FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

AUG 30 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2012-760-M WEST 2012-986-M
v.	:	
HECLA LIMITED	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2014-591-M
v.	:	
DOUG BAYER, employed by HECLA LIMITED	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). They concern an order that was issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Hecla Limited, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). In that order, MSHA alleged that Hecla had failed to examine and test for loose ground[1] as required by the safety standard at 30 C.F.R. § 57.3401.[2]

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[1] The term "loose ground" is defined as "fragmented or weak rock in which underground openings cannot be held open unless artificially supported, as with timber sets." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 320 (1997). In this case, it generally means material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling. *See Amax Chem. Co.*, 8 FMSHRC 1146, 1148 (Aug. 1986).

[2] Section 57.3401 states that "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed,

MSHA designated the violation of the standard as "flagrant" pursuant to section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), and proposed that Hecla pay a civil penalty of $159,100. MSHA also proposed that Doug Bayer, the mine superintendent, personally pay a civil penalty of $4,500 pursuant to section 110(c) of the Mine Act.[3]

Hecla and Bayer contested the order and the proposed civil penalties before a Commission Administrative Law Judge. After a hearing on the merits, the Judge vacated the order; he concluded that Hecla had performed an examination as required by section 57.3401. 37 FMSHRC 877, 889-90 (April 2015) (ALJ). The Secretary of Labor filed a petition for review of the Judge's decision, which we granted.[4]

For the reasons that follow, we hold that the order must be vacated. Although we hold that the Secretary can reasonably construe the examination and testing requirement in section 57.3401 to require more extensive testing in certain situations, we conclude Hecla did not have fair notice of this interpretation.

I.

Factual and Procedural Background

Hecla operates the Lucky Friday Mine, a silver, lead, and zinc mine located in northern Idaho. On April 15, 2011, a large fall of ground occurred in an active mining area known as the 15 Stope. A "stope" is where the mining of ore takes place. Larry Marek, a miner, was fatally injured by the ground fall.

Hecla mined in the 15 Stope using an unusual method known as underhand cut-and-fill mining. Under this method, the ultimate trajectory of mining proceeds downward. Mining begins at the "slot," which is the access point of the stope. Cuts are taken simultaneously to the

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prior to work commencing, after blasting, and as ground conditions warrant during the work shift." 30 C.F.R. § 57.3401.

[3] Section 110(c) provides that "any director, officer, or agent of [a] corporation who knowingly authorized, ordered, or carried out [a] violation" shall be subject to a civil penalty fine. 30 U.S.C. § 820(c).

[4] As noted *infra*, the Judge's decision also concerned a citation issued to Hecla for a violation, arising out of the same fatal accident, of 30 C.F.R. § 57.3360, which requires ground support to be designed, installed, and maintained to control the ground in places where miners work or travel. The Judge concluded that Hecla violated the standard, the violation was S&S, and the violation was the result of an unwarrantable failure to comply with the standard. 37 FMSHRC at 887-88. The Judge assessed a $180,000 penalty under the flagrant violation provision in section 110(b) of the Mine Act after concluding that Hecla was reckless in its failure to make reasonable efforts to eliminate a known violation. *Id.* at 894-95. Hecla did not appeal any of the Judge's findings with respect to this separate citation and, accordingly, it is not before the Commission.

east and to the west of the slot.[5] After a cut is complete and before the next cut is mined, the cut is backfilled. This is accomplished by installing bolts vertically in the mined out area and filling that area with a backfill paste.[6] The bolts provide structure for and reinforce the paste fill. After the backfill cures, the miners begin the next cut. That cut occurs 10 feet below the last cut; the floor of the previous cut becomes the roof or "back" of the subsequent cut.

The ground fall that is the subject of this proceeding occurred on the western side of the third cut of the sublevel. On the first cut of the sublevel on the western side of the stope, Hecla advanced a 20-foot wide cut for about 50 feet. Then, Hecla created two parallel entries, following the two diverging ore veins that were located in the stope. The rock between the veins was not removed. The miners only backfilled the area where the ore veins had been located. The unmined rock, known as "waste rock," remained as a pillar in between the two entries. The second cut of the sublevel was mined in a similar manner. Solid waste rock was again left as a pillar between the two advancing faces. *Id.* at 880. On the third cut, the two ore veins merged into the area directly below the waste rock/pillar left above in the first and second cuts. Hecla directed the miners to cut all of the rock in the stope including the rock directly under the waste rock pillar that was left in cuts one and two. *See* Attached Appendix (The Cut Three Stope Map), Gov. Ex. 8, at 15. Bolts were installed in the bottom of the pillar.[7] In total, the undercut pillar on the western side of the stope extended an estimated 72 feet and ranged from three to nine feet wide. Gov. Ex. 8, at 7.

Prior to the ground fall, Hecla had undercut previous waste pillars for short distances of 10 to 20 feet. The practice of undercutting a pillar for 72 feet was unprecedented at the mine. 37 FMSHRC at 888.

On April 13, 2011, Hecla managers conducted a weekly geology tour of the mine, which included a visit to the mining faces of the third cut on the 15 Stope. Bayer participated in this tour and observed no ground control problems. Tr. 471-72, 479-80.

On the morning of April 15, 2011, Nicholas John Furlin, a Hecla production geologist, also visited the third cut and observed no indications that the ground was unstable. Tr. 619-21. Later that day, a massive portion of the "back" in the western side of the stope fell and fatally crushed Mr. Marek. MSHA estimated that the ground fall was approximately 90 feet long, 20 feet wide, and 30 feet high. Gov. Ex. 8, at 3.

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[5] One "slot" is used to access a "sublevel," which consists of five cuts totaling 50 vertical feet. Jt. Stips. nos. 27-28.

[6] The backfill paste is pumped underground from the surface. It consists of cement, water, and classified mill tailings. Jt. Stips. no. 33. The intense horizontal pressure, that significantly exceeds the vertical pressure, which is a characteristic of the Coeur D'Alene Mining District where the Lucky Friday Mine is located, holds the backfill in place. The backfill paste is elastic and able to withstand this horizontal pressure.

[7] Before beginning work in the stope, miners examined those bolts. Tr. 474-75.

MSHA issued Hecla an order alleging a violation of 30 C.F.R. § 57.3401 for a failure to examine and test for loose ground.[8] MSHA also issued Hecla a citation for a failure to maintain ground control as required by 30 C.F.R. § 57.3360.[9]

After the hearing on the merits, the Judge vacated the order. He concluded that Hecla had adequately performed the examination required by section 57.3401. 37 FMSHRC at 889. The Judge considered the miners' visual examination of the bolts and the backfill to be a sufficient examination under the safety standard. The Judge noted that the Secretary had not set forth any guidelines for another examination technique. *Id.* (citing *Asarco, Inc.*, 14 FMSHRC 941, 947 (June 1992)).

With respect to the citation issued for a violation of section 57.3360, the Judge found that Hecla had failed to control the ground and, thus, he affirmed the citation.[10] Hecla did not appeal that ruling.

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[8] The order states:

> Management failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken. This was necessary due to constantly changing ground conditions, they were mining a wide stope and removing the support pillar. The operator has engaged in aggravated conduct constituting more than ordinary negligence . . . .

Gov. Ex. 1, at 8.

[9] The citation states:

> Ground support was necessary in the stope to mine safely, but the ground support utilized was not adequate. The ground control was not designed, installed, and/or maintained in a manner that was capable of supporting the ground in such a wide stope when the support pillar was removed. Mine management has engaged in aggravated conduct constituting more than ordinary negligence by directing the pillar to be mined as the stope advanced and allowing miners to work under inadequately supported ground.

Gov. Ex 1, at 1.

[10] The Judge concluded that Hecla had failed to provide any evidence that it was reasonable to believe that the ground was adequately supported when it mined under the waste pillar. 37 FMSHRC at 886-87. The Judge assessed a penalty of $180,000 pursuant to section 110(b) of the Mine Act for a flagrant violation. *Id.* at 894-95.

II.

Disposition

On review, the Secretary contends that in the circumstances of this case section 57.3401 required Hecla to undertake a more rigorous examination and test than it had conducted. The Secretary argues that he reasonably interprets section 57.3401 to require more extensive analysis when the operator knows or should know that it is mining in a manner that creates ground control hazards beyond the risks inherent in normal mining. S. Br. at 14-15. He asserts that the analysis should be sufficient to pinpoint reasonably foreseeable ground control problems. The Secretary also alleges that this interpretation is compelled by prior Commission decisions, i.e., *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), and *Dynatec Mining Corp.*, 23 FMSHRC 4 (Jan. 2001). Finally, he maintains that, in this case, the hazardous practice of undermining a pillar for an extensive length required Hecla to undertake a geomechanical or engineering analysis.[11]

Hecla argues that section 57.3401 does not require a geomechanical or engineering analysis. Hecla further maintains that it lacked notice of the Secretary's interpretation, in that a reasonably prudent miner would not interpret the language of the safety standard as the Secretary has.

A. The Secretary Reasonably Interprets Section 57.3401 to Require Examinations and Testing Sufficient to Identify Reasonably Foreseeable Ground Control Problems.

The language of section 57.3401 does not dictate or explain what is required by an "examination" of ground conditions. The text of the standard is silent or ambiguous as to how supervisors or other designated persons should "test" "as ground conditions warrant" in novel situations. As our dissenting colleagues identify, in the majority of mining environments, testing for loose ground involves physically tapping or vibrating the roof with a scaling bar. Slip op. at 13. However, when a mine operator engages in a novel mining practice, ordinary techniques may not be appropriate to identify dangerous ground conditions in areas where work is to be performed. Accordingly, that ordinary technique cannot be an effective "test" for loose ground.

Here, Hecla took the previously unprecedented step of undermining a rock pillar for a length of 72 feet. Hecla's chief mining engineer, Ron Krusemark, testified that undercutting a waste rock as was done in cut three was "way out of the norm."[12] Tr. 143-44, 153. He only knew of three situations where a large pillar was undercut for more than 50 feet at the mine (15

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[11] The American Society of Civil Engineers states that "[g]eotechnical engineering utilizes the disciplines of rock and soil mechanics to investigate subsurface conditions. Geotechnical engineering evaluations also include a review of geologic conditions." Geotechnical Engineering, Am. Soc'y of Civil Eng'rs, www.asce.org/geotechnical-engineering/geotechnical-engineering/ (last visited Aug. 29, 2016).

[12] Bayer testified that in his 17 years at the mine it was not uncommon to undercut a pillar by 10 to 30 feet; however, it was not common to undercut a pillar by more than 70 feet. Tr. 544.

Stope west cut three, 15 Stope east cut three and in the 12 Stope). *Id.* (citing 159). Krusemark testified that he was not aware of the plan to undercut the pillar until after the accident. Tr. 150, 152-53. Terry DeVoe, Hecla's chief geologist, testified that he had only undercut a pillar for a similar distance on one other occasion prior to the cuts in the 15 Stope. Tr. 655.

The Secretary maintains that the safety standard at issue was drafted broadly enough to require a mine operator to take all necessary steps to detect hazards when engaged in a novel mining technique such as the one used in this case.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a "regulation is silent or ambiguous with respect to [a] specific point at issue, we must defer to the agency's interpretation as long as it is reasonable." *Tenet HealthSystems Healthcorp. v. Thompson*, 254 F.3d 238, 248 (D.C. Cir. 2001); s*ee generally Auer v. Robbins*, 519 U.S. 452 (1997).

In upholding the Secretary's interpretation of another regulation regarding examinations, the D.C. Circuit stated that it is compelled to "defer to the Secretary of Labor's interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulations." *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005). In fact, deference is appropriate when the agency advances a permissible interpretation even if that interpretation diverges from what a first-time reader of the regulation would conclude is the best interpretation of the regulation. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citing *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991)).

The Secretary's proffered interpretation is consistent with both the language and specific purpose of section 57.3401, as well as with the general purpose of the Mine Act: to protect the safety and health of miners. The drafters of the safety standard intended its language to be "flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines." 51 Fed. Reg. 36192, 36192-93 (Oct. 8, 1986).

It is consistent with the policy goals of the Mine Act to require in a highly unusual mining situation the type of examination or testing that is necessary to discover latent hazards that cannot readily be observed, such as rock fractures above a roof, before miners are exposed to the hazards in their working area. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) (("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (alteration in original) (quoting *Emery Mining Co. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984))). In addition, the Secretary's interpretation is congruent with our decision in *Dynatec* in which we broadly held that an examination must be "designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards." 23 FMSHRC at 24 (quoting *Dynatec Mining Corp.*, 20 FMSHRC 1058, 1086 (Sept. 1998) (ALJ) (emphasis omitted)).

As demonstrated by the facts of this case, the use of novel and more hazardous mining techniques without prior technical analysis to pinpoint hazards puts miners' lives at risk.

Faults were common at the mine. Tim Ruff, a former production geologist at Hecla, testified that throughout the mine there were faults, which could cause some rocks to be "free hanging." Tr. 351. As a result, Ruff testified that he thought it was "crazy" to undermine the pillar. Tr. 354. Ruff voiced his concerns to Bayer. Tr. 354-58. The miners working in this section told Ruff that they were nervous that they had mined too far under the pillar and had compromised its stability. Tr. 360.[13]

There is also evidence in the record that ground conditions warranted additional tests based on the reports of miners actively mining cut number three. Dan McGillis, a retired Lucky Friday miner, testified that the miners working in the 15 Stope discussed with each other their concerns about mining underneath the pillar. Tr. 322-23. McGillis told Bayer that a miner on his section saw the back "dribbling," that is, he saw little rocks fall from the roof. Tr. 325. McGillis understood that to be an indication that the roof was unstable. Tr. 325. Bayer reportedly responded to McGillis' concerns by stating "maybe next cut we can do something different." Tr. 326. The Judge specifically credited McGillis' testimony. 37 FMSHRC at 884.

The limited visual observations performed by Hecla employees were not sufficient to determine if the pillar was stable or if it was compromised by the rock fractures that commonly occur in this mine. The Secretary's Report of Investigation states that the accident occurred because

> [m]anagement did not conduct an evaluation, engineering analysis, or risk assessment to determine the structural integrity of the stope back. The back that struck the victim was comprised of a combination of paste fill and waste pillar. As shown on projection maps, geologic structures in the form of joints, faults, and fractures intersected the waste pillar at various angles. These intersecting discontinuities cut the pillar rock mass into angular blocks and wedges which facilitated gravity failure. The large blocks and wedges observed in the fall rubble were not sufficiently supported by the 6-foot long rock bolts installed in the undercut surface of the waste pillar.

Gov. Ex. 8, at 9. Where an unusual technique is used in an area compromised by rock fractures and faults, it is reasonable to interpret the examination and testing provisions of section 57.3401 to require a technical analysis that is necessary to pinpoint hazards that imperil miners.[14] [15]

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[13] Even Bayer acknowledged that it was possible that the pillar was affected by faults. Tr. 537. Bayer also testified that he believed that no mining had occurred above the pillar and, therefore, it was about 7000 feet tall. Tr. 536.

[14] We note that geomechanical analyses have been performed at the Lucky Friday Mine in the past. For example, in 2001, engineers from the National Institute for Occupational Safety and Health (NIOSH) and Hecla Mining collaborated on a study which included instruments

Our dissenting colleagues contend that the language of the safety standard is plain, and does not allow such a broad application of its requirement to "examine" and "test ground conditions." Slip op. at 12. According to them, the Secretary would need to institute rulemaking before requiring the geomechanical and engineering analysis he claims was needed here. We disagree. The Secretary cannot anticipate every unusual mining technique an operator chooses to institute and then promulgate a rule that explains the testing and examination that is required to protect miners from roof falls through that mining process. Safety standards can be issued using general terms like "examine" and "test" and an operator is then expected to implement the appropriate tests and exams sufficient to detect reasonably foreseeable ground problems.

Our colleagues also assert that we cannot "explain how this duty is triggered or how far outside the working place it would extend." *Id.* at 11. We anticipate, however, that the specific parameters of the duty will be developed on a case-by-case basis. As the Secretary argues, when an operator adopts a "new and unusually hazardous mining technique" that departs from the norm, as was the case here, it is reasonable for the Secretary to require that the examination and testing obligations under section 57.3401 also depart from the norm. S. Br. at 14.

Our dissenting colleagues also suggest that after the accident MSHA should have cited the operator only under 30 C.F.R. § 57.3360 for the failure to provide adequate ground support and should have refrained from also citing it for failing to examine and test for loose ground. Slip op. at 11. We again disagree. Enforcing section 57.3401 according to the Secretary's proffered interpretation promotes the elimination of future hazards (by ensuring adequate examinations of working places with a high risk of ground failure), rather than simply reacting after the fact to hazards that have already occurred.

Unlike an underground coal mine, where an operator must mine according to a roof control plan approved by MSHA that is suitable to the roof conditions and mining system of each

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embedded in the rock bolts to determine if the strength of the rock bolts installed in the backfill at the Lucky Friday Mine was being exceeded. *See generally* T.J. Williams et al., Nat'l Inst. For Occupational Safety and Health, *Geomechanics of Reinforced Cemented Backfill in an Underground Stope at the Lucky Friday Mine, Mullan, Idaho* (July 2001), https://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/2001-138.pdf

[15] Our dissenting colleagues have asserted that the safety standard's requirement to examine and test the ground does not require an operator to examine or test a waste pillar roof above the head of miners working in a stope. Slip op. at 13, 20. In fact, the requirement of the safety standard is simple: When an operator sends miners to work under a waste rock pillar, the waste pillar then becomes an area where work is to be performed, and the operator is required to examine and test it for loose ground. Thus, the phrase "in areas where work is being performed" modifies the words "ground conditions." The "areas where work is being performed" include all areas that affect working miners and are not limited just to the spots where miners are standing or walking. In this case, ground about 30 feet above the roof in cut three fell; this means the point of failure was about 10 feet above cut one (and not "several thousand feet above the working place"). *See* dissent slip op. at 13.

mine, 30 U.S.C. § 862(a), the Mine Act imposes no similar obligation upon underground metal and non-metal mines. *See Amax*, 8 FMSHRC at 1149 ("[A]pproved roof control plans are not required in underground metal-nonmetal mining operations . . . .").[16] Because there is no plan-approval process, and metal and non-metal mine operators have the latitude to depart from their normal mining plans, it is reasonable for the Secretary to interpret the safety standard at section 57.3401 to require technical analyses when he believes it is necessary to safeguard miners' lives; it is a check against recklessness in the pursuit of production. In short, it is necessary to ensure miner safety.

B. Hecla Did Not Have Adequate Notice of the Secretary's Interpretation.

While we have determined that the Secretary's interpretation is reasonable, Hecla is entitled to due process protections prior to enforcement of that interpretation. To comport with due process, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991). The "fair notice doctrine" has been incorporated into administrative law and "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Suburban Air Freight, Inc. v. Trans. Sec. Admin.*, 716 F.3d 679, 683-84 (D.C. Cir. 2013) (alteration in original) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Because the standard had consistently been applied in a more limited fashion, we hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis. As we stated *supra*, we consider the Secretary's interpretation to be a permissible one, although it would not be an obvious reading of the standard to a person familiar with the mining industry. *See Gen. Elec.*, 53 F.3d at 1330 (finding that although the interpretation was permissible, fair notice was lacking where the agency's "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed [regulated parties] of the agency's perspective"). In fact, the Secretary readily acknowledges that his interpretation is not obvious and advocates simply that the regulation is "susceptible of such reading." S. Br. at 15.

Contrary to the Secretary's assertions, the broad holdings of the *Asarco* and *Dynatec* decisions likewise do not provide notice that a geomechanical or engineering analysis may be required to comply with section 57.3401. These cases are factually dissimilar to the

[16] The *Amax* decision concerned a prior safety standard that governed examinations at metal and non-metal mines, 30 C.F.R. § 57.3-22.

circumstances of the present proceeding. Neither case involved a geomechanical or engineering examination, nor was there any indication that such technical examinations were required by the standard.

In *Asarco*, a drill operator was fatally injured by a large ground fall. MSHA issued a citation alleging that Asarco had failed to examine and test for loose ground in the stope. 14 FMSHRC at 944. However, MSHA never alleged that compliance with the standard required geomechanical or engineering analysis. The Commission ultimately vacated the citation at issue. *Id.* at 955.

In *Dynatec*, the Commission again vacated a citation issued for a violation of section 57.3401. 23 FMSHRC at 24. The Commission held that pursuant to the safety standard an examination must be "designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards." *Id.* at 24 (quoting 20 FMSHRC at 1084 (emphasis omitted)). However, that decision also contained no mention that a mine operator may be required to perform a geomechanical or engineering analysis or when such an obligation is triggered. As a result, we reject the Secretary's argument that Commission precedent put Hecla on notice that it was required to perform a geomechanical or engineering analysis.

Hence, we rule that Hecla did not have fair notice of the Secretary's interpretation.

III.

Conclusion

For the aforementioned reasons, we conclude that the Secretary's interpretation of section 57.3401 is prospectively entitled to deference. However, we also conclude that Hecla did not have notice of this interpretation at the time the order in this case was issued. Therefore, we affirm the Judge's decision to vacate the order and not impose civil penalties on Hecla and Bayer.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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

This case arises from a massive rock fall from a point approximately 25 feet above the mine roof in an extended stone pillar above the area where work was being performed. MSHA properly cited the operator for a flagrant violation of 30 C.F.R. § 57.3360 — that is, failure to provide adequate ground support.[1] The Judge found the violation of section 57.3360 directly applicable to the fatality due to the failure to provide adequate ground support for an extensive overhead rock pillar. He further found the violation was flagrant and levied a fine of $180,000 — substantially more than the fine proposed by the Secretary. Thus, MSHA cited and the Judge sustained and substantially fined the failure to provide ground support related to the tragic event.[2]

Rather than prosecuting the operator only under the appropriate section of the regulations, MSHA chose to pursue a novel claim and additionally cited the operator for a flagrant violation of 30 C.F.R. § 57.3401. That section provides:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

In citing a violation of section 57.3401, the Secretary proposes to layer upon the common and ordinary examinations routinely conducted in working places a new, undefined, and extraordinary duty to conduct a highly technical geomechanical analysis. Neither the Secretary nor the majority can explain how this duty is triggered, or how far outside the working place it would extend. We think it unwise to endorse an ad hoc and unclear imposition of responsibility in this context.

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[1] 30 C.F.R. § 57.3360 provides:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

[2] MSHA also cited the operator for two other violations not related directly to the rock fall but arising from the same mining practice. The Judge sustained each violation and levied fines of $50,000 for each violation.

The upshot of the majority decision is to allow the Secretary to create a new substantive regulation under the guise of a new interpretation of a 30-year-old regulation despite the plain wording of the existing rule and the unreasonableness of the new interpretation. The majority agrees that no reasonably prudent person could read the section to require the type of pre-operational testing demanded in this unique case. Slip op. at 9. Further, they do not dispute that in the 30 years since promulgation of the regulation MSHA has never proposed such an interpretation. They find that, because no reasonable operator could have understood the regulation to require this novel type of analysis, they must vacate the citation. *Id.* at 10. We concur in vacating the citation, but respectfully disagree with the majority's reasoning. We would find the Secretary's lawyers' interpretation of section 57.3401 as presented to the Commission is unreasonable, non-persuasive, and invalid.

Discussion

I. The Plain and Unambiguous Wording of Section 57.3401 Does Not Require Undefined Geomechanical Engineering Analyses.

Under *Auer v. Robbins*, 519 U.S. 452 (1997), an agency's interpretation of its own regulation may be entitled to deference, "[b]ut *Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). In this case, we owe no deference to the Secretary's interpretation of section 57.3401 because the Secretary's post-hoc litigation position is inconsistent with the plain words of the regulation as they have been understood for more than 30 years. The Secretary's interpretation cannot be reconciled with the plain, obvious, and accepted meaning of section 57.3401.

The Secretary does not define what the term "geomechanical analysis" means. More importantly for present purposes, whatever the Secretary may envision, the requirements of section 57.3401 plainly do not include an unspecified type of geomechanical analysis of an extended rock pillar above the working place before work occurs in the mine.[3]

The Commission must give words in statutes and regulations their common, ordinary meaning unless they are otherwise defined. *Perrin v. United States*, 444 U.S. 37, 42 (1979). As used in the metal and nonmetal regulations, the word "examine" has an ordinary meaning. An operator "examines" an area by inspecting the designated area — the working place — visually to determine dangers or deficiencies. For example, 30 C.F.R. § 57.18002(a) requires that a competent person "shall examine each working place at least once each shift for conditions which may adversely affect safety or health." No one would suggest that such an examination requires some sort of computer analysis of areas above and around the working place during

[3] Perhaps the language of the regulation may be ambiguous with respect to the precise nature of its application to examinations and testing of the place where work is being performed. It is not ambiguous, however, with respect to the fact that its wording plainly does not require examinations of places in the mine that are not places where work is being performed. *See* 30 C.F.R. § 57.3401("[D]esignated persons shall examine and, where applicable, test ground conditions *in areas where work is to be performed* . . . .") (emphasis added).

each shift, and neither the majority nor the Secretary cites any authority supporting this extraordinary expansion of the scope of the term "examine."[4] Further, section 57.3401 requires examination of the "area where work is to be performed." By statutory definition this means "the working place." 30 C.F.R. § 57.2. Certainly, a stone pillar extending several thousand feet above the place where miners are working is not "the working place."

Ignoring the definitions in the regulations and case law, the majority states that "areas where work is being performed"— that is, working places — "include all areas that affect working miners and are not limited just to the spots where miners are standing and walking." Slip op. at 8 n.15. Thus, the majority does not even recognize the clear regulatory distinction between "active workings" at 30 C.F.R. § 57.2, which are "areas at, in, or around a mine or plant where men work or travel," and working places at 30 C.F.R. § 57.2 which are "areas where work is being performed." Not only does the majority fail to acknowledge that the final regulation was limited from the scope of the proposed regulation, they defy the commonsense reading of the English language by asserting a "working place" extends into a rock column up to 6000 feet above the working place. Because miners must visually examine and physically test a working place for loose ground in order to scale it down, the portion of the roof that could contain scalable ground is part of the working place. However, under section 57.3401, the working place does not include a pillar of rock several thousand feet above the working place. *See* 37 FMSHRC 877, 879 (Apr. 2015) (ALJ).[5]

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[4] The Commission should construe the duty to "examine" a working place harmoniously with other regulations. *See Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993); *Gen. Elec. Co., Aerospace Grp. v. United States*, 929 F.2d 679, 681 (Fed Cir. 1991) ("[W]e are mindful of the canon of statutory construction, equally applicable to regulations, 'that, where the text permits, statutes dealing with similar subjects should be interpreted harmoniously.'" (quoting *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring))). "[R]ules of statutory construction are equally applicable to the interpretation of administrative regulations." *Buckley v. United States*, 51 Fed. Cl. 174, 192 (2001). "In determining the meaning of such regulations, rules of interpretation applicable to statutes are appropriate tools of analysis." *Gen. Elec. Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979); *see also Ala. Tissue Ctr. of Univ. of Ala. Health Serv. Found., P.C. v. Sullivan*, 975 F.2d 373, 379 (7th Cir. 1992) ("The same rules of construction apply to administrative rules as to statutes."(citation omitted)); *accord Wronke v. Marsh*, 787 F.2d 1569, 1574 (Fed. Cir. 1986) (stating that for the interpretation of regulations, just as in the interpretation of statutes, courts must begin with their plain language).

[5] The majority seems to suggest that we imply the fall may have occurred from more than 30 feet above the actual working place. Slip op. at 8 n.15. Of course, we do not. We simply reflect that the majority does not assign any vertical limit to the newly imposed duty to perform a geomechanical analysis of some undefined dimension under some undefined circumstances. It does not opine, for example, that if the break occurred at 100, 200, 500, or 1000 feet, it would not find a violation. As we point out in this dissent, neither the Secretary nor the majority provides meaningful guidance as to the actual content, meaning, or duties of this newly found obligation.

Further, our precedents reflect the common understanding that the purpose of the standard is to permit scaling and removal of loose ground. The need to scale roof or ribs in the working place is determined by testing the roof and ribs. In *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), the Secretary alleged a failure to examine and test a roof in violation of section 57.3401. *See id.* at 945. The Commission reviewed the plain language of the regulation and found that the regulation contains two requirements: "First, areas where work is to be performed must be examined for loose ground before work is started, after blasting, and as conditions otherwise warrant during the workshift. Second, where applicable, ground conditions in work areas must also be tested." *Id.*

Regarding the examination requirement, "the judge interpreted the examination requirement of the regulation to require a careful visual inspection." *Id.* (citing *Asarco, Inc.*, 12 FMSHRC 2073, 2083-84 (Oct. 1990) (ALJ)). The Secretary did not dispute that interpretation. *Id.* The examination requirement of section 57.3401 cannot be interpreted to require an engineering or geomechanical analysis outside the working place when "examination" in the context of examining the area where work is to be performed plainly means "a careful visual inspection" of the working place.

Further, inherent in *Asarco* is the common understanding that the phrase "testing for loose ground" means physically tapping or vibrating the roof to determine if there is loose ground that needed to be scaled down with a scaling bar.[6] Indeed, ironically, in *Asarco* the Secretary argued for a narrow interpretation of section 57.3401, alleging that the respondent failed to test the roof because it used a jumbo drill to vibrate the roof to reveal loose ground conditions, rather than thumping the roof with a scaling bar. The Judge had agreed with the Secretary's witnesses, who testified that "sounding the roof with a steel bar was the only effective method to test a mine roof." *Id.* at 944 (citing 12 FMSHRC at 2084-87).

The Commission stated that "[t]he Secretary seems to take the position in this case that a scaling bar is the proven and effective means of testing for loose ground." *Id.* at 948. However, the Commission held that the Secretary failed to provide notice that he did not consider a jumbo drill to be a permissible means to test a roof, so the Commission did not defer to the Secretary's interpretation and found that use of a jumbo drill was allowed under section 57.3401. *Id.* at 947, 948, 950. Therefore, while the Secretary now seeks to read the term "test" to require undefined

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[6] The Commission has found that

> [t]he term "loose ground" has a specific meaning within the mining industry and is defined as "[b]roken, fragmented, or loosely cemented bedrock material that tends to slough from sidewalls into a borehole . . . . As used by miners, rock that must be barred down to make an underground workplace safe . . . ." *DMMRT* 658. Accordingly, the term loose ground, as used in this standard, refers generally to material in the roof (back), face, or ribs that is not rigidly fastened or securely attached and thus presents some danger of falling.

Amax Chemical Co., 8 FMSHRC 1146, 1148 (Aug. 1986).

geomechanical and engineering analyses, it is clear that "test" has always been understood by the Secretary, the Commission, and regulated parties to be a plain industry-specific term that refers to testing the immediate roof and ribs to determine if loose rock ("loose ground") needs to be taken down.

Auer deference is inappropriate because the plain meaning of the regulation clearly does not include the geomechanical and engineering analysis the Secretary seeks to require for the first time in this case. However, even under *Auer*, the law provides four separate reasons not to defer to the patently unreasonable, post-hoc interpretation offered by the Secretary in this case. *See Christopher v. SmithKline Beecham*, 132 S.Ct. 2156 (2012).

II. Applying the *Auer* Standard, the Secretary's Interpretation Is Not Entitled to Deference.

In *Christopher*, the Supreme Court identified four reasons to withhold deference to an agency interpretation of its own regulation. Where *any* of these circumstances pertain, the Secretary is not entitled to deference. All four are present here.

A. The Secretary's Interpretation Does Not Reflect MSHA's Fair and Considered Judgment.

The Secretary's current interpretation does not reflect MSHA's fair and considered judgment for several reasons. There is no reason to defer if there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question:

> [D]eference is . . . unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, *supra*, at 462; *see also, e.g.*, *Chase Bank*, *supra*, at ___ (slip op., at 14). This might occur . . . when it appears that the interpretation is nothing more than a "convenient litigating position," *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988), or a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," *Auer*, *supra*, at 462 (quoting *Bowen*, *supra*, at 212; alteration in original).

Id. at 2166-67.

First, the Secretary's current interpretation of § 57.3401 is a new one inconsistent with his prior interpretation of the regulation. MSHA's Program Policy Manual contains no mention of an obligation to conduct a geomechanical analysis when an operator departs from normal mining practices nor is there any evidence that the Secretary has ever, in the 30 years since promulgating section 57.3401, required an operator to conduct such an analysis. Furthermore, the Secretary has never urged his current interpretation in previous litigation before the Commission.

Second, the Secretary's interpretation in this case is only a convenient litigating position[7] and post hoc rationalization of past agency action to support a citation for actions cited appropriately and directly by another regulation in this case. *See Christopher*, 132 S.Ct. at 2166. These two recognized exceptions are well-established principles of administrative law. *See Bowen,* 488 U.S. at 212; *Auer*, 519 U.S. at 462 (also citing *Bowen* for the same two limits on deference).

In his reply brief before the Commission, however, the Secretary contends that his "interpretation before the Commission is 'agency action, not a post hoc rationalization of it.'" S. Reply Br. at 11 (quoting *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (quoting *Martin v. OSHRC*, 499 U.S. 144, 157 (1991))).[8] The Secretary may believe that incantation of "deference" is enough to prevent meaningful review of his lawyers' litigating positions — regardless of whether such positions express the considered views of policy makers rather than the tactical interests of trial attorneys — but his reliance on *Martin* for the proposition that the Commission must defer to his litigating position, no matter how unreasonable the new obligations imposed upon a regulated party, is misplaced and disregards subsequent precedent.

As the law of deference has evolved, courts have conformed their deference to interpretations of regulations depending on how the interpretation has been developed — interpretive rule, policy statement, opinion letter, litigation position, etc. As part of such evolution, federal courts are unwilling to afford full *Auer* deference to agency litigating positions when, as here, agency lawyers offer the interpretation in litigation without review by policymakers and when the lawyers' positions are a post hoc rationalization made for the first time before a reviewing courts or boards. Interpretations offered for the first time by appellate counsel during judicial review, and especially post-trial review, without any demonstrated input from policy makers within an agency are entitled to no deference or, if at all, deference under the power to persuade standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In such circumstances, reasons for deference to agency expertise simply do not apply.

As the Ninth Circuit has recognized, Martin's distinction between agency adjudications and court reviews of agency action has been abrogated. In *Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820 (9th Cir. 2012), the circuit court recognized that *Martin* drew a distinction between the Secretary's litigating position taken before OSHRC and that taken before a circuit court. However, the Ninth Circuit dismissed such a distinction:

> The distinction in *Martin* between administrative and court adjudication did not survive *Mead*, *Auer*, and *Auer's* progeny,

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[7] When we speak of interpretations as mere litigating positions, we mean interpretations of regulations announced for the first time in a brief before the Commission or a reviewing court, not interpretations, for example, that simply "articulate an explanation of longstanding agency practice." *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000).

[8] The Secretary's argument that "when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress," S. Reply Br. at 11 (quoting *Akzo Nobel*, 212 F.3d at 1304), is inapposite. MSHA did not embody the Secretary's lawyers' interpretation in the citation in this case, nor was it argued before the Administrative Law Judge.

> although the deference accorded the Secretary's litigating position in *Martin* is fully consistent with those cases. Notably, *Martin* involved interpretation of regulations, not a statute. Under *Auer* and its progeny, the line *Martin* drew between agency interpretations advanced during administrative versus court adjudications no longer obtains when interpretation of regulations is at issue.

Id. at 831 n.7.

Moreover, *Martin* was decided prior to *Auer*. In the post-*Auer* era, courts are clearly in agreement that interpretations announced in litigation for the first time on appeal do not warrant *Auer* deference. *See, e.g.*, *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1077-78 (9th Cir. 2016) (declining to defer to government's litigating position when no court had previously had occasion to construe the relevant provision, there was no prior interpretation of the provision by the government, and the government admitted that the interpretation was developed for the purposes of that litigation); *Rancheria v. Jewell*, 776 F.3d 706, 715 (9th Cir. 2015) ("The agency presented its position for the first time in its brief, and it offered sparse explanation for it. We need not defer to an agency position when taken for purposes of litigation."); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 827 (Fed. Cir. 2010) ("Where the agency's interpretation seeks to advance its litigating position, deference is typically not afforded to the agency's position announced in a brief."); *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010) ("[D]eference is inappropriate, however, where the interpretation is a novel litigating position 'wholly unsupported by regulations, rulings, or administrative practice.'" (quoting *Bowen*, 488 U.S. at 212)); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 838 (Fed. Cir. 2006) ("[An] interpretation must truly be one that had been applied by the agency, either prior to or, at the latest, during the exercise of its administrative powers in the present matter. An 'interpretation' is therefore not a position advanced by the agency for the first time before the [Merit Systems Protection] Board or in a court of review. Such an 'interpretation' is then no more than a litigation position to which no deference is due.").[9]

Regarding the regulation at issue in this case, section 57.3401, the Secretary has never construed that section to be so broad as to require a geomechanical or engineering analysis in policy manuals, citations, or litigation before the Commission or circuit courts. The Secretary's interpretation did not appear in the citation,[10] and the Secretary did not even urge this

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[9] To the extent courts have decided they must exercise their right to review such litigating positions independently for conformance with the agency regulation, we note that Commission Administrative Law Judges spend their careers in the study and application of the Mine Act. They are part of a specialized independent agency, a principal purpose of which is to adjudicate disputes regarding MSHA citations for violations of mandatory safety standards. Commission Judges, therefore, are equipped (respectfully, better equipped than courts) to interpret mandatory safety standards vis-à-vis legal opinions by the Department of Labor Solicitor's Office developed during litigation.

[10] The Secretary asserts that the citation embodied the interpretation now placed before the Commission. *See* S. Reply Br. at 11. However, the citation contains no mention of a

interpretation before the Administrative Law Judge. In his post-hearing brief, the Secretary instead argued liability on the basis that "Hecla management failed to design any sort of a ground examination system . . . that could pinpoint problems with ground support before they became a hazard." S. Post-Hrg. Br. at 19.[11]

Rather than specifying what section 57.3401 required, and what Hecla failed to do, the Secretary instead stated that "[i]f a full timber ground support had been installed, visual examination might have been sufficient." *Id.* Thus, according to the Secretary at that point, if the operator had not violated section 57.3360, the absence of a geomechanical analysis would not have been a violation. That is not a sensible interpretation of regulations. If a mandatory safety standard requires the operator to perform the analysis before any mining, then providing additional ground support would not obviate the violation but rather hide it. Essentially, the Secretary admits his interpretation does not make sense.

The Secretary first announced this interpretation in his petition for discretionary review. The Secretary argues before the Commission that the Judge failed to apply the correct standard even though at the time of the Judge's decision, the Secretary had not articulated the standard pressed before the Commission.

By definition, this is a post hoc rationalization of past agency action. The Secretary issued a section 104(d)(1) citation on August 8, 2011, charged Hecla with a flagrant violation of section 57.3401, proposed a penalty of $159,100, and fully litigated the case at the trial stage, all without raising his proposed "geomechanical and technical analysis" requirement until he filed his petition for discretionary review on May 28, 2015.

The litigating position offered by counsel post-citation does not set forth the fair and considered judgment of any policymaking position within the MSHA but has been asserted before the Commission only after the hearing and after the Judge's Order. Even before the Commission, the Secretary does not argue in this case that the regulation mandates his reading, nor that he has interpreted and enforced the regulation as if it included a "geomechanical and engineering" analysis requirement. *See* PDR at 15 ("Section 57.3401 does not explicitly require . . . an engineering or geomechanical analysis of the ground conditions"). Instead, the Secretary's counsel argues that "the standard is certainly susceptible of such a reading." *Id.* Furthermore, the Secretary's counsel himself seemed unsure of what would be required under the new interpretation of the standard. *See* Oral Arg. Tr. 30, 34 (characterizing it as "do[ing] the

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geomechanical or engineering analysis, and merely parrots the requirement of the regulation, stating that "[m]anagement failed to adequately examine and test the ground conditions to determine if additional measures needed to be taken." Gov. Ex. 1, at 8.

[11] While the Judge noted that the inspector testified that an examination should have been performed by someone "with a geomechanic background," he rejected this suggestion, correctly holding that it "is not required by the safety standard." 37 FMSHRC at 891 n.10. The Judge also correctly noted that the failure to perform an engineering analysis "relates directly to the requirement to design suitable ground control under section 57.3360," the standard under which the operator was properly cited, with the Judge affirming the flagrant penalty in all respects and increasing the penalty requested by the Secretary. *Id.* at 890, 895.

math and crunch[ing] the numbers"). There is no indication that this interpretation reflects an MSHA policy judgment. In other words, the Secretary's counsel's argument before the Commission does not show any "fair and considered judgment as to what the regulation required at the time [the citation was issued]." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210 (2011).

Accordingly, we afford deference in the same manner as would a reviewing court and hold that the Secretary's litigating position does not set forth a considered judgment by MSHA.[12]

B. The Secretary's Interpretation Is Plainly Inconsistent with the Regulation.

There is no reason to defer when the interpretation is plainly erroneous or inconsistent with the regulation: "Deference is undoubtedly inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Christopher*, 132 S. Ct. at 2166 (quoting *Auer*, 519 U.S. at 461).

As described above, the meanings the Secretary now ascribes to the terms "examine," "test," and "area where work is performed" are far different from the Secretary's prior interpretations, from other sections of the regulations, and from the Commission's and regulated parties' understanding. *See discussion supra* pp. 12-14. We do not need to remake those points here, but we must note that the new interpretation set forth in litigation is plainly inconsistent with the regulation. The regulation's examination requirement has never been construed to mean anything beyond a visual inspection, and the regulation's testing requirement is a specific term within the mining industry to denote tapping or rattling the ground to determine if any loose ground needs to be scaled down with a scaling bar prior to continuing work.

1. MSHA Limited the Scope of Section 57.3401 During the Drafting Process.

Section 57.3401, originally proposed for public comment as section 58.3401(b), provided:

> A person designated by the operator, shall examine, and test where applicable, ground conditions *in active workings* prior to work or travel in these areas and as ground conditions warrant during the work day. After blasting, a designated person shall examine ground conditions in areas affected by the blast before any other work is performed. Designated person shall be experienced in examining and testing the ground and understand the nature of the hazards involved.

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[12] Indeed, it would be an odd standard that would require one level of deference when introducing a new interpretation on appeal before the Commission, yet, if the Commission were to deny review, and the Secretary were to appeal the case to a circuit court, his new interpretation would be owed a different level of deference.

Safety Standards for Ground Control at Metal and Nonmetal Mines, 49 Fed. Reg. 8368, 8374 (March 6, 1984) (emphasis added).

As long defined in the regulations, "active workings" means "areas at, in, or around a mine or plant where men work or travel." 30 C.F.R. § 57.2. Therefore, as proposed, the regulation was expansive in terms of the area that would have been covered: the proposal required examination of all areas where men work or travel rather than just areas where work is to be performed. At the same time, of course, no one suggested that "in active workings" included a mountainous area *above* where miners work or travel.

In finalizing the regulations, MSHA decided that, by requiring examinations "in active workings," the proposed regulation was too broad. In the final rule notice, MSHA discussed the proposal's requirement that a supervisor examine ground conditions during visit to "active workings." MSHA explicitly described its action:

> [T]he agency limited the application of this standard in the proposed rule to "working places," which was defined as "any area where work is being performed."

Safety Standards for Ground Control at Metal and Nonmetal Mines, 51 Fed. Reg. 36192, 36195 (Oct. 8, 1986).

In response to one commenter's worry that the language would require "'firebossing,' or examining the mine each day for all types of hazards," MSHA stated that "the final rule clarifies the agency's intent" that it "requires examination for loose ground in areas where work is to be performed prior to commencing work, after blasting, and as ground conditions warrant." *Id.*

Further, after discussing application of the regulation to haulageways and travelways, MSHA clarified that "[e]xaminations may be done by appropriate supervisors or other designated persons experienced in examining and testing for loose ground who have been designated by the mine operator to perform the task" and stated that "the qualifications for such persons are set out in the standard." *Id.* at 36196.

Thus, whereas the Secretary contends that a specialized geomechanical engineer is an "appropriate supervisor or designated person," PDR at 15, the regulation itself provides that "appropriate supervisors or other designated persons" are those who are "experienced in examining and testing for loose ground." 30 C.F.R. § 57.3401. As explained *supra*, both "examining" and "testing for loose ground" have long-understood, specific meanings. *See supra* Part I. Conspicuously absent in the final rule notice is any mention of any intent, on the part of MSHA, to require a geomechanical analysis of an extended pillar above the working place prior to mining activities.[13]

[13] The majority contends that "[s]afety standards can be issued using general terms like 'examine' and 'test' and an operator is then expected to implement the appropriate tests and exams." Slip op. at 8. That observation is irrelevant, because the Secretary did not demonstrate any intent to draft section 57.3401 so broadly as to require anything resembling a geomechanical or engineering analysis. Where an "interpretation runs counter to the 'intent at the time of [a]

Thus, the intent of the regulation expressed in the regulatory history cuts directly against affording deference to the Secretary's new interpretation. As the Federal Circuit held in *Gose v. U.S. Postal Service*, 451 F.3d 831, 838 (Fed. Cir. 2006), "[j]ust as an agency's inconsistent interpretation of its regulation detracts from the deference we owe to that interpretation, so does evidence that the proffered interpretation runs contrary to the intent of the agency at the time of enactment of the regulation."

In finding a need to defer to the Secretary's interpretation, the majority quotes from the final rule notice that section 57.3401 was intended to be "flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mines." Slip op. at 6 (quoting 51 Fed. Reg. 36192-93). The majority, however, mischaracterizes the context in which MSHA stated that section 57.3401 was intended to be flexible. In proposing the regulation, MSHA included a section 57.3402, which stated: "Supervisors shall examine ground conditions during each visit of a working place to determine that proper ground control practices are being followed." 49 Fed. Reg. 8368, 8374 (Mar. 6, 1984). However, MSHA deleted that provision in the final rule:

> Commenters recommended that the portions of this standard proposed as 58.3402 be deleted because of redundancy with other standards. MSHA agrees. Section 56/57.3401 in the final rule appropriately addresses the needed ground examinations. The final rule must be flexible enough to accommodate the variety of situations which may arise while assuring the safety of persons working in the mine. Circumstances may occasionally require the attention of a supervisor at a particular area of the mine, preventing a visit to a work place during a shift. Requiring inspection during each visit by a supervisor, as was proposed by MSHA in 58.3402 could actually discourage supervisory visits.

51 Fed. Reg. 36192-93. The statement that the rule be "flexible enough" was made in the context of deleting a provision that would have required a supervisor to inspect a working place during each visit, because that could prove too onerous a burden given that circumstances may call a supervisor elsewhere in the mine. Properly read *in context*, therefore, MSHA's statement does not support the majority's reasoning.

Not only did MSHA never express any intent to require the Secretary's new geomechanical engineering analysis, we again note that the Secretary never before asserted that interpretation even in litigation. As explained above, inherent to the *Asarco* decision is a common, shared understanding that the phrase "testing for loose ground" meant physically tapping or vibrating the roof to determine if there was loose ground that needed to be scaled down with a scaling bar. While the Secretary's attorneys now argue the term "test" means a geo-mechanical engineering analysis, it is clear that "test" has always been understood by the Secretary, the Commission, and regulated parties to be an industry-specific term referring to physically hitting the roof to determine if there is loose rock that needs to be taken down.

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regulation's promulgation,' . . . *Auer* deference is unwarranted." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

2. Case Law Demonstrates the Meaning of the Regulation.

The Secretary and the majority rely on *Dynatec Mining Corp.*, 23 FMSHRC 4 (Jan. 2001), asserting without explanation that the Commission "broadly held that an examination must be 'designed to pinpoint the problems so that they can be fixed before miners are exposed to the hazards.'" Slip op. at 6 (quoting *Dynatec*, 23 FMSHRC at 23).

In fact, *Dynatec* did not concern the testing requirement of section 57.3401. It concerned only the examination requirement. In *Dynatec*, the Secretary alleged, and the judge had found, that the respondent failed to examine sufficiently a structure that it had built and failed to examine the surrounding rock for issues. The Commission applied the judge's "pinpoint the hazards" examination requirement, but disagreed with both the Secretary and the judge that the examinations were insufficient. 23 FMSHRC at 23-24.

Regarding the examination of the structure, the respondent had found problems and reported them to the operator of the mine, along with recommendations for repairs, but the operator did not heed the respondent's warnings. *Id.* at 23. Thus, because the respondent had found and reported the issues, the Commission held that it "pinpointed the problems that needed to be fixed." *Id.* Regarding the examination of the surrounding rock, the Secretary argued that even though it "appeared stable, Dynatec did not know that because it did not attempt to examine the ground." *Id.* The respondent argued that "a reasonably prudent person would not have removed timber in the raise structure to examine ground conditions absent some indicia that ground conditions were problematic." *Id.* at 15, 24.

The Commission agreed with the respondent, and found that, because there was no indication that the respondent needed to remove the timber structure to examine the surrounding ground, there was no failure to examine. *Id.* While the majority and the Secretary focus on the "pinpoint the hazards" requirement, they fail to either note or notice that "examination," means a "careful visual inspection." *Asarco*, 14 FMSHRC at 945.

C. The Secretary's Interpretation Does Not Give Fair Warning of the Conduct Section 57.3401 Prohibits or Requires.

It is well understood that adjudicators need not defer to an interpretation that does not give fair warning of the conduct a regulation prohibits or requires:

> To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires." *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (C.A.D.C. 1986) (Scalia, J.). Indeed, it would result in precisely the kind of "unfair surprise" against which our cases have long warned.

Christopher, 132 S.Ct. at 2167 (footnote omitted).

In *Christopher*, the Supreme Court warned that deference to an agency interpretation for which there was not fair notice, "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 132 S.Ct. at 2167 (alteration in original) (quoting *Gates & Fox Co.*, 790 F.2d at 156). Because we concur with Part II.B of the majority's decision, we necessarily would find that the Secretary's new interpretation does not give Hecla fair warning of what was required under section 57.3401. As the majority succinctly held, "a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis." Slip op. at 9. The majority, however, defies precedent in nevertheless affording the Secretary deference even though the Supreme Court has stated explicitly that deference is not warranted in exactly this situation.

The majority appears to glean this bifurcated, two-step consideration from *General Electric Co. v. U.S. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), a pre-*Auer*, pre-*Christopher* deference case. In that case, the D.C. Circuit found that the EPA's interpretation of a regulation was permissible, but found that the "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the regulated party] of the agency's perspective." *Id.* at 1330. In relying on *General Electric*, the majority effectively disregards 20 years of subsequent, controlling precedent without comment in order to afford deference where it is unwarranted.

Coal operators are required to perform pre-shift examinations in accordance with 30 C.F.R. § 75.360. Section 75.360(b) states that "[t]he person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health and safety standards . . . . test for methane and oxygen deficiency, and determine if the air is moving in its proper direction." Section 75.360(b) does not contain any requirement for, or indeed any mention of, a requirement to perform a geomechanical or engineering analysis. The absence of a comparable requirement in a comparable standard serves to illustrate that a reasonably prudent miner would not recognize a geomechanical analysis to be an inherent part of an "examination."

The majority states that section 57.3401 has "consistently been applied in a more limited fashion" than that which the Secretary seeks in this case. Slip op. at 9. This is quite the understatement. The preamble to the final rule contains no mention of the Secretary's new requirement, nor does MSHA's Program Policy Manual. *See* IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 57, at 12 (2003). In fact, we are unaware of any instance where the Secretary has imposed or even sought to impose such a requirement on any mine operator in the thirty years since the regulation was issued. Because the Secretary has never asserted his new interpretation in any format whatsoever, the Commission finds that no reasonably prudent person in the mining industry would have suspected that section 57.3401 required a geomechanical or engineering analysis. Under the Supreme Court's analysis in *Christopher*, this is precisely a situation in which deference should not be given.

D. The Secretary's Interpretation Would Impose New Liability in a Case Involving Fines or Damages.

Finally, in terms of the *Christopher* standard, courts need not defer to an agency's interpretation "where doing so would impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements' or in a case involving 'fines or damages.'" *Christopher*, 132 S.Ct. at 2167 (alterations in original) (quoting *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974)).

"In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule." 1 R. Pierce, *Administrative Law Treatise* § 6.11, p. 543 (5th ed. 2010); *see also Christopher*, 132 S.Ct. at 2167 n.15 (quoting Pierce for the same proposition). In *Christopher*, the Court found that the agency engaged in just such a practice:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.
>
> Accordingly, whatever the general merits of *Auer* deference, it is unwarranted here.

132 S.Ct. at 2168.

In the present penalty proceeding, we concur with the majority that Hecla and Bayer should not be held liable for violating section 57.3401 because they had no notice whatsoever of the Secretary's current interpretation. There is no distinction between this case and the Supreme Court's statements in *Christopher*. The Secretary is attempting to assert a new interpretation that no reasonable person in the mining industry could have foreseen in order to impose a duty on Hecla and Bayer of which they had no notice, and the Secretary has proposed penalties of $159,100 and $4,500 for Hecla and Bayer, respectively. In nevertheless deferring to the Secretary, the majority disregards clear precedent without comment. As the First Circuit has found, "deference is inappropriate where significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue." *Sun Capital Partners III, LP v. New England Teamsters & Trucking Ind. Pension Fund*, 724 F.3d 129, 141 (1st Cir. 2013).

III. Under *Skidmore* Deference, the Secretary's Interpretation Lacks the Power to Persuade.

Here, there is no doubt that the position taken by the Secretary is simply a litigating position adopted at the late stage of review before the Commission. As the majority agrees, there

is no hint that MSHA has ever taken such a position in the past, and the interpretation was crafted by the Secretary's attorneys for presentation to the Commission itself. Though we would find the Secretary's litigation opinion is not entitled to deference, it is useful to demonstrate that the interpretation fails to satisfy the familiar elements of a *Skidmore* review: "[the] thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other relevant] factors." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140). As set forth below, an analysis of these factors demonstrates the litigating position of the Secretary has no power to persuade.

A. There Is No Evidence of a Thorough Consideration.

MSHA promulgated section 57.3401 on October 8, 1986. Since that date, MSHA has not proposed any amendment to the regulation or issued any formal or informal guidance suggestive of the interpretation offered in this litigation. Indeed, even in this litigation, the Secretary's lawyers rather than MSHA propose the interpretation for the first time before the Commission. There is no evidence any policymaker within MSHA has ever considered the interpretation. The Secretary's lawyers developed the interpretation in an effort to sustain the application of a clearly irrelevant regulation to a tragedy to which the appropriate standard was fully applied. Thus, there is no evidence that MSHA has interpreted the regulation at all, let alone thoroughly.

B. The Secretary's Reasoning for the Proffered Interpretation Does Not Support His Interpretation.

The majority offers the best consideration of this factor by concluding in its decision that no reasonable person would have understood the section to mean the interpretation now posited by the Secretary. Slip op. at 9. We must be careful to understand here that this element refers to the reasoning for the interpretation of the standard, not whether a standard as proposed by the Secretary's clearly incorrect interpretation might be useful. As demonstrated below, a post hoc interpretation of a long-existing standard is not a legitimate substitute for rulemaking, including public notice and opportunity to comment. *See infra* Part IV.

C. The Proffered Interpretation Is Not Consistent with Prior Interpretations.

The Secretary has not cited any prior interpretation of section 57.3401 that is consistent with, or that would even hint at, the interpretation taken by the Secretary before us. Indeed, as described above, in *Asarco*, the Secretary took the position that "a scaling bar is the proven and effective means of testing for loose ground." *Asarco*, 14 FMSHRC at 948.

D. Other Relevant Factors

Three other factors demonstrate that the Secretary's litigating position has no power to persuade. We discuss them briefly.

First, as the majority also finds, acceptance of the Secretary's interpretation would deprive the operator of fair notice. Slip op. at 2, 9. Further, adoption of such interpretation

would amount to promulgation of a new substantive requirement without public notice and comment. Certainly, implementation of an interpretation resulting in denial of fair notice and basic statutory rights is not persuasive.

Second, the proffered interpretation is completely undefined and, as offered by the Secretary, still does not provide fair notice or guidance as to how mine operators should apply such an interpretation in the future. The Secretary never explains what the interpretation offered by it in this case means operators must actually do in future situations. Section 57.3360 is clear: operators must provide adequate ground support. But the Secretary's "interpretation" in this case regarding section 57.3401 is simply that the operator did not perform an analysis that, in hindsight, it should have performed. There is no guidance whatsoever as to the scope of duties the proffered interpretation would require in ongoing operations.

The majority simply couches the requirement in terms of "the use of novel and more hazardous mining techniques without prior technical analysis," thereby incorporating three hopelessly ambiguous elements into a mandatory safety standard — "novel mining techniques and more hazardous mining techniques without prior technical analysis." *See* slip op. at 6. What is a "novel" technique? What is a "more hazardous" technique? What is a "prior technical analysis?" In the absence of guidance, the interpretation offered by the Secretary amounts to a hopelessly vague invitation for post hoc citations. If something goes wrong, the operator should have done more because the activity was "novel" or "more hazardous" or required some previously never used sort of "prior technical analysis." Such an interpretation is unenforceable as hopelessly vague. Certainly, it is not a persuasive interpretation of section 57.3401.

IV. The Secretary's Interpretation Is a Legislative Rule, Requiring Notice-and-Comment Rulemaking.

Here, the Secretary essentially seeks to issue a new legislative rule under the guise of interpreting an existing one. That is impermissible. The unlawfulness of an agency seeking to create a new legislative rule through a litigation interpretation overlaps to a certain extent with the absence of fair notice and the failure of a litigating position to reflect a fair and considered judgment of agency policymakers. However, this element of our review implicates the indispensable right to notice and opportunity for public comment before imposition of substantive obligations—a bedrock principle of administrative law.

Two principles are at play: (1) the right of citizens to express their views on government actions imposing obligations enforced by fines before imposition of the obligations, and (2) the interest of rulemaking that results in clear, feasible, and enforceable standards. Here, for example, the "rule" resulting from the Secretary's litigating position portends enforcement though large fines, but the contours of the "rule" are completely undefined.

"Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983)). Thus, "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties — and that would be the basis for an enforcement action for violations of those obligations or requirements

— is a legislative rule." *Id.* at 251. Interpretive rules, on the other hand, are not required to go through notice and comment rulemaking. *Id.* at 250 (citing 5 U.S.C. § 553(b)(3)(A)). "[A]n agency action that merely interprets a prior statue or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule." *Id.* at 252.

In *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the D.C. Circuit articulated criteria to determine whether an asserted "interpretative rule" is actually a legislative rule that requires notice and comment.[14] The criteria for determining whether an interpretation of a regulation is a legislative rule, and thus subject to notice and comment, applicable to this case are:

> (1) Whether in the absence of the interpretive rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties;
>
> (2) Whether the legislative rule the agency is claiming to interpret is too vague or open-ended to support the alleged interpretive rule;
>
> (3) Whether the interpretive rule effectively amends a prior legislative rule.

1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 454. If the answer to any of these questions is affirmative, the newly proffered interpretation is a legislative rule. *Id.*

First, in the absence of the Secretary's litigating position, section 57.3401 clearly does not require an operator to conduct a geomechanical and engineering analysis prior to mining. As the majority correctly found, no reasonable person in the mining industry would have interpreted § 57.3401 to include that requirement, and there is no indication that the Secretary, prior to this litigation, would have done so either. This new interpretation is legally binding on the regulated parties, as evidenced by the fact that the Secretary seeks to assess large penalties in this case, even though Hecla and Bayer had no notice that section 57.3401 could be read to require a geomechanical or engineering test.

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[14] Initially, the court identified four criteria, including "whether the agency has published the rule in the Code of Federal Regulations." *Am. Mining Cong.*, 995 F.2d at 1113. However, in *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994), the court stated that publication or lack therefor has never been taken "as anything more than a snippet of evidence of agency intent." Professor Pierce in *Administrative Law Treatise* characterizes this as having reduced the criteria to three. 1 Pierce, *supra*, § 6.4, at 453. Subsequently, in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), the Supreme Court articulated an "anti-parroting rule," which Pierce explains is an application of the rule, also articulated in *American Mining Congress*, that an agency cannot use an interpretive rule to provide real content to amorphous legislative rules. 1 Pierce, *supra*, § 6.4, at 453.

Second, the Secretary's interpretation would render the words of section 57.3401 so vague and open-ended as to mock the rationale for the Administrative Procedure Act. To characterize this interpretation as "interpretive" would allow the Secretary to conduct rulemaking while bypassing the APA's notice and comment requirements.

Third, because the Secretary, Commission, and any reasonable person in the mining industry have never considered section 57.3401 to contain the Secretary's new requirement, the Secretary is, effectively, amending section 57.3401 to include the requirement of a geotechnical and engineering analysis.

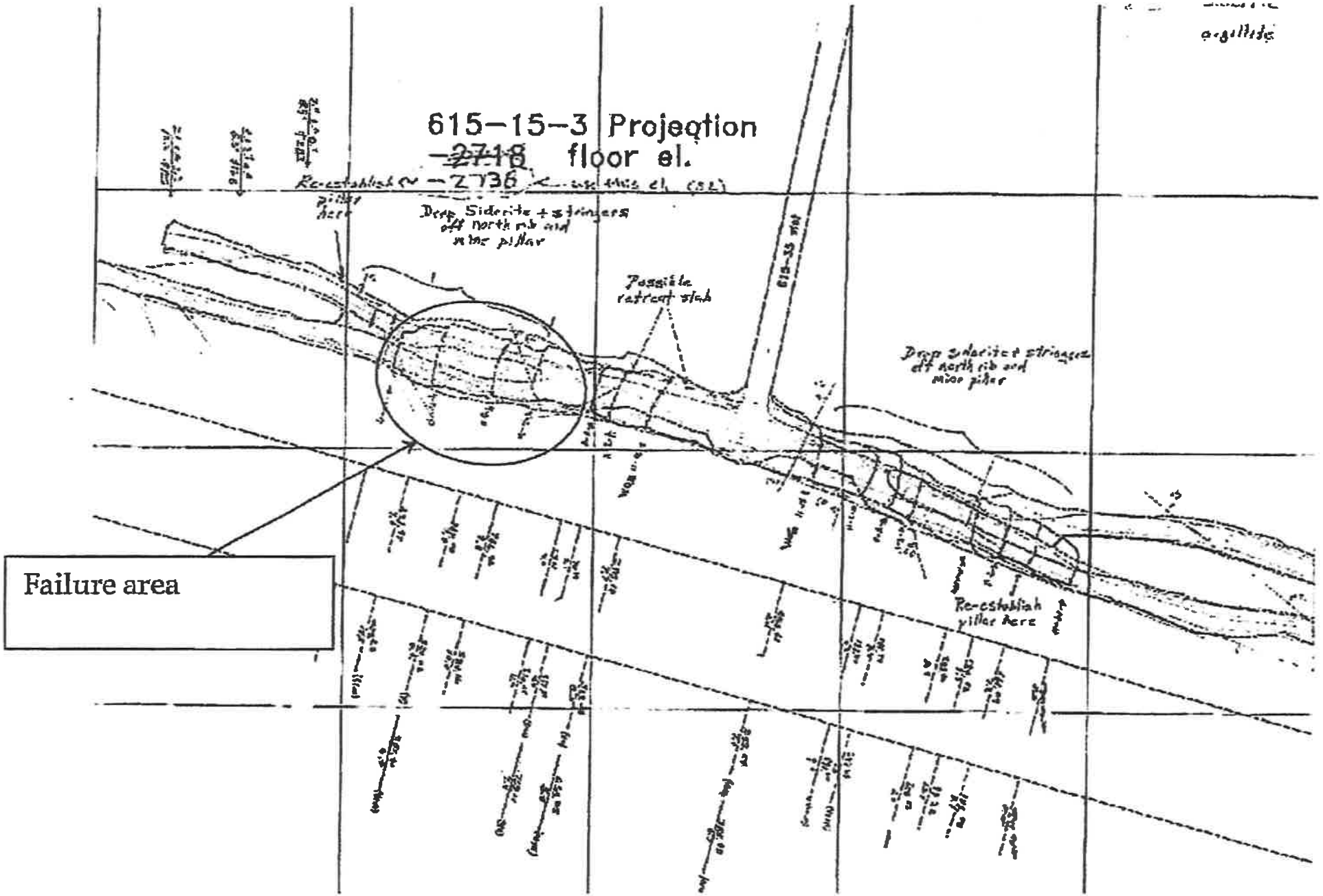
There can be no dispute that the Secretary's new interpretation is a substantive amendment to expand the existing rule. Such an expansion of a substantive rule may issue only after notice-and-comment rulemaking.

CONCLUSION

For the reasons stated above, we find no reason to defer to a post-hearing litigating position that plainly conflicts with the words and well-understood purpose of section 57.3401 and would impose liability without any prior notice of its interpretation. Therefore, while we concur with affirming the Judge's decision, we dissent with respect to the majority's interpretation of section 57.3401.

Michael G. Young, Commissioner

William I. Althen, Commissioner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Failure area

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