FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2011-283
NEWTOWN ENERGY, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:[1]

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a section 104(d)(1) citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Newtown Energy, Inc. ("Newtown"). The citation alleges that Newtown violated 30 C.F.R. § 75.511 by failing to lock out a shuttle car's[2] trailing cable cathead while it was being physically inspected and repaired.[3]

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[1] A majority of the Commissioners joins in each section of this opinion, and therefore it constitutes the Commission's decision in this case. A footnote at the beginning of each section and subsection explains which Commissioners join in that section.

[2] A shuttle car is a vehicle on rubber tires or continuous treads used to transfer material such as coal and ore, from loading machines in trackless areas of a mine to the mine's main transportation system. Am. Geological Institute, *Dictionary of Mining, Minerals, & Related Terms* 504 (2d ed. 1997).

[3] 30 C.F.R. § 75.511 states:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be

The Administrative Law Judge affirmed the violation but determined that the gravity of the violation and the negligence of Newtown was less than alleged. 35 FMSHRC 2494 (Aug. 2013). The Judge vacated the "significant and substantial" and "unwarrantable failure" determinations in the citation and reduced the negligence to "low." The Secretary filed a petition for discretionary review of the Judge's negligence, gravity, "significant and substantial," and "unwarrantable failure" determinations, which we granted.

For the reasons that follow, we reverse the Judge's findings on S&S, and vacate and remand the Judge's unwarrantable failure determination and civil penalty assessment.

I.

Factual and Procedural Background

In May 2010, MSHA Inspector Russell Richardson conducted a regular inspection of the No. 2 section of Newtown Energy's Coalburg No. 2 Mine, an underground mine in West Virginia. Richardson was accompanied by Mine Superintendent Robert Herndon, a certified electrician. At the time of the inspection, the section had stopped production due to a problem with the section's continuous miner. All miners on the section except the shuttle car operator were located at the site of the continuous miner.

Upon arriving at the section, Richardson spoke briefly with the miners there, and then continued on with the shuttle car operator to inspect the nearby shuttle cars. Richardson directed Superintendent Herndon to lock out the shuttle car's cathead[4] at the power station so that he could inspect the shuttle car's trailing cable. Herndon informed Richardson that he did not have a lock, but he agreed to obtain one from another miner. After several attempts, Herndon procured a lock owned by a roof bolt operator.

While the shuttle car operator and Richardson proceeded to the shuttle cars, Superintendent Herndon went to the power center, de-energized the cathead for the shuttle cars, and locked the cathead with the roof bolter's lock. However, Herndon found that he was unable to remove the lock's key without possibly breaking it. So, he left the key in the lock and rejoined the inspection party. He left the locked cathead with the key still in it lying on the floor of the mine. Herndon did not tell Richardson that he left the key in the lock.

While inspecting the shuttle car's trailing cable, Richardson discovered two defects in the outer jacket of the trailing cable that required repair. The first defect was repaired with the application of electrical tape and rubber to the end of a splice boot where moisture could enter. The second defect, which exposed the inner copper wire of the black power conductor, was

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> removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

[4] A cathead is the "connecting plug" permitting an electrical cable to be attached to a receptacle on a power station. Tr. 15, 17.

repaired by cutting away part of the cable's insulation and adding rubber and tape to seal off the repair.

Richardson continued inspecting the trailing cable until he reached the power station. At that time, the inspector discovered that the key had not been removed from the lock on the cathead. Accordingly, the inspector issued Citation No. 8110086 for a violation of 30 C.F.R. § 75.511. Richardson alleged that the failure to properly lock out the shuttle car's cathead while performing electrical work was significant and substantial ("S&S")[5] and constituted an unwarrantable failure[6] to comply on the part of Newtown. Sec'y Ex. 3.

The Judge determined that Herndon's failure to properly lock out the trailing cable cathead while performing electrical repair work on the cable constituted a violation of section 75.511. 35 FMSHRC at 2500. He then found five mitigating factors that warranted a finding of low negligence. In particular, the Judge found that (1) the citation was a direct result of the inspection process, not the normal mining cycle, and that if the inspector had not ordered the lockout of the power on the cable cathead to facilitate the inspector's investigation of the trailing cable, no violation would have occurred; (2) the inspector failed to recognize the interplay between his direction to Herndon and the resulting violation; (3) although Herndon should not have used a faulty lock, his actions were a good faith attempt to comply with the inspector's request; (4) section 75.511 allows for the use of a tag when locking out is not possible and the faulty lock "did act as a signal to anyone seeing it that something out of the ordinary was going on"; and (5) the faulty lock was only on the cathead for a short period of time—10 to 30 minutes. 35 FMSHRC at 2501–02.

The Judge vacated the citation's S&S designation. The Judge found that the chain of events required for the hazard to result in an injury was so remote as to make the likelihood of injury "almost speculative." *Id.* at 2506. He recognized that, if the events did occur, the result would be potentially fatal. However, the Judge reasoned that because the miners on the section were aware of the ongoing MSHA inspection, had been trained to only remove locks that they had themselves placed on electrical components, and were not under pressure to maintain production, a miner who is "reasonably aware of his surroundings" would not likely re-energize the trailing cable. *Id.* at 2503, 2506. Additionally, the Judge found that, for the short period of time the lock was on the cathead, the inspection party maintained some level of control over access to the trailing cable due to its close proximity to the power station. *Id.* at 2505.

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

[6] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and 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."

In his unwarrantable failure analysis, the Judge found that the violation was a product of ordinary negligence, not aggravated or intentional misconduct. The Judge stated that the traditional factors set forth in *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), did not lend themselves to violations that occur in the course of an inspection and only exist for a short period of time. Based upon his negligence and gravity analysis, the Judge concluded that "this was an isolated, ad hoc event, noteworthy primarily because of the potential severity of consequences from an unlikely event" and thus did not warrant the unwarrantable failure designation. 35 FMSHRC at 2508. The Judge reduced the $7,578 penalty proposed by the Secretary to $207.

II.

Disposition

On review, the Secretary argues that the Judge erred in vacating the citation's S&S and unwarrantable failure designations and by reducing the proposed civil penalty from $7,578 to $207. As to the assessed penalty, the Secretary contests the Judge's findings concerning the gravity of the violation and the negligence of the operator.

Below, we address the Commission's S&S test as articulated in *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984), in light of recent appellate decisions, and apply the test to the facts of the case. Next, we review the Judge's unwarrantable failure findings. Finally, we examine the Judge's findings as to the section 110(i) penalty criteria, negligence, and gravity.

A. S&S

1. The *Mathies* Test[7]

Section 104(d)(1) of the Mine Act provides that inspectors must note if a "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Under longstanding Commission precedent, a violation is significant and substantial if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *National Gypsum*, we also stated that a violation "'significantly and substantially' contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial." *Id.* at 827.

In *Mathies*, 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

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[7] Commissioners Young, Nakamura, and Althen join in this interpretation of the *Mathies* test.

> 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). *Accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

In conducting the *Mathies* analysis, the focus now generally centers on the interplay between the second and third steps. A correct understanding of that interplay is crucial to the appropriate evaluation of S&S.[8]

The second step addresses the extent to which the violation contributes to a particular hazard. This step is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016).

The third step is primarily concerned with gravity. *Id.* at 162. At this stage, the analytical focus shifts from the violation to the hazard, which has been established in stage two, and whether it would be reasonably likely to result in injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *Knox Creek*, 811 F.3d at 162 ("Requiring a showing at [step] three that the violation itself is likely to result in harm would make [step] two superfluous."). "Every federal appellate court to have applied *Mathies* has also assumed the existence of the relevant hazard when analyzing the test's third [step]." *Knox Creek*, 811 F.3d at 161–162 (citing *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Review Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek*, 52 F.3d at 135; *Austin Power*, 861 F.2d at 103–04; *cf.*

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[8] As discussed *infra*, we now consider the proper focus of the second step of the *Mathies* test to be the likelihood of the occurrence of the hazard the cited standard is designed to prevent. In the past, the Commission considered in the third step of Mathies *both* whether there was a reasonable likelihood that the hazard contributed to by the violation would occur *and* whether there was a reasonable likelihood that that occurrence would result in injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (the third step "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in *an event* in which there is an injury.") (emphasis added). As a result, for many years the second step was often a given in the S&S analysis. Indeed, the second step was not contested in this case or in *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 154, 161-62 (4th Cir. 2016). Following the Commission's decisions in *Musser* and *Cumberland*, *infra*, that combined analysis was split between the second and third steps. Consideration of whether the hazard was reasonably likely to occur is now moved to the second step. Consideration of whether an injury was reasonably likely in the event of that occurrence remained in the third step. However, the ultimate inquiry has not changed.

Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n, 717 F.3d 1020, 1025–27 (D.C. Cir. 2013)).

Therefore, the relevant concept tying together the second step "likelihood" analysis and third step "gravity" analysis of *Mathies* is the "hazard" at issue. In light of the analytical importance placed on "hazards" under the *Mathies* test, it is essential for the Judge to adequately define the particular hazard to which the violation allegedly contributes. A clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations. That same clearly defined hazard will also frame the potential source of injury for purposes of determining gravity in the third step analysis. The Commission thus defines the "hazard" in terms of the prospective danger the cited safety standard is intended to prevent.

The articulation of the hazard in the instant matter therefore considers the potential danger, and the violation's contribution to a reasonable likelihood that injury to miners may result. As described above, the starting point for determining the hazard is the actual cited section. Section 75.511, the standard violated in this case, requires that electrical equipment be locked out and tagged out while electrical work is performed on the equipment. The requirement of lock out and tag out is to ensure that power will not be restored during electrical work, thus protecting the miners performing the electrical work from electrical shock or electrocution. Hence, the specific hazard in this case is that the cathead for the shuttle car would be re-connected to the power center, thus re-energizing the cable which Richardson was inspecting and Herndon was repairing—that is, the hazard of a miner working on energized equipment. Simply stated, in this case, the tangible hazard for consideration at the second step was the likelihood of the occurrence of miners working on energized equipment.

Having clearly defined the hazard, the next task at step two is for the Judge to determine whether the violation sufficiently contributed to that hazard. The Commission has utilized a "reasonable likelihood" analysis for determining whether a violation significantly and substantially "contributes" to a hazard. That means the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. Here, for example, the question under step two is whether, under these particular circumstances, the violation (the failure to remove the key from the lock) was reasonably likely to result in the restoration of power to the shuttle car cables while the inspection group was working on it.[9]

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[9] This is not a situation like a respirable dust violation, *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (Jun. 1986), or a pre-shift examination violation, *Manalapan Mining Co.*, 18 FMSHRC 1375, 1388–98 (Aug. 1996) (Jordan and Marks, Comm'rs, concurring in part and dissenting in part), where the hazard may be presumed from the fact of the violation. Here, the Secretary must prove that the violation contributes to the hazard.

If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the hazard identified at step two, the Judge then assumes such occurrence and determines at step three whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury. At step four, the Judge determines whether any resultant injury would be reasonably likely to be reasonably serious.

We recognize that "reasonable likelihood" is not an exact standard. Obviously, a Judge cannot calculate the degree of risk of the occurrence of a hazard or a reasonably serious injury in precise percentage terms. Rather, the "reasonable likelihood" standard is a "matter of a degree" evaluation with particular focus on the facts and circumstances presented regarding these risks. This imprecision and the complexity of the facts in many Mine Act cases do not undercut the importance of the standard; indeed, it serves to emphasize the necessity for careful, thoughtful review of all relevant facts in every S&S proceeding. In this regard, it is not unlike other decisions that require Commission Judges to apply their experience and sound discretion to the resolution of difficult, fact-intensive questions, such as those involved in an unwarrantable failure analysis.[10] And as with the unwarrantable failure analysis, Commission Judges have applied an analytical framework in S&S cases that has developed a generally coherent view of the term "reasonably likely," despite its inherent imprecision.

In a recent Mine Act case involving an S&S determination, the Fourth Circuit used the phrase "at least somewhat likely," in describing the second step of *Mathies*. Specifically, the court stated that the Secretary establishes a contribution when he shows that the violation is "at least somewhat likely to result in harm." *Knox Creek*, 811 F.3d at 163.

The Fourth Circuit's discussion on the second step of *Mathies* is brief and merely supplements the court's primary discussion regarding other matters. Specifically, the meaning of the second step was not at issue in *Knox Creek*; instead the court was concerned with the application of the third step of *Mathies*. *Id.* at 161. The court only described the second step of *Mathies* in order to contrast its purpose with the purpose of the third step. *Id.* at 162. Thus, nothing in the case turned on the exact degree of "contribution" in the second step of *Mathies,* and the court was not required to analyze the differences between "at least somewhat likely" and "reasonably likely."

All Commissioners agree that the Judge must analyze the likelihood of the occurrence of the hazard at step two of the *Mathies* test. It is simply incorrect to assert that the Fourth Circuit "promulgated" a test for the second step of *Mathies* in *Knox Creek*. Slip op. at 20 (Jordan, Chairman, and Cohen, Comm'r, concurring in part and dissenting in part). As pointed out above, the second step of *Mathies* was not an issue in *Knox Creek*. Neither party briefed step two; the step two test was not before the court. For that reason, the fact that the Fourth Circuit discussed the necessity of a likelihood element in step two simply emphasizes that a review of the

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[10] An unwarrantable failure refers to more serious conduct by an operator in connection with a violation. It is "more than 'ordinary negligence.'" *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Therefore, the Judge must determine the degree of negligence.

likelihood of the occurrence of the hazard is required. Indeed, the words "at least" show the circuit court was writing in terms of a minimum standard in discussing a principle not in issue. Those words provide no basis for an inference that the court was considering changing, let alone intending to change, our long-existing reasonable likelihood standard in a case where the issue was not before it. If the court intended to substitute a new standard, it would have said so.[11]

We note that the Commission itself has never construed "reasonable likelihood" in a narrow or cramped manner that would hinder achievement of the Mine Act's objective of a safe and healthful mining environment.[12] That leads us to believe that the Fourth Circuit was not trying to announce any particular interpretation of the statutory S&S language or draw any distinctions between degrees of likelihood, but was merely attempting to describe existing Commission jurisprudence. As a result, we continue to apply our established standard rather than embracing a different phrasing of the standard in this case.[13]

We now apply the *Mathies* test to the facts of this case.

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[11] The restraint the court displayed in its discussion of this issue is consistent with its thoughtful and well-reasoned opinion.

[12] For example, the Commission has repeatedly held that "reasonable likelihood" does not mean more probable than not. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996); *Amax Coal Co.*, 19 FMSHRC 846, 848-49 (May 1997). Further, we apply certain assumptions in determining reasonable likelihood, such as the presumption that the violation will continue unabated in the course of continued mining operations. *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Additionally, we do not take into account the existence of redundant safety measures. *Knox Creek*, 811 F.3d at 162, *aff'g* 36 FMSHRC 1128 (May 2014).

[13] Because *Knox Creek* was issued after briefing in this case was completed, we have not yet heard from the Secretary, the operators, or others in the regulated community on this issue. For example, inspectors now evaluate the likelihood aspect of gravity under the penalty criteria in terms of "reasonably likely." We do not know how or whether adopting an "at least somewhat likely" standard for the second step of *Mathies* would impact the assessment of gravity by MSHA inspectors. Nonetheless, we do not foreclose the possibility of making changes in our application of the *Mathies* test in the future if circumstances warrant such a change.

2. Application of the *Mathies* Test[14]

With respect to the first step of the *Mathies* test, Herndon's actions constituted a violation of a mandatory safety standard. Specifically, he failed to lock out the shuttle car cathead while electrical work was being performed, in violation of 30 C.F.R. § 75.511. As a result, the first step of *Mathies* is met.

The second step of the *Mathies* analysis asks whether this failure to lock out the shuttle car cathead during electrical work contributed to a discrete safety hazard. As noted above, the specific hazard posed by the violation in this case was that the cathead for the shuttle car would be re-connected to the power center while miners were working on the power cables. Therefore, under the second step of *Mathies*, the question is whether that hazard was reasonably likely to occur given the particular facts surrounding this violation. After a careful review of those facts, we conclude that such an occurrence was reasonably likely.

The relevant facts surrounding this violation are as follows: The inspector, Herndon, and the shuttle car operator composed the inspection party. At the outset of the electrical inspection, Herndon had placed a lock he borrowed from a roof bolter on the shuttle car cathead so that the cable could be inspected and, if necessary, repaired. He was unable to remove the key from the lock and so he decided to simply leave it in place. Tr. 101–05. Inspector Richardson testified that because the key was left in place, anyone working in the area could have removed the lock from the cathead, put the cathead back in the power center, and energized the cable. Tr. 58. Roughly 10 people were on the section and many of those miners would not have known that cable repair was being made. Tr. 61. Miners were likely to be near the power center because, as Richardson testified, this was a location where miners congregated to access their lunch buckets. Tr. 63.

Richardson believed that a miner could "[w]alk by, see the cathead, the shuttle car, and think that the electrician was working on the shuttle car before he got called to work on the miner and say, 'Well, I'll help him out and I'll finish re-energizing[15] the cathead to the shuttle car.'" Tr. 78–79. In doing so, a miner might simply think that the electrician forgot to remove the key. Tr. 61. Richardson also testified that miners would be expected to work at the power center in the near future. At the same time that Herndon was repairing the shuttle car in the fourth entry, a

[14] Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the Judge's S&S findings. Commissioner Nakamura finds that the violation was S&S applying the "reasonably likely" standard for step two of the *Mathies* test. Chairman Jordan and Commissioner Cohen find that the violation is S&S applying either the "reasonably likely" or the "at least somewhat likely" standard which they discuss in a separate opinion, *infra*, for step two of the *Mathies* test.

[15] The transcript quotes the inspector as saying "finish de-energizing the cathead." Tr. 79. However, just before this, the inspector was agreeing that someone could walk by the power center and think that he was helping the electrician by "re-energiz[ing]" the cathead. Tr. 78. In context, it is clear that "de-energizing" was a typographical error by the Court Reporter.

different electrician, Carpenter, was repairing a continuous miner cable in the fifth entry. Tr. 34, 75. After Carpenter was finished with his repair he would have gone to the power center to energize the continuous miner. Tr. 64. Or, he might have given another miner the key to his lock and asked him to go to the power center to energize the continuous miner cable. Tr. 64. That assistant miner might have seen the key in the shuttle car cable lock and energized that cable because he believed he was assisting the section electrician or because he had mistaken the shuttle car cathead for the miner cathead. Tr. 64.

These facts compel a finding that the violation contributed to the hazard of electrical shock. The failure to remove the key was reasonably likely to result in a miner accidentally or unknowingly plugging the cable back into the power center. The miner working on the cable would then be exposed to electrical shock. Therefore, the second step of *Mathies* is met.

The Judge made several findings regarding the likelihood that the cable would be re-energized. Although he did so in his discussion of the third step of *Mathies*, as shown above, the proper place for this analysis is in the second step of *Mathies*. Therefore, the Judge's findings regarding the likelihood of the occurrence of the event against which the standard is directed will be considered here. In doing so, we conclude that the Judge's findings contain legal errors and are not supported by substantial evidence.[16]

Specifically, the Judge found that the lock, even with the key in place, constituted a "visual cue to any miner seeing it that the cathead should not be plugged back in, perhaps similar to the visual cue a proper tag used to tag out a cable like this would provide." 35 FMSHRC at 2504. In making this finding, the Judge relied on the fact that the standard at issue, section 75.511, contains an alternative to locking out, "i.e., it is acceptable to 'suitably' tag a cathead when an actual lock out is not possible." *Id.* The Judge was "convinced . . . that the tagging effect of finding a lock of any sort on a cathead mitigates against a finding of greater likelihood." *Id.*

It is true that section 75.511 contains an alternative to locking out. However, this alternative is a narrow exception that is not applicable here. That section provides that disconnecting electrical devices should be locked out "except that in cases where locking out is not possible, such devices shall be opened and suitably tagged." 30 C.F.R. § 75.511. Therefore, a predicate to the use of tagging out without locking is the impossibility of locking out. Here, there is no question that locking out was possible. In fact, Herndon was able to place a lock on

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[16] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

the cathead; he claimed he simply wasn't able to remove the key. Therefore, the exception to the rule is not applicable.

The Judge also found that the condition had existed "for only a few minutes before Herndon told Richardson about it, during which time no work was done on the power cable." 35 FMSHRC at 2505–06. This finding is based on the Judge's incorrect assumption that Herndon told Richardson he had left the key in the lock when he returned to the inspection party. However, the record shows that this assumption is incorrect. Herndon testified that when he put the lock on the cathead, he was unable to remove the key, even with the help of channel locks. Tr. 104. He then walked back over to the shuttle car. Tr. 104–05. He testified that the time between when he left to place the lock on the cathead and when he returned was approximately three minutes. Tr. 105. He testified that in that three-minute period, no work was done on the cable. Tr. 105. However, Herndon did not tell Richardson about the condition when he returned. In fact, the undisputed evidence is that Richardson did not learn about the key in the lock until after the repairs were made. Tr. 46, 48–50. That means that all of the repairs were conducted while the key, unbeknownst to Richardson, was still in the lock. Herndon testified that the repairs lasted ten minutes. Tr. 108. Although the cuts in the cable may have taken ten minutes to repair, Richardson estimated that the lock and key were on the cathead for about 30 minutes during which time he was handling the cable looking for additional hazardous conditions. Tr. 56–57. Therefore, substantial evidence does not support the Judge's finding that no repairs were conducted while the key was in place or that the condition existed for only a "few" minutes.

In addition, the Judge found that from the shuttle car, "a visual observation of the cathead was arguably possible," and that the inspection team could have shouted at any miner working around the cathead, warning that miner not to tamper with the lock. 35 FMSHRC at 2505. The Judge supported this finding by noting that the mining machine was turned off and no coal was being produced, meaning that the section would be much quieter than usual. *Id.* This would allow the voices of the inspection team to travel farther. Furthermore, the Judge stated that the power center was only 55 feet away from the shuttle car. *Id.*

There are several problems with the Judge's finding regarding the inspection party's ability to see the power center. First, the Judge's conclusion is based on disputed and contradictory evidence. In particular, while Herndon testified that the power center was only 55 feet from the shuttle car, Richardson testified that it was 115 feet away. Tr. 36–37, 102. Further, Herndon testified that he could clearly see the power center from the shuttle car with his cap lamp, while Richardson testified that the power center was not visible from the shuttle car because of large blocks of coal between the entries. Tr. 37, 127–28. In analyzing whether the inspection crew would be able to verbally warn a miner against re-energizing the cable, the Judge used the 55-foot distance and also assumed that the inspection crew would be able to see a miner at the power center.

Regardless of distance and visibility, the Judge's conclusions are not supported by substantial evidence. Even if the power center was only 55 feet from the shuttle car and even if there was nothing obstructing the view, the evidence would still not support a finding that the inspection crew could "warn" miners away from the power center. First, of the three members of

the inspection team present, only one, Herndon, was aware that the key was left in the lock. Tr. 104–05. Richardson only learned of the condition after the repairs were completed. Tr. 46, 48–50. Perhaps more importantly, Herndon, the only person in the inspection party aware of the condition, was busy repairing the cable at the time and might not have been aware that a miner was approaching the power center. Tr. 105–08. Even if Herndon happened to notice a miner approaching, he testified that he did not believe that the key constituted a hazard and therefore would have felt no need to warn the miner. Tr. 111–12. Thus, substantial evidence does not support the Judge's conclusion that the inspection party could warn miners away from the power center.

The Judge also found that, because the continuous miner machine was being repaired, there was "less than normal pressure to keep a production pace, which as a matter of common sense might reduce a miner's incentive to cut corners." 35 FMSHRC at 2506. The Judge reasoned that without this pressure, there was no known impetus to re-energize a cable with a lock in it. *Id.* This conclusion is speculative and is not based on any evidence in the record. There is no reason to believe that miners would be more cautious simply because the continuous miner was being repaired. Richardson testified that the continuous miner being down can, in fact, sow confusion. Tr. at 61. Substantial evidence does not support the Judge's assumptions.

Additionally, the Judge found that the miners would be less likely to re-energize the cable because they were aware that an MSHA inspector was in the area conducting an inspection. 35 FMSHRC at 2506. The Judge believed that the presence of the inspector was "far enough out of the ordinary to override a miner's being 'on auto-pilot' while doing his job to motivate him to be a bit more perspicacious and cautious than normal." *Id.* Once again, the Judge's conclusion is speculative. While it is true that miners were aware that Inspector Richardson was on the section, there is no evidence to suggest that this would somehow change the way miners would consider a lock with the key inserted. Further, many mines have federal inspectors present daily and there is no evidence to suggest that it was out of the ordinary for an inspector to be at this mine. Even if a mine inspection at this particular mine was relatively rare, there is no evidence to suggest that the presence of an inspector would necessarily make miners more cautious. Once again, substantial evidence does not support the Judge's assumptions.

Moreover, the Judge found that miners were trained to know that only the person who placed a lock on a cathead was permitted to unlock it and re-energize it. *Id.* at 2503, 2506. The Judge held that "[a]ll miners are initially trained and subsequently re-trained never to remove a lock placed by someone else . . . . In order for this element to fail, a miner must forget or ignore the training." *Id.* at 2506.

The Judge's reliance on the operator's training program constitutes legal error. Essentially, the Judge is positing that miners were trained to be particularly cautious when working with locks on electrical equipment. However, in *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), we held that whether miners would exercise caution is not relevant under the *Mathies* test. In fact, the Commission concluded that the consideration of mitigation by caution would essentially add a new element to the *Mathies* test. Instead, we held, "[t]he hazard continues to exist regardless of whether caution is exercised." *Id.* at 1123. The second and third steps of the *Mathies* test should be applied by the Judge accordingly. "While miners should, of

course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." *Id.* We have also held that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior.'" *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)).

For those same reasons, we reject the Judge's conclusion here that the likelihood of the hazard was lessened by Newtown's training regime. The common sense justification for this legal conclusion is supported by the Judge's own statement that miners forgetting or ignoring their training is "something that happens all too frequently." 35 FMSHRC at 2506. Similarly, Inspector Richardson testified that miners do not always comply with their training. Tr. 61–62. After all, as Richardson noted, miners were trained not to leave their key in the lock but Herndon did so anyway here. Tr. 62–63. Therefore, the Judge committed legal error in his consideration of the miners' training as a factor militating against a finding of S&S.

In light of these errors, we conclude that the Judge's opinion (and the brief submitted by the operator) does not undermine our ultimate conclusion reached above: The presence of the key in the lock made it reasonably likely that the cable would be re-energized.

Having determined that the Secretary has established the second step of *Mathies*, we can now turn to the third and fourth steps to discuss whether it was reasonably likely that the hazard would result in serious injury. As described above, it is necessary at this point to assume that the hazard is realized. *See Knox Creek,* 811 F. 3d at 161–62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135. In this case, that means assuming that the cable was re-energized while miners were working on it.

It is undisputed that Herndon worked on the cable with a metal knife. Tr. 60. The inspector testified that there were two separate conditions with the cable creating points of exposure. Tr. 40. The Judge credited this conclusion. 35 FMSHRC at 2497. If someone re-energized the cathead while the metal knife or a bare hand was in contact with the power conductor inside, the person would become exposed to ground voltage and would complete the path for electricity to flow. Tr. 60. While Herndon testified that he did not believe he or anyone else was exposed to a hazard, he also testified that he would not have touched the inner wires while energized because he would not be sure they were free from pinholes and they would constitute a shocking hazard. Tr. 132–133. If shocked, the miner would come into contact with 277 volts of electricity. Tr. 58. A 277-volt shock would be sufficient to cause fatal injury. Tr. 43, 58. In fact, the Judge found that the injury would be "potentially fatal." 35 FMSHRC at 2506.

If the cable at issue had been energized, it was reasonably likely that Herndon would have been shocked. That shock would be reasonably likely to result in fatal injury. As a result, the third and fourth steps of *Mathies* are established.

Therefore, we reverse the Judge's finding that the Secretary failed to prove that the violation was significant and substantial.

B. <u>Unwarrantable Failure</u>[17]

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all 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. *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350–57 (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). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

Noticeably absent from the Judge's unwarrantable failure analysis was any consideration of Herndon's position as mine superintendent.[18] A supervisor is held to a higher standard of care than a rank and file miner, and as such, evidence of a supervisor's involvement in the creation of a violative condition is an aggravating factor that should be considered in conjunction with the traditional unwarrantable failure factors. *See, e.g.*, *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Furthermore, a supervisor's violative conduct which occurs within the scope of his employment may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194–97. Therefore, recognition of Herndon's position should have played a major role in influencing the analysis of the traditional factors, such as the operator's knowledge of the violation.

In addition, the Judge erred by failing to discuss the Commission's established factors for unwarrantable failure, finding that the "traditional factors . . . do not lend themselves well to the facts of this case." 35 FMSHRC at 2508. However, while a Judge may determine that some

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[17] Commissioners Young, Cohen, and Althen vacate and remand the Judge's finding regarding unwarrantable failure.

[18] Consideration of Herndon's supervisory role is of even greater importance given his role at the mine. Herndon was the mine's superintendent. With the exception of the mine manager, every employee at the mine was under his authority. Tr. 31. He is also a certified electrician, and thus would have been in a better position to influence his subordinates' approach to addressing electrical hazards.

factors are not relevant or are less important than others under the circumstances, "all of the factors must be taken into consideration and at least noted by the Judge." *IO Coal Co.*, 31 FMSHRC at 1351. Regardless of the weight the Judge lends to a factor, the Judge should at least identify the factors and state the reason for the weight he assigns. Obviously, the opinion need not be repetitive if the reason for the weight is the same for a number of factors. However, the Judge should indicate the weight placed on each factor.

The traditional unwarrantable failure factors do not lose their relevancy simply because the violative conduct occurred in the context of an inspection. The extent of the violation, the length of time the violation existed, whether the violation was obvious, the operator's knowledge of the violation, whether the operator was attempting to abate the violation prior to the issuance of the citation, and whether the operator had in the past been placed on notice of similar failures to properly lock and tag out equipment are all discernible when violative conduct occurs in such a context. Furthermore, each factor poses a separate and distinct question that, when taken together, helps to form a greater understanding of whether the operator's conduct was aggravated.

Given the absence of analysis of the fact that Herndon was the mine superintendent and of meaningful findings on many of the traditional unwarrantable failure factors, we remand the determination of unwarrantable failure. On remand, the Judge shall examine the evidence as to each of the unwarrantable failure factors with the recognition that the violation was attributable to the superintendent of the mine.

C. Civil Penalty[19]

Pursuant to section 110(i) of the Mine Act, the Commission, in assessing a civil penalty, considers six factors including the negligence and gravity of the violation. Here, the Secretary challenges the Judge's reduction of the penalty to $207, specifically challenging the findings as to negligence and gravity. We agree that the Judge erred in changing the evaluation of Newtown's negligence from "high" to "low." 35 FMSHRC at 2500–03. With regard to gravity, we agree that the Judge erred in finding that an injury was unlikely to occur, even though it would be potentially fatal. *Id.* at 2503–04.

1. Negligence

In analyzing an operator's degree of negligence, the Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *Brody Mining,*

[19] Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the Judge's findings regarding negligence and gravity.

LLC, 37 FMSHRC 1687, 1702 (Aug. 2015) (citations omitted); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

However, we have long recognized that mine management should be held to an even higher standard of care. *See Midwest Materials Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("a foreman . . . is held to a high standard of care"). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).

Substantial evidence does not support the Judge's finding that the violative condition was the result of a low degree of negligence on the part of Newtown. It is clear from the record that Herndon, a certified electrician, failed to meet the high standard of care befitting his position as the mine's superintendent. Herndon knew that leaving the key in the lock was a violation of federal regulations. Tr. 119. *See Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994) (concluding that actual knowledge of violative conditions and failure to act constituted high negligence). He failed to demonstrate good faith because he did not inform Richardson that he was unable to procure a functional lock. Furthermore, despite his position and experience as an electrician, Herndon failed even to recognize the danger the faulty lock posed. Tr. 111. Not only did his actions put him in danger of serious bodily harm, they also set a poor example for the miners under his supervision.

The Judge erred in finding that the standard of care expected of Newtown was diminished because the violation occurred in the course of an MSHA inspection of the trailing cable.[20] It is indisputable that the violative condition was the product of Herndon's decisions alone. Richardson did not instruct Herndon to use the defective lock, nor did he improperly pressure Herndon to utilize the most expedient means to facilitate the inspection. Further, the Judge erred in characterizing Herndon as a "deputized" agent of Inspector Richardson. *See* 35 FMSHRC at 2499–500. Rather, Herndon's participation in the inspection was voluntary pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f), and Herndon was not at risk of sanction were he to report to Richardson that he was unable to locate a functional lock. Tr. 144–45. Because the Judge shifted part of the blame for the violation to Richardson, he failed to recognize the implication of his finding that Herndon "cut corners." 35 FMSHRC at 2502.

The Judge also found that leaving the key in the lock should be considered an element of mitigation because it represented something akin to tagging the cathead within the meaning of 30

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[20] Given the highly regulated nature of underground coal mines, MSHA inspections occur with enough frequency to be considered a part of the normal mining cycle. Furthermore, the duty to inspect and repair the trailing cable existed independently of the inspection. As such, we see no need to treat the fact that the violation occurred in the context of an inspection as a mitigating factor.

C.F.R. § 75.511, thus acting "as a signal to anyone seeing it that something out of the ordinary was going on." 35 FMSHRC at 2502–03. However, the key in the lock was not intended as a "signal" like tagging. Herndon left the key in the lock simply because he could not get it out.

Finally, the Judge found, as an element of mitigation, that the faulty lock was on the cathead for only a short period of time. *Id.* at 2503. While the length of time of the violation is relevant to the issue of unwarrantable failure, it has little relevance to negligence, especially where Herndon testified that "there was no danger" in leaving the key in the lock. Tr. 111.

Although Herndon partially complied with section 75.511 by de-energizing the trailing cable and placing a lock, albeit defective, on the cathead, this fact alone does not preclude a finding of high negligence.[21] As we have repeatedly held, the Commission and its Judges are not bound to apply the regulations in 30 C.F.R. Part 100 that MSHA uses to calculate most proposed penalties. *See, e.g.*, *Brody Mining*, 37 FMSHRC at 1701–03. We have explained that an ALJ "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* at 1702; *Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1264 (D.C. Cir. 2016). A finding of high negligence may be made in spite of mitigating circumstances. *Brody Mining*, 37 FMSHRC at 1702–03. Instead, the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

Accordingly, we find that the operator failed to meet its duty of care and that Herndon's actions in his position as mine superintendent require a finding of high negligence.

2. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294–95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. Here, the Judge concluded that if an injury occurred it would be potentially fatal and would affect one miner, but that an injury was unlikely to occur. 35 FMSHRC at 2503.

The Judge reached his conclusion by noting that, despite the fact that Herndon's actions placed him at risk of serious electric shock or electrocution, it was unlikely that the power cable would have been re-energized. However, for the reasons set forth in our S&S analysis, we find that substantial evidence does not support the Judge's conclusion that an injury-causing event was unlikely. We vacate this finding and conclude that the gravity of this violation was high: a potentially fatal injury to one miner was reasonably likely to occur.

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[21] "Locking out" with a defective lock is analogous to using the wrong size of roof bolts. In both instances, the negligence is not diminished by a miner's clearly ineffective effort to comply with the safety standard.

Accordingly, we reverse the Judge's findings as to negligence and gravity and remand for a reassessment of the civil penalty.

III.

Conclusion

For the foregoing reasons, we: (1) reverse the Judge's findings on S&S, and reinstate the S&S designation for the violation; (2) vacate and remand the unwarrantable failure determination for further proceedings consistent with this decision; and (3) vacate and remand the civil penalty for reassessment consistent with the negligence and gravity findings in this decision and (if unwarrantable failure is found) the statutory minimum penalty for section 104(d)(1) citations and orders. *See* 30 U.S.C. § 820(a)(3)(A).

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Chairman Jordan and Commissioner Cohen, concurring in part and dissenting in part:

While we join Commissioner Nakamura in finding that the violation was S&S, we write separately because we disagree with the interpretation of the second step of the S&S test in *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984), set forth by the majority on this issue (Commissioners Young, Nakamura, and Althen). In our view, all that is required to establish the second *Mathies* step is that the violation be shown to be "at least somewhat likely to result in harm," as stated by the Fourth Circuit in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148, 162 (4th Cir. 2016).

As our colleagues state, in the second step of the *Mathies* test, the question is whether the violation contributes to a particular hazard. This step is primarily concerned with likelihood, that is, the extent the violation increases the likelihood a hazardous condition will occur. *Id.* at 162. In the third and fourth steps, the violation is no longer the explicit concern of the analysis; the question instead is whether the previously identified hazard is reasonably likely to result in a reasonably serious injury. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365, 2370 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013) (citing *Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)); *Knox Creek*, 811 F.3d at 162 ("Requiring a showing at [step] three that the violation itself is likely to result in harm would make [step] two superfluous."). These steps are primarily concerned with gravity. *Knox Creek*, 811 F.3d at 162.

We also agree with our colleagues that under the *Mathies* test, it is essential for the Judge to adequately define the particular hazard that is allegedly contributed to by the violation. Establishing a clear definition of the hazard at issue provides something tangible that the violation's contribution can be measured against in the second step analysis. In the instant proceeding, the Judge did not articulate the hazard at issue. On that point, he simply asserted, "[i]t is a discrete safety hazard to perform electrical work on equipment without locking or tagging it out." 35 FMSHRC 2494, 2505 (Aug. 2013) (ALJ). The Judge's statement of the hazard is insufficient as it does not specify the danger facing miners.

Additionally, we agree with our colleagues that the starting point for determining the hazard is the regulation cited by MSHA. The "hazard," for purposes of the *Mathies* analysis, is the danger which the cited safety standard is intended to prevent. Section 75.511, the standard violated here, requires, among other things, that electrical equipment be locked out and tagged out while electrical work is performed. The requirement of lock out and tag out is to ensure that power will not be restored during electrical work. Under the plain wording of the standard, it is not sufficient for someone performing electrical work to simply de-energize the equipment. Hence, as the majority correctly acknowledges, the specific hazard in this case is that the cathead for the shuttle car would be re-connected to the power center, thus re-energizing the cable which Richardson was inspecting and Herndon was repairing. As Inspector Richardson testified, "[w]ith the key being left in the lock[,] anyone could have removed the lock from the cathead, put the cathead back in the power center and energized the cable." Tr. 58.

After identifying the specific hazard, the next step is to conduct the likelihood analysis in light of that hazard. To that end, the trier of fact must determine whether the Secretary has

proven that the violation contributed to that hazard. It is at this point in the analysis that we disagree with our colleagues.

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).[1]

Regarding *Knox Creek*, our colleagues state that the Fourth Circuit's discussion of the second step of *Mathies* cannot be taken as intending to change our "long-existing reasonable likelihood standard," and merely supplements the court's primary analysis. Slip op. at 7–8. We disagree. While the term "reasonable likelihood" is longstanding in our jurisprudence, its traditional use in the third step of the *Mathies* test rather than the second step makes its meaning in the latter context far from clear. The question of what is meant by a hazard "contributed to by the violation" has not heretofore been addressed by the Commission, and has not been specifically equated with "reasonably likely."

Moreover, *Knox Creek* contains a thorough discussion of the Mine Act's S&S provision, and Commission decisions interpreting that provision. The Fourth Circuit stated that the evidentiary test for the second step of *Mathies* is "at least somewhat likely to result in harm" in two separate places within its opinion. 811 F.3d at 162, 163. The Commission should not ignore the test promulgated by the Fourth Circuit in *Knox Creek*.

As explained in the Commission's opinion, the Judge made several erroneous findings regarding the likelihood that the cable would be re-energized. Although he did so in his discussion of the third step of *Mathies*, as shown above, the proper place for this analysis is in the second *Mathies* step. Therefore, we would have considered the Judge's findings regarding likelihood in the context of the second step analysis. In doing so, we conclude that the Judge's findings contain legal errors and are not supported by substantial evidence. We conclude that the violation was S&S under the majority's "reasonably likely" test for the second step of *Mathies* as

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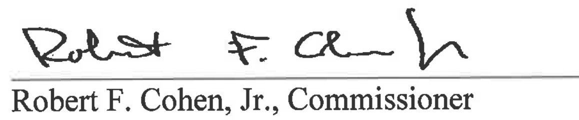
[1] We recognize that, in the past, the Commission has been reluctant to hold that a violation was S&S based on a finding that it "could" result in an injury-causing event. *See, e.g.*, *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993) ("A reasonable likelihood of an ignition is [a] necessary precondition to the reasonable likelihood of an injury."). However, as the court in *Knox Creek* pointed out, that holding is inconsistent with our holding in *Musser*. 811 F.3d at 164.

well as under the "at least somewhat likely" test which we would prefer to have the Commission adopt.

Mary Lu Jordan, Chairman



Robert F. Cohen, Jr., Commissioner

Commissioners Young and Althen concurring in part and dissenting in part:

We concur with Parts A.1 and B of the opinion. For the reasons set forth below, we dissent with regard to Parts A.2 and C.

A. Substantial Evidence Supports the Judge's Decision that the Violation Was Not Significant and Substantial

This is a substantial evidence case. We agree with the majority that defining the hazard is the first step in determining whether a violation is reasonably likely to result in the occurrence of the hazard against which a standard is directed. We further agree that the hazard in this case was the danger that Herndon or the shuttle car operator would work on energized equipment.

Therefore, under the Commission's articulation of the significant and substantial test, the evidence must preponderate that, upon the particular facts and circumstances of the case, it was reasonably likely that Herndon would work on energized equipment. Here, the Judge focused on the likelihood of the occurrence of the hazard. He analyzed the facts, made findings, and rendered his decision based upon the particular facts surrounding the violation. Substantial evidence supports his finding that the violation was not reasonably likely to result in Herndon or the shuttle car operator working on the shuttle car while it was energized.

Because this is a substantial evidence case, our analysis must be whether, in light of the evidence placed before the Judge, a reasonable mind might accept such evidence as "adequate to support [the Judge's] conclusion" that there was not a reasonable likelihood of the occurrence of the hazard under the facts related to the violation. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Without doubt, a reasonable person could, indeed would, arrive at the same conclusion as the Judge that the facts do not demonstrate any measurable likelihood that Herndon or the shuttle car operator faced a danger of working on energized equipment during the inspector's brief inspection.

Based upon evidence in the record cited and relied upon the Judge, he found:

1. No mining was occurring. Other than the two miners with the inspector, all miners were a substantial distance from the power center as they were located with the mining machine shut down for maintenance. Tr. 90, 99. Further, the Judge found, "[t]here was no known impetus to re-energize a cable with a lock on it." 35 FMSHRC 2494, 2506 (Aug. 2013) (ALJ). Thus, based on the evidence, the Judge determined there was no miner near the power center and no reasonable likelihood a miner would go near the power center during the brief inspection. The majority conveniently ignores the time it took to perform the inspection. A reader of the majority opinion might assume that it was expected to go on for hours. In fact, it lasted a brief period, and, even then, took only minutes, at most, to do a brief repair. Of course, an accident only takes an instant. Here, however, the facts are that miners were far removed from the power center and had no reason to return to it during the period of the inspection or to make the gross mistake of energizing the shuttle car if by some remote chance a miner returned.

2. Because the power center was only 55 feet from the shuttle car, in the very unlikely event a miner did approach the power center, the Judge found the supervisor and shuttle car operator could see them and notify them of the inspection of the shuttle car. *Id.* at 2505. In fact, the Judge further found that the miners were aware that an inspector was on the section, so such an alert may not even have been necessary.

3. The operator had labelled all catheads and receptacles at the power center. Tr. 89. The catheads and the receptacles at the power center clearly designated both the cathead that went to the shuttle car and the receptacle for the shuttle car cathead. Similarly, specific labels displayed all other equipment receptacles.

4. Herndon had removed the cathead for the shuttle car, labelled as described above, from the power center and laid it on the floor of the mine. Tr. 103, 111.

5. In fact, Herndon locked out the cathead. Herndon had placed and locked a lock on the cable. The labelled shuttle car receptacle was empty and the labelled and locked cathead was lying on the floor. Tr. 103–04. Therefore, any approaching miner would have confronted a locked out cable labelled for the shuttle car. Such a lock actually does far more than "alert" miners to the out of service status of the cathead. Because the key was in the lock, the lock could be removed. However, such action would require a miner to physically turn the key and remove the lock from the labelled cathead lying on the floor. He would then have to have inserted the labelled cable into a labelled receptacle for a piece of equipment upon which he was not working, the shuttle car.

Therefore, for the violation to result in Herndon working on energized equipment during the inspection, several events, none of which was individually reasonably likely to occur, would *all* have to have occurred. During a brief period, a miner, however unlikely and without reason, would have to have travelled to the power center. The inspector and the two miners would have to have not seen him. That miner, who would have had no work to do with the shuttle car, would have had to pick up the cathead clearly labelled for the shuttle car from the floor of the mine. Then, the miner would have to take the lock off the labelled cathead by turning the key and removing the lock. Then, he would have to have plugged the cathead into a receptacle labeled for the shuttle car and turned on power to the shuttle car.

Not only is the foregoing sequence of events not reasonably likely but also such an action would violate the most basic training given miners. In this respect, the Commission previously has discounted the possibility of gross neglect as a basis for an S&S finding:

> Substantial evidence supports the Judge's implicit finding that the only possibility through which miners could have been exposed to a hazard from the cut in the cable was if a mine repairman were willfully grossly neglectful in completing repairs under an action plan that was underway. The possibility of such willful gross neglect in ongoing repairs does not provide grounds to overturn the Judge's finding that that the Secretary did not carry his burden of proof.

Knox Creek Coal Corp., 36 FMSHRC 1128, 1139 (May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016). Without doubt, taking a labelled and locked cathead from the floor of the mine, removing the lock, and inserting the cathead into a plug for equipment a miner is not using, and has no reason to use, would be grossly neglectful.[1]

Thus, the Judge correctly followed Commission case law and applied the applicable reasonably likely standard to the likelihood of the occurrence of the hazard. He considered all the evidence and evaluated whether, "under the particular facts surrounding the violation," there was a reasonable likelihood of an event causing an injury—that is, the occurrence of a hazard of working on energized equipment. He noted correctly that it is the Secretary's job to prove through the particular facts that the violation was reasonably likely to cause such an occurrence rather than the operator's job to prove injury was unlikely. It is not sustainable for the majority to find that a reasonable person reviewing the evidence could not reach such a conclusion.

The Commission majority chooses to defy logic and disregard the substantial evidence rule in order to reverse the Judge's eminently reasonable decision. We dissent.

B. Civil Penalty

1. The Issue of Negligence Should be Remanded

While we would not hold the violation to be S&S, we would vacate and remand the Judge's finding of low negligence for reconsideration. There may be some argument about the precise level of negligence implicated by Herndon's conduct here, but the Judge had a duty to assess independently the operator's negligence in light of all of the relevant facts and circumstances.

Herndon was superintendent. He had responsibility for ensuring compliance with the Act and yet failed to comply fully with the requirement to lock and tag out electrical equipment while working on the equipment. This failure might have been mitigated by telling the inspector about the status of the lock or taking other measures to foreclose the possibility that the keyed lock

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[1] *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), cited by the majority, is not remotely relevant. Slip op. at 12. That case involved a presumption by the Judge that a miner would walk cautiously once he entered water that presented a substantial hazard of slipping. The issue was the likelihood of an injury where the occurrence of the hazard was conceded, and, therefore, involved caution by a miner already in a hazardous situation. *Id.* at 1123. This case is not remotely similar to a miner's action when caught in a hazardous situation. Creation of a hazard in this case could occur only if a miner: (1) without reason to do so returned to the power center, (2) was not spotted by Herndon who had a clear view, (3) picked up a labelled and locked cathead with which he was not working from the mine floor, (4) contrary to all training and commonsense unlocked it (5) inserted it into the receptacle, (6) re-energized equipment with which the miner would not have had any concern, and (7) within 10 minutes. Certainly, a reasonable person viewing those facts could conclude that such a sequence of events was not reasonably likely. That is the substantial evidence standard of review.

might be removed and the cathead connected to the power. It is possible that Herndon did put a tag on the lock—as we have noted, the record is inconclusive—but he allowed the inspector to work on the cable without fully assuring that the lock could not be removed.

In light of this failure by the superintendent, we could not find the negligence to be low. It may be either moderate or high negligence. We believe a remand is necessary for the Judge to consider the violation and Herndon's actions in the context of his position and responsibilities as a supervisor and to determine independently the operator's level of culpability.

2. Gravity

For the reasons set forth above, we conclude that substantial evidence supports the Judge's finding that the violation was not S&S. At the same time, we agree that the gravity requires consideration of a number of factors. For that reason, we join in a remand for re-evaluation of gravity in considering the appropriate civil penalty.

Michael G. Young, Commissioner

William I. Althen, Commissioner

Chairman Jordan and Commissioner Nakamura, concurring in part and dissenting in part:

We join Commissioner Cohen in vacating the Judge's finding that the violative condition was the result of low negligence on the part of Newtown, and we agree that a finding of high negligence is required and that the violation was significant and substantial. We write separately because we find that the violation was due to the operator's unwarrantable failure.

As our colleagues correctly state, slip op. at 14, unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMHRC 1997, 2001 (Dec. 1987). It is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350 (Dec. 2009).

In this case, Robert Herndon, a mine superintendent (who was a trained electrician), in attempting to lock out a shuttle car cathead at a power station, intentionally left the key in the lock. Tr. 30–31, 104–05, 110–11. As the Judge noted, Herndon conceded that leaving the key in the lock on the cathead would violate federal law if electrical work was being performed because someone could remove the lock and re-energize the line. 35 FMSHRC 2494, 2498 n.3 (Aug. 2013) (ALJ) (citing Tr. 119–20).[1] Adding insult to injury, he had been asked to lock out the cathead by an MSHA inspector who needed to inspect a trailing cable, and he told the inspector that he had locked and tagged out the cathead. Tr. 38, 49–50. However, by leaving the key in the lock, he created a hazardous condition, because another miner could have come to the power station, removed the key, and energized the cable.[2] Tr. 58–60.

We find it deeply troubling that a mine superintendent could demonstrate such a disregard for the safety of the inspector and of the other miners. Even the Judge, who determined that the violation was not the result of unwarrantable failure, concluded nonetheless that:

> Herndon's choice of means to comply with [the inspector's] directive was wrong under the circumstances. Based on his experience and training, he could have done something different that would have facilitated the inspection without creating a potential hazard. He chose a method that increased the likelihood of an injury-causing event. He cut corners in an attempt to facilitate [the] inspection.

35 FMSHRC at 2502 (citations and footnotes omitted).

The Commission's admonition in *Wilmot Mining Co.*, 9 FMSHRC 684 (Apr. 1987), bears repeating:

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[1] Newtown argued that electrical work was not being performed, but the Judge rejected this claim. 35 FMSHRC at 2496-98.

[2] Along with Commissioner Cohen, we rely on many of these findings to support a determination of high negligence. Slip op. at 15-17.

> We emphasize that managers, such as Schrock, who was superintendent and overall supervisor of the pit operation, must be held to a demanding standard of care in safety matters. Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.

Id. at 688; *see also Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) ("Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation.") (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, dissenting)).

Accordingly, when the mine superintendent in this case did not properly lock out and tag out the cathead, and then failed to inform the inspector that the cathead was not locked and tagged out, we determine that, pursuant to longstanding Commission precedent regarding the involvement of high level managers in violations, the record compels the conclusion that this constituted an unwarrantable failure.[3]

For our purposes, the analysis need go no further. However, we wish to address the decision of our colleagues to remand this case rather than reversing the Judge and finding unwarrantable failure. They remand and instruct the Judge to examine the evidence as to each of the unwarrantable failure factors, while recognizing that the violation was caused by the mine's superintendent. Slip op. at 14–15.

The factors to which they refer are used by the Commission and its Judges to determine whether conduct is aggravated in the context of unwarrantable failure. They include: (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. *Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal*, 31 FMSHRC at 1351–60; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Although these factors are usually helpful in analyzing whether a violation is due to an unwarrantable failure, they should not operate as a rigid checklist, especially in a case such as this, where the mine superintendent deliberately violated the standard.

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[3] Our colleagues in the majority recognize the importance that Herndon's position as the mine's superintendent should play in the unwarrantable failure analysis, emphasizing that "[w]ith the exception of the mine manager, every employee at the mine was under his authority." Slip op. at 14 n.18.

Even applying the usual factors, however, we believe it unnecessary to remand to the Judge to make further findings. Nobody disputes that the potential hazard posed a high risk of danger—indeed, of electric shock. The Commission has often relied upon the high degree of danger posed by a violation to support a finding of unwarrantable failure. *See, e.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 34–37 (Jan. 1997) (finding that the record compelled the conclusion that a foreman's conduct reflected reckless indifference and a serious lack of reasonable care when it resulted in a miner working directly underneath unsecured heavy equipment to dismantle it); *BethEnergy Mines, Inc., et al.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992) (finding unwarrantable failure where the unsaddled beams presented a danger to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon common knowledge that power lines are hazardous and precautions are required when working near them with heavy equipment); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708–09 (June 1988) (finding unwarrantable failure where highly dangerous roof conditions were present).

Moreover, the operator's knowledge of the existence of the violation is uncontroverted, as it was caused by the mine superintendent.[4] In addition, the violation (caused by leaving the key in the lock) was obvious, as the lock was clearly being used to ensure electrical equipment was de-energized. Tr. 46, 110–11.

Even assuming that the unwarrantable factors must be taken into account in this case, the evidence regarding these three factors alone would require a determination that the violation was unwarrantable. The Commission reached a similar conclusion in *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999), *aff'd*, 229 F.3d 1141 (4th Cir. 2000) (unpublished). In that case, a foreman failed to de-energize equipment before doing mechanical work. *Id.* at 892. We noted that as a supervisor, the foreman had been entrusted with augmented safety responsibility and was obligated to act as a role model for a subordinate who was watching him. *Id.* at 893.

In upholding the Judge's finding of unwarrantable failure, the Commission concluded that the supervisor's failure to de-energize the rail in the face of obvious and dangerous hazards supported the Judge's determination.[5] *Id.* at 893–95. We emphasized that, consistent with

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[4] We reject the implication of the Judge's decision that the inspector shared some fault for this violation. 35 FMSHRC at 2500. The majority cogently refutes this contention in its discussion vacating the Judge's finding of low negligence and finding high negligence. Slip op. at 15–17. Moreover, the fact that the violation occurred during an MSHA inspection is irrelevant. Enforcement of safety standards are not checked at the door simply because an inspection is in progress.

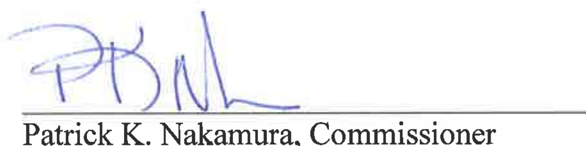
[5] In *Midwest Material*, we held that reliance on the brief duration of the violation was misplaced in view of the high degree of danger posed by the hazardous condition and its obvious nature. 19 FMSHRC at 36. We noted that:

> [g]iven the extreme hazard created by [the foreman's] negligent conduct, that misconduct is readily distinguishable from other

Commission precedent on unwarrantable failure, we needed to apply only those factors relevant to the facts of the case. *Id.* at 893, n.13 (*citing Lafarge Constr. Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998) (holding that for violations involving high danger of which a foreman should have been aware, other factors may be less relevant)).

In summary, we see no need to remand this case and require the Judge to examine evidence regarding each of the unwarrantable failure factors. The Commission has not hesitated to reverse a Judge's finding of no unwarrantable failure when faced with compelling evidence to the contrary. *See, e.g.*, *Consolidation Coal Co.*, 22 FMSHRC 328, 334 (Mar. 2000) (reversing Judge's finding that a violation of a standard requiring the operator to maintain a supply of supplementary roof support material was not due to unwarrantable failure); *Jim Walter Res., Inc.*, 19 FMSHRC 480, 487–89 (Mar. 1997) (reversing Judge's conclusion that coal accumulation violations were not the result of unwarrantable failure); *Midwest Material*, 19 FMSHRC at 34–37 (reversing Judge's determination that a violation of a standard requiring that in certain circumstances, mechanical equipment be blocked or mechanically secured to prevent it from rolling or falling, was not the result of the operator's unwarrantable failure). Similarly, remand is not necessary here, where the superintendent's actions demonstrated a reckless disregard for safety constituting an unwarrantable failure. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when the record supports no other conclusion).

Mary Lu Jordan, Chairman



Patrick K. Nakamura, Commissioner

> types of violations – such as those involving the accumulation of coal dust – where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time.

The same holds true in this case.

Distribution

Christopher D. Pence, Esq.
Hardy Pence PLLC
500 Lee Street, East, Suite 701 (25301)
Post Office Box 2548
Charleston, WV 25329
cpence@hardypence.com

W. Christian Schumann, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South-Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge L. Zane Gill
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710