FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOL PENNSYLVANIA COAL CO.,	Docket No. PENN 2021-0084

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY: Baker and Marvit, Commissioners

This proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2024) ("Mine Act" or "Act"), involves two citations issued to Consol Pennsylvania Coal Company ("Consol") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA"). The first citation, Citation No. 9204245, alleges that the operator committed a significant and substantial ("S&S") contribution violation by failing to maintain a longwall shield in safe operating condition because a horizontal "keeper" pin in the shield was missing, in violation of the mandatory safety standard at 30 C.F.R. § 75.1725(a). The second citation, Citation No. 9204250, was also designated an S&S contribution violation and concerned the operator's failure to maintain a continuous miner in permissible condition because four light globes on the continuous miner were cracked, in violation of the mandatory safety standard at 30 C.F.R. § 75.503.

Consol challenged the citations in its petition for discretionary review ("PDR"). After a hearing on the merits, a Commission Administrative Law Judge issued a decision on June 9, 2022, affirming the 104(d)(1)[1] findings for each citation. 44 FMSHRC 450 (June 2022) (ALJ).

[1] Section 104(d)(1) provides in relevant part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, . . . he shall include such finding in any citation given to the operator under this Act.

The Judge affirmed the citations and designations of gravity, and determined both violations were S&S contribution violations. The Judge assessed a $383 penalty for Citation No. 9204245 and $355 for Citation No. 9204250. Consol filed a petition for discretionary review. The Commission granted the petition for review.

For the reasons that follow, we affirm the Judge's order.

I.

Factual and Procedural Background

Consol owns and operates the Bailey Mine, an underground coal mine in Greene and Washington counties, Pennsylvania. The subject citations were issued in March 2021 as part of MSHA spot inspections.[2]

A. Citation No. 9204245 (Pin Violation)

MSHA Inspector Walter Young issued Citation No. 9204245 alleging that Consol failed to maintain a longwall shield in safe operating condition. The mandatory safety standard at 30 C.F.R. § 75.1725(a) requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The inspector designated the gravity as reasonable likelihood of injury, the violation as S&S, and as demonstrating the operator's low negligence.

During his inspection, Inspector Young discovered that a horizontal pin on company number 3 gate shield located on the 8L Longwall Working Section was missing from the clevis.[3] The purpose of a horizontal pin is to keep the vertical pin in the proper position if it were to break. Tr. 33. The vertical shear pin connects the relay bar to the clevis of the longwall shield, which hooks to the pan line or pan conveyor.[4] Tr. 32; GX 3. The vertical pin drops into a hole in the clevis and the entrance to the hole is located between two little ears on top of the clevis. Along the longwall at issue, there were 274 longwall shields and each shield was 1.75 meters wide. The shield at issue exerted more than 30 tons of pressure. The inspector cited the operator

30 U.S.C. § 814(d)(1).

[2] Spot Inspections are conducted pursuant to section 103(i) at mines that "liberate excessive quantities of methane or other explosive gases during operations" or at mines where a methane ignition occurred that resulted in death or serious injury in the last five years. 30 U.S.C. § 813(i). The Baily Mine is on a 5-Day spot inspection cycle, the most aggressive required by law.

[3] In Exhibit GX 3, the clevis is the u-shaped component. The keeper (horizontal) pin slides through two ears on top of the clevis.

[4] "Pan conveyor" is defined as "a conveyor comprising one or more endless chains or other linkage to which usually overlapping or interlocking pans are attached to form a series of shallow, open-topped containers. Bureau of Mines, U.S. Department of the Interior, *Dictionary of Mining, Minerals & Related Terms*, 790 (1968).

for failing to maintain a "gate shield located on [a] Longwall Working Section in safe operating condition. The Horizontal Keeper Pin to retain the vertical (breakaway) pin in place was missing. This condition will permit…pieces of the vertical breakaway pin to become airborne and injur[e]." GX 1. None of the vertical pins were missing from the longwall shields during Inspector Young's inspection.

The Judge credited Inspector Young's testimony that a pin could become a projectile and was known to create a hazard. 44 FMSHRC at 456-57. Inspector Young testified that on almost every shift, at least one of the longwall vertical shield pins shear or break. Tr. 47. The operator agreed that the purpose of the vertical pin was to shear or break to protect the shield system. Tr. 32, 142. The inspector testified that in the absence of the horizontal pin, a vertical pin could break and become an airborne projectile that could hit people if within eight feet of the shield. Tr. 44, 66. In addition, he testified that this hazard had been present several times in the past and could result in serious eye or neck injury. Tr. 42-43, 51. He provided details of one incident involving a miner named Tim Farrell, who allegedly suffered a cut to his cheek by a piece of shear pin from a longwall shield. Tr. 60-61.

The Judge affirmed the gravity, negligence, and S&S contribution designations of the citation. Citing to the reasonably prudent miner standard the Commission has adopted for recognizing a hazard in the unsafe operation of machinery or equipment, the Judge concluded that the Secretary had demonstrated the presence of a hazard due to the missing component, a horizontal keeper pin. 44 FMSHRC at 456.

Regarding the Secretary's assertion that the hazard was reasonably likely to occur, the Judge "found that credible evidence exists to support that the hazard—a projectile shear pin—could occur[.]" *Id.* at 457. The Judge also affirmed the citation's negligence designation as "a reasonably prudent person in their position should have known about the violation condition and acted to remedy it." *Id.* at 461.

With respect to the S&S determination, the Judge applied the current iteration of the *Mathies Coal Co.* test and found that the violation had occurred, satisfying the first step. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) ("*Mathies*"). Per the second step of the *Mathies* test, the Judge found the violation was reasonably likely to result in a discrete safety hazard. 44 FMSHRC at 457. The Judge determined that the vertical shear pin breaking and becoming a projectile due to being unsecured by a horizontal pin was a hazard. Then, he found that the hazard was reasonably likely to occur. *Id.* Despite contrary assertions from the respondent, the Judge gave substantial weight to the inspector's testimony of past events. The Judge then concluded that the hazard was likely to result in an injury, per step 3 in the *Mathies* analysis, because "one or more miners would have been at risk of injury from the discrete hazard." 44 FMSHRC at 459-60. Finally, the Judge found that it was reasonably likely that such an injury would be of a reasonably serious nature because "the Secretary provided credible, undisputed testimony that the hazard could result in lacerations or eye damage[,]" in line with the fourth step of the analysis. *Id.* at 461.

B. Citation No. 9204250 (Globes Violation)

Inspector Young also issued Citation No. 9204250 alleging that four orange plastic protective covers (globes) over light bulbs on the side of the continuous miner were cracked. Section 75.503 requires that an operator "maintain in permissible condition all electric face equipment required…to be permissible which is [used in certain areas of the mine]." 30 C.F.R. § 75.503. The purpose of permissibility requirements is to prevent an ignition inside an enclosure from escaping to, and igniting, the general atmosphere. Inspector Young designated the citation as reasonably likely to result in injury, as low negligence, and as an S&S contribution violation.

The globes at issue were permissible explosion-proof enclosures for the bulbs. Tr. 74. In the citation, the inspector wrote that the

> Continuous Miner…in [a] Working Section…was not maintained in permissible condition. Four 120 A.C. volt area light globes were cracked. The 2 area lights inby the side bolters contained one or more cracks which ranged from 1.5 to 3 inches in length…The double ended area light (2 globes) directly below the rib bolter on the operators [sic] side were badly damaged by being covered with cardboard and had overheated. These light globes contained numerous, large spider web…cracks going in multiple directions, one contained a hole measuring 0.25 inches wide by 0.375 inches long…

GX 4 at 2. The inspector also noted that the mine liberated "10,835,416 cubic feet of methane every 24 hours." GX 4. The methane monitor on the continuous miner was improperly calibrated; when tested with a concentration of 2.5% methane, it incorrectly registered the methane concentration at 1.7%. GX 5. However, the monitor was set to turn off the power of the continuous miner at 1.5%, so under the incorrect calibration, the power was turned off during the test. *Id.* (citation No. 9204251).

The inspector testified that moisture, erosion, vibration from the continuous miner, or simply age could cause a light fixture within a globe to fail, which could lead to an ignition within the enclosure. Tr. 75. The inspector did not know the type of bulb used in the globes. Tr. 87. The operator's witness asserted that most mining machines used LED bulbs. Tr. 163. In its post-hearing brief, the operator asserted that all four lightbulbs inside the cracked globes were LED. Resp't Post-Hearing Br. at 15. The operator provided a photograph taken after the inspection depicting an LED bulb. Tr. 174, R-7 at Consol 0041. The operator's witness testified that LED bulbs are far more efficient than other types of bulbs because they "produce less heat." Tr. 160-61. The operator asserted that the bulbs did not need to be replaced to abate the citation. According to the operator's witness, LED bulbs are more efficient and "nearly intrinsically safe." However, the operator conceded that the light fixtures frequently fail and a hole in the globe might allow ignition. Tr. 174-76. The Secretary did not address the operator's assertion that LED bulbs do not create enough energy to ignite methane.

The Judge affirmed the gravity, likelihood, and S&S contribution designations of the citation. The Judge found that the potential ignition of the general mine atmosphere outside the

four cracked globes on the continuous miner constituted the hazard. The Judge further found that a light fixture failure must be "assumed to be able to ignite methane that naturally enters the enclosure." 44 FMSHRC at 465. The Judge also found that LED bulbs could still provide a potential source of ignition and that there was no evidence that the LED bulbs were being used at the time of the inspection, rejecting the photographic evidence of the bulbs taken after the inspection that the operator submitted. *Id*. The Judge found that it was reasonably likely that the ignition within the globes would escape into and ignite the general mine atmosphere outside the globe, finding that the mine was gassy and represented a "constant threat[.]" *Id.* at 466.

II.

Disposition

For the pin violation, Consol challenges the Judge's finding of a violation and the Judge's negligence, gravity findings, and S&S contribution findings. The operator challenges the Judge's finding that the violation was reasonably likely to result in a projectile hazard and that the projectile hazard was reasonably likely to result in injury to miners. For the globes violation, the operator does not dispute the finding of a violation or negligence finding, but does challenge the gravity and S&S contribution findings. The operator particularly challenges the finding that the violation was reasonably likely to result in an ignition hazard.

For the reasons discussed below, we affirm the Judge's findings. Due to an extensive discussion and review of the history of section 104(d)(1) and the original statutory purpose of the S&S designation, we address the Judge's S&S findings separately, after addressing all other relevant findings.

A. Standard of Review

The Commission is bound by the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The substantial evidence test is highly deferential. *See Cumberland Coal Res. v. FMSHRC*, 717 F.3d 1020, 1028 (D.C. Cir. 2013). "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)). The Commission must "consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 710 (Aug. 2008) (quoting *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997)). However, the possibility of "two inconsistent conclusions" to be drawn from evidence does not prevent a conclusion that a finding is supported by substantial evidence. *Sec'y of Labor on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996). The Commission applies a *de novo* review standard for legal issues. *See, e.g.*, *James M. Ray, employed by Leo Journagan Constr. Co., Inc.*, 20 FMSHRC 1014, 1022 (Sept. 1998).

B. Citation No. 9204245 (Pin Violation)

1. Violation

As discussed above, Citation No. 9204245 was issued for a missing horizontal pin on a longwall shield, which could allegedly result in an unsecured vertical pin becoming a projectile hazard. The Judge found a violation of section 75.1725(a). The operator has appealed the finding on the grounds that it was unlikely that the pin would become a projectile hazard and that the inspector's testimony was not credible.

Substantial evidence supports the Judge's finding of a violation of section 75.1725(a). The longwall shield was a piece of equipment that was not maintained in safe operating condition and that was not removed from service immediately. In affirming the violation, the Judge found that the circumstances of the pin violation were "sufficiently similar" to recent decisions involving broken or missing components and that the component, in this case the horizontal pin, was indeed missing. 44 FMSHRC at 456. Furthermore, he credited testimony from the inspector that this condition posed a hazard to miners and was therefore unsafe. *Id.* at 456-57, 461. We agree with the Judge.

The operator argued that "even with a missing horizontal pin, vertical shear pins, more often than not, remain in place" and "when vertical shear pins break, the bottom and center pieces typically fall out of the hole onto the ground, while the top piece remains in the hole and does not fly out as a projectile." PDR at 13. That is, the operator alleged that the condition was not unsafe.

We disagree. Consol did not dispute that the horizontal pin was missing. The violation concerns whether the missing component poses a hazard rather than the likelihood of a danger occurring. *See Alabama By-products Corp.*, 4 FMSHRC 2128, 2131 (Dec. 1982) (noting that in the context of a section 75.1725 violation that "whether an unsafe condition existed" is a separate question from the gravity of the violation, and that "upon observing the defective equipment at issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action"). Furthermore, the Commission's test for whether machinery or equipment violates section 75.1725(a) is "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Id.*, 4 FMSHRC at 2129. The Judge credited the inspector's testimony that, in his experience, this condition could pose a hazard to miners. 44 FMSHRC at 456-57, 459. A judge's credibility determination is "entitled to great weight and may not be overturned lightly." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1739 (Aug. 2012) (citations omitted); *see also*, *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *citing Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984) ("Since the ALJ has an opportunity to hear the testimony and view the witnesses he is ordinarily in the best position to make a credibility determination."). The Judge's determination in the instant case is supported by substantial evidence.

The operator characterized the inspector's testimony as "self-serving" and "uncorroborated." PDR at 14-15. Again, we must disagree. As noted, the (Commission assigns great weight to a judge's decision to credit the testimony of a witness and it cannot be overturned lightly. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). The Commission reviews a judge's credibility determinations under an abuse of discretion standard and there must be "compelling reasons" to take the "extraordinary step" of reversing a judge's determination. *KenAmerican Res., Inc.*, 42 FMSHRC 1, 3 (Jan. 2020) (citations omitted). We have further stated that is "reasonable for [a] Judge to rely on [an] experienced inspector's testimony." *Consol Penn Coal Co., LLC*, 43 FMSHRC 145, 151 (Apr. 2021).

Inspector Young testified to two instances where a miner was injured by a vertical projectile, and other instances where a pin became a projectile but miners were not injured. Tr. 42-43, 60-61. The Judge credited the inspector's testimony and found that the "Secretary has presented credible evidence that the shear pins, which are designed to break, have been projected from the clevis upon breaking. The [MSHA] inspector noted one known injury where he was present and multiple reports from other miners of the hazard occurring without causing injury." 44 FMSHRC at 456. The Judge was within his rights to rely on that testimony and the operator provided no basis for us to overturn that determination.

We conclude that the missing horizontal pin presented a safety hazard and it was reasonable for the Judge to rely on an experienced inspector's testimony.[5]

2. Negligence

Inspector Young determined that the operator's degree of negligence was low and the Judge affirmed. The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Newton Energy, Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016) (quoting *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). The Commission also uses the reasonably prudent person test to determine whether an operator met its duty of care. *Id.* (citations omitted); *see also Spartan Mining Co.*, 30 FMSHRC at 708 (considering negligence inquiry to be circumscribed by scope of duties imposed by regulation violated).

In the instant case, the Judge concluded that the operator "must work to continually . . . maintain the machinery in a safe operating condition," and a reasonably prudent person in the operator's position "should have known about the violative condition." 44 FMSHRC at 461. The Judge noted "that these pins consistently break, and that the condition could have occurred between the last inspection and the violation." *Id.* The operator argued that no one knew about the pin therefore negligence was not demonstrated. Br. at 30. The Judge did not explain how a person would have known about the violative condition. The inspector testified that "the [violative] condition could have occurred after the [fore]man did his pre-shift or even after the foreman walked by." Tr. 46.

[5] Inspector Young became an inspector in 2006 and worked in the mining industry for 22 years as a longwall foreman. Tr. 24-28.

However, we disagree with the operator's implication that negligence requires actual knowledge. The Commission has recognized that "an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." *The American Coal Co.*, 38 FMSHRC 2062, 2083 (Aug. 2016). The Commission has also "long recognized that mine management should be held to an even higher standard of care . . . . The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners." *Newton Energy, Inc.*, 38 FMSHRC at 2047 (citing 30 U.S.C. § 801(e)). As the inspector testified, the horizontal keeper pin in the No. 3 gate shield was missing and miners are directed to replace pins wherever they are missing. Tr. 55, 61; *see also The Ohio County Coal Co.*, 40 FMSHRC 1096, 1099 (Aug. 2018) (approving modification to low negligence for failure to fix equipment defect). Substantial evidence supports the Judge's finding of violation and that the operator should have known about the missing pin. We therefore affirm the Judge's holding that the operator's violation was of low negligence.

3. Gravity

Inspector Young designated the citation as reasonably likely to result in injury and the Judge affirmed. 44 FMSHRC at 457. The operator appeals.

Consol again takes issue with the Judge's credibility findings and contends that "there would have to be unusual and adverse conditions at the cited shield to cause the vertical pin to work loose and break and that there was no evidence of adverse conditions at the time of the inspection or projected future mining." Br. 24-25. The operator also argues that there were no miners near the shields during the inspection that found a component to be missing in the machinery. *Id.* at 27-28. The Judge credited the MSHA inspector's testimony that the vertical pin could become a projectile and cause "injuries such as lacerations or eye injuries." 44 FMSHRC at 454.

The inspector testified that a miner would need to be within eight feet of the shield to be struck with a projectile vertical pin. Tr. 66. However, the operator alleges that miners would rarely be within eight feet of the shield because they would follow the operator's "required practice [policy] of . . . being at least two shields away." PDR at 19; *see also* Tr. 115-16. The operator also alleges that "there was no . . . evidence of any injury ever occurring from the vertical pins breaking, becoming airborne, [and] hitting . . miners." PDR at 20.

The operator asserts that being two shields away means that miners must be eleven feet away from the shields. PDR at 19. The Judge noted that "[a]ll witnesses . . . testified that miners at this mine generally operate shields . . . from two shields away at a distance of seven-to-eleven feet." 44 FMSHRC at 460. Therefore, the operator and Judge disagree as to the distance between a miner and a shield if the miner was "two shields away"—the operator claims such distance would be eleven feet, out of the eight foot range of a projectile pin, while the Judge found such distance would be seven to eleven feet, potentially within the range of the projectile pin.

One of the operator's witnesses testified that if a miner was "two shields away," he would be seven to ten feet from the shield, potentially within the range of the projectile pin. Tr. 116 (Q: "And approximately how far would you be from the shield that you're moving if you're two shields away?" A: "That would be roughly seven to ten feet."). This testimony by the operator's own witness constitutes substantial evidence supporting the Judge's determination that a miner would be within the eight feet range of the projectile hazard.[6]

Assuming miners always follow company policy and exercise appropriate caution is contrary to Commission precedent. The Commission has noted that "[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators . . . to prevent unsafe working conditions." *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) (quotation omitted). Similarly, the Commission has "emphasized that . . . the vagaries of human conduct cannot be ignored." *Id.* at 1901 n.17. Therefore, under continued mining operations, miners may not always exercise caution or follow policy.

The Commission has held that the "focus of the seriousness of the violation is . . . on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). While the Judge did not explain the inconsistency in his description of the appropriate analysis,[7] he credited the inspector's testimony regarding instances of injuries due to pins becoming projectiles upon breaking. 44 FMSHRC at 456-57. As we have said, this determination is afforded substantial weight. Therefore, the Judge's finding of gravity is affirmed.

C. Citation No. 9204250 (Globes Violation)

1. Gravity

Inspector Young designated the globes violation as reasonably likely to result in injury. The Judge affirmed this designation,. finding that "credible evidence exists to support the potential ignition in a light fixture penetrating a compromised globe." 44FMSHRC at 464. The operator now appeals.[8]

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[6] The record does indicate that each shield was 1.75 meters wide. Tr. 149. Accordingly, the width of two shields would be 3.5 meters or approximately 11 feet. However, this measure simply raises the possibility of drawing a different conclusion from the evidence, which "does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y of Labor on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citation omitted).

[7] In his decision, the Judge discussed the gravity analysis as focused on the likelihood "of the expected resulting injury" assuming "the occurrence of the hazard." 44 FMSHRC at 452. Later, the Judge noted that "the Secretary asserts that the hazard is reasonably likely" and concluded that "credible evidence exists to support that the hazard—a projectile shear pin—could occur." *Id.* at 457.

[8] The operator does not challenge the Judge's finding of a violation.

Citing *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1131 (May 2014), the Judge noted in his analysis of the violation that "[p]ermissibility requirements 'ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the mine atmosphere.'" 44 FMSHRC at 463. The Judge then analyzed the likelihood of an explosion as part of step 2 of the *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) test. 44 FMSHRC at 465.

The Judge credited the inspector's testimony that one could not predict when an electrical circuit will fail as a result of "moisture, erosion, vibration, or just age." 44 FMSHRC at 465. The Judge rejected the operator's arguments that "there would have to be a failure in the light fixture on the nonprotected side of the light's ballast [to cause an ignition]," "that there was no evidence of electrical issues with lights," and "that the LED lights allegedly present are nearly intrinsically safe." *Id*. The Judge found that these arguments rested on incorrect assumptions that a light fixture could not ignite methane and that continued normal mining operations did not exist, and on an unproven assertion that LED lights were "nearly intrinsically safe." *Id.* The Judge further found that "nothing in the record prov[ed] that LED bulbs were in fact present at the time of the citation." *Id.*

As to an ignition within the globes escaping to, and igniting, the general mine atmosphere, the Judge assumed "a constant threat of explosive methane in a gassy mine," finding, in relevant part, that the mine was "gassy" and liberated more than ten million cubic feet of methane every 24 hours. *Id.* at 466. The Judge also noted that the methane monitor was improperly calibrated. *Id.* at 467; *see* Tr. 78, 123; GX-5. In relevant part, the Commission has concluded that a finding that a "mine liberated more than one million cubic feet of methane in a twenty-four-hour period, and [that] there had been a methane ignition . . . in the year preceding the hearing" might be sufficient to uphold an S&S designation. *Knox Creek,* 36 FMSHRC. at 1136 (citing *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1284 (Sept. 1986)). We note also that this level of methane led to the mine being on a 5-day spot inspection cycle and, in fact, Inspector Young was at the mine to conduct a spot inspection at the time this citation was issued. Tr. 71; *see* 30 U.S.C. § 813(i).

Here, the mine liberated much more than one million cubic feet of methane in a twenty-four-hour period. Therefore, assuming continued mining operations, it is reasonably likely that a sufficient amount of methane for an atmospheric ignition would exist in the future. Similarly, assuming continued mining operations, the methane monitor, which was improperly calibrated at the time of the MSHA inspection, would be reasonably likely to be improperly calibrated in the future, and thus fail to accurately detect the level of methane in the atmosphere. Accordingly, the Judge's finding that "credible evidence exists to support the potential ignition in a light fixture penetrating a compromised globe" is supported by substantial evidence. 44 FMSHRC at 464.

Assuming a light fixture failure, such a circuit failure must produce sufficient energy for an ignition. The operator's witness testified that "most of the [operator's] mining machines use LED bulbs." Tr. 163. In contrast, the MSHA inspector testified that he did not know the specific type of bulbs in the light fixtures in the defective globes ("I don't know if it was LED or not"). Tr. 87. Moreover, the operator provided a photograph, taken some time after the MSHA

inspection, depicting a globe with LED bulbs on the machine at issue. Tr. 166, 174; R-7 at Consol 0041. Relatedly, the operator claims that "no lights were replaced to abate the [c]itation," implying that the same bulbs present during the MSHA inspection were represented in the photograph taken afterwards. Br. at 33.

The Judge made a finding that "there [was] nothing in the record [to demonstrate] that LED bulbs were in fact present at the time of the citation." 44 FMSHRC at 465. A "determination as to the substantiality of evidence supporting a challenged finding 'must take into account whatever in the record fairly detracts from its weight.'" *Consol Pennsylvania Coal Co., LLC,* 44 FMSHRC 37, 43 (Feb. 2022) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). The operator in its PDR states that "photographs depicting [the continuous mining machine at issue] taken when the machine was removed from underground showed LED lights present." PDR at 24; *see* R-7 at Consol 0038-0041. However, given that the photograph was taken some time "after the globes had been replaced," the Judge found that the photograph might represent different bulbs from those present during the MSHA inspection. 44 FMSHRC at 465; Tr. 174.

The Judge did not address testimony that most of the operator's mining machines use LED bulbs, or the contention that the bulbs in the defective globes did not need to be replaced to abate the citation. However, 30 C.F.R. § 18.2 defines the phrase "intrinsically safe" as "incapable of releasing enough electrical or thermal energy under normal or abnormal conditions to cause ignition of a flammable mixture of methane or natural gas and air of the most easily ignitable composition." This definition is consistent with testimony during the hearing defining "intrinsically safe" as "the point where you can guarantee [the] methane air mixture will not ignite." Tr. 172. Therefore, if a bulb inside a globe is intrinsically safe, it is virtually impossible for a failure in the circuit to result in an ignition inside the globe, even assuming an explosive level of methane inside the globe.

In contrast, the operator characterizes the LED bulbs it alleged to be in the continuous miner globes as "nearly intrinsically safe." *See* PDR at 11. There is no definition in the Mine Act or its related regulations for a "nearly intrinsically safe" piece of equipment. The operator provides no quantum for measuring "nearly intrinsically safe" equipment or a legal framework for considering it. Therefore, we find that operator's characterization irrelevant. And, for these reasons, we affirm the Judge's gravity determination.

D. Significant and Substantial Contribution

On appeal, the operator explicitly argues that the Judge's decision to uphold the S&S designations for both citations was erroneous, contrary to law, and not supported by substantial evidence. PDR at 17, 21; *see* 30 U.S.C. § 823(d)(2)(A)(ii). It takes issue with the Judge's holding that "[the] inspector's conclusion that a possible injury is of a reasonably serious nature is sufficient for *Mathies* Step 4 (ALJ 11)." PDR at 9. The operator argues that the Judge ignored evidence that miners would not be struck with "force substantial enough and in an area reasonably likely to result in injury." *Id.* Furthermore, it argues that the Judge erred in applying the second step of *Mathies* by ignoring "unusual and adverse conditions at the cited shield to cause the vertical pin to work loose and break." *Id.* at 18.

The Commission has reviewed issues on appeal because they are implicitly raised below or so intertwined with matters before the judge that they may be considered.[9] *See Oak Grove Resources, LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011) (citing *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007), *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984)). In the instant case, reviewing the Judge's S&S analysis—especially with respect to the issue of likelihood, which goes to the heart of the appropriateness of the statutory interpretation contained in *Peabody*—requires us to determine whether the Commission's *Newtown/Peabody* reformulation of the *Mathies* test comports with the language of the Mine Act.[10]

We recognize that the following discussion on *Mathies*, *Newtown*, and *Peabody* might be more than a bit confusing. As will be demonstrated herein, the confusion goes to the very heart of the Commission's longstanding and shifting jurisprudence regarding section 104(d)(1) of the Act. The Commission's changes to the S&S analysis have created significant confusion among judges, MSHA, and the mining industry, and have created a test that is barely connected to the original text of the Mine Act. The Mine Act is the Commission's lodestar and, where our jurisprudence has become contrary or inconsistent with the Act, it is incumbent upon us to return to the language of the Act and Congress's intent in drafting it.

The Mine Act categorizes violations of mandatory safety standards on a gradient of increasing severity, from normal section 104(a) citations, to S&S citations, to unwarrantable failure and withdrawal orders. 30 U.S.C. § 814(d); *see Emery Mining Corp*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citations omitted). The Commission has previously explained in detail the Mine Act's gradual enforcement scheme for violative conditions:

> As an incentive for operator compliance, the Act's enforcement scheme provides for increasingly severe sanctions for increasingly serious violations or operator behavior. Sections 104(a) and 110(a) provide that the violation of any mandatory standard requires the issuance of a citation and assessment of a monetary civil penalty. Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed. 30 U.S.C. §§ 814(b) and 820(b). Under section 104(d), if an inspector finds a violation and also finds that the violation is

[9] *See, e.g.*, *San Juan Coal Co.*, 29 FMSHRC 125, 130 (Mar. 2007) (considering on appeal unwarrantable failure factors not specifically argued by a party or analyzed by the Judge because they were intertwined with evidence relating to factors that were addressed); *BHP Copper, Inc.*, 21 FMSHRC 758, 762 (July 1999) (concluding that points made by the Secretary to Commission, while not identical to those made to the Judge, were sufficiently related to those below to permit the Commission to consider them under 30 U.S.C. § 823(d)(A)(iii)); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11 n.7 (Jan. 1994) (accepting an argument as sufficiently related to one made below because it enlarged the one made below).

[10] As discussed below, the operator raises several arguments concerning the Judge's analysis with regards to likelihood in Citation No. 9204250.

> of a significant and substantial nature and has resulted from the operator's unwarrantable failure to comply with the standard, a citation noting those findings is issued. This "section 104(d) citation" carries enforcement consequences potentially more severe than section 104(b) sanctions. If further unwarrantable failure violations occur within 90 days of the citation issued under section 104(d), unwarrantable failure withdrawal orders are triggered. Issuance of the withdrawal orders does not cease until an inspection of the mine discloses no unwarrantable failure violation.

Nacco Mining Co., 9 FMSHRC 1541, 1545 (Sept. 1987) (citations and quotation marks omitted).

The "significant and substantial contribution" designation contained in section 104(d)(1)[11] represents an initial step on the ladder of progressive enforcement, beyond issuing a citation for a simple violation of a safety standard. An S&S contribution designation generally increases the civil penalty proposed for the violation, and can provide the basis for a "pattern of violations" designation and possible future withdrawal orders.[12] 30 U.S.C. § 814(e); 30 C.F.R. § 100.3. The failure to abate the violative condition cited in any citation can also result in a withdrawal order and enhanced civil penalties. 30 U.S.C. §§ 814(b), 820(b).

Section 104(d)(1) also provides that within 90 days after the issuance of an S&S contribution citation, if an inspector finds another violation of any mandatory safety standard and finds such violation to be also caused by an unwarrantable failure to comply, he shall issue a withdrawal order causing miners to be withdrawn from the area until the inspector determines such violation has been abated. 30 U.S.C. § 814(d)(1). The Mine Act provides additional sanctions to compel compliance for more egregious or imminently dangerous hazards. 30 U.S.C. § 820(b)(2) (defining a "flagrant" violation as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious

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[11] *See* 30 U.S.C. § 814(d)(1), *supra* note 1.

[12] Section 104(e) provides MSHA with the ability to issue withdrawal orders in situations in which a mine operator has demonstrated a pattern of S&S violations. Section 104(e) of the Mine Act provides that:

> If an operator has a pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. § 814(e)(1). Any operator so notified is subject to an order requiring the immediate withdrawal of miners, if an inspection within 90 days discovers any additional significant and substantial violations at the operator's mine. Any subsequent inspections that reveal significant and substantial violations will result in further withdrawal orders, until the mine achieves an inspection with no such violations. 30 U.S.C. §§ 814(e)(1), (2), (3).

bodily injury"); 30 U.S.C §§ 817(a) 802(j) (providing an inspector the authority to issue a withdrawal order when he observes an imminent danger, i.e., "the existence of any condition or practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated") (emphasis added).

When Congress passed the Federal Mine Safety and Health Act in 1977 and enacted section 104(d)(1), it did so in order to highlight the way in which a violation would *contribute* to the risk of a hazard. 30 U.S.C § 814(d)(1). While the Commission, MSHA, and the industry have traditionally referred to this requirement by the shorthand of "S&S," this shorthand may misconstrue Congress's intent and the statutory language itself. Below, we review Commission precedent on section 104(d)(1), the statutory language, and legislative history, and conclude that Congress intended the Commission to apply the S&S designation to violations where the violation "could significantly and substantially contribute" to the risk of a mine safety or health hazard.

We turn next to the ways in which the language now contained in section 104(d)(1) has been interpreted by the Commission through the years to reach the recent and problematic *Peabody/Newtown* formulation.

1. The Commission's Erroneous *Peabody* Significant and Substantial Test

Below we review the history of section 104(d)(1), the evolution of the language that it contains starting with its appearance in 1966, and the Commission's various iterations of its practical implementation starting with the 1984 *Mathies* test and culminating in the current *Peabody* test from 2020. This overview leads us to conclude that over forty years of tinkering has resulted in an awkward and cumbersome standard divorced from the statutory text and the reality of how MSHA inspectors, acting as the Secretary's representatives per the statute, analyze S&S in practice. The *Peabody* test runs afoul of the statutory text and Congress's desire to enact an enhanced penalty for violations that contribute to a risk of hazard. Congress never intended the language in section 104(d)(1) to be an abstract and contested bar to enhanced enforcement. Instead, as the Senate and House Reports demonstrate, the Mine Act's drafters included section 104(d)(1) as a practical tool to reduce risk of injury.

a. The History of Section 104(d)(1) and its Interpretation

i. Origin of the "Significant and Substantial" Designation

The phrase "significantly and substantially contribute" entered federal mining regulation in the Federal Coal Mine Safety Act Amendments of 1965. Pub. L. 89-376, 80 Stat. 84 (1966), amending the Federal Coal Mine Safety Act of 1952, Pub. L. 82-552, 66 Stat. 692 (1952). Specifically, the amendment required representatives of the Bureau of Mines to note a violation of a safety provision if it was of "such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident." Sec. 3(a), § 203, 80 Stat. at 85. The amended provision did not define "significantly and substantially" or provide for monetary penalties; instead, the statute made such a determination a baseline finding for future withdrawal orders. *Id.*

Congress partially carried over and expanded this language in the passage of the Federal Coal Mine Health and Safety Act of 1969. Pub. L. 91-173, 83 Stat. 742 (1969). Under that Act, a representative of the Secretary was required to note a violation of a health or safety standard if "such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard."[13] §104(c)(1), 83 Stat. at 751. As with the 1965 Amended Act, the Coal Act of 1969 did not define the term "significantly and substantially." The legislative history of the Coal Act contained little in the way of guidance. The conference report showed the language in the section-by-section analysis but did not provide any information that could aid in the interpretation of the language. H.R. Rep. 91-761, at 67 (1969) (Conf. Rep.). The House report was equally opaque. *See* H.R. Rep. 91-563 (1969).

However, during debate on the bill, Congressman Carl D. Perkins of Kentucky further elaborated on the problems that Congress hoped to fix with the 1969 Act:

> The 1952 law was directed only at the prevention of major disasters. The day-to-day accidents, which still cause roughly 90 percent of all coal mines (sic) fatalities, were not to be a concern of the Federal Government. Despite a record which showed that the States were not discharging their responsibilities and were unlikely to do so, despite their weak standards and weaker enforcement, the chief responsibility for mine safety was left with the States.
>
> . . .
>
> The Federal Coal Mine Health and Safety Act of 1969 which we are considering today deals comprehensively with both the health and safety problems of the mines. It corrects the deficiencies of the 1952 Act, takes account of past experience and provides for the development and implementation of safeguards against hazards that may develop in the future.

Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong. 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1124-25 (1975).

The Secretary of the Interior, under the auspices of the Interior Board of Mine Operations Appeals ("IBMA"), was charged with interpreting the S&S language for practical implementation. Pub. L. 91-173, 83 Stat. 742, § 105. Even though the IBMA only heard cases for a few short years, it made several attempts to interpret this statutory language. The first case

[13] While the language is somewhat similar to the 1965 Amended Act, the previous limitation of the significant and substantial language to violations that contribute to "a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident" was removed. Instead, the provision in the 1969 Act applied to any violation that contributed to a "mine safety or health hazard." The broadening of the language in this section mirrored Congress's general expansion of federal authority found throughout the Coal Act.

in which the IBMA interpreted the S&S language of the Coal Act was *Eastern Associated Coal Corp.*, 3 IBMA 331 (Sept. 1974). Specifically, the IBMA defined the phrase "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" to mean "conditions or practices, constituting violations, which pose a probable risk of serious bodily harm or death short of imminent danger and where there is a degree of fault, greater than ordinary negligence, which may be aggravated by repetition." *Id.* at *7. Later in the decision, the Board made it clear that the phrase probable risk of bodily harm or death short of imminent danger was the practical definition of the statutory phrase "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." *Id.* at *9.

The IBMA later reiterated and clarified its *Eastern Associated Coal Corp.* holding in *Ziegler Coal Co.*, wherein it noted that the clause which reads "could significantly and substantially contribute to the cause and effect" states a "probability requirement, designed . . . to prevent application of section 104(c) to largely speculative 'hazards.'" 4 IBMA 139, **8 (May 1975).

However, the *Eastern Associated Coal Corp.* standard did not last long. Shortly after its issuance, *Ziegler Coal Co.* was overturned by the D.C. Circuit on grounds unrelated to the S&S definition. *See UMWA v. Kleppe*, 523 F.2d 1403 (D.C. Cir. 1976). Nonetheless, the IBMA decided to reinterpret the S&S definition after the Court's decision. In *Alabama By-Products Corp.*, the IBMA instead stated that a violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard when it posed a risk of injury that was more than "remote or speculative." 7 IBMA 85, **4 (Nov. 1976). That is, taking *Eastern Associated Coal Corp.* and *Alabama By-Products* together, citations are broken into two broad categories: purely technical violations—which are not S&S— and violations that could serve as the source of an injury, even if that injury is not serious or is unlikely to occur.

This was, obviously, a major shift in interpretation. Now, instead of applying only to violations that posed a probable risk of bodily harm or death short of an imminent danger, S&S would be applied to all "non-technical" violations. The gulf between the tests announced in *Eastern Associated* and *Alabama By-Products* demonstrates opposing interpretations of the statutory language under the Coal Act of 1969. The distance between those two interpretations still represents the outer limits of S&S interpretations to this day.

When Congress passed the Federal Mine Safety and Health Act in 1977, it had a choice to make between these divergent interpretations of the S&S language, and it made its choice clear. The section of the statute concerning the term "significantly and substantially" in the Coal Act, section 104(c)(1), was maintained unchanged, but was moved to section 104(d)(1). Pub. L. No. 95-164, sec. 201, § 104, 91 Stat. 1290, 1301 (1977). In doing so, Congress for the first time signaled its intent as to the meaning of the phrase "significantly and substantially" contributing to the hazard language. Importantly, the Senate report contained in the Legislative History of the 1977 Mine Act expressly rejected the heightened narrow standard in the IBMA's *Eastern Associated Coal Corp.* decision and explicitly endorsed the broad standard contained in the

IBMA's subsequent *Alabama By-Products Corp.* standard (that is, an S&S citation is any non-technical violation). S. Rep. 95-181 (1977). It stated in pertinent part:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the 'gravity test' and has required that the violation be so serious as to very closely approach a situation of 'imminent danger,' *Eastern Associated Coal Corporation*, 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in *Alabama By-Products Corp.*, 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).
>
> The Board there held that 'an inspector need not find a risk of serious bodily harm, let alone death' in order to issue a notice under Section 104(c)(1).
>
> The Board's holding in *Alabama By-Products Corporation* is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when 'technical' violations do pose a health or safety danger to miners, and are the result of an 'unwarranted failure' the unwarranted failure notice will be issued.

Id. at 31.

Furthermore, the ramifications of significant and substantial citations and orders were expanded under the Mine Act. Congress added other enhanced penalties that underscored how section 104(d)(1), containing the significant and substantial statutory language, was meant as an initial step in the progressive enforcement scheme. A new section, 104(e), created the new concept of "pattern of violations" triggered by S&S violations.[14] The pattern of violations

[14] Specifically, that section states:

> (e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have *significantly and substantially* contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could *significantly and substantially* contribute to the cause and effect of a coal or other

sanction is among the most stringent in mine regulation and the desire to avoid such a designation is a major incentive to operators to ensure compliance.

a. The Commission's evolving interpretation of section 104(d)(1)

Despite Congress's express endorsement, the Commission never adopted the *Alabama By-Products* standard. Instead, the Commission developed a new test in 1981, which did not last long. The Commission has never really settled on a test and has instead made continuous attempts to clarify the meaning of the phrase "significantly and substantially," for purposes of adjudication. Unfortunately, those attempts have often strayed further and further from the statutory language and Congressional intent, resulting in the currently problematic *Peabody* test.

> mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could *significantly and substantially* contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.
>
> (3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could *significantly and substantially* contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.
>
> (4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

30 U.S.C. § 814(e) (Federal Mine Safety and Health Act of 1977, Pub. L. 95-164 at §104(e)) (emphasis added).

Thus, *Peabody* is the culmination of four decades of Commission attempts to translate the statutory language into a practical test for the adjudication of the disputes before it without reaching a workable, statutorily grounded solution.

The Commission's first attempt to interpret Section 104(d)(1) came in *Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (Apr. 1981). In that case, the Commission implicitly rejected the *Alabama By-Products* standard, stating that it was inconsistent with the statutory enforcement scheme, would turn every citation into an S&S citation (and thereby cause every mine to constantly be on POV status), and would eliminate the ability of inspectors to use their judgment in determining whether a citation was S&S.[15] *Id*. at 825, 828-29, 829 n.9. The Commission stated that the proper legal standard for an S&S violation "falls between [ ] two extremes—mere existence of a violation, and existence of an imminent danger." *Id*. at 828. That is, the Commission neatly restated the two extreme positions from the IBMA's *Eastern Associated* and *Alabama By-Products* cases and placed the "proper" analysis somewhere in the wide gulf between them.

The Commission concluded that a violation is S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Id*. at 825.[16] However, later in the same decision, the Commission defined the word "hazard" to denote "a measure of danger to safety or health" and found that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation *could* be a major cause of a danger to safety or health. *Id*. at 827 ("In other words, the contribution to cause and effect must be significant and substantial.").

The inconsistency of these two definitions in the same decision is readily apparent: Is a violation S&S if there is a reasonable likelihood that the hazard contributed to will result in serious injury or illness, or if the violation could be a major cause of a danger? Those two questions will not necessarily have the same answers. For example, an operator may be cited for failing to adequately support a rib in a rarely traveled portion of the mine. Utilizing the first definition, failure to support a rib could be a major cause of a rib failure and rock fall, which would be a danger. Therefore, someone might reasonably conclude that the violation was S&S. However, utilizing the second definition, a rock fall in a rarely traveled portion of the mine might not be "reasonably likely" to result in an injury. Therefore, someone else might reasonably conclude that the violation was not S&S. Sometimes, the answer to both inquiries may lead to

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[15] A review of the actual use of patterns of violations by MSHA over 50 years shows that the Commission's concerns were misplaced. MSHA rarely cites operators under the pattern of violation standard no matter what the Commission's standard is for S&S contribution to a hazard.

[16] It is important to note that the term "reasonably serious" was created in *National Gypsum* without discussion. The statute does not discuss "reasonably serious" injuries and the Commission made no effort, at that time, to explain its decision to include it. This is especially relevant as the current Commission test from *Peabody* is replete with references to "reasonableness."

the same conclusion, but that conclusion would be reached through different inquiries and would consider different facts.

In an attempt to resolve this ambiguity, the Commission in *Mathies Coal Co.*, returned to the definition of S&S. However, rather than choose between the two previous definitions in *National Gypsum* (the "hazard contributed to is reasonably likely to cause an injury" definition and the "could be a major cause" definition), the Commission strayed further from the language and intent of the Mine Act and made them two separate inquiries in a four-step analysis, thereby subtly changing each.

Specifically, the Commission held that a violation of a mandatory safety standard significantly and substantially contributes to the cause and effect of the hazard when there is: (1) an underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety[17]—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. *Id*. at 3-4. The end result was that the attempt to clarify the test resulted in a change in the nature of the test, adding elements not required by the statute and creeping towards the imminent danger standard.

Furthermore, in applying its new test, the Commission appears to have muddied the waters and created confusion about how the analysis should be conducted. A common-sense reading of these second and third factors of *Mathies* would imply that someone conducting the second step must establish that the violation contributes to a hazard. Then, in the third step, the analysis shifts so that the violation is no longer being considered but, instead, the question is whether the hazard identified would be reasonably likely to result in an injury.

For example, if the violation at issue was a 5% concentration of methane, the second step would establish that such a concentration contributes to an explosion hazard. Then, the third step would not ask whether this particular 5% concentration of methane – the violation itself – was reasonably likely to cause an injury, but instead whether an explosion – the hazard created – would be reasonably likely to cause injury.

However, a close reading of the *Mathies* decision shows that the Commission seems to have misapplied the very test it had just established. The facts in *Mathies* concerned a citation written for a defective "sander" used to slow a railway mantrip. 6 FMSHRC at 4. In analyzing the second step, the Commission noted that the violative condition there contributed to a hazard of sliding derailment or collision with objects on a mantrip track. *Id*. To support this holding, the Commission noted that brakes alone could not stop the machine, that the mine was damp, that the track was wet, and that there were curves and grades on the route. *Id*. Following the language of the test, the third factor should have asked only whether a sliding derailment or collision (the hazard) was reasonably likely to result in injury. Instead, in the third step the Commission essentially reviewed the same evidence from the second step again, including the

[17] This formulation, which was intended to clarify, has only added to the confusion through its attempt at concision and the use of words with multiple meanings. A clearer definition for "hazard" under the *Mathies* formulation would be the *degree* of danger to a *miner's* health or safety.

fact that the route encompassed curves and grades and that it was wet. *Id*. It held that "[i]f the dampness, curves, or grades had necessitated use of the defective sander, the absence of sanding capacity could have been a major cause of . . . derailment." *Id*. It then stated that because miners were on the machine, they would be seriously injured in such a derailment. *Id*.

The problem with the Commission's application is apparent. The wording of the test implies that the correct step three inquiry was whether a derailment or collision would be reasonably likely to cause injury. Instead, the Commission seemed to be determining whether the violation (defective sanders) would be reasonably likely to cause injury. While the Commission concluded, "we concur with the judge that the hazard contributed to by the violation created a reasonable likelihood of injury," it did so only after confusing the nature of the test. Instead, the Commission could have simply asked whether the violation was reasonably likely to cause an injury, thereby resolving both steps 2 and 3 at the same time. While major changes have since been made to the *Mathies* test, the formal structure of the *Mathies* S&S test continues to be used by both the Commission and the Courts, and ambiguities remain.[18]

In *Musser Engineering, Inc.,* 32 FMSHRC 1257 (Oct. 2010), the Commission attempted to clarify that the "Secretary need *not* prove a reasonable likelihood that *the violation itself* will cause injury." *Id*. at 1281 (emphasis added). The Commission held that the proper inquiry according to *Mathies* is whether "there is a reasonable likelihood that *the hazard* contributed to by the violation . . . will cause injury." *Id*. (emphasis added). The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. In *Musser*, the violation at issue was the failure of the mine operator to have an accurate map. The hazard was the danger of breaking through to an adjacent mine and the resulting water inundation. *Id.* at 1280-81. The Commission specifically rejected the operator's claim that the Secretary must prove the inaccurate map (the violation) would be reasonably likely to cause an injury. *Id*. at 1281.

The Commission's decision in *Musser*, however, did not conclusively determine how *Mathies* was to be applied. A year later, finding that the holding in *Musser* was still not clear, the Commission issued *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011). In that case, the Commission noted that under *Musser*, the inquiry is whether there was a reasonable likelihood that the relevant hazard would cause injury, not the violation itself. *Id*. at 2366. It noted that judges err when they consider the likelihood that an emergency might occur, rather than assuming the occurrence of an emergency when conducting the S&S analysis. *Id*. The Commission stressed that Judges must not conflate "violation" with "hazard," hoping to clear up the confusing and unwieldy *Mathies* test, which the Commission struggled to consistently apply.

In *Cumberland Coal Res*., 717 F.3d 1020, 1026 (D.C. Cir. 2013), the D.C. Circuit considered arguments as to whether *Mathies* Steps 2 and 3 allowed the assumption of an emergency when evaluating the S&S designation involving an emergency safety standard. The D.C. Circuit rejected the operator's arguments that the *Mathies* test required the evaluation of the

[18] For example, in *Sec'y of Labor v. Jim Walter Res*., 111 F.3d 913, 917 (D.C. Cir. 1997), the D.C. Circuit clarified that *Mathies* Step 2 contains two separate inquires: (1) whether there is a hazard to which the violation might contribute and, if so, (2) whether the violation significantly and substantially contributes to that hazard.

probability of an emergency. *Id.* at 1026-7. Instead, the D.C. Circuit accepted the Secretary's argument that the word "could" in section 104(d)(1) "refers to the violation's intrinsic capacity to contribute to the hazard, not to any specific probability that it will." *Id.* at 1026. The D.C. Circuit held that the Secretary need not demonstrate in the context of an emergency standard the likelihood that a violation would result in a hazard. *Id*. at 1027. As the court explained, "The hazard here is delayed escape from an emergency, but there can be no delayed escape, unless there is an emergency in the first place. Similarly, if there is no emergency, then there can be no resulting injury. *Id.*

Circuit courts were, generally, deferential to the Commission's *Musser* and *Cumberland* formulation of *Mathies*. In *Knox Creek Coal Corp. v. Secretary of Labor*, the Fourth Circuit analyzed the *Mathies* test to determine whether one should presume the occurrence of the hazard at step three. The Fourth Circuit reasoned:

> Given the language and structure of the *Mathies* test taken as a whole, this approach makes sense. In its first key opinion interpreting the statute's S & S provision, 30 U.S.C. § 814(d)(1), the Commission identified two sensible considerations—"likelihood and gravity"—that rendered a violation S & S. *Sec'y of Labor v. Nat'l Gypsum Co.,* 3 FMSHRC 822, 828 (1981). In short, the Commission reasoned that a violation should be considered S & S when it is reasonably *likely* to result in *serious* harm. *See id.* The later-developed *Mathies* test, at its core, also reflects a dual concern for both likelihood and gravity. In our view, the second prong of the test, which requires the showing of a "discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation," *Mathies,* 6 FMSHRC at 3, primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.
>
> By contrast, we think that *Mathies'* third and fourth prongs, which the Commission expected would "often be combined in a single showing," *Mathies,* 6 FMSHRC at 4, are primarily concerned with *gravity*—the seriousness of the expected harm. To the extent that the third and fourth prongs are concerned with likelihood at all, they are concerned—by their very terms—with the likelihood that the relevant hazard will result in serious injury. *Id.* at 3–4. Requiring a showing at prong three that the violation itself is likely to result in harm would make prong two superfluous.

811 F.3d 148, 162 (4th Cir. 2016). The Fourth Circuit explicitly rejected the operator's argument that a reasonable likelihood of the hazard is relevant at step three, and instead endorsed the analysis in *Musser*. *Id*. at 164. ("However, that position is flatly contradicted by more recent Commission precedent, *Musser,* 32 FMSHRC at 1281, by the unanimous voice of federal

appellate courts, *see Peabody Midwest,* 762 F.3d at 616; *Cumberland Coal,* 717 F.3d at 1025–27; *Buck Creek,* 52 F.3d at 135; *Austin Power,* 861 F.2d at 103–04, and by the various considerations outlined above. Accordingly, the scales still tip decidedly in the Secretary's favor.").

Despite court approval, the Commission amended the *Mathies* test yet again following the Fourth Circuit's *Knox Creek Coal* decision, in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2039 (Aug. 2016) ("the Fourth Circuit['s] discuss[ion] [of] the necessity of a likelihood element in step two simply emphasizes that a review of the likelihood of the occurrence of the hazard is required."). Though the Fourth Circuit only required some likelihood that a hazard would result in harm, the *Newtown* Commission rewrote Step 2 to instead require the violation create a "reasonable likelihood of the occurrence of the hazards." *Id.* at 2038 ("[B]ased 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.").

Four years later, the Commission remained unsatisfied with the application of the *Mathies* test, reformulating it again in *Peabody Midwest Mining, LLC*, 42 FMSHRC 379 (Jun. 2020). In *Peabody*, the Commission purported to place the *Newtown* analysis within the framework of the *Mathies* test. *Id.* at 383. Specifically, the Commission recast the *Mathies* test to require: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Id.*[19]

Once again, while stating that it was clarifying the *Mathies* test, the Commission changed it in significant ways. As one Commission Judge observed, this has essentially split *Mathies* Step 2 into a "two-step process," thereby adding a fifth step to the *Mathies* four-step test. *Consol Pennsylvania Coal Company, LLC*, 45 FMSHRC 774, 784 (Aug. 2023) (ALJ Lewis). Specifically, the second step of the analysis now requires an ALJ to:

> (1) determine the specific hazard the standard is aimed at preventing; and (2) determine whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC at 1868. This finding must be based on "the particular facts surrounding the violation." *Northshore Mining Co.*, 38 FMSHRC 753, 757 (2016). The Secretary need not prove a reasonable likelihood that the violation itself will cause injury, but rather whether there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

Id.

[19] More recently, in *Consol Pennsylvania Coal Company, LLC*, 44 FMSHRC 691 (Dec. 2022), the Commission affirmed a Judge's S&S decision, citing both the *Mathies* test and the *Newtown* language, while omitting mention of the *Peabody* test.

After *Peabody*, the Commission attempted to sum up its interpretation of 104(d)(1) in a single sentence in a way that captured the entire, tortured history of its jurisprudence, stating that "significant and substantial violations…[are] violations that that create a cause and effect resulting in a reasonable likelihood of a reasonably serious injury." *Northshore Mining Company*, 43 FMSHRC 1, 12 (Jan. 2021).

The final product is a Commission-created transmogrification of the *Mathies* test, which was supposed to clarify the statutory language, into a different, more stringent test that is unmoored from the language of the statute or the explicit intent of Congress. The effect of the higher standard is illustrated through *Musser*, in which the Commission stated that the Secretary need only show the inaccurate mine map *contributed to the danger* of a mine inundation. According to *Peabody*, the Secretary must now demonstrate that the inaccurate mine map would be *reasonably likely to cause* the mine inundation. As we recounted above, the Commission in *National Gypsum* stated that S&S "falls between [ ] two extremes – mere existence of a violation, and existence of an imminent danger." 3 FMSHRC at 828. In *Peabody*, the Commission swung towards announcing that S&S is the same as the existence of an imminent danger.

b. Problems with *Peabody* S&S Test

For the reasons discussed below, we conclude that the current *Peabody* S&S test contradicts the plain language of section 104(d)(1) of the Mine Act.

i. The language of the *Peabody* S&S test contradicts the language of section 104(d)(1) of the Mine Act.

Section 104(d)(1) requires a representative of the Secretary to designate a violation as "significant and substantial" if the violation "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). Step 1 of the *Peabody* S&S test is superfluous as it asks whether there is an "underlying violation of a mandatory safety standard." *Peabody*, 42 FMSHRC at 383. Of course, there must first be a violation of the standard before an S&S designation occurs.

Step 2 of the *Peabody* S&S test asks whether "the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed." *Id*. Notably, section 104(d)(1) of the Mine Act only requires that the violation "could significantly and substantially *contribute to the cause* and effect of [a safety or health hazard]." 30 U.S.C. § 814(d)(1). Requiring the Secretary to demonstrate that the violation would "cause the occurrence" of a hazard deviates in impermissible ways from the language of section 104(d)(1), which only requires a "contribut[ion]." Moreover, the D.C. Circuit has issued multiple decisions stating that the Secretary must demonstrate that the violation could *contribute* to a hazard.[20] *See Sec'y of Labor v. Jim Walter Res*., 111 F.3d at 917 (requiring that the Secretary demonstrate the violation significantly and substantially contributes to the hazard); *see also*

[20] While Court of Appeals have applied the Commission's S&S test, none have expressly adopted it or analyzed whether it is consistent with the Mine Act.

Cumberland Coal Res., 717 F.3d at 1026-27 (requiring a showing that the violation has an intrinsic capacity to contribute to the hazard). The Commission's role must always be to interpret the language of the Mine Act, rather than creating a new standard not found anywhere in the law.

As the Commission has previously observed, "it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Sec'y of Labor v. Youghiogheny & Ohio Coal Co*., 9 FMSHRC 673, 677 (Apr. 1987) (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)) (emphasis added). This means the language is about the degree to which a violation adds to the existence of a hazard, not how likely it is for a hazard to exist. While the exact difference between those terms may not be entirely clear, it is unquestionable that "reasonably likely to cause" establishes a higher standard than "could significantly and substantially contribute to," the language contained in the Mine Act.

In *Carmeuse Lime*, one Commission Judge cogently described the extra-textual nature of the *Mathies* second step analysis:

> The *Newtown/Peabody* reformulation is inconsistent with the Mine Act's definition of S&S, which focuses on violations that could significantly and substantially contribute to a hazard. 30 U.S.C. § 814(d)(1). This aspect is satisfied if the violation "could" contribute to the hazard. Section 104(d)(1) of the Mine Act expressly uses the term "could," and the Fourth and Seventh Circuits have rejected the idea that step two requires proof of reasonable likelihood. *See Knox Creek Coal Corp. v. Sec'y of Lab.*, 811 F.3d 148, 164 (4th Cir. 2016) (noting that at step two, "the Secretary must establish that the violation contributes to a discrete safety hazard," and at steps three and four, "that the hazard is reasonably likely to result in a serious injury"); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611, 616 (7th Cir. 2014) ("the question is not whether it is likely that the hazard … would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of the likelihood), it was reasonably likely that a reasonably serious injury would result"). The legislative history of the Mine Act also "suggests that Congress intended all except 'technical violations' of mandatory standards to be considered significant and substantial." *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987); *accord Knox Creek*, 811 F.3d at 163 ("Congress did not intend for the S & S determination to be a particularly burdensome threshold for the Secretary to meet"). In addition, this analysis is consistent with the Commission's own understanding of step two of the *Mathies* test up until Newtown. *See, e.g., Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280 (2010).

45 FMSHRC 500, 517 n.12 (Jun. 2023) (ALJ Moran); *see also Saiia Construction Company, LLC*, 46 FMSHRC 452, 461 n.5 (Jul. 2024) (ALJ Lewis) ("This Court notes the mounting criticism of the Commission's *Newtown/Peabody* reformulation of the second step of the *Mathies* test.").

Accordingly, Step 2 of the recently amended *Peabody* test both ignores the language of the Mine Act and Court precedent as to how that language is to be applied.

Step 3 of the *Peabody* S&S test requires that "the occurrence of that hazard would be reasonably likely to cause an injury." However, section 104(d)(1) of the Mine Act does not require the Secretary to demonstrate any "injury." Nothing in the statutory language refers to injuries. Instead, it refers only to the *contribution* to a mine safety or health hazard. It has been suggested that consideration of injuries is implied because section 104(d) discusses the "cause and effect" of a hazard and an injury is an "effect" of a hazard. However, that is not a particularly natural reading. The most obvious "effect" of a hazard in the context of this section would be a miner's exposure to a danger, not necessarily an injury. You can be exposed to a hazard without being injured, and Congress was immensely concerned about exposure. Indeed, many mine safety and health dangers, such as respiratory hazards and examination standards, stem from repeated exposure or the general risks associated with undiscovered exposures to danger.[21] Congress could have stated it was concerned with injuries in this section if it so desired, as it did with imminent dangers and other sections of the Mine Act, but chose to simply discuss the creation of hazards.[22]

The Commission has previously recognized the need to eliminate conditions that contribute to a hazard but do not necessarily create an immediate injury. For example, the Secretary has adopted mandatory health standards pursuant to the Mine Act aimed at protecting miners against respirable dust in underground coal mines. *See, e.g.*, 30 C.F.R. § 70.100. The Commission recognized both that Congress was concerned with "the potentially devastating consequences" of respiratory illnesses and that exposure to respirable hazards may be so gradual as to not result in injury until many years after prolonged exposure, remarking that "the development of respirable dust induced disease is insidious, furtive and incapable of precise prediction." *Consolidation Coal Co.*, 8 FMSHRC 890, 898-99 (June 1986), *aff'd,* 824 F.2d 1071 (D.C. Cir. 1987). Therefore, the Commission held that the third prong of the *Mathies* test was presumed to be established if the Secretary proved that "overexposure to respirable dust" had occurred. *Id.* at 899. As the Commission later wrote, the presumption was adopted "because of

[21] It is difficult to see how any examination violation, for instance, could ever be S&S under the *Peabody* standard. And yet, examinations are central to the Mine Act's statutory scheme for preventing injury and illness to miners.

[22] When Congress was concerned about injury or potential injury, it knew how to address that issue. For instance, in section 110(b)(2) of the Mine Act, Congress defined a "flagrant" violation as, "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). If Congress wanted the S&S language to address injuries or even the reasonable potential for injuries, it could have used similar language in 104(d).

the virtual impossibility of determining the contribution of a single incident of overexposure to respirable dust to the development of respiratory diseases, including pneumoconiosis." *Manalapan Mining Company, Inc*., 18 FMSHRC 1375, 1380 (Aug. 1996). Exposure, not likelihood of injury, was understood as the guiding principle.

Further, section 104(d)(1) does not contain the phrase "reasonably likely," which is a common standard in the law and which Congress could have used if it intended to do so. It is further notable that Congress chose not to use the phrase "reasonably likely" or any variation of that phrase in any provision of the Mine Act, and it would be wrong for the Commission to write it in here. Qualifying that the sanction can only be used, if and when the hazard would be *reasonably likely* to result in an *injury*, further demonstrates that the test is unmoored from the statute.

Finally, Step 4 of the *Peabody* S&S test asks whether "there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature." 42 FMSHRC at 383. Yet, section 104(d)(1) does not instruct the Secretary to treat violations that contribute to hazards that would result in minor injuries any differently than hazards that would result in major injuries. Why then does the Commission S&S test measure the seriousness of the injury which is likely to result? It is impossible to peg this step to any language contained in the Act. And, in fact, this step of the analysis (like the first) is often rendered superfluous: any injury is reasonably serious.

ii. The *Peabody* S&S standard impermissibly overlaps with the Mine Act's "imminent danger" standard.

Perhaps the clearest example of the *Peabody* S&S test's conflict with statutory language is illustrated by a comparison of the test with the Mine Act's definition of an "imminent danger." 30 U.S.C. § 802(j). Specifically, the current test is identical to the higher standard of imminent danger, making it such that any violation found to be S&S would of necessity also be an imminent danger, thereby collapsing the careful scheme of enforcement and sanctions that Congress created.

As established, the Mine Act categorizes violations of mandatory safety standards on a gradient of increasing severity. *See Emery Mining Corp*, 9 FMSHRC at 2000 (Dec. 1987) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC at 828 (the Mine Act's overarching enforcement scheme promotes mine operator's compliance with its requirements by providing "increasingly severe sanctions for increasingly serious violations or operator behavior.")). The S&S designation must be understood within the context of the Mine Act's "increasingly severe sanctions." An S&S designation is the initial designation (beyond a simple violation) within the progressive enforcement scheme.

The Mine Act expressly provides that an S&S violation is less serious than an "imminent danger." *See* 30 U.S.C. § 814(d)(1) (stating that an S&S standard is appropriate for violations that "do not cause imminent danger"). An "imminent danger" is "the existence of any condition or practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated." 30 U.S.C. § 802(j) (emphasis

added). If the inspector discovers an "imminent danger," he is authorized to withdraw all miners from the affected area pursuant to section 107(a) of the Mine Act. The issuance of an S&S citation ordinarily does not result in the withdrawal of miners, but instead the assessment of a proposed civil penalty. 30 U.S.C. § 815(a).

Despite Congress' clear instructions that an S&S violation is for situations when "such violation [does] not cause imminent danger" the *Peabody* S&S test makes little distinction between the two designations.[23] The *Peabody* S&S test requires that a violation be reasonably likely to lead to significant injury in order to be S&S. However, the Mine Act states explicitly that any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated," is an "imminent danger." 30 U.S.C. 803(j). For all practical purposes, these two tests are identical, with both standards directing a Judge to determine whether a violation is reasonably likely to cause harm. The two tests each functionally require that the Secretary demonstrate a reasonable likelihood of serious or fatal injuries, and it is difficult to imagine a situation where a violation would be S&S under the Peabody test and not also be an imminent danger. Accordingly, the *Peabody* S&S test directly contradicts Congress' edict that an S&S violation is appropriate only when "such violation [does] not cause imminent danger." 30 U.S.C. § 814(d)(1).

The Senate Report that accompanied the Mine Act, includes a critique of the Commission's predecessor, the Interior Board of Mine Operations Appeals ("IBMA"), for interpreting an identically worded "significant and substantial" provision in a manner that closely resembled the definition of an "imminent danger." S. Rep. No. 95-181, at 31 (stating that the Board interpreted the applicable language in "an unnecessarily and improperly strict view . . . and has required that the violation be so serious as to very closely approach a situation of 'imminent danger'").[24] By drifting further and further from the language of the Mine Act, the Commission has allowed that same strict view to prevail. It appears that history has repeated itself.

iii. A Return to the Statutory Framework to Analyze Significant and Substantial Sanctions

The Commission has for decades expanded and tinkered with a test that was too removed from the language of the Mine Act and too confusing to ever function as intended. As has been shown above, the multiple S&S tests that the Commission created usually led to more confusion than clarification. Furthermore, though they had the appearance of legal tests, they failed to function as such. Various steps were redundant or unnecessary, while the operative steps were often so imprecise that the same facts led to contradictory results when applied by different judges. A test that does not provide a reliable answer is not a test. Indeed, the Supreme Court

[23] When Congress uses a term in one section of a statute but a different term in another, that difference is presumed to be intentional. *See, e.g.*, *Village of Barrington, Ill v. Surface Transp. Bd*., 636 F.3d 650, 661 (D.C. Cir. 2011) (citing *Russello v. U.S*., 464 U.S. 16, 23 (1983)).

[24] Specifically, in *Eastern Associated Coal* the Board had required that the Secretary demonstrate that a violation "posed a probable risk of serious bodily harm or death." 3 IBMA at 334.

wrestled with this very issue last year when it issued its landmark decision in *Loper Bright Enterprises v. Raimondo*, explaining that it was overturning the Chevron doctrine in part because what had been intended to be a simple two-step test had become unworkable. 603 U.S. 369, 375 (2024). According to the Court, *Chevron* deference was inappropriate and failed to provide a clear or easily accessible standard:

> Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again. Our attempts to do so have only added to *Chevron's* unworkability, transforming the original two-step into a dizzying breakdance. *See Adams Fruit Co.*, 494 U.S. at 649–650, 110 S.Ct. 1384; *Mead*, 533 U.S. at 226–227, 121 S.Ct. 2164; *King*, 576 U.S. at 486, 135 S.Ct. 2480; *Encino Motorcars*, 579 U.S. at 220, 136 S.Ct. 2117; *Epic Systems*, 584 U.S. at 519–520, 138 S.Ct. 1612; on and on. And the doctrine continues to spawn difficult threshold questions that promise to further complicate the inquiry should *Chevron* be retained. *See, e.g., Cargill v. Garland*, 57 F.4th 447, 465–468 (CA5 2023) (plurality opinion) (May the Government waive reliance on *Chevron*? Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?), aff'd, 602 U. S. 406, 409 (2024).
>
> Four decades after its inception, *Chevron* has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of "say[ing] what the law is." Marbury, 1 Cranch at 177. And its continuing import is far from clear.
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> . . .
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> Nor has *Chevron* been the sort of "'stable background' rule" that fosters meaningful reliance. Post, at 2298, n. 1 (opinion of KAGAN, J.) (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 261, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010)). Given our constant tinkering with and eventual turn away from *Chevron*, and its inconsistent application by the lower courts, it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case. And even if it were possible to predict accurately when courts will apply *Chevron*, the doctrine "does not provide 'a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.'" *Janus*, 585 U.S. at 927, 138 S.Ct. 2448 (quoting *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 186, 138 S.Ct. 2080, 201 L.Ed.2d 403 (2018)). To plan on *Chevron* yielding a particular result is to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the

> stability that comes with them. History has proved neither bet to be a winning proposition.

Id. at 409-410. The Supreme Court could easily be discussing the Commission's S&S test, for the reasons we have outlined. The Commission's S&S test is neither clear nor simple. In fact, attempts to clarify the Secretary's burden have instead added to the tests overall unworkability, ultimately producing a test that further complicates the issue and no longer reflects the language of section 104(d)(1). Accordingly, our S&S test is an impediment to, rather than a tool for, applying the law.

For the reasons stated herein, we find that *Peabody* is not consistent with section 104(d)(1).[25] Section 104(d)(1)'s plain language should be applied directly by the Commission and its judges when reviewing cases that involve the Secretary's use of the S&S designation. We believe that in drafting the language of section 104(d)(1) Congress made its intent clear so that the Commission could interpret the use of S&S by its own stated and plain terms and not through an entirely separate (and non-textual) formulation.

Though the Commission has acted in good faith over the decades in modifying and clarifying the S&S test, it has become clear that a formalized test does more to confuse the statutory provision and has led us to a point where the test bears very little relationship to the statutory language. Therefore, rather than trying to create a new test or modify the string of old ones—a move that history has shown will lead to further straying from the statute—we find that a formalized test for S&S is unnecessary and problematic. Instead, we will simply define the terms of the provision and allow MSHA and administrative law judges to apply the statutory language as defined to any given citation. The Commission must return to applying the law as written in section 104(d)(1) and as interpreted by appellate courts. That is, whether the violation cited, "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C § 814(d)(1).

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-33 (2000) (citations omitted). Considering the syntax of section 104(d)(1), it is clear that the phrase "significantly and substantially" modifies the term "contribute." *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC at 677 ("It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.").

In determining the meaning of statutory terms, the Commission and courts have also considered the dictionary definitions of common terms. *See, e.g., CalPortland Co., Inc.*, 839 F.3d 1153, 1163 (D.C. Cir. 2016) (finding a dictionary definition of the term "reinstatement" in

[25] Our decision here is limited to the S&S test and does not concern other aspects of the Commission's S&S caselaw. For example, Commission cases stating the necessity of assuming the existence of an emergency when considering an emergency standard or cases stating the analysis should be conducted assuming continued normal mining operations are not impacted. We are simply reformulating the interpretation of section 104(d)(1) to follow the statutory language.

section 105(c)(2), 30 U.S.C. § 815(c)(2), of the Mine Act clarified Congressional intent). Here, the common dictionary definition of terms used in section 104(d)(1) clarify its meaning. 30 U.S.C. § 814(d)(1) ("could significantly and substantially contribute to the cause and effect" of a hazard.). Merriam-Webster defines "contribute" as "to play a significant part in bringing about an end or result." *Merriam-Webster Collegiate Dictionary* 252 (10th ed. 1999). A "cause" is "a reason for an action or condition" or "something that brings about an effect or a result." *Id.* at 182. An "effect" or "something that inevitably follows an antecedent (as cause or agent)." *Id.* at 367. When these terms are read together – "contribute" "cause" and "effect" – and their ordinary definitions are considered, it is clear that Congress was concerned about violations to which a miner could be exposed that could *result* in a hazard.[26]

The inclusion of the term "could" indicates that section 104(d)(1) does not require that the Secretary demonstrate that the hazard would be "reasonably likely" to occur. Rather, the term "could" refers to violations that have the potential to contribute to a mine safety and health hazard. *See also Cumberland Coal Res.*, 717 F.3d at 1026-27 (D.C. Cir. 2013) (a judge must consider whether a violation has an intrinsic capacity to contribute to a hazard).

In sum, in order to affirm an S&S designation, the plain language of section 104(d)(1) dictates that the Secretary must demonstrate that the violation to which miners are exposed *could* make an S&S contribution to a mine safety or health hazard. This is consistent with the initial portion of the Commission's original *Mathies* test (without the surplusage of Step 3 and Step 4). 6 FMSHRC at 3-4 (Step 2 requires a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation). Importantly, it is also consistent with the D.C. Circuit's decision in *Sec'y of Labor v. Jim Walter Res.*, 111 F.3d at 917.[27] In *JWR*, the D.C. Circuit clarified that *Mathies* Step 2 contains two separate inquires: (1) whether there is a hazard to which the violation might contribute and, if so, (2) whether the violation significantly and substantially contributes to that hazard. *Id.*

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[26] For a hazard to "effect" miners, the Secretary must demonstrate that miners could be exposed to the hazard during continued mining operations.

[27] In *JWR*, the operator was cited for an S&S violation of a mandatory safety standard prohibiting the accumulation of combustible materials in "active workings," *i.e.*, "any place in a coal miner where miners are normally required to work or travel." *Id.* at 916. A ventilation curtain ran across the cited trash pile, dividing it and placing the bulk of the pile outside of active workings. *Id.* The Commission concluded that the trash outside of active workings was not relevant to the S&S analysis. The D.C. Circuit agreed, stating that "[b]y focusing the decisionmaker's attention on 'such violation' and its 'nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards." *Id.* at 917. Stated another way, the S&S analysis requires the Judge to focus solely on the violative conditions, and if those conditions "significantly and substantially" contribute to any hazard that "might" exist. *See* 30 U.S.C. § 814(d)(1) ("[I]f he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.").

Notably, the Mine Act's graduated enforcement scheme contains a variety of tools for MSHA to issue increasingly severe enforcement such as section 104(d)'s "unwarrantable failure" designations and section 104(e)'s "pattern of violations" designation. 30 U.S.C. § 814(d)(1);30 U.S.C. § 814(e). The "significant and substantial" designation is but an initial step on the ladder of a progressive enforcement system and should be interpreted consistently within its statutory role.[28]

Finally, the Commission's intention in reformulating the S&S analysis is not to change the frequency with which Section 104(d) is cited by MSHA inspectors. That is a public policy question for the Secretary of Labor to decide and for conditions in the nation's mines to dictate. Our only role is to ensure the test used by the Commission is consistent with the language of section 104(d)(1) of the Mine Act and can be consistently applied.

2. Application of the Statutory Language in Section 104(d)(1) to the Judge's S&S Findings

The Judge affirmed the S&S designations for both violations at issue in this appeal. Below we review the facts of the case through the statutory test contained in section 104(d)(1) pursuant to the definitions and conclusions we reached above. For the reasons below, we find that for both violations the Judge's findings are supported by substantial evidence and establish that the violations significantly and substantially contributed to a mine safety or health hazard within the meaning of Section 104(d)(1).

a. Citation No. 9204245 (Pin Violation)

The inspector testified that the cited condition, a missing horizontal pin from the gate shield, could play a significant and substantial role in exposing miners to the hazard of a vertical pin becoming a projectile and striking a miner. Tr. 42-53, 61. The Judge credited the inspector's testimony and found that the "Secretary has presented credible evidence that the shear pins, which are designed to break, have been projected from the clevis upon breaking." 44 FMSHRC at 456. Equally important to the Judge's finding that the violation could contribute to a mine

[28] The D.C. Circuit has previously instructed that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are deliberately changed not casually ignored." *Lone Mountain Processing, Inc*., 709 F.3d 1161, 1164 (D.C. Cir. 2013) (citing *Greater Boston Television Corp*., 444 F.2d 841, 852 (D.C. Cir. 1970)). Our decision here today reflects the plain meaning of section 104(d)(1) and is consistent with the decisions of the D.C. Circuit.

For instance, ALJs should continue to analyze citations in the context of continued mining operations and without consideration of redundant safety measures. Similarly, citations of emergency standards should still be considered in light of an emergency situation.

We also note that the effect of our decision should not be to either increase or decrease the number of S&S citations. That is a public policy question for the Secretary of Labor to decide and for conditions in the nation's mines to dictate. Our only role is to ensure the S&S test used by the Commission is consistent with the language of section 104(d)(1) of the Mine Act.

hazard is that he found miners were within the area where the vertical pin would be airborne. 44 FMSHRC at 460. ("All witnesses . . . testified that miners at this mine generally operate shields . . . from two shields away at a distance of seven-to-eleven feet."). That is, they would be exposed to any hazard.[29] The Judge applied the *Mathies* and *Peabody* tests to find that the violation was S&S. While the Judge's application of the *Mathies* and *Peabody* tests was not in error at the time his decision was issued, we take the opportunity now to apply the plain-language reading of the statute that we announced above.[30]

As the inspector testified, a miner within eight feet of the shield could be struck with a projectile and that several such incidents had occurred in the past. 66-67. The operator alleged instead that a miner would be at least two shields away, a distance of eleven feet, and that there had been no injuries ever recorded. Tr. 68. The Judge reasonably credited the inspector's testimony and affirmed his S&S designation. 44 FMSHRC at 460. On review, we find that the mine safety or health hazard was a flying projectile to which miners could be exposed. A missing pin in a gate shield where miners are present could significantly and substantially contribute to a flying pin hazard. As the Commission has previously observed, "[i]t is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *Sec'y of Labor v. Youghiogheny & Ohio Coal Co*., 9 FMSHRC at 677. This standard is met by the evidence in the record.

Substantial evidence supports the Judge's determination that the violative condition could significantly and substantially contribute to the hazard of a miner being struck by a vertical pin. Further, substantial evidence supports the Judge's determination that miners were exposed to this hazard (or would have been exposed under normal continuing mining operations). As a result, we affirm the Judge's determination that the citation was properly cited as having an S&S contribution.

b. Citation No. 9204250 (Globes Violation)

The operator argued that the Judge erroneously found that an "explosion within the enclosure was reasonably likely (ALJ 15-16)." PDR at 10. The operator argued that the Judge ignored testimony that "several unlikely events would have to occur simultaneously for any hazard related to the alleged condition to occur." PDR at 22. The operator also objected to the Judge's finding that that "there was nothing in the record proving that LED bulbs were in fact present at the time of the citation[.]" PDR at 23.

For the reasons outlined extensively above, we have rejected the *Newtown* and *Peabody* analyses. As a result, the Judge was not required to determine whether an explosion was

[29] Had the Judge credited the operator's testimony that miners were not in the area where the vertical pin would be airborne under continued normal mining conditions, this citation would not have been S&S under the plain language of section 104(d)(1). However, substantial evidence supports the Judge's determination.

[30] While we apply the interpretation of section 104(d)(1) announced above we note, in the alternative, that even if we applied the now-discarded *Peabody* test, we would have affirmed the Judge's findings with respect to both citations for the reasons set forth in his decision.

reasonably likely to occur. *See Cumberland Coal Res*., 717 F.3d at 1026-27 (D.C. Cir. 2013) (Section § 104(d)(1) "refers to the violation's intrinsic capacity to contribute to the hazard, not to any specific probability that it will."). Instead, we again apply the plain statutory language to the facts in this matter. The inspector testified that the cited condition, cracks in the light fixture globes, could play a significant and substantial role in exposing miners to the hazard of a methane explosion. Tr. 72-81; Sec. Ex. 4. In determining this hazard, the inspector noted that the mine liberated considerable amounts of methane and had suffered methane ignitions in the past. The Judge credited the inspector's testimony and found that that a light fixture failure must be "assumed to be able to ignite methane that naturally enters the enclosure." 44 FMSHRC at 465. The Judge found the ignition within the globes could escape into and ignite the general mine atmosphere outside the globe, finding that the mine was gassy and represented a "constant threat[.]" *Id*. at 467. Finally, in the event of a methane ignition, any miners in the area would be exposed to the hazard.

Further, the Judge properly disregarded the operator's evidence that the violative condition could not expose miners to a hazard because it alleged that the continuous miner had LED lights. As the Judge determined, there is no evidence in the record that this particular miner, in fact, had LED lights. Furthermore, even if it did, nothing in the record supports the operator's contention that LED bulbs are "nearly intrinsically safe" or that they could not cause a methane ignition. *Id*. at 465.

As discussed above, the proper inquiry is whether the violation could have significantly and substantially contributed to the cause and effect of a hazard. Here, substantial evidence supports the Judge's determination that the violative condition could significantly and substantially contribute to the hazard of a methane explosion. Further, substantial evidence supports the Judge's determination that miners were, or would have been, exposed to this hazard. As a result, we affirm the Judge's determination that the citation was properly cited as having an S&S contribution.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision and direct Consol to pay the civil penalties ordered by the Judge.

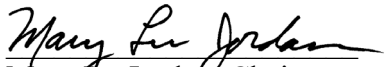
Timothy J. Baker, Commissioner

Moshe Z. Marvit, Commissioner

Chair Jordan concurring, in result:

I join my colleagues in affirming the Judge's findings and conclusion that Consol Pennsylvania Coal Company violated the mandatory safety standard at 30 C.F.R. § 75.1725(a) and that the violative condition was the result of a low degree of negligence.

I also affirm the Judge's decision upholding the "significant and substantial" ("S&S) designation accorded the violations of the safety standards at 30 C.F.R. § 75.1725(a) and 30 C.F.R. § 75.503. While I do not join the majority in their S&S analysis, I appreciate their concern that the standard necessary to support an S&S designation may have evolved so as to now approach the standard applied to an imminently dangerous condition, and I have on occasion noted what I perceived to be inconsistencies between the Commission's S&S standard and Circuit Court case law. *See Peabody Midwest Mining*, 42 FMSHRC 379, 393-99 (June 2020) (dissenting opinion); *Newtown Energy*, 38 FMSHRC 2033, 2051-53 (Aug. 2016) (concurring and dissenting opinion).



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