FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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JUL 19 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-434
v.	:	
NALLY & HAMILTON ENTERPRISES	:	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

In this proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Administrative Law Judge vacated a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Nally & Hamilton Enterprises ("Nally & Hamilton") and dismissed the pending penalty proceeding. 35 FMSHRC 2198 (July 2013) (ALJ).[1] At issue is the regulatory interpretation of 30 C.F.R. § 77.1710(i), which states, in relevant part, that miners "shall be required to wear" seatbelts in certain vehicles where conditions pose a danger of overturning. For the reasons that follow, we vacate and remand the Judge's decision.

I.

Facts and Proceedings Below

A. Factual Background

The citation at issue arose out of an accident on April 21, 2010, in which a rock truck overturned at Nally & Hamilton's Chestnut Flats Mine in Kentucky. 35 FMSHRC at 2199. James Patterson, the driver of the truck, was not wearing a seatbelt at the time of the accident and sustained injuries that resulted in lost work days. *Id.* at 2199-200.

[1] We are deciding this case in conjunction with our consideration of *Lewis-Goetz & Co.*, 38 FMSHRC __, No. WEVA 2012-1821 (July __, 2016), which also involves the interpretation of 30 C.F.R. § 77.1710. Therefore, we are issuing the decisions in both cases on this date.

Patterson was not at the mine during MSHA Inspector Arthur Smith's April 29 investigation because he was under doctor's orders at the time not to return to work. *Id.* at 2200. On May 3, 2010, Inspector Smith visited Patterson at his home. Smith testified that he "asked [Patterson] about the accident, and we discussed . . . when it happened and why it happened, how it happened. And I asked him, I said, were you wearing a seatbelt? He said, well, I won't lie to you. He said, no, I was not." Tr. 40.

Two days later, Inspector Smith returned to the Chestnut Flats Mine to continue his investigation. 35 FMSHRC at 2200. Smith spoke with Mine Foreman Michael Lewis and informed him that he was going to issue a citation because the victim was not wearing a seatbelt at the time of the accident. Smith testified that Lewis then told him that company policy required miners to wear seatbelts at all times while riding in mobile equipment. *Id.*

Inspector Smith also spoke with a grader operator about the company's policy and was informed that "if they were found operating mobile equipment without a seatbelt, that they had to spend eight hours in a classroom after that. The company gave them the class. They couldn't work. They had to attend a class concerning seatbelts." Tr. 70. Inspector Smith also testified that, during his previous inspections at the Chestnut Flats Mine, he had seen miners wear seatbelts while operating mobile machinery such as bulldozers, loaders, and rock trucks. Tr. 71, 81. When asked about negligence, Smith testified that it was Patterson who was negligent. Tr. 90.

As a result of this investigation, Inspector Smith issued Citation No. 8362516, which alleged that Nally & Hamilton violated 30 C.F.R. § 77.1710(i). Smith characterized the alleged violation as "significant and substantial" ("S&S").[2] Smith indicated on the citation that an injury had already occurred, that the injury resulted in lost workdays or restricted duty, and that one miner was affected. Smith also alleged that the violation was the result of Nally & Hamilton's moderate negligence. MSHA later proposed a penalty of $52,500, and Nally & Hamilton timely filed a notice of contest.

At the hearing before the Judge, the Secretary of Labor presented evidence that Patterson was not wearing a seatbelt when the accident occurred and that the vehicle was equipped with rollover protection. Tr. 26, 40. The parties stipulated that the truck had overturned. Nally & Hamilton did not dispute that Patterson failed to wear a seatbelt or that the standard covered the vehicle Patterson was driving at the time of the accident. Nally & Hamilton instead presented evidence of its safety policy requiring employees to wear seatbelts and evidence of its enforcement of that policy. 35 FMSHRC at 2201-02.

Before the Judge, the parties agreed that the crux of their dispute was the proper interpretation of the standard. The Secretary advocated a strict liability interpretation, whereas Nally & Hamilton argued for the Judge to apply the Commission's interpretation of section 77.1710 (as applied to safety belts and lines) announced in *Southwestern Illinois Coal Corp.*, 5

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[2] 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."

FMSHRC 1672, 1674-77 (Oct. 1983) ("*Southwestern I*"). 35 FMSHRC at 2203-04; *see also Southwestern Illinois Coal Corp.*, 7 FMSHRC 610, 612-13 (May 1985) ("*Southwestern II*") (applying *Southwestern I*'s interpretation of § 77.1710).

B. The Judge's Decision

The Judge analyzed 30 C.F.R. § 77.1710(i) and concluded that under the plain language of the standard and the Commission's precedent in *Southwestern I*, the standard's language "imposes upon the operator a *duty to require, not a duty to guarantee*." 35 FMSHRC at 2205 (citing 5 FMSHRC at 1675). The Judge noted that the Commission has interpreted section 77.1710's phrase "shall be required to wear" to mean that "operators must (1) establish a safety system requiring the wearing of the clothing or equipment and (2) enforce the system diligently." *Id.* at 2204 (citing *Southwestern I*, 5 FMSHRC at 1674-75).

The Judge further concluded that Nally & Hamilton's policies and enforcement satisfied the Commission's interpretation of the standard. 35 FMSHRC at 2205-06. The Judge noted that Nally & Hamilton maintains a safety policy that requires miners to wear seatbelts where equipment is equipped with roll-over protection systems and that it requires employees to sign a statement agreeing to the safety policies before beginning employment. *Id.* at 2205. Further, the operator has each miner revisit the safety policy every year at the company's annual retraining. *Id.* Finally, Patterson signed off on the policy before starting employment and every subsequent year at the annual retraining. *Id.* at 2201.

The Judge found it "noteworthy" that both MSHA Inspector Smith and Nally & Hamilton Safety Coordinator Creech "agreed that it was not possible for a mine foreman or other supervisor, standing at ground level, to see whether a truck operator is wearing a seatbelt while sitting in the truck cab, which rises nearly 10 feet above ground level." *Id.* at 2205. The Judge concluded from that testimony that Nally & Hamilton had taken reasonable steps to require Patterson to wear his seatbelt. *Id.* The Judge also noted that the testimony showed one instance in which a miner was disciplined for failing to wear a seatbelt and one instance in which an employee had an accident similar to Patterson's, but was wearing a seatbelt and suffered no injuries. *Id.* at 2206. The Judge concluded that those facts supported a finding that Nally & Hamilton diligently enforced its safety policy. *Id.* Accordingly, he vacated the citation. *Id.*

Though the Judge vacated the citation, he also made alternative findings in the event that the Commission were to depart from its existing precedent, i.e., that the operator was not negligent and that the Secretary had failed to establish that the violation was S&S. *Id.* at 2206 n.10. He also stated that if the Commission determined that a violation occurred, he would assess a civil penalty of $100, rather than the $52,500 penalty proposed by the Secretary after a special assessment. *Id.*

II.

Disposition

This case presents competing interpretations of 30 C.F.R. § 77.1710(i).[3] Does section 77.1710(i) require that miners use the seat belts in vehicles where there is a danger of overturning and rollover protection is provided, or does the section merely require that operators institute procedures (training, education, discipline, etc.) to require miners to wear seat belts?

We find the only sensible reading of the regulation is that it requires that miners use seat belts. That reading is consistent with the language of the regulation, the requirements of other regulations in 30 C.F.R. Part 77, case law governing the interpretation of regulations, and the purpose of the Mine Act. Therefore, for the reasons set forth below, we overrule *Southwestern I* and *II*.

The failure of a miner to use a seat belt in operating a vehicle defined in section 77.1710(i) is a violation. The operator, in turn, is strictly liable for such violation without regard to the diligence with which it has trained and required miners to use seat belts. Therefore, we vacate and reverse the decision below and find the operator committed a violation of section 77.1710(i). We remand the case to the Administrative Law Judge for further proceedings consistent with this decision.

A. Interpretation of Section 77.1710

In *Southwestern I*, a majority of three Commissioners held that "when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation." 5 FMSHRC at 1675. In reaching this conclusion, the majority relied exclusively on its reading of the words "shall be required" and a prior decision of the Interior Board of Mine Operation Appeals ("IBMA") in *North American*

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[3] In relevant part, section 77.1710 provides:

> Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> . . . .
>
> (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
>
> . . . .
>
> (i) Seatbelts in a vehicle where there is a danger of overturning and where rollover protection is provided.

Coal Corp., 3 IBMA 93 (1974). In turn, in *North American*, the IBMA summarily concluded that the regulation did not actually require that the relevant protective apparatus be worn.[4] *Id.* at 107.

We do not lightly overrule previous Commission holdings.[5] However, in light of the compelling reasons for the interpretation we adopt today, we cannot prefer adherence to precedent over the language and purpose of the standard. The standard mandates an important measure of protection for miners operating vehicles where there is a danger of overturning. It achieves that purpose if and only if miners wear seat belts, and such obligation is manifest in the wording of the regulation.

Therefore, we do not read section 77.1710 as imposing an obligation only upon the operator to train and discipline miners. The section compels the wearing of the prescribed protective clothing and devices. The language of the standard, other standards related to use of protective gear, Commission precedent, and the purpose of the Mine Act underscore our interpretation.

First, the language of the standard supports our view. When a federal regulation "requires" that something be done, the regulation is an authoritative demand that the action be taken. Indeed, the word "require" means "to ask for authoritatively or imperatively," "claim by right and authority," "insist upon usu[ally] with certainty or urgency," or "demand." *Webster's Third New International Dictionary* 1929 (1993). It would be wholly incongruent with the language of the regulation to construe a mandate that miners must be required to wear protective clothing and equipment as merely compelling an effort by operators to achieve the important protective purposes of the regulation.

In a thoughtful concurrence and dissent in *Southwestern I*, Commissioner Lawson effectively refuted the Commission's reliance upon *North American* and elaborated on what is meant by the word "required" in the regulations. As he stated:

> The core sense of "require" is to mandate, not exhort–that which is required, shall be done. *See Mississippi River Fuel Corp.*

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[4] *North American* involved the use of safety goggles, and *Southwestern I* involved the use of fall protection. However, both cases turn upon the interpretation of the language of the opening paragraph of section 77.1710 that miners "shall be required" to wear the protective clothing and devices identified in the following subsections.

[5] The Supreme Court has explained that "[a]dhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). However, the Court also has stated that adherence to precedent "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The Court has recognized that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt restrained to follow precedent.'" *Payne*, 501 U.S. at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

> *v. Slayton et al*, 359 F.2d 106, 119 (8th Cir. 1966): "Required" implies something mandatory, not something permitted by agreement."
>
> . . . Although it appears unnecessary of repetition, regardless of the existence of even a diligently enforced company rule, a miner is not protected from the danger of falling unless he is actually wearing a safety belt. There is no meaningful, nor even semantically persuasive distinction, between "shall be required to wear" and "shall be worn."

Southwestern I, 5 FMSHRC at 1681 (Lawson, Comm'r, concurring and dissenting).[6]

Second, safety standards "must be interpreted so as to harmonize with and further . . . the objective[s] of" the Mine Act. *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Our interpretation of section 77.1710(i) harmonizes it with other sections of 30 C.F.R. Part 77 and other mandatory safety standards.

For example, section 77.1710(g) is worded in a manner similar to section 77.1710(i)—namely, miners "shall be required to wear . . . (g) Safety belts and lines where there is a danger of falling." However, due to the unique uses of fall protection, section 77.1710(g) contains an additional proviso: "a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." Obviously, this mandate is only meaningful if the miner entering the dangerous area is wearing a lifeline. Certainly, therefore, the purpose is to compel use of lifelines when there is a danger of falling. We apply the same rationale to section 77.1710(i).

In addition, section 77.403-1(g) appears in the provision listing the safeguards for mechanical equipment applicable to surface mines. It provides: "Seat belts required by § 77.1710(i) shall be worn by the operator of mobile equipment . . . ." This language identifies the seat belt requirement contained in section 77.1710(i) and unquestionably contemplates that miners must wear seat belts under section 77.1710(i). Section 77.403-1(g) is in textual harmony with a finding that the standard at section 77.1710(i) mandates the use of seat belts. The wording of section 77.1710 does not permit avoidance of operator liability when a miner negligently endangers himself by failing to wear a seat belt.

Third, in parallel regulations affecting metal/non-metal mines, the mandate is that seat belts must be worn. For example, 30 C.F.R. § 57.14131(a) provides, "Seat belts shall be provided and worn in haulage trucks." 30 C.F.R. § 56.14131(a) contains the identical requirement. These regulations point to and support an interpretation of section 77.1710(i) in a manner that provides equivalent and harmonized safety protection across different types of mining ventures.

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[6] Commissioner Lawson further correctly observed that this "interpretation [operator liability] is congruent with those final—and absolute—responsibilities placed upon the operator by the Act to prevent safety and health hazards to miners, including forestalling employees from engaging in unsafe and unhealthful activities." *Southwestern I*, 5 FMSHRC at 1682.

Commission case law supports, indeed dictates, such a parallel construction of coal and metal/non-metal regulations. The Commission has found that "[t]here is no logical reason why coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010); *see also Solar Sources, Inc.*, 37 FMSHRC 218, 221 (Feb. 2015).

The legislative history of the Mine Act further confirms this approach. A fundamental purpose of the Act was to provide a standard for safety for metal/non-metal miners as comprehensive and protective as the standards provided for coal miners. The Senate Report on the Mine Act notes that the Coal Act[7] was more comprehensive in scope and reach than the Metal Act.[8] It states that one reason why enactment of the Mine Act was an absolute necessity was that there would be "one statute for both coal and metal/nonmetal mines, affording equal protection for all miners and a common regulatory program for all operators." S. Rep. No. 95-181, at 9 (1977), *reprinted in* S. Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Fed. Mine Safety and Health Act of 1977*, at 597 (1978). Consequently, it would be illogical and at odds with the purpose of the Mine Act to construe coal regulations in a manner achieving less protection for coal miners than the protection afforded metal/nonmetal miners.

Fourth, if a violation is dependent upon the training regimen and enforcement practices of the operator, it is difficult to see how an inspector observing a driver not wearing a seat belt could know whether that failure constituted a violation. The inspector would have little or no information about training or enforcement of the seat belt requirement. Therefore, the inspector arguably would need to forego issuance of a citation, commence an investigation of the operator's practices before issuance, or issue a citation thereby touching off a further inquiry to determine if the citation is valid. Such a process is not consistent with the enforcement procedures of the Mine Act and regulations.

Fifth, the Secretary's interpretation is also consistent with the Mine Act's scheme of strict liability. Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault. *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 795 (D.C. Cir. 2009) (stating that strict liability "means liability without fault[;] [i]t does not mean liability for things that occur outside one's control or supervision" (citation omitted)); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The ultimate responsibility for compliance lies with the operator. Moreover, imposing strict liability on the operator for a miner's failure to comply with the regulatory requirements promotes safety in furtherance of the Mine Act's purpose.

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[7] Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977).

[8] Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977).

Consequently, when a miner fails to wear a seat belt when operating a vehicle covered by section 77.1710(i), he violates the standard. Then, as required by law, the operator is liable for the violation. *See Sewell Coal Co.*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Prods. Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). Of course, the operator's fault or lack of fault goes to the issue of negligence and, thus, is considered in assessing a civil penalty. *Asarco, Inc.-Nw. Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); *Sewell Coal Co.*, 686 F.2d at 1071; *W. Fuels-Utah, Inc.*, 10 FMSHRC 256, 259 (Mar. 1988). In this regard, the standard set forth for liability in *Southwestern II* may provide an appropriate test for operator negligence that depends upon whether the operator has undertaken appropriate training and enforcement to show "diligence in site-oriented enforcement" of section 77.1710(i). *Southwestern II*, 7 FMSHRC at 612.

Sixth, this interpretation best achieves the purpose of the Mine Act and regulations issued under it—namely, protection of the health and safety of miners. *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999); 30 U.S.C. § 801(g). Viewed from this perspective, it is plainly evident that section 77.1710(i) requires miners to wear seat belts.

Even if we harbored doubts about the proper interpretation of section 77.1710, we necessarily would find section 77.1710(i) to be ambiguous, and would defer to the Secretary's interpretation as a reasonable and persuasive construction of the regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997).

For these reasons, we vacate and reverse the finding of no violation by the Administrative Law Judge. We conclude that the operator violated section 77.1710(i) because of the miner's failure to utilize seat belt protection in operating a vehicle where there was a danger of overturning and rollover protection was provided.

B. Alternative Findings

As set forth above, anticipating the possibility of the overruling of *Southwestern I*, the Judge made two alternative findings. He found that if a violation occurred, the operator was not negligent and that the violation was not significant and substantial. We look first at negligence and then at the S&S issue.[9]

[9] The operator also raised due process considerations on the basis that it relied upon the *Southwestern I* decision and, therefore, would have had no notice of a possible violation notwithstanding compliance with the protective measures prescribed in *Southwestern I*. However, the operator does not provide any cogent explanation of any prejudice from the alleged lack of notice. It does not assert that it would have, or could have, done more to assure usage of seat belts or otherwise acted differently based upon an understanding of our current decision. Indeed, such assertions might well have undercut its basic defense. Further, as the Secretary pointed out, S. Reply Br. at 12, he has made it abundantly clear that he would continue to cite operators notwithstanding *Southwestern I*. Therefore, we do not find the operator was prejudiced or denied due process by the decision we reach today.

We affirm the finding of no negligence. The Judge found that the operator established and conducted a sufficient training and enforcement program to avoid liability under *Southwestern I.* The Judge found, "that the rock truck was not defective at the time of the accident, that Nally & Hamilton did not know (and could not reasonably determine for this truck) that Patterson was not wearing his safety belt, and that the mine had, and enforced, a policy regarding the wearing of safety belts." 35 FMSHRC at 2206. Substantial evidence supports that finding. That finding, in turn, supports the Judge's finding of no negligence.[10]

Regarding the issue of whether the violation was significant and substantial, the Judge did not engage in sufficient analysis to permit action by the Commission. Because a finding on the issue of whether the violation was significant and substantial could affect the gravity element of the penalty assessment, we remand the case to the Administrative Law Judge for further consideration of whether the violation was significant and substantial and assessment of a penalty.

III.

Conclusion

For the foregoing reasons, we vacate the Judge's decision and remand the case for further action consistent with this decision.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

[10] Commissioner Cohen would impose a duty upon operators to "monitor" for seatbelt usage under section 77.1710(i). This would be a significant obligation, not sought by the enforcement agency in this case as a requirement to meet the standard of a reasonably prudent operator. Based on this record, we do not adopt Commissioner Cohen's position.

Commissioner Young, dissenting:

The majority claims that "we do not lightly overrule previous Commission holdings." Slip op. at 5. The decision then cites Supreme Court cases which solemnly intone the preference for the principle "that the applicable rule of law be settled," before getting to the point that the Court should not be constrained by precedent, and has not been, when confronted by decisions that are "unworkable or are badly reasoned." *Id.* at 5 n.5 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).[1]

In fact, though, the majority hardly makes the case that *Southwestern Illinois Coal Corporation*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), or *North American Coal Corporation*, 3 IBMA 93 (1974), are "unworkable or are badly reasoned." Rather, the majority simply doesn't like the conclusion compelled by those decisions in this case. While the majority's intentions are good, the actual effect on mine safety may not be, and the unsettling effect on our precedents certainly is not.

The standard at issue provides that "[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine *shall be required* to wear protective clothing and devices," including, inter alia, fall protection devices where there is a danger of falling and seatbelts when in vehicles which present a danger of rolling over. 30 C.F.R. § 77.1710 (emphasis added). As always, when reviewing a standard, we must first examine its language and determine if it is plain or ambiguous.

The Commission held, in *Southwestern I*, that the language was plain. There is no basis in law—no overriding precedent, no change in the wording of the standard—to justify the majority's reconsideration of this point. While the Secretary, as the prevailing party in *Southwestern I*, was precluded from challenging the Commission's interpretation in that case, it has been binding precedent before us for decades. Nothing precluded the Secretary from revising the regulation if he disagreed with our decision to acknowledge its plain meaning. Where, then, is the recognition of the intrinsic value of settled law?

The understanding affixed to the standard, in fact, predates the adoption of the Mine Act. Our decision in *Southwestern I* relied on the decision of the Interior Board of Mine Operation Appeals ("IBMA") in *North American*, 3 IBMA at 107, involving a similarly-worded standard, employing the same phrase—"shall be required to wear"—to support its interpretation of the standard. Consistent with *North American*, the Commission explained:

> The intended effect of [the Interior Board's] construction was that if a failure to wear the protective clothing and equipment was "entirely the result of the employee's disobedience or negligence

[1] In this context, citation to *Payne v. Tennessee* is archly ironic. In that very decision, there is a lively debate about the role of stare decisis, in which Justice Scalia noted that Justice Marshall's vigorous dissent against that principle could be rebutted by opinions authored by Justice Marshall himself. 501 U.S. at 833-35 (Scalia, J., concurring).

> rather than a lack of requirement by the operator to wear them, then a violation has not occurred." . . . .
>
> The regulation does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them. The plain meaning of "require" is to ask for, call for, or demand that something be done. Accordingly, when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation. We respectfully disagree with our dissenting colleagues that "shall be required to wear" means "shall be worn." The two phrases are not the same, and we do not find persuasive a reading that converts a duty to require into a duty to guarantee. Certainly, the purpose of the standard is to protect miners, but the standard as written provides for that protection by directing that operators require the belts to be worn.

Southwestern I, 5 FMSHRC at 1675 (emphasis and citations omitted). The Commission rejected the Secretary's argument that "shall be required" means "shall be worn," stating that the two phrases carried different meanings and that if the Secretary intended the latter, he should have promulgated the regulation accordingly. *Id.* Ultimately, the Commission reversed the Judge and reinstated the citation because they found that the record did not show "sufficiently specific and diligent enforcement."[2] *Id.* at 1676. The Commission noted that use of the safety belt and line was left to the discretion of the miner and no direction was provided as to specific work situations where belts should be worn. *Id.*

Beyond the command of stare decisis, the outcome of this case should recognize *Southwestern I*'s legal and logical underpinnings as a plain language case. Thus, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

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[2] Likewise, in *Southwestern Illinois Coal Corp.*, 7 FMSHRC 610 (May 1985) ("*Southwestern II*"), the Commission reversed the Judge and entered summary decision in the Secretary's favor, again finding that the operator had failed to prove its affirmative defense. *Id.* at 612-13. Because the Secretary received favorable rulings on liability in both cases, the Secretary had no standing to challenge the Commission's contrary interpretation of section 77.1710 in a court of appeals. *See Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam) ("As a general *rule*, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." (emphasis added)).

The applicable subsection provides that each employee "*shall be required to wear* . . . [s]eatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." 30 C.F.R. § 77.1710(i) (emphasis added). Based on this plain language, the Commission has interpreted section 77.1710 to create a limited exception to the Mine Act's strict liability scheme. Under the Commission's interpretation of the standard, an operator avoids liability if it proves that (1) it has a safety system in place requiring miners to use protective gear and (2) it adequately enforces the system. *Southwestern I*, 5 FMSHRC at 1674-77; *Southwestern II*, 7 FMSHRC at 612-13.

This interpretation of the standard has hardly served as an escape hatch for operators. In *Southwestern I*, the Commission ultimately ruled in the Secretary's favor on liability and concluded that the operator had failed to prove that its safety policies and enforcement were adequate. 5 FMSHRC at 1676. Further, the Commission noted that the operator must take "specific enforcement actions" that show "diligence in site-oriented enforcement" of its policy. *Southwestern II*, 7 FMSHRC at 612. Thus, the operator must prove that it is affirmatively acting to ensure that miners wear or use the required protective equipment, consistent with the standard's plain meaning.

In this case, the Judge correctly applied the interpretation set forth in *Southwestern I*. *See* 35 FMSHRC at 2204-06. This would rightly raise the next issue: whether the record provides substantial evidentiary support for the decision below.[3]

Contrary to the Secretary's contention, substantial evidence supports the Judge. As the Judge noted:

> Both Inspector Smith and Safety Coordinator Creech specified the numerous safety measures that the mine routinely employed to enforce its seatbelt policy. Not only did Nally & Hamilton require its employees to sign off on agreeing to the mine's safety policies, including seatbelt usage, before beginning employment, but each miner also revisits this policy every year at the company's annual retraining. The truck's driver, James Patterson, was among the Nally & Hamilton employees who agreed to this safety policy before starting employment at the mine; he was further reminded of these rules every year at annual retraining. Tr. 115-116.

Id. at 2205. The Judge also noted that the fact that Nally & Hamilton had only one incident of discipline for violation of its seatbelt policy indicated that its enforcement measures were effective, as Inspector Smith also testified that he had witnessed miners in compliance with the

[3] When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

regulatory requirement on past inspections. *Id.* at 2205-06. In that instance, the violative conduct occurred on a public road. Thus, the mine's policy was enforced even where an employee was off Nally & Hamilton's property. Tr. 106, 125-26.

Unlike the circumstances in *Southwestern I*, the facts here indicate that Nally & Hamilton's policy on seatbelt use was explicitly clear and its training demonstrative of the safety hazards of noncompliance. Thus, the record supports the conclusion that Nally & Hamilton provided supervision and enforcement of its policy.

While I would hold that substantial evidence supports the Judge's finding that Nally & Hamilton sufficiently enforced its policy requiring miners to wear safety belts, I readily concede that a finding to the contrary on the operator's policy could also be sustained on substantial evidence grounds. The judge could have held that the fact of violation here indicated that the operator's policy was not fully effective, and that spot checks or other means should have been employed because whether vehicle operators are complying with company policy cannot always be determined by observation from outside the vehicle.[4]

This is a question of evidentiary weighing, within the Judge's province to make requisite findings and then apply the law to those findings. *See Martin Cty. Coal Corp.*, 28 FMSHRC 247, 261-62 (May 2006) ("The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision." (citing *Mid-Continent Res.*, 16 FMSHRC 1218, 1222 (June 1994)). Where that analysis is not clearly erroneous, we are bound to respect it. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) ("[A]buse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law.") (citing *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)). There is no clear error here because the Commission in *Southwestern I* specifically rejected a guarantee of compliance. Here, the evidence supports that the operator had a policy in place, provided training to its miners on said policy, employed a system of progressive discipline to deter non-compliance, and actually imposed discipline on the one prior occasion where a miner was found to be in violation of the company's policy. Moreover, the inspector admitted that on past inspections, he witnessed miners complying with the seatbelt rule. Determining whether this was "enough" is a judicial function.[5]

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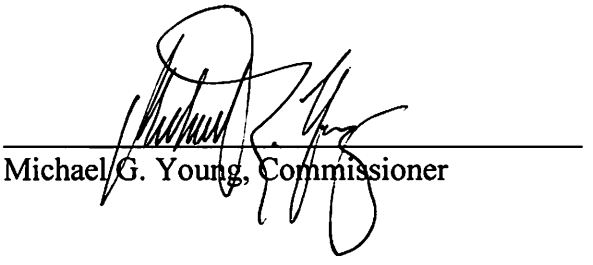
[4] Were we to apply *Southwestern I* and affirm the Judge in this case, the operator would nonetheless have notice that its enforcement program was not fully effective and that additional measures, such as spot checks, might be needed to ensure compliance with the standard.

[5] I would note that the occurrence of the accident here should put the operator on notice that greater efforts may be required in the future. If Nally & Hamilton had no reason to suspect its program may not be fully effective before the accident in this case, it has reason to question that assumption now. I would also point out that the Secretary may promulgate guidance on what it requires for compliance with the requirements of *Southwestern I*, but has not done so.

Finally, the majority's decision today is contrary to the intent of the Act and its safety purposes. The Act provides that mine operators, with the assistance of miners, "have the primary responsibility to prevent" the existence of hazardous conditions and practices. 30 U.S.C. § 801(e). *Southwestern I*'s imposition of a duty on operators to ensure seatbelts are worn is entirely consistent with this statutory command.

More importantly, the standard at issue applies only at surface mines. Such mines are inspected only once per year. Thus, the only ways to find a violation would be to have the inspector be present when it occurs, on the one inspector's single annual visit to the mine site, or to have the fact revealed as it was here, in the aftermath of an accident. Conversely, under *Southwestern I*, the agency could audit and review the operator's program for proactively and assertively requiring the use of appropriate protective clothing and devices, to ensure the operator is fulfilling its duties under the law. This seems more likely to have a beneficial and more consistent effect than the hope of a random encounter with a violator or, worse, an accident investigation.

Southwestern I rests on the plain language of a standard drafted by the Secretary and has served the interests of mine safety since we decided the case on those grounds. It is important, as the Supreme Court has noted, for settled law to remain settled. Accordingly, I dissent.



Michael G. Young, Commissioner

Commissioner Cohen, concurring in part and dissenting in part:

For the reasons that follow, I concur with the majority that the record evidence compels the conclusion that Nally & Hamilton violated the safety standard at 30 C.F.R. § 77.1710(i). However, I disagree with the majority's affirmance of the Judge's alternative finding of no negligence.

Although I agree with the finding of a violation in the majority's decision, I cannot join them in their rationale. Their conclusion that *Southwestern Illinois Coal Corp.*, 5 FMSHRC 1672 (Oct. 1983) ("*Southwestern I*"), was badly reasoned is not supported. In the absence of a compelling justification that the decision was wrongly decided, the Commission should abide by the doctrine of stare decisis. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of stare decisis demands special justification.").

The majority states that "the only sensible reading of the regulation is that it requires that miners use seat belts." Slip op. at 4. If this were simply a matter of a policy choice, I would agree with my colleagues. However, their legal analysis is fatally flawed. The majority's purported plain reading of the safety standard is inconsistent with the language of the safety standard. *See* 30 C.F.R. § 77.1710(i) ("Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: . . . (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.").

A. The Majority's Plain Reading of Section 77.1710(i) Fails to Give Effect to All the Words in the Safety Standard.

In *Southwestern I*, the Commission held that the language of section 77.1710(i) requires an operator to (1) "establish a safety system designed to assure that employees wear [the clothing or equipment] on appropriate occasions" and (2) "enforce such system with due diligence." *Southwestern I*, 5 FMSHRC at 1674-77 (quoting *N. Am. Coal Corp.*, 3 IBMA 93, 107 (1974)); *Southwestern Ill. Coal Corp.*, 7 FMSHRC 610, 612-13 (May 1985) (*Southwestern II*).[1] In so holding, the *Southwestern I* Commission gave effect to all the words of the safety standard.

Today, the majority does something different. They hold that the standard's direction that "each employee . . . *shall be required to wear* [seatbelts]," 30 C.F.R. § 77.1710 (emphasis added), means that seat belts shall be worn. Slip op. at 4. The majority has ignored the phrase "be required to" in the safety standard. Effectively, the majority concludes that the phrase is superfluous.

Reading words out of a regulation is not a proper approach to construction. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (stating that a cardinal principle of interpretation is to give effect, if possible, to every clause or word). The words "be required to" were deliberately chosen by the Secretary when he drafted section 77.1710(i). They provide meaning and context.

[1] The *Southwestern* cases, like the present case, arose in the context of a surface coal mine.

Those words inform mine operators that they are strictly liable for a failure to require their employees to wear seatbelts.

The *Southwestern I* Commission determined that a mine operator performs its duty when it establishes a safety system to require compliance and diligently enforces its safety system. I conclude that *Southwestern I* was correctly decided, because the Commission's interpretation gives effect to all the words in the safety standard.

Unquestionably, the Secretary knows how to write a regulation which provides that miners "shall wear" protective clothing or that protective clothing "shall be worn." A search of the Secretary's regulations containing mine safety and health standards (30 C.F.R. Parts 56, 57, 75 and 77) reveals 35 separate regulations where the Secretary directly and unquestionably requires that miners shall wear protective clothing such as gloves, face-shields or goggles, hard hats, suitable protective footwear, seat belts, safety lines, self-rescue devices, respirators, etc.[2] The fact that section 77.1710 uses the language "shall be required to wear" indicates that the Secretary meant something different.

B. The Majority Has Not Demonstrated that *Southwestern I* is Badly Reasoned.

My colleagues' asserted rationale for overruling *Southwestern I* fails when closely examined.

For example, my colleagues state that the reinterpretation of the safety standard is necessary so that the standard better conforms with a similar regulation that governs haulage trucks operating at metal and non-metal mines. Slip op. at 7. The safety standard at 30 C.F.R. § 57.14131 requires that "[s]eat belts shall be provided and *worn* in haulage trucks." (emphasis added).

However, section 57.14131 was promulgated by the Secretary in August 1988, about five years *after* the Commission issued *Southwestern I.* 53 Fed. Reg. 32496, 32528 (Aug. 25, 1988). The Secretary's subsequent promulgation of a new regulation concerning seat belt use at metal and non-metal mines has no legal effect on the Commission's prior interpretation of section 77.1710(i) (governing surface mines).

My colleagues also suggest that *Southwestern I* was wrongly decided because it allegedly causes section 77.1710(i) to conflict with the safety standard at 30 C.F.R. § 77.403-1(g). Section 77.403-1(g) states that "[s]eat belts required by § 77.1710(i) *shall be worn* by the operator of mobile equipment required to be equipped with [rollover protective structures] by § 77.403-1." (emphasis added). The supposed conflict between the *Southwestern I* interpretation of section 77.1710(i) and section 77.403-1(g) is imagined by the majority. Section 77.1710(i) requires an

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[2] *See* 30 C.F.R. §§ 56.14130, 56.15002, 56.15003, 56.15004, 56.15005, 56.15007, 56.15014, 56.15020, 56.16002; also 57.5044, 57.5045, 57.14130, 57.15002, 57.15003, 57.15004, 57.15005, 57.15007, 57.15014, 57.15020, 57.15031, 57.16002; also 75.705-6, 75.705-9, 75.1106-4, 75.1714-2, 75.1720-1, 75.1723; also 77.401, 77.403-1, 77.606-1, 77.704-6, 77.704-9, 77.1607, 77.1710-1, and 77.1908.

operator to establish a safety system and for the operator to enforce such system. It applies to all vehicles at surface coal mines where there is a danger of overturning and rollover protection has been provided. In contrast, section 77.403-1(g) applies only to the vehicles specifically listed in 30 C.F.R. § 77.403-1.[3] Therefore, section 77.403-1 adds an additional requirement for an operator, i.e., it must guarantee that the belts are worn when a miner operates vehicles listed in section 77.403-1, or be held strictly liable. The standards create different duties for a mine operator. The existence of separate duties does not cause conflict; it explains the Secretary's promulgation of different rules.

The majority suggests that section 77.1710(i) and section 77.403-1(g) should be interpreted functionally as requiring the same conduct; this is an odd result for sure. I suggest that the heightened requirements imposed on a mine operator by section 77.403-1(g) can only be understood by interpreting section 77.1710(i) as the *Southwestern I* Commission did.

For these reasons, as well as the reasons stated by Commissioner Young in his dissent, I find that the majority has failed to demonstrate that *Southwestern I* should be overturned. *See* slip op. at 10-12 (Young, Comm'r, dissenting).

C. Nally & Hamilton Violated Section 77.1710(i).

In *Southwestern I* and *II,* the Commission made clear that an operator's safety program requiring the wearing of seat belts coupled with discipline for violation of the requirement is not sufficient to comply with section 77.1710(i). The operator must also put in place a system of supervision to ensure compliance. 5 FMSHRC at 1676; 7 FMSHRC at 612.

The record evidence demonstrates that Nally & Hamilton established a safety system; it created a policy requiring the use of seatbelts, and provided annual refresher training. Miners were required to sign off on the policy prior to beginning employment and upon receipt of annual training. In addition, the mine foreman presented monthly safety talks. 35 FMSHRC at 2201-02. Sanctions for violating the policy included the issuance of a written warning or retraining, *id.* at 2201, 2205-06, but the system lacked a method for monitoring compliance.

The majority describes the operator's responsibility under section 77.1710 as limited to an obligation "to train and discipline miners." Slip op. at 5. The majority does not recognize that when the regulation states that an employee "shall be required to wear" protective clothing, the requirement includes a responsibility on the part of the operator to monitor the work rules it promulgates.

After considering the evidence, the Judge concluded that the policy was enforced diligently, stating that there were "no reasonable additional steps [that] could have been taken to assure that [the mine's] employee was wearing the seat belt for this vehicle, given the undisputed record that one could not tell from the ground if the lap belt was being worn." *Id.* at 2205. However, the Judge's conclusion that "no reasonable additional steps could have been taken to

[3] In this case, the driver was operating a rock truck, a type of vehicle not listed in section 77.403-1.

assure that [miners were] wearing the[ir] seat belt" lacks the support of substantial evidence in the record.[4] Nally & Hamilton Safety Coordinator Creech testified that a supervisor could have performed a periodic safety spot check by asking drivers to open their cab door to check for seat belt usage. Tr. 126. The Judge failed to consider the absence of this simple monitoring program suggested by the operator's own safety coordinator.

Enforcement with due diligence requires that mine operators take reasonable steps to conduct periodic spot checks for compliance. Certainly, requesting that a driver open his door as a safety spot check is a reasonable step. Such a practice is not an onerous burden, and need only be performed on an occasional basis to constitute the due diligence required by the safety standard. *See Southwestern I*, 5 FMSHRC at 1676 (holding that general guidance by the mine operator does not constitute diligence in enforcement; rather, reinforcement of safety considerations is necessary under the standard).

If a mine operator lacks a monitoring tool for compliance, then the safety system cannot be said to be enforced with "due diligence," and a violation of section 77.1710(i) is established. Because the evidence demonstrates that Nally & Hamilton lacked an appropriate monitoring tool to ensure compliance with their safety policy, the operator violated the safety standard.[5]

D. <u>The Operator Was Negligent in Violating the Standard.</u>

The majority affirmed the Judge's alternative finding that Nally & Hamilton was not negligent in its violation of the safety standard.

As previously stated, substantial evidence does not support the Judge's finding that no reasonable steps could have been taken by Nally & Hamilton to assure that its employees were wearing seatbelts. *See* 35 FMSHRC at 2205. The majority's negligence determination rests on that finding.

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[4] "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 *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

[5] The majority contends that interpreting section 77.1710(i) to make it dependent on the training regimen and enforcement practices of the operator makes it difficult for an MSHA inspector who observes a driver not wearing a seat belt to determine whether to issue a citation. Slip op. at 7. The short answer is that this interpretation of the standard has been in effect for the more than 40 years since the *Southwestern* cases were decided. The Secretary could have eliminated any enforcement problem simply by re-writing section 77.1710 so as to eliminate the words "be required to." To enforce the standard as it actually was written, an inspector who observes a miner operating a vehicle without the required seat belt the inspector should (1) stop the driver, (2) question the driver about the training he has received and whether/how the operator enforces a seat belt requirement, (3) direct the driver to put on the seat belt before re-commencing work, and (4) if necessary, depending on his interview of the driver, conduct further investigation into whether the operator actually requires the drivers to wear seatbelts.

I conclude that the complete absence of a monitoring program compels the conclusion that the operator was at least moderately negligent in violating the safety standard.

E. Conclusion

For the reasons stated, I would reverse the Judge's findings, and find that the operator violated section 77.1710(i) and that the violation was moderately negligent. I would remand the case to the Judge for determinations of S&S and the penalty.

Robert F. Cohen, Jr., Commissioner

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