FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 29 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2011-1351-M WEST 2011-1153-RM
SMALL MINE DEVELOPMENT	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is a single citation issued to Small Mine Development ("SMD") for its failure to install a refuge chamber while engaged in the initial development and exploration of an ore body. On December 11, 2012, the Judge affirmed the citation and the significant and substantial ("S&S")[1] designation. 34 FMSHRC 3193 (Dec. 2012) (ALJ).

SMD filed a petition for discretionary review in which it asserts that the Secretary's interpretation of 30 C.F.R. § 57.11050(a)[2], requiring a refuge chamber when there is only one functioning escapeway, is contrary to the standard's plain meaning and not entitled to

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

[2] Section 57.11050(a) requires that:

> Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

deference. In addition, SMD argues that the citation was not properly designated as S&S. For the reasons that follow, we affirm the Judge's decision.

I.

Factual and Procedural Background

SMD was contracted to drive the initial exploratory drift at Newmont Gold's Vista Mine in Nevada in order to determine the feasibility of mining a gold ore deposit. The exploratory drift was designed to be 16 feet wide, 16 feet high, and 1,371 feet in length with a decline from the portal of 9.5%. The drift was also designed to have four crosscuts, which were intended to eventually accommodate storage, drilling stations, and a refuge chamber.

On June 7, 2011, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a spot inspection of the Vista Mine after hearing that the mine had not yet installed a refuge chamber. When the inspector arrived at the mine site, he observed a refuge chamber, forklift, loader, and various trucks near the portal. Although the inspector did not enter the mine, he was able to determine from a mine map that SMD had advanced the drift approximately 1000 feet and was nearing completion of the fourth crosscut, but had yet to install an emergency refuge. Tr. 21-28.

Based on these observations, the inspector issued Citation No. 8605242, alleging a violation of section 57.11050(b)[3] for SMD's failure to deploy a refuge chamber while the mine had only one escapeway. The inspector believed that if the conditions continued unabated, it was reasonably likely that the lack of a refuge would lead to a fatal injury were there to be a roof fall or equipment fire that prevented miners from getting out through the mine's sole escapeway. Tr. 32-34.

The Judge concluded that because both parties had put forth reasonable interpretations regarding the obligation to provide a refuge chamber in light of the conditions existing at the time of the inspection, the standard was ambiguous. The Judge found further that deference to the Secretary's interpretation was warranted because it was reasonable, and consistent with the language and safety-promoting purposes of the standard and the Mine Act. *Id.* at 3203, 3205-06.

In addition, the Judge affirmed the Secretary's negligence and gravity findings. On the S&S issue, the Judge found that in the event of a ground fall or equipment fire, the lack of a refuge was reasonably likely to result in serious injuries. *Id.* at 3208. The Judge rejected SMD's arguments that additional safety measures provided by the operator would reduce the likelihood of injury and affirmed the Secretary's S&S designation. *Id.* at 3207-08.

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[3] Prior to the hearing, the Judge granted the Secretary's motion to plead a violation of 30 C.F.R. § 57.11050(a) in the alternative. On appeal, the parties do not rely on the applicability of subsection (b). As a result, we need not address the applicability of subsection (b) in this decision.

The Commission granted SMD's petition for discretionary review.

II.

Disposition

A. Regulatory Interpretation

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

The parties disagree as to section 57.11050(a)'s meaning. SMD argues that a literal reading of the standard would require a refuge chamber only "while a second opening to the surface is being developed." According to the operator, therefore, if no second opening is developed, no refuge chamber is required. Because the standard only recommends, but does not require, a second escapeway during exploration or development of an ore body, SMD contends that an operator who chooses not to provide that second escapeway, cannot be required to install a refuge chamber.

The Secretary argues that taken together, the first two sentences of the standard clearly require that mines have two escapeways, and that if a mine does not have a second escapeway, it must have a method of refuge and one escapeway. The Secretary contends that the third sentence ("a second escapeway is recommended, but not required, during the exploration or development of an ore body") dispenses with the two-escapeway requirement for mines in exploration and development, but remains silent about a refuge requirement, creating an ambiguity. Oral Arg. at 60-61. In light of this ambiguity, the Secretary argues that the standard must be read as a whole and that doing so reveals its general aim to provide miners with two means of survival during an emergency. Therefore, a refuge chamber must be provided whenever there is only one functional escapeway.

We conclude that the standard is ambiguous. It does not directly state whether mines are required to have a refuge chamber during the exploration or development of an ore body when only one escapeway will be developed. It is unclear the extent to which each sentence should be read in conjunction with one another or how the general requirements of the first two sentences are impacted by the third sentence. While not explicitly stating that a refuge chamber is required in all situations where a mine has only one escapeway, the standard, by virtue of its silence, leaves open the question of whether the refuge requirement applies in such

circumstances. *See Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 782 (6th Cir. 2001) (citing *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001)).[4]

The standard states that a refuge chamber is required when a second escapeway is being developed, but it is ambiguous because it is silent as to whether a refuge chamber is mandated when only one escapeway is anticipated during exploration or development. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 10-11 (D.C. Cir. 2003) (finding regulatory language ambiguous in part because the wording clearly mandated how respirable dust must be measured under some circumstances, but was silent as to how it should be measured under others); *E. Associated Coal Corp.*, 27 FMSHRC 238, 242 (Mar. 2005) (finding training regulation ambiguous because it did not explicitly address the disputed issue of whether hazard training must include provisions of a mine's roof control plan). Thus, "[n]eedless to say, the language of this section does not unambiguously resolve this dispute." *Excel Mining,* 334 F.3d at 8.

We analyze the text of the standard construing all parts together, interpreting the meaning not from certain words in a single sentence but from the standard as a whole, and viewing it in light of its general purpose. 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.5 (7th ed. 2014); *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728-29 (8th Cir. 2003) (applying rules of statutory construction with equal force to discern an issue of regulatory construction). We agree with the Secretary that the third sentence does not expressly rescind the refuge requirement contained in the first two sentences. *See* Comm'n Oral Argument Tr. 34.[5] Thus, our dissenting colleagues, in stating that the third sentence

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[4] We reject the dissent's argument that the *Takacs* and *Whetsel* cases do not include the concept that a regulation's ambiguity may be shown by its silence as to a particular set of factual circumstances. Slip Op. at 13. Both cases involved claims for overtime compensation under the Fair Labor Standards Act ("FLSA"). In both cases, the respective employer-defendants had made deductions from employees' pay which were inconsistent with the contention that the employees were "exempt employees" under FLSA, but had changed that policy and restored the deductions. The employers thus contended that they had not lost the ability to characterize the employees as exempt under FLSA on the basis of the "window of correction" principle contained in 29 C.F.R. § 541.118(a)(6). The Secretary of Labor filed amicus briefs in both cases, arguing that the "window of correction" regulation was ambiguous, and seeking deference for his interpretation that the employers' actions were not covered by the "window of correction" principle. Agreeing with the Secretary, the 7th Circuit in *Whetsel* found the regulation to be ambiguous, stating: "We rely on the fact that the regulation *does not explicitly state* that it is available to correct a policy or pattern of deductions, *thus leaving open the question of whether it applies to those circumstances.*" 246 F. 3d at 901 (emphasis added). The 6th Circuit in *Takacs* explicitly relied on this statement by the *Whetsel* court. 246 F. 3d at 782. Similarly, we find that 30 C.F.R. § 11050(a) is silent, and thus ambiguous, as to the issue of whether refuge chambers are required in exploration or development mines with only one escapeway.

[5] The Secretary's view that the first two sentences should be read together, with the third sentence only "taking back" the two-escapeway requirement during exploration and development but not "taking back" the refuge requirement, is supported by the regulatory

history. An earlier version of the first sentence, which was identical in all pertinent respects to the first sentence of the current standard, was proposed on June 24, 1970 to replace the then-existing standard. The proposed standard read:

> Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other.

Health and Safety Standards for Metal and Nonmetallic Underground Mines, 35 Fed. Reg. 10,305, 10,307 (proposed June 24, 1970) (to be codified at 30 C.F.R. pt. 57). By its terms this proposal provided that miners always have two ways of escape.

On December 17, 1971 the Secretary revised the proposed standard by adding a sentence which was identical to the second sentence in the current standard. The revised proposal read:

> Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other. A method of refuge shall be provided while a second opening to the surface is being developed.

Health and Safety Standards for Metal and Nonmetallic Underground Mines, 36 Fed. Reg. 24,044, 24,045 (proposed Dec. 17, 1971) (to be codified at 30 C.F.R. pt. 57).

Thus, when the second sentence was originally drafted, the proposal retained the requirement that all mines have two escapeways. The second sentence required that a refuge be provided in the one instance where it was contemplated that only one escapeway would exist in the mine, i.e., while the second escapeway was being developed. This regulatory history supports the Secretary's argument that the first two sentences taken together mandate that miners always have two ways to safety.

It was not until nearly six years later that the third sentence was added to what became the final rule:

> A second escapeway is recommended, but not required, during the exploration or development of an ore body.

New and Revised Health and Safety Standards for Metal and Nonmetal Mines, 42 Fed. Reg. 57,038, 57,043 (Oct. 31, 1977) (to be codified at 30 C.F.R. pts. 55-57).

This sentence provides for an exception to the two-escapeway requirement during exploration or development work. With respect to miner safety it creates the same circumstance contemplated in sentence two, i.e., the existence of only one escapeway in the mine. As the Secretary correctly notes, despite creating the same circumstance, sentence three is silent as to whether a refuge is required.

addresses one-escapeway mines, slip op. at 12, are only half right — the sentence addresses one-escapeway mines, but only as to the escapeway requirement, not the refuge requirement.[6]

The dissent's assertion that the standard unequivocally provides only one instance where a refuge is required, slip op. at 15, is inconsistent with its critique of us for "miss[ing] or ignor[ing] the structure of section 57.11050 . . . [which] contains two subsections [including] [s]ubsection (b) [which] deals with placement of refuges in two-escapeway mines." Slip op. at 12. Section 57.11050(b) does indeed create a requirement for a method of refuge "for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method." Thus, there are *two* circumstances where a refuge chamber is required in an underground metal or non-metal mine. The second circumstance occurs even though a mine has two separate escapeways. The fact that section 57.11050(b) requires a refuge chamber when a miner has to travel a long distance to the surface even though two separate escapeways exist — in effect, a third method of safety — supports the Secretary's contention that the first two sentences of section 57.11050(a) taken together mandate that miners always have at least two ways to safety.

Moreover, under the literal approach adopted by the dissent, the careful operator who acts on the recommendation in the third sentence and plans to construct a second escapeway during exploration and development would have to provide a refuge while there was just one escapeway, while the less prudent operator who has no plans to construct a second escapeway would have no requirement to provide a refuge. This leads to an absurd result that we cannot sanction, providing an additional reason why we reject the asserted "plain language" approach to interpreting the standard. *See Cent. Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001);

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[6] The dissent points to our recent decision in *Big Ridge, Inc.*, 37 FMSHRC ___, Nos. LAKE 2011-699-R et al. (Sept. 9, 2015), as a model for determining whether regulatory language is ambiguous. *Big Ridge* involved the interpretation of section 103(j) of the Mine Act, 30 U.S.C. § 813(j), which sets forth the responsibilities of an operator and the Secretary after a mine accident. In that case, we held that section 103(j) of the Mine Act was clear and unambiguous because Congress had directly spoken to the issue at hand.

Section 103(j) explicitly sets forth separate obligations for the operator and authorization for the Secretary in two distinct scenarios: in the event of an accident (where an operator must notify the Secretary and take measures to prevent the destruction of relevant evidence) and in the event of an accident in which rescue and recovery work is necessary (where the Secretary is authorized to issue a 103(j) control order when he deems it appropriate, to protect individuals and supervise and direct rescue and recovery activities). We thus relied on the plain language of the statute to reject the Secretary's contention that he was authorized to issue a 103(j) control order in the absence of rescue and recovery work. *Big Ridge, Inc.*, 37 FMSHRC at ___, slip op. at 5. However, such clarity is not found in section 57.11050(a), where the obligations of the operator during exploration and development are muddled because of the question of how the regulation's third sentence modifies the obligations imposed by the first and second sentences.

Rock of Ages Corp., 20 FMSHRC 106, 122 (Feb. 1998); *R.G. Johnson Co., Inc. v. Apfel*, 172 F.3d 890 (D.C. Cir. 1999) (rejecting the district court's literal reading of a statute because the interpretation would frustrate the clear intent of Congress).

As the D.C. Circuit noted in upholding the Secretary's interpretation of a preshift examination standard, "[t]he standard of review that governs interpretive dueling before this court compels us to defer to the Secretary of Labor's interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulations." *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82, 83 (D.C. Cir. 2005). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). In interpreting the meaning of regulatory language, the Commission avoids focusing on an isolated phrase at the expense of the overall intent of the regulators and the safety objectives that the regulation is attempting to achieve. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (citations omitted) ("[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions."); *Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) ("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (quoting *Emery Mining Co. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

Upon examination of the standard as a whole, it is reasonable to conclude that the drafters intended for miners to have more than one method of survival in case of an emergency. Section 57.11050(a) provides that mines in production shall have at least two functional escapeways at all times. In circumstances where a miner does not have ready access to more than one means of escape, an operator must provide a refuge chamber. Choosing to avail itself of the option to operate with only one escapeway during exploration or development, as the standard permits, should not thereby permit the operator to also deprive miners of the alternate means of survival provided by a refuge chamber.

Given the importance the standard places upon providing duplicative means of survival in an emergency, it makes sense that the same protections be extended to miners who are engaged in exploration or development work, which carries with it many of the same dangers as production mining. SMD's interpretation, however, would frustrate the purpose of the standard and deprive those miners of an alternate means of safety were the sole escapeway to become impassable. In addition, SMD's interpretation would produce the anomalous result whereby operators who follow the Secretary's recommendation to install a second escapeway would have to provide a refuge chamber during construction of that escapeway, while operators who ignored the recommendation would be allowed to proceed with only one escapeway and no refuge chamber.

The operator argues that the Secretary's interpretation is not reasonable because it departs from agency precedent and was instituted without the benefit of notice-and-comment rulemaking.[7] According to SMD, prior to 2006 the Secretary followed an unwritten policy of

[7] The Administrative Procedure Act ("APA") does not require notice-and-comment rulemaking when an agency issues interpretive rules intended to advise the public of the agency's construction of the rules which it administers. *See, e.g., Shalala v. Guernsey Mem'l*

not requiring a refuge during exploration or development. The Judge, however, found that the Secretary never held a prior interpretation of the standard and there is not enough evidence in the record for us to disturb that finding. 34 FMSHRC at 3204.[8]

Even assuming, *arguendo*, such prior approach did exist, the Secretary's current interpretation would still warrant controlling deference. An agency's change in interpretation of a regulation does not require notice-and-comment rulemaking under the APA. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015). SMD cannot reasonably claim to be unfairly surprised by the policy change. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (deference is not appropriate when a change in agency interpretation creates an unfair surprise). SMD was first put on notice of the Secretary's interpretation in 2006 when it received a citation alleging a violation of section 57.11050(a). *See* Gov't Ex. 9. Although the 2006 citation was ultimately vacated by the Secretary, MSHA also published program information bulletins ("PIBs") in 2007 and 2009 clearly setting forth the Secretary's current interpretation. *See* Program Information Bulletin, No. P07-04, at 1-2 (Feb. 28, 2007) (Gov't Ex. 6); Program Information Bulletin, No. P09-09, at 1-2 (Jun. 4, 2009) (Gov't Ex. 7). Based upon this history, the Secretary's interpretation clearly represents a long standing, considered exercise of the Secretary's policy making authority. *See Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deference to an agency interpretation of an ambiguous regulation is warranted when it "reflect[s] the agency's fair and considered judgement on the matter in question").

Accordingly, the Secretary's interpretation deserves controlling deference.

B. S&S

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

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

Hosp., 514 U.S. 87, 99 (1995). *See also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015) (finding that notice-and-comment rulemaking is not required even when an agency changes its interpretation of one of the regulations it enforces).

[8] We note that in the incident described *infra*, footnote 9, MSHA required refuge chambers to be used in a mine being developed, which had only one escapeway, in 1978, after the present language of the regulation had become effective.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

SMD argues that the Secretary failed to proffer sufficient evidence showing that the lack of a refuge chamber would be reasonably likely to result in an injury. SMD reasons that because there was no evidence of ground problems or equipment malfunction, the inspector's conclusion was purely speculative. Moreover, SMD asserts that extra safety measures such as fire suppression systems, shotcrete, and emergency air and water tubing further decrease the possibility of serious injury in case of an emergency.

In terms of the *Mathies* test, the Judge, after finding a violation of section 57.11050(a), concluded that "there can be little doubt that the failure to provide a method of refuge created a discrete safety hazard, that of miners having no alternative means of survival in the event of an emergency that blocks the single escapeway." 34 FMSHRC at 3206. The Judge then determined that the Secretary had established a reasonable likelihood that the hazard contributed to will result in a serious injury, based on the history of numerous diesel equipment fires and ground failures at mines in the area. *Id.* at 3206-08.

Because this case involves a violation of an emergency evacuation standard, our application of the *Mathies* test is controlled by *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011), *aff'd, Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). In *Cumberland*, the Commission held that "[t]he hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation." 33 FMSHRC at 2364. This is because "[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Id.* at 2367.

When applying the *Mathies* analysis with respect to violations citing deficiencies with evacuation and shelter of miners in an emergency, we consider the S&S nature of those violations within the context of an emergency. *Cumberland*, 717 F.3d at 1027-28 (providing that "assuming the existence of an emergency" when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). The D.C. Circuit made clear that the likelihood of an emergency actually occurring is irrelevant to the *Mathies* inquiry, which focuses on the nature of the violation itself. *Id.* at 1027 (citing *Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)). *Cf. Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (Secretary need not prove the likelihood of an emergency when evaluating whether escapeway violations were S&S).

In the context of a roof fall or equipment fire that impedes passage through the mine's sole escapeway, the lack of a refuge chamber clearly contributes to the hazards posed by miners not having a safe location to await rescue. Without the fresh air and water supply and protection from fire and hazardous gases that a refuge chamber provides, there is a reasonable likelihood that miners would suffer serious, potentially fatal injuries before they can be

rescued.[9] Although other safety measures such as fire suppression systems and emergency air and water tubing may also help prevent injury in an emergency, the Commission and courts have soundly rejected the argument that additional safety measures should preclude a finding of S&S. *Cumberland,* 33 FMSHRC at 2369 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995)).

Accordingly, the Judge's application of the *Mathies* test to conclude that the refuge violation was S&S is fully supported by the record.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's finding of a violation and the S&S determination.

Mary Lu Jordan, Chairman

Robert F. Cohen, Commissioner

Patrick K. Nakamura, Commissioner

[9] MSHA has documented an incident where, in an underground zinc mine, a diesel-powered front end loader caught fire, blocking a 15-degree incline to the mine portal. The mine was under development and had only one escapeway. Twenty-nine trapped miners retreated to rescue chambers, where they waited more than five hours until a rescue team reached them and brought them out safely. MSHA, *Mine Safety and Health Magazine*, April-May 1978, page 19.

Commissioners Young and Althen, dissenting:

This case rests upon interpretation of the three brief and easily understood sentences that comprise 30 C.F.R. § 57.11050(a). The majority attempts, with lawyerly aplomb but no success, to rationalize the meaning of the sentences by ignoring or mischaracterizing the plain language of the section. The majority also erroneously affirms a meritless S&S determination made by an inexperienced inspector who did not even enter the mine. We respectfully dissent.

I.

Discussion

A. The Plain Meaning Rule

This case turns upon interpretation of section 57.11050(a). The section consists of three sentences:

> Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

In *Christensen v. Harris*, 529 U.S. 576, 588 (2000), the Supreme Court reinforced the primary rule of regulatory construction — the plain meaning of a statute or regulation governs. The Court made it clear that neither an agency nor a subsidiary tribunal may substitute its ad hoc judgment for the words of a regulation, stating:

> But *Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted.

Id.

Obviously, the plain language rule applies with full force and effect to the Commission's interpretations of the Mine Act, regardless of the interpretation urged upon it by the Secretary. *See Vulcan Constr. Materials, L.P. v. FMSHRC,* 700 F.3d 297, 312 (7th Cir. 2012) ("Because we have determined that the plain meaning of § 815(c) requires that we reverse the Commission, we do not need to reach the question of the proper deference owed to the Secretary's interpretation of the statute."); *Performance Coal Co.* v. *FMSHRC,* 642 F.3d 234, 238 (D.C. Cir. 2011)

("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there") (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The same holds true with respect to the regulations implementing the Mine Act. *See Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998) (citing *Dyer v. United States,* 832 F.2d 1062, 1066 (9th Cir. 1987)); *Morton Int'l, Inc.*, 18 FMSHRC 533, 538–39 (Apr. 1996) (stating that if violation of regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what agency intended but did not adequately express) (quoting *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976))).

B. Section 57.11050(a) does not require refuge chambers in one-escapeway exploration projects.

Section 57.11050(a) follows classic rules of legal draftsmanship. The first sentence creates a general rule. The following two sentences establish distinct and disconnected exceptions to that general rule, based on a mine's status. Nothing in the language or structure of the section or, for that matter, in the history of the section's promulgation and enforcement, indicates any interrelationship between the separate exceptions that follow the expression of the general rule.

The first sentence of section 57.11050(a) creates an obligation for underground mines to have two escapeways: "Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others." 30 C.F.R. § 57.11050(a). Obviously, this sentence does not consider, let alone require, refuge chambers in any mine. The following two sentences create separate exceptions to the two-escapeway obligation. Only the second sentence requires refuge chambers.

The second sentence creates a narrow, time-limited exception to the two-escapeway requirement — namely that "[a] method of refuge shall be provided while a second opening to the surface is being developed." 30 C.F.R. § 57.11050(a). Recognizing that there cannot be two escapeways from the very opening of a mine, the second sentence exempts operators from the requirement for a second escapeway while the second escapeway is constructed. It conditions that exception on the provision of a refuge chamber during the period of construction. This exception is limited to the period necessary for construction of the second escapeway. The sentence addresses one, and only one, circumstance — the construction of a second escapeway.

The third sentence creates a complete exception from the requirement for two escapeways, but is limited to a narrow class of small and evanescent mines: "A second escapeway is recommended, but not required, during the exploration or development of an ore body." 30 C.F.R. § 57.11050(a). In creating this exception, MSHA did not mention, let alone establish, a requirement to use a refuge chamber in exploration mines.

The majority misses or ignores the structure of section 57.11050. The section is entitled "Escapeways and refuges." It contains two subsections. Subsection (a), which is at issue here, deals with escapeways. Placement of refuge chambers is not the subject matter of subsection (a).

Subsection (b) deals with placement of refuges in two-escapeway mines. The second sentence of subsection (a) requires a refuge chamber as the "second" means of protection while the second escapeway is constructed in mines required to have two escapeways.

The incongruity of asserting that the second sentence of section 57.11050(a) requires a refuge in a permissible one-escapeway exploration project is obvious upon the briefest reflection. The third sentence plainly states that only one escapeway is required in an exploration mine. The second sentence requires the provision of a refuge chamber "while a second opening to the surface is being developed." 30 C.F.R. § 57.11050(a). It distorts all meaning, and defies commonsense, to read the second sentence to require a refuge chamber where a second escapeway is neither required nor under construction.

Reading the second sentence to mandate a refuge chamber in an exploration mine would mean the sentence requires a refuge chamber if one set of circumstances exists (ongoing construction of a second escapeway) and also requires a refuge chamber if that same set of circumstances does not exist (no ongoing construction of a second escapeway in an exploration mine). Thus, the majority expands a brief, clear, and narrow exception by permitting the Secretary to add a wholly new requirement. In effect, it amends the second sentence to read, "A method of refuge shall be provided while a second opening to the surface is being developed *and also shall be provided in an exploration mine with one escapeway.*"

Moreover, the exception in the second sentence is limited by the time necessary to construct a second escapeway. Such time limitation would be irrelevant to a one-escapeway exploration project where no second escapeway is being or will be constructed unless the exploration mine moves to production. At that point, the refuge chamber and second escapeway would be mandatory.

The majority fails to attempt to reconcile its expansion of the second sentence with the words of the regulation. The majority's rationale is a stand of twigs too weak to survive the gentlest breeze: an argument that the regulation is "silent" and, therefore, amenable to the majority's policy preference and two subsidiary arguments — resort to regulatory history that actually works directly against them and a policy argument based only upon their personal wishes as to what the section should provide.

With nothing in the language of the section or regulatory history upon which to rely, the majority cites *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776, 782 (6th Cir. 2001), which in turn cites *Whetsel v. Network Property Services, LLC*, 246 F.3d 897 (7th Cir. 2001), for the proposition that section 57.11050 is "silent" with respect to one-escapeway exploration mines, and, therefore, ambiguous.

Neither *Takacs* nor *Whetsel* rests upon "silence." In *Takacs* and *Whetsel*, the issue was whether certain deductions from the plaintiffs' pay caused the employees not to be exempt employees for overtime purposes under the FLSA and relevant Department of Labor regulations. The case concerned the "window of correction" test to determine whether the "salary basis" requirement of regulations promulgated under the Fair Labor Standards Act ("FLSA") properly applied to certain specific employees. They involved the issue of whether those courts should

defer to the Secretary's interpretation of the regulation. In *Whetsel*, the employer cited provisions of the regulation that it asserted implied the correctness of its position under the principle of *expressio unius est exclusio alterius*. The court found the principle to have "reduced force" in the context of interpreting regulations. 246 F.3d at 902. It was in rejecting use of the provisions cited by the plaintiff to imply the interpretation asserted by the plaintiff that the court noted the failure of the regulation to accept "explicitly" the plaintiff's interpretation. *Id.* at 901. The cases do not involve "silence" but rather the court's unwillingness to imply a proffered interpretation from other provisions of the regulation under the circumstances of the cases.

The Unites States Court of Appeals for the D.C. Circuit has reversed the Commission for hearing "sounds in the silence" despite plain statutory language. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 158 (D.C. Cir. 2006). In this case, there is no "silence" — no need for any implication. The regulation explains clearly and unequivocally when a refuge is required. The regulation simply does not speak the words the majority wishes to hear. Ironically, the majority's hearing impairment occurs just a month after the entire Commission correctly applied the plain meaning rule to reject a similar "silence" argument by the Secretary. *Big Ridge Inc.*, 37 FMSHRC ___, Nos. LAKE 2011-699-R, et al. (Sept. 9, 2015).[1] Notably, *Big Ridge* involved a section of the Mine Act, the language of which is not subject to clarification by the Secretary. Here, we consider a regulation that the Secretary could have modified through rulemaking if he decided to change the obligations imposed upon operators.[2]

In fact, by asserting that the second sentence of section 57.11050(a) is "silent" with respect to refuge chambers in one-escapeway exploration mines, the majority effectively concedes that the second sentence simply does not address one-escapeway mines. However, instead of concluding that because the next sentence addresses one-escapeway mines, such silence intentionally omitted one-escapeway mines from the ambit of the refuge chamber requirement, the majority acquiesces to the Secretary's mission of amending the regulation through litigation before the Commission.

The only argument by the majority even possibly drawn from the words of the section is the claim that the third sentence does not "expressly rescind" a refuge requirement they contend is "contained in the first two sentences." Slip op. at 4. The irresoluble problem for that statement is that the first "two" sentences of the section do not create a requirement for a refuge chamber. Only the second sentence creates an obligation for a refuge chamber, and the requirement could not be clearer. A refuge chamber is required "while a second opening to the surface is being developed." 30 C.F.R. § 57.11050(a). As is obvious to all but the majority,

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[1] In *Big Ridge*, the Commission rejected an argument by the Secretary that the first sentence of section 103(j) of the Mine Act is silent on the right of the Secretary to issue orders for the preservation of evidence and thus ambiguous. The Commission correctly applied the plain language of the section. 37 FMSHRC at ___, slip op. at 5.

[2] Program Information Bulletin No. P07-04, at 1-2 (Feb. 28, 2007) (Gov't Ex. 6); Program Information Bulletin No. P09-09, at 1-2 (Jun. 4, 2009) (Gov't Ex. 7) are classic examples of an attempt to make a de facto change of the substance of the rule without rulemaking.

neither the first nor the second sentence creates a requirement for a refuge chamber in a one-escapeway mine. Simply put, there is no requirement for a refuge chamber in a one-escapeway mine to "rescind."[3]

The "silence" argument by the majority essentially is a contention that refuge chambers are required for one-escapeway mines because the third sentence that expressly permits one-escapeway exploration and development mines does not expressly state that refuges are not required. To the majority, the regulation's plain requirement for a refuge chamber in one circumstance — "when a second escapeway is being developed" — means that the separate third sentence requires refuge chambers unless such sentence expressly provides that the duty is not required. Slip op. at 4-6. Under this contorted logic, the third sentence that says nothing at all about refuge chambers actually means a refuge chamber is required unless the regulation had gone on to say, "by the way, a refuge chamber is not required." The majority assiduously ignores, indeed flees from, acknowledging that the regulation plainly and unequivocally provides one specific circumstance when a refuge chamber is required. Again, that requirement is "while opening to the surface is being developed." 30 C.F.R. § 57.11050(a). Because the language of the section is plain, we need not deal with the majority's subsidiary arguments. The plain language governs. However, as seen below, the majority's subsidiary arguments serve only to strengthen the clear intent of the plain language.

The majority cites to regulatory history. Slip op. at 4 n.5. The regulatory history that exists, however, actually supports the plain language of the regulation demolishing the majority's reconstruction of the section based upon a "silence" theory.

The majority observes that, as proposed in 1971, the section required two escapeways in all mines except while a second escapeway was being constructed. They then assert the requirement for a refuge chamber for two-escapeway mines in 1971 must apply to one-escapeway mines permitted by the final regulations adopted six years later. In fact, promulgation of the exception in the final regulation to allow exploration and development mines to have only one escapeway is directly contrary to the majority's theory.

The promulgated regulation changed the proposed requirement that all mines have two escapeways in order to allow one-escapeway mines in exploration and development mines. When the agency made that change, it certainly was aware of the brief, clear requirement of the immediately preceding sentence providing for a refuge chamber while the operator constructs the second escapeway in a two-escapeway mine. Yet, the drafters omitted any requirement for a refuge chamber in the newly created category of one-escapeway mines. Certainly, if the agency desired to require a refuge in one-escapeway mines, it would have included such a requirement in adding the right for there to be one escapeway in exploration mines. Thus, the addition of an exception from the two-escapeway requirement without requiring a refuge chamber works

[3] The majority seems to fault us for the Secretary's drafting, stating that in failing to read into the standard language what the Secretary didn't include, we "are only half right – the sentence addresses one-escapeway mines, but only as to the escapeway requirement, not the refuge requirement." This is circular. Without the assumption of a "refuge requirement" by the majority, there is none.

against the argument that a requirement that applies only to two-escapeway mines was intended to extend to the new class of one-escapeway mines.

Finally, rather than making any additional legal argument, the majority turns to an unsupported hypothetical. For its hypothetical, the majority creates an operator that constructs a second escapeway from the very outset of a short-lived exploration mine. They call it the "careful" operator. Creation of this hypothetical "careful" operator allows the majority to dispense with any analysis of the clear language of the regulation without any record support. They then assert that the regulation would be unfair to their careful operator that is doing more than the clear application of the law, as written, would require. Thus, they characterize as an "absurd" result the typical and regular operation of the law through which operators that comply with the regulation's explicit terms are not punished regardless of whether other purely hypothetical operators do more than the law requires. In fact, of course, the majority seeks to punish the law-abiding operator for failing to act in accordance with their policy desires.

Apart from the logical fallacy inherent in its argument that where one does more than required, all must do more than required, the majority, consciously or not, chooses to view exploration mining as a "one size fits all" enterprise in which an operator of an exploration mine must immediately insert a refuge chamber at the mouth of the mine even though the entire mine will be short-lived and may not extend more than a few hundred feet with a total travel time of a few minutes.[4] In the real world, of course, exploration mines are not one size fits all. An exploration mine may be undertaken to confirm the likelihood of economically viable deposits or they may be prospecting ventures aimed at less likely targets for production mining. Exploration mines may prove or disprove the economic viability of opening a production mine at very different points in the exploration process. As exploration mining proceeds, points will arise at which the exploration is negative or positive for production mining.[5]

Given that MSHA defines exploration mining as narrowly as possible,[6] the absence of any bright-line test, and the short-term nature of any exploration, the exploration operator must

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[4] The majority seems not to understand that mineral exploration and development depends, *inter alia*, upon geologic, technical, environmental, and economic considerations. A plethora of variables enters into the undertaking of mineral exploration.

[5] We further note that making the "careful" operator the new legal benchmark would perversely discourage more careful practices, which would only be seen by operators as a toehold for more onerous regulation as requirements are ratcheted up. As they say, no good deed goes unpunished.

[6] MSHA's Program Policy Manual states:

> In this connection, "exploration or development of an ore body" should be used in its narrowest sense, i.e., while an ore body is being initially *developed, or development or exploration work is being conducted as an* extension of a currently producing mine.

be alert to whether the exploration mine will lead to production. With the commencement of production, the operator must begin to establish a second escapeway and insert a refuge chamber. However, the section clearly does not require a refuge chamber unless and until the operator elects to commence production, which triggers the requirement to begin construction of a second escapeway. It is those two requirements — commencing construction of a second escapeway and insertion of a refuge chamber — that go together by virtue of the first and second sentences.[7]

We may gain insight into the regulatory decision not to require refuge chambers in exploration mines that are evanescent by their very nature by examining other regulations. For example, the exploration mine in this case was nearly completed. Tr. 126-27. At this point of completion, the face was approximately 1,000 feet from the outside environment (Tr. 85), the entry was 16 feet by 16 feet (Tr. 122), and it was a 5 to 10 minute walk from the face to the outside world (Tr. 135). In turn, subsection (b) of section 57.11050 requires that, if miners cannot reach the surface from their workplace through the two required escapeways within one hour, refuge chambers must be within 30 minutes (not 10 minutes) from the miners' workplace.[8] 30 C.F.R. § 57.11050(a). Similarly, section 75.1506(c)(1), requiring refuge chambers in underground coal mines (often with significant seam height and terrain impediments), provides in part that refuge chambers must be within 1,000 feet of the nearest working face. 30 C.F.R. § 75.1506(c)(1). Therefore, those sections permit placement of refuge chambers further by time and/or distance from the face than the time or distance necessary to exit this exploration mine. Thus, the majority would find that this section requires more of short-lived, minimally-staffed exploration mines than are required of large underground production mines.[9]

IV MSHA, U.S. Dept. of Labor, *Program Policy Manual*, 57.11050 (2003) (emphasis added).

[7] We note that, although there is scant regulatory history, the history of the period demonstrates a likely scenario for the exception to allow one-escapeway exploration mines — a desire to encourage mineral exploration and development within the United States. We need cite no authority for the common knowledge that in the early 1970s there was a worldwide copper shortage causing many homebuilders to switch from copper wiring to aluminum — a change that would be reflected in house fires in only a few years. More importantly and just as well known, in May 1973, oil-exporting nations embargoed oil shipments. The impact upon the United States was immediate and dramatic. Prices for petroleum-based products — an almost unlimited array of products from gasoline to paint to all plastic products — skyrocketed. These developments naturally created a demand for domestic American production of raw materials. In this context, encouragement of exploration mining is entirely understandable.

[8] In attempting to deal with section 57.11050(b), the majority does not address the point of our reference to this subsection. The point, of course, is that, in drafting the final regulation in 1978, the drafters decided 30 minutes provided an adequately close refuge. Thus, the regulation permits refuge chambers to be 30 minutes from the workplace in production mines while in this, and other short-lived exploration mines, the outdoor environment (10 minutes away) is closer than required for refuges in mines that require the presence of two escapeways.

[9] Moreover, under section 57.11050(a), there would be no requirement in the regulation for the position of the placement of refuges in one-escapeway mines. Any placement would be

In this decision, the majority abdicates the Commission's responsibility to apply the regulations as written. Through such action, the critical right of the public to notice of and opportunity to comment upon the requirements of binding rules backed by punitive sanctions suffers irreparable harm. A society of fair and transparent rulemaking is grievously injured if courts, commissions, or agencies may change rules simply by declaring a rule "silent" simply because it does not comport to the desired policy outcome, and, therefore, is amenable to whatever interpretation the enforcement or adjudicatory authority wishes to impose by fiat.[10]

In sum, the majority's arguments display an outcome-driven determination rather than dispassionate regulatory analysis. *See* slip op. at 4-6.[11] For our part, we are left, first and last, in the place where all regulatory analysis must begin — the plain language of the regulation.

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less than 30 minutes from the face. Therefore, despite the inspector's protestation, placement of a refuge just within the outside opening would comply with section 57.11050(a) and (b). In fact, there would be a host of unanswered questions. When would the refuge chamber be required in a one-escapeway exploration mine? When the entry was 100 feet and less than a minute to the outside? When the entry was 500 feet and 2.5 to 5 minutes from the outside? Finally, recognizing the vital importance of the exploration and development of metal and nonmetal resources, the promulgating Secretary may have decided not to require refuges in exploration mines that are transitory and rapidly either abandoned or converted to production mines, at which point the first two sentences of the section would then apply.

[10] Rulemaking serves the critical interests of transparency and public participation in the creation of binding obligations. MSHA has long had an opportunity to propose requiring installation of refuge chambers in exploration mines by amendment of the regulation rather than taking the path of attempting to force refuge chambers upon one-escapeway mines through an untenable, invented interpretation. MSHA's failure to take such action notwithstanding the clarity of section 57.11050(a) is another factor in rejecting the Secretary's tortured interpretation of the regulation. *See Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 711 (8th Cir. 2013) ("MSHA has not changed the regulation even when it had the opportunity to do so.").

[11] While the majority claims that MSHA "has documented" a situation where miners in a development mine with a single escapeway were able to use a refuge chamber, slip op. at 10 n.9, this supposed historical reference is legally irrelevant. The "documentation" is included in a news item in a publication that MSHA did not even rely on in these proceedings. It is not part of the administrative record before us and we therefore may not consider it. *See* 30 U.S.C. § 823(d)(2)(C). Furthermore, the news item, even if accurate, indicates that 29 miners were underground at the mine. This is radically different from the circumstances before us. The news item does not state whether MSHA required the chamber due to the extensive nature of the development or whether the operator voluntarily installed it. Of course, even were there some regulatory history consonant with the majority's desire to impose a refuge chamber requirement on one-escapeway exploration mines, it could not overcome the plain language of the section. A regulation cannot be construed to mean what an agency intended but did not express. *Performance Coal*, 642 F.3d at 238.

C. The Secretary's position is not entitled to deference.

If deference were a consideration in this case, the Judge and the majority err in failing to follow fundamental precepts of administrative law and regulatory interpretation in obeisance to "deference." For example, in *Moore v. Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir. 2003), the Fifth Circuit demonstrates that the Seventh Circuit in *Whetsel*, *supra*, improperly failed to focus upon the plain language of the regulation as the starting point for its "ambiguity" analysis. Instead, the *Whetsel* court started with the agency's interpretation and then applied it to the regulation. As the Fifth Circuit states, this mode of interpretation puts the cart before the horse:

> Under *Christensen,* this approach is backwards. The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered "ambiguous" merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.

317 F.3d at 497.

Even if we were to find the regulation to be ambiguous, the Commission must determine whether the Secretary has exercised his fair and considered judgment on the issue. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012). The Secretary's interpretation is impermissible under this standard.

The Secretary's interpretation would fail because it cannot stand as the considered position of the agency. We do not blindly defer to agency decisions simply because they are agency decisions, and where the Secretary has not exercised his fair and considered judgment, his interpretation does not deserve controlling deference. *Id. See also Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579, 584, 588 (D.C. Cir. 1997) (stating that an agency cannot "promulgate mush" and then ask for deference to clarify regulations), *abrogated on other grounds, Perez v. Mortgage Bankers Ass'n,* 575 U.S. ___, 135 S. Ct. 1199, 1207 (2015).[12]

[12] In *Perez v. Mortgage Bankers Association,* the Supreme Court reversed the requirement, articulated in *Paralyzed Veterans*, that interpretive rules that substantively alter a regulation's prior, definitive meaning must proceed through notice-and-comment rulemaking. The Supreme Court's unanimous judgment disapproved of the D.C. Circuit's decision as inconsistent with the Court's "straightforward reading of the APA." 135 S. Ct. at 1207. However, nothing in the Court's opinion undercuts the D.C. Circuit's disapproval of untrammeled deference. Indeed, Justice Scalia and Justice Thomas expressly questioned the application of *Auer* deference and its underpinnings in *Seminole Rock. Id.* at 1211-13 (Scalia, J., concurring); *Id.* at 1213-25 (Thomas, J., concurring). Justice Alito suggested he would consider these views in a more appropriate context, where concerns about "the aggrandizement of the power of administrative agencies" enabled by Seminole Rock and its progeny "may be explored

At the time this standard was promulgated, the considered view of the agency did not deem necessary a requirement for either two escapeways or an escapeway and a refuge at all times in an exploration mine, even though that could have been easily expressed. Unwinding that policy choice should require an equally thoughtful and deliberative process. Evidence of such care is entirely absent from the administrative record.[13]

The factual context of this case also highlights the formless nature of the supposed "rule" and the near-total absence of the analytical underpinnings required to support the asserted exercise of the agency's reasoned and considered judgment. Only by allowing a further over-reach by the agency do we learn when the "duty" to provide a shelter arises, i.e. at or before the second crosscut is made. Accepting the "rule" as such requires us to permit the agency to impose *another* specific regulatory requirement setting a limit at the second crosscut without the benefit of rulemaking. We should not be party to this abrogation of the administrative process.

D. The S&S designation is unsupported by substantial evidence.

We also dissent from the majority's holding that the violation in this case was S&S. There is no evidentiary or legal basis for holding that the absence of a refuge chamber at this stage of the mine's development was of such a nature that it made it reasonably likely to result in an event causing death or serious bodily injury. If anything, a careful analysis of the S&S issue only underscores the unreasonableness of the Secretary's construction of the standard to find a violation here.

Cumberland did clarify that standards designed to protect miners in the event of an emergency must consider such emergency as part of the operative context for the law. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2364-65 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Following *Cumberland* we applied a full *Mathies* analysis in a case, even though the parties stipulated that an emergency requiring the use of escapeways would be reasonably likely to result in serious injuries. *Spartan Mining Co.*, 35 FMSHRC 3505, 3507, 3509 (Dec. 2013) (citing *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)). Here, the inspector and, consequently, the Judge merely assumed that the absence of a refuge chamber was reasonably likely to result in a reasonably serious injury. The Judge failed to apply the *Mathies* test to the facts of this case.

The circumstances in this case cannot support an S&S finding under a principled application of the *Mathies* test. First, the inspector had no underground mining experience prior to becoming an inspector. Tr. 42. Second, he made no underground examinations at the mine

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through full briefing and argument." *Id.* at 1210-11 (Alito, J., concurring in part). Thus, a significant plurality on the Court is open to questioning *Auer* due to overreaching typified by the Secretary in this case.

[13] The majority and the Judge below seem untroubled by practical aspects of mining, especially in an exploration context. We should draw a reasonable inference that the Secretary determined at the time the rule was drafted that the advice of its advisory committee was helpful on this question and that the Secretary accordingly determined that the recommended exception was consistent with the statute.

prior to issuing the citation. Tr. 27, 50. In fact, he had never been to the mine before. Tr. 43. The inspector also testified that he did not take the mine's ventilation into account in writing an S&S violation. Tr. 55.[14]

The Commission has held that an S&S determination may not be based on purely speculative conjecture about a potential injury that "could" occur. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (Apr. 1988). Despite this well-settled law, the majority approves the S&S conclusions reached by a relatively inexperienced inspector regarding a mine he had never visited before and circumstances in an underground environment he had not seen, concerning possible hazards he had not considered.

The evidence is thus insubstantial and vanishingly weak in its purported support of the conclusion reached. While the Secretary posits that the violation is S&S because a refuge chamber would not have been available in the event of an emergency, the Secretary can point to no clear regulatory standard for determining *when* and *where* the refuge would be required in the mine. Nor does the majority articulate a particular point at which the refuge would have been necessary and practical in this mine. It is obvious that the obligation is neither feasible nor useful when the earth is first disturbed and not apparent at all at what point the operator's duty would arise under the majority's view. At what point, by time or distance, would the refuge chamber be required — 100 feet or 1 minute, 300 feet or 3 minutes, 600 feet or 6 minutes, etc.?

Thus, the Secretary's position is facially arbitrary and unreasonable. It is not grounded on any facts particular to this mine or even those applicable generally to mines during their early development. Indeed, in this very case, it has been suggested that the operator would not have been in violation had it stated that it intended to install the refuge chamber at some point in the near future during the development process. Surely, the Secretary would not suggest that actions in compliance with the law and regulations nonetheless contribute significantly and substantially to the cause and effect of a hazard likely to cause death or serious injury to miners. *See Mathies* at 3; *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981) ("[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 and health").

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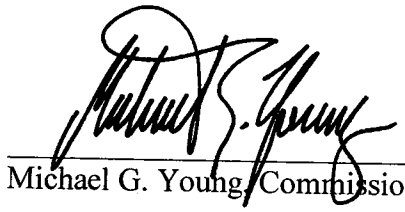
[14] The Judge generally precluded cross-examination about the specific conditions the inspector may have considered in determining that the violation was S&S. Tr. 52-55. However, the Secretary bears the burden of proof on this issue, and it is conclusively established that the inspector did not observe any conditions underground at a mine he had never visited before determining that this violation was S&S.

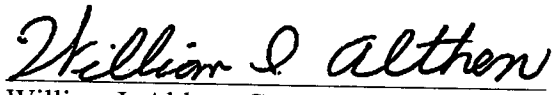
II.

Conclusion

Perhaps it is inevitable that federal agencies imbued with the hubris of executive authority will seek to impose regulatory obligations without following the dictates of law. However, the only function of an adjudicatory body is to enforce compliance with the law. Here, the Commission affirms a result-driven policy decision thereby permitting MSHA to create a new regulation without rulemaking. Neither MSHA nor the Commission will afford affected persons and members of the public a chance to comment on this fundamental change. We respectfully dissent.



Michael G. Young, Commissioner



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