FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

JUL 23 2015

MILL BRANCH COAL CORPORATION	:	
	:	
v.	:	Docket Nos. VA 2012-435-R
	:	VA 2012-436-R
SECRETARY OF LABOR,	:	VA 2012-439-R
MINE SAFETY AND HEALTH	:	VA 2012-440-R
ADMINISTRATION	:	

BEFORE: Cohen, Nakamura, and Althen, Commissioners[1]

DECISION

BY THE COMMISSION:

In these contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and multiple orders, including an imminent danger order, to Mill Branch Coal Corporation after observing deteriorating conditions in the operator's Low Splint A Mine. A Commission Administrative Law Judge upheld the imminent danger order and a citation alleging a significant and substantial ("S&S")[2] violation of an escapeway standard.[3] 34 FMSHRC 2090, 2137 (Aug. 2012) (ALJ). He also upheld two

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[1] Chairman Jordan and Commissioner Young assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision-making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

[2] 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).

[3] That standard, 30 C.F.R. § 75.380, provides in relevant part:

> (d) Each escapeway shall be –
> (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons[.]

orders alleging S&S violations of standards mandating weekly safety examinations.[4] *Id.* The Judge concluded, however, that the weekly examination violations had not resulted from an unwarrantable failure to comply with the standards.[5] *Id.*

Mill Branch and the Secretary of Labor filed cross-petitions for discretionary review, which we granted. For the reasons set forth below, we affirm the Judge's decision: (1) upholding the imminent danger order; (2) concluding that the violation of the escapeway standard was S&S; and (3) holding that the operator violated the weekly examination standards. As to the examination violations, we remand the Judge's S&S determinations for further findings and analysis and vacate the Judge's unwarrantable failure determinations and remand for findings and analysis consistent with this decision.

I.

Factual and Procedural Background

The Low Splint A Mine is an underground coal mine located in Wise, Virginia, which exists at a middle level between two other mines. The Taggart seam, which lies approximately 250 feet below the Low Splint A Mine, is mined out, and the mine formerly in that seam is now closed. The mining of the Taggart seam created pressures in the Low Splint A Mine, including the creation of "floor heave."[6]

Mining was performed in the Low Splint A Mine in the following sequence: development of the Southeast Mains, A Left and B Left sections; retreat mining of the B Left section; development of the B Right and the 5 West sections; and retreat mining of the 5 West

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[4] The standard, 30 C.F.R. § 75.364(b), provides in relevant part:

> At least every 7 days, an examination for hazardous conditions . . . shall be made by a certified person . . . at the following locations:
> (1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.
> (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

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

[6] Floor "heave" is defined as a "rising of the floor of a mine caused by its being too soft to resist the weight on the pillars." *See* Am. Geological Institute, Dictionary of Mining, Mineral, and Related Terms 258 (2d ed. 1997).

and B Right sections. On May 21, 2012, the only producing section in the mine was the B Right section, where retreat mining was being conducted using a continuous miner.[7]

On May 22, 2012, MSHA Inspector Christopher Cain, accompanied by his supervisor, Gary Hall, visited the mine in order to conduct a monthly retreat-mining review, a six-month evaluation of the roof control plan, and a regular underground inspection. Inspector Cain had driven by the mine the day before and had seen coal coming out of the mine on the stacker belt, so he knew that production had been occurring. He had previously inspected the mine in January 2012, when another MSHA inspector had asked him to consult on floor heaval along the Southeast Mains, and a citation had been issued alleging a failure to maintain the roof and ribs along the No. 5 belt.

Inspector Cain stated that when he arrived, Randy Hensley, who had been acting as superintendent at the mine since earlier that month, informed him that they were no longer mining and that they were pulling equipment from the B Right area because the belt could no longer run. 34 FMSHRC at 2094; 5 Tr. 28-29; 6 Tr. 6.[8] Hensley explained that the floor heaval under the belt had required the belt to be raised to the point that it was too close to the roof to run. 5 Tr. 29, 40-41, 165, 218. Cain checked the weekly examination book, which did not describe the conditions described by Hensley.

Cain, Hall, and Hensley travelled toward the face via the No. 3 entry, which was the secondary escapeway (also referred to as the "return entry" or "alternate escapeway"), through the Southeast Mains panel. The secondary escapeway served as the travelway for men and equipment from the No. 5 belt drive to the working face. Inspector Cain observed that the floor heaving that he had previously seen in January was worse, and that the ribs had deteriorated more.

In the A Left panel, they got out of the mantrip and continued on foot. Conditions worsened, as documented by photographs, and included floor heaval, heaved floor material scooped and dumped into crosscuts and entries, bent and tilted 100-ton jacks, knocked-out jacks, and spalling ribs. Some of the jacks had been recently set, as demonstrated by the lack of rock dust on them. Some jacks had been knocked out and not reset.

When Cain and Hall traveled through the B Right area, they observed seven miners working underground to remove mining equipment, including one mechanic who was removing the canopy from a shuttle car. They also observed a "cutter," or crack, where the roof met the ribs, indicating deterioration, and they directed that area to be dangered-off. 5 Tr. 170-71.

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[7] A mine map is attached to this decision as Attachment A.

[8] The hearing in this case occurred over two days (June 5, 2012 and June 6, 2012), and each day has its own transcript that begins on page 1. The transcript for June 5 will be referred to as "5 Tr.," and the transcript for June 6 will be referred to as "6 Tr."

Inspector Cain asked Hensley if they could use the mantrip to travel through the primary escapeway (sometimes referred to as the "intake escapeway"). Cain stated that Hensley replied that the mantrip would not make it through the primary escapeway due to the heaving bottom. 5 Tr. 68-69; S. Ex. F1 at p. 4. As the inspectors walked through the primary escapeway, they observed conditions similar to those they observed in the secondary escapeway, which they also documented with photographs. Both inspectors noted that, unlike the secondary escapeway, there was no evidence that the operator had attempted to scoop the heaving floor. In addition, there was a roof fall which required the primary escapeway to be re-routed.

After traveling past the roof fall in the primary escapeway, Cain and Hall could not find a door that would open between the primary and secondary escapeways. Inspector Cain stated that for 1400 feet they could not find a door that would open and allow access into and out of the intake escapeway. In addition, he stated that the door positioned just outby the seven drive, where he had seen miners working, would not open. The doors would not open because of the pressure exerted on them by the floor heaval.

Before returning to the surface, Cain issued a verbal imminent danger order for the Southeast Mains and the A Left and B Right areas of the mine due to the excessive pressure in the area. Once on the surface, Inspector Cain issued one citation and several additional orders.

Following the inspection by Cain and Hall on May 22, there were other visits to the mine to inspect conditions. On the night of May 22, Daniel McGlothlin, the safety manager for Alpha Natural Resources, and General Manager John Richardson went into the mine to look at conditions and to mark the location of the remaining equipment. On May 23, Mill Branch personnel accompanied state mine inspectors through the area. On May 24, accompanied by some of the operator's personnel, Cain and Hall inspected the mine with Mike Gauna, a mine engineer from MSHA's Office of Technical Support. On June 1, MSHA went underground again because the Judge granted a motion permitting the operator's technical experts to observe the conditions, and the Judge ordered MSHA representatives to accompany them.

Mill Branch contested the citation and orders, and an expedited hearing was conducted on: (1) the imminent danger order (Order No. 8178569); (2) Citation No. 8178570, alleging that the operator failed to adequately maintain the primary escapeway in violation of section 75.380(d)(1) and that the violation was S&S and caused by unwarrantable failure; and (3) Order Nos. 8178573 and 8178574, alleging that Mill Branch failed to inspect and record in the weekly examination books the hazards present in the intake and return escapeways in violation of sections 75.364(b)(1) and (b)(2), and that the violations were S&S and caused by unwarrantable failures.

After the hearing, the Judge affirmed imminent danger Order No. 8178569 and the S&S primary escapeway violation alleged in Citation No. 8178570. The Judge concluded that the inspector did not abuse his discretion in issuing the imminent danger order given: (1) the conditions that comprised an S&S violation of section 75.380(d) and (2) evidence that there might be a massive failure of the structural integrity of the mine. He found, however, that the violation of section 75.380(d) had not resulted from unwarrantable failure. The Judge further

concluded that the operator violated sections 75.364(b)(1) and (b)(2) because there were numerous observable hazards in the escapeways that the weekly examiner essentially failed to recognize, record, or report. The Judge adopted the Secretary's rationale expressed in his post-hearing brief that the violations were S&S, but concluded that they were not unwarrantable because there was some question regarding the length of time that the conditions were known to the operator and the weekly examiner had not recorded the hazards because they were already known to the operator.

Mill Branch filed a petition for discretionary review with the Commission, challenging the Judge's determinations upholding the imminent danger order, that the violation of section 75.380(d)(1) was S&S, that it had violated sections 75.364(b)(1) and (b)(2), and that those violations were S&S. The Secretary challenged the Judge's determination that the violations of sections 75.364(b)(1) and (b)(2) had not resulted from unwarrantable failures.[9] The Commission granted both petitions and heard oral argument.

II.

Disposition

A. Order No. 8178569 – The Imminent Danger Order

Mill Branch argues that the Judge erred in affirming the imminent danger order because the Judge failed to properly consider the imminence of the danger associated with the conditions present, and that there was no objective evidence that a collapse or an emergency situation would occur in a short time. The operator asserts that Cain's and Hall's concerns about the conditions were belied by the repeated investigations permitted in the area after issuance of the order. In addition, it contends that the Judge erred in his imminent danger analysis by improperly assuming the occurrence of an emergency requiring the use of the primary escapeway.

Section 107(a) of the Mine Act provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). Section 3(j) of the Act defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). The Commission has held that "there must be some degree of imminence to support a section 107(a) order." *Utah Power and Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991) ("*UP&L*").[10]

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[9] The Secretary did not challenge the Judge's determination that the violation of section 75.380(d) had not resulted from an unwarrantable failure. Oral Arg. Tr. at 35-36.

[10] In *UP&L*, the Commission additionally stated that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury *within a short period of time.*" 13 FMSHRC at 1622 (emphasis added). We clarify that, while it may be necessary in some cases for the condition or practice to be

reasonably expected to cause death or serious injury within a short time in order to show imminence, such a showing is not necessary in all cases. Rather, the Mine Act requires that an imminent danger be one that "'could reasonably be expected to cause death or serious physical harm before [a] condition or practice can be abated.'" *See Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014) (citing 30 U.S.C. § 820(j)) (added emphasis omitted) (upholding an imminent danger order despite the absence of evidence demonstrating that the cited danger had a reasonable potential to cause death or serious injury in a short time).

Commissioner Cohen believes that the foregoing analysis is not sufficient to resolve the tension between our case law and the language of the Mine Act. In fact, the *UP&L* Commission's statement that the injury must have the potential to occur "within a short period of time" was a departure from earlier Commission and U.S. Court of Appeals holdings that "refused to limit the concept of imminent danger to hazards that pose an immediate danger." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (citing *Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974); *Eastern Assoc. Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974); *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 33 (7th Cir. 1975)). The court decisions issued prior to enactment of the Mine Act in 1977 are relevant because the definition of "imminent danger" was created in the Federal Coal Mine Health and Safety Act of 1969, and was not changed when Congress enacted the Mine Act in 1977. *Cypress Empire Corp.*, 12 FMSHRC 911, 918 (May 1990).

Now confronted with reconciling these two seemingly competing interpretations, Commissioner Cohen finds it appropriate to turn to the statutory language of the Mine Act for assistance. Section 3(j) of the Mine Act defines "imminent danger" as "the existence of any condition or practice . . . which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated.*" 30 U.S.C. § 820(j) (emphasis added). Upon reflection, it appears to Commissioner Cohen that, in interpreting the language of section 3(j), the *UP&L* Commission assumed that all hazardous conditions or practices which necessitate the immediate removal of miners can be abated "within a short period of time." (Without such an assumption, there would be an obvious conflict between the quoted language of *UP&L* and section 3(j) of the Mine Act). He would conclude that the *UP&L* assumption is incorrect; the Commission has subsequently recognized that hazards which require the immediate withdrawal of miners cannot universally be abated in a short period. *See Connolly-Pacific Co.*, 36 FMSHRC at 1555 (involving an unstable highwall, which because of its extraordinary height could not be promptly abated).

Accordingly, consistent with *Rochester & Pittsburgh Coal Co.* and the decisions of the Seventh Circuit and Fourth Circuit cited therein, Commissioner Cohen would conclude that the definition in section 3(j) of the Mine Act governs, and that the Secretary is not required to demonstrate that his inspector believed the cited hazardous condition had a reasonable potential to cause serious injury *within a short period of time* in order to sustain the issuance of a section 107(a) withdrawal order.

The Commission has also recognized that "'[t]he concept of imminent danger is not limited to hazards that pose an immediate danger.'" *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014) (quoting *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008)). While the danger justifying an imminent danger order need not be immediate, the danger must be such as to require the immediate withdrawal of miners because it could reasonably be expected to cause death or serious harm before the danger can be abated. *Freeman Coal Mining Co. v. Int. Bd. of Mine Op. App.*, 504 F.2d 741, 744-45 (7th Cir. 1974). Thus, the Commission has upheld the issuance of an imminent danger order involving an extremely hazardous condition that was created by the potential for fall of material from a long-existing highwall that the operator was not able to abate. *Connolly-Pacific*, 36 FMSHRC at 1555.

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993); *UP&L*, 13 FMSHRC at 1622. A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47. The Commission has explained that a Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed. *Id.* at 346. We review the Judge's determination of whether the inspector abused his discretion under a substantial evidence standard. *See, e.g., Connolly-Pacific*, 36 FMSHRC at 1555.

With respect to Order No. 8178569, the Judge determined that a reasonable person possessing a qualified inspector's education and experience would have been warranted in issuing an imminent danger order when confronted with the conditions that Inspector Cain found on May 22 "[g]iven the objective stigmata of dangerous pressure convergence, including floor heaval, rib collapse, compromised jacks, signs and reports that conditions had significantly worsened in recent days, and given that [Mill Branch] had in fact stopped mining and was in the process of retrieving equipment." 34 FMSHRC at 2129.

In reaching his determination, the Judge made many credibility determinations. On review, the Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, we will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Similar to the hazardous conditions in *Connolly-Pacific* which could not be abated, Mill Branch had ceased mining and had begun retrieving equipment rather than abating conditions in

the Southeast Mains, A Left, and B Right areas of the mine. Inspector Cain testified that Acting Superintendent Hensley had informed him that Mill Branch had ceased mining in the B Right area because the No. 6 belt had been squeezed between the floor and roof and could no longer run. 34 FMSHRC at 2094; 5 Tr. 28-29, 40-41, 159. Therefore, Mill Branch was withdrawing its equipment from the area in order to mine a different section of the mine. 34 FMSHRC at 2094; 5 Tr. 29.[11]

Inspector Cain testified that he issued the imminent danger order because he believed the mine was "past the point of no return" due to the "squeeze" pressures exerted on the floor, ribs, and roof.[12] 5 Tr. 87-88. He observed that there had been dramatic changes in the mine that had occurred since he last visited the mine in January, and knew from conversations with Hensley and Martin that conditions had "dramatically worsened" in the past week or so. 5 Tr. 84-85, 88; S. Ex. E-1 (Order No. 8178569).

Regarding the floor conditions, Inspector Cain observed floor heaval that reduced the height and width of the area, and affected mandoors. Although the average height of an entry in the mine area was 5 feet, the secondary escapeway had been reduced to a height of 35 to 36 inches in most places, and 25 inches at one place. 5 Tr. 32, 75-76, 101, 146. In the primary escapeway, Cain and Hall observed floor heaval almost to the mine roof. 5 Tr. 181; S. Ex. B-7. Inspector Cain testified that Hensley had acknowledged that the mantrip would not fit in the primary escapeway. 34 FMSHRC at 2096; 5 Tr. 68, 107; S. Ex. F-1 at p. 4. The heaving had caused the mandoors between the primary and secondary escapeways to be inoperable for approximately 1400 feet. 5 Tr. 80-81, 100, 140, 189. Inspector Cain also testified that the door just outby the 7 drive where miners were working would not open. 5 Tr. 141.

The floor heaval also impacted jacks set throughout the area to provide support. 5 Tr. 36, 61. Cain and Hall observed multiple 100-ton jacks that had bent because of the floor heaval. 5 Tr. 36-39, 185-86, 210; S. Ex. B-18. Cain and Hall observed jacks in the secondary escapeway

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[11] Hensley testified that the decision was made to stop mining the B Right section on May 22 not because of the impossibility of further mining in the B Right section but because the 4 West area was ready to mine. 6 Tr. 8, 51. The Judge discredited Hensley's testimony. 34 FMSHRC at 2131. We see no reason to overturn the Judge's credibility determination. As the Judge found, one of the operator's witnesses, Alpha Natural Resources Safety Manager McGlothlin, testified that he had learned of the equipment being withdrawn from the area "because of excessive floor heave." *Id.*; 5 Tr. 304.

[12] The Judge credited Inspector Cain's testimony, as corroborated by the testimony of Hall and Gauna, regarding the conditions observed and the reasonable inferences drawn from such observations. 34 FMSHRC at 2133. We find no reason to overturn the Judge's credibility determination. As the Judge found (*id.* at 2131, 2133), and as set forth more fully below, the testimony of these witnesses was internally consistent, consistent with each other, and Cain's testimony was corroborated by his contemporaneous field notes. *See, e.g.*, 5 Tr. 58-59, 78, 180-81, 185; S. Ex. F-1. Moreover, Safety Manager McGlothlin also testified, "If I'd went through that area, I'd say, 'we're pulling out of there.'" 5 Tr. 312.

that had been recently set, as evidenced by their lack of rock dust, and that were already leaning due to pressures exerted in the area. 5 Tr. 58, 185; S. Ex. B-14. In addition, the inspectors observed that jacks had been knocked out but not reset in the secondary escapeway. 5 Tr. 61, 217-19; S. Ex. B-18.

The floor heaval impacted the safe accessibility of the lifelines in the escapeways. In the primary escapeway, floor heaval was directly under the lifeline. 5 Tr. 72-74; S. Ex. B-1. In the secondary escapeway, the lifeline was positioned against the left rib where supports had been compromised and not reset. 5 Tr. 60-61; S. Ex. B-17.

Regarding the rib conditions, Cain and Hall observed ribs deteriorating on both sides of the primary escapeway (5 Tr. 72, 78, 180; S. Ex. B-6) as well as ribs deteriorating in the secondary escapeway (5 Tr. 53, 183-84; S. Exs. B-8, B-10). When asked whether pictures taken in the primary escapeway by the inspectors showed "pretty major rib sloughage," Acting Superintendent Hensley admitted that they did and that walking over the sloughage when using the lifeline would be hazardous. 6 Tr. 50-51; S. Ex. B-6.

As to the roof conditions, Inspector Cain observed that there were areas of roof fall that required the re-routing of the primary escapeway. 5 Tr. 80-81, 98-100, 142; S. Ex. A-3. A roof fall occurred in the primary escapeway on April 25, less than a month before the inspection. 5 Tr. 99; S. Ex. A-3. Moreover, the inspectors observed in the secondary escapeway a "cutter," or crack, where the roof met the ribs, in a crosscut near the 7 drive. 5 Tr. 170-71. The cutter required the inspectors to have the area dangered-off. 5 Tr. 170. Donald Jacobs, the senior manager of geology at Alpha Natural Resources (6 Tr. 144), testified that "typically in the mine, before when we've had roof failure, you would typically see cutters where the roof [was] breaking up." 6 Tr. 156-57. Mill Branch acknowledged that there was a cutter at the 7 drive. 6 Tr. 16-17; MB Br. at 15 n.4.

Gauna corroborated the conditions observed by Cain and Hall, explaining that the overall stability of the area was negatively impacted by the pillar and floor failure. He testified that conditions of closure, or the coming together of the roof and floor, were created by the retreat mining of the B Left and 5 West areas, and that these two areas of failure were trying to merge. 5 Tr. 235-36, 238, 240-42. Gauna observed that there was pillar system failure along the 6 belt area, which is an area between the B Left and 5 West sections. 5 Tr. 241-42; S. Ex. C at p. 2. He stated that "when you see this type of floor heave and you see this type of pillar degradation, it's a combination pillar failure and floor failure that's happening simultaneously." 5 Tr. 234. He explained, "[w]hen you're in a system failure like this, things can become unpredictable," and that "you've lost control in the overall stability." 5 Tr. 242. Gauna testified that the operator should have pulled its equipment out sooner because closure is "a trap waiting to happen. It's like a fish trap." 5 Tr. 257. He explained that closure could happen at an "indeterminate time," which could be "instantaneous," and that it was the first time he had seen miners working in an area with that degree of failure. 5 Tr. 243-44, 258, 260-61.

In contrast, the operator's expert witness, David Newman, testified that the roof was stable, that the area had reached a state of equilibrium after mining had ceased, and that there

were no stability related issues. 6 Tr. 177-78, 185-86, 197-98. In reaching his conclusion, Newman relied upon modeling and checking eleven "bore holes," or holes that previously had been drilled into the roof of the secondary escapeway. 6 Tr. 165-68, 179-85; MB Ex. LS-4.

There is ample evidence in the record to support the Judge's crediting of Gauna's testimony over that of Newman. 34 FMSHRC at 2129 n. 22, 2132. The Judge credited Gauna's testimony that the model relied upon by Newman was flawed because the modeling program incorrectly assumed that the roof and floor were of the same material. 34 FMSHRC at 2118, 2129 n.22. Gauna testified that the model did not accurately display the global stability because it overstated the stability of the pillars. 6 Tr. 236. He explained that the pillars could not be stable because they were on a soft floor, and the model did not work with conditions involving a soft floor. 5 Tr. 254; 6 Tr. 237-38. On cross-examination, Newman admitted that the model assumed that the roof and floor were composed of the same rock, although that was not the case at the mine. 6 Tr. 193-94.

Besides finding that the model Newman relied upon was flawed as applied to the mine's conditions, the Judge found that Newman spent little or no time assessing the primary escapeway. 32 FMSHRC at 2132. Newman admitted that he traveled in the secondary escapeway and did not witness conditions in the primary escapeway. 6 Tr. 158.

In addition, the Judge found that Newman's "narrow focus on the 'stability of the immediate roof' raised questions regarding his conclusions about the mine's global stability." 34 FMSHRC at 2132. The Judge gave limited weight to Newman's testimony that the cessation of mining had lessened stresses on the roof and that a state of equilibrium had been attained, and found more persuasive Gauna's testimony "regarding the unpredictable nature of the global environment at Low Splint A, even after the work stoppage." 34 FMSHRC at 2130.

The Judge's credibility determination is supported by the record. MSHA witnesses testified that the miners removing the equipment were in danger even though mining had ceased.[13] Inspector Cain testified that in order to remove the feeder, the operator would have to use the continuous miner or scoop to make the entry large enough. 5 Tr. 156-57. Acting Superintendent Hensley admitted that the operator might have had to use the continuous miner to get the feeder out of the mine. 6 Tr. 8. Hall testified that as miners moved equipment out and removed the floor in order to clear the equipment, he did not know what was going to trigger a collapse. 5 Tr. 189. He explained that "[t]he ribs are already failed . . . if you continue to let them move that material, . . . I just couldn't predict when it would have a failure." 5 Tr. 189.

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[13] It is understandable than an operator desires to retrieve expensive mining equipment and machinery before abandoning a section. However, the operator must make that decision before conditions deteriorate to the level of an imminent danger. Once there is a reasonable expectation that the integrity of the mine environment has been compromised and a collapse could occur at any moment, miners must be withdrawn. Equipment may be replaced, the lives of the miners may not.

Moreover, even if the equipment could be removed, an examiner would still need to travel through the area to perform weekly examinations. 6 Tr. 143.

Accordingly, we affirm the Judge's determination that Inspector Cain did not abuse his discretion in issuing Order No. 8178569 as supported by substantial evidence.[14]

B. Citation No. 8178570 – Primary Escapeway Violation

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> 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.

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[14] We do not find convincing Mill Branch's argument that MSHA's actions in permitting later investigations are inconsistent with the issuance of the imminent danger order. MB Br. at 17. The unavoidable risk posed by investigating conditions, as permitted by the Mine Act, state law, and the Judge's order, does not undermine an inspector's reasonable belief that an imminent danger existed at the time when the order was issued. *Cf. Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992) (stating that although some "imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners[, t]he fact that such actions are necessary to abate a condition . . . does not mean that the condition does not pose an imminent danger").

Further, we need not reach the operator's argument that the Judge erred by assuming the occurrence of an emergency in his imminent danger analysis. Although the Judge considered the S&S violation of section 75.380(d)(1) in his imminent danger analysis, he set forth conditions existing outside of those cited as violative of section 75.380(d)(1) that justified issuance of the imminent danger order. *See* 34 FMSHRC at 2129.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Judge concluded that the primary escapeway violation described in Citation No. 8178570 was S&S. 34 FMSHRC at 2126. In satisfaction of the first *Mathies* factor, he found that the operator had failed to maintain the primary escapeway in a safe condition to always assure passage of anyone, including disabled persons, as required by section 75.380(d)(1). *Id.* Regarding the second factor, the Judge determined that the violation contributed to a discrete safety hazard in that miners did not have a safe means of escaping during an emergency at the mine. *Id.* He concluded that the inability of miners, disabled or otherwise, to escape quickly was reasonably likely to cause a serious injury in satisfaction of the third factor. *Id.* Finally, the Judge found that the fourth factor had been satisfied because the inability of miners to get out quickly and safely in emergency conditions would clearly lead to a reasonable likelihood of injuries that would be of a reasonably serious nature. *Id.* at 2127.

Mill Branch disputes the Judge's findings with respect to the second and third *Mathies* factors. It argues that the Judge should have used a sliding scale in considering the difficulty of using the escapeway – that is, a consideration that what constitutes a quick escape in a coal seam with a height of 36 inches is different from what is considered for a coal seam with a height of six feet – and that it was only required to have an escapeway that was approximately three feet high. The operator further contends that the Judge failed to consider that potential fire sources were removed from the area.

We have recognized that the need for adequate escapeways will only arise in the context of an emergency evacuation from the mine and that the S&S nature of an escapeway violation must be considered in the context of an emergency. *Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). Therefore, we conclude that the Judge accurately described the relevant hazard contributed to by the violation as delayed escape from the mine during an emergency.

We further conclude that substantial evidence supports the Judge's S&S determination. The record reveals the existence of floor heaval directly under the lifeline in the primary escapeway. 5 Tr. 72-74; S. Ex. B-1. In addition, the floor heaval in the primary escapeway was not being scooped, as it was in the secondary escapeway. 5 Tr. 76-77, 180-82. Doors were damaged between the primary and secondary escapeways, thus preventing access between the escapeways for approximately 1400 feet. 5 Tr. 140. The operator's Acting Mine Superintendent admitted that the floor heaval made travel through the area slower and more difficult in an emergency situation. 6 Tr. 45. Moreover, Bruce Martin, the operator's weekly examiner, testified, "[y]ou could get a stretcher down there[,] but you couldn't carry it." 6 Tr. 113. McGlothlin similarly testified that travel through the primary escapeway with a stretcher "wouldn't have been easy," and that travel through the area would be difficult. 5 Tr. 278-79, 307. Thus, there is clearly substantial evidence that the cited conditions would contribute to a delayed escape during an emergency, particularly for disabled miners, and the delay in escape would be reasonably likely to lead to serious injury.

We do not find persuasive Mill Branch's argument that the Judge should have used a sliding scale in considering the difficulty in using the escapeway since it was only required to have an escapeway that was approximately three feet high. In the primary escapeway, inspectors observed floor heaval almost to the mine roof. 5 Tr. 181; S. Ex. B-7. Cain testified that he had difficulty traveling through the primary escapeway even without a stretcher. 5 Tr. 147. Such evidence amounts to substantial evidence demonstrating a reasonable likelihood of injury under the cited conditions regardless of how low the escapeway was permitted to be. Accordingly, we affirm the Judge's determination that the violation of section 75.380(d)(1) alleged in Citation No. 8178570 was S&S.

C. Order Nos. 8178573 and 8178574 – Weekly Examination Violations

1. Whether the Judge correctly determined that Mill Branch violated 30 C.F.R. §§ 75.364(b)(1) and (b)(2)

Orders Nos. 8178573 and 8178574 allege violations of sections 75.364(b)(1) and (b)(2) because the weekly examiner failed to recognize and record in the weekly examination book hazardous conditions existing in the intake and return escapeways, respectively. The Judge upheld the violations because there were numerous observable hazards in the escapeways that the weekly examiner essentially failed to recognize, record, or report.[15] 34 FMSHRC at 2135, 2136.

As noted above, hazardous conditions in both the primary and secondary escapeways justified the issuance of an imminent danger order. There is substantial evidence in the record that, although such conditions had existed for some time and the operator was aware of them, the conditions had not been reported in the weekly examination book before the May 22 inspection other than the entry on May 8 that the "bottom was hooving in some places." S. Ex. G, at 2; 5 Tr. 112. The return escapeway had three generations of stopping lines that had been crushed out, rebuilt, and re-patched. 5 Tr. 107-08, 119, 241. The primary escapeway also had damage and rehabilitation to stoppings. 5 Tr. 108. The conditions of the stoppings had existed for some time. 5 Tr. 194-95, 257. In addition, there is evidence in the record that the belt had to be repeatedly raised in May due to the extreme floor heaval that caused the belt rollers to stop turning.[16] 6 Tr. 88-89; 5 Tr. 33-34; S. Exs. B-23 through B-28. There were tracks over the floor heaval in the primary escapeway, indicating that the examiner had passed through the area and

[15] The orders do not allege violations of 30 C.F.R. §§ 75.363 or 75.364(h), which pertain to recordkeeping requirements for examinations. Operator's counsel confirmed that Mill Branch does not argue that an improper standard was cited. Oral Arg. Tr. at 65-66. Accordingly, we do not reach the issue.

[16] Although Hensley testified that the belt had to be raised only one time (6 Tr. 52), weekly examiner Martin testified that the belt was repeatedly raised in May, although he did not know how many times. 6 Tr. 88-89. The Judge found Hensley to be less than fully credible, and we affirm the Judge's credibility determination. 34 FMSHRC at 2131.

was aware of the deteriorating conditions. 5 Tr. 77; S. Ex. B-5. Moreover, Cain testified that Hensley knew that a four-wheeler mantrip could not make it through the primary escapeway. 5 Tr. 69, 85. Such evidence amounts to substantial evidence supporting the Judge's determination that Mill Branch violated section 75.364(b)(1) and (b)(2) by failing to recognize, record, or report hazardous conditions in the escapeways.[17]

2. **Whether the Judge correctly determined that the violations were S&S**

With respect to each violation, the Judge, in a single sentence, adopted the rationale of the Secretary in concluding that the violations were S&S. 34 FMSHRC at 2136.

The Commission requires that a Judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). The D.C. Circuit has explained that, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a Judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981) (citations omitted).

The Commission has recognized that "wholesale incorporation of a litigant's brief is a questionable judicial practice."[18] *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 n.8 (July 1994). Here, the Judge failed to set forth his findings of fact, indicating which evidence he weighed and any credibility determinations he made, as well as any other reasons for concluding that the violations were S&S. Rather, the Judge adopted the reasoning of the Secretary set forth in a post-hearing brief. Without the Judge's findings and explanations, we are unable to effectively perform our review function. Accordingly, we remand this matter to the Judge so that he may set forth his analysis and findings supporting his determination that Mill Branch's violations of sections 75.364(b)(1) and (b)(2) were S&S.

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[17] We find unpersuasive Mill Branch's argument that the orders fail to sufficiently identify hazardous conditions. Section 104(a) requires that each "citation shall be in writing and shall describe with particularity the nature of the violation . . . ." 30 U.S.C. § 814(a). We have recognized that the requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993) (citations omitted). Mill Branch's extensive examination and cross-examination of witnesses concerning the cited conditions demonstrate that Mill Branch was able to adequately prepare for trial and knew what conditions would have required abatement. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1306 (July 1993).

[18] The document setting forth the rationale for the Judge's decision, that is, the Secretary's post-hearing brief, is not easily accessible to a reader of the decision.

3. **Whether the Judge correctly determined that the violations did not result from unwarrantable failure**

The Judge concluded that the weekly examiner's conduct in not recording the conditions alleged in Order Nos. 8178573 and 8178574 did not result from unwarrantable failure. 34 FMSHRC at 2136. The Judge reasoned that the operator's justification for not recording the hazards, that is, because the hazards were well known, was more "the result of ignorance, misunderstanding, and incompetence than that of intentional misconduct or reckless disregard." *Id.* The Judge further noted that "there remain[] some questions as to the length of time [that] the conditions were known to the operator." *Id.*

Whether conduct is "aggravated" for purposes of unwarrantable failure is determined by looking at all of the facts and circumstances of each case, including: (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1993 (Aug. 2014); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

The Commission has repeatedly made clear that it is necessary for a Judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *San Juan Coal Co.*, 29 FMSHRC 125, 129-30 (Mar. 2007); *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (remanding an unwarrantable determination for further analysis and findings when the Judge failed to analyze all factors). While a Judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the Judge. *IO Coal*, 31 FMSHRC at 1351.

Although the Judge set forth the factors that must be considered in an unwarrantable failure determination (34 FMSHRC at 2126), he failed to set forth his findings and analysis applying them. *See id.* at 2135-36.

Moreover, the Judge erred in accepting as a mitigating circumstance the examiner's justification that he did not record the hazardous conditions because he believed they were known to the operator. In promulgating the examination regulations, MSHA recognized that "[e]ffective examinations are the first line of defense to protect miners working in underground coal mines." 77 Fed. Reg. 20700, 20702 (Apr. 6, 2012). Cain and Hall explained that the purpose of an examination and the recording of a hazard is clear communication of any hazards, so that miners and management are not surprised by conditions, know whether they have a safe way out of the mine, and have an opportunity to address the hazardous conditions. 5 Tr. 114-15, 197. Effective examinations and the recording of hazards are particularly important with

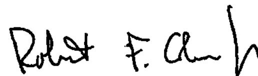
"worsening conditions," which the Judge found to be occurring in the mine. 34 FMSHRC at 2124. The weekly examiner's determination that conditions did not need to be recorded deprived miners of an important first line of defense and amounted to an aggravating factor.

Accordingly, we vacate the Judge's unwarrantable failure determinations. We remand this matter to the Judge so that he may apply the factors described herein, setting forth his analysis and findings consistent with this decision.

III.

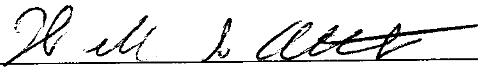
Conclusion

For the reasons discussed above, we affirm the Judge's decision upholding Order No. 8178569, concluding that the violation of section 75.380(d)(1) alleged in Citation No. 8178570 was S&S, and holding that the operator violated sections 75.364(b)(1) and (b)(2) as alleged in Order Nos. 8178573 and 8178574. However, we remand the Judge's S&S determinations with respect to Order Nos. 8178573 and 8178574 so that he may set forth findings and analyses supporting his S&S determinations. Finally, we vacate the Judge's determinations that the violations of section 75.364(b)(1) and (b)(2) did not result from unwarrantable failures and remand for findings and analyses consistent with this decision.

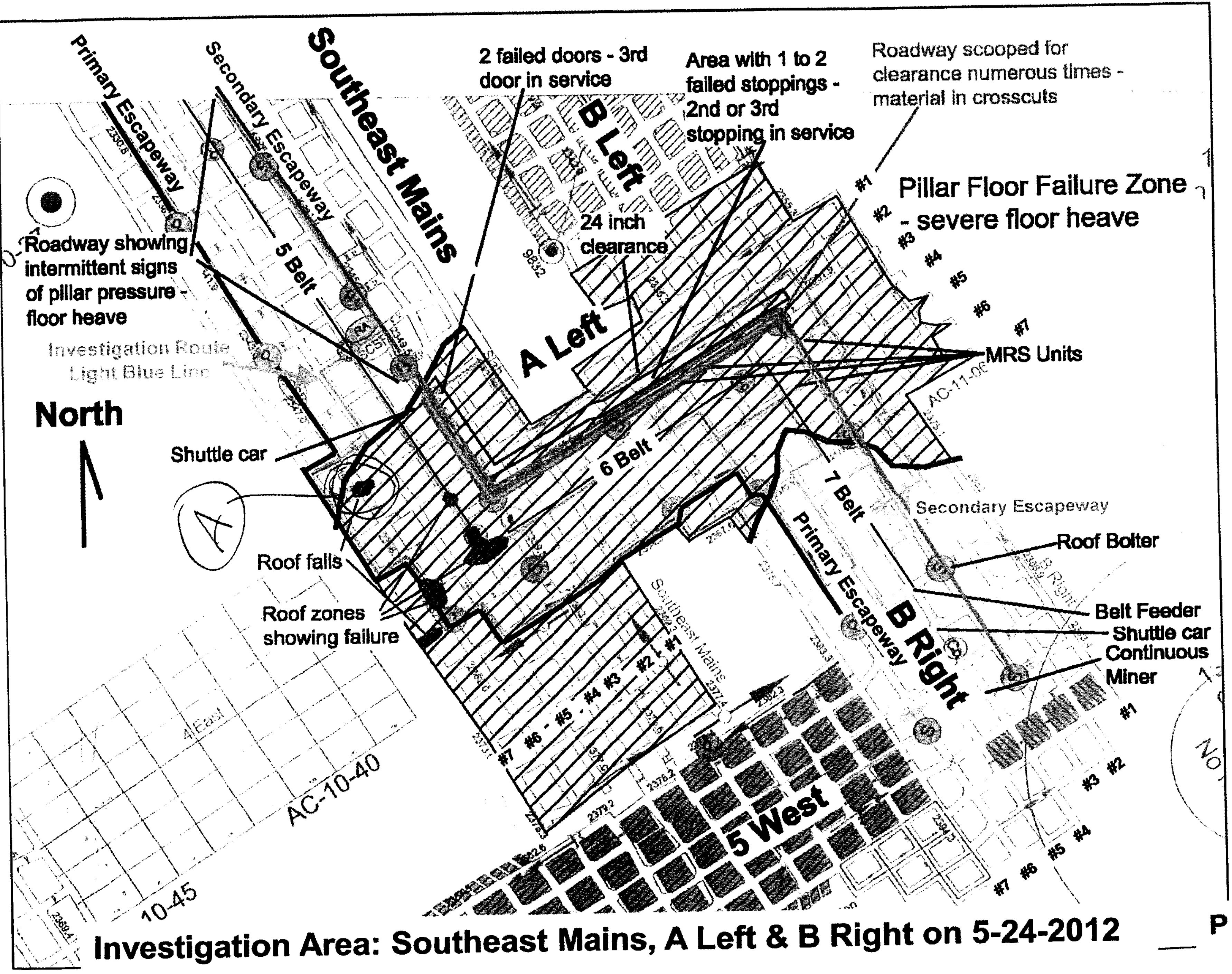


Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner



Investigation Area: Southeast Mains, A Left & B Right on 5-24-2012

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Attachment A

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