

**June 2020**

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**No review was denied during the month of June 2020.**

## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, D.C. 20004-1710

June 2, 2020

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

v.

Docket No. LAKE 2017-450

PEABODY MIDWEST MINING, LLC

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. (2012) (“Mine Act”). At issue is a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Peabody Midwest Mining, LLC (“Peabody”). The citation alleges a violation of section 316(b) of the Mine Act, 30 U.S.C. § 876(b), for failure to comply with a provision of the mine’s approved Emergency Response Plan (“ERP”). The ERP requires that “[r]efuge chambers will not be placed in direct line of sight of the working face.” Sec’y. Ex. 1, 2. MSHA designated the violation as “significant and substantial” (“S&S”)<sup>1</sup> and resulting from an unwarrantable failure.

The Administrative Law Judge affirmed the citation as written and increased the penalty from \$44,546 to \$50,000. 40 FMSHRC 861 (June 2018) (ALJ). On review, Peabody does not contest the fact of the violation or the unwarrantable failure designation. It challenges the citation’s S&S designation.

For the reasons that follow, we reverse the Judge’s S&S determination and remand the case for reassessment of the penalty.<sup>2</sup>

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

<sup>2</sup> In its Petition for Discretionary Review, Peabody notes that while it does not contest the unwarrantable failure finding, the citation was classified as a section 104(d)(1) citation. If the S&S designation is deleted, Peabody further notes that the citation must be reclassified as a section 104(a) citation as a matter of law. PDR at 2 n.2. We agree.

## I.

### **Factual and Procedural Background**

On July 19, 2017, MSHA Inspector Bryan Wilson conducted an inspection of the Francisco Underground Pit, an underground coal mine in Gibson County, Indiana. During the inspection, Inspector Wilson observed a refuge chamber properly located in the 27 crosscut.<sup>3</sup>

He also observed a second refuge chamber. It was located in Entry 6, approximately 480 feet outby, and in the line of sight of, the working face. As a result, Inspector Wilson issued Citation No. 9105403, alleging that the placement of the refuge in Entry 6 violated the mine's ERP that, in relevant part, provides that "[r]efuge chambers will not be placed in direct line of sight of the working face." Sec'y Ex. 1, 2.

The use of refuge chambers in underground coal mines is mandated by Section 2 of the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 876 ("MINER Act") and 30 C.F.R. § 75.1506. The regulation requires that refuge chambers in working sections must be located within 1000 feet of the face and must be able to accommodate the maximum number of persons that can be expected on or near the section at any time. The #1 Unit normally had 15 miners per shift. However, during shift changes, two shifts (a presumed total of 30 miners) would be present on the section simultaneously for a brief period. Because the refuge chambers employed by Peabody could accommodate 20 miners each, two refuge chambers were utilized for the #1 Unit in order to comply with the regulation during any brief influx of miners to the section.

At the hearing, Inspector Wilson testified that the placement of the refuge chamber in Entry 6 violated the ERP and could contribute to a discrete hazard. He testified that if there was an explosion, it could travel outby and damage the refuge chamber in that entry. Tr. 42. If that occurred when more than 20 miners were present, then there would not be the required place of refuge for all miners.

Inspector Wilson did not base his finding that an injury would be reasonably likely on the particular facts of the mine but rather upon "past history of mines with explosions . . ." *Id.* He further testified that he designated the citation as significant and substantial because he "found it reasonably likely, if normal mining conditions were to continue, an event of a serious nature would cause an injury of a -- of a reasonably serious nature." Tr. 46.

It is evident from the testimony of Peabody's Director of Safety and Compliance, Chad Barras, and the evidence of record, that the only time more than 20 miners would be on section was during shift changes when an oncoming crew would arrive before the current crew left the section. He testified that no mining occurs during this changeover period as the departing crew is

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<sup>3</sup> Refuge chambers (also called "refuge alternatives") provide shelter to miners during a catastrophic emergency where escape may not be possible. The chambers are equipped with tools, supplies, communication equipment, and oxygen sufficient to sustain miners for 96 hours while awaiting rescue. *See* 30 C.F.R. § 75.1506.

preparing to leave and the incoming crew is preparing to take over. Therefore, according to him, continuous mining and coal haulage—that is, production activities—do not occur during the brief period when more than 20 miners are present. Tr. 82-84. The Secretary did not introduce any rebuttal testimony.

Nevertheless, the Judge found the citation satisfied all the criteria for an S&S designation and affirmed the finding that the violation was S&S. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). He found that the violation contributed to a discrete safety hazard. Specifically, he found that some miners would be unable to use a refuge chamber if an explosion traveling outby damaged or destroyed the refuge chamber in Entry 6 while more than 20 miners were present on the section. He opined that the other refuge chamber, located in the crosscut, would be insufficient. The Judge found that the only relevant factor was that more than 20 miners would be “working” on the section during a shift change.

## II.

### Disposition

#### **A. The Significant and Substantial Standard—*National Gypsum***

The definition of an S&S violation is found in Section 104(d)(1) of the Mine Act. There, the Act identifies a significant and substantial violation as a violation “of such nature as could significantly and substantially contribute to the *cause and effect* of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1) (emphasis added).

For nearly 40 years, our fundamental precedent on S&S findings, namely, *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822 (Apr. 1981), based its holding on this statutory language. There, the Secretary posed an interpretation that “a violation is of a significant and substantial nature, so long as it poses more than a remote or speculative chance that an injury or illness will result, no matter how slight that injury or illness.” *Id.* at 825. We rejected that interpretation, finding that such an interpretation “would result in almost all violations being categorized as significant and substantial” and that such an interpretation “would be inconsistent with the statutory language and with the role we believe the significant and substantial provisions are intended to play in the enforcement scheme.” *Id.*

We found that a violation is significant and substantial if the “violation ‘significantly and substantially’ contributes to the *cause and effect* of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to *cause and effect* must be significant and substantial.” *National Gypsum* at 827 (emphasis added). We then articulated the seminal holding that a violation is S&S if, “based upon the particular facts surrounding the violation, there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.” *Id.* at 825. Obviously, the violation will be reasonably likely to result in an injury if it is reasonably likely to cause a hazardous event that, in turn, is reasonably likely to result in an injury.

The fundamental principles of *National Gypsum* form the basis of our analysis in this case. Here, the facts show the uncontested violation as a wrongly placed refuge chamber. Fundamentally, there must be proof of a true unavailability of shelter for the miners affected due to this violation. The *cause and effect* of the violation is, then, predicated upon whether the unavailability of a second shelter would significantly and substantially contribute to an inability of miners on the section to shelter at the time an emergency occurred.

### **B. The *National Gypsum* Standard as Refined by *Mathies* and its Progeny**

The *National Gypsum* “reasonably-likely-to-result” analysis necessarily involves the relationship of the violation both to the “cause” and to the “effect” of a hazard. We refined this in *Mathies, supra*, by applying a 4-Step analysis:

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

6 FMSHRC at 3-4 (footnote omitted).

We further explained the roles of Steps 2 and 3 of this analysis in *Newtown*, 38 FMSHRC at 2036-37. The application of Step two of the *Mathies* test requires us to determine “whether [the] hazard was reasonably likely to occur given the particular facts surrounding this violation.” *Id.* at 2041.

Our decision today recognizes that *National Gypsum, Mathies, Secretary v. Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) and, most recently, *Newtown*, are all grounded on the statutory language of the Mine Act, and that cases following *National Gypsum*, including *Mathies, Musser*, and *Newtown*, have been bound by *National Gypsum*’s focus on a violation’s contribution to both the “cause and effect” of the hazard.

Indeed, *Musser*’s analytical focus of “reasonable likelihood” was grounded on the statutory language. 32 FMSHRC at 1279-81. However, *Musser* left an unanswered question of whether determination of the contribution of the “cause” of the hazard under Step 2 required the Secretary to prove a reasonable likelihood that the hazard would occur. *Newtown* answered that question in the affirmative.

Thus, once a violation has been established in Step 1, we are required to analyze that violation to determine whether it could significantly and substantially contribute to the cause (Step 2) and the effect (Steps 3 and 4) of the hazard. Under *National Gypsum* and subsequent

precedents, that contribution must be such as to make the hazard reasonably likely to occur (“cause”) and, in turn, reasonably likely to result in reasonably serious injuries (“effect”).<sup>4</sup>

### C. The Restated Significant and Substantial Standard

To set forth the *Newtown* refinement in language helpfully parallel to *Mathies*, we hold that the proper test for an S&S violation is:

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.<sup>5</sup>

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<sup>4</sup> In his brief, the Secretary suggests a desire to abandon nearly 40 years of precedent regarding the *National Gypsum* “reasonably likely” standard in favor of lay terminology of “somewhat likely” mentioned in dicta by the United States Court of Appeals for the Fourth Circuit. *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016). There, the Circuit Court *did not say* that Step 2’s analysis would be satisfied by a finding that the hazard would be “somewhat likely” to materialize. Instead, the Court observed that, “the *second* prong of *Mathies* requires proof that the violation in question contributes to a ‘discrete safety hazard,’ which implicitly requires a showing that the violation is at least somewhat likely to result in harm.” 811 F.3d at 163. The Court was not focused upon the Commission’s longstanding “reasonably likely” analysis in *National Gypsum* and subsequent cases. At oral argument in this case, the Secretary was unable to identify a principled, intended difference between the two phrases, insufficiently claiming only that the “somewhat likely” standard would garner more S&S findings—a convenient litigating position. The *Knox Creek* court, however, refused to provide deference to such convenient litigating positions under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984). 811 F.3d at 159-60. The Secretary has advanced no rationale at all for overthrowing the recent majority decision of the Commission reaffirming “reasonably likely” in *Newtown*, let alone a persuasive argument that would satisfy the threshold for *Skidmore* deference. We thus reject the substitution of the phrase “somewhat likely” based upon our sound precedent of “reasonably likely” as the proper S&S standard.

<sup>5</sup> Disregarding *stare decisis* and overstating the Fourth Circuit’s dicta in *Newtown*, Commissioner Jordan continues to agitate for the practically indecipherable term “at least somewhat likely” as a substitute for “reasonably likely,” a term that has been used in forty years of case law. Slip op. at 13 n. 4. The majority decision rejecting this approach in *Newtown* is not a “new formulation.” *Id.* It simplifies and states more descriptively the separate “cause” and “effect” functions of steps 2 and 3 of *Mathies* in line with the description of “significant and substantial” in section 104(d)(1) of the Mine Act.

## **D. Determination of “Significant and Substantial” in the Context of a Contemplated Emergency under *Cumberland*, *National Gypsum* and Restated *Mathies***

### **1. The Contemplated Emergency under *Cumberland***

The Secretary and our dissenting colleagues conflate the initiating emergency with the hazard at which the standard is directed. The initiating emergency, in this case, is the anticipation of an explosion at the face that requires miners at the face to take shelter in a place of refuge. The hazard would be insufficient refuge for those miners, if and when an explosion would occur that may destroy or render useless the refuge chamber that was placed in the line-of-sight of the working face.

Therefore, it is crucial that we identify the “hazard,” precisely, in the context of the occurrence of the envisioned “emergency.” *Cumberland Coal Res., LP*, 33 FMSHRC 2358, 2369 (Oct. 2011). The “hazard,” here, turns on whether the violation renders shelter unavailable to *any* affected miner on the section if and when an “emergency” occurs.

As we held in *Cumberland*, identification of the contemplated emergency is not the end of the S&S inquiry. “Because the particular facts in a case may not establish that a violation of an evacuation standard contributes to a hazard which is reasonably likely to result in an injury, not every violation of an evacuation standard will be S&S.” *Id.*, citing *Rushton Mining*, 11 FMSHRC 1432, 1436 (Aug. 1989). A violation is S&S only if it meets the standards of *Mathies/Newtown*. The Commission has never held that every violation of an emergency standard is S&S, nor have we assumed the elements of an S&S are always present.

In fact, we have expressly held to the contrary: “[A]ssuming the existence of an emergency is not the same thing as assuming that the violation is S&S.” *ICG Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016). Yet contrary to *Cumberland* and *ICG*, the Secretary and the dissent seek here to merge the contemplated “emergency” with the “hazard.” They are not synonymous. The emergency is an assumed explosion on the face that destroys or renders unusable the refuge chamber left exposed to the explosion in Entry 6. The hazard is that a miner will not have a place of refuge. Thus, it must be established that, at any time at which a plausible explosion might occur, there would be insufficient shelter for the number of miners on the section at that moment. There is no substantial evidence in this case to support such an insufficiency.

### **2. The Number of Affected Miners**

All agree that during a shift change there would have been more than 20 miners on the section. However, the key factor in determining whether this violation is S&S is the number of miners on the section at a time when mining activities might have resulted in an explosion. The problem with the Secretary’s theory is that substantial evidence does not support a finding that there would be more than 20 miners on the section during that time.

As previously noted, Peabody engaged in a practice whereby miners would not leave the section until the next shift neared the section—a “hot-seat” shift transition. Through that process,

the existing crew stays at the section until the oncoming crew nears the unit. Tr. 82-83. The evidence demonstrated that Peabody had instituted and followed a safety policy whereby coal production would cease during the transition.<sup>6</sup> Tr. 82-84.

The Secretary points to the testimony of Chad Barras, regarding the possibility of mining operations continuing during shift changes. The Judge and our dissenting colleagues grievously misconstrue Barras testimony, taking it out of context. Barras' testimony does not indicate any prospect for an ignition source during shift changes and, in fact, Barras testimony directly disclaims such prospect.

Barras testified that not all work stopped on the section, but a shift change “[d]oesn't mean we're not all up there, but the mining part, we -- we stopped the car hauling” (Tr. 83) and without car haulage the continuous miner would not be operating. Tr. 84.<sup>7</sup> He further testified that the existing miners stay on the section until the oncoming section gets “near” to the section. Tr. 82-83. In fact, Barras testified that miners would typically be ready to go home at the end of their shift and would be waiting next to the mantrip when the next shift arrived.<sup>8</sup> Thus, Barras' testimony directly undercuts any notion of the existence of an ignition source during shift change. Importantly, this evidence was not contradicted.

The dissent again misrepresents our opinion, arguing that we “assume” a shift will have always entirely ceased mining activity while waiting for the on-coming shift to arrive during a “hot seat” changeover. Slip op. at 15. In fact, as demonstrated above, we do not assume anything. We reflect the unrebutted testimony in the record.

Critically, the Secretary did not introduce any evidence of a plausible ignition source at the hearing, as was his burden. Likewise, the dissent does not cite any evidence suggesting any type of active mining or any other activities that could trigger an ignition, which in turn would

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<sup>6</sup> The dissent notes that “[t]raditionally, a ‘hot seat’ change requires a miner to remain at his or her position until he is relieved by a miner on the following shift.” Slip op. at 14 n.5. However, this was not the practice at this mine. Mr. Barras testified, without rebuttal, that in a hot seat change the miners stay “on the unit” and “that they’re really ready to go home, and they’re sitting out closer to the man trip and see [the next shift] come in.” Tr. 82-83. This directly contradicts any notion that the miners were at their mining positions, let alone working at such positions when the oncoming crew arrives. The facts do show that at shift change there are more than 20 miners on the section. However, the facts also show that no mining was occurring that could cause an explosion. Our dissenting colleagues simply do not see, or refuse to acknowledge, the difference and its importance to the S&S evaluation.

<sup>7</sup> As such, machinery that could conceivably trigger an explosion—haulage vehicles and the continuous miner—are not in operation. Additionally, Barras testified that the policy decision to cease production during the shift changes was instituted to avoid miners being injured by vehicles bringing the next shift to the section. Tr. 80-84.

<sup>8</sup> The Secretary did not introduce any evidence showing that the man-trips bringing miners to the section could constitute an ignition source.

lead to an explosion occurring during the shift change. That is the crucial period in this analysis since it is the only time when more than 15 miners would be present on the section. This is the fact that the dissent continually seeks to avoid but cannot be permitted to overlook.

Additionally, the dissent misstates our opinion by incorrectly claiming that we assert a second refuge chamber will *never* be needed, that the violation could *never* be an S&S violation, and that we have launched an attack on the ERP itself. Slip op. at 15-16. That is nowhere in our opinion, nor can it be implied. The ERP provision at issue here is a general ERP provision applicable to many mines and, undoubtedly, to many situations. It is not formed specifically to the facts and circumstances of each and every individual mine or mining circumstance. Here, we are not dealing with abstract future events or general, non-specific circumstances. This case involves a specific and limited issue. Over the short operative period of the specific violation in this case, the issue is whether more than 15 miners will be on the section when any activity takes place that might produce an explosion. As seen, there is no evidence that such an event would occur during the operative period. Refusing to accept the evidence, the dissent again attempts to conflate the emergency with the hazard attempting to dodge the fact that the evidence does not support that such an event could occur over the brief operative period of this violation.

The un rebutted facts are determinative.

The Secretary must prove his case based upon those facts and not upon what he wishes them to be. This is precisely the mandate of the Mine Act, as well as the Administrative Procedure Act, 5 U.S.C. § 551, *et. seq.* Here, the Secretary failed to prove his case.

Our dissenting colleagues' reference to *Twentymile Coal Co.*, 36 FMSHRC 1533, 1537 (June 2014), and *Plateau Mining Corp.*, 28 FMSHRC 501, 505 (Aug. 2006), (slip op. at 16) underscores the necessity for facts and evidence demonstrating the reasonable likelihood of an explosion. Both of those cases involved the reasonable likelihood of an explosion during *production activities* with supportive evidence based upon facts proven. That is what is absent in this case. While the dissent laments that the "Secretary could never prove that a violation of this emergency response provision was S&S" (slip op. at 20), they nevertheless attempt to set parameters where the Secretary must prove practically nothing. The Secretary cannot alter the state of facts and evidence, much less ignore them altogether.

The Judge and dissent confuse the elements of a violation with the proof required for an S&S violation. The presence of more than 20 miners on the section at any time that the refuge chamber was exposed to the hazard of an explosion at the face constitutes a violation because it violates the plan requirements. That violation is S&S however, *only* if it meets the elements of S&S.

Although not stated explicitly, our dissenting colleagues directly contradict the settled case law cited above that the assumption of the emergency is different from the assumption of the occurrence of the hazard. They essentially take the position that every violation of an emergency standard is an S&S violation because one must assume the occurrence of the hazard at which the emergency provision is directed. Thus, here, they assert we must assume the occurrence of an explosion when more than 15 miners are present on the section during mining

operations, when there is *no evidence* that more than 15 miners *would be present* on the section *when mining is occurring*. This reasoning is fatally flawed given the uncontroverted facts.

The only time more than 15 miners were present, in this case, is at a time when no mining activities were occurring. There is no evidence to suggest otherwise. Moreover, the conditions of the area, at this time, rendered nothing to indicate a potential explosion. The inspector found proper rock dusting in place (Tr. 27), did not note the presence of any float coal dust, nor did he identify any nearly explosive level of methane. The dissent manufactures a hypothetical explosion out of thin air without any evidentiary support.

The dissenters cite *ICG, supra*, which ironically undercuts their argument. In that case, there was a *working section* with mining activities *actively occurring*. *ICG Illinois*, 38 FMSHRC at 2475-82. The assumption in that case was that there would be an explosion on a *working section*. In turn, the S&S question in *ICG* was whether it was reasonably likely that miners would not be able to reach a refuge chamber placed farther from the face than allowed under the emergency provisions. *Id.* The majority held that evidence supported the claim that miners would reasonably likely not be able to reach the refuge chamber. *Id.* at 2479-80. The assumed triggering event for the danger, however, was an explosion on a section *where mining was actively occurring*. Thus, the finding of a violation is not the same as the finding of S&S. Similarly, in referring to *Spartan Mining Co., Inc.*, they again fail to note that the case dealt with an assumed occurrence of an explosion on a *working section* when *mining is actively occurring*. 35 FMSHRC 3505 (Dec. 2013). Again—that is not the case, here.

Our dissenting colleagues effectively assert that every violation of an emergency standard is an S&S violation. Assuming that all 15 miners left the section before another 15 arrived, it would be absurd to concoct an S&S violation—only 15 miners would be on the section at any given time. There would still be a violation of the ERP because of the location of the second refuge but there would not be a possibility of a shortage of places in a refuge chamber. Yet, for purposes of analysis that is virtually the situation here. During mining at shift change, the section becomes as quiescent regarding mining, as if no miners were present.<sup>9</sup>

### 3. The “Significant and Substantial” Analysis

The record developed below does not support a reasonable likelihood of ongoing activities capable of igniting methane, and in turn, causing an explosion when more than 20 miners would be present on the section. To the contrary, the evidence shows that during mining activities of the operative shifts, there would be only 15 miners working on the section at a given

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<sup>9</sup> In a resort to hyperbole, the dissent argues that our construction means an exception that “swallows the rule.” Slip op. at 16. It is difficult to fathom this false proposition. This opinion does not propose any “exception.” We enforce the longstanding S&S standard. Here, as we have stated throughout our opinion, we assume an explosion may occur during mining, and that the refuge chamber placed improperly in this mine would be destroyed or unusable. We are not willing to assume without evidence, however—and here none was presented—that an explosion will occur in the absence of active mining operations at this otherwise compliant work face. As noted previously, our position is entirely consistent with *Cumberland* and *ICG Illinois*.

time. Tr. 44. No evidence was presented that more than 15 miners would be on the section when mining was occurring. More specifically, there was no evidence that mining activities capable of igniting an explosion would occur during a shift change.

Therefore, substantial evidence fails to establish that more than 20 miners were, or would be, present on the section when there was any reasonable likelihood of the hazard—lack of refuge space—toward which the standard is directed. For this reason, we do not find substantial evidence that the location of the second refuge chamber in Entry 6 was reasonably likely to result in the absence of a refuge alternative, and consequently, an injury of reasonably serious nature.

The Secretary suggested that there could be some reason for more than 15 miners to be present on the section during mining. However, this is pure speculation without any evidentiary support. In short, no testimony supported a contention that a single refuge chamber would be insufficient when any ignition sources existed on the section.

Under the basic tenets of *National Gypsum*, there is no proof of an unavailability of shelter for any affected miner at the time of the emergency contemplated under the facts of this case. At a time of an “emergency,” when an explosion might occur, fewer than 20 miners would be on the section. There being no unavailability, the “hazard” of insufficient shelter space does not exist. Without such reasonable likelihood, the violation is not significant and substantial.

This result is confirmed under a restated *Mathies* Step analysis. Under Step 2 of *Mathies*, the Secretary would not be required to prove that the refuge chamber would be unavailable. However, he *is required* to show that the violation (the wrongly placed refuge chamber) was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed—the inability of miners *to shelter*.

The Secretary’s case also separately falters at Step 3—the duty to prove by a preponderance of the evidence that the occurrence of the contemplated hazard would be reasonably likely to result in injury. As noted, the Secretary has not shown any mining activities that could cause an explosion occurring while there were more than 20 miners on the section. Therefore, if there was a loss of one refuge chamber, after an explosion, a functioning refuge chamber in the crosscut would have accommodated all miners on the section.

As in most S&S cases, our conclusion is a narrow one, based on the particular circumstances of this case. Here, the operator conceded the violation. However, one refuge chamber capable of housing 20 miners was properly located in a crosscut and the Secretary did not introduce sufficient evidence to find that more than 20 miners would be on the section at the time of any plausible explosion. Therefore, the Secretary did not demonstrate that it was reasonably likely there would be more miners on the section than the one remaining 20-person refuge alternative could accommodate. Accordingly, the Judge's finding of a significant and substantial violation must be vacated.

### III.

#### Conclusion

For the foregoing reasons, we reverse the Judge's findings on S&S and vacate the S&S designation for the violation. We remand the case so that the Judge may reassess the penalty in accordance with this decision.

/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, dissenting:

In violation of its own emergency response plan, Peabody Midwest Mining (“Peabody”) placed a rescue chamber in direct line of sight of the working face.<sup>1</sup> Peabody does not challenge the Judge’s finding of a violation before the Commission, only the decision to affirm the significant and substantial (“S&S”) designation. For the reasons set forth below, we would affirm the Judge’s significant and substantial finding.

The operator’s plan requires that “[r]efuge chambers will not be placed in direct line of sight of the working face.” Sec’y Ex. 2.<sup>2</sup> The purpose of this requirement is to ensure that refuge alternatives are intact and available to the miners who might need them in the event of an emergency.<sup>3</sup>

Peabody had two rescue chambers in the relevant area of the mine, the one at issue (480 feet from the working face and in direct line of sight of it) and a second one that was properly situated. Each chamber housed 20 miners. Although the operator did not challenge the violation, its primary defense to the S&S designation is that even if the improperly located chamber were damaged by an explosion, the second chamber could serve to protect all miners, as there would never be more than 20 working in the area at one time when mining was taking place. As we explain below, this contention is not supported by the record.

In order to find that a violation of a mandatory safety standard is significant and substantial, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury;

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<sup>1</sup> A working face is any area of a coal mine where work of extracting coal is performed during the mining cycle. 30 C.F.R. § 75.2.

<sup>2</sup> This language mirrors that of the safety standard that specifies that refuge alternatives must not be placed “within direct line of sight of the working face.” 30 C.F.R. § 75.1507(a)(11)(i).

<sup>3</sup> As the preamble to the final rule promulgating the analogous safety standard explained:

The final rule is consistent with the NIOSH [National Institute of Occupational Safety and Health] report, which recommended that refuge alternatives be positioned in crosscuts, rather than entries, or located in dead-end cuts to decrease the possibility of damage from overpressure or flying debris from an explosion. NIOSH also recommended that refuge alternatives be located away from potential sources of fires, such as belt drives.

Refuge Alternatives for Underground Coal Mines, 73 Fed. Reg. 80656, 80687 (Dec. 31, 2008).

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).<sup>4</sup>

Our S&S inquiry hinges on whether, if there were an explosion, some miners would not have access to a refuge chamber (the hazard) and whether there is a reasonable likelihood that this would result in an injury. This analysis, in turn, centers on whether there would ever be more than 20 miners at a time who might need to take shelter in a rescue chamber. Our colleagues answer this question in the negative, and, finding no need for two rescue chambers, conclude that the violation was not S&S.

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<sup>4</sup> Commissioner Jordan notes that the majority articulates a new formulation of the *Mathies* test. Slip op. at 5. Applying the facts in the record and properly assuming an emergency, she believes that the outcome of this case is the same under either standard.

Moreover, for reasons stated in her separate opinion in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2051-52 (Aug. 2016), Commissioner Jordan would follow the analysis utilized by the Fourth Circuit in *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016), which held that the Secretary establishes a contribution for the purposes of the second step of *Mathies* when he shows that the violation is “at least somewhat likely to result in harm.”

As she stated in her opinion in *Newtown*:

In *Knox Creek*, the Fourth Circuit held that the Secretary establishes a “contribution” for the purposes of the second step of *Mathies* when he shows that the violation is “at least somewhat likely to result in harm.” *Knox Creek*, 811 F.3d at 162, 163. Similarly, in *Peabody Midwest Mining, LLC v. FMSHRC*, the Seventh Circuit held that “[a] violation is significant and substantial if it could lead to some discrete hazard, the hazard was reasonably likely to result in injury, and the injury was reasonably likely to be reasonably serious.” 762 F.3d 611, 616 (7th Cir. 2014)(emphasis added). We find the standard put forth by the Fourth and Seventh Circuits to be similar and would apply this standard of proof for the second step of *Mathies*. In short, a violation “contributes” if it is at least somewhat likely to result in, or could result in, a safety hazard. In adopting this language, we note that this standard is in harmony with the wording of section 104(d) of the Mine Act. 30 U.S.C. § 814(d)(1) (“[S]uch violation is of such nature as could significantly and substantially contribute to the cause and effect of a ... safety or health hazard ....”) (emphasis added).

38 FMSHRC at 2052.

Before the Judge and the Commission, Peabody asserted that more than 20 miners were present at the face only during a hot-seat change,<sup>5</sup> and that mining is not performed during those periods. The operator contends that an ignition creating an explosion that would require the use of both chambers would be unlikely at that time.

The Judge rejected this argument. He stated that:

Peabody's claim that both chambers would only be necessary if an ignition occurred during a hot-seat change and that no work is performed during those changes is not supported by the ERP's [emergency response plan] language or the record. The number of refuge chambers required in a given area is dictated by the number of employees that may work in the area, and the ERP explicitly requires two refuge chambers with the capacity to hold 20 miners apiece. Tr. 81-82.

40 FMSHRC 861, 869 (May 2018).

The Judge's ruling is supported by substantial evidence.<sup>6</sup> In rejecting Peabody's assertion, he relied on the testimony of Chad Barras, the operator's safety director. Barras stated that both rescue chambers are necessary because more than 20 miners could be present at the working face on a given shift—and not only during hot-seat changes. He testified as follows:

Q. How many refuge chambers are required to be present in an intake? Actually, let me ask it a different way: How many refuge chambers are required to be present for use by miners on the working section?

A. It really depends on the total number of employees to be there at a given time. For the plan at Francisco [the mine in question], it's two.

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<sup>5</sup> Traditionally, a "hot seat" shift change requires a miner to remain at his or her position until he or she is relieved by a miner on the following shift. *See Rag Cumberland Res.*, 26 FMSHRC 639, 643 n.9 (Aug. 2004). The miner's "seat" on the idling machine remains "hot" during the change.

<sup>6</sup> When reviewing a Judge's factual determinations under the substantial evidence standard, we ask whether there is "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" Substantial evidence has been found to be more than a scintilla, but less than a preponderance of the evidence. The Commission has recognized that the "possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Alcoa World Alumina, LLC*, 40 FMSHRC 655, 661 n.11 (May 2018) (citations omitted).

Q. It's two? Okay. And why is it two?

A. The --there are situations where we have changed it to face or had more people on the unit than just A crew.<sup>7</sup> It's by alphabet and that could go past the capacity of a 20-man chamber.

Tr. 81-82.

Given this testimony, it was reasonable for the Judge to conclude that there are times when more than twenty miners work on the unit. 40 FMSHRC at 869. Conversely, it is unreasonable for our colleagues to suggest that the Secretary's assertion that there could be more than 15 miners present on the section during mining is "pure speculation." Slip op. at 10.

In the context of continuing normal mining operations, and mindful of the production pressures inherent in mining, it would defy common sense if we were to assume (as the majority has) that the out-going shift will have always entirely ceased mining activity while waiting for the on-coming shift to arrive during a "hot seat" changeover.

The Judge also correctly relied on the language of Peabody's emergency response plan itself, which explicitly requires two refuge chambers with the capacity to each hold 20 miners. 40 FMSHRC at 869. Peabody's plan requires two chambers, but the operator now claims—and our colleagues agree—that there will never be a time when two chambers will be needed.<sup>8</sup> Their logic is that the unlawfully located chamber would never be needed to shield miners from a hazard (and can therefore never form the basis of an S&S violation). This assertion, however, is directly contrary to Peabody's agreement in its negotiated emergency response plan that at least two chambers are necessary. Notably, Peabody does not challenge the Judge's finding that it violated its plan.

In effect, the claim that only one rescue chamber is ever needed is an indirect attack against the plan provision itself. However, the plan's mandate has the legal effect of a mandatory standard. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1624 (Aug. 1994) ("Once a ventilation plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards."); *see also UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 393, 409 (D.C. Cir. 1976); *Freeman United Coal Mining Co.*, 11 FMSHRC 161, 164 (Feb. 1989); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). Hence, the effort

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<sup>7</sup> The crews were identified by letters of the alphabet. Tr. 82.

<sup>8</sup> The majority states that the Secretary's suggestion that there could be some reason for more than 15 miners to be present on the section during mining is "pure speculation." Slip op. at 10. However, the requirement in Peabody's plan that two rescue chambers be available belies this accusation.

to negate the provision of the operator's emergency response plan is analogous to attacking the validity of a mandatory safety standard in the context of an enforcement proceeding.<sup>9</sup>

Moreover, the majority's reliance on testimony that during a hot seat change there is no mining activity because at that time the miners "typically" are ready to go home (slip op. at 7) hardly explains away the need for the two chambers required by the operator's plan. It also ignores the possibility that an explosion may occur even in the absence of active mining, as sparking and ignitions can be triggered by roof bolts breaking during a roof fall. *Twentymile Coal Co.*, 36 FMSHRC 1533, 1537 (June 2014) (inspector testified that sparking could occur from roof bolts breaking during a roof fall); *Plateau Mining Corp.*, 28 FMSHRC 501, 505 (Aug. 2006) (roof fall in the gob ignited hydrocarbons).<sup>10</sup>

In any event, the operator's contention—and the majority's insistence—that the violation is only S&S if an explosion would be reasonably likely to occur during a hot-seat change (slip op. at 6-7) is entirely beside the point. Caselaw regarding S&S violations of emergency standards makes clear that the inquiry "should be considered in the context of the emergency contemplated by the standard." *ICG Illinois, LLC*, 38 FMSHRC 2473, 2476 (Oct. 2016). Although our colleagues give lip service to this principle, they attempt to carve out an exception that swallows the rule.

Commission precedent (as well as guidance from the D.C. Circuit), makes clear that when "evaluating the significant and substantial nature of violations of emergency safety standards . . . [we] assume the existence of the contemplated emergency." *Cumberland Coal Res. LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1025 (D.C. Cir. 2013), *aff'g Cumberland Coal Res.*, 33 FMSHRC 2357 (Oct. 2011). This is because "[e]vacuation standards

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<sup>9</sup> Challenges to safety standards are governed by section 101(d) of the Mine Act, 30 U.S.C. § 811(d), which provides that only the courts of appeals have jurisdictions to hear such cases. As to provisions of emergency response plans to which an operator might object, they are resolved pursuant to section 316(b)(2)(G)(ii) of the Mine Act, 30 U.S.C. § 876(b)(2)(G)(ii), which states that if there is a dispute between an operator and the Secretary over a plan provision, the Secretary must issue a citation. *Emerald Coal Res., LP*, 29 FMSHRC 956, 961 n. 7 (Dec. 2007). Nothing in the record indicates that the requirement to provide two rescue chambers was ever disputed by the operator when it negotiated its plan with MSHA.

<sup>10</sup> In his testimony, the inspector explained that if there were to be an explosion, it would travel out by the working face and could damage the refuge chamber. Tr. 42. The inspector stated that on the citation he marked the expected injury as "fatal" because there is no way to tell when an explosion would occur, and one could occur during a shift change. Tr. 43-44 ("I don't know when an explosion would happen. I don't know when an explosion will not happen, so the mine has to maintain both chambers in the event that an explosion happens during shift – shift change"). Furthermore, as the Commission stated in *ICG Illinois, LLC*, "[i]t is of course impossible to predict the time, location, nature or severity of a mine disaster." 38 FMSHRC 2473, 2479 (Oct. 2016).

are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” 33 FMSHRC at 2367. In *Cumberland*, the operator was cited for S&S violations of the lifeline requirement. The Commission found the violations S&S and the operator appealed. The Court rejected the operator’s view that an emergency should not be assumed, reasoning that without such an assumption, “it would appear unlikely that any violation of those standards would ever be ‘significant and substantial.’” 717 F.3d at 1027.<sup>11</sup>

Under *Cumberland* and Commission caselaw, we assume the existence of an emergency (an explosion or fire) in evaluating the hazard in step 2 (the inability to access the refuge chamber in a life-threatening environment when escape from the mine is not possible).<sup>12</sup> As the Commission stated in *ICG Illinois*, “[t]he likelihood that the emergency will actually occur is irrelevant to the *Mathies* inquiry. . . . The standard at issue is intended to apply in the context of an emergency so severe as to make evacuation impossible, survival outside the refuge unlikely, and travel extremely difficult in the face of smoke, debris, and possible injury.” 38 FMSHRC at 2476-77

In *ICG*, the operator was charged with placing a refuge chamber 1,110 feet from the nearest working face, in violation of a safety standard requiring that the chamber be located within 1,000 feet. The Commission emphasized that the violation should be considered in the context of the emergency contemplated by the standard and found the violation S&S.

In a prescient comment, the D.C. Circuit in *Cumberland* emphasized that “the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard. Thus, if the decision-maker does not assume the existence of the emergency, then his focus must necessarily shift away from the nature of the violation to the likelihood of the emergency.” 717 F.3d at 1027.

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<sup>11</sup> In *Cumberland*, a unanimous Commission rejected the operator’s argument—echoed by the majority here (slip op. at 8-9)—that if the Judge evaluated the S&S determination in the context of an emergency, every violation of an evacuation standard would be S&S. 33 FMSHRC at 2368. We also pointed out the somewhat unremarkable proposition that “if the violations had instead been relatively minor in nature and scope, a fact-finder may well not have found the violations [S&S].” *Id.*

<sup>12</sup> Notwithstanding the majority’s characterization (slip op at 6), the Secretary correctly identified the emergency (“an explosion originating in the working face that traps miners and forces them to seek shelter in the refuge chamber,” Sec’y Resp. Br. at 20), and the hazard itself (“the inability to access a functioning or operational refuge chamber in a life-threatening environment when escape from the mine is not possible.” *Id.* at 18-19).

And yet, that is precisely where the focus of our colleagues in the majority lies, as they analyze the likelihood of an ignition occurring during a shift change<sup>13</sup> (slip op. at 6-7) and fix on the narrow inquiry as to whether activity leading to an explosion might occur “during the operative period.” Slip op. at 8. This is exactly the wrong inquiry. Our colleagues acknowledge that an emergency must be assumed—*except* an emergency that occurs during a shift change (when there would be too many miners to fit into one rescue chamber). This contention finds no support in our caselaw, which may come as surprising news to readers of the majority opinion, focused as it is on whether and when “activities capable of igniting methane” took place. Slip op. at 10.<sup>14</sup>

*ICG* teaches us not to cherry-pick the timing of the emergency that is assumed. Here, the majority insists that no explosion or fire could occur during the shift change (despite the Judge’s finding that work could be performed during a hot-seat change, 40 FMSHRC at 869). However, in *ICG*, we emphasized that the inspector charging the S&S violation correctly assumed “a ‘disaster’ or ‘worst case scenario’ when making his S&S determination.” 38 FMSHRC at 2476. Here, the “worst case scenario” is a situation where, assuming an emergency such as a fire or explosion that renders the refuge chamber at issue unusable and makes escape from the mine impossible, more than 20 miners are in need of shelter (either due to a shift change or to other circumstances).

The Commission decision in *Spartan Mining Co.*, demonstrates the importance of assuming an emergency when deciding whether a violation of an emergency response standard is S&S. In *Spartan*, a unanimous Commission affirmed the decision of the Judge holding that escapeway standard violations were S&S. Notably, in *Spartan*, the parties stipulated that “*at the times of the violations, an emergency requiring evacuation was not reasonably likely to occur.*”

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<sup>13</sup> Specifically, the majority states that there was insufficient evidence to demonstrate that the location of the refuge chamber at issue “was reasonably likely to result in the absence of a refuge alternative, and consequently, an injury of a reasonably serious nature.” Slip op. at 10. Their statement is consistent with the majority’s holding in *Newtown*. However, in their S&S *evaluation* the majority reconsiders the reasonable likelihood of an emergency situation happening under a specific factual context. In doing so they erred. *Cumberland*, 33 FMSHRC at 2366 (“The Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S.”). Case precedent is clear that we must assume an emergency throughout the S&S analysis. *See, e.g., Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (holding it is not necessary for the Secretary to prove the likelihood of an emergency at step three); *ICG Illinois*, 38 FMSHRC at 2480 (stating that, assuming the occurrence of an emergency the disaster would be fatal under [a step four analysis]).

<sup>14</sup> The majority’s willingness to assume an emergency has its convenient limits. Although there is no precedent for refusing to assume an emergency only during a particular timeframe or under certain conditions, our colleagues nonetheless state categorically that they “are not willing to assume without evidence . . . that an explosion will occur in the absence of active mining operations.” Slip op. at 9 n. 9.

35 FMSHRC 3505, 3507 (Dec. 2013) (emphasis added).<sup>15</sup> The Commission quickly rejected the operator’s contention that this stipulation rendered an S&S finding impossible, noting that “[j]ust as the need for a lifeline in *Cumberland* would arise only in the event of an emergency, the need for adequate escapeways will only arise in the context of an emergency evacuation from the mine.” *Id.* at 3509.

Not only do our colleagues misapply established case law regarding when an emergency should be assumed, but they also turn other longstanding S&S precedent on its head. They state that the Secretary did not demonstrate the existence of “any mining activities that could cause an explosion occurring while there were more than 20 miners on the section, and thus, failed to prove step three of the *Mathies* test. Slip op. at 10. However, as just discussed, we must assume throughout the S&S inquiry that an emergency—the explosion—has occurred. In addition, at step three we must assume that the hazard—insufficient shelter space —also occurs.

The majority errs by deciding the record compels the conclusion that an explosion could never occur at a time shelter would be needed by more than 20 persons at the face (in addition to a given production crew, maintenance crews, inspection parties, engineers, etc.). Not only is that conclusion unreasonable, it is inconsistent with our precedents directing us to assume the existence of the hazard at step three of the *Mathies* test. Those precedents wisely prohibit us from entertaining hypotheses as to whether the hazard would have occurred.<sup>16</sup> Thus the proper

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<sup>15</sup> Thus, our precedent recognizes that we must assume an emergency even if it is not reasonably likely to occur. In an attempt to depart from our case precedent, our colleagues nonetheless argue that a second chamber is never needed during production because only 15 miners would be present. Slip op. at 7-8. We are not ready to say with certainty that, assuming normal mining operations would continue, *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984), the operator’s asserted practice would always be followed. Indeed, as noted above, the operator’s own safety director testified there are times there may be more than 20 miners at the face. Tr. 81-82. We do not hope against the worst case scenario emergency, we assume it.

<sup>16</sup> As the Fourth Circuit has emphasized:

Every federal appellate court to have applied *Mathies* has also assumed the existence of the relevant hazard when analyzing the test’s third prong. *See Peabody Midwest*, 762 F.3d at 616 (“[T]he question [presented by *Mathies*’ third prong] is not whether it is likely that the hazard . . . would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result.”); *Buck Creek*, 52 F.3d at 135 (accepting as sufficient for satisfying *Mathies*’ third prong the ALJ’s finding “that *in the event of* a fire [i.e., the relevant hazard], smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention”

(continued...)

inquiry at this step is whether, assuming an explosion (the emergency) and the insufficiency of adequate space in the refuge chambers (the hazard), there is a reasonable likelihood of injury.<sup>17</sup>

In sum, under the majority’s reasoning, the Secretary could never prove that a violation of this emergency response provision was S&S unless he demonstrated that at the exact time when more than twenty miners would be working at the face there was a reasonable likelihood of an ignition followed by an explosion of such force and specific character that it would render the subject rescue chamber unusable. The Secretary’s burden of proof under the *Mathies* test does not require this level of granularity of detail in evidence, which would make it nearly impossible for the Secretary to demonstrate that a violation of this critically important emergency standard is significant and substantial. Moreover, it is unlikely even the most thorough expert forensic testimony could ever establish what the majority would accept as a “reasonable likelihood” of a precisely timed ignition followed by a sufficiently large explosion. We must not require the

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<sup>16</sup> (... continued)

(emphasis added)); *Austin Power*, 861 F.2d at 103-04 (finding *Mathies*’ third prong satisfied where a workplace fall, i.e., the relevant hazard, was from a height of thirty-six feet and so “would almost certainly result in serious injury,” without requiring evidence that a fall itself was likely); cf. *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm’n*, 717 F.3d 1020, 1025–27 (D.C. Cir. 2013) (accepting the Secretary’s interpretation that the *Mathies* test allows the decision-maker to assume the existence of an emergency when evaluating whether the violation of an emergency safety standard is S & S).

*Knox Creek Coal Corp.*, 811 F.3d at 161–63.

<sup>17</sup> The majority’s reliance on the presence of the second rescue chamber also contradicts our longstanding case precedent that redundant safety measures do not mitigate S&S findings for violations of emergency standards. See, e.g., *ICG Illinois*, 38 FMSHRC at 2481-82; *Black Beauty Coal*, 36 FMSHRC 1121, 1125, n.5 (May 2014). In *ICG*, the Commission rejected the operator’s argument that the presence of self-contained self-rescuers was a mitigating factor in the S&S analysis. We relied on the D.C. Circuit’s opinion in *Cumberland Coal Resources* in which the Court explained that “assuming the existence of an emergency in which a lifeline would be necessary also assumes an emergency in which all of the redundant safety measures . . . have failed.” 33 FMSHRC at 2481-82, quoting 717 F.3d at 1028-29. “Here,” noted the Commission in *ICG*, “the same principle applies.” *Id.* at 2482. More recently, in *Consolidation Coal Co.*, the Court emphasized that “[w]hen deciding whether a violation is [significant and substantial], courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation.” 895 F.3d 113, 118 (D.C. Cir. 2018), quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

Secretary to satisfy our judicial imaginations that there was a reasonable likelihood of the occurrence of an event the courts have clearly instructed us to assume. We undermine enforcement of the Act by demanding this sort of fool's errand to establish that the operator's failure to locate refuge chambers consistent with the Secretary's standards and its own emergency plan is a serious and substantial violation.

For the foregoing reasons, we respectfully dissent.

/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**

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

June 16, 2020

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

v.

CANYON FUEL COMPANY, LLC

Docket No. WEST 2019-0380-R

Docket No. WEST 2020-0014  
A.C. No. 42-00089-496617

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

**DIRECTION FOR REVIEW, DECISION, AND ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On October 8, 2019, the Commission received from Canyon Fuel Company, LLC (“Canyon Fuel”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a); the motion to reopen was docketed in Docket No. WEST 2020-0014.

On June 10, 2020, the Commission received from Canyon Fuel a petition for discretionary review (“PDR”) of the Judge’s order dismissing Docket No. WEST 2019-0380-R, a related contest proceeding involving the underlying citation to the penalty assessment at issue in Docket No. WEST 2020-0014. Order dated May 11, 2020. In Docket No. WEST 2019-0380-R, Canyon Fuel notified the Judge of the still pending motion to reopen. The Judge concluded, however, that the penalty assessment had become a final order and dismissed the contest regarding the related citation as moot.

Having reviewed the pleadings, we grant Canyon Fuel’s request to reopen the penalty assessment in Docket No. WEST 2020-0014. Accordingly, we hereby also grant its Petition for Discretionary Review of Docket No. WEST 2019-0380-R and vacate and reverse the Judge’s order in that case.<sup>1</sup> We also consolidate the contest and penalty proceedings and remand for further proceedings.

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<sup>1</sup> There have been previous instances in which the pendency of a motion to reopen before the Commission has delayed a related case before a Judge from moving forward. In those instances, the Office of the Chief Administrative Law Judge has communicated to the Commission the need for prompt action on the motion to reopen. Since that process has proven successful, we would urge Judges to avail themselves of it in cases such as this. A Judge also can stay a related case while he or she waits for the Commission to act on a motion to reopen.

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on August 8, 2019, and became a final order of the Commission on September 9, 2019. Canyon Fuel asserts that it mistakenly sent the contest form for Assessment No. 000496617 along with partial payment to the MSHA payment office in St. Louis, instead of MSHA’s Civil Penalty Compliance Office in Arlington, Virginia. Canyon Fuel further states that it had filed a notice of contest for Citation No. 8537643, docketed at WEST 2019-0380-R, and intended to contest the proposed assessments for both that citation and related Order No. 8537644, but erroneously failed to submit its penalty contest to the correct MSHA office. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Canyon Fuel's request and the Secretary's response, we find that the operator intended to contest both violations and the proposed assessment, but mistakenly sent the form to the wrong MSHA office, and timely filed its motion to reopen upon discovering its error. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ 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

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# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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June 15, 2020

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

v.

CONSOL PENNSYLVANIA COAL CO.,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-0019  
A.C. No. 36-07416-476696

Mine: Enlow Fork Mine

**DECISION AND ORDER**

Appearances: Brittany Williams, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary  
of Labor  
  
James P. McHugh, Esq., Hardy Pence, Charleston, West Virginia, for the  
Respondent

Before: Judge Lewis

**STATEMENT OF THE CASE**

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act” or “Mine Act”). A hearing was held in Pittsburgh, Pennsylvania. The parties subsequently submitted post hearing briefs and reply briefs which have been fully considered in reaching the within decision.<sup>1</sup>

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<sup>1</sup> On August 16, 2019, this Court issued a Partial Decision Approving Settlement that disposed of Citation/Order Nos. 9079299, 9079304, 9079305, 9079239, and 9079241.

## **LAW AND REGULATIONS**

### **§ 75.1700 Oil and gas wells.**

[STATUTORY PROVISIONS]

Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

## **FINDINGS OF FACT AND CONCLUSION OF LAW**

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

## JOINT STIPULATIONS

The parties' joint stipulations are as follows:

1. Enlow Fork is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. Enlow Fork is an "operator" as contemplated by the Federal Mine Safety and Health Act of 1997, as amended ("Mine Act").
3. The proposed penalties, if upheld, will not affect Enlow Fork's ability to continue in business.
4. Each citation was properly served as required by the Mine Act.

T. at 5-6; *see also* SBI, p. 1.<sup>2</sup>

## SUMMARY OF TESTIMONY

### WITNESSES

#### James Baker

James Baker had been employed at MSHA for five and a half years. T. 12-13. He had spent 22 week at the National Mine Academy and had a week-long class in journeyman training. T. 13. Prior to his employment with MSHA he had worked for approximately 22 years in mining, 17 years underground, and 5 years on the surface.<sup>3</sup> T. 13.

At the time of hearing, Baker worked as a coal mine inspector. T. 13. On direct examination, Baker testified that in September 2018 he was performing a regular E01 inspection at Enlow Fork Mine when he was informed that the operator had struck a gas well. T. 15. Baker verbally issued a § 103(k) order. T. 18. He met with the mine foreman, Joe Bartolotto, traveled with Bartolotto to the E 30 Longwall Section, No. 73 Shield, and found the borehole that had been cut through. T. 19.

On September 10, 2018, Baker issued Citation No. 9079236. GX-1. He issued such based upon Respondent's failure to properly locate and plug the cited gas well in violation of Section 75.1700. GX-1; T. 22-22. As to the violation's gravity, Baker found that an injury was

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<sup>2</sup> "T" refers to the hearing transcript. "GX" refers to the Secretary's exhibits and "RX" refers to Respondent's exhibits. "SBI" refers to the Secretary's original post hearing brief and "SBII" refers to his reply brief. "RBI" refers to Respondent's original post hearing brief and "RBII" refers to its reply brief.

<sup>3</sup> *See* T. 13-14 for more detailed description of Baker's mining experience and certifications.

reasonably likely to occur. T. 21. Without locating the well, there would be no way of knowing if methane gas were present. He concluded that bits on the shearer drum could turn and strike a gas well “not properly grouted or concrete,” possibly causing an ignition of any methane gas present. T. 21-22, 48.

Enlow Fork had a history of methane and ignitions. T. 22. It had been on a five-day spot for the amount of methane liberated in a 24-hour period. T. 22.

Baker determined that three persons would be affected by the violation because typically two shearer operators and one shield man were at the face the entire 9-hour shift. GX-1; T. 22. If bits struck the unlocated borehole or casing with methane present, an ignition causing burns or smoke inhalation to three individuals could have taken place. T. 22-23. The worst case scenario would have been an explosion. T. 23.

On cross-examination Baker agreed that Consol had preserved the scene after the well breach. T. 30. There was no methane found. T. 31. The top hole was “very clean.” T. 32-33. The operator’s crew had done everything in regard to the DNF mining procedures longwall mining method.<sup>4</sup> GX-3; T. 34.

The well was ultimately plugged with concrete being applied to the mine floor and a 36-inch plug installed in the upper hole. GX-1, Section 17; T. 36. Baker conceded that Section 75.1700 did not specifically set forth a duty to plug located wells. T. 38. He further acknowledged that he knew of no applicable definition or MSHA promulgated rules for “reasonable measures” to locate wells. T. 40.

The cited well was ultimately located under a sand mound at a third-party’s house. T. 41.

Baker again affirmed his belief that the operator or operator’s contractors should “have probably found” the well because “it was so close to the way they found it underground that they probably should have found it on top...” T. 40.

Baker described the hazard thusly: “if your bits from your shearer hit that casing or well and it had methane in it, it could cause an ignition.” T. 48. There was, however, no casing involved in the within citation. T. 48-49. In reaching his S&S determination, he had taken into account the fact that MSHA’s cut-through plan allowed the operator to cut through wells that could not be located. T. 50. Baker was surprised that another inspector (Young) had found non-S&S in a similar situation in which an operator had cut through a well that it had been unable to locate. T. 51; GX-3. In reaching his S&S determination, Baker had not considered such factors—as considered by Inspector Young—that the well was not producing, that the well contained no metal casing, that the well was covered over with dirt on the surface, that there was “plenty of air on the face to dilute the methane coming out of [the] well bore.” T. 53-54.

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<sup>4</sup> DNF stands for “did not find.” T. 23; GX-3.

When asked how he could determine whether a violation was S&S if he did not know the four parts of *Mathies*, Baker replied: “I guess I can’t.”<sup>5</sup> T. 54.

Baker again expressed surprise that, in another situation involving a borehole cut-through, an inspector found that the risk of injury to be unlikely. GX-4; T. 54-55.

On redirect examination, Baker noted that wells should be properly sealed, grouted, and plugged before an operator cuts through them. T. 57-58.

On recross, Baker’s investigation as to the efforts exerted by Respondent in attempting to locate the cited well was limited to the information received from the contractor, 18 Karat, and Burns. T. 62.

### Jeremy Williams

Jeremy Williams began his employment with MSHA in 2005 and had been employed as a supervisory mine safety and health specialist since 2012. T. 66. He had previously worked as a ventilation specialist and health specialist, receiving ventilation training every year. T. 66-67. Prior to his employment with MSHA, Williams had worked for Consol Energy beginning in 1998, last working as an assistant shift foreman and section foreman. T. 67. He had a bachelor’s degree in mining engineering from West Virginia. T. 67.

On direct examination, Williams testified that his current duties included review and approval of gas well pillar permits, gas well cut-throughs, and alternative borehole plans. T. 68. As to gas well cut-through plans, mine operators, as Respondent, must petition for modifications to plug and mine through gas wells pursuant to Section 75.1700. T. 69; GX-7. Operators may not engage in longwall mining through gas wells without plugging them. T. 74. Operators, through their engineering departments, obtain mapping and databases with the state, and gas well maps to locate on-the-surface gas and oil wells. T. 75.

Hazards associated with cutting into a well, which has not been plugged, included methane inundation, ignition, and explosion. T. 75. Enlow Fork was a gassy mine, probably liberating in excess of six million cubic feet a day, and having a history of ignitions. T. 75-78; GX-6, 7. Some of the past ignitions did not involve a metal casing. T. 89-90. Often boreholes were full of water with methane boiling up through the water. T. 92. Fuel, oxygen, and a heat source were necessary for an ignition to occur. T. 95-96.

Generally, the mine maps show where a gas well is located. T. 102. The mine operator, through its own personnel or contractors, will attempt to locate wells, observing the local topography, including depressions, using metal detectors, searching for any evidence of gas wells. T. 102. Once a well is located, the operator will plug it in order “to mine through to the point for the petition for modification.” T. 102. Given the different depths in the Pittsburgh Coal

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<sup>5</sup> Despite Baker’s response, this Court is persuaded that the inspector did, in general, understand the steps in *Mathies* but was becoming frustrated by operator’s counsel’s vigorous cross-examination.

Seam, one would expect that a hole could deviate up to 40 feet away, and Williams believed that it was the operator's responsibility to search that area. T. 103-104.

According to the DNF 2019, Williams testified that a reasonable search to locate a well would require an operator or its contractors to go out and conduct a physical examination of the area. T. 104. If evidence were found, metal detectors could be used to find any casings or other evidence of well drilling, such as couplers. T. 104. Subsurface excavations could also be performed with shovels, Bobcats, bulldozers, and any other types of equipment to strip off the top soil and dig down to locate a borehole. T. 104. Even if metal casings were not found, wood conductors might be discovered on the surface. T. 104. Once a well is located and plugged, the operator can mine through without incident. T. 104.

As to the well at issue, it "was basically in a guy's back yard," located in the leach bed for his sewage system. T. 104. Williams opined that the operator had not exercised due diligence in opting not to do subsurface excavation. T. 105.

At times there might be sand pipes sticking out of the ground, indicating the presence of a well. T. 105. However, here there were none, probably due to the construction of the home. T. 105. The area was graded over and there was no evidence of the presence of a well due to excavations and landscaping over the years. T. 105. There was no hole present and no pipe sticking out of the ground. T. 105.

Given that the petition for modification required the operator to locate and plug gas wells, Williams opined that Section 75.1700 was violated because "in this scenario, a gas well was not located or plugged and then mined through." T. 107, 108.

On cross-examination, Williams testified that he had been told that the mine operator had not dug with Bobcats or bulldozers. T. 110. Williams agreed that, consistent with the standard of the industry, Respondent's contractors had dug down in the cited area to uncover any metal evidence. T. 110-111. Old mine maps might have wells separated by 700 to 1,000 feet. T. 111.

MSHA has not promulgated any rules as to what would constitute reasonable measures to be taken by operators to locate wells. T. 111-112. Williams was unaware of any definition of reasonable measures that could be given to the regulated community. T. 112. He was aware that Respondent's contractors had dug with hand tools in the area of the "guy's yard" to search for metal fragments—but not with Bobcats, bulldozers, or high lifts. T. 113. Williams agreed that the petition for modification did not specifically set forth a requirement that wells be located; rather it dealt with the plugging procedures to be followed once a well was discovered. GX-8; T. 115.

As to planning operations near a well believed to exist, Williams opined that this would not apply to a situation where the operator simply could not find the well. T. 116-118; GX-7, p. 7.

Williams was aware that of five reported wells believed not to have existed, the operator had only intersected one. T. 124; RX-E. He could not remember whether in the past he had stated that the Respondent had taken reasonable measures to find the well in question. T. 124.

Of the approximately seven episodes characterized as ignitions, Williams agreed that all but one were located in the headgate, tailgate or development sections. T. 126-127. At 50,000 CFM, there would be approximately ten times more ventilation delivered to the longwall surface at Enlow as opposed to the continuous miner development section, which only had 5,000 CFM. T. 128-129.

Williams was not aware of any incident where Consol had caused anyone to be injured because of intersecting a borehole or gas well. T. 134. He couldn't "say for sure" whether the operator's contractor's grid search in the 100-foot zone area with metal detectors constituted a reasonable search. T. 137. Williams testified that Consol usually did a "good job" in looking for gas wells, and to the best of his knowledge 18 Karat was a reputable contractor. T. 138, 140.

#### Joseph Bartolotto

At the time of hearing, Joseph Bartolotto had been safety inspector at Enlow Fork Mine for the past 8 months. T. 143-144. He had gone to technical school for computer-aided drafting. T. 144. He had started in the coal industry in 2013 as a surveyor, moving into the dust department. T. 144. He had worked at Bailey Mine as a GMS contractor employee, working on the longwall, then as a dust technician. He had all his dust certifications, PA blasting cap, federal train-the-trainer card, West Virginia and Pennsylvania black hat. T. 144.

On direct examination, Baker testified that he had accompanied Baker on the date the inspector had issued Citation No. 9079236. T. 144-145. They went to the longwall, met with the section boss, and traveled onto the face. T. 146. They checked for gas immediately and found none. T. 146. People on the section had also found none. T. 146. After inspecting the intersected borehole, they decided upon a course of action to plug it and then continue mining through. T. 147.

The well site was intersected at 12:10 and they were on the scene prior to 2:30. T. 147. At 3:33 there was a verbal modification of the K order and permission was given to plug the hole. T. 147; RX-D.

Reflective signs hanging down from shields gave notice that the area was a gas well zone. T. 148. There was a sign reading "gas well zone starts here" and then a sign on the other side reading "ends here." T. 148. The start of the zone was No. 62 Shield and the end of the zone was No. 80 Shield at the pluses of 107, plus 85 to 106. T. 149; RX-L. The gas well was intersected at No. 73 Shield. T. 151.

#### Robert Botroac

Botroac worked as a section foreman at Consol. He had an associate's degree in mining and technology and had worked for Respondent since 2008, primarily as a longwall and gate

foreman. T. 153. He was section foreman when the borehole in question was intersected. T. 154. Botroac testified that on September 6, 2018, he had received information about a DNF well zone and had set the 100-foot zone with signs wired to a shield. T. 155-157. In mining the 100-foot zone, additional gas checks are taken. T. 157.

### Robert J. Robinson

Since 2017, Robert J. Robinson had worked as director of engineering for Consol mines. T. 162. He had a bachelor's of science in mining engineering. T. 162. He had worked in the coal industry since 1976, had transferred to Bailey Mine in 1998 and had been promoted to director of engineering for Respondent in 2017.<sup>6</sup> Dating back to the late 1980's he had been involved in conducting searches for gas wells and plugging them according to the 101 (c) petition. T. 163-164.

On direct examination, Robinson testified that some of the challenges presented to Respondent in locating old gas wells included the fact that many of the wells were drilled prior to 1940, using steam rigs. T. 164. These old wells were almost exclusively drilled with cable tool rigs. T. 164. Wells, such as the one at issue, were extremely difficult to find, because there was no permit requirement or plat that went with the well. T. 164. The driller simply reached an agreement with the landowner and started drilling, there being no record made. T. 164-165. Wooden derricks were erected on the site. T. 165. The equipment used—oil-and-gas driven steam engines—was small, as opposed to the large well pads utilized in the Marcellus Shale industry. T. 165.

The cable drill had a 12-inch very heavy drill bit, the drill being about 15 feet long. T. 165. Typically, the wells would go 2,800 to 3,200 feet deep, depending where the coal was at or where the gas zone was located. T. 166. If, however, the drillers encountered an issue, they would simply skid the rig over 15 feet and begin a new hole with no need for permits. T. 167. Over the years such unpermitted skidded holes would be found and plugged. T. 167-168.

In the 1970s and 1980s, plats provided good information as compared to previously when wells were unpermitted with no drawing or records.<sup>7</sup> T. 168. In the modern day, handheld GPS devices are used so that one can walk up to a latitude/longitude location with the geographic coordinate value noted on the drilling permit and get within 10 feet of a platted or permitted well. T. 168.

In searching for unpermitted older wells, Consol uses farm line maps or producer maps. Such maps were developed by past gas companies such as Carnegie Manufacturers Heat and Light, Columbia, and Equitable Gas. T. 169. Gas company employees would go out to farms, meet with the landowners, and mark farm line maps with symbols showing the location of wells. T. 169. The problem with the older Carnegie/Columbia maps was that they might depict the

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<sup>6</sup> See pp. 162-164 for more detailed description of Robinson's past experience.

<sup>7</sup> Robinson described "plats" as "basically, like, a property survey." T. 168.

same gas well in different locations. T. 170-171; RX-K. Furthermore, the range that the company's (Carnegie's) symbol might cover could be up to 1,000 feet. T. 172.

The petition for modification filed by Respondent for Enlow Fork Mine dealt with the procedures, practices, and methods for plugging gas wells to be mined through with a continuous miner or a longwall. T. 173. It did not specifically address the questions of locating a borehole or gas well. T. 173.

Once Consol has obtained maps and plotted them, it scans the hard copy images into an autoCAD-type program, scales them, rotates them, and fits them to a farm tract or to a quadrangle section. T. 174.

The digital image can be overlaid on Respondent's § 75.1200 mine drawing. T. 174. A search map can be generated that will have the various gas company symbols which, together with available aerial imaging, can show where a gas well might be located. T. 175-176; RX-I. The mapping however is not 100% accurate. "Not found wells" might never be found underground. T. 178. Exhibit RX-B was the Enlow Fork approved oil and gas well cut-through plan, which was an addendum that was used to spell out the procedure for the mine to follow when mining through a gas well area. T. 178-179.

Robinson outlined the measures taken by Consol to locate wells or boreholes on the surface based on his past experiences. T. 179. All available mapping is reviewed; historical photographs are examined; the best location to conduct a field reconnaissance or foot search is selected; people are sent out to the site and work under the supervision and direction of Matthew Ruckle, the project engineer. T. 179, 227.

A map may have five different companies' symbols. T. 179. If one of the symbols ends up a vertical cliff, there is good probability that there was no drilling sitting there, so the area is narrowed down. T. 179-180. Aerial photography is used. Topography is looked at; a bench is tried to be found. T. 180. Once an area is zeroed in, there is always a metal detector search for cut nails, for past drilling, and miscellaneous materials. T. 179-180. A lot of times the material detected is old farm scrap and has nothing to do with a gas well. T. 180. If drilling material is discovered, the site is evaluated as to whether further excavation is warranted. T. 180. Depressions and sinkholes and ground features that don't quite fit into the topography are noted. T. 180.

Exhibit J depicted the area where Respondent's project engineer and contractors conducted their search for the well. T. 181. The type of search conducted for the subject well was the type "normally" employed. T. 182. The operator had already mined through three other areas that had shown wells believed not to exist (DNFs) and were not ultimately found there. T. 182. Given the number of duplicate wells on available farm line and producer maps, finding the actual location of wells was difficult. T. 182.

In the past, Consol had worked with the state of Pennsylvania and MSHA to get plans approved in order to mine using a longwall and continuous miner above a gas storage field. T. 182. Due to Consol's success in locating 32 more wells than the gas storage operator believed to

have existed, Consol had been asked to train individuals as to how to properly search for wells. T. 182-182.

Anytime Consol is unable to locate a DNF, it shows a symbol to alert individuals to be watchful. T. 184; RX-B.

Robinson opined that Respondent was improperly cited for violating § 75.1700 in that the operator had taken reasonable measures to locate the well, employing methods routinely used for such searches. T. 185. This was not a situation where there was a plat that showed the well location with a surveyed location, or, even without a surveyed location, a plat that showed distances from two corners. A failure to locate in such situations would be the result of unreasonable measures. T. 185.

On cross-examination, Robinson opined that a cable tool rig had been used in the well at issue. T. 191. In the past, Respondent's employees had utilized hard copy farm line maps. T. 192. But when oil and gas came out with digital mapping, farm line maps were digitized and Respondent refined the symbols showing gas well locations. T. 192. The red symbol depicted a dry hole; the green symbol was also a dry hole; and the blue symbol was a gas well. T. 193; RX-I. A second look at the mapping had taken place in late 2017-early 2018 prior to Respondent starting the longwall panel. T. 193.

According to the operator's calculations the gas well was estimated to be located in the area of No. 71 Shield. T. 197. It was actually intersected at No. 73 Shield. T. 198. The operator would not have needed to tear down the private property owner's house to locate the well. T. 203. There was, however, a sewage sand mound or septic system where the well was eventually located. T. 203.

Robinson had spoken with the private property owner, who had grown up in the area and whose father had owned the neighboring farm. T. 207. She had no knowledge whatsoever of a well in the area. T. 207.

### Robert Conner

Robert Conner worked since 2006 as foreman for gas well locating for 18 Karat. T. 209-210. Over the years he had searched for approximately 1,000 wells and had performed services for multiple companies, including Consol, CNX Gas, and Murray Energy Corporation. T. 210.

On direct examination, Connor testified that he had been contacted by Respondent to search for the gas well at issue. T. 210-211. He reviewed a Carnegie Gas map which showed a location that an earlier search company had found not to be accurate. T. 211. Conner overlaid the old gas map on top of Google Earth. T. 213. He pulled it in as best he could with the old roads and property lines; then faded out the old map on top of Google Earth and got a search location that was submitted to Respondent. T. 213.

At the selected site, 18 Karat worked a grid with searchers four feet apart, digging up any evidence that could be located. T. 214. On March 12, 2018, two searchers spent 10 hours

searching, and found cable down by a fence. T. 213-215. They also found round nails and some modern nails with no rust. T. 213-215. On March 13, 2018, the same two people found part of a three way, which was described as “a T,” and round and modern nails. T. 215. On March 14, 2018, the same searchers again found round and modern nails. T. 216. The property owner said there was 10 feet of fill over where 18 Karat was looking for the well, located behind his house, going down next to where a fence was at near a pond. T. 216. Conner was uncertain how long the pond had been on the property. T. 216. On March 15, 2018, Conner continued to hand-search for the well, searching down into the swamp on the pond on the hollow side of the fence. T. 216-217. A few pieces of molten metal and right-handed cable were located at a depth of four feet in the hollow to the left of the pond in a wooden area. T. 217. Locating molten metal is relevant because it could be where past drillers dressed tools on old drilling rigs. T. 217. The March 16, 2018 notes by 18 Karat indicate continued hand searching for well 2019, with a few pieces of molten metal found a few inches deep along a creek bank along with a few scattered nails in no pattern. T. 217. The lack of pattern was considered significant because in attempting to locate wells “there will be a pattern the way the rig sat in there, the derrick fell.” T. 218. No pattern of any kind was found. T. 218.

Metal detectors were used because metal was important evidence in locating a well: “you can lay out how that rig sat in there to give you direction of which way the hole would be.” T. 218. Specifically, the metal that is relevant to where the rig sat would be: 16, 18, and 20-inch long rig bolts; ¾ inch bolts with hex heads; hex nuts and a couple of washers on them. T. 219. These items would be about 6 feet apart and “pairs of four the way the rig laid in there for the motor house to be bolted onto.” T. 219. Such pattern of residual evidence would indicate the location of a well whereas scattered debris and molten metal and nails would not be helpful. T. 219.

Exhibit RX-J depicted the area searched by 18 Karat, with a yellow outline indicating the area searched and a red outline to indicate the items found. T. 219. 18 Karat employees searched with metal detectors in the yellow outlined area and dug in the area of the private property owner’s back yard, but found no indicia of a well’s presence. T. 220.

Shovels were used to do the digging. Shovel digging was a normal practice in attempting to locate a well. T. 220. 18 Karat employees used shovels anywhere, including woods and yards. T. 220. When, however, searching in a private individual’s back yard, shovels were preferable because there are unmarked lines, including gas lines, phone lines, and electronic lines, which must be approached with care. T. 221. Shovels were “the common practice” for looking for a well. T. 221. Conner remembered 18 Karat employees searching in the third party’s yard. T. 221.

Of the thousand or so wells that Conner had searched for, he had been unable to locate approximately 300 of the older wells through field searches. T. 221-222. Of these 300, possibly 9 wells had been intersected. T. 222. Some of such wells had actually been dug for in the past with equipment but with no success. T. 222.

The decision to use heavy equipment is based upon the “reasonable well evidence” uncovered by the initial hand search such as fire pit, drilling cable (left-handed) and rig bolts. T. 223. However, during 18 Karat’s search there was nothing found to suggest that equipment

should be brought in. T. 223. Conner opined there was no evidence found that warranted bringing in additional equipment. T. 223. 18 Karat could have gotten equipment if it had requested such. T. 223.

On cross-examination, Conner agreed that the large house and pond depicted on RX-J would have required a lot of ground to be moved in the digging and construction of such. T. 224. He also agreed that there was an area that had 10 feet of fill that was between the pond and the house, included in the red zone of RX-J. T. 224.

### Matthew Ruckle

Matthew Ruckle graduated in 2008 majoring in engineering. T. 226. He began working for Respondent in May 2005 as a summer intern and started full time in January 2009 as a project engineer in such activities as air shaft installation. T. 226. He was laid off for two years, during which time he worked for 18 Karat as a project manager, estimating and managing jobs, surface jobs, and site construction. He returned to Consol in March 2018 as a project engineer. He was responsible for gas well searching and maintaining degas boreholes. T. 227.

On direct examination, Ruckle testified that he had reviewed the various searches for gas wells associated with the E 30 Longwall. T. 228. Exhibit RX-I contained a drawing showing the E 30, the back end of the longwall panel, depicting two wells that had been located and three wells that were not located shown as DNFs. The borehole that was intersected and subject of the within citation was 2019. T. 228. At some point Ruckle decided that a more extensive search for the well should be conducted. T. 228-229. He reviewed all the search records of 2019 located in his office. T. 229; RX-C. This file included the search records from Burns Drilling and 18 Karat. T. 229. Burns Drilling had found some pipe and some nails but not much more. T. 230.

Respondent did some research, looking at old producer maps. T. 230. It was felt that more searching, a little further to the south, needed to be conducted. T. 230. 18 Karat was Respondent's primary well searching company and was asked to go back out to search for the well further to the south. T. 232.

Exhibit RX-I depicted the location of well 2019 moved to the best estimated location away from its originally estimated location. T. 231.

Ruckle reviewed all of Conner's search reports and was provided with a best estimated location with GPS coordinates. T. 234-235. No actual evidence of a well, however, was uncovered. T. 239.

It was normal to use metal detectors and shovels in searches. T. 236. If Conner had requested heavy equipment, Ruckle would have approved the request. T. 236.

Exhibit RX-E contained a notification letter sent to MSHA's district manager by Respondent's mine engineer, stating that the E Longwall would be mining through areas where there were five reported wells believed not to exist, including DNF well 2019. T. 237. This

notification was based upon search records provided by Ruckle. T. 237. Ruckle did not believe any of the five wells existed based upon the lack of evidence. T. 238.

The procedures utilized by Respondent in attempting to locate the well were consistent with procedures used by Respondent in the past. T. 238. In the past Ruckle had gone out with MSHA personnel, including District Manager Riley, to attempt to locate DNF wells and had been unsuccessful. T. 238-239.

On cross-examination, Ruckle testified that he had not gone out to the search location until after the well was intersected. T. 241. Despite an 18 Karat search note dated March 14, 2018, indicating there was “10 foot of fill over where the well should be,” Ruckle opined that the area could be accurately excavated with a shovel. T. 242-244; RX-C.

On redirect examination, Ruckle testified that 18 Karat notes from March 15, 2018, indicated that the metal and a right-handed cable were located at 4-foot depth. T. 244. Diggers would follow where the evidence led. T. 244.

### Jonathan Tajc

Jonathan Tajc had a Bachelor of Science degree from Penn State. T. 243. He had worked for Respondent as an industrial engineer foreman, assistant mine foreman, and mine engineer. He had also worked for the Commonwealth of Pennsylvania Bureau of Mine Safety as a mining engineering specialist. T. 246. As a mine engineer, Tajc had experience in plotting the location of gas wells. T. 246. His office maintained records such as the letter contained in RX-E. T. 247.

## **CONTENTIONS OF THE PARTIES**

The Secretary argues that Respondent violated 30 C.F.R. § 75.1700 when it failed to take reasonable measures to locate and plug a gas well prior to mining through the E 30 Longwall at Enlow Fork Mine. It argues that, given that Respondent had markings on its mine maps indicating the potential existence of a DNF well in the area where the gas well was ultimately intersected, the Respondent bears the burden of demonstrating that it had taken reasonable measures to locate the gas well. Specifically, Respondent’s contractors were negligent in failing to further search the gas zone area and to conduct additional digging and excavation with heavy equipment in the area.

Respondent initially argues that the intersected borehole referred to on Consol maps as “DNF 2019” was not, in fact, a gas well but rather an abandoned “dry hole” and, as such, would not be subject to § 75.1700 provisions.<sup>8</sup> Assuming the site in question was a gas well,

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<sup>8</sup> Given the within holding which is wholly dispositive, this contention need not be fully addressed. The ALJ does observe that MSHA has not yet promulgated a definition for “gas well.” In *Sec’y. v Consol*, 42 FMSHRC 118 (Jan. 30, 2020) (ALJ), this Court addressed the question of whether the Secretary’s interpretation of § 75.1700 should be given controlling weight in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019). The ALJ further notes that the

(continued...)

Respondent argues that it had, in good faith and with due diligence, followed its MSHA approved ventilation plan, including its gas well cut-through plan which dealt with mining operation near a well believed not to exist. Despite that it had failed to locate the gas well before its intersection, Respondent had satisfied § 75.1700's "reasonable measures" mandate by reviewing old farm line and gas producer maps, available photography, and by contracting with experienced gas well searchers. Considering the lack of evidence uncovered in the suspected gas well area, Respondent's contractor(s) had not acted unreasonably in using only hand tools and shovels for digging and declining to use heavy machinery in its search.

## ANALYSIS

Issue: Did the Secretary carry its burden of proving that Respondent failed to take reasonable measures to locate the cited gas well in violation of § 75.1700?

I. The Secretary bears the burden of proving Respondent's violation of § 75.1700 oil and gas wells.

It is black letter Commission law that the Secretary has the burden of proof in establishing *each and every element* of a citation.<sup>9</sup> See also 29 C.F.R. § 2700.63 (b). In his post hearing brief, the Secretary attempts to relieve himself of this burden thusly: "because the Respondent had all of the records including the mine maps pertaining to this gas well, (it) bears the burden of demonstrating that it took reasonable measures to locate the well." SBI, p. 7. The Secretary cites no source or case cite for this bald proposition. Furthermore, this Court has found no statutory or appellate case law supporting Secretary's argument for a shifted burden of persuasion as to operators cited under § 75.1700 and declines to do so instantly.<sup>10</sup> The burden

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<sup>8</sup> (...continued)

distinction between an abandoned dry hole and an old gas well site becomes increasingly more problematic when passing time, decay, and/or property development destroys much of the evidentiary indicia distinguishing such. Suffice it to say that the Secretary had presented persuasive evidence and compelling arguments (*see inter alia* SBII, pp 1-2) in support of finding DNF to be a "gas well." If required to resolve this issue, this Court would presently not be inclined to find that the Secretary had acted unreasonably in treating the intersected site in question as a gas well for § 75.1700 enforcement purposes.

<sup>9</sup> Such an evidentiary burden dates back to even ancient times. For example, the Latin maxim, "*Semper necessitas probandi incumbit ei qui agit.*" ("The necessity of proof always lies with the person who lays charges.") See also Luther's defense at the Diet of Worms that those charging heresy bore the burden of presenting specific scriptural proof of his theological errors.

<sup>10</sup> As discussed *infra*, the ALJ finds neither the law nor applicable facts justifying a shifted burden. The fact that Respondent had in its possession mapping giving clues to the well's possible location does not in itself warrant a shifting of the *burden*. This Court was persuaded by Respondent's arguments/testimony that the DNF 2019 symbol was not an exact longitude/latitude point, as Secretary implied, but rather a best estimate spanning up to 1,000 square feet. See also RBI, pp 3-4.

remains with the Secretary to establish a breach of each and every element of § 75.1700, including whether Respondent failed to take reasonable measures to locate the gas well *sub judice*.

II. The test to determine whether Respondent had violated § 75.1700 should be the reasonably prudent operator standard.

As noted *intra*, there is no statutory or case law directly on point as to what constitutes reasonable measures regarding the location of wells under § 75.1700.<sup>11</sup> MSHA to date has not promulgated any regulations or specific guidelines for operators to follow in satisfying § 75.1700's reasonable measures mandate. Given no binding case law directly on point, this Court holds that the test for determining compliance with § 75.1700's requirements is a reasonably prudent operator standard. Were the steps taken to locate the well, measures which *a reasonably prudent operator, familiar with the factual circumstances surrounding the hazardous condition, including any facts peculiar to the mining industry and considering the protective purpose of § 75.1700, would have taken.*

Thus, this Court concludes that the critical question in determining a violation of § 75.1700 is not whether Respondent was ultimately successful in locating the well—*nor, indeed, whether Respondent could have done more to locate the well.*<sup>12</sup> Rather the enquiry must focus on whether the actual measures taken by Respondent were sufficiently reasonable, considering the totality of the circumstances.

III. The steps taken by the Respondent to locate the gas well were reasonable measures so as to satisfy § 75.1700 requirements.

The protective purpose of § 75.1700 is that miners should be shielded from the inherent hazards of inundation, ignition, and explosion associated with the intersection of unlocated wells. There are all too many abandoned gas and oil wells in Pennsylvania posing hidden dangers to miners.<sup>13</sup>

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<sup>11</sup> See Secretary's concession of such at SBI, p. 8.

<sup>12</sup> MSHA's improper application of § 75.1700 reasonable measures standard is illustrated by Inspector Baker's testimony at T. 104: "I don't believe they took *every effort* to locate it (the well) outside on this man's property."

<sup>13</sup> Though the following statistics have no bearing on the instant decision, it should be noted that in a recent front-page article titled the "Looming Crisis," the Pittsburgh Post-Gazette reported that there were roughly 200,000 orphan wells dotting Pennsylvania and abandoned by their owners over a century of drilling. For most of the time period, fully sealing off expired wells was not required. Very little money has been allocated for funding and plugging wells which, at the present allocation, would take *17,500 years and cost \$6.6 billion* (emphasis added). Laura Legere, "The Looming Crisis," Pittsburgh Post-Gazette, Sunday Edition, Vol. 93, No. 248, April 5, 2020.

However, the language and protective purpose of § 75.1700 should not be interpreted in such a way that any failure to locate a gas well penetrating a coal bed operates as a *per se* violation of this mandatory safety standard.<sup>14</sup> Operators should not be placed in a “catch-22” situation in which they are deemed not to have taken reasonable measures, if they are unsuccessful in ascertaining a particular well’s location.

In his post hearing brief Secretary argues that “gas well DNF was...not the needle in the haystack that Respondent attempts to portray.” SBII, p. 3. This Court agrees that finding a needle in a haystack is not an apt metaphor for describing an operator’s onus in locating a DNF in general nor this Respondent/operator’s onus in particular.<sup>15</sup> However, this Court does accept Respondent’s essential argument and testimony in support thereof that DNF wells can be often quite difficult to locate and that the failure to do so may not necessarily be grounded in the failure to take reasonable measures. *See inter alia* Robinson testimony at T. 164-168.

At hearing, Respondent’s witnesses described the various steps that Respondent had taken in attempting to locate DNF wells, including DNF 2019. These steps were succinctly summarized in the August 14, 2018 notification to the MSHA district manager (RX-E). These measures including “field searching, gas well map reviews, online database searching, aerial photograph searching, and API map reviews.” RX-E.

At hearing Robert Conner, foreman of gas well locating for 18 Karat, outlined the measures taken in the onsite field search which included using metal detectors, working a grid with searchers 4 feet apart, attempting to find evidence indicative of past rigging, like rig bolts in a pattern, using shovels for digging. T. 214-220, *see also* Robinson testimony regarding such.

Conner had long experience in searching for gas wells and characterized the steps taken by 18 Karat as standard in the mining industry. T. 111, 182, 220. The Secretary’s witnesses, Baker and Williams, while honest and straight forward, did not appear to have the length or depth of specific experience in gas well searching possessed by Respondent’s witnesses, Robinson and Conner. Baker and Williams offered no persuasive testimony establishing that

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<sup>14</sup> This is not to say this Court is altogether adverse to the application of strict liability and to the finding of *per se* violations of mandatory safety standards in certain limited circumstances. This Court’s decision in *The Doe Run Co. v. Sec’y*, 40 FMHSRC 1165 (July 20, 2018) (ALJ) is presently pending before the Commission. In such, this Court proposed that *whenever there is an unexplained catastrophic roof collapse killing a miner, a per se* violation of the underlying safety standard should be found with no necessity for a prudent operator analysis as *intra*.

<sup>15</sup> Perhaps a more apt metaphor for describing the less daunting task facing mine operators charged with locating abandoned wells is the old expression, “finding a black cat in a coal cellar.”

Respondent had somehow departed from the standard of care expected of those in the mining industry searching for gas wells.<sup>16</sup>

At hearing Respondent's witnesses credibly described the problematic nature of old farm line and gas producer maps.<sup>17</sup> See *inter alia* Robinson testimony at T. 164-169. As noted *supra*, this testimony reasonably counters Secretary's argument that the possession of mine maps shifts the burden of proof (SBI, p. 7) or, for that matter, necessarily points to a finding of violation.

At hearing and in its arguments, Secretary further seeks to take the position that if an operator searches close to an estimated location of a well and fails to find such, it is derelict in its duty. See SBII, p. 4; see also Baker testimony at T. 24 and Williams' testimony at T. 108. This Court declines to impose a "if you come close, you must find" standard for § 75.1700.

In support of a § 75.1700 violation the Secretary has also argued that, given notice of a 10 foot land fill in the area of the private citizen's residence, Respondent's decisions to only use shovel tools and not to utilize heavy machinery were unreasonable and further motivated by economic concerns. SBI, p. 8. This Court, however, found Conner's explanations as to the look of patterned evidence at the digging site and the adequacy of hand shoveling to be arguably reasonable.

Further, this Court finds that the existence of, extent of, and location of the alleged 10-foot land fill in this matter is problematic and should not be accorded great probative or substantive weight. See also Respondent's persuasive arguments on this point at RBI, p. 18 and RBII, p. 5.

As to possible economic considerations motivating Respondent not to bring in heavy equipment, this Court is not naïve regarding human cupidity nor unaware that unscrupulous mine operators in the past have placed "profits over people." However, there is nothing in the record to support the Secretary's bald assertion that Consol or its contractors were driven by monetary concerns in their decision-making.

Conner's testimony was credible that he did not believe that evidence at the scene warranted the bringing in of heavy machinery. T. 223. This Court further found Conner to be credible in his assertion that he could have gotten heavy machinery had he asked for it. T. 223.<sup>18</sup> Arguably, as Respondent's primary gas well searcher, 18 Karat would have little to gain in

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<sup>16</sup> This Court, of course, recognizes that certain industry practices—"custom and usage"—may not necessarily operate as a defense to an alleged safety standard violation. However, it may be relevant to determining reasonableness.

<sup>17</sup> The dangers posed to miners due to the absence of mapping or inaccurate mapping was exemplified in the Quecreek disaster. See also *Sec'y v. Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010).

<sup>18</sup> At hearing Consol's project engineer, Matthew Ruckle, also essentially corroborated such. T. 236.

failing to use needed equipment to locate gas wells whose intersections could lead to such citations as within.

This Court accepts that Respondent may have found the cited gas well—had Respondent searched longer, further, and deeper in the gas well zone area and had it chosen to use larger machinery. However, this Court nonetheless concludes that the steps taken by Respondent and its contractors were sufficiently reasonable under the circumstances, such that the within citation was not warranted.

Given the above holding this Court does not find it necessary to go forward with a full blown *Mathies/Newtown* analysis. Suffice it to say that, given the particular facts surrounding this alleged violation, including the lack of casing or methane found at the scene, the increased ventilation at the longwall surface, the occurrence of the hazard against which the mandatory safety standard was directed would have been unlikely.

### **ORDER**

It is the **ORDER** of this Court that Citation No. 9079236 is hereby **VACATED** and **DISMISSED**.

/s/ John K. Lewis  
John Kent Lewis  
Administrative Law Judge

Distribution:

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# **ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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WASHINGTON, D.C. 20004-1710  
TELEPHONE NO.: 202-434-9933  
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June 12, 2020

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

v.

GORHAM SAND & GRAVEL INC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. YORK 2020-0027  
A.C. No. 17-00661-503641  
Mine: Unit #63 Portec 1047J

Docket No. YORK 2020-0031  
A.C. No. 17-00663-503642  
Mine: Unit #65 Komatsu BR550 JG  
CRSHR

**ORDER REGARDING THE JUNE 5, 2020 “JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67.”**

Before the Court is a most unusual submission from a trial attorney with the Department of Labor’s Office of the Regional Solicitor, out of Boston, Massachusetts. Framed as the “JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67,” hereinafter “June 5<sup>th</sup> Motion,” it represents yet another misunderstanding on the part of the Solicitor’s trial attorney (“DOL Attorney”) regarding motions and the purpose of a motion.<sup>1</sup> This latest misunderstanding comes after the Court has now, *twice*, previously explained to the government attorney the requirements for filing a motion for summary decision of the judge, pursuant to the Commission’s procedural rule, found at 29 C.F.R. §2700.67. In a nutshell, on this occasion the June 5<sup>th</sup> Motion is a *request* for the Court “to employ the Summary Decision process as the most expeditious way of resolving the two dockets here.” Jt. Mot. at 3 (June 5, 2020). Translated, the June 5<sup>th</sup> Motion is nothing more than a *request* to file a motion for summary judgment, as distinct from actually filing a proper motion for summary decision. The distinction is significant, though apparently unrecognized by the DOL Attorney.

**One doesn’t file a motion *to request* employing the summary decision process; one files a motion *for* summary decision.**

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<sup>1</sup> As stated by the Supreme Court, “the term ‘motion’ generally means ‘[a]n application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant.’” *Melendez v. United States*, 116 S. Ct. 2057, 2061 (1996) (citing Black’s Law Dictionary 1013 (6th ed.1990), and Random House Dictionary of the English Language 1254 (2d ed.1987)).

Accordingly, the motion, utterly failing to comply with 29 C.F.R. §2700.67, presents nothing for the Court to rule upon.<sup>2</sup>

## Background

Before addressing the vaporific *request* to file a motion for summary judgment, some history is in order. Regrettably, as set forth *infra*, the submissions from the DOL Attorney have been error-filled.

Both dockets were assigned to this Court on March 25, 2020. On April 24th, the Court emailed the parties, in response to an email on that same day from the DOL Attorney seeking resolution of these dockets through summary decision.

After the Court inquired about its inability to locate one of the dockets through e-CMS, the DOL Attorney advised that one docket number was incorrectly listed.<sup>3</sup>

With that problem solved, the Court advised on the same date, April 24, 2020, that:

In a motion for summary judgment the parties will need to state what the salient agreed-upon facts are, all of them, and on that basis that there are NO factual disputes, leaving only a legal ruling on the applicability of the cited standard(s) for [the Court] to resolve and if the Secretary prevails [the Court] will then issue a penalty or penalties, as appropriate, following [its] ruling(s). **[The Court] will give the parties 2 weeks to both determine and agree that there are no factual disputes and to submit the motion no later than May 8th. Please be sure that the motion complies with 29 CFR 2700.67.**

Email from the Court to the parties (Apr. 24, 2020) (emphasis added).

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<sup>2</sup> Though the Court has already made note of it, in a previous order, it expressed awareness and appreciation that the Respondent, who is not an attorney, is simply challenging whether too many citations invoking a reporting requirement were issued. Here, the Court again reassures the Respondent, and the Labor Department Attorney as well, that none of the attorney's missteps will operate to influence the Court's eventual resolution of this matter, whether that comes about through a hearing or by way of a motion for summary judgment, that is to say, for the latter, once an appropriate, 29 C.F.R. §2700.67 compliant, motion is ever filed. Simply put, the Court, whether by a hearing or by a summary decision ruling, will determine the issue impartially, ignoring all the missteps.

<sup>3</sup> On April 24, 2020, in response to the Court's inquiry that it could not locate one of the listed docket numbers, the DOL Attorney informed that his listing one of the dockets as YORK 2020-2007 was erroneous.

May 8<sup>th</sup> came and went, all without any compliance to the Court's email. Noticing this failure, the Court, on May 20, 2020 emailed the parties the following message:

Re: Gorham Sand & Gravel Inc YORK 2020-2007 and YORK 2020-0031 (YORK 2020-2007 erroneously listed docket by the Secretary). The parties are directed to respond to this Court ... by tomorrow, May 21, 2020, why they have not responded to the Court, nor filed through e-CMS per the Court's directive to them on Friday April 24, 2020, [which earlier directive was then repeated in the email].

Email from the Court to the parties (May 20, 2020).

The following day, May 21, 2020, the Court received and responded to the Respondent's non-attorney representative, who advised:

Good Morning, I have had correspondence with the lawyer [meaning the DOL Attorney, as the Respondent, a non-attorney, is proceeding *pro se*] and done everything they requested. Please let me know what I need to do. Respectfully,  
Gene S. Fadrigon III, Gorham Sand & Gravel.

Email from Resp't to the Court and DOL Attorney (May 21, 2020).

The Court responded to Mr. Fadrigon on May 21<sup>st</sup>, as follows:

Dear Mr. Fadrigon: I am in receipt of your reply. Thank you for responding. I have yet to hear from [the DOL Attorney] or the Secretary of Labor generally. Your lawyer<sup>4</sup>, seeing my message below, should know what to do. There was to be a motion filed, now quite late, for summary decision, per 29 CFR 2700.67. I have already made this clear in earlier emails. I may have no choice but to issue an Order to Show Cause. Regards, Judge William Moran

Email from the Court to the parties (May 21, 2020).

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<sup>4</sup> At that time, the Court mistook the Respondent's reference to "the lawyer" to mean that the Respondent had an attorney. The Court later corrected that misunderstanding.

Later that same day, the DOL Attorney emailed the Court, stating:

Dear Judge Moran, I write to apologize to the Court regarding the delay in filing the parties [sic] joint motion for Summary Affirmance.<sup>5</sup> These motions were drafted and sent to the Respondent on May 7, 2020, with a request that the Respondent review the text and make any changes necessary. I had understood that my office would file the motions the next day, May 8, per this Court's Order. I have learned today, to my mortification, that the Motions were not in fact filed. I deeply regret this oversight. They will be filed today.

It is of course my responsibility to ensure that these documents are filed in a timely matter. I regret this oversight and pledge to exercise greater vigilance in the future. As embarrassed as I am about my lapse, I do want the Court to understand that I did not disregard the filing deadline, but failed to follow-up as I should. Since I was acting for both parties as it were I should have double checked. Again, my apologies!

Email from DOL Attorney to the Court and Resp't (May 21, 2020).

The Court responded to the DOL Attorney the same day, stating, "Received your response. Mistakes happen. Apology accepted. I will look for the filing on e-CMS today. Regards, Judge William Moran" Email from the Court to the parties (May 21, 2020).

Later that same day, May 21, 2020, a "JOINT MOTION OF THE PARTIES TO REQUEST THAT RESOLUTION OF THIS MATTER BE MADE BY SUMMARY DECISION" was filed by the DOL Attorney. (emphasis added). The full text of the May 21<sup>st</sup> Joint Motion<sup>6</sup> provided:

The undersigned counsel, after telephonic discussion, jointly request [sic] that this matter be resolved by means of the Commission's Summary Decision mode of resolution in lieu of a hearing. The parties share the view that the citations at issue are straightforward and well documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed

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<sup>5</sup> The term "summary affirmance," seems to be the DOL Attorney's coinage. The Court is unaware of that term's presence in the Commission's procedural rules. It found only one Commission level case employed the term, and in a distinct context, referring to a judge citing the Board's [meaning the predecessor appeal board, the Interior Board of Mining Appeals] summary affirmance of a judge's decision. *Sec. v. Old Ben Coal Co.* 2 FMSHRC 2806 (Oct. 1980). Further, the Court located only a single administrative law judge decision employing the words, "summary affirmance." *Sec. v. Windsor Power House Coal*, 6 FMSHRC 2773, (Dec. 1974). In that instance as well, the term appears in the context of affirming a judge's decision.

<sup>6</sup> The entirety of both motions was identical, differentiated only by the separate docket numbers.

to work remotely until further notice during the current national health crisis. The Solicitor's Office suggests that the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion. For these reasons, the parties jointly urge the Court to grant this request as an efficient and time-saving alternative to a live hearing.

Jt. Mot. of the Parties to Request that Resolution of this Matter be Made by Summ. Decision, at 1-2 (May 21, 2020).

On May 26, 2020, the Court issued its "**ORDER REGARDING JOINT MOTION FOR SUMMARY DECISION**", which is repeated in relevant part here:

Before the Court is a Joint Motion ("Motion") requesting that these matters be addressed by summary decision. The Motion was filed by an attorney for the Solicitor of Labor. The Respondent is not an attorney. Though not cited in the motion, summary decision is addressed under the Commission's procedural rules pursuant to 29 C.F.R. §2700.67, which is titled "Summary decision of the Judge." The Motion advises that the "parties share the view that the citations at issue are straightforward and well-documented and accordingly are well-suited to the Summary Decision process. Further the parties assert that it would be more economical to proceed on the papers in this matter, as well as more practical, since the Regional Solicitor's Office in Boston, Massachusetts has been directed to work remotely until further notice during the current national health crisis." Motion at 1.

The Motion also seeks to have the "the date for filing of the cross motions for summary decision be set not sooner than (30) thirty days from the date of the filing of the instant motion." *Id.* For the reasons which follow, the Court grants the request but only to the extent of allowing the parties to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision. For the reasons set forth below, the submission of an appropriate, properly supported filing will be due by **Friday, June 5, 2020**. ...

The motions were filed but were woefully inadequate, in small and large aspects. Docket No. YORK 2020-0027-M erroneously lists another judge as presiding and also gives the wrong assessment control number in the caption.

Of more concern, both Motions utterly failed to meet the requirements of § 2700.67, which as noted, speaks to the Summary decision by the Judge. That rule provides, in relevant part, that "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b), "Grounds."

Of particular importance here, 29 C.F.R. § 2700.67, subsection (c) details the “Form of motion,” providing that “[a] **motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.**” (emphasis in original).

Neither motion complies with the procedural rule, subsection (c). The Court made it clear back on April 24, 2020 that it gave “the parties 2 weeks to both determine and agree that there are no factual disputes and to submit the motion no later than May 8th.” It also expressly reminded the parties to “[p]lease be sure that the motion complies with 29 CFR 2700.67.” April 24, 2020 email to the parties (emphasis added).

The Solicitor’s attorney is a seasoned employee in that office, but even if the individual were not experienced, the Commission’s procedural rules make the requirements for submission of a motion for summary judgment quite plain. At this point, despite being informed that a motion fully compliant with 29 CFR 2700.67 was to be filed by May 8<sup>th</sup>, and in the face of failing to file the motion by that date, now the DOL Attorney would like at least *another* 30 days to file the motion. Further dawdling is entirely unwarranted.

**Accordingly, the parties are directed to file an appropriate, 29 C.F.R. §2700.67 compliant, motion for summary decision by Friday, June 5, 2020. SO ORDERED.**

Order (May 26, 2020).<sup>7</sup>

The history recounted above brings us to the June 5, 2020, Joint Motion filed by the DOL Attorney, which presented another disappointing submission. The entirety of the June 5<sup>th</sup> Motion, titled as “JOINT MOTION OF THE PARTIES TO UTILIZE THE SUMMARY DECISION PROCESS PURSUANT TO 29 C.F.R. § 2700.67, stated:

The Parties, having discussed the merits of this matter, and pursuant to this Court’s direction, now jointly request that in lieu of a hearing, that the dockets, YORK 2020-0027 and YORK 2020-0031, in issue be decided by means of the Summary Decision provision of 29 C.F.R. §2700.67. The Parties share the view that the use of Summary Decision here will be economical and efficient, and that each party will have a full opportunity to present its case using this process.

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<sup>7</sup> While this Order explained, more than once, why a *request* for resolution of this matter by summary decision cannot be honored, it is plain why the request makes no sense. The Court cannot act on a request for resolution by summary decision until a proper motion is first filed and only then can it review the submission to determine if that method is appropriate.

A. The Use of Summary Decision Is Appropriate here.

The Parties have discussed the merits of this matter thoroughly and believe that there is no genuine issue of material fact that is in dispute. To ensure transparency regarding the Secretary's case, counsel for the Secretary has provided the complete investigative file in each of the two dockets for review. The parties spoke this week about whether either party is aware of any fact that is in dispute in this matter. The Parties assert that in their joint view there is not any factual impediment to proceeding with Summary Decision here. Counsel for the Secretary has explained to Respondent that the Secretary will, by means of affidavit, introduce the core facts, and investigative documents which support the violations. Both parties understand that each party must also file a Memorandum in support of their respective position. Having reached their preliminary understandings, the Parties believe that the Summary Decision process will serve the ends of justice here.

B. The Core Legal/ Factual Issue.

The Respondent asserts that MSHA acted improperly in issuing two separate citations for late filing of one quarterly report. The operator has 6 mines covered on one quarterly report and paid the original fine for late filing. MSHA also cited [sic] the operator 2 more times for the same singular reporting violation operated by the Respondent. The operator had data loss when switching computer networks that effected [sic] the calendar reminders for quarterly reporting. This was immediately addressed, and the fine was paid for this reporting violation. The Respondent asserts that MSHA's issuance of two additional citations for the one singular reporting violation is improper. The Secretary asserts that the issuance of two citations was a proper action by the MSHA inspector.

The Parties, after discussion, both believe that no complicated issues of law are presented by this case and that consequently that their respective memoranda will be succinct. Accordingly, the parties move that the Court grant their joint request to employ the Summary Decision process as the most expeditious way of resolving the two dockets here.

Jt. Mot. (June 5, 2020)

As noted at the outset of this Order, the shortcomings of the June 5<sup>th</sup> Motion were numerous. Of less importance, but still noteworthy, the June 5<sup>th</sup> Motion continued to incorrectly cite the wrong judge assigned to these dockets, referring to the Court's colleague, Judge Jacqueline Bulluck, who has not been assigned to either docket. Further, embarrassing himself, the DOL Attorney, in the section titled "The Core Legal/Factual Issue," states that "MSHA also *sited* the operator 2 more times for the same singular reporting violation operated by the Respondent." (emphasis added). MSHA inspectors cite, not site, violations. The next sentence, added "[t]he operator had data loss when switching computer networks that *effected* the calendar

reminders for quarterly reporting.” (emphasis added). Affected, not “effected,” is the correct word.

While these three errors are not of a grand scale, they do reflect an overall sloppy approach to the DOL Attorney’s actions in this matter, which, to recap, included originally citing an incorrect docket number, incorrectly listing the judge assigned to these dockets, notable grammatical errors, and failing to respond to the Court’s May 8<sup>th</sup> submission deadline.

Were it not for the profound deficiencies in the latest submission from the DOL Attorney, the Court likely would have noted the errors just described, but moved on to the substantive issue. It is in this latter respect that the more grievous shortcomings must be discussed.

Despite the DOL Attorney being alerted and warned as far back as **April 24<sup>th</sup>** that the parties had until May 8<sup>th</sup> to both determine and agree that there are no factual disputes *and directed to* be sure that the motion complies with 29 CFR 2700.67, the May 8<sup>th</sup> deadline was missed and not addressed until the Court brought the failure to the attention of the DOL Attorney. There is some notable irony at work here, what with the Respondent being cited for untimely quarterly reporting, while the DOL Attorney himself practiced untimely responses.

These shortcomings became magnified with the latest submission from the DOL Attorney in the June 5<sup>th</sup> Motion. That Motion, as noted above, is a “request to employ the Summary Decision process.” Jt. Mot. at 3 (June 5, 2020). It must be emphasized again that one does not file a motion requesting “to *employ* the Summary Decision process,” instead one files a motion *for* summary decision of the judge. But such a motion, as the Court has now explained more than once to the DOL Attorney, must comply with 29 C.F.R. § 2700.67.

Despite two attempts, the DOL Attorney has not met the requirements of the procedural rule for summary decision. The relevant subparts of this provision give clear instructions on the contents of such a motion.<sup>8</sup> They are set forth here:

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

(c) Form of motion. A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in

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<sup>8</sup> Substantively, the Commission’s procedural rule for summary decision is in line with the Rule 56 of the Federal Rules of Civil Procedure.

the statement shall be supported by a reference to accompanying affidavits or other verified documents.

(d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.

29 C.F.R. § 2700.67.

**Summary:**

Whether the DOL Attorney was dilatory or simply confused about the requirements for filing a motion for summary decision, the Court does not know. What the Court does know is that more than six weeks ago, on April 24, 2020, it clearly noted and explained the requirements for filing such a motion. With more than six weeks having elapsed, and following the apology for missing the first deadline, the DOL Attorney has twice filed pointless, ineffective motions which do not meet the requirements for seeking summary decision.

Of course, the DOL Attorney does not have to utilize the summary decision motion process, though he has expressed several times that he wishes to do so. However, if opted, the process, per 29 C.F.R. § 2700.67, must be followed. It was back on April 24, 2020, that the DOL Attorney asked that “a deadline for the filing of Cross Motions and Memoranda be set at least 30 days from today.” DOL Attorney E-mail, April 24, 2020. The Court, as recounted above, rejected the request that such motion be submitted “at least 30 days” from April 24<sup>th</sup>, requiring instead that it be submitted by May 8, 2020. Now, even 18 days *after* the date the DOL Attorney requested, no 29 C.F.R. § 2700.67 compliant motion has been filed.

With no 29 C.F.R. § 2700.67 compliant motion presented, the Court will set this matter for a hearing. A conference call to establish a hearing date will be held during the week of June 15, 2020. The hearing will be held without delay. Though many hearings are unsuitable for an electronic hearing, the Court believes this matter can be conducted through that method. Of course, the Court will consider a proper motion for summary decision should one ever be submitted, but again, per the applicable procedural rule, any such motion must be filed “**no later than 25 days before the date fixed for the hearing on the merits.**”<sup>9</sup> 29 C.F.R. § 2700.67(a) (emphasis added).

**SO ORDERED.**

/s/ William B. Moran  
William B. Moran  
Administrative Law Judge

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<sup>9</sup> 29 C.F.R. § 2700.67(a), titled, “Filing of motion for summary decision,” provides that “[a]t any time after commencement of a proceeding and **no later than 25 days before the date fixed for the hearing on the merits**, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.” (emphasis added).

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