FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. VA 2012-42 VA 2013-192
CONSOLIDATION COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It concerns Citation No. 8189820 issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Consolidation Coal Company ("Consol") for a violation of 30 C.F.R. § 75.220(a)(1).[1] The citation was issued after Consol failed to comply with the requirement of its roof control plan to limit cuts of coal to a maximum length of 20 feet in the presence of adverse roof conditions. The Secretary designated the citation as significant and substantial ("S&S").[2]

After a hearing on the merits,[3] a Commission Administrative Law Judge issued a decision concluding that the evidence demonstrated that the roof control plan was violated but did not establish that the violation was S&S. 37 FMSHRC 2396 (Oct. 2015) (ALJ). The Secretary of

[1] Section 75.220(a)(1) requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

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

[3] The hearing involved Citation Nos. 8202408 and 8197859 in Docket No. VA 2013-192, as well as Citation No. 8189820 in Docket No. VA 2012-42, considered herein. Neither the Secretary nor Consol sought review of the Judge's decision relating to the two citations in Docket No. VA 2013-192.

Labor filed a petition for discretionary review of the Judge's decision to vacate the S&S designation, which we granted.

The Commission is split on whether the Judge's decision on the S&S issue is supported by substantial evidence. Therefore, the Judge's decision stands as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

Acting Chairman Althen and Commissioner Young vote to affirm the Judge and conclude that her decision that the violation was not S&S is supported by the record evidence. In contrast, Commissioners Jordan and Cohen conclude that the record evidence demonstrates that the violation was S&S and, accordingly, would reverse the Judge and hold that the violation was S&S.

I.

Factual and Procedural Background

In July 2011, an MSHA inspector, W. Gregory Ratliff, conducted an inspection at Consol's Buchanan Mine # 1, an underground mine located in Virginia.

Inspector Ratliff, accompanied by Robert Baugh, Consol's safety inspector, visited a development panel where miners had recently cut a crosscut from the No. 3 entry into the No. 2 entry. When they arrived, miners were in the process of bolting the unsupported roof after taking the final cut of coal at the intersection of the crosscut and the No. 2 entry.

The inspector observed multiple adverse roof conditions in and around the crosscut. These conditions included sections of bolted roof with visible cracks in the roof and where rock had fallen during previous mining. Additionally, he observed that the unsupported roof had partially collapsed toward the end of the final cut. Tr. 238-39. Terry Hamilton, the section foreman, testified that the roof rock fell directly onto the continuous miner, breaking its chain. Tr. 268. The inspector measured about 29 to 36 inches of rock missing from the left side of the roof, and up to 42 inches of rock missing from the right side of the roof. Tr. 238.

The mine's roof control plan states that when there is "[a]ny detectable condition which is known to indicate the presence of adverse roof conditions," subsequent cuts must "be limited to 20 feet." Sec. Ex. 8 at 6. The inspector believed that the final cut of coal exceeded the 20-foot limit imposed when adverse roof conditions are present.

The inspector took two measurements of the cut. First, he measured from the second to last row of bolts installed after the previous cut. He began the measurement at this row because the last row of bolts contained damaged bolts, and the roof control plan dictates that cuts must be measured from the last row of *permanent* support. *See* Sec. Ex. 8 at 5. He measured the cut from the second to last row of bolts to be 26 feet. Second, he took a measurement from the

damaged row of bolts; he recorded this measurement as 23.5 feet. Baugh returned to the area the following day and independently measured the cut's length to be about 22 feet from the last row.

As a result of his observations, Ratliff issued a citation for a S&S violation of 30 C.F.R. § 75.220(a)(1). Consol contested the citation and the proposed civil penalty of $3,405.[4] A hearing took place before a Commission Judge.

The Judge ruled that the Secretary established that Consol took an extended cut of coal in violation of its roof control plan. She relied on the measurements taken from the last row of bolts, and credited both Baugh and Hamilton's testimony that the last row of bolts was uncompromised when the final cut was being mined and, therefore, was the appropriate place from which to take a measurement of the cut.[5] 37 FMSHRC at 2407-08. She did not make an

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[4] The citation states that:

> The Approved Roof Control Plan was not being complied with on the 17 Right Panel mmu. The crosscut from the No. 3 entry to the No. 2 entry inby SS # 28383 had a last cut out that measured 26 feet from the last row of permanent support to the corner in the No. 2 entry. There were 2 roof bolts that had been cut out on the left side and measurement were taken from the next full row of supports 2.5 feet back. There were adverse conditions present in the previous cut (visible cracks in the roof, rock that had fallen from the roof, and evidence of cracks in the test hole at 64 inches). In the adjacent entries (No. 2 and No. 3) there had been rock that had fallen when cuts were taken. The approved Roof Control Plan limits cut depths to 20 feet when adverse conditions are present in the previous cut or in adjacent entries. There was rock that had fallen during this cut that measured from 29 to 42 inches thick the entire cut. This condition exposes miners to the hazards associated with roof falls.

Sec. Ex. 6.

[5] Baugh and Hamilton both maintained that all the bolts in the last row were intact at the time the miners initiated the final cut. Tr. 269-70, 292-293. The Judge accepted that testimony, stating:

> I find Hamilton's testimony to be credible. The bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated. Tr. 269-70, 292-93. The cut depth should be measured from the last row of bolts because it was fully intact when the cut was taken.

37 FMSHRC at 2408.

exact finding on the cut's length, instead finding that it measured somewhere between 22 feet (as measured by Baugh) and 23.5 feet (as measured by Ratliff). *Id.* at 2409.

The Judge concluded that the evidence failed to demonstrate that the violation was S&S. While she found that the violation "contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof at an intersection," she also found that the Secretary had failed to establish a reasonable likelihood that the hazard, i.e., a roof fall, would result in an injury as required by the test in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).[6] 37 FMSHRC at 2409.

In support of her finding that an injury was unlikely, the Judge reasoned that miners are not permitted to stand under unsupported roof and were in fact working a substantial distance from the unsupported roof. In addition, the Judge cited the mine's use of an Automated Temporary Roof Support ("ATRS")[7] and a "tighter" bolting pattern as reasons why it was unlikely that a roof fall in the extended cut would affect the supported roof that the miners were standing under.[8] *Id.* Finally, she concluded that under continued normal mining operations the roof would have been fully supported within a short period of time and, therefore, the miners' exposure to the hazard would have been brief. *Id.* at 2410.

On review, the Secretary challenges the Judge's S&S analysis. He asserts that the Judge erred by relying on the presence of redundant safety measures, by assuming the exercise of miner caution, and by overlooking evidence regarding the scope of the roof fall at the last row of bolts.

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[6] The Commission explained in *Mathies* that:

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

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

[7] Mine operators are required to use an ATRS system while miners install roof supports. 30 C.F.R. § 75.209(a) ("an ATRS system shall be used with roof bolting machines and continuous-mining machines with integral roof bolters operated in a working section"). "ATRS systems are usually composed of one or more hydraulically-actuated cylinders with a bar, ring, or other support device that can be lifted and pressed against the mine roof." Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2363 (Jan. 27, 1988).

[8] The Judge, following a transcription error by the court reporter, mistakenly referred to the "tighter" bolting pattern used on the section as a "tiger" bolting pattern. 37 FMSHRC at 2409-10.

II.

Statement of Law

This case concerns the Judge's application of *Mathies* step 3, which requires the Secretary to prove *a reasonable likelihood that the hazard contributed to will result in an injury.* The Judge is required to determine, *if the hazard occurred*, was it reasonably likely that a reasonably serious injury would result? *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014) ("[T]he ALJ had to determine only whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result."). "The third step is primarily concerned with *gravity*. At this stage, the analytical focus shifts from the violation to the hazard . . . and whether it would be reasonably likely to result in injury." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011)) (citations omitted) (emphasis added).

When reviewing a 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)).

Acting Chairman Althen and Commissioner Young, affirming:

We would affirm the decision.

Legal Principles

The Secretary bears the burden of proving an S&S violation by a preponderance of the evidence. *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). As the finder of fact, the Administrative Law Judge determines whether the Secretary has carried his burden of proof. *See Morales v. ASARCO, Inc.*, 22 FMSHRC 947, 948 (Aug. 2000); *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 181 (Feb. 2000).

Applying *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981), and *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Judge found that the Secretary did not demonstrate that the hazard was reasonably likely to result in a reasonably serious injury to a miner. 37 FMSHRC at 2397-98, 2409-10.[9] We are bound to respect that decision.

Our review of the ALJ's conclusion is constrained by the substantial evidence standard — that is, whether the Judge's finding is adequately supported by sufficient relevant evidence that a reasonable mind would accept. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). A Judge is not required to discuss all the evidence submitted, and a failure to cite specific evidence does not indicate that the Judge did not consider that evidence. *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).[10]

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[9] The Judge issued the decision before the Commission decided *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016). After the Judge's decision in this case, the Commission clarified the relationship between the second and third steps of the *Mathies* test. Under the Commission's *Newtown* formulation of S&S, the S&S analysis requires determinations of four factors:

> (1) whether there has been a violation of a mandatory safety standard;
> (2) 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;
> (3) whether, based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
> (4) whether any resultant injury would be reasonably likely to be reasonably serious.

Id. at 2036-40.

[10] There is no reason to cite the many cases affirming the indisputable proposition that a Judge need not discuss every fact that might be opposed to his or her decision to pass the substantial evidence test. Of course, appellate courts sometimes reverse agency decisions on substantial evidence grounds, citing the evidence that does not support the decision and finding that the trier of fact should have considered such evidence or reached a different conclusion based upon it. Such cases do not contradict the principle that the Judge need not discuss every

We are not a supervening fact finding panel and may not reverse a Judge's decision merely because evidence in the record could have supported a contrary outcome. *Id.* If the Judge's decision is one a reasonable fact finder could reach based upon the evidence, we must accept the Judge's determination even though, were we the fact finder, we might have reached a different outcome. *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) ("While voicing an understanding of the statutory standard, however, the Commission did no more than substitute a competing view of the facts for the view the ALJ reasonably reached. There can be little doubt that the ALJ's findings were amply supported by substantial evidence, and even if the Commission's own view found support in the record as well, it was bound to uphold the ALJ's determinations." (footnote omitted)). Thus, our role on review is limited to considering whether a reasonable mind could have concluded that the Secretary did not prove it more likely than not that the roof fall was reasonably likely to result in a serious injury to a miner.

Application of Legal Principles

The Judge's holding is clear on this point: "The Secretary has not established that a roof fall was likely to result in injury in this case." 37 FMSHRC at 2409. Based on her review of the evidence, the Judge concluded that the Secretary did not prove by a preponderance of the evidence that, under the specific circumstances of this case, it was reasonably likely a roof fall would strike a miner because of the 2 to 3.5 foot variance from the depth of the cut specified in the roof control plan. Substantial evidence supports that conclusion. Indeed, the record demonstrates that the decision is eminently reasonable.

The inspector issued the citation based upon his measurement of a deep cut of 26 feet, Sec. Ex. 6, and the Secretary relied upon that measurement in his post-hearing brief. Sec. Post-Hearing Br. at 26. Contrary to the inspector's citation and Secretary's assertion at the hearing and afterwards, the Judge found (and the Secretary does not contest on review) that the cut was actually between 22 and 23.5 feet, thereby nearly cutting in half the depth of the excess cut upon which the Secretary had rested his case.

Robert Baugh, Consol's safety inspector, testified that he measured the cut from the last row of roof bolts from the prior cut and found the cut in question to be 22 feet. Tr. 294-95. He further testified that due to rib conditions, the cut might have been less than 22 feet. Tr. 296. In response to cross examination, he testified, "[i]t's not likely that it was less than 20, but there's no certainty that it was more than 20." Tr. 316.

The MSHA inspector, on the other hand, measured the cut from the next to last row of roof bolts to the corner of the entry into which the crosscut mined. That measurement was 26 feet. Tr. 230. At the hearing, when the inspector subtracted 2.5 feet from 26 feet based upon his understanding of the distance between the last row and the next to last row of bolts, he concluded the cut's depth was 23.5 feet from the last row of roof bolts. Tr. 242. As the Judge found, the proper place for measurement was from the last row of roof bolts, all of which were intact when mining began. Therefore, the Judge found the cut was 22 to 23.5 feet. 37 FMSHRC at 2409.

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fact in order to arrive at a decision. The issue is whether it was reasonable for the Judge to reach that decision in light of the evidence presented.

Again, the Secretary does not dispute this finding upon review.[11] Starting with the inspector's mistaken reading of the cut, the evidence clearly supports the reasonableness of the finding that the violation was not S&S.

First, the mine's MSHA-approved ventilation plan recognizes that the mine may experience roof falls in the area being mined under normal operating conditions. It provides, "[m]aterial which falls on top of the continuous miner from the roof shall not be allowed to prevent the flow of air through the throat of the machine." Sec. Ex. 3, Part 1 at 1. Obviously, a fall of material from the roof even in an area actively being mined is undesirable. However, the ventilation plan anticipates such events. There is no evidence that a fall during active mining creates a likelihood of injury to miners who operate the mining machine far from the mining area.

Second, the inspector testified that the principal stress from a deep cut arises from the weight put on remaining coal and emphasized that such weight would be most important at the intersection of the crosscut with entry No. 2, stating that "[t]he extended cut right here puts a lot of weight in the intersections, particularly intersections." Tr. 251. According to the inspector, therefore, the particular stress point resulting from a deep cut was in the intersection and not at the bolted position twenty feet from that intersection.

Third, the Secretary did not establish any cause and effect relationship between the extra length of the cut and the roof fall. There is no evidence on whether the deep cut played a role in the roof fall, whether the roof fall played a role in the deep cut through a collapse of the last two feet of the coal,[12] or whether the two were wholly unrelated. In short, the record does not contain evidence establishing that this cut had any effect upon the roof.

We do not suggest that a roof fall does not create a hazard. *See* slip op. at 22. The issue in this case, as the Judge and we recognize, is the third step of *Mathies/Newtown* — namely, whether the fall of material near the intersection in this case created a reasonable likelihood of serious injury.

Our colleagues correctly note that we "deny that rock fell in the bolted section." *Id.* We do so because it is uncontested. No rock fell in the bolted area. The inspector testified that no

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[11] The operator's witness testified that the distance between bolts was 3 feet to 3 feet 8 inches. Tr. 312. If the inspector had subtracted those distances from his measurement, his analysis from the last row of bolts would have been 22 feet four inches to 23 feet. Those measurements essentially are consistent with the 22 foot distance measured by the operator. In any event, substantial evidence supports the Judge's unchallenged finding of a cut of 22 to 23.5 feet rather than 26 feet.

[12] An operator witness testified that when mining toward an opened entry, the last few feet of coal sometimes collapses without mining. Tr. 281-83. Indeed, the operator's report suggests that the coal beyond a 20 foot cut may have fallen simply as mining progressed and then been cleaned out when the miner reentered the cut to clean rock and coal from the prior fall. R. Ex. 3 at 6.

rock fell in the bolted section, and the Secretary himself expressly disclaimed any such occurrence in his post-hearing brief. The Secretary admitted no rock fell in the bolted area and asserted instead only the possibility of such a fall in a different case: "While the fall [near the intersection] did not break through the bolts in this instance, it could have." Sec. Post-Hearing Br. at 26. Indeed, the Secretary did not claim that rock was reasonably likely to fall in the bolted area, instead asserting that it "could have."[13]

Fourth, even had the Judge found or assumed a connection between the cut and the "roof fall," no witness testified whether the roof fall in the unbolted area during the mining sequence would exacerbate, alleviate, or be neutral regarding the potential for a further roof fall in the unbolted mined area, let alone a previously bolted area.[14] In the absence of any evidence, the prior roof fall does not constitute evidence one way or the other regarding the likelihood of a subsequent roof fall in any area, bolted or unbolted.

Fifth, as the Judge noted, the operator was using a tighter bolting pattern and elongated roof bolts with resin, thereby providing increased roof strength in the bolted area. As the Judge found, the mine's use of a tighter bolting pattern made it unlikely that a roof fall would work back into the bolted area. 37 FMSHRC at 2409. The Judge also found that the inspector did not provide any explanation or any example of how the deep cut would cause a fall through or beyond the last row of roof bolts or the next to last row of roof bolts. *Id.* at 2409-10.

The record supports this conclusion. The Secretary provided no testimony from an inspector or expert, or any geo-mechanical evidence, identifying how a cut with an excess length

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[13] Rather than merely reweighing the evidence to fit their conclusion, our colleagues subtly insinuate conclusions that are not contained in the record. For example, the Judge credited Hamilton's testimony for the proper place from which to measure the deep cut thereby discrediting the starting point chosen by the inspector for measurement of the deep cut. 37 FMSHRC 2408. That action has nothing to do with the inspector's testimony that no rocks fell through any bolted area. The Judge also cited Hamilton in finding that "bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated." *Id.* The majority attempts to convert the Judge's finding that the roof fall at the intersection may have caused damage to bolts to a finding that rock fell through and/or near the bolted area — an event that the inspector testified did not happen and that the Secretary conceded did not happen in his post-hearing brief. This inaccuracy is repeated throughout their opinion.

[14] In their attempt to draw inferences that were never requested of the Judge and that the Judge did not draw, our colleagues refer to a statement in Baugh's report on the roof fall that "[o]ne could look at the cavity in the roof and know without a shadow of a doubt that the roof had fallen." Slip op. at 19 (emphasis removed) (quoting R. Ex. 3 at 5). Baugh, however, did not specify the location of the cavity in the roof, and no witness testified that the roof fall created a cavity in the bolted area. Instead, the roof fall may have caused damage to two or three bolts on the last row of bolts, but both parties agreed that the rock did not fall through the bolts, and no witness testified that it did. If this issue had actually been litigated, perhaps there would be testimony to support our colleagues' inference, but that is not the case before us.

of 2 to 3.5 feet would cause a roof fall in an area of previously-placed, elongated, resin-coated roof bolts. Indeed, the Secretary did not identify any prior event at any mine in which an excess cut caused a bolted roof, specially strengthened or not, to fall under the same or similar circumstances as this event.

Sixth, the roof fall occurred during the mining cycle of the cut. As Baugh testified, this commonly occurred as part of the mining process. Tr. 292-93.[15] The inspector affirmatively testified that no rock fell in any bolted area. Consistent with his testimony about where roof stress occurs, the inspector testified the fall occurred inby the bolts and, thus, closer to the intersection toward which the mining was moving:

> The roof had not fallen in this area where these bolts were at. The bolts were cut, folded over, damaged, the plates were missing, indicates that the miner cut the bolts out instead of the rock fall, which there was no rock that had fallen right there at this location. It was more further into the cut. It indicated that the miner cut them out.

Tr. 234. Elsewhere, he testified, "like I said, there was no rock had fallen in this particular spot where these bolts was [sic] at." Tr. 235.

Seventh, there is no testimony that the roof fell in any bolted area. Nowhere is there evidence that the roof fell into the area of the last row of bolts, let alone into the next to last row of roof bolts, the closest place any miner may have briefly come during the mining cycle. The inspector testified that damage to two bolts on the last row of roof bolts caused by the mining machine resulted in missing plates. However, in response to a question whether missing plates affected the integrity of the roof bolts in terms of the beam it creates into the roof, he testified, "No. The plate missing is basically skin control for draw rock, thin stuff." Tr. 261. A bolting crew replaced the damaged bolts.

Unlike the inspector who attributed the damaged roof bolts to the mining process because "no rock . . . had fallen" at the area where the bolts were damaged (Tr. 234), an operator witness, Robert Baugh, who investigated the roof fall attributed the damage to the bolts to an effect of the roof fall. Tr. 307. But Baugh did not testify that any rock fell under the last row of bolts and could not tell one way or the other whether the roof fall had caused the remaining two feet of the coal to fall in resulting in the deep cut. Tr. 307-08. The drawing with his report shows, in accordance with the inspector's testimony, that the roof fall occurred at the entry toward which the mining machine was moving — that is, as far as possible from the miner. R. Ex. 3 at 5. This is consistent with the inspector's notes that did not report any roof material fell in the bolted area and with his testimony that the area deepest into a cut is the area of roof stress.

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[15] We pointed out that the ventilation plan anticipates the occurrence of roof falls during active operation of a continuous mining machine to note that the operator and MSHA anticipate roof falls during mining. For that reason, procedures are in place and used to make sure miners are not in danger from a fall in the unbolted area. We do not start with a presumption of an S&S violation.

As one would expect, the roof fall occurred as active mining was occurring with the miner operator located at least 7 rows of bolted roof from the last row of bolted roof. Further, as noted above, there was no testimony as to any roof instability after the fall.

Thus, as Baugh pointed out, no miner was near where the roof fell and would not at any point, even later during required methane testing, have come closer than the next to last row of roof bolts.[16] Regardless of whether the inspector or Baugh was correct regarding the cause for dislodgement of roof bolts, no one testified to any loss of roof integrity by damaged bolts, a reasonable likelihood of a fall of roof material in a bolted area, or that the roof was reasonably likely to fall again when mining was not actively occurring.

To the extent that the Secretary now relies on this evidence to support a different theory of S&S on appeal, we reject the Secretary's argument because he failed to preserve it for appeal. Before the Judge, the Secretary relied solely on the theory that the excessive cut put additional strain on the pillars and roof, particularly given the location near the intersection and the adverse roof conditions such as "visible cracks" and "portions of the mine roof that had fallen out." Sec. Post-Hearing Br. at 23. He does not mention the roof fall "breaking back" into bolted area or the disputed cause of the missing bolts as evidence of a reasonable likelihood of the hazard of a roof fall in that area causing the violation to be S&S. In fact, the Secretary only mentioned the adverse roof conditions and the missing bolts to establish his position that the length of the cut was 26 feet, in excess of the length permitted under the mine's roof control plan (20 feet). *Id.* at 26.

The Secretary now appears to argue that a roof fall did, in fact, occur in the bolted area. He asserts that this demonstrates that the roof was compromised by the excessive cut, and that it was error for the Judge to find otherwise. *See* Sec. Br. 22-24. However, this argument was never presented to the Judge below. In fact, as we noted previously, the Secretary stated precisely the opposite in his post-hearing brief: "While the fall did not break through the bolts in this instance, it could have." Sec. Post-Hearing Br. at 26.

Because this argument was not made before the Judge, the argument is not properly before us, and we should not consider it. As the First Circuit has stated, "[i]t is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991). The Commission has long adhered to this principle under the Mine Act's analogous requirement: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii); *see Black Beauty Coal Co.*, 37 FMSHRC 687, 693-95 (Apr. 2015) (concluding that "the Secretary did not present to the Judge the theory that the maintenance shift was a 'coal producing' shift that required a separate on-shift examination," that "the Judge was never 'afforded an opportunity to pass' on the question of whether the coal produced after 11:00 p.m. by the afternoon shift constituted coal production during the separate maintenance shift that

[16] Our colleagues have suggested that "[t]he force of the roof fall certainly caused some rock to shatter and ricochet short distances upon impact with the ground." Slip op. at 24. First, there was no fall of rock in any bolted area. Second, there is no evidence of the fallen material ricocheting in any way that endangered miners.

required a separate on-shift examination," and that, therefore, the Secretary's argument had not been preserved for review and the Commission would not consider it).

For example, in a trio of cases decided in August 1992, the Secretary presented a different S&S theory before the Commission than he presented before the ALJ. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992). In each case, under the same reasoning, the Commission unanimously held that the Commission was barred from considering the Secretary's newly asserted theory. "[I]n general," the Commission stated, "a matter must have been presented below in such a manner as to obtain a ruling or order to be considered on review." *Beech Fork Processing*, 14 FMSHRC at 1320. Not only must it be raised, but it "must be raised with 'sufficient specificity and clarity [so] that the [judge] is aware that [he] must decide the issue.'" *Id.* (alterations in original) (quoting *Wallace v. Dept. of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989)). The Commission continued, stating that "[t]he rationale for requiring lower tribunals to first pass upon questions is that subsequent review is not hindered by the lack of necessary factual findings and the lack of application of the lower court's expertise or discretion." *Id.* at 1321.

The Secretary conceded below that the roof did not fall in the bolted area. Therefore, the Judge was never asked to find that the roof did actually break back through the bolted area. It is absurd for the Secretary to now argue that the Judge erred by failing to make a factual finding that neither party argued and that the Secretary *specifically disclaimed* in his post-hearing brief. Sec. Post-Hearing Br. at 24 n.19, 26.

Accordingly, the Secretary forfeited the argument that the roof actually fell in the bolted area by failing to raise it below. We would disregard that new argument. Even if we were to consider it, however, substantial evidence exists in this case that the roof did not fall in the bolted area.

Eighth, S&S determinations consider the continuation of normal mining. In this case, however, as noted above, there was no testimony or evidence that the roof in the area just mined, let alone in the area already bolted, was made less stable by the prior fall. Thus, on this record, there is no evidence that the roof was not stable after the initial fall.

Ninth, there is no evidence that a miner, including any miner taking a methane reading, would or did go out from under fully bolted roof prior to the roof bolting process. Indeed, the closest a miner may have come is the next to last row of roof bolts. As noted above, there was no evidence of any enhanced danger from the roof after the completion of the mining cycle or that damage to the last row of bolts affected the integrity of the roof.

That being the case, the operator undertook normal roof bolting operations. Given the absence of any evidence of enhanced danger, a claim that miners undertaking roof bolting were reasonably likely to be injured is clearly not meritorious. The roof bolting crew was undertaking a normal roof bolting cycle.

Tenth, the operator was required to take a "remote methane reading" every 10 minutes during mining.[17] However, as the witnesses testified, and as the ventilation plan required, a miner would use an extendable probe to take such a reading. Sec. Ex. 3 at 2; Tr. 254, 265. Further, the undisputed evidence from the operator was that it does not allow a miner making a gas check to go beyond the next to last row of roof bolts. Tr. 297-98. The Judge accepted that testimony, finding that miners taking methane readings did not go beyond the second to last row of roof bolts. 37 FMSHRC at 2409 (citing Tr. 297-98, 314).

To summarize, the record supports the following findings:

1. The excess cut was half the distance relied upon by the inspector and Secretary for the S&S designation.

2. The principal stress from such a cut was at the intersection and not at the bolted area.

3. The operator was using a tighter bolting pattern.

4. The operator was using elongated resin bolts.

5. The "fall" that did occur took place inby the last row of roof bolts and did not fall through into any bolted area.

6. The Secretary did not establish any connection between the cut and the roof fall.

7. The Secretary did not provide any explanation by exhibit or witness of how a marginal excess cut would cause a backward roof fall through elongated bolts on a tightened pattern.

8. The Secretary did not provide any example of a backward fall through bolts ever having occurred due to a 2 to 3.5 foot excess cut under conditions similar to this mine.[18]

9. The Secretary did not submit evidence showing that the roof fall during mining, regardless of whether it had a connection with the cut, had any continuing affect upon roof stability or conditions.

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[17] This requirement is contained in the operator's ventilation plan, the relevant portion of which provides, "[o]n continuous miner sections, in all working places where coal is being cut, mined, drilled, or loaded, the face shall be examined for methane every ten (10) minutes using extendable probes or other remote means." Sec. Ex. 3 at 2.

[18] In its brief to the Commission, the Secretary for the first time referenced an investigation report involving a roof fall resulting from a 30-foot unbolted area. That reference was not presented to the Judge or operator and, thus, there could not be and was not any inquiry involving it at the hearing before the Judge.

10. The Secretary admits that continuous miner operators would have been seven rows of elongated bolts on a tightened pattern away from the unsupported area.

11. Assuming a miner performed a remote methane measurement with an extended probe, he would have been under the next to last row of bolts for only the few moments necessary to get a reading using an extendable remote probe.

Although we find it unlikely, perhaps a Judge with our colleagues' view of the evidence could have found the violations S&S. However, we do not reweigh the evidence. The record in this case is more than sufficient to conclude a reasonable mind could find that the Secretary did not prove that there was a reasonable likelihood of a reasonably serious injury from the roof fall under the circumstances of this case.

The Secretary's Alternative Arguments

Recognizing the weakness of his position under a substantial evidence standard of review, the Secretary argues before the Commission that he is entitled to de novo legal review. He asserts the Judge violated legal standards applicable to the evaluation of alleged S&S violations. In his Petition for Discretionary Review, the Secretary asserts the violation is significant and substantial because the Judge credited redundant safety features as mitigating the likelihood of injury and that the Judge should have considered a possibility that a miner might walk past the bolted area into an area without roof support. PDR at 10-13. We reject those arguments.

Our colleagues assert that all mandatory safety standards are redundant, dismissing any difference between roof bolting or ATRS systems and such devices as fire extinguishers. To them, "there are only safety standards" meaning all safety standards are redundant. Slip op. at 25. Surely, we have not strayed so far from common sense as to find the most fundamental form of roof support, especially when tightened, is a "redundant safety measure."[19] Roof bolts are the primary safety measure for roof support. Further, the basic notion of redundant safety measures is that when the primary safety measures fail, we do not count on secondary — that is, redundant — safety measures that must then come to life (such as sprinklers) to attenuate the danger.

[19] The danger of roof falls is a constant hazard in underground mining. Because our colleagues think mandatory safety standards are all the same and indistinguishable, they must think roof bolting is a "redundant" safety measure that does not attenuate sufficiently the hazard of a fatal roof fall. Similarly, the ATRS provides protection to roof bolters. The alternative is no roof bolting or bolting under unsupported roof. Their example of a fireproof belt is almost as strange as the proposition that roof bolting is a redundant, and therefore legally insignificant, safety measure. The danger of a violative accumulation of coal is that the coal may ignite resulting in a coal fire. If a fire retardant belt is a redundant safety measure that does not attenuate the hazard of a belt fire, then, presumably, our colleagues would not permit conveyance of coal on a beltline because the danger of fire is not sufficiently abated.

Although we suppose one may argue over the ATRS, when the roof bolter must be near or under unbolted roof in order to insert bolts, the ATRS system becomes a primary safety measure designed to guard against hazards in the first place. Without doubt, we cannot fault the Judge's completely reasonable decision for finding that miners remained at all times in places of safety.

Criticism of the Judge's consideration of the ATRS is off-target for three other reasons. First, the operator presented testimony at the hearing about the use of Automated Temporary Roof Support that, obviously, related to an argument that roof bolters would not face a reasonable likelihood of harm. Nonetheless, the Secretary did not present either of those arguments in his post-hearing brief. Certainly, such claims do not intertwine with the factual question of whether the roof was reasonably likely to roll back into a fully bolted area, injuring a miner. Therefore, such arguments are not properly before the Commission and may not serve as a ground for reversal. 30 U.S.C. § 823(d)(2)(A)(iii); *Black Beauty Coal Co.*, 37 FMSHRC 687, 693-94 (April 2015); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992).

Second, even if the arguments were properly before us, they would not alter our decision. The Judge's reference to the use of Automated Temporary Roof Support was clearly appropriate. The roof control plan expressly provided for and approved the use of Automated Temporary Roof Support during roof bolting. The plan specifically provides that such a device "is acceptable support during roof bolting operations." Sec. Ex. 8 at 5. Baugh testified that the operator anticipated some loose material following the cut and had procedures in place to clean, trim and rake the loose material. Tr. 292-93 These procedures, and the use of the ATRS, protect miners from the fall of loose material as they advance the bolting process. During bolting, the ATRS is the primary means of protecting miners from roof falls under unsupported roof.

We do not find any impediment to considering an expressly accepted roof control measure in evaluating whether a violation created a reasonable likelihood of a roof fall upon a miner in the area where the mandated roof control support was in place. The Automated Temporary Roof Support was not in any sense of the word a "redundant" safety feature. Such support was a required and accepted aspect of the roof plan. Failure to use it would have been a violation; certainly, actual use of the prescribed roof control device bears upon the reasonably likely result of a roof fall.

Third, as noted, there was no evidence of an enhanced danger from the roof after the completion of the deep cut mining cycle. That being the case, the operator undertook normal roof bolting operations. There is no evidence that the miners bolting the roof were exposed to any abnormal dangers. Given the absence of any evidence of enhanced danger, if the Secretary's claim were correct, roof bolting in every instance would expose miners to a reasonable likelihood of serious injury. Certainly, that is not the law.

Conclusion

The issue before the Judge was whether the Secretary proved the violation involved in this case was reasonably likely to cause serious injury. In turn, the issue before us is whether substantial evidence supports the Judge's decision. Our colleagues engage in a classic reweighing of the evidence and drawing of inferences different from the trial Judge. They know what they would have found and insist upon it at the appellate level. That is not their or our role. More than enough evidence supports the Judge's decision. Certainly, it is a decision that a reasonable mind could reach. Accordingly, there is no basis to disturb the Judge's findings, and we would affirm the decision.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Commissioners Jordan and Cohen, in favor of reversing:

The Judge in this case determined that although the operator made an extended cut in violation of its roof control plan, and a fall of unsupported roof occurred which "broke back" to a bolted section where miners were working, the violation was not significant and substantial ("S&S").[1] We conclude that the Judge erred in vacating the S&S designation for the violation, and would reverse her decision.

The Judge held that the Secretary had failed to prove that a roof fall in this instance was reasonably likely to cause an injury. Her finding is not supported by substantial evidence, particularly in view of her previous findings relating to the violation.[2]

The only issue before us on review is whether the Judge erred in concluding that the evidence failed to demonstrate that the hazard of a roof fall was reasonably likely to result in injury under the facts in this case. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).[3] The

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

[2] In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted), the Commission set forth the following four-step test for determining whether a violation was S&S:

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

Our colleagues, at footnote 9 of their opinion, slip op. at 6, set forth a restatement of the *Mathies* test based on *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016). In that case, a majority of the Commission articulated the second step of *Mathies* as applying a "reasonably likely" analysis to determine whether a violation significantly and substantially contributes to a hazard. *Id.* at 2038. We applied a "somewhat likely" standard. For purposes of this case, this distinction is irrelevant in view of the Judge's uncontested finding that the violation contributed to the hazard of a roof fall. However, for the record, we note our continued disagreement with the majority's formulation of step 2. *See id.* at 2051-53.

[3] The Secretary filed a petition for review of the Judge's decision to vacate the citation's S&S designation, which we granted. Consol did not file a petition to review the Judge's finding of a violation and, therefore, the factual findings related to the underling violation are not before us. *See* Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(g) ("If a petition is granted, review shall be limited to the issues raised by the petition . . .").

findings the Judge made with respect to the violation are relevant to this inquiry, and thus we begin our analysis with a review of that section of the Judge's opinion.

The Judge's Factual Findings on the Violation

The Judge's findings regarding the time, scope, and manner in which bolts on the last row were damaged are especially pertinent to the S&S determination. Notably, in ruling that the operator violated its roof control plan, the Judge found that the last row of bolts was "fully intact" when the extended cut was mined. 37 FMSHRC 2396, 2408 (Oct. 2015) (ALJ). She found that "[t]he bolts [on the last row] were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward," crediting the testimony of Robert Baugh, Consol's safety inspector, and Terry Hamilton, the section foreman. *Id.* (citing Tr. 269-70, 292-93).

At the hearing, Baugh testified that the roof fall at the end of the extended cut rolled back 20 or so feet and caused rock above the last row of permanent roof bolts to fall, damaging three of the bolts. Tr. 292-93, 307. A fourth bolt on the last row was damaged by the continuous miner as it was trimming the roof after the roof fall occurred. Tr. 292-93. Hamilton corroborated this account. Hamilton believed that the bolts were either damaged when "rock fell around [them]" or by the continuous miner trimming the roof afterward. Tr. 269-70. Importantly, this testimony was explicitly credited and *cited* by the Judge in her factual findings. 37 FMSHRC at 2408.

Baugh had previously interviewed the bolting crew and the continuous miner operator who cleaned up the section. He documented his findings in a report entitled "Report on 17 Right Roof Control Violation Citation 8189820," which is consistent with his testimony. R. Ex. 3. The report states:

> The [miner] operator told me that 3 bolts in the last row of bolts in the crosscut being mined were damaged when he first entered the crosscut with the miner to clean up rock that had fallen in the cut mined by the day shift crew. He also informed me that a fourth bolt was damaged by him when he was trimming top of the mined cut to remove the loose roof during the clean-up cycle.
>
> . . .
>
> He said he cleaned the rock off of the miner before he cleaned the fallen rock in the crosscut to enable the bolt crew to bolt the mined cut.
>
> . . .
>
> From the conversation with the miner operator it is also reasonable to deduct that *the damaged bolts found in the last row of bolts became damaged when the rock fell from the roof.* The damaged row of bolts was intact when the cut was being mined and until the coal of the cut was removed. Once the coal was removed, the

> adverse roof had no support underneath it, and the bad section of the roof fell damaging three bolts of the last row as it fell.

Id. at 4 (emphasis added). Baugh believed that "[o]ne could look at the cavity in the roof and *know without a shadow of a doubt that the roof had fallen.*" *Id.* at 7 (emphasis added).

Because the Judge credited Baugh and found that the bolts were "fully intact" when the extended cut was mined, the Judge effectively rejected Inspector Ratliff's contradictory testimony.[4] Ratliff had speculated that the last row of bolts was damaged by the continuous miner either *prior to or when* the extended cut was mined. Tr. 234-35. Ratliff, unlike Hamilton and Baugh, believed that the bolts on the last row were not damaged by a rock fall. Tr. 234. He also believed that it was unlikely that the bolts were damaged during the clean-up cycle. Tr. 235.

In summary, in her analysis of the violation of the safety standard, the Judge made the following factual findings: Unsupported roof fell at the end of the extended cut. The roof fall "broke back" causing additional rock to fall around the last row of bolts. The rock fall damaged three bolts on the last row. The continuous miner operator damaged an additional bolt on the last row when he was trimming the roof following the rock fall.

The Judge's S&S Findings Are Not Supported by Substantial Evidence

Although the Judge found a violation of the safety standard, she concluded that the violation was not S&S. The Judge stated that an injury was not reasonably likely to occur because a roof fall was not likely to "spread into or significantly affect the bolted roof areas behind it." 37 FMSHRC at 2409. For the following reasons, we conclude that the Judge's decision on S&S is not supported by substantial evidence.[5]

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[4] A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We have recognized that, because the Judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp.* v. *NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

[5] The Commission requires that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (Jun. 1994) (citation omitted). When reviewing a 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*,

On review, the Secretary correctly argues that the Judge's S&S analysis is inconsistent with the findings that the Judge previously made when she upheld the violation. In addition, the Secretary properly asserts that the Judge failed to fully consider countervailing evidence before reaching her conclusion.

In her discussion of the violation, specifically in rejecting Inspector Ratliff's opinion that the deep cut measured 26 feet, the Judge found that the last row of roof bolts was undamaged prior to the beginning of mining the cut. Her finding in this regard was as follows: "[t]he bolts were likely dislodged or otherwise damaged by the roof fall or by the continuous miner as it was trimming the roof afterward, as Hamilton and Baugh stated." 37 FMSHRC at 2408 (citing Tr. 269-70, 292-93). However, in her S&S analysis, the Judge entirely disregarded her previous finding that the roof fall damaged some of the roof bolts. Instead, she exclusively focused on the testimony of Inspector Ratliff and found that the Secretary had failed to provide evidence explaining how a fall of unsupported roof would affect the supported roof.

It was inconsistent for the Judge to find that a roof fall "broke back" and dislodged rock in the bolted area in discussing the violation, and then conclude that there was no evidence that a roof fall would affect the bolted area when determining if an injury was reasonably likely to occur in accordance with *Mathies* Step 3. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1690-91 (Aug. 2015) (concluding that substantial evidence did not support a Judge's S&S conclusion because his factual findings were inconsistent). Simply stated, a Judge may not "re-set" her factual findings for purposes of Step 3.

Furthermore, the Judge ignored the fact that both the inspector and Baugh *agreed* that a roof fall in the extended cut would affect the supported roof behind the extended cut. Ratliff testified that he was worried about the roof "breaking back in through the adverse conditions back to where the miners are working." Tr. 238-39.[6] He considered the extended cut to be particularly dangerous because it terminated at an intersection. The extended cut put a lot of weight on the roof in the intersection.

Baugh noted that it was not uncommon for an area of unsupported roof that falls to result in damage to the bolted portion of the roof. Tr. 293. In fact, he testified that the unsupported roof fall that occurred *in this case* "broke back" and dislodged rock in the bolted section. Tr. 293 ("Q- When that piece of rock fell, it damaged three bolts? A-[Baugh] Right"), Tr. 307 ("Q- And basically your contention here with those damaged bolts is that the roof did roll back and damaged those bolts, right? A- [Baugh] Yes."). Hence, Baugh's testimony was that the roof

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340 U.S. 474, 488 (1951)). S*ee also Washington* v. *Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994) (The "'[s]ubstantiality of evidence must be based upon the record taken as a whole,' we must 'meticulously examine the record' to determine whether the evidence in support of the [ ] decision is substantial and 'take into account whatever in the record fairly detracts from its weight.'") (citations omitted).

[6] Although he believed that the damage here was actually caused by the continuous miner when the extended cut was mined, Tr. 234-35, this did not diminish his concern that a fall of unsupported roof would compromise supported roof. Tr. 238-39.

fall rolled back and that additional rock fell in the bolted area which damaged the three roof bolts.

It was error for the Judge to simply ignore evidence – which she had already determined to be probative – in making her S&S analysis. *See Smith v. Schweiker*, 728 F.2d 1158, 1162 (8th Cir. 1984) (*citing Brand* v. *Sec'y of HEW*, 623 F.2d 523, 527 (8th Cir. 1980) ("[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.") (quoting *Universal Camera Corp.*, v. *NLRB*, 340 U.S. at 488); *see also Kirby v. Sullivan*, 923 F.2d 1323 (8th Cir. 1991). At the very least, the Judge was required to address and attempt to reconcile countervailing evidence. *See Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1376 (Fed. Cir. 2012) (finding error because "countervailing evidence was manifestly ignored, overlooked, or excluded.") In this case, the Judge simply ignored previously-credited evidence that detracted from her S&S conclusion.[7]

At least one miner regularly works near the area where some of the rock fell. The Judge found that the continuous miner operator stood a few feet from the last row of bolts (at the second to last row) every 10 minutes; he used a probe to check methane levels at the working face. *See* 37 FMSHRC at 2409; Tr. 240, 250, 253, 297-98. Certainly a miner within a few feet of a rock fall is reasonably likely to be injured. Even standing in close proximity to roof with severely damaged bolts is a significant danger. The fortuitous fact that he was not in the vicinity of the roof fall when it occurred is irrelevant to our S&S inquiry.

For all the aforementioned reasons, we conclude that the Judge's Step 3 *Mathies* conclusion is not supported by substantial evidence in the record. Instead, we would hold that the Judge's own factual findings on the violation and the weight of the evidence compel the conclusion that a roof fall in these circumstances was reasonably likely to result in a reasonably serious injury.

Response to the Separate Opinion Affirming the Judge

We disagree with the reasoning of Acting Chairman Althen and Commissioner Young in several respects.

First, they contend that because the mine's ventilation plan anticipates roof falls, the extended cut and resulting roof falls that occurred here were somehow less serious. Slip op. at 8.

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[7] Citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000), and other Court of Appeals decisions, our colleagues state "[a] Judge is not required to discuss all the evidence submitted, and a failure to cite specific evidence does not indicate that the Judge did not consider that evidence." Slip op. at 6. This statement of black letter law is not applicable here. Unquestionably, in the context of her findings on the existence of a violation (a point contested by Consol before the Judge), the Judge considered the evidence of the roof fall "breaking back" and causing rock to fall around the last row of bolts which damaged the roof bolts. Her error was ignoring this same evidence she had credited when she considered the S&S issue.

Their reliance on the ventilation plan is a red herring.[8] The citation at issue concerns a violation of the mine's *roof control plan*. The fact that the ventilation plan provides contingencies in the event of a roof fall does not make roof that falls as a result of a violative cut less dangerous to miners.

Second, our colleagues claim that the inspector testified that the principal stress inflicted by the extended cut was at the intersection, not on the bolted roof. Slip op. at 8. However, they ignore the inspector's testimony that he was *also* concerned about the roof "breaking back in through the adverse conditions back to where the miners are working." Tr. 238-39.

Third, they assert that the violation of the roof control plan did not contribute to the hazard of the roof falling. Slip op. at 8. This ignores the Judge's finding that "[t]his violation contributed to the discrete safety hazard of a roof fall occurring due to the extended span of unsupported roof." 37 FMSHRC at 2409. Consol has not contested this finding and, therefore, it is not presently before us. In any event, the evidence from Hamilton and Baugh, as well as Inspector Ratliff, was that the roof fall occurred as the cut was being extended into Entry No. 2. Tr. 238, 267; R. Ex. 3 at 4.

Fourth, Acting Chairman Althen and Commissioner Young state that no witness testified that a roof fall in the unbolted area would exacerbate roof problems in the bolted section. Slip op. at 9. However, Baugh repeatedly testified that he believed the roof fall in the extended cut "broke back" and caused the resulting rock fall to damage bolts on the last row. *See, e.g.*, Tr. 307 ("Q – And basically your contention here with those damaged bolts is that the roof did roll back and damaged those bolts, right? A- [Baugh] Yes."). As previously mentioned, Baugh's testimony was corroborated by Hamilton, who testified that the bolts were either damaged by rock that fell around the bolts or by the continuous miner that trimmed the roof afterwards. The Judge credited and cited this testimony. 37 FMSHRC at 2408 (citing Tr. 269-70, 292-93). Importantly, this testimony attributes the falling rock to be the direct cause of the damage sustained by some of the bolts. Additionally, the roof was trimmed in close enough proximity to the last row of bolts to damage an additional bolt on that row. Indeed, Baugh referred to this area as "the edge" of the roof fall in his Report. R. Ex. 3 at 4. Our colleagues ignore the testimony explicitly credited by the Judge in favor of the Inspector's discredited account.

Fifth, our colleagues assert that the tighter bolting pattern used by Consol prevented the roof from breaking back to the bolted area. Slip op. at 9. As stated, the facts of this case demonstrate otherwise.

Sixth, our colleagues deny that rock fell in the bolted section. Slip op. at 10. Our colleagues cite to the testimony of Inspector Ratliff to support their assertion. However, as we previously discussed, the Judge specifically rejected this aspect of the Inspector's testimony in her finding of a violation. *See supra,* slip op. at 19.

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[8] The ventilation plan was introduced by the Secretary as evidence for an entirely separate citation; a citation that alleged the continuous miner was operating with clogged water sprays. 37 FMSHRC at 2399-2401.

Our colleagues' decision is unmoored from the Judge's credibility determinations and therefore fatally flawed. Rather than accepting the Judge's uncontested factual findings with respect to the violation, they have mixed-and-matched credited testimony with uncredited testimony to create alternative factual findings. For example, compare our colleagues' reliance on uncredited testimony from the inspector at slip op. at 10 ("[t]he roof had not fallen in this area where these bolts were at") with their decision to ignore the following testimony of Consol's Safety Inspector Baugh that the Judge expressly credited. 37 FMSHRC at 2408 (citing Tr. 292-93).

> Q- When that piece of rock fell, it damaged three bolts?
> A- Right.
> Q- And then when he was cleaning the place up and trimming it up to make it safe for the bolters to come in he damaged one of the bolts?
> A- Correct. And it's not uncommon for it to damage bolts when it falls. A lot of times it'll come past - - come outby the last installed row of bolts. It's not unusual at all.

Tr. 293.

Seventh, our colleagues maintain that Baugh did not testify that the roof fall in the extended cut "broke back" causing rock to fall around the last row of bolts. Slip op. 10. This is inconsistent with the record testimony.[9] Baugh's report repeatedly referenced the roof breaking back and rock falling, damaging the last row of bolts.

Acting Chairman Althen and Commissioner Young also contend that the issue of whether a roof fall was responsible for damaging the last row of bolts is not properly before us. They claim that the Judge had not been afforded an opportunity to pass on this question of fact. Slip op. at 11 (citing 30 U.S.C. § 823(d)(2)(A)(iii)); *see also* 29 C.F.R. § 2700.70(d).[10] This is a curious argument in view of the fact that the Judge's Decision discusses the roof fall damaging the last row of bolts. 37 FMSHRC at 2408. We note that evidence of the rock fall was elicited by counsel for Consol. Therefore, the Judge had the opportunity to pass on the question of fact and, in fact, relied on it by *crediting* this testimony. Because the issue of fact was placed squarely before the Judge, our case is readily distinguishable from the cases cited by our colleagues in which the Commission refused to consider an issue that was first raised on review.[11]

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[9] *See, e.g.*, Tr. 293-94 ("Q- When that piece of rock fell, it damaged three bolts? A [Baugh] –Right").

[10] The Commission has also recognized that a matter urged on review may have implicitly been raised below or may be so intertwined with something before the Judge that it may be properly considered on appeal. *See San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007).

[11] For instance, in *Black Beauty Coal Co.*, 37 FMSHRC 687 (Apr. 2015), the Commission concluded that the Secretary did not preserve the issue of whether coal was

Eighth, our colleagues assert that there is no evidence that the roof was unstable after the initial fall. Slip op. at 12. Of course, the fact that the roof "broke back" to the bolted area and dislodged rock demonstrates instability.

Ninth, our colleagues assert that no miner was in a position of danger, including the miner required to take a methane reading every ten minutes. Slip op. at 12. However, the Judge concluded that the methane readings were conducted within several feet of the section of roof that fell which is certainly within the zone of danger. The record establishes that the next to last row of bolts was about three feet from the rock fall. The force of the roof fall certainly caused some rock to shatter and ricochet short distances upon impact with the ground. It is fortunate that a miner was not checking for methane at the moment rock fell merely a few feet from his presence.

The Judge Erred in Considering Redundant Safety Measures in her S&S Analysis

The Judge's errors are not confined to the failure to reconcile her factual findings. As we will demonstrate, there were additional errors that affected her analysis. In particular, the Judge relied on safety features that were employed pursuant to MSHA's mandatory safety standards and the mine's own roof control plan. This reliance on redundant safety measures conflicts with longstanding precedent.

Specifically, the Judge concluded that an injury was not reasonably likely to occur on the section because: (1) miners were not under unsupported roof and were in fact standing under bolted roof; (2) the mine was using an ATRS, and (3) the supported roof was bolted in a "tighter pattern."[12] 37 FMSHRC at 2409.

The Judge erred in her analysis: she failed to recognize that each of these safety measures is required pursuant to the Secretary's regulations. For instance, the mandatory safety standard at 30 C.F.R. § 75.202(b) prohibits miners from working or traveling under unsupported roof.

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produced on a specific shift for review (which would have obligated the mine to conduct an on-shift examination). The Commission relied on the complete absence of evidence of coal production in the record when it concluded that the Judge was not afforded the opportunity to pass. *Id.* at 695.

The Commission decisions in *Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992), *Shamrock Coal Co.*, 14 FMSHRC 1300 (Aug. 1992), and *Shamrock Coal Co.*, 14 FMSHRC 1306 (Aug. 1992), are also distinguishable. In each of these cases the Secretary made a legal argument on review that was never presented to the Judge. In contrast, the issue presently before us is an issue of fact that was presented to the Judge.

[12] The mine's roof control plan requires that "[i]n areas where abnormal roof conditions are encountered, indicated or anticipated additional support shall be provided where necessary." Sec. Ex. 8 at 9. As a result of the adverse roof conditions, the mine reduced the distance between rows from four feet to anywhere from three feet to three feet and eight inches. In addition, extra bolts were added between rows. Tr. 312-13.

The mandatory safety standard at 30 C.F.R. § 75.209 requires the use of an ATRS system with roof bolting machines. In addition, the roof control plan which must be complied with pursuant to 30 C.F.R. § 75.220(a)(1) requires that the mine provide "additional support" when "abnormal roof conditions are encountered."[13] Sec. Ex. 8 at 9.

It is settled law that redundant safety measures are not to be considered in determining whether a violation is S&S. *See Black Beauty Coal, Co.*, 38 FMSHRC 1307, 1312 (June 2016) (citing *Knox Creek Coal Corp.*, v. *Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016)); *Cumberland Coal Res., LP*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). In *Black Beauty*, the Commission concluded that a Judge erred in considering redundant safety measures as part of his S&S analysis for ventilation and accumulation violations, specifically including his consideration of the "the methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters." 38 FMSHRC at 1314. In *Cumberland*, the D.C. Circuit emphasized that "redundant safety measures . . . are irrelevant to the significant and substantial inquiry." 717 F.3d at 1029 (citing *Sec'y of Labor* v. *FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)).[14]

Citing no authority, our colleagues read a new exception into this body of case law. They assert that the longstanding precedent stating that we do not take redundant safety measures into account in an S&S analysis only applies to "secondary" safety measures, and not to "primary" safety measures.

This effort to create a dichotomy between types of safety standards has no legal basis. Neither the Mine Act nor MSHA regulations nor Commission case law make a distinction between "primary" safety measures that prevent an incident and "secondary" safety measures that seek to control a danger once it occurs.[15] For purposes of S&S analysis, there are only safety standards.[16]

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[13] We note the irony of citing a mine's implementation of roof control plan provisions that are required in the presence of adverse roof conditions as evidence of roof stability.

[14] Our colleagues argue that the Judge's erroneous consideration of the required safety measures is not properly before the Commission on review. Slip op. at 15. However, we have previously considered a Judge's erroneous application of longstanding Commission precedent even when the party appealing that ruling did not raise the legal issue before the Judge. *See, e.g., Paramont Coal Co.*, 37 FMSHRC 981, 985 (May 2015) (concluding that the Judge erred by ignoring long standing Commission case law "that an S&S determination must be made at the time the citation is issued 'without any assumptions as to abatement'") (citations omitted). Here too the Judge erred by ignoring black letter Commission case law. The Secretary properly sought review by identifying this issue in his petition for review.

[15] It fact, it may not always be clear which standards are designed to prevent a danger from occurring and which are designed to control a danger once it has occurred.

[16] Our colleagues, in footnote 19 of their opinion, slip op. at 14, grossly misstate our position. Our discussion of redundant safety standards is limited to the context of whether a particular violation is S&S. In this analysis, we simply would hold that the Secretary need not

For example, consider fire dangers along a belt line. MSHA's standard at 30 C.F.R. § 14.20 requires conveyors belts used in mines to be flame-resistant. At the same time, 30 C.F.R. § 75.1100-2(b) requires the installation of waterlines equipped with firehoses parallel to all underground beltlines.

If the conveyor belt works properly, then it should not catch on fire. The waterlines would never be necessary. However, if an operator is cited for a damaged waterline, the Commission will not consider the existence of a flame-resistant belt in determining whether the damaged waterline "significantly and substantially contributed to the cause and effect" of a mine fire. The question is the level of danger posed by the damaged waterline. In that case, the fact that the conveyor belt is flame-resistant is a redundant safety measure. So it isn't considered.

On the other hand, if a waterline is functioning properly, fire should not pose a danger because it can be instantly extinguished. Whether the belt was flame resistant or not wouldn't matter. However, if the Secretary designates the citation for failing to install a flame-resistant belt as S&S, the Commission will not consider the existence of the waterlines. In that case, the waterline is a redundant safety measure. So it isn't considered.

Hence, under the Mine Act, there are no primary or secondary protections, only protections. The Secretary may promulgate several standards to help prevent and/or control a given danger. Each standard is therefore complementary – but, in an S&S analysis, redundant – to all the others directed at the same danger. When the Commission zeroes in on the danger posed by a given violation, it ignores these redundant measures. The Fourth Circuit noted in *Knox Creek Coal Corp. v. Sec'y of Labor*:

> "[i]f mine operators could avoid S&S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply." Respondents' Br. at 37. Such a policy would make such standards

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demonstrate multiple violations of complementary safety standards in order to demonstrate that a hazard, such as a roof fall, is reasonably likely to result in a serious injury. We do not suggest that any standard is "legally insignificant." In fact, the thrust of our opinion is just the opposite. With respect to S&S determinations, the hazard posed by a violation cannot be discounted because of the existence of other, related safety measures. An operator cannot argue that its failure to comply with one standard is not hazardous simply because it complied with another standard. That preserves the integrity of the violated standard; no standard is secondary or superfluous, and operators must comply with all of them.

Further, we in no way suggest that a safety measure, (such as a flame retardant belt), does nothing to attenuate the hazard at which it is directed. We simply state that that attenuation is irrelevant when considering whether the violation of a different standard is S&S. That does not mean, as our colleagues suggest, that under our view mining is somehow rendered impossible. Operators, of course, must operate their mines. But they must do so while complying with all mandatory standards and face the full consequences prescribed by the Mine Act when they fail to do so. The Mine Act's purpose is to enhance safe mining and to deter unsafe mining.

> "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S&S] inquiry." *Cumberland Coal*, 717 F.3d at 1029; *see also Buck Creek*, 52 F.3d at 136.

811 F.3d at 162.

Accordingly, we conclude that the Judge additionally erred when she relied on the operator's compliance with separate mandatory safety standards as part of her determination that an injury was not reasonably likely to be sustained by miners.

The Judge Erred in Relying on the Exercise of Miner Caution

The Judge found that a roof fall was unlikely to result in injury, in part because miners were not allowed to enter the "red zone" (a space unsafe for miners to enter) beyond the next-to-last row of bolts. She specifically noted that the continuous miner operator is not allowed to go beyond the next-to-last row of bolts even when performing gas checks. 37 FMSHRC at 2409.

The Commission has held that "relying on [the] skill and attentiveness of miners to prevent an injury 'ignores the inherent vagaries of human behavior.'" *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)); *see also Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether a violation is S&S). Furthermore, the Commission has recognized that "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great W. Elec.*, 5 FMSHRC at 842.

Accordingly, we conclude that to the extent the Judge relied on the exercise of caution by miners in her *Mathies* Step 3 analysis, she erred.

Conclusion

As stated, the evidence establishes that a roof fall affecting the bolted area was not only reasonably likely to occur, it did occur. Furthermore, the evidence establishes that any injury that would result from roof rock falling onto a miner would be reasonably serious, if not fatal. Inspector Ratliff testified that the roof rock weighed approximately 150 pounds per square foot. Tr. 239. Accordingly, we conclude that the record compels the conclusion that the violation was S&S. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

For these reasons, we would reverse the Judge and find that the violation was significant and substantial.

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