C., 986 F.2d 611, 614–15 (1st Cir. 1993). Because this test has not been met here, this exception to the mootness doctrine does not apply.

In sum, because the adjudication of this case will provide no tangible legal benefit to the operator, and because it does not meet the standard for the exception to the mootness doctrine, I conclude that the matter is moot. Consequently, the Commission has no jurisdiction to hear this case. Accordingly, I respectfully dissent.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

Commissioner Traynor concurring in part and dissenting in part:

I join my colleague Commissioner Jordan to conclude M-Class's contest of the section 103(k) "control order" is moot. However, I join the majority's decision to review the order under an exception to the mootness doctrine. But the majority's misapplication of the incorrect standard of review leaves me no choice but to strongly dissent from their judgment. My colleagues ignore that our review of the issuance or modification of a section 103(k) order looks to whether the agency's discretionary decision was reasonable based on the facts known to the inspector at the time the decision was made. We do not engage in a retrospective second-guessing of the issuance of a section 103(k) order using information the decision-maker only knew or could have known after the decision was made. I also dissent from the majority's attempt to limit the issuance of section 103(k) orders to "accidents" where the Secretary is able to prove the specific cause of the injury by a preponderance of the evidence.

On February 24, 2018, MSHA Inspector Brandon Naas arrived at the M-Class No. 1 underground mine to conduct an investigation into the injuries that hospitalized miner Mitchell Mullins. Naas issued an order pursuant to section 103(k) of the Mine Act to suspend operations at the Headgate #6 section.[1] Naas started his investigation by reviewing pertinent records, including those of the mine's carbon monoxide monitoring system. Naas was not able to locate the injured miner's gas spotter, which would have indicated if he had been personally exposed to elevated levels of carbon monoxide. The inspector proceeded underground and took carbon monoxide measurements around Headgate #6. Naas did not find any evidence of elevated levels of carbon monoxide or any other dangerous conditions and, accordingly, modified the 103(k) order to permit M-Class to resume normal mining operations in the area.

On February 26, Naas returned and interviewed other miners who had worked with Mullins on February 24. He learned that Mullins had been operating and working around the diesel air compressor prior to falling ill and this was the only piece of equipment in use to which Mullins was not regularly exposed. Naas modified the section 103(k) order to prohibit further use of the compressor pending an investigation into whether it was defective. On March 1, M-Class submitted a proposed action plan to prevent exposure to carbon monoxide. MSHA determined that the proposal was insufficient. On March 15, M-Class contested the order with the Commission. On April 4, MSHA terminated the order.

A. M-Class's Contest of the Order is Moot, but Review is Appropriate under an Exception to the Mootness Doctrine.

I join Part A of Commissioner Jordan's dissenting opinion, finding the operator's case is entirely moot. Slip op. at 19-21.

However, I join my colleagues in the majority taking review of the decision below under the 'capable of repetition but evading review' exception to the mootness doctrine. The exception

[1] Section 103(k) of the Mine Act provides in pertinent part that "[in] the event of any *accident* occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person . . . ." 30 U.S.C. § 813(k) (emphasis added).

applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). When examining whether the action at issue is likely to repeat, "it is not whether the precise historical facts that spawned the plaintiff's claims are likely to recur, but instead whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 237 (D.C. Cir. 2011) (quoting *DelMonte Fresh Produce v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009)).

I find that a condition imposed during the pendency of the order – the restriction against using certain equipment – is a putative harm capable of repetition, but otherwise evading review because the pendency of a 103(k) order is often too short to be fully litigated. Slip op. at 7-9. Therefore, I agree it is appropriate here to take review of the otherwise moot question of whether the challenged decisions to issue and modify the now terminated 103(k) order were an abuse of discretion.

B. The MSHA Inspector Did Not Abuse his Discretion in Issuing and Modifying the section 103(k) order.

Section 103(k) provides an MSHA inspector the authority to "assume control of the mine in the event of an accident." *Jim Walter Res., Inc*., 37 FMSHRC 1868, 1868 n.1 (Sep. 2015); *see e.g., DQ Fire & Explosion Consultants, Inc*., 36 FMSHRC 3090, 3091 (Dec. 2014) (section 103(k) order issued following an explosion that killed 29 miners at a coal mine). It provides the inspector the "plenary power to make post-accident orders for the protection and safety of all persons." *Miller Mining Co., v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

The Commission reviews the issuance of a section 103(k) order, the scope of the order and any subsequent modification for an abuse of discretion.[2] *See Jim Walters*, 37 FMSHRC at 1871; *see also Pattison Sand Co. v FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012). "Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion." *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1893-94 (Dec. 2010). Under the abuse of discretion standard, the Judge considers whether "the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *Id.* at 1893-94.

Consistent with the purpose and nature of abuse of discretion review, a reviewing court looks to whether the challenged decision bears a rational connection to the facts and information available to the decision-maker at the time the relevant discretionary decision was made. *See PBGC v. LTV Corp*., 496 U.S. 633, 654 (1990) (under an abuse of discretion standard the court

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[2] A mine operator that contests issuance or modification of a section 103(k) order may move for expedited consideration of its contest pursuant to Commission Procedural Rule 52, 20 C.F.R. § 2700.52. The grant or denial of a motion for expedited review is within the discretion of the Judge, but exercise of the discretion should take into consideration the parties' positions as to the likelihood expedited review would prevent substantial harm.

evaluates "the agency's rationale at the time of decision."). "When examining whether an agency decision "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2) (A) . . . the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see, e.g. Golden Oak Mining*, 12 FMSHRC 1360, 1365 (June 1990) (ALJ) ("In determining whether [a District Manager] abused his discretion, I have to look to the facts and circumstances which were made known to him at the time. Subsequent developments or changes in the mine situation cannot be used to show an abuse of discretion.")

Thus, Commission Judges review a decision to issue, modify, continue or terminate a section 103(k) order by looking to whether the decision was rationally connected to the facts before the decision-maker, and *not* whether such facts were supported by substantial evidence.[3] The Commission in turn gives *de novo* review to our Judges' determinations as to whether agency action is arbitrary and capricious, and we review our Judges' findings of fact for substantial evidence. *Pattison Sand,* 688 F.3d at 514 (holding that a judge's findings of fact - *not* the factual predicates for the inspector's discretionary decision-making - are subject to substantial evidence review).

Here, the MSHA inspector's decision to issue the section 103(k) order was rationally based on the information available to him. He determined that a miner was working in the mine, experienced a headache, dizziness, chest pains, a rapid heart rate, and difficulty breathing. The miner – Mitchell Mullins - was administered oxygen and evacuated by ambulance to the local hospital where the treating physician diagnosed him with carbon monoxide poisoning.[4] Mullins had been working in close proximity to a diesel motor exhausting carbon monoxide. On the basis of this information, the inspector reasonably concluded there had been an "injury to . . . [a] person" at the mine and thus an "accident" according to section 3(k). Accordingly, I would affirm the Judge's conclusion that the inspector did not abuse his discretion in issuing the order.

Furthermore, I would affirm the Judge's conclusion that the inspector did not abuse his discretion in modifying the order based upon his belief that a miner suffered carbon monoxide poisoning. *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) (requiring modifications of section 103(k) orders to be "reasonably tailored to the situation."). First, Inspector Naas quickly modified the order to allow the return of normal mining after concluding that there was no present danger to miners in the Headgate #6 section. Naas later modified the order to prevent the return of the air compressor to service pending further investigation for a

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[3] The "substantial evidence" test can be applied to set aside agency action only in "certain narrow, specifically limited situations." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). "Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, or when the agency action is based on a public adjudicatory hearing." *Citizens to Preserve Overton Park*, 401 U.S. at 414.

[4] Mullins went on to spend 72 hours in the hospital on 100% oxygen.

defect. Mullins had operated the compressor immediately before his hospitalization. No other potential cause of the injuries was identified during the investigation. M-Class failed to produce Mullins' gas spotter to investigators. I conclude that substantial evidence supports a finding that the modification to the order was rationally connected to the facts then available to MSHA and the temporary removal of the diesel air compressor was reasonably tailored to the situation. The record evidence fully supports a finding that the inspector did not abuse his discretion.

C. The Majority Errs in their Interpretation of the term "Accident."

Section 103(k) provides the Secretary the authority to issue a control order "in the event of an accident." According to the statutory text at section 3(k) of the Act, an "'accident' *includes* a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k) (emphasis added).[5] In *Pattison Sand,* 688 F.3d at 512-13, the Court held that the term "accident" should be interpreted expansively and section 3(k)'s use of the term "includes" indicates that the enumerated list of types of accidents was not intended to be exclusive. The Eighth Circuit held that it was appropriate to defer to the Secretary's reasonable interpretation of an "accident" and affirmed the Judge's finding that a roof fall was an accident. *Id*. at 513-14 (citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)).

My colleagues ignore the Eight Circuit's analysis in their majority opinion, including our own precedents the Court relied upon to conclude that section 3(k) should be construed expansively and in deference to the Secretary's reasonable interpretation. Moreover, my colleagues ignore that the plain language of section 3(k) provides that an "accident" includes an "injury to . . . any person." Misconstruing section 3(k), the majority fabricates a requirement that for an "injury to . . . any person" to constitute an "accident" the Secretary must also provide proof as to how the injury occurred. Slip op. at 9 ("the predicate for an accident must be an incident or occurrence, or condition in a mine"). Because this interpretation is inconsistent with

[5] We have held that an accident is "a necessary precondition to the issuance of a section 103(k) order." *Aluminum Co. of America*, 15 FMSHRC 1821, 1824 (Sep. 1993) ("*Alcoa*"). Thus, an MSHA agent may only issue a section 103(k) order where the decision to do so is rationally connected to facts available to him or her indicating an "accident" under section 3(k) has occurred. My colleagues claim that *Alcoa* also establishes that an "accident" must have a predicate "incident, occurrence or condition in a mine." Slip op. at 9. It does not. *Alcoa* involved a section 103(k) order issued after an MSHA inspector observed evidence of mercury contamination at a plant. The record contained no evidence of any resulting "injury" to any miner. Accordingly, the Judge found that the Secretary failed to demonstrate the occurrence of an "accident." The Commission affirmed the Judge, stating that "[o]ur conclusion in this case is based solely on the record developed before the judge" and that it did "not disagree with the Secretary's broad interpretation of section 103(k) of the Act." 15 FMSHRC at 1828.

the plain language of the Mine Act and produces absurd results, it is unlikely to be easily applied in future enforcement proceedings.[6]

I would affirm the Judge's finding of fact that an accident occurred. Substantial evidence supports a finding that Mullins suffered an injury, subsequently diagnosed by a doctor as carbon monoxide poisoning. Though reasonable minds may differ as to whether the balance of medical and other evidence developed at hearing supports a conclusion that Mullins suffered an injury, the Judge's conclusion is supported by substantial evidence. And I have no hesitation deferring to an interpretation of the term "injury" in section 103(k) as covering a doctor's diagnosis of carbon monoxide poisoning following the onset of physical symptoms that first manifested in close proximity to a potential source of carbon monoxide and prompted his emergency evacuation.

Nothing in the majority opinion should discourage MSHA inspectors from readily issuing control orders under section 103(k) upon reaching a reasonable conclusion that an accident has occurred when a miner has suffered an injury, even if it manifests only as an illness of indeterminate etiology. Though the majority opines that the inspector did not have a statutory basis for issuing the section 103(k) order, it must be emphasized that the majority agrees that the issuance of the control order in this case was not an abuse of the inspector's discretion. In reality, it was the only reasonable course of action.

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[6] The majority's interpretation is not only inconsistent with the plain text of the statute and our precedents, it would lead to absurd results; an injury or death that resulted from an unknown origin would not qualify as an "accident" and the Secretary would lack the authority under section 103(k) to remove the remaining miners from the potential danger.

In addition, the majority's requirement that the Secretary demonstrate the cause of the injury in order to validly issue a section 103(k) order would narrow the broad discretion Congress intended to provide MSHA to investigate injuries in mines and protect the life and safety of miners. *See* slip op. at 9-10 n.9; S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) ("The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary . . . be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person.").

Substantial evidence supports the Judge's finding that an "accident" occurred in this case. Were that not so, and the order not already terminated (rendering any further contest moot), the majority is correct that it would at that point need to be vacated. But that is neither the posture nor the factual record before us, and because I find that the control order was validly issued and modified, I would affirm.

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 24, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE DOE RUN COMPANY	Docket Nos. CENT 2015-0318-RM CENT 2015-0319-RM CENT 2015-0441-M CENT 2016-0055-M

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). At issue is whether the Administrative Law Judge erred in affirming two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The Doe Run Company ("Doe Run") at its Fletcher Mine, an underground lead, copper, and zinc mine in Missouri.

Both citations arise from the fatality of a scaler operator, John Hoodenpyle. One citation alleges that Doe Run failed to design and install an adequate support system to control the ground in an area where miners worked or traveled in performing their assigned tasks, in violation of 30 C.F.R. § 57.3360.[1] The other citation alleges that Hoodenpyle was operating a scaling machine from a location that exposed him to falling material, causing the fatality in violation of 30 C.F.R. § 57.3201.[2] Both violations were designated as significant and substantial

[1] Section 57.3360 provides in pertinent part:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3360.

[2] Section 57.3201 states that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201.

("S&S").[3] The ground support violation was alleged to be the result of high negligence and the scaling violation designated as the result of moderate negligence.

In affirming both citations,[4] the Judge concluded that the fatal roof fall[5] established a violation of both standards. 40 FMSHRC 1165, 1205-10 (July 2018) (ALJ). The Judge also vacated the S&S designations and reduced both negligence designations to "low."

Doe Run and the Secretary of Labor each filed a petition seeking discretionary review of the Judge's decision, both of which the Commission granted. As set forth below, we conclude that the Judge erroneously failed to apply the "reasonably prudent person" test to the alleged violations of the broadly-worded standards cited by the Secretary. Further, the cited standards did not provide the operator with fair notice of the obligations the Secretary seeks to impose in this enforcement action. Accordingly, we reverse the Judge's findings of violation and vacate the citations.

I.

Factual and Procedural Background

A. Factual Background

Doe Run is a large mine operator in Missouri with six underground mines in what is geologically known as the new Viburnum Trend ("The Trend"). The Trend is a 32.5 mile-long lead, copper, zinc and ore deposit. The host rock in the Trend, including the Fletcher mine,[6] is dolomitic limestone, or "dolomite," an altered limestone that is very high in strength and

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

[4] The Judge also vacated a third citation, Citation No. 8680902, which had alleged that the operator had failed to conduct required workplace examination training, in violation of 30 C.F.R. § 48.7(a). 40 FMSHRC 1165, 1214-16 (July 2018) (ALJ). The Judge vacated the citation on the basis that the Secretary had unduly prejudiced Doe Run by modifying the citation in an untimely manner. *Id*. The Secretary does not seek review of this ruling.

[5] This decision uses the terms "roof" and "back" interchangeably to refer to the roof of the mine. Similarly, the decision uses the terms "roof fall" and "ground fall" interchangeably to refer to roof falls.

[6] The Fletcher Mine is designed in a modified room and pillar format, meaning that pillars are left to support the roof as working headings are advanced. Mine drifts, or tunnels, are typically 28 to 32 feet wide while the pillar widths average between 30 and 32 feet. The roof height generally ranges from 16 to 120 feet. Fletcher's typical mine cycle consists of (1) face drilling of holes; (2) hole charging and blasting; (3) post-blast muck and rock loading and haulage; (4) scaling (both mechanical and high boom hand scaling); and (5) roof bolting.

stability. Consequently, the ground conditions at Fletcher and throughout the Trend were described by witnesses from both sides as generally "stable" (Tr. 217-18), and "competent," with no significant issues in the stability of the host rock. Tr. 424-25.

Despite these general conditions, a fatal roof fall occurred on January 21, 2015. About 175 tons of rock – a section 55 feet long by 20 feet wide by 6 feet deep – collapsed onto a mechanical scaling machine that Hoodenpyle was operating.[7] Tr. 73, 647. He was inside the scaler's reinforced cab about 60 feet from the face. Tr. 206-07. The roof fall crushed and killed him. The cab was under the bolted area when the roof fell. Tr. 311.

Approximately 75% of the fall area was unbolted, and 25% was bolted with six-foot Split Set friction stabilizer bolts. Tr. 114, 195, 252. The scaler had a reinforced cab with a falling object protection system ("FOPS"). In addition to the reinforced cab, the scaler also had a rollover protection system ("ROPS"). During an MSHA inspection the day before the accident, both the scaler and the ROPS/FOPS operator's compartment were found to be in good operational condition with no damage.

Before the accident, another miner working in the area, Thomas Welch, heard Hoodenpyle start and begin to use the scaler around 10:00 pm. Tr. 513; S. Ex. 8 at 3. Welch recalled seeing the roof bolts in that area and testified that "everything looked fine." Tr. 519. Hoodenpyle scaled for about 15 minutes before Welch heard the loud sound of a roof collapse. "It sound[ed] like a lot of rock." Tr. 513-14. He could no longer hear the scaler after the collapse.

Vern Roark, a roof bolter with 18 years of roof bolting experience, testified that on January 5, 2015, he had installed Split Set bolts in the area of the accident. He had examined the area on arrival and said everything "looked perfectly fine." Tr. 466. Roark testified that "[t]he back was fine. There was no loose on it. It was in good color, solid, no voids in it." Tr. 467. Roark also drilled a hole and sounded the back once he set his bolting machine up. He testified that the back was solid with no "drumminess" indicating a hollow area or void above the roof. Tr. 467.

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[7] Blasting often creates the need for scaling the unstable or loose material from the roof and sidewalls, which may be done by hand or by the use of specialized equipment such as a mechanical scaler. Tr. 429-30. This machine was a Getman S330 Mechanical Scaler with a roof scaling coverage range of 9.8 feet to 29.5 feet and a rib scaling coverage ranging up to 29.5 feet. Sec. Ex. 8, at 6 (MSHA's accident investigation report). The single extension boom allowed for an advancement of over 13.1 feet from a single setup, allowing the operator to stay in a reinforced cab while extending the reach. The scaler with the boom was approximately 40 feet long and 8 feet high. *Id*. The scaler's operator cab was located at the extreme rear of the machine and was designed to keep the operator at the farthest point away from the scaling work, as the material is removed. Tr. 434-35.

MSHA Inspector Jeremy Kennedy[8] had conducted an inspection of the mine about eight hours before the January 21 accident. According to Inspector Kennedy, the active faces and active roadway in the area had all been free of adverse conditions. Kennedy performed a visual inspection of the back and ribs and walked up to the face between pillars 7517 and 7561, the area of the eventual fall. He testified that he had not noticed anything unusual on the face and had not observed any "change" that would have indicated the existence of adverse ground conditions. Tr. 105. The pillars had appeared to be adequately sized, with nothing out of the ordinary, and the widths of the drifts and crosscuts had been normal. In addition, regarding the entire area inspected, Kennedy had written "no loose noted" and "ok" in his General Field Notes. Tr. 101; DR Ex. AA at 3.

Kennedy had not observed "anything that was not typical" when he walked directly under the back that would fall later that evening. Tr. 57, 102. He testified that the back had looked smooth and "didn't seem to have any unusual features to it." Tr. 59-60, 102. He further testified that he had not recalled seeing any churned or disrupted rock in the area and had not noticed any loose ground. He had also inspected the ground support in the area and testified that everything had appeared accurate. He had inspected the last two rows of bolts between pillars 7508 and 7516 (the bolts that would later fall) and they appeared adequately installed and flush to the back. Kennedy also had not noticed any abnormal noises such as popping or cracking. In sum, he observed nothing abnormal and nothing that would cause him concern about hazardous ground conditions.

MSHA Inspector Michael Van Dorn led the agency's investigation into the accident, joined by inspector Kennedy, geologist James Vadnal, and engineer Gregory Rumbaugh from MSHA Technical Support. On June 10, 2015, MSHA issued its accident investigation report. The report did not identify the precise geological cause of the roof fall, nor did any of the witnesses do so definitively at the hearing. The report concluded that Doe Run should have drilled test holes before drilling holes for blasting to identify hazardous roof conditions and that there should have been a more effective way for miners to communicate hazards to management. S. Ex. 8 at 6-7. The report found that the roof fall occurred because the roof was not adequately supported, and that resin bolts should have been used. *Id*. In addition, the report concluded that the resin bolts should have been installed no more than 30 feet back from the face. S. Ex. 8 at 6. On March 11, 2015, Van Dorn issued both citations. S. Ex. 1; S. Ex. 2.

At the time of the accident, Doe Run was complying with its internal ground control policy. The policy contained several requirements with respect to scaling, bolting and test holes. It required, among other things, workplace examinations, scaling to begin no less than 60 feet back from the face, and a 5x5 standard roof bolt pattern for intersections. The policy also required one test hole per completed tunnel intersection. Tr. 429, 446, 449-50; DR Ex. F. The area where the January 21, 2015 roof fall occurred was not a completed intersection. There had been no unplanned reportable roof falls at Fletcher between the establishment of the revised

[8] Inspector Kennedy worked at Doe Run for eight and a half years prior to going to work for MSHA in 2009. He had previously worked underground at Doe Run's Brushy Creek, Sweetwater, and Fletcher mines, the last of which where he spent four years as a surveyor. As an MSHA inspector, he had inspected Fletcher at least eight times.

ground control policy in 1998[9] and the 2015 roof fall. According to the recollection of the mine's operations manager, Randall Hanning, MSHA repeatedly had the opportunity to review Doe Run's ground control policy and had never raised any objections to it before the accident occurred.

B. The Judge's Decision

The Judge affirmed the violations of sections 57.3201 and 57.3360, holding that "where there is an accidental roof fall causing death . . . the fact of the fatal accident itself, by reason of strict liability, demonstrates a *per se* violation of the safety standard." 40 FMSHRC at 1209 (emphasis omitted). In concluding that the facts of the case here constituted *per se* violations of both those *metal-nonmetal* standards as he interpreted them, the Judge relied exclusively on the Commission's interpretation of the general roof control standard applicable to underground *coal* mines, 30 C.F.R. § 75.202. *Id*. at 1207-09 (citing *Jim Walter Res., Inc.*, 37 FMSHRC 493 (Mar. 2015) ("*JWR*")).

In affirmatively holding that such an interpretative approach should be extended to the non-nonmetal roof control standards at issue here, the Judge "intentionally decline[d] to address" arguments made by both parties that the standards at issue instead be interpreted, and the violations be determined, pursuant to the application of the Commission's "reasonably prudent person test." *Id*. at 1209. The Judge conceded that "[s]uffice it to say that, given the plethora of questions raised and unresolved, a prudent person test would have made the Secretary's case as to the fact of violation much more problematic." *Id*.

The Judge went on to delete the S&S designations associated with both citations, finding that the Secretary failed to provide "compelling indicia surrounding the instant violations that would have suggested the reasonable likelihood of" a roof fall on Hoodenpyle while he scaled. *Id*. at 1210. With specific reference to the S&S findings, the Judge rejected the Secretary's evidence of disrupted rock and found that the geologic features in the area would not have indicated a reasonable likelihood of a roof fall. *Id.* at 1211. The Judge found that the scaler's position 60 feet from the face, its position under bolted roof, and its reinforced cab did not "contribute[] to the reasonable likelihood of an injurious roof fall onto Hoodenpyle." *Id*. at 1212.

The Judge also rejected the Secretary's contention that Doe Run's use of Split Set bolts, rather than resin bolts, made a roof fall more likely. *Id*. at 1212-13. He noted that the Secretary presented hearsay evidence of prior roof falls but appeared to reject that evidence. *Id*. at 1213-14. The Judge opined that "the etiological mystery at the heart of this accident," i.e., the fact that no one could definitively identify the precise geological cause of the roof fall, was relevant to the S&S analysis. *Id*. at 1214.

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[9] The policy was revised in 1998 in response to the fatal roof fall at a separate Doe Run mine (referred to in the transcripts as the "Casteel Mine"). Tr. 611, 633-34. There were no section 57.3360 violations found in Fletcher Mine's ten-year citation history. Tr. 528-29; *see generally* DR Ex. O. There was one citation for a violation of section 57.3201, six years prior, in 2009. Tr. 529; DR Ex. O at 29.

Finally, in one sentence, without explanation (other than in a very brief footnote that only addressed the scaling standard citation), the Judge reduced the negligence associated with both citations to "low." *Id*. at 1212 n.72.

II.

Disposition

A. Summary of Relevant Law

In contests of citations and orders under the Mine Act, the Secretary bears the burden of proving each element of the Mine Act standard allegedly violated. *See, e.g.*, *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998); *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983); *Sims Crane*, 41 FMSHRC 393, 396 (July 2019); *Asarco, Inc*., 14 FMSHRC 941, 950 (June 1992); *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857-59 (Aug. 1984).

In some instances, standards are written in such a way that the basic facts may demonstrate that the conditions or practices prescribed or proscribed by a standard have been violated. Such instances, wherein the bare facts may demonstrate a violation, are often referred to as sufficient to constitute "per se" violations of the standard at issue. *See, e.g.*, *Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003) (holding that miner's electric shock, 18-foot fall, and head injury "per se" met the requirement that an "accident" had occurred at the mine under the cited standards). In those instances of such narrowly written standards, the facts of the alleged violation, standing alone, prove the violation. The operator may be found "strictly liable" under the standard, given that the facts, standing alone, show a violative practice or condition clearly satisfying all the terms of the standard.[10]

In contrast, there are many Mine Act health and safety standards that are "simple and brief[,] in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982). In those instances, as with any law or regulation, the standard must "give the

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[10] *See, e.g.*, *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that operator could not escape liability due to its lack of prior knowledge of the violative condition of the equipment where it met neither of two duties imposed upon it by equipment standard that did not require such knowledge); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (Jan. 1981) (finding operator strictly liable, even absent knowledge of equipment defect, because "unless the standard itself so requires, an operator's negligence has no bearing on the issue of whether a violation occurred"); *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 635, 370 (Feb. 2013) (upholding strict liability under the standard because the Secretary met his burden of establishing a violation of section 77.1607(b) merely by demonstrating that the equipment operator failed to maintain full control of equipment while it was in motion, and "[n]othing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control"); *Wake Stone Corp.*, 36 FMSHRC 825, 826 (Apr. 2014) (imposing strict liability because a defect in equipment established a violation of the terms of the standard).

person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (refusing to apply a regulation that "inadequately expresses an intention to reach the activities to which MSHA applied it"). Consequently, a Mine Act standard must provide reasonable notice of what it requires or proscribes. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983); *see also Amax Chem. Corp.*, 8 FMSHRC 1146, 1149 (Aug. 1986) (rejecting finding a per se violation of a ground control standard in the metal-nonmetal context and instead holding that "all relevant factors and circumstances must be taken into account.").

As a result, in interpreting and applying broadly worded mine safety and health standards that pertain to a host of possible conditions and practices, the Commission, with the widespread approval of the courts of appeals,[11] has applied the "reasonably prudent person test" to determine whether a violation has occurred. In other words, the inquiry is whether the standard prescribed the obligation with sufficient specificity to provide an operator with adequate notice of the requirements for compliance under the facts of the case. Then, the analysis turns on whether the facts demonstrate noncompliance with the standard. *See, e.g.*, *Alabama By-Products*, 4 FMSHRC at 2129-30; *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (requiring that the Secretary establish that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard"); *U.S. Steel*, 5 FMSHRC at 5 (stating that in order to prove a violation of a broadly-worded standard regulating mine safety, the Secretary must demonstrate that the allegedly violative condition "do[es] not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction . . . , considerations unique to the mining industry, and the circumstances at the operator's mine."). Consequently, the standard must describe the conditions or practices required or forbidden with sufficient specificity to provide the operator with fair notice of the obligation. When a standard uses broad language, the operator must act as a reasonably prudent person in meeting the obligation. If the operator acted as a reasonably prudent operator, then no violation occurs and there is no liability.

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[11] *See, e.g.*, *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) ("[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."); *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083 (10th Cir. 1998) (quoting *Freeman United*, 108 F.3d at 362); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1182 (9th Cir. 1998). Our dissenting colleague, Commissioner Traynor (slip op. at 40-41 n.12) is thus mistaken in relying on a 2011 decision from the D.C. District Court to argue that under the Mine Act the reasonably prudent person test is only relevant with respect to the imposition of penalties, and not the initial question of whether a violation occurred. *See Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012) ("An accumulation exists if a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.") (citation omitted).

B. The Judge Erred in Not Applying the Reasonably Prudent Person Test.

We must reverse the Judge's findings of violations here because he committed basic legal errors when analyzing the issues presented by the two citations. The Judge made little attempt to evaluate the ample evidence proffered to determine Doe Run's obligations under the cited standards and whether Doe Run had failed to meet those obligations – the primary judicial decisional rubric in *any* administrative adjudication. Tellingly, the Secretary here does not support affirmance based on the Judge's analysis.

1. Mine Act Strict Liability Cannot Be Used as the Sole Justification to Find a Per Se Violation of a Mine Act Standard.

We begin by addressing the Judge's view, offered *sua sponte*, that strict liability under the Mine Act frames the initial question of violations here. *See* 40 FMSHRC at 1205 ("Given that the Mine Act is a strict liability statute and . . . that a miner was killed due to the fall of roof material . . . were there *per se* violations . . . ?"). The Secretary's post-hearing brief mentioned strict liability only once and then only in a *pro forma* opening sentence of the argument. Thereafter, he sought to sustain the alleged violations using only the "reasonably prudent person" standard—the correct standard. *See* S. Post Hearing Br. at 20, 24-28. In fact, the Judge explicitly recognized that both parties argued the merits under the reasonably prudent person test. 40 FMSHRC at 1205, 1207. He eventually concluded that strict liability dictated that "per se" violations of the standards at issue here had been established by the fatality suffered. *Id*. at 1209-10.[12]

Such an approach was plain analytical error. *Every* determination of whether a Mine Act standard was violated *begins* with addressing the specific terms of the standard in question. *See, e.g.*, *Peabody Twentymile Mining, LLC*, 931 F.3d 992, 996 (10th Cir. 2019). Here though, the Judge's discussion of the terms of the standards was only in passing, and even then was either non-existent or perfunctory.

In finding that a per se violation of 30 C.F.R. § 57.3360 occurred, the Judge stated that the standard "provides *in pertinent part* that the ground 'support system be designed, installed, and maintained to control ground in places where people work.'" 40 FMSHRC at 1209 (emphasis added). In so doing, the Judge failed to set forth the relevant terms of section 57.3360 in their full context. The relevant language of the standard actually states:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in

[12] While the wording of his opinion suggests that the Judge might have intended his per se analysis to be confined to fatalities caused by roof falls, his failure to consider the text of the regulations does not support consideration for such a limitation.

> places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3360. In purporting to interpret and apply the primary standard at issue in the case, the Judge completely ignored the terms of the entire first, and thus prefatory, sentence of the standard. That sentence requires the operator to apply ground support *where* the mining conditions or experience in similar ground conditions *indicate that it is necessary*. The cardinal principle of interpretation is to give effect, if possible, to every clause or word. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Regulatory interpretation cannot be properly undertaken in any other manner. Again, it is the site-specific *location* that dictates the application of ground support. That is precisely what Doe Run did here – apply ground support in the location *where* it was necessary.

Regarding the other standard at issue here, 30 C.F.R. § 57.3201, in concluding that a *per se* violation of it had been established, the Judge similarly truncated it. The standard provides that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, *or other protection from falling material shall be provided*." 30 C.F.R. § 57.3201 (emphasis added). The Judge, however, made no effort to interpret it, simply concluding that that "[t]he *operative language* . . . is that 'scaling shall be performed from a location which will not expose persons to injury from falling material . . . ." 40 FMSHRC at 1209 (emphasis added). In short, he impermissibly read out of the standard its entire second prong.

The Judge confused the strict liability the Mine Act imposes *for violations* with an entirely separate and different legal concept – common law strict liability for *activities, conditions or practices*. *See, e.g.*, *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989) (discussing the difference between Mine Act strict liability for an undisputed violation of a coal mine roof control standard and strict liability under common law for the consequences of ultrahazardous activities); *see also Indiana Harbor Belt R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (applying Illinois law to determine whether there was strict liability in tort for accident). In so doing, the Judge wholly disregarded the reasonably prudent person test that is fundamental to interpretation of Mine Act standards such as the ones at issue in this case.

There is operator liability for a mining condition or practice *only if* the condition or practice is found to constitute a violation of the Mine Act or its standards. *See Western Fuels-Utah*, 870 F.2d at 715; *see also* 30 U.S.C. §§ 814(a), 815(d). No "general duty clause" was included in the Mine Act, unlike with section 5(a)(1) of the Occupational Safety and Health Act of 1970. S*ee* 29 U.S.C. § 654(a)(1). Indeed, such a provision was specifically *excluded* from the Mine Act. *See* S. Rep. No. 95-461, at 38-39 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1316-17 (1978) ("*Mine Act Legis. Hist.*").[13]

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[13] Immediately after invoking Mine Act strict liability as a basis for determining whether the violations had been established, the Judge veered into a condemnatory denunciation of the

(continued…)

The Judge's error regarding the application of strict liability can be seen from his own direct quote to the legislative history of the Mine Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). *See* 40 FMSHRC at 1206 ("confirm[ing]" that under section 109 of the Coal Act, the precursor to section 110 of the Mine Act, there was "congressional intent that there should be 'liability *for violations of the standards* against the operator without regard to fault'") (quoting H.R. Rep. No. 91-761, at 71 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1515 (1975) (emphasis added).

Further, *both* of the cases cited by the Judge as support for his strict liability analysis (40 FMSHRC at 1205-06) were cases in which strict liability attached *only after* the entirely separate question of whether a violation had been established was resolved on an entirely independent basis. *See Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1070-71(4th Cir. 1982) (rejecting contention that, due to an ongoing strike by some miners, operator should not be liable for mine conditions that constituted undisputed violations of MSHA standards); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) ("The Mine Act is a strict liability statute, such that an operator will be held liable *if a violation of a mandatory standard occurs* regardless of the level of fault.") (emphasis added).

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[13] (…continued)
history of mining, excoriating "mine operators" and "lawyers, constabulary, and biased judicial donees." 40 FMSHRC at 1206-07. This diatribe, which the Judge included in a context where he himself acknowledged its irrelevance, is completely out of line and detracts from the analysis. Commission Judges should bear in mind that they are officers of the Commission. While Judges are entitled to hold and express their own opinions privately, and while we do not suggest that Judges should refrain from appropriate citations to history in rendering their decisions, irrelevant dicta must be avoided. Ironically, the Judge, albeit by footnote, absolves the operator from acting "reprehensibly." *Id*. at 1206 n.61.

Our colleagues, in their separate dissents in support of affirming the Judge's erroneous analysis, similarly misapply Mine Act precedent. They cite *Sewell*, *Western Fuels-Utah*, *Spartan*, and a host of other court and Commission cases, which, while certainly speaking to an operator's liability once a violation is found, are far less relevant to the initial task of interpreting a Mine Act standard to determine an operator's obligations under it and *whether* a violation even occurred. *See* slip op. at 25-27; 34, 36, 44-45 n.20.[14] Simply put, strict liability under the Mine Act is not a concept by which a mine operator can be found liable for an activity, condition or practice for which it did not have sufficient notice to otherwise properly find the condition or practice to constitute a violation of a health or safety standard.

2. Neither Section 75.202(a) Nor *JWR* Govern the Interpretation of Sections 57.3360 and 57.3321.

The Judge's misuse of the concept of strict liability was compounded by his improper focus, in interpreting the standards at issue here, on Commission case law involving a significantly different standard. The Judge looked to 30 C.F.R. § 75.202(a), and concluded that *both* of "the mandatory safety standards at issue are *essentially identical*" to it in their "plain meaning." 40 FMSHRC at 1209 (emphasis added) (citing *JWR*, 37 FMSHRC at 495). They are not identical. Section 75.202(a), the general ground control standard for underground coal mines, simply reads "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

It is, of course, correct that all three regulations are directed at preventing roof falls. But any similarity ends there. Comparing the terms of section 75.202(a) to the terms of the two standards at issue here, the language employed in the coal and metal-nonmetal standards is strikingly different in both instances. Properly reviewed, there is virtually no commonality

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[14] *See, e.g.*, *Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982) (after upholding that equipment conditions constituted violation, rejecting contention that evidence of significant employee misconduct should be taken into account in deciding whether to hold operator liable for the violation); *Miller Mining Co.*, 713 F.2d at 491 (describing strict liability as holding an operator liable for "any *failure to comply with a regulation* under the Act [that] result[s] in a citation") (emphasis added); *Northwestern Mining Dep't v. FMSHRC*, 868 F.2d 1195, 1197 (D.C. Cir. 1989) (upholding Commission's finding that "*once it was determined* that . . . a miner employed by Asarco[] *violated a mandatory safety standard* in Asarco's . . . [m]ine, Asarco, under the Mine Act, was subject to a civil penalty . . . and that the fact that Asarco's supervising employees were not at fault was not a defense to the citation") (emphases added); *Ames Constr., Inc. v. FMSHRC*, 676 F.3d 1109, 1110-12 (D.C. Cir. 2012) (rejecting production-operator's claim that strict liability for truck driver's violation of the standard should not attach to it); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) (finding that an operator is strictly liable "*if* a violation of a mandatory safety standard occurs") (emphasis added); *Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1651 (July 2016) ("[W]hen a miner fails to wear a seat belt when operating a vehicle covered by [30 C.F.R. §] 77.1710(i), he violates th[at] standard. *Then*, as required by [the Mine Act], the operator is liable for the violation.") (emphasis added).

between the short and direct obligation under section 75.202 and the broader language of the subject regulations.

In reaching his decision, the Judge did not discuss any of these distinctions in language between section 75.202(a) and the subject standards. As noted, he entirely omitted quoting the prefatory sentence in section 57.3360, which, as discussed below, is crucial to understanding the obligations the standard imposes upon operators. Commonality of any sort, including subject matter, does not relieve the Commission or the Judge from the duty to examine the actual words of the regulations. It is simply impossible to conclude that the terms of two or more standards are "essentially identical" without analyzing all of the terms of those standards.

The difference in language in the standards leads us to also reject the claim that Commission precedent, with respect to violations of section 75.202(a), controls interpretations of the standards at issue here, and thus the findings of violations in this case. This includes the Commission majority's decision in the *JWR* roof fall fatality case, which largely focused on the particular language of that standard in reaching its conclusion. Of course, that language did not include anything remotely similar to the first sentence of section 57.3360 nor to any part of section 57.3321.[15]

The significant difference between the language of the specific coal standard that governed in *JWR* and the language of the metal-nonmetal regulations at issue here is not the only reason to reject *JWR* are as controlling in this case. There is also a substantial distinction between the regulation of roof control for coal mines and the regulation of ground control for metal-nonmetal mines. The coal regulations, as shown in subpart C in Part 75 devoted to roof

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[15] In *JWR*, the Secretary urged an interpretation of section 75.202(a) under which a fatality due to a roof fall in an underground coal mine would result in a finding of a per se violation of that standard. 37 FMSHRC at 494-95. The Commission majority instead, acknowledging strict liability under the Mine Act, chose to simply apply the specific terms of section 75.202(a) to the facts. It ultimately held that, as to "the issue of whether the operator failed to support the roof 'to protect persons from hazards related to falls,'" a miner was found

> . . . lying fatally injured beneath a large roof fall. Accordingly, the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall. . . . [T]he Mine Act is a strict liability statute, and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a). The roof fall . . . amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls.

Id. at 496. The miner had entered the area despite a large roof fall having occurred nearby. *Id*. at 494.

control, include specific requirements for detailed roof control plans. *See generally* 30 C.F.R. Subpart C.[16]

In contrast, the underground metal-nonmetal regulations impose no specific roof control parameters, and that is for good reason. *See generally* 30 C.F.R. Part 57. Metal-nonmetal operators deal with diverse conditions, such as varied rock types and material structures, and they have many different ways to handle those types of conditions. In short, these are site-specific regulations. This inherent difference in the nature of metal-nonmetal mining conditions mandates that metal-nonmetal operators must have flexibility to deal with the conditions as they see fit, at the immediate site, on a case-by-case basis.

Similar to the Judge, Commissioner Jordan interprets the standards at issue largely without addressing the exact terms of the standards and the differences between the regulatory contexts of coal and metal-nonmetal mines. Instead, she too relies on *JWR* (as does Commissioner Traynor), along with other cases in which, based on the application of the facts to the simple terms of different regulatory standards, violations of those standards were found. *See* slip op. at 25-30, 39. Like *JWR*, their cited cases provide little to no guidance for how the more complex standards at issue here are to be interpreted and applied, and do not stand for the proposition that strict liability under the Mine Act can be substituted for determining whether a violation was established.[17]

In addition, Commissioner Jordan would go so far as to read the legislative history of the Mine Act as sufficient authority, by itself, for the Commission to rewrite by interpretation any metal-nonmetal standard so that it is functionally equivalent to a coal standard. *See* slip op. at 27-28 (quoting S. Rep. No. 95-181, at 12-13 (1977), *Mine Act Legis. Hist.* at 600-01). We decline to do so. In a 16-month period, approximately ten years after the passage of the Mine Act, MSHA issued revised ground control regulations for both coal and metal-nonmetal contexts. Despite the legislative history's belief in the "essential[ity] of a common regulatory program for all operators," MSHA nevertheless adopted the significantly different ground control standards set forth above. *Compare* Safety Standards for Ground Conrol at Metal and Non-Metal Mines,

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[16] This distinction flows from the language and structure of the Act itself. Coal mining roof and rib control requirements are addressed directly in section 302 of the statute, 30 U.S.C. § 862, along with the rest of Title III that imposed interim safety standards on the coal mining industry. *See* 30 U.S.C. § 861, enacted Dec. 30, 1969, Pub. L. No. 91-173, § 301, 83 Stat. 765; amended Nov. 9, 1977, Pub. L. No. 95-164, § 203, 91 Stat 1317. By contrast, metal-nonmetal ground control is not explicitly in the Act.

[17] *See Stillwater*, 142 F.3d at 1183-84 (finding load of ore that operator permitted to flow in chute exceeded design capacity of bolts on chute gate shown by failure of gate, and thus operator violated general safety regulation prohibiting use of equipment beyond its design capacity); *Clintwood Elkhorn*, 35 FMSHRC at 370 (finding that truck leaving the road violated standard requiring full control of equipment while it is in motion); *Nally & Hamilton*, 36 FMSHRC at 1648-51 (after interpreting key term "required" in context of standard imposing obligation that seat belt be worn, finding violation solely based on equipment operator's failure to wear seat belt).

51 Fed. Reg. 36,192 (Oct. 8, 1986); Safety Standards for Roof, Face and Rib Support [in Underground Coal Mines], 53 Fed. Reg. 2343 (Jan. 27, 1988). It is not the role of the Commission, through case law, to attempt to satisfy legislative history while implying that the Secretary himself has clearly ignored that history in carrying out his standard-setting function under section 101 of the Mine Act, 30 U.S.C. § 811.[18]

3. The Reasonably Prudent Person Test Applies to the Standards Here.

a. The Standards' Broad Terms Require That the Commission's Reasonably Prudent Person Test Be Applied Here.

Turning to the terms of the standards that the Judge omitted, it is significant that section 57.3360 begins by stating that "[g]round support shall be used where ground conditions, or mining *experience* in *similar* ground conditions in the mine, *indicate* that it is *necessary*." 30 C.F.R. § 57.3360 (emphases added). The terms "experience," "similar," "indicate," and "necessary" are clearly indicative of a "judgment call" on when and what ground control is needed, based on all the relevant ground conditions in the mine. The actions required by section 57.3360 – choice of ground support under the first sentence of the standard, and the resulting design, installation and maintenance of that support under the second sentence – thus rest upon the experience of the operator in the particular mining conditions to indicate appropriate ground control measures. Because the regulation *explicitly directs* the mine operator to base its judgment upon experience in similar ground conditions and knowledge of the ground conditions, determining whether this standard was violated clearly negates a strict liability application and calls for application of the Commission's reasonably prudent person test. *See BHP Minerals Int'l Inc*., 18 FMSHRC 1342, 1345 (Aug. 1996) (recognizing that factors bearing upon the application of the reasonably prudent person standard include accepted safety standards and circumstances at the operator's mine).[19]

Separately, even when we find the actions of the operator would violate a standard, orders have nonetheless been vacated when the reasonably prudent operator did not have fair notice of a requirement through the wording of the standard. We apply the "reasonably prudent person" test in deciding whether an operator had fair notice. *See, e.g.*, *Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016) ("[W]e hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis. [Although] we consider the Secretary's interpretation to be a permissible one . . . it would not be an obvious reading of the standard to a

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[18] We further note that, in contrast, in *Nally & Hamilton*, the case cited by our colleague in support of her argument for a harmonious interpretation of similar MSHA safety standards, the standard at issue, 30 C.F.R. § 77.1710(i), was promulgated prior to the passage of the Mine Act.

[19] Contrary to Commissioner Traynor's arguments (slip op. at 42 n.15, 44), our reliance on the terms of the standard in our analysis, such as the term "experience," does not inject "negligence" concepts into this case. It is the key terms of the standard that dictate whether the reasonably prudent person test applies, and we cannot ignore such terms.

person familiar with the mining industry."). The reason is simple – the constitutional principles of due process and fair notice apply *prior* to a finding of a violation that results in a civil penalty.

Here, for example, the operator could not have had "fair notice" of a supposed obligation to install the type and extent of roof support measures that could have prevented the magnitude of roof failure that occurred in this situation. The evidence demonstrates, unequivocally, that the operator's prior years of *mining experience* in *similar* ground conditions in the same and other mines *did not indicate* that it was necessary. To the contrary, the experience indicated that it was *not* necessary. *See Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) (agreeing with the Commission and other federal circuits that MSHA regulations permitting a reasonably prudent person standard provides sufficient notice to satisfy due process and supports potential sanctions).[20]

This case illustrates the importance of the language of section 57.3360. Here, the operator had long operated six mines in the Trend, the host rock being dolomitic limestone, which is very high in strength and stability. There was no evidence of any prior roof fall even vaguely approaching the calamitous nature of the fall that occurred in this case.[21] MSHA inspected the area just hours before the fall and did not see or note any ground condition giving rise to fear of any roof fall, let alone one of catastrophic proportions. Although there was post hoc speculation about breakage along the ribs by one MSHA witness based upon post-accident views, the evidence does not establish the existence of any ground conditions that could have foreshadowed the massive fall that occurred.

Under Commissioner Traynor's interpretation of section 57.3360, an operator is strictly liable for *any* failure of ground in a part of a mine regardless of *where* the operator has decided that some measure of ground control is necessary, on the rationale that such failure means the operator has violated one or more of the design, installation, or maintenance terms of the second sentence. Thus, in any metal-nonmetal mine where an operator has recognized the necessity for ground control in a specific location, our dissenting colleagues would, in essence, read section 57.3360 identically to how section 75.202(a) applies in coal mines. Aside from being an erroneous comparison, such an approach would obviously ignore the many cases requiring fair notice of the obligations of a standard and a level of clairvoyance far removed from the terms of the standard.

In light of the terms of the first sentence of the standard and as the standard has been interpreted by the Secretary, we do not agree that an operator's liability under the second

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[20] Commissioner Traynor, again, misses the point by his comment that our finding here is "directly contradicted by counsel for Doe Run." Slip op. at 37, n.6. We agree with counsel for Doe Run that "ground support is necessary." It is a matter of *where* that ground support is used as necessary.

[21] There was limited testimony that some unidentified person may have heard of a roof fall of undescribed dimensions in some unidentified part of the mine; however, we find it implausible that there could have been a previous fall, in this mine, approaching this magnitude with no witness able to testify to it in any detail.

sentence of section 57.3360 can or should be expanded by such an interpretative approach and default to strict liability. It would, in essence, render irrelevant the operator's compliance with the obligations the first sentence of the standard imposes.

The other regulation at issue, section 57.3201, is a classically general standard. As with section 57.3360, the standard's language is broadly-worded, stating that "[s]caling shall be performed from a *location* which will not expose persons to injury from falling material or *other protection* from falling material shall be provided." 30 C.F.R. § 57.3201 (emphases added). The key words here are "location" and the phrase "other protection." It is important that the standard permits alternative means of compliance, i.e., the operator may ensure scaling is done from a location that does not expose miners to hazards *or* it may provide protection to them.

Additionally, as with section 75.3360 again, and reading it in *pari materia* with that more general control standard – as we should, because they both appear in Subpart B of MSHA's Part 57 regulations addressing ground control – section 57.3201 does not require operators to foresee and provide protection against a wholly unexpected and unprecedented collapse of an enormous section of stable, hardened limestone. There are no details in the standard as to where that "location" ought to be, and there are no details as to what "other protection" ought to be applied here. Thus, as with section 57.3360, judgment calls are required to be made by the operator, based on its experience with ground conditions in the mine, with respect to both the "location" from which scaling is performed and the type of "protection . . . provided."

That is understandable because section 57.3201 applies to a wide variety of circumstances. Metal-nonmetal mines involve diverse ground conditions in a variety of unique mining environments that call for numerous scaling procedures. MSHA openly acknowledged in its final rule promulgating section 57.3201 that, in metal-nonmetal mines, the "[c]ontrol of ground is made uniquely difficult because of the variety of conditions encountered and the changing nature of the forces affecting ground stability at any given operation." 51 Fed. Reg. at 36,192.

This is a different context than underground coal mine operations, where mine plans and roof conditions, albeit varying, are often very similar within a given type of underground mine, and have been subject to more stringent and uniform regulation from the Mine Act's inception. Section 57.3201, on the other hand, must account for the broad variety of materials extracted, the diversity of mining types and geographic areas represented, and the multiple methods of scaling possible, depending on the type of mine and environment.[22] Various conditions in a mine affect scaling and the type of scaling utilized.[23] Each one of these diverse factors impacts what equates to a safe "location" for performing scaling.[24]

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[22] These include, but are not limited to, ground hand-scaling, rock pile scaling, high-boom hand-scaling, mechanical scaling, front-end loader scaling, bolter scaling, and jumbo drill scaling.

[23] These include, but are not limited to, host rock stability, mineralization, layered back, thick shale seams, brecciated ground, sandstone, existence or non-existence of ground support, water penetration, active faults, and mud seams.

As such, the standard, like section 57.3360, requires the application of the "reasonably prudent person" test. If the operator, informed of the requirements of those regulations with ascertainable certainty, failed to act with respect to either as a reasonably prudent person, then a violation occurred. On the other hand, if the operator acted with reasonable prudence, there can be no violation.

Our dissenting colleague, Commissioner Traynor, would affirm the Judge's findings of violations here, citing unassailable "plain meanings" to the standards at issue, and that thus the reasonably prudent person test cannot be used. Slip op. at 36-44. However, he himself disregards the plain language of section 57.3201, which provides that, as an alternative to scaling from a location which will not expose persons to injury from falling material, "other protection against falling material shall be provided." 30 C.F.R. § 57.3201. Here, the operator used both – a belt-and-suspenders approach. It positioned the miner beneath supported roof, where even the inspector testified it would not have been a violation absent a roof fall, *and* used a specialized piece of equipment featuring a long boom to permit the miner to remain under protected roof while scaling from within a strong, reinforced cab. Clearly, therefore, the operator used other protection as required. The key point is that the standard requires the operator to use its experience and judgment in providing alternative fall protection that a reasonably prudent operator would provide under the mining conditions.

b. Application of the Reasonably Prudent Person Test to the Two Metal-Nonmetal Ground Control Standards is Amply Supported by Established Commission Precedent.

Applying the reasonably prudent person test to determine whether the alleged violations of sections 57.3360 and 57.3201 occurred is supported by no less than four Commission cases. Nevertheless, the Judge rejected applying the test in favor of interpreting the standards solely in light of an interpretation of a coal mine ground control standard. *See* 40 FMSHRC at 1209. In so doing the Judge failed to follow Commission precedent in recognizing and according significance to the difference between regulations under Part 57 and Part 75, as noted earlier. We have consistently recognized this distinction when interpreting the metal-nonmetal standards.

In *Asarco, Inc*., 14 FMSHRC 941, 942-43, 952 (June 1992), all four metal-nonmetal ground control violations cited were in connection with a fatality resulting from a roof fall

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[24] Again, our dissenting colleagues would read the standard in question as requiring much less in the way of evidence, and affirm the Judge's analysis that the facts here establish a *per se* violation of section 57.3201. They would find the scaler's location under the roof fall entirely dispositive on the question of whether the standard was violated, regardless of how objectively reasonable that location might be at the time given the operator's ground control experience in the mine. Slip op. at 30-31, 43-47. Similarly, they would ignore that the operator provided "other protection" in the form of a reinforced cab thereby clearly complying with the obligations of the standard. As discussed *infra*, Commission precedent in interpreting predecessor and similar metal-nonmetal ground control standards does not support such an interpretation, neither with respect to section 57.3360 nor with regard to section 57.3201.

which, similar to the case at bar, was considered to have been "unpredictable." In determining whether the Secretary had established violations of *both* metal-nonmetal ground control standards at issue, the Commission employed the reasonably prudent person test. *See id*. at 947-50 (reversing finding of violation of 30 C.F.R. § 57.3401), 952 (in reversing finding of violation of 30 C.F.R. § 57.3200, rejecting "[t]he Secretary['s] premis[ing] her case on the assumption that the rock that fell had been loose and could have been detected by proper testing," because "[a]s we have concluded, a reasonably prudent person familiar with the mining industry would not have recognized that" the testing measure employed did not fulfill the requirements of section 57.3401).

In *Asarco*, the Secretary, like the Judge and our dissenting colleagues in this case, relied on the fact of the accident to establish that the operator *per se* violated one of the standards in question: section 57.3200. 14 FMSHRC at 950-51; *see also* 30 C.F.R. § 57.3200 (providing in pertinent part that "[g]round conditions *that create a hazard* to persons shall be taken down or supported before other work or travel is permitted in the affected area.") (emphasis added). The Commission expressly rejected that idea. Instead, we interpreted and applied the standard, cast in the foregoing broad, judgment-call terms, to conclude that "[t]he fact that there was a ground fall is *not by itself* sufficient to sustain a violation." *Asarco,* 14 FMSHRC at 951 (emphasis added).

Rather, the Commission held that the hazardous ground must be "detectable *before*," not just "after" the accident, and determined that, through an application of the "reasonably prudent" miner test, that the operator's pre-fall detection efforts were reasonable under the circumstances. *Id*. at 951-52. We further note that, in addition to the Commission in *Asarco* expressly rejecting the premise upon which the Judge here based his findings of violations, the similarity in the language used to circumscribe metal-nonmetal operators' ground control obligations in sections 57.3201, 57.3360 and section 57.3200 at issue in *Asarco* is much greater than the similarity in language between section 75.202(a) and sections 57.3201 and 57.3360 that the Judge found to "essentially identical." *See* 40 FMSHRC at 1209.

The Commission in *Asarco* viewed its interpretation of the metal-nonmetal ground control standard at issue to be compelled by its earlier decision in *Amax*. *See Asarco,* 14 FMSHRC at 952-53 (citing *Amax Chemical Company*, 8 FMSHRC 1146, 1149 (August 1986). In *Amax,* the Commission had also explicitly rejected a similar attempt by the Secretary to establish a *per se* test for violations of 30 C.F.R. § 57.3-22 (1984), a predecessor standard to 30 C.F.R. § 57.3401. Particularly emphasizing that the mine at issue was a "potash mine," the Commission in *Amax* specifically noted that:

> . . . [u]nlike the regulatory scheme that obtains with respect to underground coal mines, approved roof control plans are not required in underground metal-nonmetal mining operations. Rather, "[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." (30 C.F.R. § 57.3020 (1985) (formally numbered as 30 C.F.R. § 57.3-20 (1984)).

8 FMSHRC at 1149 (citing *White Pine Copper Div.*, 5 FMSHRC 825, 835-37 (May 1983)).

Amax's citation to *White Pine* is particularly significant. In *White Pine*, we concluded that the terms of 30 C.F.R. § 57.3-20, the predecessor to 30 C.F.R. § 57.3360, required the Commission to evaluate the current conditions as well as the operating experience of the mine. Similar to what is now section 57.3360, section 57.3-20 stated that "[g]round support shall be used if the operating *experience* of the mine . . . *indicates* that it is required." 30 C.F.R. § 57.3-20 (1982); 5 FMSHRC at 825 (emphasis added).

We did so after finding that "experience" includes "practical wisdom" and "broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary." 5 FMSHRC at 836 & n.23. We ultimately held that the requisite determination under the standard

> takes into account the operating history of the mine, (i.e., its past mining practice) geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from potential roof fall.

Id. at 838. In other words, the Commission interpreted the standard according to the "reasonably prudent person" test.[25]

Lastly, the Commission's decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), although it involved a former coal mine ground control standard, is instructive with regard to the circumstances in which the reasonably prudent person standard applies to ground control standards like the ones at issue here, particularly section 57.3360. Former 30 C.F. R. § 75.200, the predecessor to what is now 30 C.F. R. § 75.202(a), provided in pertinent part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working

[25] Unlike Commissioner Traynor, we put no stock in the fact that, in some of the older cases, the Commission did not specifically state that it was applying the reasonably prudent person test. *See* slip op. at 41. The Commission had already started interpreting broad standards using such an approach before it first stated the specific "reasonably prudent person" terminology in *Alabama By-Products*, 4 FMSHRC 2128, 2129 (Dec. 1982). *See, e.g.*, *Lone Star Indus., Inc.*, 3 FMSHRC 2526, 2530 (Nov. 1981) ("[s]ection 56.9-41 is the kind of standard made simple and brief in order to be broadly adaptable to myriad circumstances. The relevant variables affecting safe position are numerous, may differ from plant to plant, and may change from day to day in any particular operation.").

> places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

30 C.F. R. § 75.200 (1984); 9 FMSHRC at 667 n.1. Thus, a continually developing ground-control program was required on a mine-specific basis, analogous to the requirement of the first sentence of section 57.3360. In *Canon Coal*, a case in which a roof fall resulted in a fatality, the Commission, faced with an allegation that a violation of former section 75.200 had occurred, did not hesitate to apply the reasonably prudent person test, even in light of the language in the second sentence of the standard that it emphasized. *See* 9 FMSHRC at 667-68 & n.1.

Of course, as we have seen, former section 75.200's successor standard, section 75.202(a), no longer includes that first sentence. Accordingly, we view the Judge here as having erred when he treated the Commission majority's finding in *JWR* with regard to the newer, different coal mine ground control standard as having overruled the Commission's application of the reasonably prudent person test in *Canon Coal* (*see* 40 FMSHRC at 1207-09),[26] as that was a case in which a ground control standard written in much broader terms was at issue.

Based upon the foregoing established case law and principles, we hold that the "reasonably prudent person" test applies to the alleged violations of section 57.3360 and section 57.3201 here. The Commission has consistently applied this test for nearly four decades. *White Pine* and *Canon Coal* establish beyond peradventure that section 57.3360 is to be interpreted and applied as a "reasonably prudent person standard." Likewise, and in accord with our decisions interpreting ground control standards in the metal-nonmetal context, the determinations under section 57.3201 of whether the scaling "location" was proper or, in the alternative, that "protection" was "provided," can only be made under the "reasonably prudent person" test.

C. Application of the Reasonably Prudent Person Test

1. The Record Compels the Conclusion that Ground Support at the Accident Location was Properly "Designed, Installed and Maintained" Based on the "Ground Conditions" Known to Doe Run Prior to the Ground Fall and its Mining Experience in "Similar Ground Conditions."

With respect to the section 57.3360 violation, the Secretary urged that the Judge be given the opportunity to apply the reasonably prudent person test in the first instance after having originally rejected it (S. Br. at 24-26). We now examine the record to determine whether there is any need to do so, given the Secretary's burden of proof on the question. With regard to that burden, we consider it significant that, in *sua sponte* rejecting the test in this case, the Judge concluded that "[s]uffice it to say that given the plethora of questions raised and unresolved,

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[26] The Judge appears to have been strongly influenced by the claim in the concurrence in *JWR* that the majority opinion effectively overruled *Canon Coal*. *See* 40 FMSHRC at 1207 (citing 37 FMSHRC at 498). We need only observe that Commissioners Nakamura and Althen, who comprised the majority in *JWR*, certainly knew how to overrule *Canon Coal* if they wished to do so, and chose not to overrule that case. *See* 37 FMSHRC at 496 n.7.

a prudent person test would have made the Secretary's case as to the fact of violation much more problematic." 40 FMSHRC at 1209.

The Secretary argued below and on appeal that the operator should have known from conditions evident before the accident that additional ground control measures were necessary. He asserts that the operator should have drilled test holes to determine if there were voids above the roof. He also asserts that the operator should have known of shaley conditions, and that these conditions required the use of resin bolts instead of the Split Set bolts.

In his decision, the Judge rejected those arguments in addressing the S&S issue (which he reached after finding a violation of section 57.3360). Substantial evidence supports the Judge's conclusions on those issues. His conclusions, and the evidence upon which they rest, compel an overall finding of no violation. *See Sims Crane*, 41 FMSHRC at 399-400.

As recognized in the Judge's analysis deleting the S&S designations (40 FMSHRC at 1165, 1210-1214), the record contains abundant evidence, including testimony from the Secretary's own witnesses, establishing that nothing with respect to the ground conditions or ground support in the area of the accident put Doe Run on notice that any form of additional support was needed.[27]

Prior to January 21, 2015, the mine had never experienced any unplanned ground falls where Split Set roof bolts failed in ground conditions similar to those in the area of the accident. Likewise, Doe Run had used Split Set roof bolts for decades to support brecciated ground. Those bolts were effective without a history of failure. There is no evidence that the use of resin bolts instead of Split Set bolts would have made any difference.

Moreover, the opinion of every witness who worked at the location of the accident prior to the January 21, 2015 ground fall was that the ground conditions and ground support in the area, including the conditions in the fall cavity, were typical and good. This includes the Secretary's own witness, Inspector Kennedy, who conducted an inspection of the mine eight hours before the roof fell.[28] Kennedy's testimony and the other evidence – all of which the Judge credited in his S&S analysis – demonstrate that there was nothing that should have put the

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[27] Notwithstanding Commissioner Traynor's argument to the contrary (slip op. at 37 n.7), our discussion of the record evidence on the "judgment calls" and decisions made by Doe Run based on its experience and past practice does not convert our analysis of what a reasonably prudent miner would have "objectively" done into a "subjective" analysis.

[28] Kennedy testified that he did not notice anything unusual on the face and did not observe any "change" that would have indicated the existence of adverse ground conditions. Tr. 104-05. The pillars appeared to be sized adequately with nothing out of the ordinary. Likewise, the widths of the drifts and crosscuts were normal. In fact, Kennedy wrote "no loose noted" and "ok" in his General Field Notes with respect to the RC3PO stope. Tr. 101; DR Ex. AA, at 3. Kennedy had not noticed any abnormal noises such as popping or cracking. He testified that he had observed nothing abnormal that would cause him concern about hazardous ground conditions.

operator on notice that the ground support or ground conditions in the area were insufficient or hazardous.

The Secretary's evidence fails to detract from this conclusion. Despite Vadnal's post-hoc testimony that he thought "shaley conditions" existed prior to the roof fall, the Judge found that Kennedy's testimony contradicted Vadnal's opinion and diminished its probative weight. The Judge also took into account that Vadnal had never visited the mine prior to the accident, and had not personally observed the area before the roof fell. Vadnal was merely *assuming* that the changes he had observed in the fall cavity area were observable prior to the accident.

Furthermore, Van Dorn conceded that his reason for concluding that test holes had not been drilled was based on a single statement by *one driller*, Sam McCabe. However, McCabe had also made a conflicting statement saying that he *had* previously drilled a test hole. Tr. 386-89. Van Dorn failed to elicit *any* other statements that test holes had not been drilled.

Moreover, despite the Secretary's argument that the operator had created an unsafe work environment by using bonuses to reward productivity for roof bolters, the Judge found that the Secretary failed to establish that the bolters had performed their duties in an unduly speedy manner. 40 FMSHRC at 1213. Finally, the fact that there was no place on the mine's work area inspection cards to record when test holes were drilled raises the inference that the operator could have drilled test holes without noting them. The Secretary has failed to prove otherwise or bring forth any other evidence to show that the operator was on notice of insufficient ground control.

In summary, we conclude that, after applying the reasonably prudent person standard to the facts the Judge found, substantial evidence does not support a finding of a violation of section 57.3360. Accordingly, we vacate that citation.

2. The Record Establishes That Under the Reasonably Prudent Person Test Doe Run Did Not Violate 30 C.F.R. § 57.3201.

As shown in the Judge's factual findings regarding whether this violation was S&S, the record contains abundant evidence regarding Hoodenpyle's "location." The scaler's position 60 feet from the face, under bolted roof, with a reinforced cab did not "contribute[] to the reasonable likelihood of an injurious roof fall onto Hoodenpyle." *Id*. at 1212. Applying the "reasonably prudent person" test, we vacate the citation alleging that Hoodenpyle performed the scaling at an improper location without protection from falling material.

The Judge found that routine practice had demonstrated that Hoodenpyle's position in the cab was a safe location. He found that there was no prior indication of any imminent roof failure, that there was no prior indication of any unsafe location for this scaling process, and that there was no prior indication of any other locations the operator should have picked. Again, we reject the notion (*see* slip op. at 44-45) that any discussion of the record evidence on the safe past practices that led Hoodenpyle to make the decisions he did thereby converts the analysis of what a reasonably prudent miner would have "objectively" done into a "subjective" analysis.

Specifically, Hoodenpyle positioned his scaler where his ROPS/FOPS operator's compartment was approximately 60 feet from the face and directly underneath bolted ground. Both Inspectors Kennedy and Van Dorn conceded that they had seen mechanical scalers operate in this position before, and that doing so was not a violation. Indeed, Kennedy, who had four years of underground experience at the mine prior to joining MSHA, testified that he had observed mechanical scalers operate multiple times and that such positioning was normal. Likewise, Van Dorn testified that he had seen mechanical scalers operate where the cab of the machine was underneath the last row of bolts, and that he had never issued a citation for such an occurrence before. Significantly, Van Dorn testified that it is not even a violation for a mechanical scaler to be underneath 100% *unbolted* ground. Tr. 391.

Prior to January 21, 2015, the operator had never experienced an incident where a miner was injured as a result of rock falling on the operator's compartment in a mechanical scaler. Based on the "normal" location of Hoodenpyle's scaler, as well as the lack of prior similar incidents and citations, a reasonably prudent person would have believed that Hoodenpyle's location for performing scaling would have protected him from the hazard of falling material.

Moreover, prior to January 21, 2015, the mine had never experienced any unplanned ground falls where Split Set roof bolts failed in ground conditions similar to those in the area of the collapse. Likewise, Split Set roof bolts have been used for decades to support brecciated ground at Doe Run, and have proven to be effective without a history of failure. The unanimous opinion of every witness who worked in the fall area prior to the roof fall was that the ground conditions and ground support were typical and good. There had never been any instance of injury to any mechanical scaler operator at the mine due to being crushed by a rock or because rock fell on the operator's compartment. In short, based on both the ground conditions as well as the methods of ground control utilized at the mine, a reasonably prudent person would not have recognized the hazard of falling material at Hoodenpyle's scaling location.

The standard also requires a finding of no violation here because it offers alternative means of compliance. The operator did "provide . . . protection" by the use of specialized equipment, including a reinforced cab and an extended boom to keep the miner far from the area being scaled, and by bolting the area above the scaler cab – which is not required.[29] Interpreting the standard in this way encourages the adoption of specialized safety equipment and practices. As stated above, there are no details in section 57.3201 as to what "other protection" ought to be applied here. Thus, another judgment call by the operator was required here.

Furthermore, as recognized by the Judge in his S&S analysis, the safety features equipped in the mechanical scaler, e.g., the stable chassis that did not require stabilizers or outriggers, the optimized line of sight to the scaling area improving visibility, the telescopic

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[29] We reject the Secretary's contention that the operator forfeited this argument by failing to raise it before the Judge below. S. Br. at 8 n.3 (citing 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d); *Black Beauty Coal Co*., 37 FMSHRC 687, 694–95 (Apr. 2015). Doe Run explicitly raised this argument before the Judge on pages 59-60 of its post-hearing brief. DR Post-Hg. Br. at 59-60.

boom, and the ROPS/FOPS protection, demonstrate that a reasonably prudent person would have believed that the scaler offered "protection from falling material" on the day of the accident. 30 C.F.R. § 57.3201.[30] The fact is that the operator did everything a reasonable operator would have done both in terms of location and in providing other fall protection, and nothing would have been cited as a violation but for the unforeseeable roof fall.

III.

Conclusion

For the reasons stated above, we reverse and vacate the Judge's findings of violations of the ground support standard in 30 C.F.R. § 57.3360 and the scaling standard in 30 C.F.R. § 57.3201.[31]

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

[30] Moreover, the Secretary failed to produce any definitive evidence that the canopy or cab of the scaler was not approved by MSHA or used without the proper tags.

[31] Consequently, the Judge's negligence findings are vacated as well, and we need not reach the Secretary's arguments regarding S&S and negligence.

Commissioner Jordan, dissenting:

Roof falls have historically been a major cause of injuries and fatalities in our nation's mines. This case involves a mining accident during which 175 tons of rock collapsed onto a mechanical scaler which miner John Hoodenpyle was operating.[1] He did not survive. The Judge concluded that Doe Run violated the two mandatory safety standards designed to protect miners from such tragedies.[2] I would affirm this ruling.

The Judge, however, erred by failing to conduct separate analyses as to whether each violation was significant and substantial ("S&S") and in ascertaining the level of negligence for each violation. He also incorrectly ruled that the operator's negligence was low without supporting analysis. Consequently, I would remand the case on these issues.

I.

The Judge Correctly Determined that the Fatal Roof Fall established Per Se Violations of the Cited Standards.

A. The Judge Applied the Per Se Analysis the Commission Utilized for Underground Coal Mines.

In *Jim Walter Resources, Inc.*, 37 FMSHRC 493 (Mar. 2015), ("*JWR*"), the Commission considered the validity of a citation issued in the wake of a roof fall fatality in an underground coal mine. The cited standard, in pertinent part, required that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof. . . ." 30 C.F.R. § 75.202. When the inspector arrived on the scene, the miner was lying fatally injured beneath a large roof fall. In affirming the citation, the

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[1] Scaling involves knocking loose rock off of the walls and roof of a mine. Tr. 429-30.

[2] Doe Run was charged with a violation of the following standards:

30 C.F.R. § 57.3360:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3201: "Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided.

Both violations were designated as significant and substantial.

Commission observed: "the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall." 37 FMSHRC at 496.

However, the Judge in *JWR* had ruled that the Secretary had failed to prove a violation. According to the Judge, in order to uphold the citation, the Secretary had to establish the existence of objective signs that were present prior to the roof fall, which would have alerted a reasonably prudent person that additional roof support was necessary. *Id.* at 494. In reaching this conclusion, the Judge relied on the Commission decisions in *Canon Coal Co*., 9 FMSHRC 667 (Apr. 1987) (*Canon*), and *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), (*Harlan*), which had applied this "reasonably prudent person" standard to factual scenarios involving a roof fall (*Canon*) and unsafe roof conditions without a fall (*Harlan*).

In overturning the Judge, the Commission observed that "the Mine Act is a strict liability statute and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a)." 37 FMSHRC at 496. The majority acknowledged the similar factual context between the case before it and the decision in *Canon*, but specifically declined to follow that decision. In his concurring opinion, Commissioner Cohen agreed that "[a] roof that falls and kills a miner was obviously not supported 'to protect persons from hazards related to falls of the roof' as required by the safety standard." *Id.* at 498. He wrote separately to express his view that the disposition in *JWR* effectively overruled the Commission's decision in *Canon*.

B. ***JWR* is Consistent with Commission and Court of Appeals Precedent as Applied to Both Coal and Metal/Non-Metal Mines.**

The Commission's decision in *JWR* is the most recent in a long line of precedents holding operators liable when they have failed to achieve the result required by an MSHA safety standard, regardless of the effort the operator may have made to comply with the standard, or the operator's ignorance regarding the existence of the violation. A few examples of these cases demonstrate that here, to determine liability, one must simply ask: "was the ground controlled" or "was the miner exposed to injury from falling material"?

Clintwood Elkhorn Mining Co. Inc., 35 FMSHRC 365 (Feb. 2013), involved a miner who was unable to stop his truck while it rolled down a haul road, crashed through a berm and flipped onto its passenger side. The operator was charged with violating the regulation requiring equipment operators to "have full control of the equipment while it is in motion." *Id*. at 367, (citing 30 C.F.R. § 77.1607). In upholding the citation, the Commission stated:

> [t]he Secretary must only demonstrate, by a preponderance of the evidence, that the operator failed to maintain full control of a piece of equipment while it was in motion. Nothing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control . . . . We conclude that

> the judge made a finding that is both necessary and sufficient to affirm the citation: the driver lost control of his truck.

Id. at 370.

In *Musser Engineering Inc., and PBS Coals, Inc*., 32 FMSHRC 1257, 1271-72 (Oct. 2010), a serious inundation led to an operator being charged with using an inaccurate mine map.[3] The operator argued that the map was prepared based on the best information available to it, and that it was not possible to ascertain the boundaries of the adjacent abandoned mine. The Commission nevertheless concluded that because the standard requires that the operator maintain an "accurate and up-to-date map," it followed that if the mine map failed to meet these requirements, the operator violated the standard, regardless of whether the operator did everything possible to locate an accurate historical map of adjacent mine workings. *Id*. at 1272.

In addition, when Spartan Mining was charged with failing to prevent damage to trailing cables by mobile equipment,[4] the Commission upheld the citation because: "It is undisputed that the trailing cable was run over and damaged by the continuous mining machine . . . ." *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 706 (Aug. 2008). It explained why Spartan's arguments were unavailing:

> We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault.

Id at 706.

In *El Paso Rock Quarries, Inc*., 3 FMSHRC 35 (Jan. 1981), the pertinent safety standard required an audible back-up alarm when the equipment operator had an obstructed view to the rear. The Judge vacated the citation because the Secretary failed to establish that the operator knew or should have known that the alarm was inoperative. The Commission reversed, reasoning that under the Mine Act, an operator may be held liable for a violation of a safety standard regardless of fault. *Id.* at 38.

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[3] The standard at issue, 30 C.F.R. § 75.1200, states:

> The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale.

[4] The operator was charged with violating 30 C.F.R. § 75.606, which requires that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment."

The Courts of Appeals have upheld the Commission's strict liability analysis. For instance, in *Asarco, Inc.-Northwestern Mining Dept. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989), a miner in an underground metal mine sustained a broken foot when struck by a falling rock while he was drilling. It was uncontested that he had not complied with the standard requiring miners to examine and test the back, face, and ribs of their working places. However, the operator argued that it had taken all actions necessary to meet the duty of care mandated by the statute and that the miner had engaged in "unpredictable and idiosyncratic misconduct" and violated his supervisor's specific instructions. *Id*. at 1196. The Court nevertheless upheld the Commission's ruling that once it was determined that the miner employed by Asarco had violated the safety standard, the operator was subject to a civil penalty, and the fact that supervising employees were not at fault was not a defense to the citation. *Id.* at 1197.

In *Stillwater Mining Co*., 142 F.3d 1179 (9th Cir. 1998) ("*Stillwater*"), the relevant standard required that "[m]achinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons." 30 C.F.R. § 57.14205. After ore being loaded from a chute into a waiting railcar jammed in the chute, the gate assembly detached, permitting the ore and muck to flow from the chute, killing a miner. Agreeing with the Judge below, the Ninth Circuit held that "[w]hatever load was applied to the bolts . . . had to have exceeded the design capacity of the bolts; otherwise the chute would not have failed." 142 F.3d at 1185. In rejecting the operator's argument that it had no reason to believe the design capacity was ever exceeded, the Court emphasized that "knowledge and culpability . . . are not relevant to the determination of whether there was a violation. As we have observed, the [Mine Act] imposes 'a kind of strict liability on employers to ensure worker safety.'" *Id.* at 1184 (citations omitted).

Here, in spite of the roof fall, my colleagues decline to find violations. They find it persuasive that the operator had long operated mines in the same ore deposit, that there was no evidence of any prior roof fall, that MSHA had inspected the area shortly before the fall and did not note any problematic ground conditions, and that the operator had never experienced an incident where a miner was injured as a result of rock falling on the operator's compartment in a mechanical scaler. Slip op. at 19-25. But the *Stillwater* court rejected similar defenses. Stillwater pointed out that the chute had been used for over five years without incident during which time more than 200,000 tons had flowed through the gate, the chute assembly was regularly inspected by workers and MSHA, and no changes or adverse conditions had occurred. 142 F.3d at 1183. The Ninth Circuit discounted such reasoning, adopting instead a per se approach: the chute failed, and thus the design capacity of the bolts must have been exceeded.

C. The Majority Erroneously Applied A Reasonably Prudent Person Standard to Determine Liability.

In contrast to the strict liability standard applied to the coal mine roof fall fatality in *JWR*, the majority contends that the distinctive nature of metal mines necessitates a reasonably prudent person test. Slip op. at 15-16. My colleagues' conclusion, however, rests on a faulty analysis. In fact, their approach flies in the face of the intent expressed by the drafters of the Mine Act that miners in metal/non-metal mines enjoy safety protections equal to those which had been set forth

in the Coal Act. The Senate Report made clear the desire to rectify the distinction which existed between the two groups of miners:

> [T]he Metal Act does not provide effective protection for miners from health and safety hazards and enforcement sanctions under that Act are insufficient to encourage compliance by operators . . . . *The Committee believes that it is essential that there be* a common regulatory program for all operators and *equal protection under the law for all miners*. Thus a principal feature of the bill is the establishment of a single mine safety and health law applicable to the entire mining industry.

S. Rep. No. 95-181, at 12-13, (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 600-01 (1978) ("Leg. Hist.") (emphasis added).

The Commission cited this legislative history when it rejected a construction of the seat belt requirement pertaining to coal miners that would have afforded them less protection than that afforded to metal/non-metal miners. The case arose when an inspector observed a coal miner who was not wearing a seat belt. The relevant standard provided that miners were required to wear seatbelts in certain vehicles where conditions pose a danger of overturning. The operator argued that liability should not be based solely on the miner's failure to wear the seat belt. Relying on its training regimen, and its enforcement practices, the operator maintained that the miners were in fact "required to wear" seatbelts, as the language of the standard mandated. *Nally & Hamilton Enterprises*, 38 FMSHRC 1644 (July 2016).

Rejecting that argument, the Commission held that the only sensible reading of the regulation was that it required miners to use seatbelts. The failure to wear the seatbelt would be sufficient to impose liability. In reaching that conclusion, the Commission noted the corresponding regulation applicable to metal/non-metal miners, which explicitly required that: "Seat belts shall be provided and *worn* in haulage trucks." 30 C.F.R § 57.14131(a). Finding "no logical reason why coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines" and that it "would make little sense for MSHA or its predecessor agency to have intended such a result," *Nally & Hamilton*, 38 FMSHRC at 1650, the Commission concluded that the coal mine standard should be construed "in a manner that provides equivalent and harmonized safety protection across different types of mining ventures." *Id.* at 1649.

In this case, however, my colleagues have construed the relevant roof control standard in a manner that affords metal/non-metal miners with less protection than that afforded to miners working in underground coal mines. A mine inspector arriving upon the scene of a roof fall fatality in an underground coal mine can issue a citation for a violation of the standard requiring the roof to be supported, without the need to determine that operator negligence was a contributing factor to the roof fall. *JWR*, 37 FMSHRC at 496. An inspector arriving upon the scene of a roof fall fatality in a metal/non-metal mine would, according to my colleagues, have to determine whether there were objective signs present prior to the fall that would have alerted a

reasonably prudent operator to install additional roof support. In other words, the inspector would have to demonstrate the operator was negligent before the inspector could issue a citation to the metal/non-metal operator. There is no logical reason for this distinction. It is contrary to Congressional intent and inconsistent with Commission and Court precedent. Moreover, as I discuss in greater detail, *infra* slip op. at 29-31, the language of the comparative regulations do not support such a result.

Although my colleagues acknowledge that the Mine Act encompasses strict liability parameters as a general rule, they claim that here they must apply a "reasonably prudent person" test to ensure that principles of fair notice to the operator are upheld. I agree that this test is appropriate when a standard requires no clear-cut outcome and fails to alert an operator to what it must do to avoid a breach of a safety rule. Thus, I have no quarrel with the majority's recitation of the black-letter law principle that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Slip op. at 6-7, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

However, there is no notice issue in this case, and thus no need to use the test here. The requirements of the two standards are clear, and individuals of "common intelligence" have no need to guess as to their meaning. *See Alabama By-Products*, 4 FMSHRC at 2129. To comply, an operator must (1) control the ground in places where persons work or travel, and (2) ensure that scaling is performed where falling material will not hurt miners or provide protection from such material. The obligations are clear.

Nonetheless, focusing only on the first sentence of section 57.3360, the majority tries to shoehorn it into the class of "incomplete, vague, indefinite or uncertain" standards that the majority states are appropriate for use of the reasonably prudent person test. Slip op. at 13-17. Whether or not the use of that test might be appropriate in cases where this sentence of the standard is at issue, the test is clearly not appropriate here. Here, it is undisputed that ground support was necessary.[5] Moreover, as discussed with greater specificity, *infra* slip op. at 31-32, section 57.3201 also states straightforward requirements that do not implicate fair notice concerns.[6]

D. Doe Run Violated the Ground Control Standard.

The Judge here properly concluded that the standards at issue "are essentially identical to § 75.202(a) in that the plain meaning of both standards is there should be adequate ground control to protect miners from falling materials." 40 FMSHRC 1165, 1209 (July 2018) (ALJ). The majority criticizes him for relying upon the *JWR* decision because in doing so, the Judge

[5] Counsel for Doe Run conceded that experience had indicated that roof bolting was necessary. Oral Arg. Tr. At 13 ("Doe Run made the decision that ground support is necessary."). And roof bolt ground support was installed in a portion of the fall area.

[6] As Commissioner Traynor correctly points out, slip op. at 40-41, the majority's reliance on *Amax Chemical Co*., 8 FMSHRC 1146 (Aug. 1986) and on *Asarco, Inc.*, 14 FMSHRC 941 (June 1992) is misplaced.

disregarded the "substantial distinction between the regulation of roof control for coal mines and the regulation of ground control for metal-nonmetal mines." Slip op. at 12. According to my colleagues, the language of the standards "is strikingly different" and they consider there to be "virtually no commonality between the short and direct obligation under section 75.202 and the broader language of the subject regulations." Slip op. at 11. I disagree.

Regarding section 57.3360, although it requires the metal/non-metal operator to make an initial judgment call as to whether ground control is needed, once the operator determines that such support is necessary (as the operator did here), there is no discretion as to how adequate that support must be. Indeed, as I will illustrate, the regulations are quite parallel on this point: the support must prevent the roof from falling on miners. This obligation remains the same, no matter whether the miner is employed in an underground coal mine or an underground metal/non-metal mine. A careful analysis of the language of the relevant regulations confirms the correctness of this assertion.

The relevant standard for coal mines is located at section 75.202(a) and provides in pertinent part: "[T]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof . . . ." 30 C.F.R. § 75.202(a) (emphasis added).

The corresponding standard for metal/non-metal mines states the following: "When ground support is necessary, the support system shall be designed, installed and maintained to control the ground in places where persons work or travel in performing their assigned tasks." 30 C.F.R. § 57.3360 (emphasis added).

Both regulations require the operator to achieve the same result and each regulation provides the operator with ascertainable certainty as to what that result should be: the operator is required to support the roof so that it does not fall and injure a miner. A roof fall fatality unquestionably demonstrates a failure to achieve the required result. A failure to achieve the regulation's required result equates to a violation of either standard. This is the approach that the Commission took in *JWR*, and this is the approach that the Judge correctly applied here. Consequently, I would affirm the finding of a violation.[7]

E. Doe Run Violated the Scaling Standard.

As previously noted, section 57.3201 provides that: "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201.

[7] Even were I to adopt the majority's reasonably prudent person analysis, I agree with Commissioner Traynor, slip op. at 42, n.14, that one would be hard-pressed to conclude that the record compels the conclusion that no violation occurred, the standard that must be met in order to reverse the Judge. *Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

The requirements of this standard are clear: (1) scaling work shall be performed outside the zone of danger of any potential fall of ground or (2) adequate protection shall be provided. It is beyond dispute that the miner was scaling from a location where he was exposed to injury. Similarly, it is tragically incontrovertible that the structures on Mr. Hoodenpyle's scaler were not adequate to protect him from falling material caused by failure of his employer's ground control system. *See, e.g.*, *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016) (holding that an examination of working places, to comply with the examination standard at issue, must be "adequate").

The majority's effort to characterize this outcome-based standard as lacking sufficient detail and requiring a judgment call by an operator, slip op. at 13, 15, 23, are unavailing. The standard clearly protects against one hazard—injury from falling material. It contains no vague phrases requiring subjective judgment. An operator can easily discern its legal requirement: miners who are scaling must not be exposed to injury from falling material. Hoodenpyle's death from the roof fall constitutes the requisite evidence that he had failed to scale from a safe location that would prevent him from being exposed to falling material. It also demonstrates that other adequate protection from the roof fall was not provided.

My colleagues claim that section 57.3201 "does not require operators to foresee and provide protection against a wholly unexpected and unprecedented collapse of an enormous section of stable, hardened limestone." Slip op. at 15. I believe, however, that the Mine Act and MSHA safety standards are designed to protect miners from exactly this type of tragic occurrence. Accordingly, I would affirm the Judge's finding of liability.

II.

The Judge should have Conducted Separate S&S and Negligence Analyses for the Two Violations.

The Judge deleted the S&S designations associated with both citations, but failed to conduct separate analyses. In one sentence and without explanation (other than a brief footnote addressing the scaling standard) the Judge also reduced the negligence associated with both citations to low. This combined analysis constituted legal error. The Judge was obligated to separately evaluate whether each violation was S&S, and the negligence level of each.

Regarding S&S, instead of conducting separate S&S analyses, the Judge framed the issue as whether both violations were S&S, and analyzed the same evidence in the same way for both violations. 40 FMSHRC at 1210-14. But whether each violation was S&S is an issue for which different evidence is relevant, or for which similar evidence may be of varying significance. For example, the S&S analysis of the ground support violation considers the likelihood that inadequate or absent ground support will result in the hazard of a roof fall, and whether such a roof fall is reasonably likely to result in reasonably serious injury. In contrast, the S&S analysis of the scaling violation considers the likelihood that, in the event of falling material, the position of the mechanical scaler will result in the hazard of that material falling on miners (such as the miner operating the scaler). The position of a scaling machine presumably makes a roof fall no more and no less likely to occur; the standard focuses on whether any material that falls will fall on miners. The Judge's S&S analysis, however, considered the likelihood that both violations

(undifferentiated) would result in "a rock fall that would have injured [Mr.] Hoodenpyle in his scaler cab." *Id*. at 1211. That was error.

The Judge's negligence determination was also inadequate, and not only because it was exceedingly terse. As with his S&S discussion, the Judge combined his negligence analyses, failing to distinguish between the two violations. When the Secretary alleges violations of separate standards, it is well-established that Judges must conduct separate negligence and unwarrantable failure analyses for each violation, even if the violations are "factually related." *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 3-4, 6 (Jan. 2015); *Consolidation Coal Co*., 23 FMSHRC 588, 597 (June 2001).

Because the separate standards impose different obligations, two negligence analyses are required. *Sierra Rock Products*, 37 FMSHRC at 6. For example, an operator may show low negligence on a ground control violation in diligently working to control the ground, but high negligence on a scaling violation by permitting miners to scale under unsupported roof or in adverse conditions. Or an operator may show high negligence by failing to implement basic ground control practices, while diligently prohibiting miners from scaling in adverse conditions. The evidence of negligence associated with one violation is not necessarily probative of, and is certainly not dispositive of, the negligence associated with another. *See id.* at 4 ("The relative significance of a fact or circumstance may change when different violative conduct is at issue").

III.

Conclusion

I would affirm the Judge's ruling that Doe Run violated the two standards, and I would remand the case for a determination regarding whether the violations were S&S, for a ruling on the level of negligence for each violation, and for the assessment of penalties.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

Commissioner Traynor, dissenting:

The Doe Run Company operated the Fletcher Mine, a lead and zinc mine in Missouri. Unlike coal mine operators, who are required to obtain MSHA approval of comprehensive mine-specific plans for controlling the roof in their mines, the Doe Run Company mined without an MSHA approved roof control plan. MSHA's regulations gave Doe Run wide discretion to determine where in the mine ground support systems were necessary, along with full responsibility to ensure such systems are "designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks." 30 C.F.R. § 57.3360. This is an especially serious responsibility, given "[f]all of ground has historically been a leading cause of injuries and deaths in metal and nonmetal mines." *Safety Standards for Ground Control at Metal and Nonmetal Mines*, 51 Fed. Reg. 36,192, 36,192 (Oct. 8, 1986). Unfortunately, on January 21, 2015, miner John Hoodenpyle was operating a mechanical scaler when a massive slab of rock fell from the roof of the Fletcher mine and crushed him to death.

Following the accident, MSHA issued two citations that were adjudicated in the decision on review. The Judge below appropriately concluded that because the Mine Act imposes strict liability, the tragic failure of Doe Run's ground control systems to "control the ground" where Hoodenpyle was working established a violation of section 57.3360. The Judge also determined the accident that killed Hoodenpyle established a violation of the regulation requiring that "[s]caling shall be performed from a location which will not expose persons to injury from falling material." 30 C.F.R. § 57.3201.

The Judge's decision finding Doe Run violated both standards flows from our foundational precedents firmly establishing that Mine Act regulations are promulgated and enforced in a strict liability framework. The majority attempts an end-run around this authority by misapplying the "reasonably prudent person" test in order to introduce operator fault and foreknowledge as additional elements of proof necessary to establish the violations.[1] But in our strict liability framework, operator fault, foreknowledge and other inquiries into negligence are irrelevant to the question of whether a violation occurred and are only to be considered when determining what penalty, if any, shall be assessed for the violation. It is from this fundamental error – and particularly the harm it will do to enforcement of ground control obligations in metal and nonmetal mines – that I very emphatically dissent.

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[1] The "reasonably prudent person" doctrine is traditionally used by the Commission and originated as a tool to determine whether a safety standard provides the objectively reasonable mine operator notice of the prohibition or requirement of a safety standard to the extent required by due process. *Ideal Cement Co.*, 12 FMSRHC 2409, 2416 (Nov. 1990) ("whether a reasonably prudent person familiar with the mining injury and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."). The test is rooted in the constitutional right to due process in connection with the deprivation of property. *See The American Coal Co*., 38 FMSHRC 2062, 2112 (Aug. 2016) (Comm'r Althen, dissenting (explaining "[i]t is elementary that due process requires that a party must receive fair notice before being deprived of property.")).

However, I find error in other parts of the Judge's analysis. For instance, the Judge inappropriately comingled his analyses of whether the discrete violations were "significant and substantial" ("S&S"). Furthermore, the Judge erred in summarily concluding that the operator demonstrated a low level of negligence without providing a supporting rationale. While I would affirm that the standards at issue were violated, these errors would require remand.

I.

Mine Act Safety Standards Only Function Properly and As Intended If Operators Are Held Strictly Liable Without Regard for Fault or Foreknowledge.

It is well established that mine operators are universally liable for all violations that occur at their mine without regard to fault or foreknowledge of the violative conditions. 30 U.S.C. § 820(a); *see also Wake Stone Corp*., 36 FMSHRC 825, 827 (Apr. 2014) ("Imposing strict liability under the Mine Act is not optional — it is mandatory."); *see, e.g.*, *Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012) (holding that the Mine Act imposes strict liability for violations which occur at a mine without regard to an operator's fault); *Asarco, Inc., NW Mining Dept*. *v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989) ("the plain meaning of . . . section 110(a) is that when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty"); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982) ("it is a common regulatory practice to impose a kind of strict liability on [a mining] employer as an incentive for him to take all practicable measures to ensure workers' safety, the idea being that the employer is in a better position to make specific rules and to enforce them than the agency is"); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (affirming operator liability under the Mine Act without regard to fault).

As part of a strict liability framework, every Mine Act regulation "imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979)*; see also Nally & Hamilton Enter. Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act regulation "imposes strict liability on mine operators . . . regardless of whether the operator has knowledge" of hazard); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998) ("[k]nowledge and culpability, however, are not relevant to the determination of whether there was a violation. As we have observed, the FMSHA imposes 'a kind of strict liability on employers to ensure worker safety'") (citation omitted); *Allied Products*, 666 F.2d at 894 ("If the act or its regulations are violated, it is irrelevant whose act precipitated the violation or whether or not the violation was found to affect safety; the operator is liable."). Following Congress, courts have reinforced that we have consistently recognized "the inherent danger of mines, and held any failure to comply with a regulation under the Act would result in a citation to the operator . . . . [T]here are no exceptions for fault, only harsher penalties for willful violations." *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983) (*citing Allied Products*, 666 F.2d at 893–894).

II.

Exempting the Standards at Issue From Strict Liability Enforcement Dangerously Undermines Ground Control Regulation of Metal and Non-Metal Mines.

The majority's refusal to apply the regulations at issue in a manner consistent with strict liability dangerously undermines regulation of ground control in metal and non-metal mines. In order to fully appreciate this danger, it is necessary to understand how the regulatory framework requiring ground control in metal and non-metal mines is significantly different than the plan-based framework that governs roof control in coal mines.

Underground *coal mine* operators are required to mine in accordance with a roof control plan approved by the local MSHA district manager – "suitable" to the prevailing geological conditions and mining systems – and abide by generally applicable roof support standards in Part 75. *See* 30 U.S.C. § 862(a). These comprehensive and specially-tailored coal mine roof control plans mandate minimum specifications for ground support systems, e.g., bolt length, bolting patterns. "[A] violation of the requirements in the plan constitutes a violation of the Act." *UMWA Int'l Union v. Dole*, 870 F.2d 662, 667 & n.7 (D.C. Cir. 1989) ("[t]he requirements of these plans are enforceable as if they were mandatory standards") (quoting S. Rep. No. 95-181, at 25 (1977) *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)); *see e.g., Consolidation Coal Co*., 39 FMSHRC 1737 (Sept. 2017).

In contrast, "the Mine Act imposes no similar obligation [to mine in accordance with a mandatory mine-specific roof control plan] upon underground metal and non-metal mines." *See Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016). There are no comprehensive plan requirements or regulations governing roof control in metal and non-metal mines. Instead, metal and nonmetal operators have been accorded considerable discretion to design, install, and maintain support systems provided that the operator *performs* its obligation *to control the ground*.[2] *See* 51 Fed. Reg. at 36,195 ("[Section 57.3360] does not specify the type of ground support system to be used, only that *it control the ground*."); *id.* at 36,192 ("The standards are *performance-oriented*, but are sufficiently specific to provide the mine operator with the necessary guidance.") (emphases added).

Metal and non-metal mine operators are not subject to the detailed mine-specific ground control plans the Secretary requires for underground coal mines. Instead, Mine Act regulations give them wide discretion and ultimate responsibility as to where and how they control the

[2] While these regulatory schemes are significantly different owing to historic differences between the original the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act") and the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977)("Metal Act"), operators of *all* underground mines share a common obligation to control the ground in places where miners work or travel. 30 C.F.R. §§ 57.3360, 75.202(a); *see Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1650 (Jul. 2016) ("The Senate Report on the Mine Act notes that the Coal Act was more comprehensive in scope and reach than the Metal Act. ").

ground.[3] The majority's failure to interpret the standards at issue consistent with the strict liability framework in which they were promulgated relieves metal and non-metal operators of this responsibility, and an incentive, for ensuring their miners are only working in areas where the operator can control the ground. Judge Richard Posner described this incentive in an oft-cited strict liability case:

> By making the actor strictly liable – by denying him in other words an excuse based on his inability to avoid accidents by being more careful – we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.

Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990).

III.

The Plain Requirements of the Standards at Issue Were Violated.

The two safety standards at issue are plain. As discussed more fully below, the operator violated both. Whether the operator – or the objective reasonably prudent miner – knew or could have known of the ground control failure is totally irrelevant to our inquiry into whether the regulations have been violated.[4] In this case, these questions are only appropriate in the context of the negligence inquiry involved in penalty assessment and review of the S&S designations.

A. Section 57.3360 Plainly Requires That When Ground Support is Necessary Mine Operators Must Provide Sufficient Support to Continuously Control the Ground in Places Where Miners Work and Travel.

The safety standard at 30 C.F.R. § 57.3360 states that "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed,

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[3] Doe Run's unilaterally developed internal ground control policy provided loose guidance to its miners rather than specifying, for example, when a tighter bolting pattern or longer bolts would be required. DR Ex. F at 2 ("In general a 5 x 5 pattern is sufficient for intersections, however some ground conditions may dictate a tighter spacing . . . [H]istoric ground control difficulties may dictate the use of longer fixtures. Spot bolting or pattern bolting may be necessary in areas where ground control problems or geologic structures dictate.").

[4] Here, there is no cause for the reasonably prudent person test. Due process is unquestionably satisfied as all five Commissioners apparently agree that the meaning of standards is plain. *See* slip op. at 16. And when the language in a regulation "is clear, it follows that the standard provides fair notice . . . ." *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997).

installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks . . . ."

The language of the standard is clear. "Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results." *Jim Walter Res., Inc*., 28 FMSHRC 983, 987 (Dec. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987).

The first sentence of the standard establishes a predicate – ground support shall be used *where* conditions or experience indicate that it is necessary.[5] The design of the standard accounts for the variety of mining environments at issue in underground metal and nonmetal mines. For instance, not all underground metal and nonmetal mines provide roof bolt ground support. Tr. 391; *e.g*., *White Pine Copper Div., Copper Range Co*., 5 FMSHRC 825, 832-33 (May 1983). It is undisputed that in this case ground support was necessary. Counsel for Doe Run conceded that experience had indicated that roof bolting – a form of ground support – was necessary. Oral Arg. Tr. 13 ("Doe Run made the decision that ground support is necessary.").[6] And roof bolt ground support was installed in a portion of the fall area.

The second sentence of the standard plainly states that its requirements are conditioned on whether the operator has determined that ground support is necessary.[7] "*When ground support is necessary*, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel." 30 C.F.R. § 57.3360 (emphasis added). The requirements of the second sentence are thus triggered when the operator uses ground support.

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[5] The majority completely ignores the standard's conditional language *and* the plain requirements imposed in the second sentence in their purported plain meaning interpretation. Accordingly, the majority's interpretation is erroneous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that a cardinal principle of interpretation is to give effect, if possible, to every clause or word).

[6] The majority finding that "experience indicated that [ground support] . . . was *not* necessary" is thus directly contradicted by counsel for Doe Run. Slip op. at 14 (emphasis in original).

[7] The majority asserts that the question of whether ground support is necessary should be resolved by the application of a subjective version of the reasonably prudent person test, substituting its own interpretation of the regulation for that of the Secretary, who urges consideration of multiple factors relating to ground conditions and mining experience referenced in three of our prior decisions. S. Br. at 24-25. *See also* 51 Fed. Reg. at 36,195 ("Under the final rule, ground conditions and mining experience are the criteria for determining if support is required."). Unlike the majority, I would accord due deference to the Secretary's interpretation were the necessity of ground control at issue in this case. But it is not. Here, we already have the answer to this inquiry, as all parties agree that ground support was necessary and some ground support was deployed in the area where the accident occurred.

Each substantial term in the standard plainly states what an operator must do to comply in those circumstances where ground support is necessary.

"[T]he Commission has consistently construed [the term] 'maintain' in relation to other standards to require a continuing functioning condition." *Nally & Hamilton*, 33 FMSHRC at 1763. In *Nally & Hamilton*, the Commission recited this history:

> In *Lopke Quarries*, the Commission, in affirming the judge's finding of a violation, examined Webster's definition of "maintained" and determined that based on its plain meaning, "the inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator . . . ." 23 FMSHRC at 707-08. *See also Alan Lee Good*, 23 FMSHRC at 996-98 (affirming the judge's finding that, because the regulation required that braking systems on equipment be "maintained in a functional condition," and the operator conceded that the parking brake was inoperative, the evidence established that there was a violation of the cited standard); *Peabody Coal Co*., 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that a violation of section 77.404(a) was established where the operator admitted the presence of a hydraulic leak and, therefore, admitted that the forklift was not maintained in "safe operating condition"); *Jim Walter Res*., 19 FMSHRC at 1765-66 (affirming a judge's finding that a "monitor was not being 'maintained' in 'proper operating condition,"' as required by 30 C.F.R. § 75.342 where the operator intentionally routed air believed to contain methane on a path that would prevent methane monitor detection).

Id. Thus, clearly the requirement that ground support be "*maintained* to control the ground in places where people work or travel" requires that the ground is controlled in a continuing functioning condition.[8]

The standard also requires that the support be "designed" and "installed" to control the ground. The term "design" is defined in Webster's Dictionary as "used as a basis for anticipating practical problems and solving them at an engineering stage." *Webster's Third International Dictionary* 612 (1986). The term "install" is defined as "to set-up for use or service." *Id*. at 1171. In this instance, the common dictionary definition of the terms is consistent with surrounding language and purpose of the standard. *See Akzo Nobel Salt, Inc*.,

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[8] As Commissioner Jordan explains in her dissent, the requirement to "control" the ground in places where persons work or travel is plain and presents no cause for application of a reasonably prudent miner test. Slip op. at 28-30. It prompts but one question: was the ground controlled? *See, e.g.*, *Clintwood Elkhorn Mining Co*, 35 FMSHRC 365, 370 (Feb. 2013) ("'It is obvious that the driver here lost control of his truck . . . . Mine operators are strictly liable for violations such as this' . . . . This is where the analysis should have ended."); *see also Premier Elkhorn Coal Co*., 38 FMSHRC 1587, 1591-92 (July 2016) (same).

21 FMSRHC 846, 852 (Aug. 1999) ("It is a cardinal principle of . . . regulatory interpretation that words that are not technical in nature 'are to be given their usual, natural, plain, ordinary, and commonly understood meaning."). Thus, the ordinary and uncomplicated meaning of these terms cumulatively require that when ground support has been determined to be necessary, a mine operator must provide sufficient support to continuously control the ground in places where miners work and travel.[9] Therefore, if the ground falls in an area where a miner works or travels, the operator is strictly liable. This is true regardless of whether the operator could have foreseen the fall, whether the operator's or miners' conduct contributed to the fall, or whether the fall actually placed any person in danger.

This plain meaning interpretation is consistent with a similar safety standard applicable to underground coal mines, 30 C.F.R. § 75.202(a) ("[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."). In *Jim Walter Resources, Inc.*, 37 FMSHRC 493, 495 (Mar. 2015), the Commission held that "under the plain language of [section 75.202(a)] and the strict liability approach governing Mine Act violations, the Secretary . . . need only show (1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls."[10] The majority attempts to distinguish *JWR* on the ground that it involved an underground coal mine and the metal/non-metal mine operators must have the "flexibility to deal with the conditions as they see fit." Slip op. at 12. But this wide flexibility only works to improve safety when it is exercised within a regulatory framework that imposes strict liability on operators to create the "incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident." *Am. Cyanamid Co.*, 916 F.2d at 1177.

The majority misconstrues the Commission's use of the "reasonably prudent person" test in *Asarco, Inc*., 14 FMSHRC 941, 948 (June 1992). Slip op at 17-18. *Asarco* involved a roof fall and two alleged violations of 30 C.F.R. § 57.3401 ("designated persons shall examine and,

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[9] Because the contested provisions of the standard are plain and clear, there is no due process notice issue to address. The plain meaning of common ordinary usage language in the standard's language provides adequate notice to mine operators. *See Dynamic Energy, Inc*., 32 FMSHRC 1168, 1172 (Sept. 2010); *Jim Walter*, 28 FMSHRC at 988 n.6.

[10] In *JWR*, the Commission acknowledged that its holding was inconsistent with the interpretation articulated in *Canon Coal*. *JWR*, 37 FMSHRC at 496 n.7 ("we decline to follow the *Canon* decision."); *cf. Canon Coal Co*., 9 FMSHRC 667, 668 (Apr. 1987) ("the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person . . . would have provided in order to meet the protection intended by the standard."). Accordingly, Commissioners Althen's and Nakamura's expressions of their hesitation to ignore *Canon Coal* in *JWR* are simply *dicta*. The *only* principled manner in which to read *JWR* is that it established a new interpretation of section 75.202(a) – overturning *Canon Coal*. *See JWR*, 37 FMSHRC at 498 (Comm'r Cohen, concurring).

where applicable, test ground conditions in areas where work is to be performed . . . ."). The Commission applied the "reasonably prudent person" doctrine to consider whether the operator had *notice* that the standard at section 57.3401 prohibited exclusive reliance on its preferred method of testing the roof. The test was appropriately used to confirm the regulated community did not have constitutional notice of the requirements of the standard, not to interpret into those requirements a defense against violations committed without fault or foreknowledge.

Asarco argued that it reasonably believed that using a jumbo drill to vibrate the roof totest for loose ground satisfied the safety standard's requirements. The Commission agreed, concluding that the Secretary did not demonstrate that a "reasonably prudent person familiar with the mining industry would have recognized that a jumbo drill could not be used effectively to test for loose ground." *Asarco*, 14 FMSHRC at 945-46, 949-50. Section 57.3401 neither provided a methodology for testing nor had the Secretary provided any supplemental guidance in his Program Policy Manual. *Id*. at 947. Furthermore, witnesses for the operator and the Secretary testified that using a jumbo drill to vibrate the roof to test for loose ground was a common practice in the industry. *Id*. at 948-49. Accordingly, the Commission concluded that the Secretary's regulation failed to provide Asarco with adequate notice. *Id*. at 949-50.[11]

[11] *Asarco* also concerned two alleged violations of 30 C.F.R. § 57.3200 which provides that "[g]round conditions that create a hazard to persons shall be taken down or supported *before* other work or travel is permitted in the affected area." (emphasis added). My colleagues in the majority contend that they interpreted the standard under a reasonably prudent person test. Slip op. at 17. This is incorrect. Instead, the Commission relied on the plain ordinary meaning of the term "before" to hold that the Secretary must prove that there was "a reasonably detectable hazard before the ground fall." *Asarco*, 14 FMSHRC at 951 (emphasis in original). The Commission concluded that the evidence the Secretary introduced of the roof conditions *after* the occurrence of the roof fall was not substantial evidence to support the Judge's finding of a violation because the specific language of the safety standard requires evidence of a problem *before* the fall. In fact, despite my colleague's mischaracterization, slip op. at 17-18, the only time the Commission referenced the "reasonably prudent person" test in discussing section 57.3200 was in reference to the prior finding that the mine operator did not have notice that a jumbo drill did not comply with the testing requirements of section 57.3401.

Section 57.3360 on the other hand is sufficiently specific to notify the operator of its obligation: to control the ground in places where people work and travel. Accordingly, the issue in the case at hand is fully distinguishable from the Commission's consideration of what the ambiguous term "test" in section 57.3401 requires.[12]

In addition, my colleagues inaccurately claim that *Amax Chemical Co*., 8 FMSHRC 1146 (Aug. 1986), supports their erroneous application of the reasonably prudent person test. Slip op. at 18. Notably, *Amax* neither contains the phrase "reasonably prudent person" nor does it concern an issue of regulatory interpretation. Rather, *Amax* concerns whether substantial evidence supports the Judge's finding of a violation of 30 C.F.R. § 57.3-22 (1984) (a now defunct safety standard which required loose ground to be taken down or adequately supported). The Commission concluded that substantial evidence supported the Judge's determination. However, the Commission wrote further to clarify that while ground that makes a "drummy" sound when struck with a hammer suggests that the ground is loose, it does not establish that the ground is loose *per se*. 8 FMSHRC at 1148-49. My colleagues in the majority extrapolate this evidentiary ruling beyond all recognition.

The majority's reliance on *White Pine Copper Div*., 5 FMSHRC at 825, is similarly misplaced. Slip op. at 18-19. In fact, *White Pine* illustrates how far my colleagues have strayed from Commission precedent. The case involved a prior roof control standard, 30 C.F.R. § 57.3-

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[12] The majority reads the opinion in *Asarco* to imply the question of whether an operator had notice sufficient to support imposition of a civil penalty consistent with constitutional due process is controlling on the preliminary interpretive question of whether the operator violated the regulation. This is error, as explained in a D.C. District Court opinion recounting the historic development and application of the due process notice requirement in the regulatory context:

> While it is clear that the notice requirement is not limited to the criminal realm, it also has not been applied to limit agencies' interpretations in all contexts. Nearly all of the cases applying the "fair notice" doctrine concern an agency's imposition of a penalty against a private party and, moreover, formulate the doctrine in terms of penalties.

Arkansas Dep't of Human Servs. v. Sebelius, 818 F. Supp. 2d 107, 120–21 (D.D.C. 2011). Even if in *Asarco* we had explicitly departed from traditional application of the due process inquiry, that holding would have been superseded by numerous cases explicitly recognizing interpretation of a regulation to determine whether it was violated is not contingent on the due process analysis used to determine whether a civil penalty may be imposed. *See, e.g.*, *id.*; *Berwind Natural Res. Corp*., 21 FMSHRC 1284, 1328 (Dec. 1999) ("[A]n agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty."); *Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 651 (4th Cir. 2016), as amended (Nov. 23, 2016) ("[Operator] had fair notice that the failure to replace defective shutoff valves raised the possibility of sanctions, and MSHA is therefore not barred from seeking civil penalties in connection with this violation.").

20 (1984), that required "[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." 5 FMSHRC at 825.

My colleagues ignore that "[t]he only question before the Commission [in *White Pine*] [was] whether the particular conditions of the cited area required roof support, not which type of roof support." *Id*. at 835, n.19. The Commission held that once the operator determines that ground support is necessary in an area, the safety standard requires that the operator use "sufficient" support to "protect[ ] miners against roof falls." *Id*. at 837. In the case at hand, because counsel for Doe Run conceded that ground support was necessary and Doe Run had actually come to the same conclusion by installing ground support measures in the accident area, the only question before us is whether that support was sufficient.[13] My colleagues twist themselves in analytical circles in an attempt to relieve the operator of the imposition of any legal obligation of sufficiency.

Here, the Judge found that the occurrence of the roof fall – which crushed a miner to death – violated Doe Run's obligation to control the ground in a place where miners work or travel. 40 FMSHRC 1165, 1209-1210 (July 2018) (ALJ). I affirm this conclusion.[14] Whether or not Doe Run demonstrated negligence in using a 5 x 5 split-set bolting pattern at the site of the RC3PO northeast fall area, is the type of inquiry that is confined to the section 110(i) penalty criteria.[15]

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[13] Like Doe Run's counsel, my colleagues acknowledge Doe Run used ground support measures at the location where the accident occurred, emphasizing "[t]hat is precisely what Doe Run did here – apply ground support in the location *where* it was necessary." Slip op. at 9 (emphasis in original). But the ground support Doe Run applied failed to control the ground where it was applied.

[14] Even if Mine Act regulations were not created in a strict liability framework – a notion contrary to the plain text of the statute and decades of precedent – and I joined the majority in applying a reasonably prudent person test to inject foreknowledge and negligence into the analysis, I would not be able to conclude that the record compels the conclusion that no violation occurred, the standard that must be met in order to reverse the Judge. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary only when record supports no other conclusion). For example, the Secretary argued that test holes should have been drilled in the fall area. Vernon Roark, the roof bolter, testified that he had not been trained how to drill test holes and did not drill test holes. Tr. 465-66, 473-74. A second roof bolter, Sam McCabe, told Van Dorn that he did not drill test holes either. Tr. 386. The Secretary also presented evidence regarding loose rock in the area and prior roof falls. Tr. 292-93; S. Br. at 26. The Judge made no finding regarding the roof bolters' failure to drill test holes.

[15] My colleagues have injected the concept of negligence into the analysis of whether an operator was strictly liable for a violation of a safety standard, demonstrating a fundamental misunderstanding of how the Mine Act operates. It is well established that mine operators are to abide by mandatory safety standards, and if the standard is violated the operator is liable, regardless of foreknowledge, negligence or fault. 30 U.S.C. § 820(a); *Peabody Coal Co*.,

(continued…)

B. Section 57.3201 Plainly Requires that Scaling be Performed From a Location That Does not Expose Miners to Injury From Falling Material.

The safety standard at section 57.3201 provides that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201. The requirements of this standard are clear – scaling work shall be performed outside the zone of danger of any potential fall of ground or adequate protection shall be provided.[16] "[A] 'safe' location is one which will not expose persons to injury from falling material." 51 Fed. Reg. at 36,194.

It is beyond dispute that Hoodenpyle was scaling from a location where he was exposed to injury. Counsel for the Secretary has alleged that Doe Run violated the standard based on the location of the scaler. S. Post-Hr'g Br. at 21. Doe Run vigorously contested this allegation before the Judge below, but mounted no supported defense that it complied with the standard by providing "other protection from falling material." In any event, it is tragically incontrovertible that the structures on Mr. Hoodenpyle's scaler did not protect him from falling material caused

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[15] (…continued)

1 FMSHRC at 1495; *Nally & Hamilton*, 38 FMSHRC at 1651. Only when assessing a civil penalty for the violation does the Judge consider if the operator was negligent in violating the standard. *See Nally & Hamilton*, 38 FMSHRC at 1651 (citing *Asarco*, 868 F.2d at 1997) ("Of course, the operator's fault or lack of fault goes to the issue of negligence and, thus, is considered in assessing a civil penalty."); *see also KenAmerican Res., Inc.*, 42 FMSHRC 1, 8 n.16 (Jan. 2020) (consideration as to whether the operator was negligent in violating the standard is "appropriately confined to the penalty assessment for the violation."). Notably, the Commission has found a violation of a safety standard even when the operator was not negligent. *Nally & Hamilton*, 38 FMSHRC at 1652 (affirming the Judge's "no negligence" finding); *see also* 30 C.F.R. § 100.3(d) (the Secretary can issue a citation alleging "no negligence"). In the case at hand, the Judge found that Doe Run demonstrated a low level of negligence. 40 FMSHRC at 1212.

[16] The majority finds the Commission's decision in *Asarco* controlling. Slip op. at 17. However, in *Asarco*, the Commission determined that the standard was directed at ground conditions as they appeared before a roof fall based on the inclusion of the term "before" in the safety standard. *See supra* slip op. at 40, n.12. Thus, the language of the standard compels a focus on the operator's foreknowledge. Section 57.3201's directives are distinct and do not contain the term "before" or other similar language requiring an inquiry into foreknowledge or any other aspect of a negligence inquiry. Accordingly, the attempted analogy falls flat.

by failure of his employer's ground control system.[17] Thus, the fact of his injury alone, without more, is sufficient to establish a violation of the regulation.

Despite appearing to find that the language of section 57.3201 is "plain" and therefore no deference was owed the Secretary's interpretation, the majority also holds that purported ambiguities in the word "location" and the phrase "other protection" require use of the "reasonably prudent person" test. Slip op. at 15-16, 21-22. If the words of the regulation are plain, there is no cause for application of the reasonably prudent person test of whether the objectively reasonable operator had notice of the requirements of the regulation. If the standard contains ambiguities, of course we must consider whether the Secretary's interpretation is reasonable.[18] My colleagues have instead chosen to interpret the terms themselves so as to open the gates to a "reasonably prudent person" Trojan horse, concealing within it operator defenses – lack of fault, foreseeability and foreknowledge – that do not belong in a strict liability analysis.

My colleagues in the majority note that routine practice had demonstrated that Hoodenpyle's position in the cab was a safe location. Slip op. at 22. But there is absolutely no basis in the text of the regulation or our strict liability law to speculate about Hoodenpyle's subjective knowledge of the likelihood of a roof fall or the reasonableness of his choices or conduct.[19] Indeed, "the reasonably prudent person test contemplates an objective – not

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[17] I agree with Commissioner Jordan that the word "protection," which is not at issue in this case, does not introduce ambiguities requiring an exception to the principles of strict liability. Slip op. at 32. *See Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) ("We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault."). The majority declines to apply a strict liability interpretation of the standard, claiming it "requires the operator to use its experience and judgment in providing alternative fall protection that a reasonably prudent operator would provide under the mining conditions," slip op. at 17, even though the plain language of the standard reads, "protection from falling material shall be provided" and the facts indicate Hoodenpyle was not protected from falling material.

[18] The majority opinion does not address our duty to defer to the Secretary's reasonable interpretation of regulatory language. Do they find the terms of these regulatory standards plain? If not, and they conclude the terms are ambiguous, where is their analyses of whether the Secretary's interpretations are "plainly erroneous or inconsistent with the regulation?" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019). Where is any discussion of our duty of deference?

[19] My colleagues flatly claim without elaboration that "any discussion of the record evidence on the safe past practices that led Hoodenpyle to make the decisions he did" is an objective and not subjective analysis. Slip op. at 22. This is patently incorrect. Establishing what is "reasonable" by reference to an actual individual miner or operator's prior behavior – e.g., where they had located the scaler in the past without incident – rather than what the hypothetical "reasonably prudent miner" would have done is unquestionably applying a

(continued…)

subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Canon Coal Co*., 9 FMSHRC at 668*; see also Lehigh Anthracite Coal*, 40 FMSHRC 273, 282 (Apr. 2018); *Stillwater*, 142 F.3d at 1182 (the "appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.").

Inquiry into whether an individual operator or miner was aware of potentially violative conditions is nothing more than an examination of whether that person was negligent. Yet the majority uses just such an inquiry to reach the (counterfactual) conclusion that the violation must be vacated because the scaler's location did not contribute to the "reasonable likelihood of an injurious roof fall onto Hoodenpyle." Slip op. at 22. This distorted application of an altered "reasonably prudent person test," unsupported by any coherent discussion of our strict liability precedents, is just a backdoor inquiry into the operator's subjective knowledge of the violations, their foreseeability and the operator's degree of fault. It is being used not to faithfully interpret and apply the text of the regulation, but rather to add "lack of knowledge, foreseeability or fault" (negligence) as a new supra-textual defense available to any operator cited under what was promulgated as a strict liability regulation.

Once a violation is established, the Judge considers the operator's negligence only in setting a penalty for the violation.[20] 30 U.S.C. § 820(i). "[A] finding on operator negligence is

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[19] (…continued)
subjective rather than objective test. This distortion of the test begs the question of reasonableness, by improperly using Hoodenpyle and/or Doe Run's prior conduct as a benchmark of "reasonable" conduct, rather than using the hypothetical objectively reasonable person. This subjective analysis is inappropriate, even in the context of the appropriate application of the reasonably prudent person test on the question of whether due process permits a penalty (let alone the preliminary question of whether a strict liability interpretation of the regulatory terms establishes a violation in the first place).

[20] The D.C. Circuit recognized that the Mine Act separates analysis of liability from negligence in *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989). Section 104 of the Act imposes liability on an operator for violations of mandatory standards, *id.* at 716 ("the statute necessarily implies that a violation can exist even without an act on the operator's part"), and a civil penalty is imposed based on whether or not the operator was negligent, *id*. (drawing a distinction between "negligent violations and non-negligent violations"). My colleagues cite *Western Fuels-Utah* in an effort to justify their improperly injecting a reasonably prudent person theory of liability in lieu of strict liability, slip op. at 9, when in fact the D.C. Circuit's discussion of operator liability and negligence entirely undercuts my colleagues' approach. The majority confuses the concept of *strict* liability, a mandatory aspect of our interpretation of the standards at issue here, with the separate concept of *vicarious* liability for the acts of agents or supervisors, which is the primary issue addressed in *Western*
(continued…)

only necessary when the Commission assesses a penalty." *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 40 (Jan. 2020) (Chair Rajkovich, concurring (citing 30 U.S.C. § 820(i))).

If this decision were remanded to the Judge for a reassessment of negligence, he may reasonably conclude again that Doe Run demonstrated a low level of negligence or even that Doe Run was not negligent in permitting the miner to scale at this location. To that end, MSHA inspector Jeremy Kennedy conducted a routine inspection of this area the day before the accident and reported that the roof appeared to be free of adverse conditions and the bolts flush to the back. Similarly, Bob Ridings, a geologist employed by Doe Run, traveled in the area hours before the ground fall and testified that the bolts "looked good." Tr. 689. Tom Welch, a loader operator, traveled in under the last row of bolts and testified that "everything looked fine." Tr. 519.

On the other hand, there is also evidence that suggests Doe Run was negligent in permitting the miner to scale from the location where the accident occurred. He was seated inside the cab of the scaler, approximately 60 feet from the face. Hoodenpyle's scaler was located at the outermost limits of Doe Run's discretionary ground control policy. S. Ex. 7 at 1 ("[s]caling will begin 60' back from the face"). He was seated under the last row of bolts. Approximately 50 feet of unbolted ground was between that row of bolts and the face. S. Ex. 12 at 4-5. The diagram at Secretary's Exhibit 12, at 5, depicts the mechanical scaler outstretched, using the full 40 foot range of the boom to scale. S. Ex. 8 at 6. Most of the roof fall at issue occurred in the unbolted area (75% of the ground fall) and the fall extended back, ripping the last row of bolts out as well (25% of the ground fall).[21]

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[20] (…continued)

Fuels-Utah and most of the cases listed in the majority opinion's footnote 14. Slip op. at 10.

My colleagues claim numerous controlling cases mandating strict liability interpretation on the question of whether Mine Act standards are violated that are cited throughout this dissent are not "relevant to the initial task of interpreting a Mine Act standard to determine an operator's obligations under it and *whether* a violation even occurred." Slip op. at 10 (emphasis in original). But strict liability is the only proper way to determine whether the terms of the standards alone – ruling out questions of negligence, fault and foreseeability – establish a violation.

[21] As a corrective action, MSHA recommended new roof control procedures which would limit the amount of unbolted ground between the last row of bolts and the face, to ensure a safe location for scaling operations. 40 FMSRHC at 1175 (citing Tr. 203); Tr. 310. This new policy also requires the uses of the stronger resin bolts within 30 feet of the face in areas of disrupted bedding in breccia zones. S. Ex. 8 at 6. The Secretary believes that "limit[ing] distances for unbolted areas will ensure a safe location for scaling operations." *Id*. at 7. Under the new procedures, in areas of disrupted bedding, a scaler could not be seated under the last row of bolts, with approximately 50 feet of unbolted ground in front of him, as Hoodenpyle was in this case.

Doe Run was not drilling test holes to determine the conditions of the ground, in order to determine whether it was appropriate to bolt in a tighter pattern or to switch to stronger resin bolts. Tr. 294. In fact, Vernon Roark the roof bolter testified that he had not been trained on how to use the equipment required to drill a test hole and accordingly, did not drill one to test the ground.[22] Tr. 465-66, 473-74.[23] Furthermore, Doe Run management provided no mechanism for miners to communicate the result of a test hole to management. Tr. 59, 184-85. There was even testimony that other roof falls had occurred, but MSHA was not able to locate those areas upon investigation. Tr. 292-93. In the absence of adequate examination practices, a reasonable fact finder could determine that Doe Run was negligent in permitting the miner to scale in this location because reasonable care had not been taken to determine if this location was safe to continue the use of routine practices.

I decline to fully marshal the above referenced evidence to robustly examine or come to a conclusion on the question of whether Doe Run was negligent in violating the requirements of section 57.3201. That is the Judge's job. I draw upon the contrast in the record evidence as an illustrative tool to demonstrate how the evidence at issue is relevant to determining Doe Run's culpability. Because the determination of negligence is the responsibility of the Judge, I take no position as what the outcome should be if the issues of negligence associated with each violation were remanded.

[22] A test hole demonstrates what type of rock the ground is made up of. Tr. 48-49. The jumbo drill creates a percussion that has different sounds depending upon the condition of the rock. Tr. 49. The test hole is drilled deeper than a hole for a bolt, which means the miners get a better sense of the strata above. Tr. 121. A test hole could be three or four feet deeper than a hole drilled for a roof bolt. Tr. 121.

[23] My colleagues ignore that Roark testified that he did not know how to drill a test hole, when they find that the record is devoid of evidence that test holes had not been drilled. Slip op. at 21.

IV.

Conclusion

In conclusion, I would affirm the Judge's ruling that Doe Run violated the two strict liability standards and would remand the case for a determination of whether they were S&S and for a ruling on the level of negligence exhibited in connection with each violation. However, because the standards impose different obligations – one imposing an obligation to control the ground where necessary and the other requiring that scaling be performed from a safe location – the Judge would need to conduct a separate S&S analysis and a separate negligence analysis for each. *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 6 (Jan. 2015); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1315 n.11 (June 2016).

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2018-0340
AMERICAN AGGREGATES OF MICHIGAN, INC.	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It comes before us on interlocutory review of the decision of an Administrative Law Judge denying the Secretary's motion to approve settlement of a withdrawal order issued pursuant to section 104(g)(1) of the Mine Act.[1] The Order asserted that American Aggregates of Michigan, Inc. ("American Aggregates") failed to provide a miner "the MSHA-required 4-hours new miner training prior to beginning work at the mine." Ex. A at 11 (Order 8952500, May 17, 2018).

The Judge concluded that the Secretary had not presented sufficient facts to support the proposed settlement. 41 FMSHRC 382 (May 2019) (ALJ). Upon denying the settlement, the Judge recused himself, requested that the case be reassigned to another Judge for hearing, and certified his ruling for interlocutory review. The Commission granted interlocutory review.

[1] Section 104(g)(1) of the Mine Act states:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

As set forth below, we find that the Judge failed to apply the correct standard for consideration of settlement proposals and that the proposed settlement is fair, reasonable, appropriate under the facts, and in the public interest. Therefore, we reverse the Judge's denial of the settlement motion and approve the settlement.

I.

Factual and Procedural Background

MSHA's regulations contain detailed instructions for training new miners. 30 C.F.R. § 46.5(a) requires that each new miner must be provided "with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d)." However, it permits miners to begin work before receiving the full 24 hours of training provided they work "where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner." *Id.*

In turn, subsection (b) permits miners to begin work with no less than 4 hours of training and sets forth 7 general topics that must be covered during those 4 hours. 30 C.F.R. § 46.5(b). The 4-hour requirement of subsection 46.5(b) is at issue in this case.

On May 17, 2018, an MSHA inspector issued a section 104(g)(1) withdrawal order to American Aggregates, the operator of the Ray Road Plant, a surface sand and gravel mine in Oakland County, Michigan. Ex. A at 11. The order alleged that Matthew Weaver, a driller operator/helper, "had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine . . . [and] had no previous mining experience." 41 FMSHRC at 382; Ex. A at 11 (Pet. for Civil Penalty). The order directed the operator to withdraw the miner from the mine until he received the requisite training. The inspector designated the violation as significant and substantial ("S&S") and found the likelihood of injury as "reasonably likely" and the expected injury to be "fatal." He also marked the negligence as "high." 41 FMSHRC at 383; Ex. A at 11. MSHA applied the penalty point schedule set forth in 30 C.F.R. § 100.3 and proposed a penalty of $2,007.[2]

American Aggregates contested the order. It replied that Weaver was not a driller, but rather a driller helper. It attached exhibits to its answer setting out factual details of Weaver's training, including classroom training under the Occupational Safety and Health Administration's (OSHA) regulations and on-the-job training performing the same work at other non-mining sites. American Aggregates disputed the Secretary's allegations of the violation and asserted that the injury was unlikely to occur, would only result in lost work days if it occurred, and that there was no negligence. It also responded that the violation was not S&S.

[2] Upon first impression, a penalty of $2,007 seems remarkably low for an allegedly high negligence, S&S, high gravity violation. However, we recognize that the operator was small and had no prior violation history. While we are not bound by 30 C.F.R. Part 100, we note that the MSHA penalty point criteria assigned the operator only 8 penalty points before the addition of points for negligence and gravity.

A. **Settlement Motion**

On February 14, 2019, the Secretary filed a motion to approve settlement. In that motion, American Aggregates accepted the violation. The parties agreed to the removal of the S&S designation; modification of the likelihood of occurrence of injury from "reasonably likely" to "unlikely;" modification of the level of gravity from "fatal" to "lost work days or restricted duty;" and reduction of negligence from "high" to "moderate." The Secretary modified the proposed penalty from $2,007 to $132. In doing so, the Secretary applied his regulatory penalty criteria and penalty point formulation to the terms of the violation as accepted by American Aggregates. In other words, $132 would have been the prescribed penalty under MSHA's regulations if the violation had been cited as it was proposed to be settled.

The motion stated that American Aggregates offered the following facts to support its position:

> Respondent asserts that Matthew Weaver was not a driller but was a Driller's Helper. Respondent contends that Weaver had received, at the time the order was issued, 19.5 hours of OSHA related classroom training, had received 4 hours of New Miner Training and had received on-the-job training working directly with its driller. Respondent concedes that on the day of the inspection Weaver had not received training on all seven subject[s] required by 30 C.F.R. 46.5 including 46.5(b)(4) 46.5(b)(5), 46.5(b)(6) and 46.5(b)(7), and the MSHA training that Weaver had received had not been properly documented. Respondent stated that although Weaver had no previous mining experience, he did have approximately one month of experience working with its driller as a Driller's Helper taking core samples at a non-mine property being considered for purchased [sic] for future mining. Respondent avows that Weaver's work off mine property was the exact same work conducted with the same drill rig the day the withdrawal order was issued. Respondent maintains that Weaver worked directly with and [sic] closely supervised by its driller.

41 FMSHRC at 383; S. Settlement Mot. at 3-4.

For his part, the Secretary asserted:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. . . . The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the

> enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.[3]

S. Settlement Mot. at 2.

After reviewing the settlement, the Judge requested clarification from the parties on several points. The Secretary responded that he relied on the settlement motion as filed, consistent with the standards articulated by the Commission in *The American Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal I*").

B. **The Judge's Decision**

The Judge concluded that the motion did not support settlement because the operator acknowledged that it did not provide mandatory training on all topics set forth in 30 C.F.R. § 46.5(b) such as section 46.5(b)(4) (hazard task training) and (b)(7) (rules and procedures for reporting hazards), and that an injury resulting from the violation was "likely to result in lost work days or restricted duty." To a great extent, the Judge focused on the removal of the S&S designation finding that "the admitted facts do not support removal of the S&S designation." 41 FMSHRC at 386. The Judge further noted that the settlement proposed a significant percentage reduction of the penalty—about 94%.[4]

The Judge rejected the Secretary's contention that the settlement served any future enforcement benefit. He concluded that the settlement was not fair, reasonable, appropriate or in the public interest and rejected the settlement. He certified, on his own motion, his ruling for interlocutory review. Finally, having essentially taken a position upon reviewing the settlement motion that the violation was S&S, in an act of judicial statesmanship, the Judge recused himself from the case and requested that it be assigned to an alternative Judge.

On June 6, 2019, the Commission directed review of whether to uphold the Judge's denial of the settlement.

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[3] This is standard language used by the Secretary in many settlement agreements. It states concerns for the Secretary in arriving at settlement—namely, the risk of litigation and the importance of obtaining admission of alleged violations without the necessity for a contentious hearing.

[4] The Judge did not mention the conformance of the penalty with MSHA's regulatory penalty point system in light of the agreement of the parties.

II.

Disposition

A. Parties' Arguments

In concert, the parties argue that the Judge erred by failing to apply the appropriate standard for reviewing proposed settlements as articulated by the Commission in *AmCoal I* and *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"). Specifically, they assert that the Judge failed to consider the settlement holistically, and instead, engaged in a piecemeal review of aspects of the settlement in isolation, focused almost exclusively on the S&S designation that the operator contested in its Answer.

The Secretary also contends that the Judge erred by discounting the future enforcement value of the modified order. Further, the Secretary contends that the significant penalty reduction in this case was a direct product of reassessing the penalty under the Part 100 standards for regular assessments based on the penalty criteria that fairly and appropriately reflected the modified designations of negligence and gravity the parties agreed to in the settlement motion. As re-evaluated by the Secretary, the violation would result in penalty points significantly below the point value that results in the minimum penalty.[5]

American Aggregates argues that the terms of the settlement reflect a compromise the parties reached after negotiation, with both parties making concessions. In particular, it contends that it agreed to accept the violation despite providing documentary evidence that the miner received more training than required under section 46.5, including extensive OSHA training, 4 hours of new miner training, and on-the-job training. Thus, American Aggregates argues that the violation is for the failure to cover some of the seven expressly prescribed topics during the 4 hours of new miner training it did provide. It further argues that it covered several of the required topics and had already provided 19.5 hours of training in accordance with OSHA regulations.[6]

American Aggregates further contends that the parties' settlement was not an admission of adverse facts as asserted by the Judge, and that the Judge erred by characterizing the parties' settlement as an agreement to "fundamental, undisputed facts." 41 FMSHRC at 388. American

[5] The minimum penalty under the Secretary's regulation for penalty point assessments at 30 C.F.R. § 100.3 at the time of the violation was $132 for a violation with 60 or fewer penalty points. As found in the Order, and under the Secretary's penalty point criteria, the violation parameters totaled 94 points for the $2,007 assessment. As agreed upon in the settlement, the violation parameter reductions would render a point value of 44 points, which is far below the regulation's 60 point threshold.

[6] The settlement motion submitted by the parties states the operator's assertion that it provided 19.5 hours of OSHA training whereas the operator's Answer to the penalty petition states it provided 19.25 hours of training on a long list of topics. The operator further asserts, in its brief to us, that it provided over 30 hours of OSHA and MSHA training. In the interest of consistency, and while not making a fact-finding on this point, we use 19.5 hours as noted in the settlement motion that was before the Judge.

Aggregates asserts a continuing disagreement with certain factual allegations, as reported in the settlement agreement, but that it agreed to accept the violation and related designations in order to settle the proceeding.

American Aggregates also argues that the Judge erred in mischaracterizing its position on several matters in his order denying settlement.[7] Specifically, it points to the Judge's error in stating that American Aggregates "acknowledge[d] that the injury would still potentially result in lost work days or restricted duty," noting that it disputed both in its Answer and the settlement motion. *Id.* at 384. American Aggregates also agrees with the Secretary that the Judge's characterization of the penalty reduction was exaggerated because he focused on a percentage but failed to take into consideration that the reduced proposed penalty reflected a new assessment amount based on calculations using the Secretary's Part 100 regulations as applied to the settled terms of the violation.

Both parties assert that the settlement satisfies the standard set forth in *AmCoal* and ask the Commission to vacate the Judge's decision and approve the settlement.

B. Commission Review

Under section 110(k) of the Mine Act, Congress vested the Commission with authority to approve settlements of contested assessments. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1975. While such authority is internally delegated to the Commission Administrative Law Judges in the first instance, the Commissioners retain full authority regarding settlements.[8]

We have held that in reviewing settlements, "the Commission and its Judges consider whether the settlement of a proposed penalty is "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. That is the legal standard

[7] In its brief to the Commission, American Aggregates points out that it submitted documentary support of the extensive training it did provide the miner, which included section 46.5(b)(4) topics. It also disputes the Judge's statement questioning the alleged contention that it was "'unaware that the training the miner received' was not sufficient." 41 FMSHRC at 384.

[8] Section 110(k) of the Mine Act provides: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has explained that "Congress authorized the Commission to approve the settlement of contested penalties '. . . to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.'" *AmCoal I*, 38 FMSHRC at 1976 (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)).

governing settlements.[9] In turn, the decision whether a settlement is fair, reasonable, appropriate under the facts, and protects the public interest is made on the basis of a submission by the Secretary to which the operator has agreed. *See Hopedale Mining, LLC*, 42 FMSHRC ___, No. LAKE 2019-0149 (Aug. 28, 2020)

During the review of a proposed settlement, the Judge is not to engage in fact finding as he would post-hearing. *See Solar Sources, LLC*, 41 FMSHRC 594, 602 (Sept. 2019) ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *AmCoal II*, 40 FMSHRC at 991. Hence, the analysis of *submitted facts* in a settlement proposal is markedly different from an analysis of *admitted evidence* in a hearing.[10]

Whether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the particular expertise of MSHA in judging whether a violation is S&S. Indeed, if MSHA does not charge an S&S violation, the Commission cannot make an S&S finding. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996). Commission Judges do not have the discretion to make such elevated finding unless it is asserted in the first instance by MSHA. The Judge therefore should not have applied the *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016), test for S&S determinations to a settlement.

C. <u>The Judge Erred By Denying the Settlement</u>

As the Commission articulated in *AmCoal*, the Commission and its Judges consider whether the settlement of a proposed penalty is "fair, reasonable, appropriate under the facts, and protects the public interest." The Commission must review the Judge's determination to ensure that "a Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." However, "abuses of discretion

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[9] The dissent eschews any review of the settlement in favor of advocating, thankfully in a more temperate manner than in *Hopedale*, their focus upon granting Judges carte blanche to deny settlements. We do not agree with the dissent's contention that the Judge has such "wide discretion" (slip op. at 13-15, 18) or that "there must be a demonstration that no reasonable Judge would have any grounds for denial [of the settlement] . . . in application of the *AmCoal* standard" (*id.* at 18) in order to vacate a Judge's denial. The standard of review of a Judge's settlement determination is not a deferential one, but one of whether the Judge has complied with the law and whether his determination is supported by the record before him. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012).

[10] In this respect, the review of a settlement bears a resemblance to a ruling on cross motions for summary judgment. The parties present a factual basis and ask for a legal conclusion. Regarding settlements, the Judge ultimately reaches a legal conclusion whether the joint position of the parties satisfies the established legal basis for settlement. Thus, a settlement decision fundamentally is a legal decision based upon an undisputed and joint submission. Of course, an important difference is that for cross motions for summary judgment, the facts must be uncontested whereas, in a settlement, differences regarding the facts and the ability of each party to sustain its position may be a driving force for settlement.

or plain errors are subject to reversal." *Black Beauty*, 34 FMSHRC at 1864 (citing *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981)). Here, the Judge plainly erred by denying the settlement on the basis of an inappropriate legal determination on S&S on an undeveloped record and in contravention to the facts presented by the parties in support of the settlement.

In denying the settlement, the Judge concluded that "the admitted facts do not support removal of the S&S designation," 41 FMSHRC at 386, focusing on the lack of training and the "reasonable likelihood that the untrained-miner hazard contributed to by the violation [would] result in an injury that would result in lost workdays or restricted duty." *Id.* at 388. Not only is the Judge's analysis not supported by the facts presented by the parties, but it is an erroneous exercise of judicial decision making at this preliminary stage of the proceeding.

It was undisputed that the miner received 4 hours of new miner training, but that he did not receive all 7 modules that are to be covered during those 4 hours. The violation in this case is, then, the absence of certain modules that an individual must have before working as a miner.[11]

In settling, the parties essentially agree on the following facts as provided by American Aggregates in its Answer and as noted above. The miner received 4 hours of new miner training, but missed certain modules. MSHA does not contest that he previously received 19.5 hours of safety training. The miner worked as a helper rather than a driller. During the prior month of work, he was doing the same job, on the same remote terrain, and under the supervision of the same driller. S. Settlement Mot. at 3. The parties further agree that this violation involved moderate negligence with the unlikely possibility of a lost work day injury. Given American Aggregates' acceptance of the violation, and based upon the foregoing, both parties agree that the settlement is justified.[12]

In evaluating the settlement, the Judge misapprehended the correct standard for reviewing settlements, opting instead to conduct a private, unsupported S&S analysis under the *Newtown* test. At the pretrial settlement phase of litigation, Judges may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *AmCoal II*, 40 FMSHRC at 991. Hence, any fact finding or legal conclusions made based on the facts supplied by the parties in support of their settlement motion is not appropriate in the Judge's review of a proposed settlement.

The Judge ignored most of the information relevant to the reasonableness of the settlement under the *AmCoal I* criteria. The Judge failed to take into consideration the many elements of the agreement of the parties, specifically, those included in paragraph 6 of the

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[11] The order asserts that the miner "had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine." Ex. A at 11. The issue in this case is the 4 hours of new miner training before beginning work required by 30 C.F.R. § 46.5(b).

[12] If, in undertaking a post-citation or order review, MSHA learns a violation was over-cited, we do not consider it a failure for MSHA to reconsider the appropriate designations for a violation. While a Judge may require a satisfactory explanation for the reconsideration, we obviously would not require MSHA to obstinately support cited conditions after it has determined, in the proper exercise of its prosecutorial discretion, not to be appropriate.

Secretary's settlement motion cited above. These facts are directly applicable to consideration of the proposed settlement under the proper standard of review articulated in *AmCoal I*. In sum, the Secretary provided significant factual information to support the proposed settlement.[13]

Of course, even in a settlement, the parties may not be amenable to "admitting" the correctness of the other party's position on an issue of law or that a party erred in its evaluation of the facts. Therefore, settlements must be read with a realistic eye to the positions of the parties in moving toward settlement.

In his S&S-focused analysis, the Judge disregarded a host of circumstances demonstrating errors by the inspector and other factors supportive of acceptance of the settlement:[14]

- Contrary to the inspector's belief, the miner was not a driller, but rather, was a helper. The significance is that he was continuously under the control and direction of the driller.

- As a driller helper, the miner was working in open virgin areas drilling ground samples to evaluate for possible future mining. Thus, he did not work near a quarry or pit face or around such mining equipment.

- The miner had 4 hours of new miner training. The violation was for not covering all the modules set forth in subsection 46.5(b).[15]

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[13] Our dissenting colleagues make the same mistake that the Judge did below, focusing almost exclusively on the percentage of the penalty reduction without regard to the abundance of factual support provided by the parties to support modification of the order and subsequent reduction of the penalty. Slip op. at 15-16 & n.3. These facts are significant not for establishing findings of fact in the record, but for explaining the basis of the parties' settlement. In evaluating the settlement, the Judge and Commission must meaningfully consider and assess the factual explanation provided by the parties without making credibility determinations or resolving conflicts in the record. Neither the Judge below nor the dissent engages in such evaluation of the facts pertaining to the violation at issue in this settlement. We consider such facts for the limited purpose of ascertaining whether the proposed settlement is "fair, reasonable, appropriate under the facts, and protects the public interest."

[14] In reciting these points, we do not make findings of fact. Instead, we recite these points as those made by the operator, with supporting documentation, which the Secretary validly could consider in reaching settlement and that, in turn, the Commission must consider in reviewing the settlement.

[15] The Respondent claims 30 C.F.R. § 46.5(b)(4) training was completed. AA Br. at 5; AA Answer at 4-5, Ex. B (attached). It admits subsections (b)(5), (6), and (7) were not completed. These are: (b)(5) Instruction on the statutory rights of miners and their representatives under the Act; (b)(6) A review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and (b)(7) An introduction to rules and procedures for reporting hazards.

- With regard to topics bearing upon safety, the driller was not "untrained." In fact, the parties accepted that the miner had received 19.5 hours of training that covered virtually all aspects related to safe operations.

- Further, the miner had a full month of on-the-job experience as a driller helper doing the same work at the mine site during the preceding month.

- During that same preceding month working as a driller helper, the miner worked on the same type of terrain as when the drill moved onto a mine site.

- During that same preceding month as a driller helper, the miner worked under the same driller who was supervising him on the mine site.

- Section 46.5(e) provides "Practice under the close observation of a competent person may be used to fulfill the requirement for training on the health and safety aspects of an assigned task in paragraph (b)(4) of this section, if hazard recognition training specific to the assigned task is given before the miner performs the task." 30 C.F.R. § 46.5(e). Because the miner previously performed the same tasks and worked for a month under the supervision of the same driller, there is evidence the miner may have had experience with the health and safety aspects of being a driller helper as described in subsection 46.5(b)(4).[16]

- Having reviewed these facts, MSHA considered that the occurrence of an injury was "unlikely." The motion expressly stated the contention that "because of the training that Weaver had received, the experience Weaver had obtained working as a Driller's Helper and the close supervision by it[s] driller, it was 'unlikely' that Weaver would incur an[] injury.'" S. Br. at 6, n.2 (citation omitted). The parties' agreement that an injury was "unlikely" (S. Settlement Mot. at 4) is reasonable based on the miner's status as a helper, close supervision, prior significant training, receipt of new miner training, prior on the job training, and remoteness of the area from danger from proximity to a pit or other operational area. The Secretary explained in his brief that "no reading of the settlement agreement can support the judge's view." S. Br. at 6, n.2.

Instead of focusing on the above points, the Judge concentrated on his finding, without a hearing, that the violation was S&S. Again, it is not appropriate to make such a finding during a settlement review.

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[16] The dissent accuses us of making an argument not raised by the parties in noting the potential applicability of section 46.5(e) to the circumstances of this case. Slip op. at 17. However, we note this specific provision of the Secretary's training regulations because it is particularly relevant to the circumstances of this case. We cannot and do not make a legal conclusion as to whether the operator was in compliance with the Secretary's training requirements. However, we have the right and duty to consider the law in determining whether the Judge's decision was correct. In fact, the Judge should have considered that part of the law in evaluating the true character of the offense, but did not.

In general, when the Commission's review of the record demonstrates a proper consideration by a Judge of a motion and legal standard for settlements, the Commission sustains the Judge's action. However, when a motion, including admissions and concessions of the parties demonstrate the Judge erroneously failed to accept a settlement that meets the legal standard for approval, the denial of a settlement must be reversed.[17]

In reaching our decision in this case, we emphasize the importance of all aspects of training, and most definitely, the mandatory 4 hours of training before commencing any work. This training is important for the avoidance of accidents and injuries when a worker becomes a miner for the first time. It is for this reason, of course, that the regulations require that such an employee must work under the watchful eye of an experienced miner who can observe the new worker's performance for health and safety reasons. Our holding, here, is not a diminution by us of the importance of training.

In this case, American Aggregates admits that the regulation was violated—but this is a settlement case. The Secretary's evaluation toward settlement apparently led him to accept that the involved miner had received many more hours of training than the necessary hours required by subsection 46.5(b) with a significant focus on safety and health. The Secretary gave credence to the fact that the inspector had misidentified the employee as a driller when, in fact, he had a lesser job as a driller helper under supervision of a driller. The Secretary further gave recognition to the month of experience by the new miner in performing the same work, with the same driller/supervisor, on the same type of terrain as at the mine—and removed from the danger of active mining equipment in his job.

In evaluating the violation under the totality of these circumstances, which the Judge failed to do, the Secretary acted reasonably in agreeing to acceptance of the violation in return for a settlement entailing modification of gravity and negligence. It is a fair compromise to hold the operator accountable for its actual failures and to allow the Secretary to proceed with efficient use of his resources. In addition, the Secretary benefits from reliance on this violation in the operator's violation history for future enforcement.

Regarding the Secretary's use of its penalty point system for purposes of settlement in this case, we reiterate that it is the right and duty of the Commission to assess penalties, irrespective of any system that the Secretary may use. That being said, we note that in settlements, the Judge is not *setting* the penalty, but instead, is *evaluating* whether the proposed penalty is part of a fair and reasonable settlement.

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[17] We disagree that reversal of a Judge's denial of a settlement may occur only when "no reasonable Judge would have any grounds for denial under the numerous criteria to be considered in application of the *AmCoal* standard." Slip op. at 18. The Commission has recently, and unanimously, reversed a Judge's denial of a settlement without applying the standard suggested by the dissent. *The Ohio County Coal Co.*, 40 FMSHRC 1096, 1098-1100 (Aug. 2018) (reversing a Judge's denial of the settlement based on his failure to apply the appropriate standard and because his reasoning that "an internal inconsistency in the settlement terms that undermines the parties' agreement" was "unsound").

Primary authority to approve settlements of contested proposed assessments is vested by Congress to the Commission. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1976. While such authority may be delegated to the Judges, the Commissioners retain such full authority to approve such settlements. Accordingly, we find the proffered penalty to satisfy *AmCoal*.

III.

Conclusion

Based upon a careful review of the settlement motion and entire record, we conclude that the settlement is fair, reasonable, appropriate, and in the public interest. Therefore, we vacate the Judge's decision, approve the settlement motion, and assess a penalty of $132.[18]

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

[18] Commissioner Young believes that remand of improper settlement rejections would ordinarily be more appropriate than approval by the Commission, in light of our Judges' experience in reviewing settlements. But we have approved such settlement agreements here, when appropriate. *See, e.g.*, *Solar Sources*, 41 FMSHRC at 600; *Ohio County*, 40 FMSHRC at 1100. In this case, we would be required to remand to a different Judge, who would need to begin the consideration process anew. That fact, and the marginal likelihood that a significantly greater penalty would be assessed by a new Judge on the facts provided by the parties here, compel him to agree with the decision to approve the settlement.

Commissioners Jordan and Traynor dissenting:

American Aggregates of Michigan, Inc. ("American Aggregates") was charged with failing to provide required training to a miner. The parties agreed to settle the case for a $132 penalty (a reduction of more than 93%). The Judge denied the settlement motion. Because we conclude that it was well within the Judge's discretion to refuse to approve such a significant penalty reduction, we would affirm his decision.

We would affirm the decision of the Judge under the abuse of discretion standard we have long applied to review of our Judges' exercise of discretionary authority to approve or deny settlement pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k). We have long held "[t]he judge's front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Knox County Stone Co*., 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission "has stated repeatedly, if a Judge disagrees with a stipulated penalty amount or believes that any questionable matters bearing on the violation or appropriate penalty amount need to be clarified through trial, he is free to reject the settlement and direct the matter for hearing." *Pontiki Coal Corp.*, 8 FMSHRC 668, 675 (May 1986). Thus, if a Judge's approval or rejection of a settlement is "'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012). An abuse of discretion may be found if there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Id.* at 1863 (citing *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) (citations omitted)).

Our precedents governing our proper review of our Judges' discretion to approve or deny settlements is reviewed at length in our dissent in *Hopedale Mining, LLC*, 42 FMSHRC ___, slip op. at 18-22, No. LAKE 2019-0149 (Aug. 28, 2020), issued on the same day as our decision in this case. Though application of those precedents in this case should result in affirmance of the Judge's decision to deny the parties' settlement motion, his decision is nonetheless vacated by the majority. The decision below should have been affirmed as a reasonable exercise of the Judge's discretion. When the government and an operator seek Commission approval of their agreement to compromise a penalty, they have the burden of persuading a Judge exercising reasonable discretionary judgment that the proposed penalty reduction is "fair, reasonable, appropriate under the facts, and in the public interest." *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*").

As a threshold matter, we are obliged to address the majority's decision to discard the abuse of discretion standard, and its assertion that "[t]he standard of review of a Judge's settlement determination is not a deferential one." Slip op. at 7-8, n.9. In fact, the Commission has repeatedly used abuse of discretion review in analyzing Judges' decisions regarding settlement motions. *See, e.g.*, *The American Coal Co.,* 40 FMSHRC 983, 987 (Aug. 2018) ("*AmCoal II*"); *Rockwell Mining, LLC*, 40 FMSHRC 994, 996 (Aug. 2018); *Black Beauty*, 34 FMSHRC at 1869. And abuse of discretion review is, at the core of its essence, a highly deferential standard. *See, e.g.*, *Gall v. U.S.*, 552 US 38, 56 (2017) ("The Court of Appeals gave virtually no deference to the District Court's decision . . . [and] [a]lthough the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an

analysis that more closely resembled *de novo* review of the facts presented . . . ."); *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997) ("In applying an overly 'stringent' review to [a discretionary] ruling, [the Court of Appeals] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 30-31 (1st Cir. 2012) (citations omitted) ("We review a district court's approval of a proposed class action settlement for abuse of discretion. . . . The abuse of discretion standard is highly deferential and 'not appellant-friendly'").

Our Judges have wide discretion to reject the parties' proposal to compromise a penalty, provided the Judge has considered each of these *American Coal* factors, the section 110(i) penalty criteria, and other factors we have held relevant to the discretionary determination.[1] Here, the Judge did just that.

The training standard at issue, 30 C.F.R. § 46.5, requires, in relevant part, that each new miner must be provided "with no less than 24 hours of training." 30 C.F.R. § 46.5(a).[2] Subsection (b) sets forth the general topics that must be covered in the 24 hours of new miner training prior to a miner beginning work at the mine. The settlement motion conceded that the operator failed to train the miner on the topics contained in sections 46.5(b)(4)-(7), which mandate training on:

> (4) [i]nstruction on the **health and safety aspects of the tasks** to be assigned, including the safe work procedures of such tasks, the mandatory health and safety standards pertinent to such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program;
>
> (5) Instruction on the **statutory rights of miners** and their representatives under the Act;
>
> (6) A review and description of the line of **authority of supervisors and miners' representatives** and the responsibilities of such supervisors and miners' representatives; and

[1] These other factors for consideration include the future enforcement value of accepting violations as written, *AmCoal II*, 40 FMSHRC at 989; the possibility of criminal penalties, *Aracoma Coal Co*., 32 FMSHRC 1639, 1641 (Dec. 2010); settlement provisions requiring operator implement personnel changes or training improvements, *AmCoal I*, 38 FMSHRC at 1982; and deterrence, *Black Beauty*, 34 FMSHRC at 1864-65.

[2] The order alleged a violation of this provision – section 46.5(a). It specified that the miner had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine.

> (7) An introduction to . . . **rules and procedures for reporting hazards**.

30 C.F.R. § 46.5(b)(4)-(7) (emphasis added).

The training requirements in section 46.5 are based on the language of the Mine Act. Section 115(a) of the Act requires operators to have a health and safety training program approved by the Secretary. 30 U.S.C. § 825(a). The new miner training requirements in section 115(a)(2) of the Act formed the basis for much of the specific training mandates in 30 C.F.R. § 46.5. The statutory training provision states that each training program shall provide as a minimum that:

> [n]ew miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the **statutory rights of miners and their representatives** under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, **hazard recognition**, emergency procedures, electrical hazards, first aid, walk around training and the **health and safety aspects of the task** to which he will be assigned.

The Mine Act also requires each operator to verify that the miner has received the specified training in each subject area of the approved training plan. 30 U.S.C. 825(c). In addition, Congress was so emphatic about the importance of miner training that it included in the Mine Act a provision that a miner who has not received the requisite training must be deemed "a hazard to himself and to others" and immediately withdrawn from the mine and prohibited from re-entering until the miner has received the required training. 30 U.S.C. § 814(g)(1).

MSHA's original proposed assessment for this violation was $2,007. The Secretary's settlement motion proposed a reduction of the proposed penalty to $132.[3] It was entirely within the Judge's discretion to conclude that the parties had failed to demonstrate that such a dramatic reduction of a penalty imposed for a violation of the critical training requirements outlined above met the *American Coal* standard. We fail to see how this slap-on-the-wrist penalty amount could possibly serve to deter mine operators from future violations of safety standards. We strongly suspect that paying this penalty (which is less than the amount of some traffic tickets) would be less expensive for the operator than the costs involved in properly training this miner. How the public interest in ensuring miner safety is satisfied by this penalty is a mystery. And even if we disagreed with the Judges' conclusions that such a large penalty reduction was not fair or reasonable, we cannot see (and the majority does not explain) how and why these conclusions fall outside the boundaries of the Judge's wide discretion.

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[3] Under the Secretary's penalty regulations in effect at the time the settlement motion was filed, $132 was the minimum amount the Secretary could assess for a violation. 30 C.F.R. § 100.3 (2018). Of course, Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100. *The American Coal Co.*, 40 FMSHRC 1011, 1015 (Aug. 2018).

Our colleagues reverse the Judge's denial of the settlement and approve it. In so doing, they entirely mischaracterize his decision. If one reviewed only their opinion and failed to read the Judge's, the reader would come away with the impression that the Judge's ruling was based almost entirely on his view that the S&S designation should not have been deleted as part of the settlement. *See* slip op. at 8, 9. This gives short shrift to the fact that this dramatic decrease in the penalty – in addition to several other factors – motivated the Judge's denial. In his nine-page decision, he stated three times that the 93.5% reduction in the penalty was troubling. *See* 41 FMSHRC 382, 386 (May 2019) ("While a significant reduction in the proposed assessment amount is not impermissible as part of a proposed settlement agreement, the steep reduction invites closer scrutiny of the facts presented to ensure that the settlement is 'fair, reasonable, appropriate under the facts, and in the public interest,' consistent with Commission precedent"); *see also id.* at 388, 389.

The majority claims that the Judge failed to view the settlement as a whole, but the Judge's own words belie that charge:

> In the present settlement agreement . . . the parties seek to modify the likelihood of occurrence, the severity of injury, the S&S designation, and the negligence of the underlying Order. In addition, the parties seek to reduce the proposed penalty by well-nigh 94%. Almost any future enforcement benefit . . . has been almost completely eliminated. . . . The Secretary asks that I approve a 93.5% penalty reduction, as well as modifications to nearly every portion of the original Order issued for violation of a mandatory training standard, enshrined in the text of the Mine Act, on the basis of admitted facts that bear no interpretation other than the fact that [the operator] violated the Act.

Id. at 388-89.[4]

Abandoning all pretense of "abuse of discretion" review, the majority attempts to persuade us that the settlement deserves approval by convincing us of their own view that the *admitted* lack of miner training was not really that bad.[5] Despite the parties' concession in the settlement motion that the miner "had not received training on all seven subject[s] required by 30

[4] In addition, the Judge explicitly included in his written opinion the section of the Secretary's settlement motion (paragraph 6) setting forth the facts in support of settlement. 41 FMSHRC at 383.

[5] They do not even attempt to explain away the operator's concession that it did not have the appropriate documentation of the miner's training. AA Br. at 6.

C.F.R. § 46.5 including 46.5(b)(4)–(7) (S. Settlement Mot. at 3),[6] our colleagues find solace in the fact that he was drilling ground samples in an open area (slip op. at 9), "removed from the danger of active mining equipment" (*id.* at 11), which, we suppose, leads them to conclude that the lack of training would not be hazardous. In stating that "the parties accepted that the miner had received 19.5 hours of training" (*id.* at 10), they fail to take into account that this was not training pursuant to the mine's approved training program, but instead was OSHA training. They appear to equate OSHA training with mine safety training, despite the fact that the record does not demonstrate that the two are the same. Did not the Judge have discretion to come to a different conclusion?

They also make a legal argument on behalf of the parties – one not included in the settlement motion or in briefs to the Commission – that the operator actually *was* in compliance pursuant to section 46.5(e) ("practice under the close observation of a competent person").[7] Slip op. at 10. They conclude – on the basis of no record evidence – that his work under the supervision of a driller "appear[ed]" to provide him with the precise health and safety aspects of being a driller helper as described in subsection 46.5(b)(4). *Id.*[8] In short, their vigorous arguments for approving the motion run counter to the letter and the spirit of abuse of discretion review of settlements.

Moreover, the Secretary's argument that the Judge erred by discounting the future enforcement value of the modified order barely passes the laugh test. S. Br. at 7. The future enforcement value of an order modified from "fatal" to "lost workdays or restricted duty," from high negligence to moderate, with the likelihood of occurrence changed from "reasonably likely" to "unlikely" and with a deleted S&S designation, can hardly be viewed as a potent weapon of

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[6] We note with interest our colleagues' apparent acceptance of a claim made in the operator's brief (AA Br. at 5) that section (b)(4) training (instruction in the health and safety aspects of the job) was completed (slip op. at 9 n.15) when the settlement motion clearly states otherwise. This, despite the fact that they emphasize a Judge "is not to engage in fact finding," and must analyze the "*submitted facts* in a settlement proposal." *Id.* at 7 (emphasis in original). We question, how, given these constraints, our Judges and the Commission can heed the majority's mandate to "meaningfully consider and assess the factual explanation provided by the parties." *Id.* at 9, n.13.

[7] The majority attempts to conjure a non-existent distinction between the error in stating "a legal conclusion" in a settlement case (slip op. at 8) as opposed to "the right and duty to consider the law," where it chastises the Judge for failing to consider this provision "in evaluating the true character of the offense." *Id.* at 10, n.16. Were the majority decision susceptible to appellate review, such flawed reasoning would not survive scrutiny.

[8] We are at a loss to reconcile this analysis with what our colleagues meant in their *Hopedale* opinion where they claim principles of "party presentation" prohibit a Judge evaluating a settlement motion from looking beyond the facts and explanations presented in the parties' motion. *Hopedale Mining, LLC*, 42 FMSHRC at ___, slip op. at 5-6, No. LAKE 2019-0149 (Aug. 28, 2020).

mine safety enforcement.[9] More importantly, by what measure, other than their own personal views to the contrary, do our colleagues determine the Judge's conclusion with respect to enforcement value of the modified order is outside the bounds of the Judge's discretion?

The majority reverses the Judge's denial of the settlement motion because it concludes that the settlement is "fair, reasonable, appropriate, and in the public interest." Slip op. at 12. However, it fails to demonstrate that there is "no evidence" to support the Judge's decision or that it was based on a misunderstanding of the law.[10] *Black Beauty*, 34 FMSHRC at 1863. Our colleagues reverse the Judge and approve the settlement, not even attempting to comply with or distinguish black letter case law providing our Judge's wide discretion. These precedents mandate an abuse of discretion review of our Judges' application of the multi-factor standard for approval of settlements, which is fundamentally inconsistent with the majority's use of *de novo* review to substitute its preferred conclusions and outcome. The majority decision erroneously forecloses the possibility that on remand, the Judge "(like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Fed. Election Com'n v. Akins*, 524 U.S. 11, 25 (1998). Unfortunately, our colleagues have plainly lost sight of the proper application of the deferential abuse of discretion standard. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 266-67 (1981) (noting that the appellate court "expressly acknowledged that the standard of review was one of abuse of discretion," but chastising it because "the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.").

[9] The Judge properly compared the enforcement value of the modified order with those of the unmodified order and the unmodified citations in *AmCoal II.* 41 FMSHRC at 388-89. The Secretary's argument that the Judge was suggesting that only citations preserved as written have substantial enforcement value completely misreads the Judge's analysis. S. Br. at 7.

[10] The majority states that the Judge's decision was based on a misunderstanding of the law because he found that the admitted facts did not support the deletion of the S&S designation and because he concluded that there was a reasonable likelihood of injury, which goes to the 'gravity' of the violation for consideration under the penalty factors in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Slip op. at 8. Even if these rulings were deemed erroneous, it would constitute harmless error, as the Judge's decision sets forth other well supported grounds for his conclusion the proposed settlement does not meet the *American Coal* standard. But the majority's approach is to reverse the decision below by identifying its disagreement with the application of only one of the numerous criteria used to evaluate a settlement, and then substituting its own judgement to reach its favored result without regard for whether there are other grounds for denying the motion.

Although our colleagues state that the Secretary "acted reasonably" in agreeing to the settlement and that the settlement was a "fair compromise," this is not dispositive. Slip op. at 11. It is simply their personal view. A Judge may, within the Judge's discretion, deny a settlement motion that others might argue is reasonable or fair. But for the Commission to reverse the Judge and approve the settlement, the bar is high – there must be a demonstration that no reasonable Judge would have any grounds for denial under the numerous criteria to be considered in application of the *AmCoal* standard for settlement review. Such a showing has not been made.

In conclusion, we would affirm the Judge's denial of the settlement and remand the case.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2020

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

v.

HOPEDALE MINING, LLC

Docket No. LAKE 2019-0149

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves the review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Hopedale Mining, LLC, regarding four citations, and the Judge's subsequent convening of a hearing rather than ruling on a motion seeking interlocutory review of the denial. 41 FMSHRC 322, 339 (Jun. 2019) (ALJ).

For the reasons that follow, we reverse the Judge's denial of the motion seeking interlocutory review, and vacate that portion of the Judge's decision reaching the merits of the citations. We further reverse the Judge's denial of approval of the settlement motions and approve the settlement.

I.

Factual and Procedural Background

At issue in the proposed settlement are four citations issued to Hopedale on December 4, 2018, at its underground coal mine located in Harrison County, Ohio. All four citations alleged a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.370(a)(1)[2] for failure to follow the mine's ventilation plan. More specifically, Citation No. 8055975 alleged that the operator failed to follow the ventilation plan in an area where the roof bolter was operating because an air

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

[2] Section 75.370(a)(1) provides in part that, "[t]he operator shall develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1).

reading behind a line curtain measured 2,792 cfm rather than the required measurement of 3,000 cfm. Citation No. 8055976 alleged that the operator failed to follow the ventilation plan because the operator failed to drop a tail curtain in an intake entry while cutting into intake air. Citation No. 8055977 alleged that only 19 of 30 water sprays on a continuous miner were operating, while the ventilation plan requires a minimum of 27 of 30 sprays to be operating. Citation No. 8055978 alleged that the roof bolter's vacuum measured only 10 inches of mercury (Hg), while the ventilation plan requires 12 inches.

The Department of Labor's Mine Safety and Health Administration ("MSHA") proposed civil penalties in the sum of $18,093 for the four violations. Hopedale contested the penalties, and the matter was assigned to the Judge.

On March 25, 2019, the Secretary filed a motion to approve settlement stating that the operator agreed to pay $3,339 of the $18,093 penalty proposal total. The penalties agreed to in settlement were calculated in accordance with 30 C.F.R. Part 100 based on agreed upon reduced levels of gravity for two citations and reduced negligence for all four citations. The parties agreed that negligence of three of the four citations should be reduced from moderate to low, that negligence of one of the four citations should be reduced from high to moderate, and that the gravity of two citations should be reduced from highly likely to result in injury to reasonably likely to result in injury.

That same day, the Judge sent an email to the parties stating that she could not approve the settlement as submitted because of the seriousness of the violations and the operator's history of ventilation violations. Mot. for Recon., Ex. B. The Judge thereafter set the matter for hearing on April 24, 2019, and ordered the parties to submit a list of witnesses and exhibits if the matter did not settle. On April 5, 2019, the Secretary submitted an amended motion to approve settlement, providing additional information with respect to each citation.

Five days later, on April 10, the Judge, sua sponte, issued a subpoena directing the MSHA inspector who issued the citations to appear and testify at the hearing on April 24, and to bring materials related to issuance of the citations. Subsequently, Hopedale and the Secretary filed prehearing submissions in response to the Judge's hearing notice, identically stating that they did not intend to present witnesses during the hearing and that the proposed exhibits they intended to introduce were joint stipulations.

On April 17, 2019, the Judge issued an order denying the amended motion for settlement. On April 22, the Secretary filed a Motion for Reconsideration of Denial of Settlement Agreements, or, alternatively, Motion to Revoke Subpoena, or alternatively, Motion to Certify for Interlocutory Review and for Stay Pending Interlocutory Review.[3]

On April 24, the parties and Judge met at the hearing site. The Judge provided the parties with an opportunity to argue about the appropriateness of the settlement and the pending motion prior to the actual start of the hearing. Tr. 5-8, 19, 20-23. The Judge denied the motion for

[3] Hopedale later joined the Secretary's motion for reconsideration and alternative grounds of relief.

reconsideration, but did not rule on the motions pertaining to the subpoena or interlocutory review. The Judge informed the parties that they were expected to call witnesses if they wanted facts in the record and not stipulations. Tr. 27. The Secretary submitted revised stipulations into the record, which were admitted. Tr. 15, 29, 33. Although the inspector was present, the Judge did not ask him any questions. Tr. 39-40. Rather, the Judge dismissed the case on the basis that the Secretary failed to meet his burden of proving the violations. Tr. 39-40.

On June 24, 2019, the Judge issued the decision, vacating the citations and dismissing the case. First, the Judge concluded that prior to hearing, the settlement proposals were rejected because they were not fair, reasonable, appropriate under the facts, or in furtherance of the public interest. The Judge explained that the facts presented in the amended settlement motion and both sets of the joint stipulations were insufficient to support the reductions in penalties proposed. More specifically, the Judge found that the Secretary had failed to prove lower negligence as to the four citations and a lowering of gravity as to two citations. The Judge explained that for each citation, the parties presented insufficient information or "information that had little to no bearing" on the designation of gravity or negligence for which they sought modification. 41 FMSHRC at 325.

Second, the Judge denied the Secretary's motion for reconsideration and its alternative grounds for relief.

Finally, the Judge considered the merits of the four citations. The Judge accepted the agreed upon facts contained in the stipulations, including that the four violations had occurred. However, the Judge concluded that the Secretary had failed to meet his burden of establishing all four violations as alleged in the citations. She then vacated the citations, and dismissed the proceeding.

The Secretary filed a petition for discretionary review, which the Commission granted. The Secretary and Hopedale filed opening briefs contending that the Judge made four legal errors. They contend that the Judge erroneously: (1) convened a hearing that denied the parties the right to seek interlocutory review; (2) issued a subpoena to obtain evidence in connection with settlement; (3) failed to apply or incorrectly applied the standard set forth in *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*"); and (4) vacated the citations even though the parties stipulated that the violations occurred.

For the reasons discussed below, we conclude that the Judge erred in convening a hearing and failed to correctly apply the *AmCoal I* standard.

II.

Disposition

A. The Judge erred in convening a hearing rather than ruling on the motion seeking interlocutory review.

The Commission reviews a Judge's management of a case, including pre-trial rulings, under an abuse of discretion standard. *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007). We conclude that the Judge abused discretion in convening a hearing in this case before ruling on the Secretary's pending motion seeking interlocutory review.

The Judge's error involves in part the timing of key pre-trial rulings under the circumstances of this case. In the Judge's April 17 decision denying the amended motion to approve settlement, the Judge stated that the parties would be given one additional opportunity to explain why the settlement should be approved, but that if the settlement were rejected, the parties should move forward to present witnesses and exhibits.

Five days later, on April 22, the Secretary filed a motion requesting that the Judge reconsider the denial of the settlement agreements. The Secretary's motion alternatively requested that the Judge revoke the subpoena issued to the inspector. As a final ground of alternative relief, the Secretary requested that if the Judge did not reconsider the denial of settlement or revoke the subpoena, the Judge should certify both matters for interlocutory review. The Secretary requested that the proceedings be stayed pending interlocutory review.

The Judge did not reschedule the April 24 hearing in order to first rule on the Secretary's extant motion. Rather, consistent with the Judge's statement in the April 17 order, the parties met at the hearing site on April 24 and were given an opportunity to argue regarding the appropriateness of the proposed settlement. Tr. 5-6. In addition, the Judge permitted the parties an opportunity to argue the pending motion. Tr. 20-23.

Although the Judge again rejected the settlement during the proceedings on April 24, she did not explicitly rule on the motion to revoke the subpoena or the motion seeking certification for interlocutory review. Tr. 18-19, 34-35. Rather, the Judge disposed of the Secretary's motion in the June 24 decision, which also covered the post-hearing merits of the citations.

In the June 24 decision, the Judge denied the motion seeking interlocutory review on the basis that it was moot since the matter had already proceeded to hearing. 41 FMSHRC at 329. The Judge reasoned that, in any event, the questions of whether she correctly denied the settlement motions and issued a subpoena to the inspector did not involve controlling questions of law and that the questions were not "novel" or did not involve "unresolved questions of law." *Id.* at 330.

Commission Procedural Rule 76 describes the requirements for interlocutory review and provides two alternative paths by which parties may gain interlocutory review. Under section 2700.76(a)(1)(i), the Judge may certify that the interlocutory ruling involves a controlling

question of law and that immediate review will materially advance the final disposition of the proceeding. Alternatively, under section 2700.76(a)(1)(ii), if the Judge denies a party's motion for certification of the interlocutory ruling, the party must file a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. 29 C.F.R. § 2700.76(a)(1)(i) & (ii).

The Judge erroneously foreclosed the opportunity for the parties to avail themselves of the protections afforded by Rule 76(a). Even if the Judge determined implicitly that it was appropriate to deny the motion for interlocutory review before proceeding to a hearing on the merits, Procedural Rule 76(a)(1)(ii) requires that the parties be allowed the opportunity to appeal that ruling to the Commission. The issue of whether the issues should be certified for interlocutory review became moot only as a result of the Judge's abuse of discretion in convening the hearing rather than ruling on the motion and allowing the parties to seek interlocutory review directly.

Immediate review of the question would have advanced the final disposition of this proceeding because resolution of the question could have resulted in settlement. The Commission has repeatedly granted interlocutory review of orders denying approval of settlement motions. *See, e.g., Solar Sources, LLC*, 41 FMSHRC 594 (Sept. 2019); *Am. Aggregates of Michigan, Inc.*, 41 FMSHRC (Jun. 2019); *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018); *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"); *Amax Lead Co. of MO*, 4 FMSHRC 975 (Jun. 1982). In such instances, the Commission concluded that the standard set forth in section 2700.76 had been satisfied. *See, e.g, Ohio Cty Coal Co.*, 40 FMSHRC 1096 (Aug. 2018).

The Judge's decision raises further concerns, particularly regarding the longstanding principle of party presentation. It is not appropriate for a Judge to assume a role as an investigating attorney, prosecuting attorney, or defense counsel. This prohibition is underscored by the unanimous decision of the U.S. Supreme Court in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). Justice Ginsburg, in delivering the opinion of the Court, stated it very succinctly:

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw* v. *United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243.

140 S.Ct. at 1579. In quoting Justice Scalia in *Castro v. United States*, 540 U. S. 375 (2003), Justice Ginsburg went on to reiterate the "general rule" that:

> [O]ur system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them

> to relief." *Id.,* at 386 (Scalia, J., concurring in part and concurring in judgment).
>
> In short: "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc)). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

Sineneng-Smith, 140 S.Ct. at 1579.

Our dissenting colleagues, in complete disregard of the controlling law of *Sineneng-Smith*, would mandate Judges to take on the role of supervisory prosecutors. While our colleagues may disagree with *Sineneng-Smith,* it is undoubtedly applicable to "our adversarial system of adjudication" of Mine Act cases.

At the onset of these events, insistence of convening a substantive hearing without affording the parties the opportunity to avail themselves of the process set forth in Procedural Rule 76 was error. Accordingly, we reverse the Judge's denial of the Secretary's motion seeking interlocutory review and vacate that portion of the Judge's decision disposing of the merits of the citations.

We need not discuss at length additional errors – the Judge's issuance of a subpoena for witness at the hearing and dismissal of violations admitted by the operator. Nevertheless, we emphasize that Judges' conduct must conform to the principle of party presentation as reiterated in *Sineneng-Smith*. For the Judge to: schedule an almost immediate substantive hearing, deprive the parties of their right to seek interlocutory review of the denial of the proffered settlement, issue a subpoena for a witness attendance at the rushed hearing, and then cap it off by vacating admitted violations, was the type of "radical transformation of the th[e] case" that the Supreme Court rejected as judicial action that "goes well beyond the pale." *Sineneng-Smith*, 140 S.Ct. at 1581-82. Likewise, we need not discuss at length the Judge's clearly erroneous post-hearing dismissal of citations with respect to which the operator had stipulated its liability.

Thus, we now consider the question presented in the Secretary's petition for discretionary review which should have been the subject of interlocutory review, that is, whether the Judge erred in denying the proposed settlement.

B. The Judge erred in denying the settlement.

Section 110(k) of the Mine Act sets forth the Commission's authority to approve settlements of the Secretary's proposed assessments once contested. It provides:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k). The Commission has explained that "Congress authorized the Commission to approve the settlement of contested penalties . . . 'to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.'" *AmCoal I*, 38 FMSHRC at 1976 (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)). In "effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976.

The Commission and its Judges must have information sufficient to carry out this responsibility. Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include, for each violation, the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). The Commission has recognized that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors. *AmCoal I*, 38 FMSHRC at 1982.

During the review of a proposed settlement, the Judge is not expected to engage in fact finding as she would post-hearing. *See Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties." *Id.* Consideration of facts *as alleged by the parties* is entirely consistent with *Sineneng-Smith.*

Contrary to our dissenting colleagues' misrepresentation, our holding does not "instruct[] our Judges to ignore whole sections of the record before them." Slip op. at 22. It does not find that "Judges may no longer probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Id.* Our holding simply follows our own precedents in a manner consistent with the Supreme Court's unanimous mandate regarding litigation.

We have held that at the pretrial settlement phase of litigation, Judges may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *AmCoal II*, 40

FMSHRC at 991. Hence, any fact finding or legal conclusions at the settlement stage must be on the *facts stipulated to by the parties* in support of their settlement motion. A Judge may request additional facts, if the parties have not provided a sufficient basis for evaluation under the standard we articulated in *AmCoal I.* The Judge, however, may not reject stipulated facts that do not comport with the Judge's personal view of what should or must have happened at the time of the violation.

This settlement, like most, was submitted on facts stipulated by the parties. There was no testimony to review. Under such circumstances, it is unnecessary and inappropriate to make a credibility determination regarding the stipulated facts, directly or indirectly, unless the record before the Judge positively demonstrated that a stipulated fact is not correct.[4]

In prior cases, the Commission has applied an abuse of discretion standard in reviewing the denial of a settlement. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014). Notably, however, in a settlement, the Judge does not weigh conflicting evidence or make credibility determinations. The "facts" are the representations made by the parties in the settlement motion. The issue is whether, given the representations and stipulations of the parties, the settlement meets the Commission's standard for a settlement. Thus, there is no element of support for findings of fact based upon substantial evidence.

If taking those representations into account, the settlement meets the standard we articulated for approval in *AmCoal I* (fair, reasonable, etc.), the settlement should be approved. Although the Commission gives weight to the experience gained by ALJs through the handling of many settlements, the denial of a settlement that comports with the standard we have established is an abuse of discretion, and the Commission may exercise its discretion to accept the settlement. The facts of the settlement come to the Commission in exactly the same form and relevance as before the Judge.

In sum, it is an abuse of discretion to deny a settlement when agreed-upon or stipulated facts satisfy the standard for approval. We must review the facts and the conclusions the Judge draws from those facts against an objective standard, because one of the elements of the standard requires the settlement to be "reasonable."[5] Under the Mine Act, it is the responsibility of the Commission to be the final authority of the compliance of a settlement with the standards we have established.

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[4] For example, the parties' Joint Stipulation 8(f) states, "The section foreman was at the continuous miner as it cut through the E to F Crosscut, but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through." The Decision, on this point, and without examination of actual witness testimony, states, "The argument that the foreman was unaware that the line curtain had not been advanced is wholly unpersuasive and does not comport with the reasonably prudent miner standard of care." 41 FMSHRC at 335.

[5] Consistent with this, we previously recognized that the public interest inquiry is not to determine "whether the resulting array of rights and liabilities 'is one that will *best* serve society,'" but only to show that the resulting "settlement is 'within the *reaches* of the public interest.'" *Armstrong*, 36 FMSHRC at 1103-04 (citations omitted) (emphasis in original).

Although the Judge correctly articulated the *AmCoal I* standard for reviewing proposed settlements, the denial of the settlement motions was based on a misunderstanding of the law and a misapplication of *AmCoal I* and its progeny.

The Judge misapprehended the distinction between the type of factual support necessary to support penalty assessment *after a hearing* with the type of factual support that would satisfy the *AmCoal* standard *before a hearing and before any evidence has been adduced*. That is, the Judge erred by requiring the parties to provide evidence to support findings that would be appropriate after a hearing, rather than during a settlement review.

Indeed, the distinction between how factual support should be handled by the Judge during settlement review versus how a penalty is set after a hearing is set forth in the Commission's procedural rules. During a Judge's consideration of reduced penalties in settlement, a Judge need not make factual findings with respect to each of the section 110(i) factors.[6] *AmCoal I*, 38 FMSHRC at 1982; *AmCoal II*, 40 FMSHRC at 991. Rather, Commission Procedural Rule 31(g) provides that a Judge's decision approving settlement need only "set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). In contrast, Commission Procedural Rule 30(a) provides that in assessing a penalty after a hearing, a Judge "shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act," and that the decision "shall contain findings of fact and conclusions of law on each of the statutory criteria." 29 C.F.R. § 2700.30(a).

In the proposed settlement, the parties provided facts supported by the record with respect to the four ventilation plan violations supporting one-gradient reductions in gravity regarding two of the citations and in negligence regarding all four. In addition, in response to the Judge's statement that the operator had a "significant" history of violations, the parties provided specific facts related to the operator's ventilation plan violation history. Tr. 30-32; Jt. Ex. 2 at ¶¶ 4, 7(a), 8(a), 9(a), 10(a).

Although Hopedale agreed to accept the fact of violation as to all four citations, the parties provided facts supporting the penalty reduction that showed partial compliance with the relevant portions of the ventilation plan. With respect to Citation No. 8055975, the 2,792 cfm air reading taken by the inspector behind the line curtain was 93% of the level required by the plan (3,000 cfm). Jt. Ex. 2 at ¶ 7(f). The parties agreed that the section supervisor's air reading, which was taken just prior to the inspection, showed over 3,200 cfm of air behind the line curtain, and that the inspector's notes confirmed that the foreman stated he had over 3,000 cfm prior to roof bolters installing roof bolts. *Id*. at ¶¶ 7(e), (g).

With respect to Citation No. 8055977, approximately two-thirds of the water sprays on the continuous miner were functional, and the inspector's contemporaneous notes reflected that

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[6] In fact, the Commission amended Rule 31 to delete a requirement that decisions approving settlement must include a discussion of the section 110(i) factors in order "to enhance the flexibility of the judges to approve settlements." *AmCoal II*, 40 FMSHRC at 991 & n.12 (citations omitted).

the water sprays had been checked after the miner completed the third cut of the shift. *Id.* at ¶ 9(g).

With respect to Citation No. 8055978, the parties stated that the inspector's notes reflected that the roof bolter parameters had been in compliance at the start of the shift, and that the roof bolter's vacuum later measured 10 inches of the 12 inches of mercury required under the ventilation plan. *Id.* at ¶ 10(e); Amended Set. Mot. at 5 ¶ 7(d).

Related to the level of negligence, Hopedale also provided facts demonstrating that the violative conditions were not obvious or readily known to the operator. Jt. Ex. 2 at ¶ 7(h); Amended Set. Mot. at 3-5 ¶¶ 7(a), (b), (c), (d). The Secretary agreed to accept such facts in mitigation of the penalties. Amended Set. Mot. at 5-6 ¶ 8.

As to Citation No. 8055975, the parties agreed that "[a]s the continuous miner advances through the section, it moves further away from the source of ventilation, potentially resulting in an air volume reading lower than what is required by the ventilation plan, but at a variation in volume not readily discernable to a miner." Jt. Ex. 2 at ¶ 7(h). With respect to Citation No. 8055977, Hopedale provided that the location of the plugged sprays made it difficult for the miner operator to recognize that the sprays were plugged, and that dust was not observed "rolling" over the miner operator or shuttle car operators.[7] Amended Set. Mot. at 4 ¶ 7(c). As to Citation No. 8055976, "the Secretary agree[d] the section foreman was at the continuous miner as it cut through from E to F but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through." *Id.* at 3 ¶ 7(b). Similarly, Hopedale contended with respect to Citation No. 8055978, that the difference in 10 inches and 12 inches of mercury was not easily detected by the roof bolter operator. *Id.* at 5 ¶ 7(d).

Although Hopedale agreed to accept the S&S designations for all four violations, it provided facts related to a lowering of gravity as to Citation Nos. 8055976 and 8055977, and the Secretary agreed to accept such facts in mitigation of the penalties. The parties agreed that the inspector's contemporaneous notes reflected that the respirable dust parameters were in compliance at the start of the shift. Jt. Ex. 2 at ¶ 9(g). Hopedale provided results of Continuous Personal Dust Monitoring samples that were taken from the shuttle car operators on the section at the time the citations were issued that showed readings below the 1.5 mg standard. Amended Set. Mot. at 3 ¶¶ 7(b), (c). In addition, the Secretary stipulated that he was "aware of no evidence that respirable dust exposures experienced by other miners, including the roof bolters and the continuous miner operator, exceeded the standard." Jt. Ex. 2 at ¶ 8(g).

In concluding that the Secretary had failed to justify the lowering of negligence as to the four citations and the lowering of gravity for two of those citations, the Judge erred in applying an overly-stringent standard. The Judge erroneously considered the proposed penalties in settlement against the section 110(i) factors in a similar manner that would be required *after a hearing*. For instance, in the Judge's April 17 settlement denial, the Judge noted that facts showing no violation of the dust standard with regard to the shuttle car operators did not support

[7] "Rolling" of dust is an observation that can be used to evaluate whether the water sprays are effectively controlling dust. Jt. Ex. 1 at ¶ 9(f).

the reduction because "the continuous miner operator and the roof bolter do not have the same exposure as shuttle car operators." Unpublished Order at 3 (April 17, 2019). In the portion of the June decision considering the merits of the citations after hearing, the Judge similarly reasoned that the likelihood of injury for Citation No. 8055976 should not be modified based upon the shuttle car operators' samples because shuttle car operators do not receive the same or similar dust exposure as the continuous miner operators. 41 FMSHRC at 335.

The Judge also concluded that the levels of negligence should not be reduced in settlement because a foreman had been in the area at the time that the citations were issued. 41 FMSHRC at 328. The Judge appears to make a credibility determination that the foreman's lack of knowledge was not credible, but there is no basis to make such a determination because there is no record to support such speculation.

Moreover, the Commission has considered the absence of a foreman as a factor supporting a reduced penalty in settlement. *Ohio Cty Coal*, 40 FMSHRC at 1098-99 & n.3. The Commission's recognition that the absence of a foreman supports a penalty reduction in settlement does not necessarily lead to the conclusion that the presence of a foreman prohibits the reduction of penalty in settlement, particularly under the facts provided by Hopedale and the Secretary to support the penalties agreed to in settlement.

Similarly, the Judge erred by essentially requiring the parties to prove a particular level of negligence in the context of settlement, much as would be required *after a hearing*. Fact-finding against various legal standards of negligence and gravity is not appropriate during settlement review when no evidence has been adduced, although such fact-finding is required following a hearing on the merits. Rather, during a settlement review, a Judge need only review the proposed penalty reduction to see if it is "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976.

Furthermore, the Judge made a fundamental error in the application of *AmCoal II* in stating that the citations would retain their enforcement value only if Hopedale had accepted them as they had been written at issuance. 41 FMSHRC at 327. Under the Judge's faulty reasoning, any proposed penalty reductions modified in accordance with Part 100 during settlement would have no enforcement value.

Giving "due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects," we conclude that the non-monetary aspect of the proposed settlement, that is, the enforcement value of the citations, is significant. *AmCoal II*, 40 FMSHRC at 989 (citations omitted). Hopedale agreed to accept the fact of violation as to all four citations, that all four violations were S&S, and that all four violations were a result of the operator's negligence. The important nature and quality of the violations has been preserved for enforcement purposes.

As the Commission recognized in *AmCoal I*, "under the Mine Act, violations accepted by an operator in a settlement agreement may be considered as part of the operator's history of violations in the assessment of future civil penalty assessments." 38 FMSHRC at 1984 (citation

omitted). Thus, the four citations have enforcement value in that they may be considered as part of Hopedale's history of violations in the calculation of civil penalties for future violations.

In such future assessments, Hopedale may not benefit from the reduced penalties it paid in settlement. The Commission has explained that the amount of penalties assessed in the context of a settlement may not be used to arrive at penalties assessed in a decision on the merits after a hearing. *Newmont USA, Ltd.*, 37 FMSHRC 499, 506 (Mar. 2015).[8]

The Judge also erred to the extent she concluded that the settlement should not be approved because of the operator's history of violations. In the March 25 denial, the Judge noted in part that the operator had a "significant history of ignoring the ventilation requirements." Mot. for Recon., Ex. B. The Judge later based the April 17 rejection of the settlement in part on "the operator's significant history of similar violations for failure to adhere to ventilation plan requirements." Unpublished Order at 2 (Apr. 17, 2019). The Judge observed that the parties had failed to address that history and attached the operator's two-year history of violations to the order. *Id.* at 2-3. The Judge later incorporated the earlier decisions in the June 24 decision (41 FMSHRC at 324), but did not appear to address the operator's history of violations in the Judge's June evaluation of the settlement.[9]

As previously noted, primary authority to approve settlements of contested proposed assessments is vested by Congress in the Commission. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1976. While such authority may be delegated to the Judges, the Commissioners retain such full authority to find a proposed settlement is otherwise fair, reasonable, appropriate under the facts, and protects the public interest.

Contrary to the Judge's determination, the facts provided by the parties in regard to the operator's violation history supported the penalty reduction agreed to in settlement. The parties submitted facts that: (1) in the two years prior to the instant citations, the operator was cited for violations of 30 C.F.R. § 75.370(a)(1) on 10 occasions, seven of which were not classified as S&S; and (2) during calendar year 2018, only four 30 C.F.R. § 75.370(a)(1) violations were issued prior to the subject citations. Jt. Ex. 2 at ¶ 4. The parties also provided information regarding how often the Hopedale Mine had been cited for the violations that were cited in the subject citations during the prior two years. They stipulated: (1) Citation No. 8055975 - only one previous violation (Aug. 28, 2018); (2) Citation No. 8055976 – no previous violations; (3) Citation No. 8055977 – two previous violations (on April 24, 2017 and on Dec. 18, 2017); and (4) Citation No. 8055978 - one previous violation (Nov. 13, 2017). *Id.* at 2-7 at ¶¶ 7(a), 8(a), 9(a), 10(a). These four citations, and this compliance history, are wholly inconsistent with our

[8] Moreover, since all four violations are S&S, they could be relevant for pattern of violations consideration. *Brody Mining, LLC*, 36 FMSHRC 2027, 2038 (Aug. 2014) (holding that section 104(e) of the Mine Act encompasses S&S violations including non-final orders).

[9] Rather, it appears that the Judge considered the operator's history of violations in reviewing the merits of Citation No. 8055975. 41 FMSHRC at 333. We have vacated that portion of the Judge's decision reaching the merits of the citations.

dissenting colleagues' characterization of the operator as "cavalier – almost indifferent – to the need to comply with these important safety standards." Slip op. at 15.

In sum, the Judge misapplied our precedents governing settlements. The Judge erroneously reviewed the facts submitted by the parties to support settlement against the more stringent standard that applies after a hearing on the merits. The Judge further failed to reconcile the Judge's earlier holding that the operator's history of violations supported rejection of the settlement with additional facts submitted by the parties that supported the settlement. Finally, the Judge erred by concluding that the violations lacked enforcement value because they had not been accepted as written.[10] 41 FMSHRC at 327.

The Commission and its Judges may not look behind the Secretary's decision to settle or behind the decision to choose a particular amount for settlement. *See AmCoal I*, 38 FMSHRC at 1980 ("The Commission does not review the Secretary's *decision to settle*. Rather, the Commission reviews the proposed reduction of civil penalties in settlements.") (emphasis in original); *Tazco, Inc.*, 3 FMSHRC 1895, 1897 (Aug. 1981) (noting that the Commission's and its Judges powers are limited by the Mine Act). Instead, we review the proposed penalty reductions in settlement with the facts submitted by the parties against the *AmCoal I* standard.

Upon reviewing the facts submitted by the parties in the amended motion to approve settlement and amended joint stipulations, we conclude that the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest. Because the parties presented sufficient facts to support the reduced penalties agreed to in settlement, we conclude that remand is unnecessary. *See, e.g., Solar Sources*, 41 FMSHRC at 605.[11]

Our dissenting colleagues cite, with apparent approval, that 99.96% of all settlement agreements were granted in the years 2011 to 2016 – that is, about 1 in approximately every 2,200 motions. Slip op. at 16 n.2. Nevertheless, their dissent would make one think that the exercise of our discretion to grant the settlement places the settlement process on the verge of collapse.

In fact, however, the rarity of disapproval suggests that the defects of a properly-rejected settlement should be self-evident, and easily explained. The Judge's role is as an adjudicator not as an investigator or as a prosecutor. The rejection in this case was contrary to stipulated facts,

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[10] No case would ever be settled on such a literal application of "as written" because accepting all of the Secretary's findings and conclusions would render a reduction in the penalty untenable. Agreeing *in toto* to an opponent's case in chief is not a settlement but a capitulation.

[11] Commissioner Young notes that, in contrast to our decision in *American Aggregates of Michigan, Inc.*, Docket No. LAKE 2018-0340, issued on the same day as our decision in this case, the Judge here did not fail to consider entirely an evidentiary argument made by the operator, which arguably could have been the subject of further questioning on remand. The settlement in this case was a commonplace proposal to reduce negligence and gravity, the usual means through which the parties compromise similarly unremarkable disputes, and remand in this case would be unproductive.

mischaracterized the operator's compliance history, and failed to give weight to the considerable non-monetary value preserved by the settlement. The rejection therefore does not conform to the standards we have established for the evaluation of settlements, consistent with our precedents and the directives of Congress.

III.

Conclusion

For the reasons set forth above, we reverse the Judge's denial of the motion seeking interlocutory review, and vacate that portion of the Judge's decision reaching the merits of the citations. We reverse the Judge's denial of the settlement motions and approve the settlement.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Commissioners Jordan and Traynor concurring in part and dissenting in part:

I.

Introduction

This case involves serious violations of ventilation regulations that could lead to dust exposure. The inspector arrived at the mine and saw that at every phase of mining there was something wrong. When the four violations are reviewed together, it appears that the operator was cavalier – almost indifferent – to the need to comply with these important safety standards. Almost the entire mining cycle was affected – the curtain, the continuous miner, the roof bolter, the air flow.

The original penalty assessment was $18,093. The proposed settlement amount was $3,339. As the Judge noted, this was a major reduction of almost 81.5%.

It is significant that the foreman was present on the section when these violations occurred. It was his job to make sure that the curtain was moved properly, and that the water sprays on the continuous miner were properly maintained. It was certainly not mitigating to allege that the foreman simply was not aware of some of these violations. A "should have known" analysis is reasonable here, and not inconsistent with our caselaw examining the section 110(i) negligence criterion. And the Judge's application of that analysis is not outside the boundaries of her wide discretion. 41 FMSHRC 322, 328 (Jun. 2019) (ALJ).

The Judge concluded that the proposed penalty amount was not an adequate deterrent. She reviewed the facts provided by the parties and concluded that they had not persuaded her to grant the motion.

This is not an abuse of discretion – one must keep in mind that this is an extremely deferential standard. The majority's focus on deciding for themselves whether there is enough there to approve the settlement is far afield from our precedents emphasizing that our Judges have *wide* discretion that may not be reversed by a Commission that simply wishes to substitute its own preferred outcome. This is not consistent with the deference owed a Judge's exercise of discretionary judgment.

In short, the Judge's denial of the motion is supported by the factual record and is the product of a reasonable determination, a determination made within the boundaries of her discretion. Thus, her denial should be affirmed.

The majority decision ends meaningful substantive review of agreements between the government and mine operators to reduce the penalties the government originally proposes in connection with mine safety violations, enabling nearly frictionless and potentially unwarranted reduction of such penalties. The Commission has in multiple decisions recognized that this is not what Congress intended. Our precedents recognize that under the statutory enforcement framework preceding the 1977 Mine Act,[1] the government's compromise of proposed penalties without oversight or transparency had seriously undermined safety enforcement. And that

[1] The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976).

Congress responded in the Mine Act of 1977 by requiring the Commission to review and, only if warranted, approve the Secretary's compromise of a proposed penalty in an agreement to settle an operator's contest of a citation. Yet today, the majority, substituting its view of the case for that of the Judge, finds that she erred by undertaking a meaningful evaluation of the parties' contention that the penalty reduction is justified.

The Commission and its Judges have for decades fulfilled their settlement review responsibility by requiring the Secretary to publicly demonstrate that the penalty reductions are warranted by addressing in his settlement motions, among other things, the amount of the Secretary's original penalty proposal and those facts justifying Commission approval of a lesser penalty. Our Judges have then exercised wide discretion, referencing the section 110(i) penalty criteria and other factors, to determine whether the compromising parties had provided in their motion a full set of accurate facts and information sufficient to publicly demonstrate that the reduced penalty is "fair, reasonable, appropriate under the facts, and protects the public interest." *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*"). *See also* 40 FMSHRC 983, 984 (Aug. 2018) ("*AmCoal II*").

The majority's decision in this case cuts the heart out of unanimous decisions in the *American Coal* case and in other prior precedents governing transparent settlement approval, making major changes to this area of law.[2] First, the majority strips our Judges of the power and responsibility to look beyond the self-serving presentation of select facts and legal conclusions in the parties' settlement motion to determine in their own discretion whether the alleged facts and proffered conclusions, examined in light of the record as a whole, demonstrate the proposed penalty reductions are actually "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. In a sharp departure from settled precedent, the majority prohibits our Judges from assessing whether a penalty reduction the parties attempt to justify by reference to agreed upon modifications to the contested citations is warranted by application of section 110(i) and other factors we have recognized as relevant to our penalty assessment role.[3]

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[2] The majority provides no policy reason or explanation for making such radical breaks with our precedent addressing our obligation to review penalty reductions, such as our decisions in the *American Coal Co.* case and in *Black Beauty Coal Co*., 34 FMSHRC 1856, 1870 (Aug. 2012) (requiring the Secretary to provide such factual support to demonstrate the applicability of the penalty criteria as they relate to the penalties contained in the settlement proposal presented to her for review). This is an especially glaring omission in light of the fact our judges applying this precedent are able to approve 99.96% of settlement motions submitted for their review. *See AmCoal I*, 38 FMSHRC at 1977 n.7 (noting that in a five-year period from approximately 2011 to 2016, Commission Judges approved 38,501 settlements and denied only 17).

[3] Factors we have recognized that a Judge may rely upon to determine in his or her discretion whether the parties' motion demonstrates a penalty reduction is "warranted" include, for example: the future enforcement value of accepting violations as written, *AmCoal II*, 40 FMSHRC at 989; the possibility of criminal penalties, *Aracoma Coal Co*., 32 FMSHRC 1639,

(continued…)

Second, though they do so only implicitly, the majority reviews the Judge's decision on each of the *AmCoal* elements – fairness, reasonableness, appropriateness to the facts, and the public interest – under a *de novo* rather than an abuse of discretion standard. This break from precedent undertakes a nearly total elimination of our Judges' discretion to determine whether a penalty reduction is warranted. And does so in a case where no arguments against such a significant change were litigated, the parties' positions were fully aligned and no party before the Commission presented argument in opposition. In this non-adversarial proceeding, both sides sought the same outcome and the majority delivered it, along with the apparent reversal of the foundational precedents applying section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[4]

While we concur that the Judge erred in vacating the citations, we disagree with the majority's decision to usurp the Judge's discretion by granting the motion to approve settlement.[5] We conclude that the Judge's rationale for rejecting the parties' proposed settlement is consistent with our well settled and deferential standard of review. Accordingly, we would remand this proceeding to the Judge, with instructions to the parties to reconsider their settlement agreement and to file a new motion. If the parties do not agree to settle, and they continue to stipulate to the violations, we would have the Judge assess a penalty (which could necessitate a hearing).

Below, we recount the origin and development of the legal standard our Judges apply for settlement approval decisions and our own standard for review of the same. Then, we highlight how much the majority's decision departs from these precedents, before concluding with an application of those precedents to the facts of this case.

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[3] (…continued)

1641 (Dec. 2010); settlement provisions requiring that the operator implement personnel changes or training improvements, *AmCoal I*, 38 FMSHRC at 1982; and deterrence, *Black Beauty*, 34 FMSHRC at 1864-65.

[4] Commissioner Traynor separately observes that in the *AmCoal* cases, representatives of the regulated community participated as intervenors and a member of Congress as *amicus curiae* in opposition to the Secretary and another operator's arguments in favor of curtailing the Commission's settlement review authority. In similar circumstances, appellate courts on occasion take steps to ensure adversarial presentation. *See, e.g., Beckles v. United States*, 137 S. Ct. 886, 892 (2017) ("Because the United States, as respondent, agrees with petitioner that the Guidelines are subject to vagueness challenges, the Court appointed [an attorney] as amicus curiae to argue the contrary position."). Unfortunately, the Commission in this case did not receive arguments on "the contrary position." And neither party will appeal the Commission's approval of their settlement motion. Thus, the departures from precedent in this case are fully insulated from appellate review.

[5] We concur with the majority's conclusion that the Judge abused her discretion when she convened a hearing without first ruling on the Secretary's pending motion for interlocutory review that was filed pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. However, as we are now providing appellate review, this issue is now moot.

II.

Discussion

A. The Commission and its Judges' Settlement Review Obligation

Once the penalties which the government proposes for mine safety violations have been contested before the Commission, the Mine Act does not permit the government and mine operators to settle or compromise such penalties unless and until they obtain Commission approval. Section 110(k) of the Act provides:

> No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

30 U.S.C. § 820(k). Some of the earliest cases in which the Commission exercised its settlement approval authority under section 110(k) recognized that "[t]he judges' front line oversight of the settlement process is an adjudicative function that ***necessarily involves wide discretion***." *Knox Cty. Stone Co.*, 3 FMSHRC 2478, 2479 (1981) (emphasis added). These early cases emphasized the degree to which we must defer to the reasonable exercise of our Judges' discretion to accept or reject proposed penalty settlements. *See, e.g., Pontiki Coal Corp*., 8 FMSHRC 668, 675 (May 1986) ("the Commission has stated repeatedly, if a judge disagrees with a stipulated penalty amount or believes that any questionable matters bearing on the violation or appropriate penalty amount need to be clarified through trial, he is free to reject the settlement and direct the matter for hearing").

Our precedents have continued to hold that our Judges' wide discretion is a fundamental aspect of our settlement review under section 110(k), observing more recently:

> [The] statutory language [in the Mine Act] ***contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal***. Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be considered in this review.

Black Beauty Coal Co., 34 FMSHRC at 1865 (emphasis added).

In *Black Beauty*, the Commission affirmed that section 110(k) and the Mine Act's legislative history make clear that Congress requires the Commission to scrutinize the settlement of contested penalties "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest." *Id*. at 1862 (citations omitted). In order to carry out that function, the Commission in *Black Beauty* expressly rejected the Secretary's contention that "it has no authority to review the underlying modification of the citation." *Id*. at 1860. Observing that under section 110(i) of the Act, only the Commission has authority to "assess all

civil penalties provided in this Act," *id*. at 1862, the Commission held that "if a Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the [section 110(i)] statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Id*. at 1864.[6]

In addition to holding that a Judge must review the underlying modification of a citation offered as justification for a penalty reduction to ensure, *inter alia*, that it is consistent with the 110(i) penalty criteria, the Commission in *Black Beauty* was also very clear that a Judge had wide discretion to require information from the parties demonstrating the same, holding that its Judges are "clearly authorized by the Mine Act to review a proposed settlement of a contested penalty and to require the parties to submit the factual support necessary for that review." *Id*. at 1860. Thus, the Commission in *Black Beauty* concluded, "[t]he Judge did not abuse her discretion in requiring the Secretary to provide further factual support to demonstrate the penalty criteria as they relate to the subject penalties [and] . . . [o]n remand, the Judge shall ***take such further evidence as she reasonably requires*** to consider the six statutory criteria [in section 110(i)] in reviewing the motions for settlement." *Id.* at 1864, 1869 (emphasis added).[7]

In carrying out the Congressional mandate to oversee and ensure transparent justification of penalty settlements, the Commission and its Judges regularly request that the parties provide additional information – *e.g*., explanations as to how the facts in the record, in light of applicable caselaw, justify the penalty reduction proposed in the motion. Often, depending on how the parties attempt to justify their settlement, such information pertains to the statutory criteria for assessment of civil penalties set forth in section 110(i). *See, e.g., Knox County Stone Co*., 3 FMSHRC at 2480 (stating that "the judge issued to the parties a notice of hearing and pretrial order requiring in two phased responses extensive information relevant to the six penalty criteria specified in section 110(i) of the Mine Act").

After issuing *Black Beauty,* the Commission in subsequent cases faithfully applied its ruling to require Judges to determine that information provided by the parties in light of the record as a whole justifies the proposed reduction in penalty in accordance with the section 110(i) penalty criteria. *See Big Ridge, Inc*., 38 FMSHRC 1348, 1349 (June 2016) ("In light of the factual justifications provided by the parties, we determine that the penalty is appropriate under the criteria set forth in section 110(i) of the Mine Act . . . [and] further find that the terms of the settlement are supported by the record, in accordance with Commission case law."); *see also UMWA, on behalf of Franks v. Emerald Coal Res*., 38 FMSHRC 935, 938 (May 2016) (finding

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[6] The six section 110(i) statutory criteria by which all penalties must be assessed are "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).

[7] Though the majority decision is directly contrary to this, a central and unanimous holding in *Black Beauty*, the majority does not express intent to overrule it either in whole or in part, or identify subsequent authority that does so.

that the information provided demonstrates that a reduction in penalty is appropriate under the criteria in section 110(i)).

In 2016, the Secretary chose *American Coal* "to be the 'test case' for advancing his position that the Commission's authority to review settlements of contested penalties under Section 110(k)… is much more limited than that described in *Black Beauty Coal Co.*" *AmCoal I*, 38 FMSHRC at 1972-73. We issued two unanimous decisions in the *American Coal Co.* case that comprehensively addressed the substance of our Judges' responsibility to obtain sufficient information to decide whether a proposed penalty reduction is warranted and to ensure that the penalty reduction is transparent. To prompt the test case, the Secretary attached to its motion to approve settlement in *AmCoal I* (and subsequently in other cases) boilerplate referencing a unilateral "professional judgment" and a desire to conserve "resources that the Secretary would need to expend in going through a trial" in lieu of the substantive factual support traditionally provided to justify a penalty reduction.[8] *Id*. at 1973-74. The Secretary took the position that section 110(k) review is perfunctory and limited to "whether the proposed settlement (1) is legally sound, (2) is clear, (3) resolves the claims in the penalty petition, and (4) is not tainted by improper collusion or corruption." *Id.* at 1983. The operator agreed.

The Commission rejected the Secretary and operator's position, concluding adoption of their proposed "standard would effectively render section 110(k) meaningless," *id*. at 1983, and "is completely inconsistent with the need for transparency that Section 110(k) was enacted to address." *Id*. at 1984. The Commission, in a unanimous opinion, elaborated on this basis for our decision by reciting key excerpts of the legislative history of section 110(k), as it did in its *Black Beauty* decision, including Congress's finding that under the predecessor to the Mine Act, "to a great extent the compromising of assessed penalties [did] not come under public scrutiny" and that "even after a petition for civil penalty had been filed, settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge." *Id*. at 1975-76 (quoting *Legis. Hist.* at 632-33).

The Commission in *AmCoal I* reaffirmed Congress's clear explanation that "'[b]y imposing [the] requirements' of section 110(k), it 'intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations* are avoided.'" *Id*. at 1976. (emphasis added in *AmCoal I*). It also affirmed "the purpose of civil penalties, [that is,] convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public," where miners, Congress, and other interested parties, "can fully observe the process." *Id*.

The Congressional transparency mandate has always meant the Judge's decision must include a substantive explanation as to how the penalty reduction submitted for approval is (or is

[8] In recognition of the legislative history of the Mine Act, we have held that "for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and collection expenses should play no role in determining settlement amounts." *Black Beauty*, 34 FMSHRC at 1866 (quoting S. Rep. No. 95-181, at 41-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978) ("*Legis. Hist.*").

not) warranted by the facts and legal contentions the parties claim as support for their motion. *See, e.g., Co-Op Mining Co*., 2 FMSHRC 3475, 3475 (Dec. 1980) ("[S]ettlement should not have been approved [where t]he parties' stipulation shows that the alleged violation did not occur."); *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (Jun. 1995) ("[T]he Commission will not disturb a Judge's approval or rejection of a settlement if it is supported by the record, is consistent with the six statutory criteria specified in section 110(i) of the Act for the assessment of civil penalties, and is not otherwise improper."). Referencing its holding in *Black Beauty*, the Commission in *AmCoal I* held "[t]he requirements to provide factual support in the settlement proposal and for the [J]udge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979" and "standards for such factual support may be found in section 110(i)." *AmCoal I*, 38 FMSHRC at 1981. Indeed, the Commission expressly rejected the Secretary's argument that "it is inappropriate for a Judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement" and reaffirmed that the reach of section 110(i) "clearly includes contested penalties that are the subject of a settlement agreement." Id. at 1981-82 (internal quotations omitted).

In *AmCoal I*, we affirmed the centrality of the section 110(i) factors to all penalty assessments, whether they result from contest or compromise. In recognition of our Judges' wide discretion, including our precedents requiring them to consider certain factors outside of section 110(i) penalty criteria when presented in a motion to approve settlement, Judges are not required to "make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing. Rather, the Judge considers such information in the evaluation of whether the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest." *Id*. at 1982.

We affirmed the Judge's rejection of the settlement agreement in *AmCoal I* and remanded the case. The Secretary and operator filed a second settlement motion, which was also rejected by the same Judge. We took review of an interlocutory appeal from that decision in *AmCoal II*. The resulting unanimous decision fully affirmed the above described holdings in *AmCoal I* and *Black Beauty*, including the requirement that "the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal II*, 40 FMSHRC at 991. The Commission also held that a full explanation as to how the Judge concluded that the penalty reduction was warranted serves to protect the "public interest in evaluating whether a settlement should be approved." *Id*. at 987-88. The Judge's decision was vacated for a variety of errors, *inter alia*, a mistaken interpretation of our decision in *AmCoal I* as prohibiting consideration of any factors outside of section 110(i), a failure to consider nonmonetary aspects of the settlement, etc. But, importantly, it was remanded back to him for reconsideration of the settlement motion.

Commission decisions issued contemporaneous with and subsequent to *AmCoal II* have reinforced our Judges' active role in verifying, noting inconsistencies and filling gaps in the factual representations and legal contentions parties make to justify settlement motions. For example, in *The Ohio County Coal Company*, a Judge denied a motion claiming a penalty reduction was warranted because the section 110(i) negligence level should be reduced from "moderate" to "low." 40 FMSHRC 1096 (Aug. 2018). The parties' motion sought to justify the reduction by explaining that a foreman was not present at the time of the violation, pointing out

that the foreman's absence was recorded in the inspector's contemporaneous notes. The Judge denied the settlement for the sole reason that he mistakenly perceived an inconsistency in the facts offered to support the motion that was not adequately explained. The Commission reversed, acknowledging that such inconsistencies are certainly germane to the Judge's analysis, but explaining at length how the Judge misconstrued the facts and concluding in this case the Commission "do[es] not discern an internal inconsistency in the settlement terms that undermines the parties' agreement." *Id.* at 1099.

Recently, the Commission emphatically reaffirmed the authority of our Judges to request additional facts when presented with a settlement motion. In *Solar Sources Mining, LLC*, the Commission stated that "a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties" and that "the Judge *may identify gaps in the parties' explanations or specific information he may need to review and approve the settlement.*" 41 FMSHRC 594, 602-03 (Sept. 2019) (emphasis added).[9]

In sum, we have consistently protected our Judges' exercise of wide discretion in evaluating motions for settlement in light of the record as a whole to determine whether the movants have demonstrated that proposed modifications to the underlying citation are consistent with our caselaw applying the penalty criteria in section 110(i) and the *AmCoal* standard. And that discretion only exists to the extent Commission majorities have deferred to its exercise rather than reversing and substituting their own view as to whether the parties' factual presentation and legal contentions justify the penalty reduction.

B. The Majority Decision is Contrary to Our Precedents.

The majority decision instructs our Judges to ignore whole sections of the record before them when considering whether a settlement motion contains complete and accurate facts and legal contentions sufficient to transparently demonstrate, as the public interest requires, that the penalty reduction is "fair, reasonable and appropriate under the facts." *AmCoal I*, 38 FMSHRC at 1982. Judges may no longer probe gaps or inconsistencies in the explanation offered in support of a settlement motion, yet must now somehow determine whether a penalty reduction is "appropriate under the facts" by relying solely and uncritically on the parties' joint presentation of facts and legal contentions. The decision also eliminates abuse of discretion review in all but name only. It removes our Judges' discretion to determine whether the parties have demonstrated

[9] Additionally, we find it notable that in *Solar Sources*, the Commission examined the totality of the facts as alleged by the parties and found, *sua sponte*, that the parties' proposed settlement was justified in part because two of the citations at issue may have been duplicative. 41 FMSHRC at 594, 603-04 (Sept. 2019). However, in the case at hand, the majority criticizes the Judge for examining the totality of the facts at issue and considering, *sua sponte*, reasons why the parties' proposed settlement may *not* be justified under our caselaw. Slip op. at 8-13. Here, of course, the Judge found that the proposed reduction in negligence was not appropriate because the presence of a foreman in this section of the mine, at the time of the issuance of these four citations, suggests that an agent of the operator either knew or should have known of the violative conditions, which is inconsistent with the "low" negligence the parties agreed to in the settlement motion. 41 FMSHRC at 338.

that a proposed penalty reduction is warranted, by reviewing *de novo* our Judges' application of a multi-factored standard that has long been committed to their wide discretion.

1. Judges must continue to examine whether the proposed penalty reduction is appropriate to the facts of the case and should not be prohibited from doing so.

Our Judges are not required to blind themselves to the full record on their docket or refrain from reasonable legal analysis when evaluating factual and legal claims in the compromising parties' motion that a penalty reduction is "fair, reasonable and appropriate under the facts" by reference to the section 110(i) factors. Rather, they start with the factual allegations in the citation attached to the penalty petition initiating the case as well as the Secretary's initial penalty proposal grounded on those facts. They then look to the parties to provide additional facts and explanations in the settlement motion that could demonstrate a penalty reduction is warranted, often pertaining to the parties' agreement to modify the underlying citation by tinkering with the section 110(i) factors in light of subsequently discovered facts, contextual information or legal uncertainties. The Judge is *not* bound to blindly accept legal contentions the parties make in an effort to demonstrate a penalty reduction is supported by the record viewed in light of the section 110(i) factors.

Our precedents consistently require submission of facts in support of settlement motions. This is not so that the Judge might make formal 'findings of fact' to establish or disprove the violations alleged or any characteristic of such violations. Rather, such facts are essential to any substantive evaluation of the parties' claim that their penalty compromise is warranted under the *AmCoal* standard.[10] And to satisfy the public interest in transparency, a decision to reduce a penalty must include a written explanation as to how such facts demonstrate the penalty reduction is warranted. While no party is required to 'prove' any facts included in the motion to justify the settlement, the Judge does need to meaningfully evaluate (not blindly accept) any claim by the parties that the penalty reduction is justified by modifications to the underlying citation – e.g. deleting an S&S designation, or 'lowering' one of the section 110(i) criteria, such as negligence or gravity. And that judicial evaluation, summarized in the Judge's written published decision, is what "protects the public interest in evaluating whether a settlement should be approved." *AmCoal II*, 40 FMSHRC at 984.[11]

A Judge must actually evaluate – probe for gaps and inconsistencies and not blindly accept – the facts and legal contentions in any settlement motion asserting a penalty reduction is warranted. A part of that evaluation requires a determination of what the parties claim in their

[10] To the extent the majority purports to prohibit our judges from requesting information that goes beyond the factual and legal contentions in the parties' motion, their holding precludes the proper exercise of discretion to require factual support demonstrating the proposed penalty reduction is warranted by reference to the section 110(i) penalty factors, in addition to other relevant criteria, which is directly contrary to our unanimous precedential decision in *AmCoal I*.

[11] A Judge's written evaluation of the parties' factual and legal contentions as to why a penalty reduction is supported by modifications to an underlying citation does not serve the public interest if it uncritically overlooks gaps and inconsistencies with the full record or our case law applying the section 110(i) factors.

motion, i.e., that the penalty reduction is justified because of modifications to the underlying citation, is reasonable and appropriate under all of the facts alleged and provided in the motion, and those facts alleged in the original pleadings. Pursuant to this holding, our Judges often request additional factual support for such modifications, or a full explanation of why they were agreed upon – *e.g.*, recognition of some uncertainty as to the applicability of a certain point of law, reconsideration of the strength of the factual allegations made in the pleadings in light of subsequently discovered information or explanation, or, "a description of an issue on which the parties have agreed to disagree." *AmCoal II*, 40 FMSHRC at 991.[12]

The responsibility to ensure a penalty reduction is reasonable or appropriate under the facts cannot be met by a Judge compelled to ignore gaps in the explanation, including unexplained inconsistencies between the Secretary's version of the alleged facts set forth in the case pleadings and a revised version of facts the parties agree to include in their motion. In settlement review, such gaps and inconsistencies in the factual presentation do not require a full hearing for conclusive resolution, do not implicate the need for testimony to make credibility

[12] Like the majority, we do not consider the Judge's issuance of a subpoena, scheduling a hearing prior to a decision on the parties' motion for interlocutory review, or vacature of the citations. However, the majority claims our Judges may not probe the veracity, consistency and completeness of the facts and legal claims the parties include in their motion to justify approval of their motion, relying in part on the concept of "party presentation" discussed in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). Slip op. at 5-6. But the Supreme Court in that decision expressly observed that the concept of "party presentation" – the idea that Judges should maintain a passive role allowing the parties to develop the factual record and arguments – is a feature of an "adversarial system of adjudication." *Id*. at 1579. Obviously, proceedings under section 110(k) to consider the parties' jointly proposed penalty reduction are non-adversarial – even cooperative. Nothing in *Sineneng-Smith* supplies any coherent rationale for contravening our precedents and the Act's legislative history to curb our Judges' responsibility to ensure that penalty reductions in compromises struck by cooperating parties are both warranted and transparent.

Because *Sineneng-Smith* does not address the unique administrative processes under section 110(k) of the Mine Act, in which Commission Judges review jointly proposed settlement motions to determine if the parties' penalty compromise is warranted, it does not control. It is not even persuasive, given the uniquely non-adversarial nature of proceedings under section 110(k). Claiming otherwise, our colleagues maintain an obvious fiction that section 110(k) proceedings are indistinct from penalty contests, discrimination proceedings and the other types of cases in our "adversarial system of adjudication" under the Mine Act. Slip op. 6. Accepting this claim would require that we ignore that in section 110(k) settlement review cases the interests of the parties before our Judges are totally aligned, and neither engages the other in argument or examination or any of the other tools used in an adversarial system to bring forward truth. Most significantly, neither party rebuts the factual claims and arguments that are jointly presented to our Judges for approval of a penalty reduction in section 110(k) proceedings. They are indisputably non-adversarial and thus *Sineneng-Smith* – the *only* authority the majority cites as justification for its departure from our precedents – is unquestionably irrelevant to interpretation of section 110(k).

determinations, and do not require a final determination of the merits of the citations. Instead, they simply inform the Judge's decision – left to her wide discretion – as to whether the parties have demonstrated that the penalty compromise is fair, reasonable and "appropriate to the facts." And they form the basis of the explanation for approving or denying the penalty reduction that the Judge must include in a written decision. A Judge may request from the parties additional information explaining or providing context to omissions or inconsistencies. Or she might decide that despite gaps or inconsistencies in an explanation regarding one criterion, the proposed reduction is warranted by comparatively complete and consistent factual support relating to another of the section 110(i) factors, or factors outside of those in section 110(i) we have held justify penalty reduction. This is what is meant by wide discretion and is how our Judges have been successfully doing this job for many years.

2. Our Judges must continue to have meaningful discretion to perform "front line oversight" of settlement agreements

The Commission has long held that settlements are committed to the sound discretion of the Commission and its Judges, and that Judges are not "bound to endorse all proposed settlements." *Madison Branch Mgmt.*, 17 FMSHRC at 864 (quoting *Knox County Stone*, 3 FMSHRC at 2480); *see also Wilmot Mining Co*., 9 FMSHRC 684, 686 (Apr. 1987) ("The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing."); *Pontiki Coal Corp*., 8 FMSHRC at 675. We have never expressly overruled or limited these holdings.

Instead, in our latest cases addressing our Judges' discretionary settlement review function, we affirm that the concept of "wide discretion" articulated in our precedents has real substance. We have held:

> A Judge's approval or rejection of a proposed settlement must be based on principled reasons. Thus, the Commission has held that if a Judge's approval or rejection of a settlement is "fully supported" by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but that abuses of discretion or plain errors are subject to reversal.

Black Beauty, 34 FMSHRC at 1864 (citations omitted). Under this formulation, the Commission may not reverse a decision that meets these standards simply because the Judge evaluated the parties' factual presentation and legal contentions differently from the approach preferred by a majority of Commissioners on review. Application of the multifactor *AmCoal* standard – incorporating the section 110(i) and other factors we have held relevant – will generally result in some factors pointing toward one result and others to the opposite result. And nothing in section 110(i) or our caselaw explains the relative weight to be given to them. But they do focus the Judge's analysis. If a Judge has faithfully applied each factor in a manner consistent with our law

and supported by the record, we have held her determination "will not be disturbed."[13] *Id*. By contrast, if the Judge has neglected to apply or erroneously misapplied factors that served as a basis for the decision, the Commission would have a basis for reversal.

But now, today's majority ends *Black Beauty/AmCoal I* discretion, announcing a standard that is "abuse of discretion" in name only, serving to confuse the state of our law and conceal the degree to which the majority decision is incompatible with precedent. Addressing the factual and legal "representation" the parties must include in their motion to demonstrate the penalty reduction is fair and appropriate, the majority states:

> If taking those representations into account, the settlement meets the standard we articulated for approval in *AmCoal I* (fair, reasonable, etc.), the settlement should be approved. Although the Commission gives weight to the experience gained by ALJs through the handling of many settlements, the denial of a settlement that comports with the standard we have established is an abuse of discretion, and the Commission may exercise its discretion to accept the settlement. The facts of settlement come to the Commission in exactly the same form and relevance as before the Judge.
>
> In sum, it is an abuse of discretion to deny a settlement when agreed-upon or stipulated facts satisfy the standard for approval.

Slip op. at 8. Nowhere in this standard of review is there room for a Judge to make a decision with respect to application of the *AmCoal I* elements that differs from the preferred outcome of a majority of Commissioners but is nevertheless insulated by a standard that requires deference to a decision that "is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Black Beauty*, 34 FMSHRC at 1864. Simply put, the majority takes an elaborately obscured path to ending abuse of discretion review, and with it, our Judges' discretion.[14]

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[13] It must be noted in the context of the majority's curbing of our Judges' wide discretion, this phrase, "consistent with our law," means not contrary to any precedential decision of the Commission and reviewing courts, which is very different from "consistent with the views of what our law should be, as espoused by a majority of Commissioners who will review the settlement approval decision *de novo*."

[14] The majority is profoundly confused as to the Commission's role in this and other cases in which we are asked to review the exercise of discretion by one of our Judges. At one point, the majority writes that the "dissent would make one think that the exercise of *our* discretion to grant the settlement places the settlement process on the verge of collapse." Slip op. at 14 (emphasis added). Elsewhere, they write "the *Commission* may exercise *its* discretion to accept the settlement." Slip op. at 8 (emphasis added).

(continued…)

Of course, with the discretion we have long granted our Judges comes a corresponding obligation to fully explain the basis of its exercise. "While Judges have the duty to consider the sufficiency of facts submitted in support of a settlement, the proper exercise of their discretion in doing so requires them to articulate with some particularity any deficiencies against the standard we set forth in [*AmCoal I*]." *Solar Sources*, 41 FMSHRC at 601-02. But the majority has turned the *AmCoal* standard on its head. In *American Coal*, we required our Judges to exercise true discretion to apply each of its elements – fair, reasonable, appropriate under the facts – and upheld their decisions so long as they were supported by the record. If not, or if the Judge misapplied our law in the course of her evaluation, we remanded to the judge with instructions as to how to properly exercise discretion.

Under the majority's approach, the Judge's application of each of these elements and criteria is no longer really a function of discretion. Now, the Judge can be reversed by the Commission, which will substitute its *own de novo* application of any and all elements of the standard. Rather than providing room for discretion and, where error is found, remanding to the Judge for exercise of wide discretion, the Commission now refuses remand as a matter of course, rather than rare exception. This arrogation of power—in this case, undertaking a *de novo* review of the parties' motion to approve a greater than 80% penalty reduction – is not consistent with the Commission's duty when reviewing under the abuse of discretion standard to defer to the Judge's exercise of wide discretion. *See Gall v. United States*, 552 U.S. 38, 56 (2007) ("The Court of Appeals gave virtually no deference to the District Court's decision . . . [and a]lthough the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an analysis that more closely resembled *de novo* review of the facts presented."); *General Electric Co. v. Joiner,* 522 U.S. 136, 143 (1997) ("In applying an overly 'stringent' review to [a discretionary] ruling, [the Court of Appeals] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review.").

The role the majority decision leaves for our Judges is now more clerical than judicial – taking the parties' representations at face value, uncritically approving them, and entering a decision neither party will appeal. Under the majority's newly contrived standard, it does not make sense to speak of our Judges having discretion or to pretend we are engaged in a proper review of such discretion. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." Ronald Dworkin, *Taking Rights Seriously* 48 (Bloomsbury Academic 2013) (1977). True discretion is gone.

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[14] (…continued)

The majority mistakenly believes the question before us on review is whether the Commission *itself* has discretion to approve or deny the settlement agreement, which simply makes no sense in the context of a case where we are called to review the exercise of discretion by the lower court. The confused majority does not appreciate any difference between a case in which the settlement motion is filed initially with an ALJ, in which we review the Judge's exercise of discretion, and an entirely different case – not before us – in which the settlement motion is filed with the Commission, in which case we would exercise discretion and a reviewing Circuit Court would review our decision under an abuse of discretion standard.

C. Pursuant to our Precedents, the Judge Properly Exercised her Discretion to Determine that the Motion Failed to Demonstrate the Penalty Reduction is Warranted.

Each of the four citations alleges that Hopedale Mining failed to comply with its ventilation plan as required by 30 C.F.R. § 75.370(a)(1).[15] The Secretary originally proposed civil penalties totaling $18,093 for the four citations and agreed to settle the four citations for a total penalty of $3,339. The Judge denied the motions to approve settlement, finding that the information provided was not sufficient to support the proposed modifications to negligence and gravity, or the "drastic reduction" in penalty. 41 FMSHRC at 324-26. The Judge further elaborated:

> A full evaluation of the facts set forth in each citation reveals that all of the citations were issued within a relatively short period of time and in the same area of the mine. Each citation was issued for a violation of the ventilation plan and the mine foreman was in the area when the citations were issued. While the Secretary asserts that the negligence of three of the violations should be reduced from moderate to low largely because the foreman or an "agent of the operator" was not aware of the violations, the facts paint a different view . . . . [T]he mine foreman is held to a higher standard and the negligence inquiry centers around whether he "knew or should have known." For all of these reasons, I deny the Secretary's request to reconsider the denials of settlement.

Id. at 328. In addition, the Judge found that the operator had a history of not complying with its ventilation plan and the Secretary failed to explain his cursory assertion that the granting of the settlement motion would aid his future enforcement efforts. *Id.* On the whole, the Judge found that the parties failed to carry their burden to demonstrate that the proposed reduction was appropriate under the facts, reasonable, fair or in the public interest. To summarize with more specificity, the Judge ruled as follows with respect to each citation:

Citation No. 8055975 alleges that the operator failed to ensure that adequate air was provided behind the line curtain in the active section where the roof bolter was operating. In settlement, the parties proposed reducing the penalty from $1,031 to $462, the penalty that results from reducing the negligence attributable to the operator from "moderate" to "low."[16] The

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[15] Section 75.370(a)(1) requires the operator to "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1).

[16] According to the Secretary's own Part 100 guidelines, "moderate negligence" occurs when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances" and "low negligence" occurs when "the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3(d). While a Commission Judge may consider the Secretary's Part 100 regulations, the Secretary's definitions are not controlling. Commission Judges undertake a traditional negligence analysis.

Judge found that the parties failed to justify that a lower negligence designation was appropriate and reasonable, in part, because a foreman was present and "an operator's actual or constructive knowledge is a key component of a negligence evaluation. *Id*. at 333 (citing *Ohio Cty. Coal*, 40 FMSHRC at 1099). The Judge determined the parties' presentation failed to demonstrate how it would be "reasonable" and "appropriate to the facts" that a penalty reduction is warranted by the alleged absence of a foreman who should know that as mining advances farther from the ventilation source, adequate steps must be taken to ensure continued compliance with the ventilation plan. *Id.* at 333-34; *cf. Black Beauty*, 34 FMSHRC at 1863 n.6 ("[T]he explanation provided by the Secretary for a reduction in penalty related to a preshift violation was inconsistent with the inspector's description of the violation described in the order, but the inconsistency was not explained in the motion.").

Citation No. 8055976 alleges that the operator failed to remove the tail curtain in the entry intake, exposing miners to respirable coal dust and silica. In settlement, the parties proposed reducing the penalty from $12,321 to $1,666, reducing the alleged negligence from "high" to "moderate" and reducing the alleged gravity of the violation. The parties stated that a reduction in negligence is justified because the condition only existed for a short time and the foreman on the section was unaware of the violation. Assessing whether the proposed modifications are "reasonable" and "appropriate under the facts," the Judge found that these contentions do not support the modifications to the citation, citing the serious dangers presented by dust exposure and the high standard of care the Mine Act requires of a foreman. A reasonably prudent foreman would have taken proactive measures to ensure that the curtain was properly adjusted.[17] 41 FMSHRC at 335. The Judge found that paying approximately *14%* of the originally proposed penalty in settlement of this citation was not fair, reasonable, or in the public interest.

Citation No. 8055977 alleges that the continuous miner had plugged water sprays; 19 out of 30 water sprays were plugged. The ventilation plan requires a minimum of 27 sprays to be operational. In settlement, the parties proposed reducing the penalty from $3,710 to $749, reducing the negligence from "moderate" to "low" and reducing the gravity of the violation. The parties stated that management was not aware of the violative condition and the personal samples taken by the shuttle car operator showed that dusts levels were in compliance despite the violation. The Judge concluded that the compliant dust levels were not relevant to the operator's negligence in failing to abide by the water spray requirement. Furthermore, she noted that the record demonstrated that a high number of sprays were clogged, it took almost an hour to clean and repair and that a supervisor was in the area.

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[17] In her analysis the Judge accepted the stipulated facts that the foreman was both present and unaware of the violative conditions. The Judge then considered how these stipulated facts affected the negligence attributable to the mine operator. The Judge recognized that a foreman may be considered to have constructive knowledge of conditions. It is a reasonable basis for her rejection of the parties' *legal* contention that the reduction in negligence was justified because the foreman had no *actual* knowledge of the violative conditions. The Judge certainly did not engage in any credibility determination as the majority inaccurately alleges. *See* slip op. at 8 n.4.

Citation No. 8055978 was issued for failing to maintain the roof bolter vacuum as required by the ventilation plan. To settle the citation, the parties proposed modifying the penalty from $1,031 to $462 and reducing the negligence from "moderate" to "low." The parties contended that a reduction in negligence was justified because the violation did not exist at the beginning of the shift, it was hard to detect a violation, and an agent of the operator was not aware of the violation. The Judge determined the parties failed to explain how these contentions warranted a penalty reduction given that a foreman was present and should have known of the violation.

We find no abuse of discretion in the aforementioned analysis. Rather, we conclude that the Judge properly considered the facts proffered by the parties *as alleged* and found that those alleged facts and the parties' explanations and legal contentions did not demonstrate under the *AmCoal* standard that the proposed modifications to the citations were "reasonable" "fair" or "appropriate under the facts" and therefore failed to demonstrate the reduction in penalty is warranted. *Cf. Black Beauty*, 34 FMSHRC at 1863 n.6 ("[T]he motion to approve settlement lists the same facts for the reduction in penalty for each roof control and accumulation violation, but the motion does not include facts necessary to evaluate whether a reduction in negligence was appropriate, or an explanation for why the number of persons affected by the violation should be modified."). The Judge's conclusions are consistent with the *AmCoal* standard of review, "fully supported by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Black Beauty*, 34 FMSHRC at 1864 (internal quotations omitted).

III.

Conclusion

The majority provides no good reason for overturning the central holdings of at least three decisions in the *Black Beauty* and *AmCoal* cases – to completely rework a settlement review system that has performed admirably well. Principles of *stare decisis* are considered binding absent a strong reason, which should be provided in any opinion that changes or overrules precedent. Yet no policy or other reason is to be found in the majority's opinion explaining even one of multiple departures from our binding precedents. Other than an inapt quote from a Supreme Court case and misinterpretation of a few select quotes from precedential decisions to arrive at conclusions contrary to those decisions' essential holdings, the majority offers no reason – and certainly not a strong one – for departing from the rules of *stare decisis* to upend a demonstrably successful review process.

We are concerned that the majority's substantial yet unexplained departures from our precedent compromise the Commission's role as a check against abuses of power. Congress intended for Commission Judges to ensure that the information provided in support of settlement agreements is true and correct and that a penalty reduction based upon such information is warranted under the appropriate criteria. Without this oversight, it is possible a government Solicitor seeking to conserve litigation expenses and an operator looking to reduce penalties could cooperate to arrive at a mutually acceptable penalty amount and then backfill factual stipulations that would support modifications to the underlying citation needed to arrive at the

desired Part 100 recommendation. Congress enacted the unique provision at section 110(k) for the express purpose of ensuring the Commission would not be a mere rubber stamp, opening the door to the type of deal-making and unwarranted settlements that originally concerned them enough to delegate the Commission oversight authority in section 110(k).

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

August 21, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. WEVA 2015-0509 WEVA 2015-0632
THE MONONGALIA COUNTY COAL COMPANY	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), and involve two orders which the Department of Labor's Mine Safety and Health Administration issued to what is now the Monongalia County Coal Company ("MCCC").[1] We granted the Secretary of Labor's petition for discretionary review challenging a Judge's determinations that (1) belt line accumulations, which violated 30 C.F.R. § 75.400, were not attributable to an "unwarrantable failure" to comply with the standard (Order No. 8059209); [2] (2) those accumulations did not constitute a "flagrant

[1] The orders in dispute identified the operator as Consolidation Coal Company. Prior to the date of the orders, CONSOL Energy, Inc. sold all the issued and outstanding common stock of Consolidation Coal Company to Ohio Valley Resources, Inc. Thereafter, the name of the mine at issue was changed from the "Blacksville No. 2 Mine" to the "Monongalia County Coal Mine;" the Mine ID number, 46-01968, remained the same. After the purchase, the mine operator's name was changed to "The Monongalia County Coal Company."

[2] Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The unwarrantable failure terminology, taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

violation" under the Mine Act;[3] and (3) a related violation of the preshift examination standard, 30 C.F.R. § 75.360(a)(1),[4] was not the result of an "unwarrantable failure" (Order No. 8059212). 40 FMSHRC 1234 (July 2018) (ALJ).

On August 11, 2020, the Secretary and MCCC jointly moved the Commission to approve their agreement to settle the case. Pursuant to the agreement, both unwarrantable failure designations would be reinstated, while the Secretary would drop his appeal of the accumulations violation being found to not be "flagrant." The parties also agreed that the penalties assessed by the Judge in his decision, which have already been paid by MCCC, would stand: $60,000 for Order No. 8059209 and $22,200 for Order No. 8059212.

[3] Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act enacted in 2006 amended section 110(b) of the Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty as follows:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means 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).

[4] Section 75.360(a)(1) provides in pertinent part that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." Belts are required to be examined either once per shift or as part of a preshift exam for, among other things, "accumulations of combustible materials." *See* 30 C.F.R. § 75.362(a)(3)(iii) & (b).

Having considered (1) the terms of the settlement agreement; (2) the substance of the Judge's penalty assessments; and (3) that on October 29, 2019, MCCC entered into bankruptcy proceedings, we conclude that the settlement agreement "is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016). Consequently, we grant the settlement motion.[5]

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

[5] Our grant of the motion renders moot the Secretary's pending motion to strike parts of the response brief MCCC filed with the Commission.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 4, 2020

THEODORE OESAU, Complainant, v. ROGERS GROUP, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2019-0276-DM Case No. SC-MD-2019-07 Mine: Greenbrier Quarry Mine ID: 03-00855

DECISION

Appearances: Chris W. Burks, WH Law, PLLC, 1 Riverfront Place, Suite 745, North Little Rock, AR 72114

Margaret S. Lopez, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., 1909 K. Street , N.W., Suite 1000, Washington, D.C. 20006

J. Carin Burford, Ogletree, Deakins, Nash, Smoak, & Stewart, P.C., 420 20th Street North, Suite 1900, Birmingham, AL 35203

Before: Judge Simonton

This case is before me upon a complaint of discrimination filed by Theodore Oesau against Rogers Group, Inc. ("Rogers Group" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(3).[1] Oesau contends that Rogers Group violated the Mine Act when it terminated his employment because he engaged in activity protected under section 105(c). Rogers Group maintains that Oesau was terminated for violating the company's No Harassment Policy by uttering racial slurs on numerous occasions and by trying to get the mine's plant manager fired because he is Black.

A hearing was held on February 18–21, 2020 in Little Rock, Arkansas. Based on my full consideration of the testimony and exhibits presented at hearing, the stipulations of the parties, my observations of the demeanor of the witnesses, and the parties' post-hearing briefs, I find that Rogers Group did not violate the Mine Act when it terminated Oesau.

[1] In this decision, the joint stipulations, transcript, the Complainant's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. C–#," and "Ex. R–#," respectively. References to the transcript include numerals I, II, or III to denote the volume of the transcript referenced, since each day's transcript is independently paginated.

I. STIPULATIONS

In its February 7, 2020 prehearing submission, Respondent Rogers Group submitted the following joint stipulations[2] on behalf of the parties:

1. Respondent is and, at all times relevant to this proceeding, was the operator of the Greenbrier Quarry, Mine ID number 03-00855.

2. The Greenbrier Quarry is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. At all times relevant to this proceeding, products of the Greenbrier Quarry entered commerce, the operations of products thereof affecting commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Rogers Group is an operator, as the term "operator" is defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

5. The Federal Mine Safety and Health Commission properly has jurisdiction over this proceeding.

6. Complainant Theodore Oesau ("Complainant" or "Oesau") was previously employed by Rogers Group.

7. Oesau is a miner, as defined in the Mine Act at 30 U.S.C. § 802(g).

8. Rogers Group terminated Oesau's employment, effective March 14, 2019.

9. Oesau timely filed with MSHA a discrimination complaint under Section 105(c) of the Federal Mine Safety and Health Act ("Mine Act"), 30 U.S.C. § 815(c), after his employment was terminated.

10. MSHA conducted an investigation, pursuant to Section 105(c) and issued a determination letter to Oesau, dated May 23, 2019, stating that "MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence that a violation of Section 105(c) occurred."

11. On June 14, 2019, Oesau timely filed a Complaint with the Federal Mine Safety and Health Review Commission, under Section 105(c)(3).

12. After receiving an Order to Show Cause, Rogers Group filed an Answer to the Complaint on October 30, 2019.

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[2] A fourteenth stipulation concerning the parties' agreement regarding admissibility of exhibits has been excluded due to a dispute regarding the admissibility of Exhibits C–11 and C–13, which arose at hearing.

13. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case pursuant to Section 105 of the Mine Act, 30 U.S.C. § 815.

II. FINDINGS OF FACT

A. Background

Respondent Rogers Group, Inc. operates the Greenbrier Quarry ("Greenbrier" or "mine"), a sandstone open-pit quarry in Greenbrier, Arkansas. Jt. Stip. 1; Tr. II.12–13. The mine has approximately 9–10 employees. *See* Tr. I. 100, 190, 276.

Complainant Oesau worked for Rogers Group from March 2012 until March 2019. Respondent's Post–Hearing Br. at 4; Jt. Stip. 8. He was employed as a light duty mechanic, and was responsible for performing preventative maintenance on equipment. Tr. I. 200–01, 278. Oesau is not a certified mechanic. Tr. I. 197. In addition to preventative maintenance, he also worked as a backup equipment operator and performed upkeep, housekeeping, and landscaping duties as needed. Tr. I. 201. Oesau worked at Greenbrier, but also rotated to three other Rogers Group locations: El Paso, Cabot, and Conway County. Tr. I. 129. Because he worked at numerous locations and was responsible for a variety of tasks, Oesau's schedule varied each day, but he generally worked at Greenbrier a couple of days per week. Tr. I. 134, 206–07.

Prior to March 2018, Oesau's direct supervisor was the former Greenbrier plant manager.[3] Tr. I. 208; Tr. II. 111. According to Rogers Group's western division vice president, that former manager had poor attention to detail and poor safety results, and left the company because he failed a drug screen. Tr. I. 111–12. Following the former Greenbrier manager's departure, the Cabot location's plant manager became Oesau's direct supervisor. Tr. I. 206, 208.

Respondent promoted a management trainee from its El Paso location to fill the Greenbrier plant manager position in March 2018. Tr. I. 273; Tr. II. 109. Relevant to this case, he is a Black person originally from Botswana. Oesau described his relationship with this plant manager as "fine," and said that the only issues the two of them ever had concerned safety. Tr. I. 135–36, 188. The plant manager said that Oesau came to him with safety concerns "infrequently." Tr. I. 317. This case largely centers on the relationship between Oesau and the Greenbrier plant manager.

At various times prior to his termination, Oesau submitted a number of safety complaints to Rogers Group management, both orally and in writing. *See* Tr. I. 140–41. At one point, he began collecting safety complaints from other miners. Tr. I. 140–41. At that time, allegations surfaced that suggested Oesau had, on multiple occasions, used racially derogatory, offensive language to refer to the Greenbrier plant manager. Tr. III. 99–102.

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[3] Other than Complainant Theodore Oesau, the names of individuals who testified at the hearing or were named in testimony, briefs, or exhibits are not disclosed in this decision pursuant to an approved Protective Order issued on January 30, 2020. Tr. II. 8.

As set forth in more detail below, Rogers Group investigated both Oesau's safety concerns and the claim that he had uttered racial slurs in the workplace. Respondent determined that the employees at Greenbrier did not have any outstanding or unaddressed safety concerns and confirmed that multiple miners had heard Oesau use offensive, racist language and that Oesau was intent on getting the manager fired. Oesau was thereafter terminated for violating the company's No Harassment Policy.

At the hearing, Oesau asserted his belief that he was in fact "terminated for filing safety issues against" the plant manager. Tr. I. 127. He claimed that he never made any sort of race-based comments about the plant manager or any other coworkers. Tr. I.185–87, 269.

B. Oesau's Safety Complaints

At hearing, Oesau testified about a number of safety concerns he had regarding the Greenbrier Quarry. He claimed that the plant manager was always in a hurry to get the operation moving faster and was content with only partially fixing things so that equipment could keep running. *See, e.g.* Tr. 190.

Oesau testified about specific events, practices, and pieces of equipment that he felt posed safety hazards at Greenbrier.[4] He first testified about a drop-axel water truck, which he and another mechanic had previously tagged out of operation because it was under construction and had a suspension issue. Tr. I. 127–29, 215. He claimed that the miner he found operating the truck told him that the plant manager authorized the removal of the tags from the truck. Tr. I. 127. The plant manager denied directing anyone to remove a tag. Tr. I. 303; Tr. III. 75, 81. On cross-examination, Oesau confirmed that an outside mechanic had examined the truck with the other Greenbrier mechanic while Oesau was off-site. Tr. I. 215–16. The truck operator later testified that it was the other Rogers Group mechanic who removed the tag from the water truck, and that his impression was that the other mechanic talked to Oesau on the phone before doing so. Tr. II. 253–54.

The second issue Oesau discussed at hearing concerned a "980H loader" that was "popping in and out of gear." Tr. 131. Another former Rogers Group employee who operated the loader prior to leaving the company testified about this issue as well. Tr. I. 43–44. He said that the plant manager encouraged him to run the loader despite the issue, but then clarified on cross-examination that the plant manager did not "make" him run it. Tr. I. 44. He also testified that the plant manager had an outside mechanic come out to Greenbrier to examine the shifting issue and fix it, but it would sometimes act up again after being fixed. Tr. I. 52. Oesau too acknowledged that the plant manager had a mechanic come and look at the problem, but said initially that as far as he knew, nothing had been done to fix the problem. Tr. I. 132. He later contradicted that position and confirmed that the outside mechanic would work on the issue, think it was solved and then it would come up again. Tr. I. 224. The plant manager testified that they had difficulty

[4] These safety issues are recounted here in the order in which they arose in Oesau's testimony. The exact dates of specific events are not all well–established by witness testimony. Such dates are not necessary to determining the outcome of this case.

replicating the problem when outside mechanics came to troubleshoot, but that he took the machine out of service when the issue persisted. Tr. I. 295; Tr. III. 92–93.

Oesau also testified about his concerns with the way in which material was dumped off the high wall and onto a pile. Tr. 132–33. He suggested that dumping material off the side of a high wall that has never been driven on or packed posed a hazard because of its inability to support the weight of the equipment being driven on it. *See* Tr. I. 133. He further implied that operators were dumping too close to the high wall. *See* Tr. I. 133–134. Oesau was not present at the mine when this occurred. Tr. I. 228. When asked about this issue, the Greenbrier plant manager acknowledged that an operator had raised this practice as a concern and stated that they went to look at the area and came up with a solution to allow the operator to safely approach it. Tr. I. 294–95.

Another safety issue Oesau raised was an electrocution that occurred at Greenbrier. Two months after being electrocuted on the job, the affected miner mentioned the incident to Oesau. Tr. I. 138. Oesau then told his supervisor, the manager at the Cabot location, who had not previously heard about the incident. Tr. I. 138–39. The Greenbrier plant manager asserted that though he did not communicate with the Cabot manager about the incident, he did report it to upper management shortly after it happened. Tr. I. 349, 353.

Oesau also testified about a haul truck at the mine that had a broken seat. Tr. I. 139–40. He said two miners at Greenbrier came to him with the problem, and the three of them went to the Greenbrier plant manager to discuss it. Tr. I. 139. According to Oesau, the plant manager said "it'll be alright," and one of the miners then went on driving the truck despite the broken seat. Tr. I. 140. The plant manager testified that the seat normally allows an operator to adjust how the seat "floats" depending on work conditions and other factors, and the issue was that the seat had not been adjusting properly. Tr. III. 90. He also said that he made sure the operator was comfortable driving the truck, and that he ordered a replacement seat. Tr. III. 90. Before the replacement seat arrived, the operator came back to the plant manager and reported that he was no longer comfortable operating the truck. Tr. III. 90. The plant manager said that another miner then operated the truck until the new seat arrived since the faulty seat still performed for that miner's weight class. Tr. III. 90.

At the hearing, Oesau further testified that he had concerns about flat struts in the 325 haul truck, the same truck that had a broken seat. Tr. I. 147–48. Oesau reported that the condition was the result of the truck being overloaded. Ex. 4, p. 1. However, the plant manager testified that this could not be the case, since a front strut was at issue, which would indicate speeding around a curve rather than overloading. Tr. III. 146. Oesau called in an outside mechanic to fill up the struts, and the plant manager did not interfere with getting that work done. Tr. I. 227–28.

Oesau complained about a parking brake issue in the haul truck, too. Tr. I. 225; Ex. 4, p. 3. The truck's brake pads were replaced, but Oesau said the outside mechanic who replaced the pads said that the rotor was warped and also needed to be replaced. Tr. I. 226–27; Ex. 4, p. 3. According to Oesau, the plant manager did not allow the mechanic to put in a new rotor. Tr. I. 226–27. The plant manager testified that the outside mechanic came several times to work on the brakes. Tr. III. 85–86. Over the course of multiple visits, the brake pads were adjusted, the the

locking mechanism was replaced, and the brake pads were replaced. Tr. III. 86. The plant manager stated that the mechanic recommended the rotors be replaced, too, since they were causing the brake pads to wear prematurely. Tr. III. 86. However, because the mechanic confirmed there were no safety implications, the plant manager decided to wait to replace the rotors. Tr. III. 86. He confirmed that the mechanic tested the brakes after each visit to ensure that they worked properly. Tr. III. 86–87.

Next, Oesau testified that a sensor repair completed on a W–600 loader's joystick was insufficient to fix its problems and asserted that the joystick should have been fully replaced. Tr. I. 229; Ex. 4, p. 4. The plant manager testified that he had called the mechanic in to look at the issue, but since it was a few days before they could get out there, Oesau looked at the machine before the outside mechanic did. Tr. III. 83. Oesau had ordered a new joystick assembly, but once the outside mechanic came out and saw it, that mechanic did not think the entire thing had to be replaced. Tr. III. 83–84. For that reason, the plant manager returned the joystick Oesau had ordered. Tr. III. 84.

Finally, Oesau alleged that a miner had not been properly task trained to operate a piece of equipment at the mine. Tr. I. 230. He did not ask the miner in question or the plant manager about the training, but said that the two people qualified to do so told Oesau that they had not task trained the miner yet. Tr. I. 230–31. Oesau believes the Mine Safety and Health Administration (MSHA) cited Rogers Group for this. Tr. I. 231. The plant manager testified that the miner was task trained on the equipment prior to Oesau's complaint. Tr. III. 96–97. The miner's training records support this assertion. Ex. R–JJ.

After witnessing what he believed to be numerous safety issues at the mine and feeling that nothing was being done about them, Oesau went to his direct supervisor, the manager of the Cabot location, with his concerns. Tr. I. 140. Oesau testified that his supervisor directed him to compile a written list of his concerns and to get written statements from other miners at Greenbrier to document their concerns about the issues. Tr. I. 141. Oesau did this, and assembled a list documenting the haul truck's flat struts, broken seat, and faulty brakes, as well as the loader's joy stick issue. Ex. C–4, p. 1–4. His document included a statement from one other miner, who complained about the loader's joystick, overloaded haul trucks, and the plant manager's insistence on continuing operations when lightning is striking too close to the plant. *Id*., p. 5–9.

Complainant's counsel called four other former Rogers Group employees to testify about safety issues. Tr. I. 41–123. One of these employees never worked at the Greenbrier location. Tr. I. 119. All had some friction in their relationships with the Greenbrier plant manager. While some of these witnesses testified about safety concerns that Oesau also complained of, it appeared that they were essentially called to imply a pattern that shows employees who go over the plant manager's head to report safety concerns end up getting fired, just like Oesau. However, none of the four former employees ever filed discrimination complaints against the company. In large part, they testified about issues at other mine locations or facts that are otherwise unrelated to this matter. In the interest of clarity, I have elected not to summarize their testimony here.

C. Oesau's Harassing Remarks

Respondent maintains that Oesau was fired for racial harassment in violation of the company's No Harassment Policy. In particular, Respondent asserts that he was fired for using racial slurs when referring to the Greenbrier plant manager—which clearly constitutes racial harassment under the policy. At hearing, Rogers Group called multiple witnesses to testify about the comments.

1. Miner A

One miner ("Miner A"), who himself is Black, credibly testified that he heard Oesau make racially offensive statements on multiple occasions. The first time was in May 2018, when Miner A had only been at Greenbrier for a few weeks. Tr. II. 264. After a morning safety meeting, Miner A recalls Oesau say, in reference to the plant manager, "That black ass nigger monkey. I ain't doing nothing he tell me to do. He don't know nothing he talking about."[5] Tr. II. 263–64. About two hours later, Oesau came up to him and apologized, and Miner A told Oesau to apologize to the plant manager, not him. Tr. II. 265.

A few weeks later, Miner A took a truck to Oesau to be fixed. Tr. II. 256, 266–68. Miner A testified that he told Oesau "[the plant manager] told me to bring the truck up here for you to fix the door," and that Oesau replied, "I'm not going to fix on that nigger's truck." Tr. II. 257, 267. Feeling bad, Miner A left and fixed the door himself. Tr. II. 257–58.

The third time, Miner A again brought a truck to Oesau, this time for an antifreeze leak. Tr. II. 268. Oesau first said he was busy, and Miner A "waited, and waited, and waited." Tr. II. 268. When Miner A then said that the plant manager had him come up there to fix the issue, Oesau said, "I'm not fixing anything for that nigger," and Miner A drove off. Tr. II. 268.

Miner A did not report the harassment at first because he did not want Oesau to lose his job. Tr. II. 268. However, by the third instance, he realized that Oesau really meant what he said, and felt that Oesau was "too comfortable" using that offensive language—Miner A "just couldn't take it" anymore. Tr. II. 263, 268, 272.

When Oesau attempted to collect a written statement from him about the plant manager allegedly putting miners in danger, Miner A told Oesau that he did not want to be involved. Tr. II. 258–59. Because he felt as if Oesau and two other miners were blindsiding the plant manager by trying to get him fired for things that were not true, Miner A went to the plant manager to tell him about Oesau's attempts to get miners to write up safety complaints. Tr. II. 260–61. At that time, he also told the plant manager about the racial slurs Oesau had used when referring to him. Tr. II. 261.

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[5] Reluctantly, I recount the racial slurs articulated at the hearing in order to provide an accurate, uncensored account of the testimony.

2. Miner B

A second miner ("Miner B") testified he heard Oesau use racial slurs several times. The first instance was before a morning safety meeting, when Oesau used the "n" word to refer to the plant manager. Tr. II. 318. Then, in the shop on another morning, Oesau used the slur again. Tr. II. 319. Miner B told Oesau that that was not "the best thing to be saying" since they had the plant manager and Miner A, who are both Black, working at the mine, and added that it was disrespectful to say in front of anybody. Tr. II. 319. Miner B also testified that Oesau had said "monkey" on three or four separate occasions, and that he figured Oesau was referring to the plant manager each time he said it. Tr. II. 320–21.

Miner B did not report the comments right away because he thought that Oesau might stop using that language. Tr. II. 319. However, after the second time he heard Oesau use the "n" word in the shop, Miner B called the plant manager after work to tell him about the racial slurs as well as Oesau's attempts to collect safety violations against the plant manager. Tr. II. 326–28. Regarding the safety violations, Miner B said that another miner had approached him on behalf of Oesau and told him that Oesau wanted to "get a list of safety violations to try to go against [the plant manager], to try to get him fired." Tr. II. 328. Miner B told the other miner that he was not going to do that, and testified that he felt it was wrong because the plant manager had never done anything to put any of the miners at risk. Tr. II. 328–29. Miner B said the plant manager was "surprised that somebody was trying to go after him" and told Miner B that he would take care of it. Tr. II. 329–30.

3. Greenbrier Plant Manager

The plant manager testified that four miners told him Oesau was going around collecting safety complaints in an attempt to get him fired. Tr. I. 323–24. In addition to Miners A and B reporting to him about the slurs and collection of safety complaints, the plant manager said a third miner also called him about the safety complaints. Tr. I. 324. The plant manager then called a fourth miner to see if he knew anything about it. Tr. I. 324. After hearing from the miners, the plant manager sent an email to his supervisors in upper management with an attached document detailing the issues. Tr. I. 328. In pertinent part, the attachment reads as follows:

> Information given below is as given to me by those who took the liberty to inform me in the spirit of confidence and would like to maintain anonymity:
>
> On Thursday, March 21st 2019[6], Ted Oesau came to Greenbrier quarry to perform some PMs on our equipment. During the course of the day he approached some of my employees individually to notify them that [the Cabot manager] had instructed him to compile all events in which I asked/forced them (my employees) to work unsafely or put them in uncomfortable/hazardous situations. It was mentioned that

[6] This date is incorrect. The document should say February 21, 2019. The email this attachment accompanied is dated February 25, 2019, and the Thursday preceding the date of the email was February 21, 2019. The plant manager also acknowledged the typo at hearing. *See* Tr. III. 109.

> Ted assured those he spoke to that he was going to take the information directly to [the division vice president] to purge me. When Ted approached some individuals they refused to be a part of his agenda, however, ["Miner C"] continued to persuade everybody to join him and Ted on this mission. Everyone on the crew except for ["Miner D"] declined [Miner C]'s attempt. [Miner D] allegedly agreed to join forces with Ted Oesau and [Miner C].
>
> Friday morning, first employee approached me to warn me to the situation that was brewing. Throughout the day on Friday and Saturday the rest of my team called me to warn me of this. . . .
>
> Two of my employees remarked that Ted had used hateful words against me in the past, calling me a "black monkey" and a "nigger". These words were said in front of other employees in my absence.

Ex. R–X, p. 3.

The plant manager also recalled a conversation he had with Oesau's supervisor, the Cabot manager,[7] after Oesau was fired: "he told me that he personally has heard Ted call me a nigger, previously, and he coached Ted to never use that language ever again during his employment with Rogers Group." Tr. I. 334.

D. Rogers Group Investigations

Both before and after the Greenbrier plant manager sent the email about Oesau's apparent attempt to get him fired, Rogers Group upper management conducted investigations into Oesau's various safety complaints. The western division vice president testified at hearing about these investigations. After initially becoming aware of issues between Oesau and the Greenbrier plant manager in December 2018, he held a meeting in his office in January 2019.[8] Tr. II. 36, 114. In that meeting, the division vice president, the Arkansas production manager, the Greenbrier plant manager, and Oesau met to discuss safety concerns as well as communication issues between Oesau and the plant manager. Tr. II. 36–37. At hearing, the division vice president could not remember which safety issues in particular were discussed at the January meeting. Tr. II. 38.

A second meeting was held in the division vice president's office in February 2019. Tr. II. 39. At that meeting, Oesau claimed that tags were being taken off of a water truck and it was being operated when it was tagged out. Tr. II. 119–20. After that meeting and after receiving Oesau's list of complaints from the Cabot manager, the division vice president went to Greenbrier to look into the safety issues. Tr. II. 122–25. He talked through the complaints with the plant manager and went through and investigated each complaint himself. Tr. II. 125–26.

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[7] Unfortunately, Oesau's direct supervisor was not called to testify at the hearing.

[8] According to a timeline submitted by Complainant, this meeting occurred in either late November or early December, not in January. Ex. C–6, p. 2. Though the date of the meeting is not established, this discrepancy does not impact the outcome of this case.

The division vice president believed that the issues between Oesau and the plant manager had something to do with the transition from the old Greenbrier plant manager to the new one—they had different management styles. Tr. II. 114–15. He testified that, to him, it seemed that the main problem between them was communication, and that both Oesau and the plant manager seemed willing to work together going forward after each meeting in his office. Tr. II. 115–18.

Following the Greenbrier plant manager's February 25, 2019 email about Oesau's offensive statements and attempts to collect safety complaints about the plant manager, the division vice president directed the Arkansas area manager[9] and general manager of central Arkansas operations to begin an investigation. Tr. II. 131; Ex.13, p. 1. The area manager did not testify, but he did author a memo which recounts the investigation and the events leading up to it. Ex. R–Y. It explains that, on March 11, 2019, he and the general manager:

> Both traveled to Greenbrier to interview all hourly employees on site. Each employee was brought into an individual interview to determine if they had been required to work in an unsafe manner, to ask how they felt the safety culture was, determine if the crew had received appropriate training, and to determine if they had been part of or witnessed anyone participating in derogatory conversation regarding supervision or coworkers. After having detailed conversations with all personnel on site it was discovered that 3 employees had witnessed Mr. Oesau calling [the plant manager] racially slanderous names. It was also found that only ["Miner E"] felt that there could be a safety issue at Greenbrier, but during conversation it was also discovered that he had never been asked to or forced to work in an unsafe manner.

Id., p. 3. The general manager's testimony at hearing was consistent with this. He recounted that he and the area manager went to Greenbrier unannounced and interviewed employees one at a time. Tr. II. 175–76. They asked the miners whether they had any safety concerns and if they "had heard any obscene, or vulgar, or derogatory, or racial type slurs in and around the operations." Tr. II. 176. The interviewers did not name Oesau in their questioning, but the notes they typed up later states that two of the three miners who had heard racially charged language "offered up, without coercion, Mr. Oesau's name." Tr. II. 176, Ex. R–Z, p. 2.

Two of the witnesses at hearing were miners that had been questioned in the March 11, 2019 interviews. Miner A recalled being asked if he had heard anything inappropriate said around the mine. Tr. II. 271. Without naming Oesau, Miner A told the investigators about the three instances in which he had heard racially offensive language at Greenbrier. Tr. II. 271, 291. Miner B testified that when he met with the investigators, they asked him about the safety culture around the plant, and he told them that they had no problems with safety. Tr. II. 331. When asked generally about racial harassment, Miner B told the investigators that Oesau had been making racial comments. Tr. II. 331.

[9] This individual was also referred to at hearing as the production manager for Arkansas. Tr. II. 172.

The investigators did not interview the plant manager as part of their investigation into Oesau's offensive remarks. Tr. I. 328–29. The two interviewers took handwritten notes and later typed them into a document at the request of Rogers Group's Health and Safety director. Tr. II. 176–78.

E. Oesau's Termination

The division vice president reviewed the results of the investigation with the area manager, and they agreed that Oesau should be terminated. Tr. II. 137–38. Neither the Greenbrier plant manager nor the Cabot plant manager was involved in the decision to terminate Oesau. Tr. II. 137–38, 139–40; Tr. III. 110. Oesau was called into the division vice president's office and informed of his termination on March 19, 2019. Tr. I. 150; Jt. Stip. 8. Oesau estimated that his termination occurred approximately three weeks after turning in his list of safety issues to his supervisor. Tr. I. 150.

Oesau filed a 105(c) discrimination complaint with MSHA on March 26, 2019. Ex. C–1, p. 1. On May 23, 2019, MSHA notified Oesau that the agency had investigated his complaint and determined that there was insufficient evidence to support his allegations. *Id*. p. 6–7. Oesau then initiated this case on June 14, 2019. Jt. Stip. 11. Testimony and documentary evidence was presented at a hearing held in Little Rock, Arkansas on February 18–21, 2020, and the parties thereafter submitted briefs and replies to the court.

III. DISPOSITION

Oesau's termination is the subject of this case. He claims that he was fired because he raised concerns about various safety issues. Rogers Group argues that his safety complaints are not protected activity because Oesau had no reasonable, good faith belief that his safety allegations were true. Respondent maintains that it did not terminate Oesau because he engaged in protected activity, but rather because he violated the company's No Harassment Policy by using offensive, racist language on multiple occasions in front of other employees at work and because he attempted to lure other employees into a racially-motivated campaign to get the Greenbrier plant manager fired.

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). Under the traditional *Pasula-Robinette* framework, the Commission has held that a miner alleging discrimination establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981).

If a miner establishes a prima facie case, the operator may rebut that case "by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving by a preponderance of the evidence that, although part of its motivation was unlawful, the adverse action was also motivated by the miner's unprotected activity *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id*.; *Pasula*, 2 FMSHRC at 2799–2800.

A. Prima Facie Case

It bears repeating that to make out a prima facie case of discrimination, a complainant need only present "evidence *sufficient to support a conclusion* that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Driessen*, 20 FMSHRC at 328 (emphasis added). "This burden is lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner*, 33 FMSHRC at 1065. For the reasons that follow, I find that Oesau has met this initial, low burden and established a prima facie case of discrimination.

1. Protected Activity

Complainants bear the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2797–2800; *Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920–21 (2016). A miner has engaged in protected activity if they (1) have "filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) are "the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) have "instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) have "exercised on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

It is undisputed that Oesau raised numerous safety concerns while employed at Rogers Group. Though Respondent does not dispute the existence of Oesau's safety complaints, it has attempted to show that Oesau's complaints were made in bad faith and are thus unprotected by the Mine Act. *See* Respondent's Post-Hearing Brief (Resp. Br.) at 40–62. Rogers Group argues that Oesau "ignored open and obvious information readily available to him showing that there was no hazard." Resp. Br. at 41. Respondent has also endeavored to undermine Oesau's safety concerns by highlighting that he is not a certified mechanic. *Id*.

Unquestionably, raising safety concerns at work constitutes "protected activity" within the ambit of section 105(c). *See, e.g.*, *Riordan*, 38 FMSHRC at 1922 ("Raising safety concerns is paradigmatic 'protected activity' within the meaning of section 105(c)(2)."). For the purpose of this decision, it is immaterial whether the safety hazards Oesau feared actually existed. Oesau had no duty to avail himself of information that could have dispelled his concerns prior to submitting his complaints, and thus his failure to do so does not amount to bad faith. Oesau has provided sufficient evidence to show that he had legitimate concerns about various practices and

equipment at Greenbrier and that he communicated these concerns to his superiors. Ex. C–4, p. 1–4; *see* Tr. I. 140–41, 145–49. Accordingly, I find that Oesau engaged in protected activity and has satisfied the first element of the prima facie case.

2. Adverse Action Motivated by Protected Activity

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). The question of whether an employer's action qualifies as "adverse" is thus decided on a case by case basis. *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984).

Oesau alleged in his initial MSHA complaint and briefly mentioned at hearing that he was denied a raise in early February 2019. Ex. C–1, Tr. I. 268. This allegation was scarcely discussed at hearing and Oesau has failed to proffer any evidence that establishes he was ever denied a raise. There is no dispute, however, that Respondent discharged Oesau on March 14, 2019. Jt. Stip. 8. This indisputably constitutes adverse action, as "[d]ischarge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act." *Driessen*, 20 FMSHRC at 329. Having established both protected activity and an adverse action, Oesau must demonstrate that there is evidence sufficient to support an inference of a causal nexus: that his protected activity motivated Rogers Group to terminate his employment.

A miner need not provide direct evidence of an operator's discriminatory motive, but may provide "circumstantial evidence . . . and reasonable inferences drawn therefrom may be used to sustain a prima facie case." *Turner*, 33 FMSHRC at 1066–67 (quoting *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982)). In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: "(1) the mine operator's knowledge of the protected activity; (2) the mine operator's hostility or 'animus' toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator's disparate treatment of the miner." *Cumberland River Coal Co.*, 712 F.3d at 318; *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–12 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). I will examine these factors in turn.

a. Knowledge of Protected Activity

Rogers Group does not dispute that Oesau submitted safety complaints. Multiple miners, including Oesau, testified about the way in which Oesau complained to his supervisor about various issues he had with situations and equipment at the mine. As discussed above, I do not agree with Respondent that Oesau's allegations were all in bad faith and thus not protected activity. I find that Respondent had knowledge of Oesau's protected activity.

b. Animus or Hostility Toward the Protected Activity

Oesau argues that an email sent by the Rogers Group Arkansas area manager to the division vice president definitively establishes Respondent's animus toward his complaints. Complainant's Post-Hearing Brief at 15–16. With regard to Oesau's alleged racially charged derogatory comments the email states that,

> [b]y itself this conduct could be forgivable, with a last chance, if there was acknowledgement from Ted and remorse regarding the conduct. The problem with the conduct is that it is aggravated by Ted's concerted attempt to organize the labor force. Again, if this concerted activity was isolated and the only issue there could be consideration given. Given the circumstance that both acts indeed occurred, the likelihood of being able to salvage Ted's job is slim to none.

Ex. C–13, p. 2. After considering all of the evidence and testimony, I do not agree with Oesau's assertion. However, for the purpose of establishing a prima facie case, I will accept that this email is at least sufficient to support an inference that there was some animus towards Oesau's collection of safety complaints from other miners, which is related to his protected activity.

c. Timing

Oesau was terminated within a matter of weeks after he submitted a list of safety complaints to his supervisor. *See* Tr. I. 150. The Commission does not apply "hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive." *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Given the objectively short amount of time between the protected activity and the adverse action, I find that a coincidence in time exists in this case.

d. Disparate Treatment

Oesau has not provided any evidence of disparate treatment. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." Chacon, 3 FMSHRC at 2512. While the company has not experienced any other allegations of racial harassment, it had previously dealt with a sexual harassment allegation. Tr. I. 141–42. In that instance, as in this one, Rogers Group conducted an investigation, confirmed the allegations were true, and terminated the employee for violating the No Harassment Policy. Tr. I. 142.

Because Oesau's experience was consistent with that of the other employee who violated the policy, I find that he was not subject to disparate treatment.

e. Conclusion

Bearing in mind that the prima facie burden is minimal, I find, in light of the above factors, that Oesau has put forth evidence that "*could* support an inference" that the adverse action was motivated, at least in part, by his protected activity. *Turner*, 33 FMSHRC at 1066

(citation omitted). As discussed below, however, I find that Rogers Group has successfully rebutted Oesau's prima facie case.

B. Rebuttal

The operator may rebut the miner's prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Turner*, 33 FMSHRC at 1064. As discussed above, Rogers Group argues that no protected activity occurred because Oesau made his safety complaints in bad faith. Because I disagree, and find that protected activity has occurred, I turn to Respondent's additional argument that Oesau's termination was in no part motivated by his protected activity.

Respondent asserts that "the evidence firmly establishes that Oesau used racist language at work, including highly offensive words and phrases that any person would recognize as bigoted, potentially threatening, and unacceptable in any context." Resp. Br. at 65. I agree. The language Oesau used is a flagrant violation of Rogers Group's No Harassment Policy, which explicitly lists "racial comments, slurs, [and] off-color jokes" as examples of harassment. Ex. R–B, p. 1. The policy also states that, following an investigation, "[i]f harassment is found, disciplinary action, up to and including termination, will be taken against the harassing employee." *Id*., p. 3.

Through the testimony of multiple witnesses, Rogers Group established that Oesau made race-based, offensive comments at Greenbrier when referring to the Black plant manager. The evidence also shows that Oesau endeavored to get the plant manager fired by attempting to collect safety complaints about the plant manager. Oesau's counsel points to the area manager's email referencing "Ted's concerted activity to organizer the labor force" as "smoking gun" evidence of discrimination under the Mine Act. Tr. I. 19; Ex. 13, p. 2. However, I find that the email, especially when analyzed in light of the extensive testimony on this issue, actually just shows that Rogers Group management was concerned about both Oesau's racist comments and his racist motivation likely behind the attempt to get the plant manager fired.

The evidence is clear: Rogers Group fired Complainant for racial harassment. Respondent's decision to terminate Oesau was not motivated by his protected activity, but rather by his violation of the No Harassment Policy and Rogers Group's interest in enforcing that policy and ensuring that employees have a workplace free of harassment. I find that Rogers group has successfully rebutted Oesau's prima facie case.

C. Affirmative Defense

If an employer cannot rebut the prima facie case, "it nevertheless may defend affirmatively by proving that is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Turner*, 33 FMSHRC at 1064. In asserting this defense, "[i]t is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity . . . . The employer must show that [it] did in fact consider the employee deserving of discipline for engaging in the

unprotected activity alone and that [it] *would* have disciplined him in any event." *Pasula,* 2 FMSHRC at 2800.

Ample evidence shows that Rogers Group was motivated to discipline Oesau for the harassing remarks he made at work. The company's harassment policy, its internal emails admitted into evidence, its past discharge of a harassing employee, and testimony of its management officials make this clear. In fact, when asked by the court about why the company elected to "go straight to termination, as opposed to some other discipline," Rogers Group's director of human resources confirmed that it was "the egregious nature of the comments that were made" that merited going straight to termination. Tr. III. 209.

As discussed above, I find that Rogers Group terminated Oesau based on unprotected activities alone. However, even assuming that Oesau's protected activity partially motivated Rogers Group's decision to terminate him, Respondent still did not violate section 105(c) of the Mine Act because it has proven that it would have terminated Oesau for his harassing conduct alone. Rogers Group has thus proven its affirmative defense.

IV. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by Theodore Oesau is hereby **DISMISSED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[10] For the foreseeable future, Federal Mine Safety and Health Review Commission (FMSHRC) notices, decisions, and orders will be sent only through electronic mail. Because FMSHRC will not be monitoring incoming physical mail or faxes, parties are encouraged to submit all filings through the agency's electronic filing system. If you are not able to file through our electronic filing system, please send an email copy and we will file it for you.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 4, 2020

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of WILLIAM R. WHITMORE, Complainant v. YAGER MATERIALS CORP., Respondent	TEMPORARY REINSTATEMENT Docket No. KENT 2020-0116-DM Mine: Riverside Stone Mine Mine ID: 15-00081 Docket No. KENT 2020-0117-DM Mine: Riverside Stone Mine Mine ID: 15-18549

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Thomas J. Motzny, Esq., Nashville, Tennessee, for the Secretary of Labor

Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Whitesburg, Kentucky, for the Complainant

Arthur M. Wolfson, Esq., Fisher & Phillips, LLP, for the Respondent

Before: Judge William B. Moran

This matter is before the Court on an application for temporary reinstatement ("Application") filed by the Secretary of Labor on behalf of Complainant William R. Whitmore pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("the Act"). The application, which was filed on July 9, 2020, seeks reinstatement of the Complainant "to the position he held immediately prior to the discharge, or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties." Application at 3. A video hearing on the Application was held on July 29, 2020. For the reasons that follow, the application is granted. Respondent is **ORDERED** to immediately reinstate the Complainant, William R. Whitmore, to the position he held immediately prior to his discharge, or to a similar position, at the same rate of pay, and the same shift assignment, and with the same or equivalent duties.

SUMMARY OF THE EVIDENCE

As set forth below in greater detail, on the basis of credible testimony presented during the July 29, 2020 video hearing, the Court finds that the Complainant established several instances of protected activity by voicing safety complaints, that the Respondent had knowledge of those safety complaints, and that the Complainant's suspension and termination occurred soon after those safety complaints were made. The Respondent's defense did nothing to dispel the credibility of the Complainant's safety complaints, but rather spoke to an alternative basis for the Complainant's firing. That defense did not, in any way, tend to show that Mr. Whitmore's claim was frivolous. Accordingly, the Court finds that the Mr. Whitmore's Complaint was not frivolously brought and on that basis that the Complainant is to be immediately reinstated to his former position.

HEARING TESTIMONY AND FINDINGS OF FACT[1]

Mr. William Whitmore, the Complainant, testified first. Whitmore began his employment with Respondent, Yager Materials Corp, on September 30, 2019. His job title was "maintenance manager."[2] Tr. 19-20. The name of the mine for both its underground and surface operations is Riverside Stone. Tr. 60. He described his job duties as "[s]ite-wide maintenance management for the underground mine and the surface mine. … [which entailed] [a]ll of the plant equipment that processes the aggregate and also all of the mobile equipment that produces the aggregate." [3] Tr. 20. It is noted that, among his work experience, Whitmore is an MSHA certified instructor and has done a lot of miner safety training in the course of his 36 years of mining experience. Tr. 62. Whitmore was terminated (fired) from his job at Yager on April 29, 2020. *Id.*

Whitmore testified that, during January 2020, while he was on medical leave, he anonymously reported safety incidents, which occurred prior to that leave, to MSHA through an online method provided by MSHA to report such matters. Tr. 21-24. The incidents he reported through the MSHA online method involved inadequate training and improper documentation of such training, relating to mobile equipment operators. *Id.* Upon his return to work, though no one accused Whitmore as the source for the anonymous complaint, Bryan Ory, the site's general manager, who was Whitmore's immediate supervisor at Yager, acted differently toward him. Tr.

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[1] This section of the Court's decision and order represents a more detailed summary of the hearing testimony and is derived from what the Court determined to be the salient evidence for the limited nature of the issue to be resolved in this hearing. It is not intended as a substitute for the entirety of the transcript. The parties were all provided with a copy of the transcript on the morning of July 30, 2020, the day following the hearing.

[2] According to Whitmore, "Yager Materials never had a maintenance manager for that site since 1954, approximately, whenever they started mining there." Tr. 64. Once Carmeuse acquired Yager, they determined it "necessary to have a maintenance manager on-site," and he was the first maintenance manager hired for that mine. Tr. 64-65. It was Whitmore's understanding that Bryan Ory, the site's general manager, had worked at Yager for some 32 years. Tr. 65.

[3] Yager Materials, at both its surface and underground facility, produces limestone. Tr. 78. The operation is located in Battletown, Kentucky. Tr. 20.

21, 25. Whitmore presented credible examples to support his claim that Ory treated him differently upon his return to work following his medical leave. *E.g*. Tr. 28.

During April 2020, Whitmore raised safety issues with Yager. The first was his concern that a contractor working on-site was not complying with the mine's COVID-19 restrictions and protocols. Tr. 28. Those protocols were put in place by Yager's parent company, Carmeuse. *Id.* He emailed his concern about this to Jenn Carnley, Respondent's office manager, and a human resources employee, described as a "HR generalist." Tr. 29. Several other Yager personnel were included in Whitmore's email to Carnley, including Bryan Ory. Ex. C 1 and Tr. 30. Following that, Whitmore had a face-to-face discussion with Ory about this issue. Tr. 31.

A separate instance occurred on April 17, 2020. This involved the Complainant's assertion that there was a near miss accident while he was driving in the company's pickup truck as he came upon a haul truck using the same road. According to Whitmore's account which, *for purposes of this hearing*, the Court finds to have been credible, a 70 to 75 ton haul truck was speeding on the road and upon hitting a dip in the road, large pieces of aggregate (limestone ore) fell off the haul truck, narrowly missing hitting Whitmore's vehicle. Tr. 32. Following that event, Whitmore drove to Ory's office and related the event to him, including his suggestions to remedy the safety issue he perceived. Tr. 33. Whitmore contended that Ory acted disinterested about the matter. Whitmore also emailed others within the Respondent's chain of authority about this event. Tr. 34-35 and Ex. C 2, C 3, C 4, and C 5.

Whitmore then identified another safety concern he raised with Yager. This also occurred in April 2020. Tr. 41, Ex. C 6. This matter involved maintenance concerns and his recommendation that equipment with safety issues should be taken out of service until repairs were made. In conjunction with this issue, Whitmore created a spreadsheet identifying safety deficiencies with particular pieces of equipment. This spreadsheet included some handwritten additional safety concerns involving inadequate steering control on loaded trucks. Ex C 6, with Whitmore's signature on the exhibit and dated April 21, 2020. That document was created entirely by Mr. Whitmore, including the handwritten notes on it. Tr. 76-77. Whitmore testified, again the Court finding his testimony to have been credible, *in the context of this temporary reemployment proceeding*, that he reported this to Ory, placing it on his desk. Tr. 41-42. The report Whitmore created was not an isolated instance, as he presented similar such reports "every couple of weeks." Tr. 42. The next day Whitmore found the spreadsheet returned to his desk, with no comment from Ory. Tr. 43. Whitmore informed the Court that reviewing the preshift notes and deficiencies were part of his job. Tr. 44. Whitmore provided credible detail about the nature of the safety issues he identified in that spreadsheet. Tr. 45-50.

Following the safety concerns expressed by Whitmore, as described above, on April 23rd, that is to say, two days after the spreadsheet was presented to Ory, Whitmore was instructed by Lisa Wellman to be in Ory's office for a telephone conference that day. Tr. 51. During that conference Wellman raised questions about Whitmore's interaction with a new employee, who was identified for purposes of this hearing and with the agreement of all parties only as "Mike." Whitmore was Mike's direct supervisor. Tr. 77. Focusing upon the only issue of potential pertinence to this proceeding was the Respondent's interest as to whether Whitmore had spoken to Mike on the issue of whether the new employee's probationary period could be extended.

Whitmore denied ever discussing that subject with Mike. [4] Tr. 55. The upshot of the telephone conversation was that Whitmore was informed he was suspended for three days, "[p]ending an investigation of conversations [that he, Whitmore] had with Mike." *Id.* The suspension began on April 23rd. Tr. 56. Subsequently, Whitmore was told to appear at Yager's Owensboro corporate office on April 29th. Several Yager management persons were at the meeting, including Ory, who was present, via computer, from Battletown. Tr. 57-58. Lisa Wellman directed the meeting, and informed the Complainant that he was being terminated. Tr.58. According to Whitmore, he could not get an answer as to reason for his firing but eventually Wellman, as Whitmore related her response to him, informed him that "management cannot say to an employee "what [he Whitmore allegedly] said [to Mike] and they determined that was unacceptable and that was grounds for my dismissal." Tr. 58-59, reflecting Whitmore's recounting of Wellman's reason for his firing. Following that, he was on that day given his termination letter, a severance document and informed that he had 21 days to respond to it. Tr. 59. Whitmore did not sign the agreement presented to him by Yager. *Id.*

Both at the time of the testimony under cross-examination of Mr. Whitmore and upon review of the transcript of that cross-examination, (Tr. 78- 97), and recalling that the Respondent has advanced in its defense the single claim that Whitmore made inappropriate remarks about the probationary period for the employee identified as "Mike," the Court has concluded that only the following has relevance to this proceeding seeking temporary reinstatement. Whitmore was questioned by Respondent about his duties as maintenance manager and in particular about Exhibit C 6 which, it will be recalled, involved alleged safety issues Whitmore recorded on that exhibit. Though that exhibit listed "up" for each equipment issue, the term being used to declare that the equipment was still being operated, Whitmore stated that he lacked authority to tag out equipment, making it unavailable for service. The Court finds that the Respondent's line of questioning regarding the equipment Whitmore listed with deficiencies did not advance the Respondent's attempts to diminish the information contained in that exhibit. Whitmore added that while he tagged out a lot of equipment, beyond the equipment listed in Ex. C 6, "in most cases the tags were disregarded and the equipment was run anyway." Tr. 84. It is noted that the Respondent presented no evidence in its case on rebuttal to challenge Whitmore's claim on that score.

Challenged by Whitmore's private counsel as to the Respondent's line of questioning about Ex. C 6 and Respondent's Counsel's admission that such questions were directed to Whitmore's veracity about the information in that exhibit, Whitmore's private counsel noted that credibility findings are not within the ambit of a temporary reinstatement proceeding. Respondent's Counsel differed on that score, contending that the views of two Commissioner's in *Shaffer v. Marion County*, 40 FMSHRC 39, (Feb. 2018) ("*Shaffer*") supported the line of questioning. The Court ruled by noting again that the Respondent's defense had been limited to the claim that Whitmore had made inappropriate remarks to Mike in connection with that employees probationary period. The Court then noted its view that the expressions s of any two Commissioners has no precedential value. Tr. 87-88. More will be said about *Shaffer* in the discussion regarding conclusions of law, *infra*. The Court also agreed that credibility determinations must await the full discrimination action.

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[4] In later testimony, as discussed *infra*, Yager employees arrived at a different conclusion, determining that, in their view, Whitmore *had* raised the topic with Mike.

However, the Court permitted Respondent's attorney some leeway to continue that line of questioning on the basis that "the rule itself [addressing temporary reinstatement proceedings, at 29 C.F.R. § 2700.45(d)] says that the respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought. Tr. 88. Thus given limited leeway to proceed, the Court finds that in the few questions that followed, the Respondent made no headway on that score to advance the contention that Whitmore's complaint was frivolous. [5] The Court elaborated on this subject with the following remark:

> The issue with reference to C6 might be the subject of a full hearing on discrimination, but really, for purposes of this proceeding it is just whether the respondent was aware that Mr. Whitmore created this document. And his testimony was, if I have it correct, that he created this document, put that and others on the desk of Mr. Ory, and so that's the limited focus. Not whether, in fact, a backup alarm, reverse lights were fixed and not whether the lights that were out were corrected. The same is true for the question [Respomdent's Attorney] just asked about documentation and training. The subject for this hearing [in the context of this line of questioning is] did the complainant raise issues with Yager about training and about documentation of the training. Not into the particulars of that. That is further down the road. So that's my ruling on that and so you can proceed on to something else.

Tr. 92.

When Respondent's Counsel questioned Whitmore about whether, in Ex. C 1, he specifically raised the subject of *social distancing* in connection with the COVID 19 pandemic, in that email, the Court noted that while *those words* were not expressly in the email, it was clearly the import of the message. When next asked if he received a response to that email, over an objection to the question by the Secretary's attorney, the Court allowed the question but observed that:

> for purposes of the temporary reinstatement application, A, the respondent has not alleged that had anything to do with Whitmore's termination. Another point is any employee, Mr. Whitmore doesn't have to be making a safety complaint or safety issue about those within his particular ambit, in other words those people that work directly under him or not. If I'm electrician at a mine, which is a shocking suggestion, but if I were and I make a complaint about someone who has a totally different job doing something, I can still make that complaint to management or I can make an anonymous call. It doesn't have to be something that's in my circle of authority. So, again, I come back to the point the issue in C1 is that Mr. Whitmore transmitted this message to Jenn Carnley and that's the extent of it.

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[5] Similarly, the Court finds that the Respondent made no advances to establish frivolousness, when Whitmore was asked about his anonymous complaint regarding inadequate training and insufficient documentation of such training. Tr. 89-90.

Continuing, the Court noted that:

> [h]ow they respond to [my electrician making a safety complaint example] gets far afield to what [the Court has] to determine in the narrow scope of this proceeding." [As applied here], "[d]id Mr. Whitmore send this email. Doesn't seem to be any challenge about that. So he communicated this concern and I think beyond that, when we get into issues about well, what did the respondent do about that, that, in my view, gets into the question of a full discrimination proceeding and for determination perhaps in such a proceeding if that occurs. That's my ruling on that. It is far afield.

Tr. 95-96.

With Respondent's Counsel expressing that he was unsure where the Court's ruling pointed, the Court then added,

> [i]t leaves you, I'm not interested in this hearing, it might be very interesting in a full discrimination proceeding, but I'm not interested in this proceeding whether the company did something constructive in reaction to that because that wouldn't tell me, that wouldn't instruct me that the complaint was frivolously brought and I would also note that this was not the only issue that was raised by Mr. Whitmore. There are numerous subjects that he raised during his direct testimony. It is certainly not limited to this. For my purposes, … I view this as whether the complainant issued what is effectively a complaint and a concern, safety and health concern, and [ ] there's no challenge to that. He did communicate that.

Tr. 96.

The Secretary then rested its case and the rebuttal testimony from the Respondent proceeded. Tr. 98. Ms. Lisa Wellman was then called by the Respondent. She is the HR manager for Carmeuse. She reports to Melissa Croll and for any other operations within Carmeuse she reports up through Victoria Neff. Ms. Neff is the director of HR for the field operations for Carmeuse but she does not have responsibilities over Yager. Tr. 102-103. For Yager related matters, Wellman reports to Ms. Croll. Tr.103. As to this Whitmore proceeding, Wellman informed that she "conducted the investigation and ultimately made the recommendation to Melissa Croll for [Whitmore's] termination. Tr. 104, 113-114. Again, Respondent's position is that it fired Whitmore solely for his "inappropriate comments regarding extending a probationary period for an employee with [a] medical condition." *Id.* Wellman then related the alleged circumstances regarded the claimed inappropriate comments, which comments, as have been noted, Mr. Whitmore has denied making them. There is no purpose is an extended retelling of Ms. Wellman's testimony on this score. In sum, she conducted her investigation, concluded that

Mr. Whitmore's version was not true and on that basis he was fired.[6] Wellman's recommendation to terminate Whitmore was made to Ms. Croll, who agreed with that outcome. Tr. 115.

At the conclusion of Ms. Wellman's testimony the Court took the opportunity to remark that

> for the purposes of the decision I have to make that I'm able to and I must compartmentalize as follows: In box A, if you will, I have Mr. Whitmore's multitude of safety and health issues which he raised. I'm not speaking to Miss Wellman's knowledge of that. I have box A, I have all of that testimony. And then in box B I have, if you will, the Mike issue. It seems to me that I don't have to resolve the Mike issue in the context of a temporary reinstatement application. If I accept for the moment that Miss Wellman knew nothing about any of this, I'm not suggesting you did, that nobody at Yager knew anything about any of these things, it doesn't matter for purposes of the temporary application proceeding. What I have to find are the bare elements, which I've reviewed already and so that would not make up, even accepted as absolutely true, that transforms Mr. Whitmore's application into a frivolous one. That's my view of it. Tr. 117.

Respondent then called Melissa Croll. Ms. Croll is based in Pittsburgh, PA and is employed by Carmeuse Americas. Tr. 126. She is the vice-president of human resource for Carmeuse Americas. *Id.* As pertinent to this proceeding, Ms. Croll stated that Lisa Wellman reports to her only for Yager Materials activities. Tr. 127. Croll determines matters of employee terminations and she approved Whitmore's firing. Tr. 128. She stated that the termination was merited because Whitmore's remarks "that he made were inappropriate and illegal and was worthy of termination." Tr. 128. Thus, she accepted Wellman's recommendation. *Id.* As with Wellman's testimony, Croll maintained that she knew nothing about Whitmore's various safety related complaints. Tr. 129.

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[6] Although Counsel for the Respondent, in response to an objection, that his question to Ms. Wellman was for the limited purpose of showing that those who decided to fire Whitmore had no knowledge of his protected activity and were only making the decision because the Whitmore's alleged remarks to Mike, the Court sustained the objection. The Court explained its ruling further noting that "it's enough if I have, if I accept the veracity of the complainant's testimony and then we have a close in time termination, which is what we have here. I do have some evidence that he communicated some of these safety concerns via email and via his testimony about the spreadsheet. So, … beyond that, that's all I have to have in meeting the very low bar for whether this complaint is frivolous[ ] or not." Tr. 110-111.

Commission Case Law on Applications for Temporary Reinstatement

The Commission has a venerable history regarding the standard to be applied in applications for temporary reinstatement and by virtue of that, the applicable law to be applied in applications for temporary reinstatement has been well established. A representative example expressing the law to be applied is set forth here:

> Section 105(c) of the Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right afforded by the Act. Under Section 105(c)(2) of the Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement hearing is therefore "narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision ***637** in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).
>
> The Commission has explained that "it is not the judge's duty … to resolve [[[any] conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). *See also*, *Sec'y of Labor on behalf of Shaffer v. Marion County Coal* Co., No. WEVA 2018-117-D, 40 FMSHRC ___, slip op. at 4, 9 (Feb. 8, 2018). Nevertheless, the Judge "need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous." *Shaffer*, slip op. at 9 (Althen, Chairman, and Young, Comm'r). ["*Shaffer*"] [40 FMSHRC 39, 47].
>
> The issues raised in a temporary reinstatement hearing are "conceptually different from those implicated by the underlying merits" of the miner's discrimination claim. *JWR*, 920 F.2d at 744. The temporary reinstatement proceeding addresses "whether the evidence mustered by the miner[] to date establishe[s] that [his] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Id.*
>
> While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, the elements of a discrimination claim are relevant to the analysis of whether the evidence presented satisfies the non-frivolous test. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under the Act, a complaining miner must present evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-

> 18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co., 2* FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981). The Commission has acknowledged that evidence of motivation is frequently indirect, and has identified several "circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action." *Williamson*, 31 FMSHRC at 1089; *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The question for the judge at this stage is whether there is a non-frivolous question as to the elements of the case. *Williamson*, 31 FMSHRC at 1091.

D&H Mining, 40 FMSHRC 635, 636-637 (Mar. 19, 2018) (ALJ Miller) ("D&H").

Recently, however, the Court has noted that two Commissioners, Commissioner William Althen and Commissioner Michael Young, have expressed new perspectives about the standard required in applications for temporary reinstatement. This occurred in *Sec'y of Labor on behalf of Shaffer v. Marion County Coal Co*., 40 FMSHRC 39 (Feb. 2018) ("*Shaffer*"), wherein they introduced the view that the "preponderance of the evidence" plays a role in temporary reinstatements proceedings. This is new. As set forth below, in an examination by this Court of all prior Commission level decisions, it has not been able to find and therefore has not located any prior decision introducing that test into the temporary reinstatement analysis. In fact, as set forth below, a Commission majority opinion, which included Commissioner Young, disavowed consideration of engaging a preponderance test in such matters. *See*, *Williamson v. CAM Mining*, 31 FMSHRC 1085 (Oct. 2009), *infra.*

Here is what Commissioners Young and Althen had to say about the matter in *Shaffer*:

> There is no presumptive right to temporary reinstatement. Rather, the complainant's entitlement must be established by substantial evidence, as in any other proceeding. Only the standard that the evidence must meet is diminished. Thus, **in a discrimination case**, the complainant bears the burden of proving discrimination by **a preponderance of the evidence**. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2797-2800 (Oct. 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co*., 3 FMSHRC 803, 817-18 (Apr. 1981). In contrast, at this early stage of the proceedings, *the Secretary has the burden of proving* ***by a preponderance of the evidence*** *only that the claim is not frivolous. Sec'y of Labor on behalf of Pappus*, 38 FMSHRC 137, 154 (Feb. 2016), rev'd on other grounds, *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016).

Preponderance of the evidence means the greater weight of the evidence, such that the Secretary has demonstrated that it is more probable than not that the claim is not frivolous. **The burden of proof in a temporary reinstatement case, therefore, contains two legal standards: "preponderance of the evidence" and """"non-frivolous."**

As with all disputed claims, the outcome depends upon the evidence presented. If the operator requests a hearing, the hearing is a full judicial proceeding. In *Secretary of Labor on behalf of Gray v. North Fork Coal Corp*., 33 FMSHRC 27 (Jan. 2011), the Commission quoted with approval the decision of the Eleventh Circuit regarding the nature of a temporary reinstatement hearing:

At [the temporary reinstatement hearing], the employer has the opportunity to test the credibility of any witnesses supporting the miner's complaint through cross-examination and may present his own testimony and documentary evidence contesting the temporary reinstatement…. [T]he statute grants [the employer] the right to seek an adjudication from a neutral tribunal, prior to a deprivation of its property interest, with all the regalia of a full evidentiary hearing at its disposal.

40 FMSHRC 39 at 42 (quoting *Jim Walter Res*., 920 F.2d at 747-748) (emphasis added).

We glean two points. First, a temporary reinstatement hearing or proceeding is a full evidentiary process, albeit a greatly expedited one. The opportunity for such a hearing satisfies the operator's due process rights.

Second, the opportunity to test credibility identified by the Commission in *Gray* would be meaningless without a genuine exposition of the evidence presented. If versions of events diverge without dispositive proof of either, the outcome at the reinstatement stage may not rest upon a choice between the versions, and the miner must be reinstated. However, a Judge need not accept testimony if it is demonstrably false, patently incredible, or obviously erroneous, because such evidence fails to qualify as "substantial evidence" upon which a reasonable person might rely.

Thus, all evidence relating to the adverse employment action is relevant in a temporary reinstatement proceeding -- even that which seems directed to an affirmative defense or rebuttal of the miner's claim. While we agree that the Judge should not make credibility and value determinations of the operator's rebuttal or affirmative defense, if the totality of the evidence or testimony admits of only one conclusion, there is no conflict to resolve. It is the Judge's duty to

> determine whether the claim is frivolous, in light of undisputed or conclusively-established facts and inescapable inferences.

Id. at 46-47 (emphasis added).[7]

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[7] In *Shaffer,* Commissioner Mary Lu Jordan and now former Commissioner Robert F. Cohen Jr. hewed to the traditional and longstanding analysis applied to temporary reinstatement application proceeding, expressing:

"Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the [J] udge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990).

Courts and the Commission have likened the "not frivolously brought" standard set forth in section 105(c)(2) with the "reasonable cause to believe" standard applied in other statutes. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) ("there is virtually no rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012) (other citations omitted). The Commission has noted that in the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing "reasonable cause to believe" that a violation of the statute has occurred is a "relatively insubstantial" burden. *Argus Energy*, 34 FMSHRC at 1878 (citing *Schaub v. W. MI Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). The Commission stated that in *Schaub*, "the Court explained that the proponent 'need not prove a violation of the NLRA nor even convince the district court of the validity of the Board's theory of liability; instead he need only show that the Board's legal theory is substantial and not frivolous."' *Id.* (citations omitted). It noted that the Court cautioned:

> An important point to remember in reviewing a district court's determination of reasonable cause is that the district judge need not resolve conflicting evidence between the parties. *See Fleischut [v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988)] (stating that the appellant's appeal did not seriously challenge whether reasonable cause exists; instead it simply showed that a conflict in the evidence exists); *Gottfried [v. Frankel*, 818 F.2d 485, 494 (6th Cir. 1987)] (same). Rather, so long as facts exist which could support the

(continued…)

Of course, the opinions of any two Commissioners, as with the views of Commissioners Althen and Young recounted here, when unaccompanied by other Commission *majority decisions subscribing to such views*, is of no precedential value. Commissioner Young has observed this in *The American Coal Co.*, 35 FMSHRC 380 (Feb. 2013) ("*American Coal* "), expressing that:

> the Secretary *was unable to persuade a majority of the Commission* of the propriety of that definition then, at least in *Phelps Dodge* flaming combustion was the actual hazard occasioned by a stubborn grease fire ignited by cutting a piece of mining equipment with a torch. *Id.* at 647. Two Commissioners rejected then the imposition of a *relevant* broader definition, in part based on a reasonable concern about unintended consequences. *See id.* at 663 (Duffy and Young, concurring) ("Far-ranging conclusions, not necessary to the disposition of issues presented to the reviewing court in one case, may, ironically, end up constricting

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[7] (…continued)

> Board's theory of liability, the district court's findings cannot be clearly erroneous. *Fleischut*, 859 F.2d at 29; *Gottfried*, 818 F.2d at 494.

Id. (citations omitted).

Similarly, at a temporary reinstatement hearing, the Judge must determine "whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *JWR*, 920 F.2d 744. As the Commission has recognized, "[i]t [is] not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The Commission applies the substantial evidence standard in reviewing the Judge's determination. *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) knowledge of protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *CAM Mining*, 31 FMSHRC at 1089 (other citations omitted)." *Shaffer* at 41-43.

the court's discretion in subsequent cases where the facts may be significantly different.

Id. at 390 (Commissioner Young, concurring in part and dissenting in part) (emphasis added).[8]

The Court's Research of Commission Case Law on Applications for Temporary Reinstatement and the Term "preponderance of evidence."

The Court's research revealed fifteen (15) cases where the phrase "*preponderance of evidence*" was expressed, but *only* in *Shaffer* has the term been employed to an applicant for temporary reinstatement. What follows are the cases uncovered by the Court's review.

In *Cobra Natural Resources, LLC*, 35 FMSHRC 394 (Feb. 2013), a temporary reinstatement proceeding, the Commission employed the phrase, but in the context of *an operator* affirmatively proving that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence. *Id.* at 397 (citing *Gatlin*, 31 FMSHRC at 1055).

In *KenAmerican Resources*, 31 FMSHRC 1050 (Oct. 2009), also a temporary reinstatement proceeding, the issue of whether the duration of a temporary reinstatement should be modified was involved. There, the Commission instructed that the judge "should determine whether [the mine operator] KenAmerican *has proven by a preponderance of the evidence* that the occurrence of the layoff is a legitimate reason for tolling Mr. Gatlin's economic reinstatement. … In sum, in order to justify termination of economic reinstatement, *KenAmerican must prove by a preponderance of the evidence* that Mr. Gatlin's inclusion in the layoff was entirely unrelated to his protected activities." *Id.* at 1055 (emphasis added).[9]

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[8] By analogy, this is in keeping with the somewhat related concept that where two Commissioners vote to grant a motion and two to deny, the original decision stands. *See, e.g., Sec'y of Labor on behalf of McGary v. Marshall County Coal Co.,* 40 FMSHRC 767, 768 (June 28, 2018) (Commissioners Jordan and Cohen, in favor of denying the stay and then Acting Chairman Althen and Commissioner Young, in favor of granting the stay).

[9] A few of the cases found by the Court have been relegated to this footnote as follows. In the temporary reinstatement proceeding in *North Fork Coal Corp.,* 33 FMSHRC 27 (Jan. 2011), *a majority* of the Commission held that the miner's reinstatement was not dissolved following the Secretary of Labor's decision to not pursue the full discrimination proceeding. The miner, however, as permitted under the statutory scheme, then filed his own action under section 105(c)(3). Commissioners Young and former Commissioner Duffy dissented on that outcome, but as it pertains to this review, "preponderance of the evidence" only arose in the context of those dissenting commissioners referring to the Secretary's burden of proof in the *full* discrimination proceeding. *Id.* at 55. In *Lehigh Cement Co.*, 2020 WL 4366183 (July 2020), a unanimous Commission concluded that the judge erred in tolling a miner's economic reinstatement. Here again, although the phrase "preponderance of the evidence" was invoked, it was to point out that "[*o*]*perators* bear the burden of showing by a preponderance of the evidence that tolling is justified." Citing, *Sec'y of Labor on behalf of Ratliff v. Cobra Natural*

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In *C.R. Meyer and Sons Co.,* 35 FMSHRC 1183 (May 2013), yet another temporary reinstatement proceeding, the question of tolling the reinstatement obligation was again involved. The phrase "preponderance of the evidence" arose there, but again only in the context of the mine operator's burden, with the Commission stating "[s]hould the Secretary fail to sufficiently establish the possibility that any inclusion of Rodriguez in the layoff might have been motivated by the miner's protected activity, the judge must then consider the entire record and determine *whether the operator* has proven by a preponderance of the evidence that the layoff of local miners, … justifies tolling its obligation to temporarily reinstate [the miner]." *Id.* at 1188 (emphasis added).

In the temporary reinstatement proceeding of *CalPortland,* 38 FMSHRC 137, (Feb. 2016), a Commission majority affirmed the miner's temporary reinstatement. In that case Commissioner Althen dissented on grounds not pertinent to this review of cases, referring to the "preponderance of the evidence," but his remark was *in the context of a full discrimination proceeding*, that "if the Secretary or [the miner] can prove by a preponderance of evidence that CalPortland refused to hire [the miner] based on protected activity, [the miner] will be entitled to full relief under section 105(c). *Id.* at 148*,* n. 1

Sec'y of Labor obo Williamson v. CAM Mining, 31 FMSHRC 1085 (Oct. 2009), is yet another temporary reinstatement matter but it is of particular importance regarding the preponderance of evidence applicability in such matters. There, an administrative law judge denied reinstatement, a decision the Commission reversed and for which it ordered the immediate reinstatement of the miner. Pointedly all four members then composing the Commission, *which group included Commissioner Young*, stated: "we note that evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. In essence, the judge weighed the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case. In doing so, the judge erred by assigning a greater burden of proof than is required**. In a temporary reinstatement proceeding, <u>the Secretary need not establish a prima facie case of discrimination by a preponderance of the evidence</u>. Rather, the Secretary was required to prove only that a**

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[9] (…continued)

Res., LLC, 35 FMSHRC 394, 397 (Feb. 2013). *Id.* at *3 (emphasis added). Note, in a related *Lehigh Cement Co.* case, 2020 WL 4366184 (July 2020), distinctive only in that a different docket number was involved, the same result was reached. In *Robinette v. United Castle Coal*, 3 FMSHRC 803, (April 1981), the Commission remanded to address an aspect of the discrimination issue. For the purposes of this review, the phrase "burden of proof" only arose in a footnote analogy concerning unfair labor practices in NLRB matters and therefore is of no consequence to this review. *Id. at* 818, n. 20. Last, in *Contractors Sand and Gravel,* 20 FMSHRC 960, (Sept. 1998), that case too is only tangential to this review because its thrust concerned the recovery of attorney's fees and expenses under the Equal Access to Justice Act. In speaking to that issue, the Commission found that the Secretary's position had a reasonable basis in fact and rejected the contention that the Secretary had to establish its position under the preponderance of evidence standard. *Id*. at 973.

non-frivolous issue exists as to whether Williamson's discharge was motivated in part by his protected activity. *Id*. at 1091, also citing, *Chicopee Coal Co.,* 21 FMSHRC at 719 (emphasis added).

In *Reading Anthracite*, 22 FMSHRC 298, (Mar. 2000), involved was a review by the Commission vacating a judge's determination that Reading did not violate the Act's section 10(c) discrimination provision. There the miner had been previously temporarily reinstated. Reference to the preponderance of the evidence appears only in the dissent. However, the dissent was somewhat atypical because the dissenting commissioners agreed that the judge erred; their dissent was that it was unnecessary to send the matter back to the judge and that the judge's decision could simply be reversed, finding in favor of the complainant miner. The dissenting commissioners reminded that the mine operator, "Reading must prove its affirmative defense by a preponderance of the evidence," *Id.* at 314, citing (*Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc*., 14 FMSHRC 1549, 1556 (Sept. 1992)). ("*Price and Vacha*").

Speaking of *Price and Vacha,* four members of the Commission*,* affirming the judge's decision upon remand that Jim Walter Resources discriminatorily applied its drug program against the complainants, referred to the "preponderance of the evidence" *but in the context of the mine operator's burden in its affirmative defense*, stating: "[a]n operator must prove this affirmative defense by a preponderance of the evidence. *E.g*., *Eastern Associated Coal*, 813 F.2d at 642." 14 FMSHRC 1549 at 1556.

In *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite,* 23 FMSHRC 924, (Sept. 2001), the Commission again remanded the matter to the administrative law judge, after that judge again found no violation of section 105(c)(1). This decision reiterates the point made in *Price and Vacha*, and cites to that decision for the principle that in order "[t]o make out its affirmative defense, *the operator must prove by a preponderance of the evidence* that it would have taken the adverse action in any event because of unprotected activity alone. *Id*. at 929. (emphasis added).

Hopkins County Coal, 38 FMSHRC 1317 (June 2016) is yet another decision by the Commission which refers to the phrase "preponderance of the evidence," but its use is not of value to this discussion, as it employed the phrase only in the context of the Secretary's burden to establish the validity of a section 104(b) order, a burden which the Secretary met. The discrimination matter involved a separate dispute. It involved violations which were issued in response to the mine's refusal to release personnel records to inspectors as part of an MSHA discrimination investigation, records which the Secretary sought in order to determine whether there was a violation of the anti-discrimination provisions of the Act. Three commissioners, which is to say a majority, affirmed that the order was validly issued. Commissioners Althen and Young dissented, but they made no mention to the preponderance of the evidence, although they believed that the Secretary "utterly failed to carry his burden of proof of showing a reasonable basis for the document demand." *Id*. at 1338. In making no mention of the burden of proof, even when they were referencing temporary reinstatements, the dissenters, Commissioners Althen and Young, described for that process that "MSHA's preliminary investigation "must determine *only* whether there *may* be validity to the miner's claim, or in other words, that the claim was 'not frivolously brought." *Id*. at 1344, n.9. (emphasis in original).

From the foregoing, it can be seen that invoking "preponderance of the evidence" in the context of an application for temporary reinstatement has no place in the determination of whether a claim is not frivolously brought. Even the Commission itself, through the vehicle of a majority opinion, has acknowledged this to be the case. *Sec'y of Labor on behalf of Williamson v. Cam Mining*, 31 FMSHRC 1085 (Oct. 2009), *supra.* This makes sense as a general matter as well, since establishing a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. *Fischl v Armitage,* 128 F.3d 50, 55 (2d Cir. 1997). That burden is decidedly *not* required in a temporary reinstatement proceeding. In fact, it is inappropriate to engage in such determinations. Mixing the concepts of "not frivolously brought" with "preponderance of the evidence" is inappropriate, as they are mutually exclusive concepts in the context of temporary reinstatement applications and doing so introduces a layer of consideration which can only invite conflict.[10]

Summary of the Court's Conclusions and Findings Regarding Complainant William R. Whitmore's Application for Temporary Reinstatement

The Court finds that the credible evidence adduced during the temporary reinstatement hearing established, writ large, that William Whitmore's application for temporary reinstatement was not frivolously brought. **[11]** Mr. Whitmore's testimony was not demonstrably false, nor

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[10] Although the Court's exposition of the Commission's case law regarding temporary reinstatement is dispositive, it is noted that in other non-mine safety and health matters, courts have eschewed comingling the concepts of preponderance of evidence and frivolousness. For example, in National Labor Relations matters pertaining to temporary injunctive relief, the 5th Circuit observe that it was not their duty at that "juncture to pass upon whether violations have been established by a preponderance of the evidence, but merely to decide that the Board's theories are substantial and not frivolous." *Boire v. Pilot Freight Carriers, Inc*., 515 F.2d 1185, 1191 (5th Cir. 1975).

[11] The Court received a "Post-Hearing Statement" from the Respondent. ("R's Statement"). The parties representing the Complainant were given an opportunity to respond and declined to do so. The Court finds that the Complainant's representatives' decision to not respond is understandable, given the record testimony. Further, the body of this decision ordering Mr. Whitmore's immediate reinstatement effectively addresses the contentions raised by the Respondent. However, the Court makes the following additional comments about the R's Statement. Respondent raises two challenges in an attempt to show that the application is frivolous. First, Respondent contends that Complainant's April 6, 2020 email expressing his concern about a contractor employee and whether that individual was practicing social distancing in light of COVID 19 did not constitute protected activity. R's Statement at 5. The Court does not agree. The Court refers the reader to the transcript summary above. By raising his concern, the Complainant was voicing a health concern, which constitutes protected activity. The Respondent then states that such a concern may be analogized to a protected work refusal. *Id.* From that argument, the Respondent seems to argue that a miner's expressed health concern, when not specifically covered by a standard, evaporates once the miner has been given reassurance about the concern. The analogy does not hold up; Whitmore did not make a work

(continued…)

patently incredible, nor obviously erroneous. The Court finds that the testimony mustered by Whitmore presented evidence sufficient to support a conclusion that he engaged in protected activity, that he suffered an adverse employment action, and that the adverse action was motivated at least in part by that activity and in light of that, established that his complaint was not frivolously brought.[12]

The Application for Temporary Reinstatement is hereby **GRANTED**. Immediately upon receipt of this decision Respondent is **ORDERED** to reinstate Complainant William R. Whitmore to his former position at the mine, or to a comparable position within the same commuting area at the same rate of pay and benefits he received prior to his discharge, pending a final Commission order on the discrimination complaint. The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).

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[11] (…continued)
refusal in connection with his expressed health concern. Further, expressing his concern was protected activity and its status as such remained so, even if the employer addressed it.

Respondent's second contention is that without showing that the Respondent's decision-makers, meaning the two individuals who decided to fire the Complainant, knew of, that is to say "had knowledge of" Whitmore's several instances of protected activity, the complaint is frivolous. Respondent asserts that the only evidence of record is that the two individuals who decided to fire Whitmore testified that they knew nothing of his protected activities and terminated him solely on another basis, as described above in the body of this decision. As such, Respondent asserts that, their decision being pure of any protected activity knowledge, makes Whitmore's complaint frivolous. *Id.* 7-9. As the discussion of the applicable case law, set forth above, makes clear, the temporary reinstatement application proceeding may not be based on such claims, as it would transform the proceeding into resolving conflicts in testimony. Such a conflict is plainly present. A conflict can exist in less direct forms than a contention and a denial. Thus, the mere assertion by two witnesses maintaining certain factual contentions, even if not *specifically* denied, can still present a conflict, when viewed from the perspective of the entire record. In short, a conflict can exist in more subtle forms than an assertion and a parallel denial. At this stage, made for the purpose of determining only non-frivolity, it is not required for the Complainant to establish that the two individuals made their decision on grounds beyond their claimed basis. Instead, again as plainly described above, the Complainant established *multiple* instances of protected activity, each of which the Court found to be have been communicated, that he suffered the adverse action of termination, and that such termination occurred within a short period of time following expression of his safety and health concerns. "Requiring the Judge to resolve alleged inaccuracies and conflicts in testimony when the parties have not yet completed discovery would improperly transform the temporary reinstatement hearing into a hearing on the merits." *Sec. obo Deck v FTS Int'l*, 34 FMSHRC 2388, 2391 (Sept. 2012), citing *Chicopee Coal*, 21 FMSHRC at 719; *CAM Mining*, 31 FMSHRC at 1088-89.

[12] It is worth restating that in the context of an application for temporary reinstatement the test is *not* whether there is sufficient evidence of discrimination to justify permanent reinstatement.

Per 30 U.S. Code § 815, titled, "Procedure for enforcement," and in particular, subsection (c)(3) of the section, the Secretary is directed to comply with that provision which commands that "[**w]ithin 90 days** of the receipt of a complaint filed under paragraph (2)[of subsection (c)], **the Secretary shall notify**, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." (emphasis added). The Secretary shall diligently pursue completion of the investigation in the underlying discrimination complaint. Immediately upon completion of the investigation, the Secretary SHALL notify counsel for Yager Materials Corp. and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. The Court considers the Secretary's duty to comply with this provision to be of high importance. The mine operator's rights in defending against the discrimination claim are significantly affected by delays in meeting this statutory deadline.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2020

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-0211 A.C. No. 15-17741-305075
v.	
KENAMERICAN RESOURCES, INC., Respondent	Mine: Paradise #9

DECISION ON REMAND

Before: Judge Miller

This case is before me upon petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This case was remanded by the Commission to determine an appropriate civil penalty for Citation No. 8502992, issued pursuant to Section 103(a), with a total proposed penalty of $18,742.00.

I. HISTORY OF THE CASE

This case was originally assigned to Administrative Law Judge L. Zane Gill. On July 24, 2015, KenAmerican Resources ("KenAmerican") filed a motion for summary judgment, alleging that the Secretary's claims were unsubstantiated and that there was no violation of section 103(a) of the Mine Act. That section of the act, states in pertinent part that "no advance notice of an inspection shall be provided to any person," 30 U.S.C. § 813. KenAmerican's motion was granted and the citation was vacated. *Sec'y of Labor v. KenAmerican Resources, Inc.,* 37 FMSHRC 1809 (Aug. 2015) (ALJ). On August 25, 2016, following a petition for discretionary review, the Commission found that the summary decision was improper and reversed and remanded the case with instructions to hold a hearing. *Sec'y of Labor v. KenAmerican Resources, Inc.,* 38 FMSRC 1943 (Aug. 2016). After an evidentiary hearing of the case, Judge Gill issued a decision on December 14, 2018, finding that the Secretary failed to establish a violation. *Sec'y of Labor v. KenAmerican Resources, Inc.,* 40 FMSHRC 1544 (Dec. 2018) (ALJ).

Following Judge Gill's decision, the Commission granted the Secretary a second petition for discretionary review. After briefing and argument, the Commission determined that a violation had occurred as set forth in the citation issued by the Secretary and determined that the case should be remanded for the assessment of a penalty consistent with section 110(i) of the Act. 30 U.S.C. § 821(i). The Commission decision constitutes the law of the case. *See Pepper*

v. United States, 131 S. Ct. 1229, 1250 (2011). Following the unexpected passing of Judge Gill on June 23, 2020, this case was reassigned to determine the appropriate penalty. For the reasons set forth below, I assess the penalty in the amount proposed by the Secretary.

II. ISSUE ON REMAND

On April 20, 2012, MSHA Inspector Doyle Sparks and six other inspectors traveled to KenAmerican's Paradise #9 mine to conduct an investigation in response to a complaint of an alleged hazardous condition. Before the inspectors traveled into the mine to begin their investigation, MSHA inspectors instructed the miners on the surface not to warn underground personnel that MSHA inspectors were present. While inspector Sparks monitored the mine's communication system, he heard an exchange between two miners that appeared to be providing advance notice to the miners underground. Sparks overheard a call from the #4 unit in which a miner asked the dispatcher if there was "company outside," to which the dispatcher responded, "yeah, I think there is." Tr. 23-24, 163-164. Sparks asked the underground miner to identify himself, but received no response. Once underground, Sparks made a second attempt to identify the miner, but again received no response. The Commission found that Holz, the dispatcher, agreed that a miner asked him if "company" was outside and that he understood the unidentified miner's question to be an inquiry into the presence of MSHA inspectors. "Therefore, he knew the question presented a request for advance notice." *Sec'y of Labor v. KenAmerican Resources, Inc.,* 42 FMSHRC 1, slip op. at 2, No. KENT 2013-0211 (Jan. 16, 2020).

Sparks issued Citation No. 8502992 to Respondent pursuant to Section 103(a) of the Mine Act alleging that mine personnel provided advance notice to underground miners that MSHA inspectors were on site during a hazard complaint inspection. Tr.10. Section 103(a) of the Mine Act authorizes the mine inspectors to conduct inspections and investigations of coal and other mines. This section also requires that "In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person…." Similarly, a person who provides advance notice of an inspection may face the possibility of a criminal prosecution. 30 U.S.C 820(3). The citation, after amendment, was issued as a significant and substantial violation and the result of high negligence. The Commission upheld the citation as issued and remanded the case solely for the assessment of civil penalty. The penalty assessment is based upon the Commission's decision on remand and the record in its entirety, including the hearing transcript and the briefs filed by the parties in the case.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i).

The Secretary has proposed a penalty of $18,742.00 for the violation. I have considered and applied the six penalty criteria found in Section 110(i) of the Act. I have reviewed the history of this operator and taken note of the fact that two mine superintendents and a foreman were previously convicted of the crime of providing advance notice at this mine.[1] I have also considered that this is a large-sized operator, and that the parties have stipulated to the ability to pay. No issue was raised by either party about a lack of good faith abatement.

The violation was assessed as significant and substantial and was the result of high negligence. The Commission made no change to these findings in its decision and I accept the findings in determining a penalty. The violation was significant and substantial, given the importance placed on the notice requirement in the Act and that providing notice could result in a criminal prosecution. In addition, giving advance notice allows a mine operator the opportunity to alter violative conditions prior to the arrival of an MSHA inspector and allows the continuation of operations under violative conditions after an inspector departs. Therefore, the gravity of the violation is serious, and the penalty is intended to reflect that it is serious.

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." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). While the Secretary's Part 100 regulations evaluate negligence based on the presence of mitigating factors, Commission judges are not limited to that analysis. *Brody*, 37 FMSHRC at 1702-03. Rather, Commission judges consider "the totality of the circumstances holistically" and may find high negligence in spite of mitigating circumstances. *Id.* at 1702. The Commission has recognized that "the gravamen of high negligence is that it 'suggests an aggravated lack of care that is more than ordinary negligence.'" *Id.* at 1703 (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

In reviewing the record as a whole and the Commission decision, I find that the designation of high negligence is well supported. The record clearly indicates that an affirmative response was provided to a request for advance notice from an underground miner, even after the inspectors warned the miners at the surface not to engage in that conduct. Management's failure to instruct or ensure that no advance notice was given prior to inspections constitutes more than ordinary negligence. *See Ky. Fuel Corp.*, 40 FMSHRC 28 (Feb. 2018) (in which the Commission approved a judge's decision that similarly concluded that high negligence was appropriate due largely to an operator's failure to provide adequate training and materials to prevent a violation). A finding of high negligence is further supported by the circumstances surrounding the violation, in particular the unidentified miner's refusal to identify himself on the phone or in person when

[1] *See KenAmerican Resources*, slip op. at 5 (Jan. 16, 2020)(noting that "two mine superintendents and a foreman working at the Paradise No. 9 mine were previously convicted of the crime of providing advance notice." (citing *United States v. Gibson,* 409 F.3d 325, 333 (6th Cir. 2005)).

Sparks arrived underground and Holz's admission that he knew he was prohibited from providing advance notice of MSHA's presence to underground miners.

IV. ORDER

I have reviewed the record in its entirety and find that the Secretary's proposed penalty is appropriate in this case. Accordingly, Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $18,742.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 12, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PEABODY MIDWEST MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2017-0450 A.C. No. 12-02295-447106 Mine: Francisco Underground Pit

DECISION ON REMAND

Before: Judge Simonton

This case is before me upon remand from the Commission. *Peabody Midwest Mining, LLC*, 42 FMSHRC___, slip. op. at 11 (June 2, 2020). It involves a petition for assessment of a civil penalty filed by the Secretary of Labor through the Mine Safety and Health Administration ("MSHA") against Peabody Midwest Mining, LLC ("Peabody" or "Respondent"), pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 814(d)(1).

I. HISTORY OF THE CASE

On July 17, 2017, MSHA issued Citation No. 9105403 to Peabody for a violation of section 316(b) of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), which requires every underground coal mine to develop a written plan to provide for the evacuation of all individuals in an emergency and provide for the maintenance of miners trapped underground where evacuation is not possible. 30 U.S.C. § 876(b). Peabody's Emergency Response Plan ("ERP") requires two properly positioned refuge chambers, sufficient to shelter all the miners present in the event of an emergency, even during a shift change when two teams of 15 miners would be present. Ex. S–3. It states that refuge chambers "will not be placed in the direct line of sight of the working face." However, at the time of inspection, one refuge chamber was in the travelway in the direct line of sight of the working face and in violation of the ERP. Ex. R–A; Tr. 27–29. The inspector designated the citation significant and substantial ("S&S"), reasonably likely to be fatal, and the result of Peabody's high negligence and unwarrantable failure to comply with the Mine Act. Ex. S–1. The Secretary proposed a civil penalty of $44,546.00.

Peabody contested the S&S, negligence, unwarrantable failure designation, and the penalty. Respondent's Post-Hearing Brief at 10. A violation is S&S "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National*

Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981). I determined that the violation was S&S because the Secretary proved the four elements of the *Mathies* test: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984). In analyzing the second criterion, I acknowledged the Commission's recognition in past cases that "emergency standards are different from other mine safety standards because they are intended to apply meaningfully only when an emergency actually occurs." *IGC Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016) *citing Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff'd* 717 F.3d 1020 (D.C. Cir. 2013). Because Commission precedent directs judges to *assume* the existence of a contemplated emergency when defining the hazard contributed to by a violation, *see, e.g., ICG Illinois, LLC*, 38 FMSHRC at 2476, I assumed an emergency in which evacuation was impossible and the refuge chamber was necessary.

Testimony at the hearing established that the ERP prohibits positioning the refuge chamber in the direct line of sight of the working face because an explosion traveling out could damage or destroy the chamber. Tr. 29–30, 84–85. In presuming the occurrence of a fire or ignition significant enough to prevent miners from evacuating, I found that all four elements of the *Mathies* test were satisfied and thus the violation was S&S. I affirmed the citation as written and assessed a penalty of $50,000.00. 40 FMSHRC 861 (June 2018) (ALJ).

Following the issuance of my June 28, 2018 decision after hearing, Peabody appealed the decision to the Commission. It did not contest the fact of violation or the unwarrantable failure designation, but challenged the citation's Significant and Substantial ("S&S") designation. Upon review, the Commission reversed the S&S designation. 42 FMSHRC___, slip op. at 10–11. In doing so, it reviewed S&S precedent and restated the proper test for an S&S violation:

> In order to establish that a violation of a mandatory safety standard is significant and substantial, the Secretary of Labor under *National Gypsum* must prove: (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. at 5. Because more than 15 miners were only present during shift changes when no mining activities were occurring, the Commission determined that the one properly-placed refuge chamber was sufficient for the contemplated emergency because an explosion was only ever likely during mining activities. *Id*. at 8–10. The Commission remanded the case for reassessment of the civil penalty in accordance with its decision.

II. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

I have considered and applied the six penalty criteria. In the fifteen months preceding the issuance of this citation, Peabody averaged 0.59 violations per inspection day and had only one previous violation of section 316(b). The mine is a large operator and the parties stipulated that the Secretary's proposed penalty of $44,546.00 would not affect Peabody's ability to remain in business. The high negligence designation was not challenged on appeal and remains unaffected by the Commission's decision. The Commission has determined that this violation is not S&S, so the gravity involved is less severe than originally designated in the citation and affirmed in my initial decision. Relatedly, as a result of the S&S designation being vacated, the violation must be reclassified as a section 104(a) citation, which effectively removes the unwarrantable failure determination. Peabody immediately worked to abate the condition following the issuance of the citation. Tr. 62-63, 150, 172. However, it also admitted that the refuge chamber would have remained in the direct line of sight of the working face for a couple of days if not for the citation. Tr. 150.

I remain convinced that Peabody's failure to follow its own ERP by placing a refuge chamber in direct line of sight of the working face constitutes an extremely serious violation. After considering the penalty criteria in light of the Commission's decision, I find that a penalty of $35,000 is appropriate.

III. ORDER

Because the citation's S&S designation has been eliminated, it is hereby **ORDERED** that Citation No. 9105403 be changed from a section 104(d)(1) citation to a section 104(a) citation. Peabody Midwest Mining, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$35,000** within 30 days of this decision. [1]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[1] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

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