FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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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")[1] 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.[2]

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

[2] 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.[3]

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

[3] 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.

is 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").[4]

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.[5]

[4] 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.

[5] 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.[6] 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.[7] 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.[8] 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.

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[6] 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.

[7] 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.

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

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 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 unrebutted 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.[9]

[9] 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.*

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 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.

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

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.[1] 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.[2] 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.[3]

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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[1] 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.

[2] 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).

[3] 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).[4]

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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[4] 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,[5] 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.[6] 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.

[5] 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.

[6] 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.[7] 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.[8] 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 to negate the provision of the operator's emergency response plan is analogous

[7] The crews were identified by letters of the alphabet. Tr. 82.

[8] 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 attacking the validity of a mandatory safety standard in the context of an enforcement proceeding.[9]

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).[10]

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),

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[9] 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.

[10] 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).

aff'g Cumberland Coal Res., 33 FMSHRC 2357 (Oct. 2011). This is because "[e]vacuation standards 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.[11]

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).[12] 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.

[11] 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*.

[12] 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[13] (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.[14]

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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[13] 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]).

[14] 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).[15] 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.[16] Thus the proper

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[15] 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.

[16] 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" (emphasis added)); *Austin Power*, 861 F.2d at 103-04

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.[17]

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 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

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> (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).

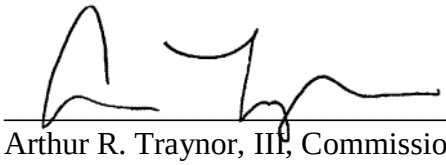
Knox Creek Coal Corp., 811 F.3d at161–63.

[17] 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).

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.

Mary Lu Jordan, Commissioner



Arthur R. Traynor, III, Commissioner

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