# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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**August 24, 2020**

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket Nos. CENT 2015-0318-RM |
| | : | CENT 2015-0319-RM |
| v. | : | CENT 2015-0441-M |
| | : | CENT 2016-0055-M |
| THE DOE RUN COMPANY | : | |

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen and Traynor, Commissioners

## DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). At issue is whether the Administrative Law Judge erred in affirming two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The Doe Run Company ("Doe Run") at its Fletcher Mine, an underground lead, copper, and zinc mine in Missouri.

Both citations arise from the fatality of a scaler operator, John Hoodenpyle. One citation alleges that Doe Run failed to design and install an adequate support system to control the ground in an area where miners worked or traveled in performing their assigned tasks, in violation of 30 C.F.R. § 57.3360.[1] The other citation alleges that Hoodenpyle was operating a scaling machine from a location that exposed him to falling material, causing the fatality in

[1] Section 57.3360 provides in pertinent part:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3360.

violation of 30 C.F.R. § 57.3201.[2] Both violations were designated as significant and substantial ("S&S").[3] The ground support violation was alleged to be the result of high negligence and the scaling violation designated as the result of moderate negligence.

In affirming both citations,[4] the Judge concluded that the fatal roof fall[5] established a violation of both standards. 40 FMSHRC 1165, 1205-10 (July 2018) (ALJ). The Judge also vacated the S&S designations and reduced both negligence designations to "low."

Doe Run and the Secretary of Labor each filed a petition seeking discretionary review of the Judge's decision, both of which the Commission granted. As set forth below, we conclude that the Judge erroneously failed to apply the "reasonably prudent person" test to the alleged violations of the broadly-worded standards cited by the Secretary. Further, the cited standards did not provide the operator with fair notice of the obligations the Secretary seeks to impose in this enforcement action. Accordingly, we reverse the Judge's findings of violation and vacate the citations.

## I.

## Factual and Procedural Background

### A. Factual Background

Doe Run is a large mine operator in Missouri with six underground mines in what is geologically known as the new Viburnum Trend ("The Trend"). The Trend is a 32.5 mile-long lead, copper, zinc and ore deposit. The host rock in the Trend, including the Fletcher mine,[6]

[2] Section 57.3201 states that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201.

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

[4] The Judge also vacated a third citation, Citation No. 8680902, which had alleged that the operator had failed to conduct required workplace examination training, in violation of 30 C.F.R. § 48.7(a). 40 FMSHRC 1165, 1214-16 (July 2018) (ALJ). The Judge vacated the citation on the basis that the Secretary had unduly prejudiced Doe Run by modifying the citation in an untimely manner. *Id.* The Secretary does not seek review of this ruling.

[5] This decision uses the terms "roof" and "back" interchangeably to refer to the roof of the mine. Similarly, the decision uses the terms "roof fall" and "ground fall" interchangeably to refer to roof falls.

[6] The Fletcher Mine is designed in a modified room and pillar format, meaning that pillars are left to support the roof as working headings are advanced. Mine drifts, or tunnels, are typically 28 to 32 feet wide while the pillar widths average between 30 and 32 feet. The roof

is dolomitic limestone, or "dolomite," an altered limestone that is very high in strength and stability. Consequently, the ground conditions at Fletcher and throughout the Trend were described by witnesses from both sides as generally "stable" (Tr. 217-18), and "competent," with no significant issues in the stability of the host rock. Tr. 424-25.

Despite these general conditions, a fatal roof fall occurred on January 21, 2015. About 175 tons of rock – a section 55 feet long by 20 feet wide by 6 feet deep – collapsed onto a mechanical scaling machine that Hoodenpyle was operating.[7] Tr. 73, 647. He was inside the scaler's reinforced cab about 60 feet from the face. Tr. 206-07. The roof fall crushed and killed him. The cab was under the bolted area when the roof fell. Tr. 311.

Approximately 75% of the fall area was unbolted, and 25% was bolted with six-foot Split Set friction stabilizer bolts. Tr. 114, 195, 252. The scaler had a reinforced cab with a falling object protection system ("FOPS"). In addition to the reinforced cab, the scaler also had a rollover protection system ("ROPS"). During an MSHA inspection the day before the accident, both the scaler and the ROPS/FOPS operator's compartment were found to be in good operational condition with no damage.

Before the accident, another miner working in the area, Thomas Welch, heard Hoodenpyle start and begin to use the scaler around 10:00 pm. Tr. 513; S. Ex. 8 at 3. Welch recalled seeing the roof bolts in that area and testified that "everything looked fine." Tr. 519. Hoodenpyle scaled for about 15 minutes before Welch heard the loud sound of a roof collapse. "It sound[ed] like a lot of rock." Tr. 513-14. He could no longer hear the scaler after the collapse.

Vern Roark, a roof bolter with 18 years of roof bolting experience, testified that on January 5, 2015, he had installed Split Set bolts in the area of the accident. He had examined the area on arrival and said everything "looked perfectly fine." Tr. 466. Roark testified that "[t]he back was fine. There was no loose on it. It was in good color, solid, no voids in it." Tr. 467. Roark also drilled a hole and sounded the back once he set his bolting machine up. He testified that the back was solid with no "drumminess" indicating a hollow area or void above the roof. Tr. 467.

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height generally ranges from 16 to 120 feet. Fletcher's typical mine cycle consists of (1) face drilling of holes; (2) hole charging and blasting; (3) post-blast muck and rock loading and haulage; (4) scaling (both mechanical and high boom hand scaling); and (5) roof bolting.

[7] Blasting often creates the need for scaling the unstable or loose material from the roof and sidewalls, which may be done by hand or by the use of specialized equipment such as a mechanical scaler. Tr. 429-30. This machine was a Getman S330 Mechanical Scaler with a roof scaling coverage range of 9.8 feet to 29.5 feet and a rib scaling coverage ranging up to 29.5 feet. Sec. Ex. 8, at 6 (MSHA's accident investigation report). The single extension boom allowed for an advancement of over 13.1 feet from a single setup, allowing the operator to stay in a reinforced cab while extending the reach. The scaler with the boom was approximately 40 feet long and 8 feet high. *Id*. The scaler's operator cab was located at the extreme rear of the machine and was designed to keep the operator at the farthest point away from the scaling work, as the material is removed. Tr. 434-35.

MSHA Inspector Jeremy Kennedy[8] had conducted an inspection of the mine about eight hours before the January 21 accident. According to Inspector Kennedy, the active faces and active roadway in the area had all been free of adverse conditions. Kennedy performed a visual inspection of the back and ribs and walked up to the face between pillars 7517 and 7561, the area of the eventual fall. He testified that he had not noticed anything unusual on the face and had not observed any "change" that would have indicated the existence of adverse ground conditions. Tr. 105. The pillars had appeared to be adequately sized, with nothing out of the ordinary, and the widths of the drifts and crosscuts had been normal. In addition, regarding the entire area inspected, Kennedy had written "no loose noted" and "ok" in his General Field Notes. Tr. 101; DR Ex. AA at 3.

Kennedy had not observed "anything that was not typical" when he walked directly under the back that would fall later that evening. Tr. 57, 102. He testified that the back had looked smooth and "didn't seem to have any unusual features to it." Tr. 59-60, 102. He further testified that he had not recalled seeing any churned or disrupted rock in the area and had not noticed any loose ground. He had also inspected the ground support in the area and testified that everything had appeared accurate. He had inspected the last two rows of bolts between pillars 7508 and 7516 (the bolts that would later fall) and they appeared adequately installed and flush to the back. Kennedy also had not noticed any abnormal noises such as popping or cracking. In sum, he observed nothing abnormal and nothing that would cause him concern about hazardous ground conditions.

MSHA Inspector Michael Van Dorn led the agency's investigation into the accident, joined by inspector Kennedy, geologist James Vadnal, and engineer Gregory Rumbaugh from MSHA Technical Support. On June 10, 2015, MSHA issued its accident investigation report. The report did not identify the precise geological cause of the roof fall, nor did any of the witnesses do so definitively at the hearing. The report concluded that Doe Run should have drilled test holes before drilling holes for blasting to identify hazardous roof conditions and that there should have been a more effective way for miners to communicate hazards to management. S. Ex. 8 at 6-7. The report found that the roof fall occurred because the roof was not adequately supported, and that resin bolts should have been used. *Id.* In addition, the report concluded that the resin bolts should have been installed no more than 30 feet back from the face. S. Ex. 8 at 6. On March 11, 2015, Van Dorn issued both citations. S. Ex. 1; S. Ex. 2.

At the time of the accident, Doe Run was complying with its internal ground control policy. The policy contained several requirements with respect to scaling, bolting and test holes. It required, among other things, workplace examinations, scaling to begin no less than 60 feet back from the face, and a 5x5 standard roof bolt pattern for intersections. The policy also required one test hole per completed tunnel intersection. Tr. 429, 446, 449-50; DR Ex. F. The area where the January 21, 2015 roof fall occurred was not a completed intersection. There had been no unplanned reportable roof falls at Fletcher between the establishment of the revised

[8] Inspector Kennedy worked at Doe Run for eight and a half years prior to going to work for MSHA in 2009. He had previously worked underground at Doe Run's Brushy Creek, Sweetwater, and Fletcher mines, the last of which where he spent four years as a surveyor. As an MSHA inspector, he had inspected Fletcher at least eight times.

ground control policy in 1998[9] and the 2015 roof fall. According to the recollection of the mine's operations manager, Randall Hanning, MSHA repeatedly had the opportunity to review Doe Run's ground control policy and had never raised any objections to it before the accident occurred.

## B. The Judge's Decision

The Judge affirmed the violations of sections 57.3201 and 57.3360, holding that "where there is an accidental roof fall causing death . . . the fact of the fatal accident itself, by reason of strict liability, demonstrates a *per se* violation of the safety standard." 40 FMSHRC at 1209 (emphasis omitted). In concluding that the facts of the case here constituted *per se* violations of both those *metal-nonmetal* standards as he interpreted them, the Judge relied exclusively on the Commission's interpretation of the general roof control standard applicable to underground *coal* mines, 30 C.F.R. § 75.202. *Id*. at 1207-09 (citing *Jim Walter Res., Inc.*, 37 FMSHRC 493 (Mar. 2015) ("*JWR*")).

In affirmatively holding that such an interpretative approach should be extended to the non-nonmetal roof control standards at issue here, the Judge "intentionally decline[d] to address" arguments made by both parties that the standards at issue instead be interpreted, and the violations be determined, pursuant to the application of the Commission's "reasonably prudent person test." *Id*. at 1209. The Judge conceded that "[s]uffice it to say that, given the plethora of questions raised and unresolved, a prudent person test would have made the Secretary's case as to the fact of violation much more problematic." *Id*.

The Judge went on to delete the S&S designations associated with both citations, finding that the Secretary failed to provide "compelling indicia surrounding the instant violations that would have suggested the reasonable likelihood of" a roof fall on Hoodenpyle while he scaled. *Id*. at 1210. With specific reference to the S&S findings, the Judge rejected the Secretary's evidence of disrupted rock and found that the geologic features in the area would not have indicated a reasonable likelihood of a roof fall. *Id.* at 1211. The Judge found that the scaler's position 60 feet from the face, its position under bolted roof, and its reinforced cab did not "contribute[] to the reasonable likelihood of an injurious roof fall onto Hoodenpyle." *Id*. at 1212.

The Judge also rejected the Secretary's contention that Doe Run's use of Split Set bolts, rather than resin bolts, made a roof fall more likely. *Id*. at 1212-13. He noted that the Secretary presented hearsay evidence of prior roof falls but appeared to reject that evidence. *Id*. at 1213-14. The Judge opined that "the etiological mystery at the heart of this accident," i.e., the fact that no one could definitively identify the precise geological cause of the roof fall, was relevant to the S&S analysis. *Id*. at 1214.

[9] The policy was revised in 1998 in response to the fatal roof fall at a separate Doe Run mine (referred to in the transcripts as the "Casteel Mine"). Tr. 611, 633-34. There were no section 57.3360 violations found in Fletcher Mine's ten-year citation history. Tr. 528-29; *see generally* DR Ex. O. There was one citation for a violation of section 57.3201, six years prior, in 2009. Tr. 529; DR Ex. O at 29.

Finally, in one sentence, without explanation (other than in a very brief footnote that only addressed the scaling standard citation), the Judge reduced the negligence associated with both citations to "low." *Id*. at 1212 n.72.

## II.

## Disposition

### A. Summary of Relevant Law

In contests of citations and orders under the Mine Act, the Secretary bears the burden of proving each element of the Mine Act standard allegedly violated. *See, e.g.*, *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998); *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983); *Sims Crane*, 41 FMSHRC 393, 396 (July 2019); *Asarco, Inc*., 14 FMSHRC 941, 950 (June 1992); *Allied Chemical Corp.*, 6 FMSHRC 1854, 1857-59 (Aug. 1984).

In some instances, standards are written in such a way that the basic facts may demonstrate that the conditions or practices prescribed or proscribed by a standard have been violated. Such instances, wherein the bare facts may demonstrate a violation, are often referred to as sufficient to constitute "per se" violations of the standard at issue. *See, e.g., Cougar Coal Co.*, 25 FMSHRC 513, 520 (Sept. 2003) (holding that miner's electric shock, 18-foot fall, and head injury "per se" met the requirement that an "accident" had occurred at the mine under the cited standards). In those instances of such narrowly written standards, the facts of the alleged violation, standing alone, prove the violation. The operator may be found "strictly liable" under the standard, given that the facts, standing alone, show a violative practice or condition clearly satisfying all the terms of the standard.[10]

In contrast, there are many Mine Act health and safety standards that are "simple and brief[,] in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982). In those instances, as with any law or regulation, the standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he

[10] *See, e.g.*, *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that operator could not escape liability due to its lack of prior knowledge of the violative condition of the equipment where it met neither of two duties imposed upon it by equipment standard that did not require such knowledge); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (Jan. 1981) (finding operator strictly liable, even absent knowledge of equipment defect, because "unless the standard itself so requires, an operator's negligence has no bearing on the issue of whether a violation occurred"); *Clintwood Elkhorn Mining Co.*, 35 FMSHRC 635, 370 (Feb. 2013) (upholding strict liability under the standard because the Secretary met his burden of establishing a violation of section 77.1607(b) merely by demonstrating that the equipment operator failed to maintain full control of equipment while it was in motion, and "[n]othing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control"); *Wake Stone Corp.*, 36 FMSHRC 825, 826 (Apr. 2014) (imposing strict liability because a defect in equipment established a violation of the terms of the standard).

may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (refusing to apply a regulation that "inadequately expresses an intention to reach the activities to which MSHA applied it"). Consequently, a Mine Act standard must provide reasonable notice of what it requires or proscribes. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (Jan. 1983); *see also Amax Chem. Corp.*, 8 FMSHRC 1146, 1149 (Aug. 1986) (rejecting finding a per se violation of a ground control standard in the metal-nonmetal context and instead holding that "all relevant factors and circumstances must be taken into account.").

As a result, in interpreting and applying broadly worded mine safety and health standards that pertain to a host of possible conditions and practices, the Commission, with the widespread approval of the courts of appeals,[11] has applied the "reasonably prudent person test" to determine whether a violation has occurred. In other words, the inquiry is whether the standard prescribed the obligation with sufficient specificity to provide an operator with adequate notice of the requirements for compliance under the facts of the case. Then, the analysis turns on whether the facts demonstrate noncompliance with the standard. *See, e.g.*, *Alabama By-Products*, 4 FMSHRC at 2129-30; *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990) (requiring that the Secretary establish that "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard"); *U.S. Steel*, 5 FMSHRC at 5 (stating that in order to prove a violation of a broadly-worded standard regulating mine safety, the Secretary must demonstrate that the allegedly violative condition "do[es] not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction . . . , considerations unique to the mining industry, and the circumstances at the operator's mine."). Consequently, the standard must describe the conditions or practices required or forbidden with sufficient specificity to provide the operator with fair notice of the obligation. When a standard uses broad language, the operator must act as a reasonably prudent person in meeting the obligation. If the operator acted as a reasonably prudent operator, then no violation occurs and there is no liability.

[11] *See, e.g.*, *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) ("[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."); *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083 (10th Cir. 1998) (quoting *Freeman United*, 108 F.3d at 362); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1182 (9th Cir. 1998). Our dissenting colleague, Commissioner Traynor (slip op. at 40-41 n.12) is thus mistaken in relying on a 2011 decision from the D.C. District Court to argue that under the Mine Act the reasonably prudent person test is only relevant with respect to the imposition of penalties, and not the initial question of whether a violation occurred. *See Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558 (D.C. Cir. 2012) ("An accumulation exists if a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent.") (citation omitted).

## B. The Judge Erred in Not Applying the Reasonably Prudent Person Test.

We must reverse the Judge's findings of violations here because he committed basic legal errors when analyzing the issues presented by the two citations. The Judge made little attempt to evaluate the ample evidence proffered to determine Doe Run's obligations under the cited standards and whether Doe Run had failed to meet those obligations – the primary judicial decisional rubric in *any* administrative adjudication. Tellingly, the Secretary here does not support affirmance based on the Judge's analysis.

### 1. Mine Act Strict Liability Cannot Be Used as the Sole Justification to Find a Per Se Violation of a Mine Act Standard.

We begin by addressing the Judge's view, offered *sua sponte*, that strict liability under the Mine Act frames the initial question of violations here. *See* 40 FMSHRC at 1205 ("Given that the Mine Act is a strict liability statute and . . . that a miner was killed due to the fall of roof material . . . were there *per se* violations . . . ?"). The Secretary's post-hearing brief mentioned strict liability only once and then only in a *pro forma* opening sentence of the argument. Thereafter, he sought to sustain the alleged violations using only the "reasonably prudent person" standard—the correct standard. *See* S. Post Hearing Br. at 20, 24-28. In fact, the Judge explicitly recognized that both parties argued the merits under the reasonably prudent person test. 40 FMSHRC at 1205, 1207. He eventually concluded that strict liability dictated that "per se" violations of the standards at issue here had been established by the fatality suffered. *Id*. at 1209-10.[12]

Such an approach was plain analytical error. *Every* determination of whether a Mine Act standard was violated *begins* with addressing the specific terms of the standard in question. *See, e.g.*, *Peabody Twentymile Mining, LLC*, 931 F.3d 992, 996 (10th Cir. 2019). Here though, the Judge's discussion of the terms of the standards was only in passing, and even then was either non-existent or perfunctory.

In finding that a per se violation of 30 C.F.R. § 57.3360 occurred, the Judge stated that the standard "provides *in pertinent part* that the ground 'support system be designed, installed, and maintained to control ground in places where people work.'" 40 FMSHRC at 1209 (emphasis added). In so doing, the Judge failed to set forth the relevant terms of section 57.3360 in their full context. The relevant language of the standard actually states:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

[12] While the wording of his opinion suggests that the Judge might have intended his per se analysis to be confined to fatalities caused by roof falls, his failure to consider the text of the regulations does not support consideration for such a limitation.

30 C.F.R. § 57.3360. In purporting to interpret and apply the primary standard at issue in the case, the Judge completely ignored the terms of the entire first, and thus prefatory, sentence of the standard. That sentence requires the operator to apply ground support *where* the mining conditions or experience in similar ground conditions *indicate that it is necessary*. The cardinal principle of interpretation is to give effect, if possible, to every clause or word. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Regulatory interpretation cannot be properly undertaken in any other manner. Again, it is the site-specific *location* that dictates the application of ground support. That is precisely what Doe Run did here – apply ground support in the location *where* it was necessary.

Regarding the other standard at issue here, 30 C.F.R. § 57.3201, in concluding that a *per se* violation of it had been established, the Judge similarly truncated it. The standard provides that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, *or other protection from falling material shall be provided*." 30 C.F.R. § 57.3201 (emphasis added). The Judge, however, made no effort to interpret it, simply concluding that that "[t]he *operative language* . . . is that 'scaling shall be performed from a location which will not expose persons to injury from falling material . . . ." 40 FMSHRC at 1209 (emphasis added). In short, he impermissibly read out of the standard its entire second prong.

The Judge confused the strict liability the Mine Act imposes *for violations* with an entirely separate and different legal concept – common law strict liability for *activities, conditions or practices*. *See, e.g., Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989) (discussing the difference between Mine Act strict liability for an undisputed violation of a coal mine roof control standard and strict liability under common law for the consequences of ultrahazardous activities); *see also Indiana Harbor Belt R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (applying Illinois law to determine whether there was strict liability in tort for accident). In so doing, the Judge wholly disregarded the reasonably prudent person test that is fundamental to interpretation of Mine Act standards such as the ones at issue in this case.

There is operator liability for a mining condition or practice *only if* the condition or practice is found to constitute a violation of the Mine Act or its standards. *See Western Fuels-Utah*, 870 F.2d at 715; *see also* 30 U.S.C. §§ 814(a), 815(d). No "general duty clause" was included in the Mine Act, unlike with section 5(a)(1) of the Occupational Safety and Health Act of 1970. S*ee* 29 U.S.C. § 654(a)(1). Indeed, such a provision was specifically *excluded* from the Mine Act. *See* S. Rep. No. 95-461, at 38-39 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1316-17 (1978) ("*Mine Act Legis. Hist.*").[13]

[13] Immediately after invoking Mine Act strict liability as a basis for determining whether the violations had been established, the Judge veered into a condemnatory denunciation of the history of mining, excoriating "mine operators" and "lawyers, constabulary, and biased judicial donees." 40 FMSHRC at 1206-07. This diatribe, which the Judge included in a context where he himself acknowledged its irrelevance, is completely out of line and detracts from the analysis. Commission Judges should bear in mind that they are officers of the Commission. While Judges are entitled to hold and express their own opinions privately, and while we do not suggest that

The Judge's error regarding the application of strict liability can be seen from his own direct quote to the legislative history of the Mine Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). *See* 40 FMSHRC at 1206 ("confirm[ing]" that under section 109 of the Coal Act, the precursor to section 110 of the Mine Act, there was "congressional intent that there should be 'liability *for violations of the standards* against the operator without regard to fault'") (quoting H.R. Rep. No. 91-761, at 71 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1515 (1975) (emphasis added).

Further, *both* of the cases cited by the Judge as support for his strict liability analysis (40 FMSHRC at 1205-06) were cases in which strict liability attached *only after* the entirely separate question of whether a violation had been established was resolved on an entirely independent basis. *See Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1070-71(4th Cir. 1982) (rejecting contention that, due to an ongoing strike by some miners, operator should not be liable for mine conditions that constituted undisputed violations of MSHA standards); *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) ("The Mine Act is a strict liability statute, such that an operator will be held liable *if a violation of a mandatory standard occurs* regardless of the level of fault.") (emphasis added).

Our colleagues, in their separate dissents in support of affirming the Judge's erroneous analysis, similarly misapply Mine Act precedent. They cite *Sewell*, *Western Fuels-Utah*, *Spartan*, and a host of other court and Commission cases, which, while certainly speaking to an operator's liability once a violation is found, are far less relevant to the initial task of interpreting a Mine Act standard to determine an operator's obligations under it and *whether* a violation even occurred. *See* slip op. at 25-27; 34, 36, 44-45 n.20.[14] Simply put, strict liability under the Mine

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Judges should refrain from appropriate citations to history in rendering their decisions, irrelevant dicta must be avoided. Ironically, the Judge, albeit by footnote, absolves the operator from acting "reprehensibly." *Id*. at 1206 n.61.

[14] *See, e.g.*, *Allied Prod. Co. v. FMSHRC*, 666 F.2d 890, 893 (5th Cir. 1982) (after upholding that equipment conditions constituted violation, rejecting contention that evidence of significant employee misconduct should be taken into account in deciding whether to hold operator liable for the violation); *Miller Mining Co.*, 713 F.2d at 491 (describing strict liability as holding an operator liable for "any *failure to comply with a regulation* under the Act [that] result[s] in a citation") (emphasis added); *Northwestern Mining Dep't v. FMSHRC*, 868 F.2d 1195, 1197 (D.C. Cir. 1989) (upholding Commission's finding that "*once it was determined* that . . . a miner employed by Asarco[] *violated a mandatory safety standard* in Asarco's . . . [m]ine, Asarco, under the Mine Act, was subject to a civil penalty . . . and that the fact that Asarco's supervising employees were not at fault was not a defense to the citation") (emphases added); *Ames Constr., Inc. v. FMSHRC*, 676 F.3d 1109, 1110-12 (D.C. Cir. 2012) (rejecting production-operator's claim that strict liability for truck driver's violation of the standard should not attach to it); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) (finding that an operator is strictly liable "*if* a violation of a mandatory safety standard occurs") (emphasis added); *Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1651 (July 2016) ("[W]hen a miner fails to wear a seat belt when operating a vehicle covered by [30 C.F.R. §] 77.1710(i), he violates th[at] standard. *Then*, as required by [the Mine Act], the operator is liable for the violation.") (emphasis added).

Act is not a concept by which a mine operator can be found liable for an activity, condition or practice for which it did not have sufficient notice to otherwise properly find the condition or practice to constitute a violation of a health or safety standard.

### 2. Neither Section 75.202(a) Nor *JWR* Govern the Interpretation of Sections 57.3360 and 57.3321.

The Judge's misuse of the concept of strict liability was compounded by his improper focus, in interpreting the standards at issue here, on Commission case law involving a significantly different standard. The Judge looked to 30 C.F.R. § 75.202(a), and concluded that *both* of "the mandatory safety standards at issue are *essentially identical*" to it in their "plain meaning." 40 FMSHRC at 1209 (emphasis added) (citing *JWR*, 37 FMSHRC at 495). They are not identical. Section 75.202(a), the general ground control standard for underground coal mines, simply reads "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

It is, of course, correct that all three regulations are directed at preventing roof falls. But any similarity ends there. Comparing the terms of section 75.202(a) to the terms of the two standards at issue here, the language employed in the coal and metal-nonmetal standards is strikingly different in both instances. Properly reviewed, there is virtually no commonality between the short and direct obligation under section 75.202 and the broader language of the subject regulations.

In reaching his decision, the Judge did not discuss any of these distinctions in language between section 75.202(a) and the subject standards. As noted, he entirely omitted quoting the prefatory sentence in section 57.3360, which, as discussed below, is crucial to understanding the obligations the standard imposes upon operators. Commonality of any sort, including subject matter, does not relieve the Commission or the Judge from the duty to examine the actual words of the regulations. It is simply impossible to conclude that the terms of two or more standards are "essentially identical" without analyzing all of the terms of those standards.

The difference in language in the standards leads us to also reject the claim that Commission precedent, with respect to violations of section 75.202(a), controls interpretations of the standards at issue here, and thus the findings of violations in this case. This includes the Commission majority's decision in the *JWR* roof fall fatality case, which largely focused on the particular language of that standard in reaching its conclusion. Of course, that language did not include anything remotely similar to the first sentence of section 57.3360 nor to any part of section 57.3321.[15]

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[15] In *JWR*, the Secretary urged an interpretation of section 75.202(a) under which a fatality due to a roof fall in an underground coal mine would result in a finding of a per se violation of that standard. 37 FMSHRC at 494-95. The Commission majority instead, acknowledging strict liability under the Mine Act, chose to simply apply the specific terms of section 75.202(a) to the facts. It ultimately held that, as to "the issue of whether the operator failed to support the roof 'to protect persons from hazards related to falls,'" a miner was found

The significant difference between the language of the specific coal standard that governed in *JWR* and the language of the metal-nonmetal regulations at issue here is not the only reason to reject *JWR* are as controlling in this case. There is also a substantial distinction between the regulation of roof control for coal mines and the regulation of ground control for metal-nonmetal mines. The coal regulations, as shown in subpart C in Part 75 devoted to roof control, include specific requirements for detailed roof control plans. *See generally* 30 C.F.R. Subpart C.[16]

In contrast, the underground metal-nonmetal regulations impose no specific roof control parameters, and that is for good reason. *See generally* 30 C.F.R. Part 57. Metal-nonmetal operators deal with diverse conditions, such as varied rock types and material structures, and they have many different ways to handle those types of conditions. In short, these are site-specific regulations. This inherent difference in the nature of metal-nonmetal mining conditions mandates that metal-nonmetal operators must have flexibility to deal with the conditions as they see fit, at the immediate site, on a case-by-case basis.

Similar to the Judge, Commissioner Jordan interprets the standards at issue largely without addressing the exact terms of the standards and the differences between the regulatory contexts of coal and metal-nonmetal mines. Instead, she too relies on *JWR* (as does Commissioner Traynor), along with other cases in which, based on the application of the facts to the simple terms of different regulatory standards, violations of those standards were found. *See* slip op. at 25-30, 39. Like *JWR*, their cited cases provide little to no guidance for how the more complex standards at issue here are to be interpreted and applied, and do not stand for the

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> . . . lying fatally injured beneath a large roof fall. Accordingly, the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall. . . . [T]he Mine Act is a strict liability statute, and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a). The roof fall . . . amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls.

*Id*. at 496. The miner had entered the area despite a large roof fall having occurred nearby. *Id*. at 494.

[16] This distinction flows from the language and structure of the Act itself. Coal mining roof and rib control requirements are addressed directly in section 302 of the statute, 30 U.S.C. § 862, along with the rest of Title III that imposed interim safety standards on the coal mining industry. *See* 30 U.S.C. § 861, enacted Dec. 30, 1969, Pub. L. No. 91-173, § 301, 83 Stat. 765; amended Nov. 9, 1977, Pub. L. No. 95-164, § 203, 91 Stat 1317. By contrast, metal-nonmetal ground control is not explicitly in the Act.

proposition that strict liability under the Mine Act can be substituted for determining whether a violation was established.[17]

In addition, Commissioner Jordan would go so far as to read the legislative history of the Mine Act as sufficient authority, by itself, for the Commission to rewrite by interpretation any metal-nonmetal standard so that it is functionally equivalent to a coal standard. *See* slip op. at 27-28 (quoting S. Rep. No. 95-181, at 12-13 (1977), *Mine Act Legis. Hist.* at 600-01). We decline to do so. In a 16-month period, approximately ten years after the passage of the Mine Act, MSHA issued revised ground control regulations for both coal and metal-nonmetal contexts. Despite the legislative history's belief in the "essential[ity] of a common regulatory program for all operators," MSHA nevertheless adopted the significantly different ground control standards set forth above. *Compare* Safety Standards for Ground Conrol at Metal and Non-Metal Mines, 51 Fed. Reg. 36,192 (Oct. 8, 1986); Safety Standards for Roof, Face and Rib Support [in Underground Coal Mines], 53 Fed. Reg. 2343 (Jan. 27, 1988). It is not the role of the Commission, through case law, to attempt to satisfy legislative history while implying that the Secretary himself has clearly ignored that history in carrying out his standard-setting function under section 101 of the Mine Act, 30 U.S.C. § 811.[18]

### 3. The Reasonably Prudent Person Test Applies to the Standards Here.

#### a. The Standards' Broad Terms Require That the Commission's Reasonably Prudent Person Test Be Applied Here.

Turning to the terms of the standards that the Judge omitted, it is significant that section 57.3360 begins by stating that "[g]round support shall be used where ground conditions, or mining *experience* in *similar* ground conditions in the mine, *indicate* that it is *necessary*." 30 C.F.R. § 57.3360 (emphases added). The terms "experience," "similar," "indicate," and "necessary" are clearly indicative of a "judgment call" on when and what ground control is needed, based on all the relevant ground conditions in the mine. The actions required by section 57.3360 – choice of ground support under the first sentence of the standard, and the resulting design, installation and maintenance of that support under the second sentence – thus rest upon the experience of the operator in the particular mining conditions to indicate appropriate ground control measures. Because the regulation *explicitly directs* the mine operator to base its

[17] *See Stillwater*, 142 F.3d at 1183-84 (finding load of ore that operator permitted to flow in chute exceeded design capacity of bolts on chute gate shown by failure of gate, and thus operator violated general safety regulation prohibiting use of equipment beyond its design capacity); *Clintwood Elkhorn*, 35 FMSHRC at 370 (finding that truck leaving the road violated standard requiring full control of equipment while it is in motion); *Nally & Hamilton*, 36 FMSHRC at 1648-51 (after interpreting key term "required" in context of standard imposing obligation that seat belt be worn, finding violation solely based on equipment operator's failure to wear seat belt).

[18] We further note that, in contrast, in *Nally & Hamilton*, the case cited by our colleague in support of her argument for a harmonious interpretation of similar MSHA safety standards, the standard at issue, 30 C.F.R. § 77.1710(i), was promulgated prior to the passage of the Mine Act.

judgment upon experience in similar ground conditions and knowledge of the ground conditions, determining whether this standard was violated clearly negates a strict liability application and calls for application of the Commission's reasonably prudent person test. *See BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996) (recognizing that factors bearing upon the application of the reasonably prudent person standard include accepted safety standards and circumstances at the operator's mine).[19]

Separately, even when we find the actions of the operator would violate a standard, orders have nonetheless been vacated when the reasonably prudent operator did not have fair notice of a requirement through the wording of the standard. We apply the "reasonably prudent person" test in deciding whether an operator had fair notice. *See, e.g., Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016) ("[W]e hold that a reasonably prudent person familiar with the mining industry would not have known that the examination and testing requirement in section 57.3401 might demand a geomechanical or engineering analysis. [Although] we consider the Secretary's interpretation to be a permissible one . . . it would not be an obvious reading of the standard to a person familiar with the mining industry."). The reason is simple – the constitutional principles of due process and fair notice apply *prior* to a finding of a violation that results in a civil penalty.

Here, for example, the operator could not have had "fair notice" of a supposed obligation to install the type and extent of roof support measures that could have prevented the magnitude of roof failure that occurred in this situation. The evidence demonstrates, unequivocally, that the operator's prior years of *mining experience* in *similar* ground conditions in the same and other mines *did not indicate* that it was necessary. To the contrary, the experience indicated that it was *not* necessary. *See Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 650 (4th Cir. 2016) (agreeing with the Commission and other federal circuits that MSHA regulations permitting a reasonably prudent person standard provides sufficient notice to satisfy due process and supports potential sanctions).[20]

This case illustrates the importance of the language of section 57.3360. Here, the operator had long operated six mines in the Trend, the host rock being dolomitic limestone, which is very high in strength and stability. There was no evidence of any prior roof fall even vaguely approaching the calamitous nature of the fall that occurred in this case.[21] MSHA

[19] Contrary to Commissioner Traynor's arguments (slip op. at 42 n.15, 44), our reliance on the terms of the standard in our analysis, such as the term "experience," does not inject "negligence" concepts into this case. It is the key terms of the standard that dictate whether the reasonably prudent person test applies, and we cannot ignore such terms.

[20] Commissioner Traynor, again, misses the point by his comment that our finding here is "directly contradicted by counsel for Doe Run." Slip op. at 37, n.6. We agree with counsel for Doe Run that "ground support is necessary." It is a matter of *where* that ground support is used as necessary.

[21] There was limited testimony that some unidentified person may have heard of a roof fall of undescribed dimensions in some unidentified part of the mine; however, we find it implausible that there could have been a previous fall, in this mine, approaching this magnitude with no witness able to testify to it in any detail.

inspected the area just hours before the fall and did not see or note any ground condition giving rise to fear of any roof fall, let alone one of catastrophic proportions. Although there was post hoc speculation about breakage along the ribs by one MSHA witness based upon post-accident views, the evidence does not establish the existence of any ground conditions that could have foreshadowed the massive fall that occurred.

Under Commissioner Traynor's interpretation of section 57.3360, an operator is strictly liable for *any* failure of ground in a part of a mine regardless of *where* the operator has decided that some measure of ground control is necessary, on the rationale that such failure means the operator has violated one or more of the design, installation, or maintenance terms of the second sentence. Thus, in any metal-nonmetal mine where an operator has recognized the necessity for ground control in a specific location, our dissenting colleagues would, in essence, read section 57.3360 identically to how section 75.202(a) applies in coal mines. Aside from being an erroneous comparison, such an approach would obviously ignore the many cases requiring fair notice of the obligations of a standard and a level of clairvoyance far removed from the terms of the standard.

In light of the terms of the first sentence of the standard and as the standard has been interpreted by the Secretary, we do not agree that an operator's liability under the second sentence of section 57.3360 can or should be expanded by such an interpretative approach and default to strict liability. It would, in essence, render irrelevant the operator's compliance with the obligations the first sentence of the standard imposes.

The other regulation at issue, section 57.3201, is a classically general standard. As with section 57.3360, the standard's language is broadly-worded, stating that "[s]caling shall be performed from a *location* which will not expose persons to injury from falling material or *other protection* from falling material shall be provided." 30 C.F.R. § 57.3201 (emphases added). The key words here are "location" and the phrase "other protection." It is important that the standard permits alternative means of compliance, i.e., the operator may ensure scaling is done from a location that does not expose miners to hazards *or* it may provide protection to them.

Additionally, as with section 75.3360 again, and reading it in *pari materia* with that more general control standard – as we should, because they both appear in Subpart B of MSHA's Part 57 regulations addressing ground control – section 57.3201 does not require operators to foresee and provide protection against a wholly unexpected and unprecedented collapse of an enormous section of stable, hardened limestone. There are no details in the standard as to where that "location" ought to be, and there are no details as to what "other protection" ought to be applied here. Thus, as with section 57.3360, judgment calls are required to be made by the operator, based on its experience with ground conditions in the mine, with respect to both the "location" from which scaling is performed and the type of "protection . . . provided."

That is understandable because section 57.3201 applies to a wide variety of circumstances. Metal-nonmetal mines involve diverse ground conditions in a variety of unique mining environments that call for numerous scaling procedures. MSHA openly acknowledged in its final rule promulgating section 57.3201 that, in metal-nonmetal mines, the "[c]ontrol of ground is made uniquely difficult because of the variety of conditions encountered and the

changing nature of the forces affecting ground stability at any given operation." 51 Fed. Reg. at 36,192.

This is a different context than underground coal mine operations, where mine plans and roof conditions, albeit varying, are often very similar within a given type of underground mine, and have been subject to more stringent and uniform regulation from the Mine Act's inception. Section 57.3201, on the other hand, must account for the broad variety of materials extracted, the diversity of mining types and geographic areas represented, and the multiple methods of scaling possible, depending on the type of mine and environment.[22] Various conditions in a mine affect scaling and the type of scaling utilized.[23] Each one of these diverse factors impacts what equates to a safe "location" for performing scaling.[24]

As such, the standard, like section 57.3360, requires the application of the "reasonably prudent person" test. If the operator, informed of the requirements of those regulations with ascertainable certainty, failed to act with respect to either as a reasonably prudent person, then a violation occurred. On the other hand, if the operator acted with reasonable prudence, there can be no violation.

Our dissenting colleague, Commissioner Traynor, would affirm the Judge's findings of violations here, citing unassailable "plain meanings" to the standards at issue, and that thus the reasonably prudent person test cannot be used. Slip op. at 36-44. However, he himself disregards the plain language of section 57.3201, which provides that, as an alternative to scaling from a location which will not expose persons to injury from falling material, "other protection against falling material shall be provided." 30 C.F.R. § 57.3201. Here, the operator used both – a belt-and-suspenders approach. It positioned the miner beneath supported roof, where even the inspector testified it would not have been a violation absent a roof fall, *and* used a specialized piece of equipment featuring a long boom to permit the miner to remain under protected roof while scaling from within a strong, reinforced cab. Clearly, therefore, the operator used other

[22] These include, but are not limited to, ground hand-scaling, rock pile scaling, high-boom hand-scaling, mechanical scaling, front-end loader scaling, bolter scaling, and jumbo drill scaling.

[23] These include, but are not limited to, host rock stability, mineralization, layered back, thick shale seams, brecciated ground, sandstone, existence or non-existence of ground support, water penetration, active faults, and mud seams.

[24] Again, our dissenting colleagues would read the standard in question as requiring much less in the way of evidence, and affirm the Judge's analysis that the facts here establish a *per se* violation of section 57.3201. They would find the scaler's location under the roof fall entirely dispositive on the question of whether the standard was violated, regardless of how objectively reasonable that location might be at the time given the operator's ground control experience in the mine. Slip op. at 30-31, 43-47. Similarly, they would ignore that the operator provided "other protection" in the form of a reinforced cab thereby clearly complying with the obligations of the standard. As discussed *infra*, Commission precedent in interpreting predecessor and similar metal-nonmetal ground control standards does not support such an interpretation, neither with respect to section 57.3360 nor with regard to section 57.3201.

protection as required. The key point is that the standard requires the operator to use its experience and judgment in providing alternative fall protection that a reasonably prudent operator would provide under the mining conditions.

**b. Application of the Reasonably Prudent Person Test to the Two Metal-Nonmetal Ground Control Standards is Amply Supported by Established Commission Precedent.**

Applying the reasonably prudent person test to determine whether the alleged violations of sections 57.3360 and 57.3201 occurred is supported by no less than four Commission cases. Nevertheless, the Judge rejected applying the test in favor of interpreting the standards solely in light of an interpretation of a coal mine ground control standard. *See* 40 FMSHRC at 1209. In so doing the Judge failed to follow Commission precedent in recognizing and according significance to the difference between regulations under Part 57 and Part 75, as noted earlier. We have consistently recognized this distinction when interpreting the metal-nonmetal standards.

In *Asarco, Inc*., 14 FMSHRC 941, 942-43, 952 (June 1992), all four metal-nonmetal ground control violations cited were in connection with a fatality resulting from a roof fall which, similar to the case at bar, was considered to have been "unpredictable." In determining whether the Secretary had established violations of *both* metal-nonmetal ground control standards at issue, the Commission employed the reasonably prudent person test. *See id*. at 947-50 (reversing finding of violation of 30 C.F.R. § 57.3401), 952 (in reversing finding of violation of 30 C.F.R. § 57.3200, rejecting "[t]he Secretary[*'*s] premis[ing] her case on the assumption that the rock that fell had been loose and could have been detected by proper testing," because "[a]s we have concluded, a reasonably prudent person familiar with the mining industry would not have recognized that" the testing measure employed did not fulfill the requirements of section 57.3401).

In *Asarco,* the Secretary, like the Judge and our dissenting colleagues in this case, relied on the fact of the accident to establish that the operator *per se* violated one of the standards in question: section 57.3200. 14 FMSHRC at 950-51; *see also* 30 C.F.R. § 57.3200 (providing in pertinent part that "[g]round conditions *that create a hazard* to persons shall be taken down or supported before other work or travel is permitted in the affected area.") (emphasis added). The Commission expressly rejected that idea. Instead, we interpreted and applied the standard, cast in the foregoing broad, judgment-call terms, to conclude that "[t]he fact that there was a ground fall is *not by itself* sufficient to sustain a violation." *Asarco,* 14 FMSHRC at 951 (emphasis added).

Rather, the Commission held that the hazardous ground must be "detectable *before*," not just "after" the accident, and determined that, through an application of the "reasonably prudent" miner test, that the operator's pre-fall detection efforts were reasonable under the circumstances. *Id*. at 951-52. We further note that, in addition to the Commission in *Asarco* expressly rejecting the premise upon which the Judge here based his findings of violations, the similarity in the language used to circumscribe metal-nonmetal operators' ground control obligations in sections 57.3201, 57.3360 and section 57.3200 at issue in *Asarco* is much greater than the similarity in language between section 75.202(a) and sections 57.3201 and 57.3360 that the Judge found to "essentially identical." *See* 40 FMSHRC at 1209.

The Commission in *Asarco* viewed its interpretation of the metal-nonmetal ground control standard at issue to be compelled by its earlier decision in *Amax*. *See Asarco,* 14 FMSHRC at 952-53 (citing *Amax Chemical Company,* 8 FMSHRC 1146, 1149 (August 1986). In *Amax,* the Commission had also explicitly rejected a similar attempt by the Secretary to establish a *per se* test for violations of 30 C.F.R. § 57.3-22 (1984), a predecessor standard to 30 C.F.R. § 57.3401. Particularly emphasizing that the mine at issue was a "potash mine," the Commission in *Amax* specifically noted that:

> . . . [u]nlike the regulatory scheme that obtains with respect to underground coal mines, approved roof control plans are not required in underground metal-nonmetal mining operations. Rather, "[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." (30 C.F.R. § 57.3020 (1985) (formally numbered as 30 C.F.R. § 57.3-20 (1984)).

8 FMSHRC at 1149 (citing *White Pine Copper Div.*, 5 FMSHRC 825, 835-37 (May 1983)).

*Amax*'s citation to *White Pine* is particularly significant. In *White Pine*, we concluded that the terms of 30 C.F.R. § 57.3-20, the predecessor to 30 C.F.R. § 57.3360, required the Commission to evaluate the current conditions as well as the operating experience of the mine. Similar to what is now section 57.3360, section 57.3-20 stated that "[g]round support shall be used if the operating *experience* of the mine . . . *indicates* that it is required." 30 C.F.R. § 57.3-20 (1982); 5 FMSHRC at 825 (emphasis added).

We did so after finding that "experience" includes "practical wisdom" and "broadly encompasses all relevant facts tending to show the condition of the mine roof in question and whether, in light of the roof condition, roof support is necessary." 5 FMSHRC at 836 & n.23. We ultimately held that the requisite determination under the standard

> takes into account the operating history of the mine, (i.e., its past mining practice) geological conditions, scientific test or monitoring data and any other relevant facts tending to show the condition of the mine roof in question and whether in light of those factors roof support is required in order to protect the miners from potential roof fall.

*Id*. at 838. In other words, the Commission interpreted the standard according to the "reasonably prudent person" test.[25]

[25] Unlike Commissioner Traynor, we put no stock in the fact that, in some of the older cases, the Commission did not specifically state that it was applying the reasonably prudent person test. *See* slip op. at 41. The Commission had already started interpreting broad standards using such an approach before it first stated the specific "reasonably prudent person" terminology in *Alabama By-Products*, 4 FMSHRC 2128, 2129 (Dec. 1982). *See, e.g.*, *Lone Star Indus., Inc.*, 3 FMSHRC 2526, 2530 (Nov. 1981) ("[s]ection 56.9-41 is the kind of standard made simple and brief in order to be broadly adaptable to myriad circumstances. The relevant

Lastly, the Commission's decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), although it involved a former coal mine ground control standard, is instructive with regard to the circumstances in which the reasonably prudent person standard applies to ground control standards like the ones at issue here, particularly section 57.3360. Former 30 C.F. R. § 75.200, the predecessor to what is now 30 C.F. R. § 75.202(a), provided in pertinent part:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

30 C.F. R. § 75.200 (1984); 9 FMSHRC at 667 n.1. Thus, a continually developing ground-control program was required on a mine-specific basis, analogous to the requirement of the first sentence of section 57.3360. In *Canon Coal*, a case in which a roof fall resulted in a fatality, the Commission, faced with an allegation that a violation of former section 75.200 had occurred, did not hesitate to apply the reasonably prudent person test, even in light of the language in the second sentence of the standard that it emphasized. *See* 9 FMSHRC at 667-68 & n.1.

Of course, as we have seen, former section 75.200's successor standard, section 75.202(a), no longer includes that first sentence. Accordingly, we view the Judge here as having erred when he treated the Commission majority's finding in *JWR* with regard to the newer, different coal mine ground control standard as having overruled the Commission's application of the reasonably prudent person test in *Canon Coal* (*see* 40 FMSHRC at 1207-09),[26] as that was a case in which a ground control standard written in much broader terms was at issue.

Based upon the foregoing established case law and principles, we hold that the "reasonably prudent person" test applies to the alleged violations of section 57.3360 and section 57.3201 here. The Commission has consistently applied this test for nearly four decades. *White Pine* and *Canon Coal* establish beyond peradventure that section 57.3360 is to be interpreted and applied as a "reasonably prudent person standard." Likewise, and in accord with our decisions interpreting ground control standards in the metal-nonmetal context, the determinations under section 57.3201 of whether the scaling "location" was proper or, in the alternative, that "protection" was "provided," can only be made under the "reasonably prudent person" test.

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variables affecting safe position are numerous, may differ from plant to plant, and may change from day to day in any particular operation.").

[26] The Judge appears to have been strongly influenced by the claim in the concurrence in *JWR* that the majority opinion effectively overruled *Canon Coal*. *See* 40 FMSHRC at 1207 (citing 37 FMSHRC at 498). We need only observe that Commissioners Nakamura and Althen, who comprised the majority in *JWR*, certainly knew how to overrule *Canon Coal* if they wished to do so, and chose not to overrule that case. *See* 37 FMSHRC at 496 n.7.

## C. Application of the Reasonably Prudent Person Test

### 1. The Record Compels the Conclusion that Ground Support at the Accident Location was Properly "Designed, Installed and Maintained" Based on the "Ground Conditions" Known to Doe Run Prior to the Ground Fall and its Mining Experience in "Similar Ground Conditions."

With respect to the section 57.3360 violation, the Secretary urged that the Judge be given the opportunity to apply the reasonably prudent person test in the first instance after having originally rejected it (S. Br. at 24-26). We now examine the record to determine whether there is any need to do so, given the Secretary's burden of proof on the question. With regard to that burden, we consider it significant that, in *sua sponte* rejecting the test in this case, the Judge concluded that "[s]uffice it to say that given the plethora of questions raised and unresolved, a prudent person test would have made the Secretary's case as to the fact of violation much more problematic." 40 FMSHRC at 1209.

The Secretary argued below and on appeal that the operator should have known from conditions evident before the accident that additional ground control measures were necessary. He asserts that the operator should have drilled test holes to determine if there were voids above the roof. He also asserts that the operator should have known of shaley conditions, and that these conditions required the use of resin bolts instead of the Split Set bolts.

In his decision, the Judge rejected those arguments in addressing the S&S issue (which he reached after finding a violation of section 57.3360). Substantial evidence supports the Judge's conclusions on those issues. His conclusions, and the evidence upon which they rest, compel an overall finding of no violation. *See Sims Crane*, 41 FMSHRC at 399-400.

As recognized in the Judge's analysis deleting the S&S designations (40 FMSHRC at 1165, 1210-1214), the record contains abundant evidence, including testimony from the Secretary's own witnesses, establishing that nothing with respect to the ground conditions or ground support in the area of the accident put Doe Run on notice that any form of additional support was needed.[27]

Prior to January 21, 2015, the mine had never experienced any unplanned ground falls where Split Set roof bolts failed in ground conditions similar to those in the area of the accident. Likewise, Doe Run had used Split Set roof bolts for decades to support brecciated ground. Those bolts were effective without a history of failure. There is no evidence that the use of resin bolts instead of Split Set bolts would have made any difference.

Moreover, the opinion of every witness who worked at the location of the accident prior to the January 21, 2015 ground fall was that the ground conditions and ground support in the area, including the conditions in the fall cavity, were typical and good. This includes the

[27] Notwithstanding Commissioner Traynor's argument to the contrary (slip op. at 37 n.7), our discussion of the record evidence on the "judgment calls" and decisions made by Doe Run based on its experience and past practice does not convert our analysis of what a reasonably prudent miner would have "objectively" done into a "subjective" analysis.

Secretary's own witness, Inspector Kennedy, who conducted an inspection of the mine eight hours before the roof fell.[28] Kennedy's testimony and the other evidence – all of which the Judge credited in his S&S analysis – demonstrate that there was nothing that should have put the operator on notice that the ground support or ground conditions in the area were insufficient or hazardous.

The Secretary's evidence fails to detract from this conclusion. Despite Vadnal's post-hoc testimony that he thought "shaley conditions" existed prior to the roof fall, the Judge found that Kennedy's testimony contradicted Vadnal's opinion and diminished its probative weight. The Judge also took into account that Vadnal had never visited the mine prior to the accident, and had not personally observed the area before the roof fell. Vadnal was merely *assuming* that the changes he had observed in the fall cavity area were observable prior to the accident.

Furthermore, Van Dorn conceded that his reason for concluding that test holes had not been drilled was based on a single statement by *one driller*, Sam McCabe. However, McCabe had also made a conflicting statement saying that he *had* previously drilled a test hole. Tr. 386-89. Van Dorn failed to elicit *any* other statements that test holes had not been drilled.

Moreover, despite the Secretary's argument that the operator had created an unsafe work environment by using bonuses to reward productivity for roof bolters, the Judge found that the Secretary failed to establish that the bolters had performed their duties in an unduly speedy manner. 40 FMSHRC at 1213. Finally, the fact that there was no place on the mine's work area inspection cards to record when test holes were drilled raises the inference that the operator could have drilled test holes without noting them. The Secretary has failed to prove otherwise or bring forth any other evidence to show that the operator was on notice of insufficient ground control.

In summary, we conclude that, after applying the reasonably prudent person standard to the facts the Judge found, substantial evidence does not support a finding of a violation of section 57.3360. Accordingly, we vacate that citation.

### 2. The Record Establishes That Under the Reasonably Prudent Person Test Doe Run Did Not Violate 30 C.F.R. § 57.3201.

As shown in the Judge's factual findings regarding whether this violation was S&S, the record contains abundant evidence regarding Hoodenpyle's "location." The scaler's position 60 feet from the face, under bolted roof, with a reinforced cab did not "contribute[] to the reasonable likelihood of an injurious roof fall onto Hoodenpyle." *Id*. at 1212. Applying the "reasonably

[28] Kennedy testified that he did not notice anything unusual on the face and did not observe any "change" that would have indicated the existence of adverse ground conditions. Tr. 104-05. The pillars appeared to be sized adequately with nothing out of the ordinary. Likewise, the widths of the drifts and crosscuts were normal. In fact, Kennedy wrote "no loose noted" and "ok" in his General Field Notes with respect to the RC3PO stope. Tr. 101; DR Ex. AA, at 3. Kennedy had not noticed any abnormal noises such as popping or cracking. He testified that he had observed nothing abnormal that would cause him concern about hazardous ground conditions.

prudent person" test, we vacate the citation alleging that Hoodenpyle performed the scaling at an improper location without protection from falling material.

The Judge found that routine practice had demonstrated that Hoodenpyle's position in the cab was a safe location. He found that there was no prior indication of any imminent roof failure, that there was no prior indication of any unsafe location for this scaling process, and that there was no prior indication of any other locations the operator should have picked. Again, we reject the notion (*see* slip op. at 44-45) that any discussion of the record evidence on the safe past practices that led Hoodenpyle to make the decisions he did thereby converts the analysis of what a reasonably prudent miner would have "objectively" done into a "subjective" analysis.

Specifically, Hoodenpyle positioned his scaler where his ROPS/FOPS operator's compartment was approximately 60 feet from the face and directly underneath bolted ground. Both Inspectors Kennedy and Van Dorn conceded that they had seen mechanical scalers operate in this position before, and that doing so was not a violation. Indeed, Kennedy, who had four years of underground experience at the mine prior to joining MSHA, testified that he had observed mechanical scalers operate multiple times and that such positioning was normal. Likewise, Van Dorn testified that he had seen mechanical scalers operate where the cab of the machine was underneath the last row of bolts, and that he had never issued a citation for such an occurrence before. Significantly, Van Dorn testified that it is not even a violation for a mechanical scaler to be underneath 100% *unbolted* ground. Tr. 391.

Prior to January 21, 2015, the operator had never experienced an incident where a miner was injured as a result of rock falling on the operator's compartment in a mechanical scaler. Based on the "normal" location of Hoodenpyle's scaler, as well as the lack of prior similar incidents and citations, a reasonably prudent person would have believed that Hoodenpyle's location for performing scaling would have protected him from the hazard of falling material.

Moreover, prior to January 21, 2015, the mine had never experienced any unplanned ground falls where Split Set roof bolts failed in ground conditions similar to those in the area of the collapse. Likewise, Split Set roof bolts have been used for decades to support brecciated ground at Doe Run, and have proven to be effective without a history of failure. The unanimous opinion of every witness who worked in the fall area prior to the roof fall was that the ground conditions and ground support were typical and good. There had never been any instance of injury to any mechanical scaler operator at the mine due to being crushed by a rock or because rock fell on the operator's compartment. In short, based on both the ground conditions as well as the methods of ground control utilized at the mine, a reasonably prudent person would not have recognized the hazard of falling material at Hoodenpyle's scaling location.

The standard also requires a finding of no violation here because it offers alternative means of compliance. The operator did "provide . . . protection" by the use of specialized equipment, including a reinforced cab and an extended boom to keep the miner far from the area being scaled, and by bolting the area above the scaler cab – which is not required.[29] Interpreting

[29] We reject the Secretary's contention that the operator forfeited this argument by failing to raise it before the Judge below. S. Br. at 8 n.3 (citing 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d); *Black Beauty Coal Co.*, 37 FMSHRC 687, 694–95 (Apr. 2015). Doe Run

the standard in this way encourages the adoption of specialized safety equipment and practices. As stated above, there are no details in section 57.3201 as to what "other protection" ought to be applied here. Thus, another judgment call by the operator was required here.

Furthermore, as recognized by the Judge in his S&S analysis, the safety features equipped in the mechanical scaler, e.g., the stable chassis that did not require stabilizers or outriggers, the optimized line of sight to the scaling area improving visibility, the telescopic boom, and the ROPS/FOPS protection, demonstrate that a reasonably prudent person would have believed that the scaler offered "protection from falling material" on the day of the accident. 30 C.F.R. § 57.3201.[30] The fact is that the operator did everything a reasonable operator would have done both in terms of location and in providing other fall protection, and nothing would have been cited as a violation but for the unforeseeable roof fall.

## III.

## Conclusion

For the reasons stated above, we reverse and vacate the Judge's findings of violations of the ground support standard in 30 C.F.R. § 57.3360 and the scaling standard in 30 C.F.R. § 57.3201.[31]

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

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explicitly raised this argument before the Judge on pages 59-60 of its post-hearing brief. DR Post-Hg. Br. at 59-60.

[30] Moreover, the Secretary failed to produce any definitive evidence that the canopy or cab of the scaler was not approved by MSHA or used without the proper tags.

[31] Consequently, the Judge's negligence findings are vacated as well, and we need not reach the Secretary's arguments regarding S&S and negligence.

Commissioner Jordan, dissenting:

Roof falls have historically been a major cause of injuries and fatalities in our nation's mines. This case involves a mining accident during which 175 tons of rock collapsed onto a mechanical scaler which miner John Hoodenpyle was operating.[1] He did not survive. The Judge concluded that Doe Run violated the two mandatory safety standards designed to protect miners from such tragedies.[2] I would affirm this ruling.

The Judge, however, erred by failing to conduct separate analyses as to whether each violation was significant and substantial ("S&S") and in ascertaining the level of negligence for each violation. He also incorrectly ruled that the operator's negligence was low without supporting analysis. Consequently, I would remand the case on these issues.

## I.

## The Judge Correctly Determined that the Fatal Roof Fall established Per Se Violations of the Cited Standards.

### A. The Judge Applied the Per Se Analysis the Commission Utilized for Underground Coal Mines.

In *Jim Walter Resources, Inc.*, 37 FMSHRC 493 (Mar. 2015), ("*JWR*"), the Commission considered the validity of a citation issued in the wake of a roof fall fatality in an underground coal mine. The cited standard, in pertinent part, required that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof. . . ." 30 C.F.R. § 75.202. When the inspector arrived on the scene, the miner was lying fatally injured beneath a large roof fall. In affirming the citation, the

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[1] Scaling involves knocking loose rock off of the walls and roof of a mine. Tr. 429-30.

[2] Doe Run was charged with a violation of the following standards:

30 C.F.R. § 57.3360:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

30 C.F.R. § 57.3201: "Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided.

Both violations were designated as significant and substantial.

Commission observed: "the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall." 37 FMSHRC at 496.

However, the Judge in *JWR* had ruled that the Secretary had failed to prove a violation. According to the Judge, in order to uphold the citation, the Secretary had to establish the existence of objective signs that were present prior to the roof fall, which would have alerted a reasonably prudent person that additional roof support was necessary. *Id.* at 494. In reaching this conclusion, the Judge relied on the Commission decisions in *Canon Coal Co*., 9 FMSHRC 667 (Apr. 1987) (*Canon*), and *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275 (Dec. 1998), (*Harlan*), which had applied this "reasonably prudent person" standard to factual scenarios involving a roof fall (*Canon*) and unsafe roof conditions without a fall (*Harlan*).

In overturning the Judge, the Commission observed that "the Mine Act is a strict liability statute and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a)." 37 FMSHRC at 496. The majority acknowledged the similar factual context between the case before it and the decision in *Canon*, but specifically declined to follow that decision. In his concurring opinion, Commissioner Cohen agreed that "[a] roof that falls and kills a miner was obviously not supported 'to protect persons from hazards related to falls of the roof' as required by the safety standard." *Id.* at 498. He wrote separately to express his view that the disposition in *JWR* effectively overruled the Commission's decision in *Canon*.

## B. ***JWR* is Consistent with Commission and Court of Appeals Precedent as Applied to Both Coal and Metal/Non-Metal Mines.**

The Commission's decision in *JWR* is the most recent in a long line of precedents holding operators liable when they have failed to achieve the result required by an MSHA safety standard, regardless of the effort the operator may have made to comply with the standard, or the operator's ignorance regarding the existence of the violation. A few examples of these cases demonstrate that here, to determine liability, one must simply ask: "was the ground controlled" or "was the miner exposed to injury from falling material"?

*Clintwood Elkhorn Mining Co. Inc.*, 35 FMSHRC 365 (Feb. 2013), involved a miner who was unable to stop his truck while it rolled down a haul road, crashed through a berm and flipped onto its passenger side. The operator was charged with violating the regulation requiring equipment operators to "have full control of the equipment while it is in motion." *Id*. at 367, (citing 30 C.F.R. § 77.1607). In upholding the citation, the Commission stated:

> [t]he Secretary must only demonstrate, by a preponderance of the evidence, that the operator failed to maintain full control of a piece of equipment while it was in motion. Nothing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control . . . . We conclude that the judge made a finding that is both necessary and sufficient to affirm the citation: the driver lost control of his truck.

*Id*. at 370.

In *Musser Engineering Inc., and PBS Coals, Inc*., 32 FMSHRC 1257, 1271-72 (Oct. 2010), a serious inundation led to an operator being charged with using an inaccurate mine map.[3] The operator argued that the map was prepared based on the best information available to it, and that it was not possible to ascertain the boundaries of the adjacent abandoned mine. The Commission nevertheless concluded that because the standard requires that the operator maintain an "accurate and up-to-date map," it followed that if the mine map failed to meet these requirements, the operator violated the standard, regardless of whether the operator did everything possible to locate an accurate historical map of adjacent mine workings. *Id*. at 1272.

In addition, when Spartan Mining was charged with failing to prevent damage to trailing cables by mobile equipment,[4] the Commission upheld the citation because: "It is undisputed that the trailing cable was run over and damaged by the continuous mining machine . . . ." *Spartan Mining Co., Inc.*, 30 FMSHRC 699, 706 (Aug. 2008). It explained why Spartan's arguments were unavailing:

> We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault.

*Id* at 706.

In *El Paso Rock Quarries, Inc*., 3 FMSHRC 35 (Jan. 1981), the pertinent safety standard required an audible back-up alarm when the equipment operator had an obstructed view to the rear. The Judge vacated the citation because the Secretary failed to establish that the operator knew or should have known that the alarm was inoperative. The Commission reversed, reasoning that under the Mine Act, an operator may be held liable for a violation of a safety standard regardless of fault. *Id.* at 38.

The Courts of Appeals have upheld the Commission's strict liability analysis. For instance, in *Asarco, Inc.-Northwestern Mining Dept. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989), a miner in an underground metal mine sustained a broken foot when struck by a falling

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[3] The standard at issue, 30 C.F.R. § 75.1200, states:

> The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale.

[4] The operator was charged with violating 30 C.F.R. § 75.606, which requires that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment."

rock while he was drilling. It was uncontested that he had not complied with the standard requiring miners to examine and test the back, face, and ribs of their working places. However, the operator argued that it had taken all actions necessary to meet the duty of care mandated by the statute and that the miner had engaged in "unpredictable and idiosyncratic misconduct" and violated his supervisor's specific instructions. *Id*. at 1196. The Court nevertheless upheld the Commission's ruling that once it was determined that the miner employed by Asarco had violated the safety standard, the operator was subject to a civil penalty, and the fact that supervising employees were not at fault was not a defense to the citation. *Id.* at 1197.

In *Stillwater Mining Co*., 142 F.3d 1179 (9th Cir. 1998) ("*Stillwater*"), the relevant standard required that "[m]achinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons." 30 C.F.R. § 57.14205. After ore being loaded from a chute into a waiting railcar jammed in the chute, the gate assembly detached, permitting the ore and muck to flow from the chute, killing a miner. Agreeing with the Judge below, the Ninth Circuit held that "[w]hatever load was applied to the bolts . . . had to have exceeded the design capacity of the bolts; otherwise the chute would not have failed." 142 F.3d at 1185. In rejecting the operator's argument that it had no reason to believe the design capacity was ever exceeded, the Court emphasized that "knowledge and culpability . . . are not relevant to the determination of whether there was a violation. As we have observed, the [Mine Act] imposes 'a kind of strict liability on employers to ensure worker safety.'" *Id.* at 1184 (citations omitted).

Here, in spite of the roof fall, my colleagues decline to find violations. They find it persuasive that the operator had long operated mines in the same ore deposit, that there was no evidence of any prior roof fall, that MSHA had inspected the area shortly before the fall and did not note any problematic ground conditions, and that the operator had never experienced an incident where a miner was injured as a result of rock falling on the operator's compartment in a mechanical scaler. Slip op. at 19-25. But the *Stillwater* court rejected similar defenses. Stillwater pointed out that the chute had been used for over five years without incident during which time more than 200,000 tons had flowed through the gate, the chute assembly was regularly inspected by workers and MSHA, and no changes or adverse conditions had occurred. 142 F.3d at 1183. The Ninth Circuit discounted such reasoning, adopting instead a per se approach: the chute failed, and thus the design capacity of the bolts must have been exceeded.

### C. The Majority Erroneously Applied A Reasonably Prudent Person Standard to Determine Liability.

In contrast to the strict liability standard applied to the coal mine roof fall fatality in *JWR*, the majority contends that the distinctive nature of metal mines necessitates a reasonably prudent person test. Slip op. at 15-16. My colleagues' conclusion, however, rests on a faulty analysis. In fact, their approach flies in the face of the intent expressed by the drafters of the Mine Act that miners in metal/non-metal mines enjoy safety protections equal to those which had been set forth in the Coal Act. The Senate Report made clear the desire to rectify the distinction which existed between the two groups of miners:

> [T]he Metal Act does not provide effective protection for miners from health and safety hazards and enforcement sanctions under

> that Act are insufficient to encourage compliance by operators . . . . *The Committee believes that it is essential that there be* a common regulatory program for all operators and *equal protection under the law for all miners*. Thus a principal feature of the bill is the establishment of a single mine safety and health law applicable to the entire mining industry.

S. Rep. No. 95-181, at 12-13, (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 600-01 (1978) ("Leg. Hist.") (emphasis added).

The Commission cited this legislative history when it rejected a construction of the seat belt requirement pertaining to coal miners that would have afforded them less protection than that afforded to metal/non-metal miners. The case arose when an inspector observed a coal miner who was not wearing a seat belt. The relevant standard provided that miners were required to wear seatbelts in certain vehicles where conditions pose a danger of overturning. The operator argued that liability should not be based solely on the miner's failure to wear the seat belt. Relying on its training regimen, and its enforcement practices, the operator maintained that the miners were in fact "required to wear" seatbelts, as the language of the standard mandated. *Nally & Hamilton Enterprises*, 38 FMSHRC 1644 (July 2016).

Rejecting that argument, the Commission held that the only sensible reading of the regulation was that it required miners to use seatbelts. The failure to wear the seatbelt would be sufficient to impose liability. In reaching that conclusion, the Commission noted the corresponding regulation applicable to metal/non-metal miners, which explicitly required that: "Seat belts shall be provided and *worn* in haulage trucks." 30 C.F.R § 57.14131(a). Finding "no logical reason why coal mines would be subject to a regulation designed to be less protective . . . than the regulation governing other mines" and that it "would make little sense for MSHA or its predecessor agency to have intended such a result," *Nally & Hamilton*, 38 FMSHRC at 1650, the Commission concluded that the coal mine standard should be construed "in a manner that provides equivalent and harmonized safety protection across different types of mining ventures." *Id.* at 1649.

In this case, however, my colleagues have construed the relevant roof control standard in a manner that affords metal/non-metal miners with less protection than that afforded to miners working in underground coal mines. A mine inspector arriving upon the scene of a roof fall fatality in an underground coal mine can issue a citation for a violation of the standard requiring the roof to be supported, without the need to determine that operator negligence was a contributing factor to the roof fall. *JWR*, 37 FMSHRC at 496. An inspector arriving upon the scene of a roof fall fatality in a metal/non-metal mine would, according to my colleagues, have to determine whether there were objective signs present prior to the fall that would have alerted a reasonably prudent operator to install additional roof support. In other words, the inspector would have to demonstrate the operator was negligent before the inspector could issue a citation to the metal/non-metal operator. There is no logical reason for this distinction. It is contrary to Congressional intent and inconsistent with Commission and Court precedent. Moreover, as I discuss in greater detail, *infra* slip op. at 29-31, the language of the comparative regulations do not support such a result.

Although my colleagues acknowledge that the Mine Act encompasses strict liability parameters as a general rule, they claim that here they must apply a "reasonably prudent person" test to ensure that principles of fair notice to the operator are upheld. I agree that this test is appropriate when a standard requires no clear-cut outcome and fails to alert an operator to what it must do to avoid a breach of a safety rule. Thus, I have no quarrel with the majority's recitation of the black-letter law principle that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Slip op. at 6-7, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

However, there is no notice issue in this case, and thus no need to use the test here. The requirements of the two standards are clear, and individuals of "common intelligence" have no need to guess as to their meaning. *See Alabama By-Products*, 4 FMSHRC at 2129. To comply, an operator must (1) control the ground in places where persons work or travel, and (2) ensure that scaling is performed where falling material will not hurt miners or provide protection from such material. The obligations are clear.

Nonetheless, focusing only on the first sentence of section 57.3360, the majority tries to shoehorn it into the class of "incomplete, vague, indefinite or uncertain" standards that the majority states are appropriate for use of the reasonably prudent person test. Slip op. at 13-17. Whether or not the use of that test might be appropriate in cases where this sentence of the standard is at issue, the test is clearly not appropriate here. Here, it is undisputed that ground support was necessary.[5] Moreover, as discussed with greater specificity, *infra* slip op. at 31-32, section 57.3201 also states straightforward requirements that do not implicate fair notice concerns.[6]

**D. <u>Doe Run Violated the Ground Control Standard.</u>**

The Judge here properly concluded that the standards at issue "are essentially identical to § 75.202(a) in that the plain meaning of both standards is there should be adequate ground control to protect miners from falling materials." 40 FMSHRC 1165, 1209 (July 2018) (ALJ). The majority criticizes him for relying upon the *JWR* decision because in doing so, the Judge disregarded the "substantial distinction between the regulation of roof control for coal mines and the regulation of ground control for metal-nonmetal mines." Slip op. at 12. According to my colleagues, the language of the standards "is strikingly different" and they consider there to be "virtually no commonality between the short and direct obligation under section 75.202 and the broader language of the subject regulations." Slip op. at 11. I disagree.

[5] Counsel for Doe Run conceded that experience had indicated that roof bolting was necessary. Oral Arg. Tr. At 13 ("Doe Run made the decision that ground support is necessary."). And roof bolt ground support was installed in a portion of the fall area.

[6] As Commissioner Traynor correctly points out, slip op. at 40-41, the majority's reliance on *Amax Chemical Co.*, 8 FMSHRC 1146 (Aug. 1986) and on *Asarco, Inc.*, 14 FMSHRC 941 (June 1992) is misplaced.

Regarding section 57.3360, although it requires the metal/non-metal operator to make an initial judgment call as to whether ground control is needed, once the operator determines that such support is necessary (as the operator did here), there is no discretion as to how adequate that support must be. Indeed, as I will illustrate, the regulations are quite parallel on this point: the support must prevent the roof from falling on miners. This obligation remains the same, no matter whether the miner is employed in an underground coal mine or an underground metal/non-metal mine. A careful analysis of the language of the relevant regulations confirms the correctness of this assertion.

The relevant standard for coal mines is located at section 75.202(a) and provides in pertinent part: "[T]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof . . . ." 30 C.F.R. § 75.202(a) (emphasis added).

The corresponding standard for metal/non-metal mines states the following: "When ground support is necessary, the support system shall be designed, installed and maintained to control the ground in places where persons work or travel in performing their assigned tasks." 30 C.F.R. § 57.3360 (emphasis added).

Both regulations require the operator to achieve the same result and each regulation provides the operator with ascertainable certainty as to what that result should be: the operator is required to support the roof so that it does not fall and injure a miner. A roof fall fatality unquestionably demonstrates a failure to achieve the required result. A failure to achieve the regulation's required result equates to a violation of either standard. This is the approach that the Commission took in *JWR*, and this is the approach that the Judge correctly applied here. Consequently, I would affirm the finding of a violation.[7]

## E. Doe Run Violated the Scaling Standard.

As previously noted, section 57.3201 provides that: "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201.

The requirements of this standard are clear: (1) scaling work shall be performed outside the zone of danger of any potential fall of ground or (2) adequate protection shall be provided. It is beyond dispute that the miner was scaling from a location where he was exposed to injury. Similarly, it is tragically incontrovertible that the structures on Mr. Hoodenpyle's scaler were not adequate to protect him from falling material caused by failure of his employer's ground control system. *See, e.g.*, *Sunbelt Rentals, Inc.*, 38 FMSHRC 1619, 1627 (July 2016) (holding that an

[7] Even were I to adopt the majority's reasonably prudent person analysis, I agree with Commissioner Traynor, slip op. at 42, n.14, that one would be hard-pressed to conclude that the record compels the conclusion that no violation occurred, the standard that must be met in order to reverse the Judge. *Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

examination of working places, to comply with the examination standard at issue, must be "adequate").

The majority's effort to characterize this outcome-based standard as lacking sufficient detail and requiring a judgment call by an operator, slip op. at 13, 15, 23, are unavailing. The standard clearly protects against one hazard—injury from falling material. It contains no vague phrases requiring subjective judgment. An operator can easily discern its legal requirement: miners who are scaling must not be exposed to injury from falling material. Hoodenpyle's death from the roof fall constitutes the requisite evidence that he had failed to scale from a safe location that would prevent him from being exposed to falling material. It also demonstrates that other adequate protection from the roof fall was not provided.

My colleagues claim that section 57.3201 "does not require operators to foresee and provide protection against a wholly unexpected and unprecedented collapse of an enormous section of stable, hardened limestone." Slip op. at 15. I believe, however, that the Mine Act and MSHA safety standards are designed to protect miners from exactly this type of tragic occurrence. Accordingly, I would affirm the Judge's finding of liability.

## II.

## The Judge should have Conducted Separate S&S and Negligence Analyses for the Two Violations.

The Judge deleted the S&S designations associated with both citations, but failed to conduct separate analyses. In one sentence and without explanation (other than a brief footnote addressing the scaling standard) the Judge also reduced the negligence associated with both citations to low. This combined analysis constituted legal error. The Judge was obligated to separately evaluate whether each violation was S&S, and the negligence level of each.

Regarding S&S, instead of conducting separate S&S analyses, the Judge framed the issue as whether both violations were S&S, and analyzed the same evidence in the same way for both violations. 40 FMSHRC at 1210-14. But whether each violation was S&S is an issue for which different evidence is relevant, or for which similar evidence may be of varying significance. For example, the S&S analysis of the ground support violation considers the likelihood that inadequate or absent ground support will result in the hazard of a roof fall, and whether such a roof fall is reasonably likely to result in reasonably serious injury. In contrast, the S&S analysis of the scaling violation considers the likelihood that, in the event of falling material, the position of the mechanical scaler will result in the hazard of that material falling on miners (such as the miner operating the scaler). The position of a scaling machine presumably makes a roof fall no more and no less likely to occur; the standard focuses on whether any material that falls will fall on miners. The Judge's S&S analysis, however, considered the likelihood that both violations (undifferentiated) would result in "a rock fall that would have injured [Mr.] Hoodenpyle in his scaler cab." *Id*. at 1211. That was error.

The Judge's negligence determination was also inadequate, and not only because it was exceedingly terse. As with his S&S discussion, the Judge combined his negligence analyses, failing to distinguish between the two violations. When the Secretary alleges violations of

separate standards, it is well-established that Judges must conduct separate negligence and unwarrantable failure analyses for each violation, even if the violations are "factually related." *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 3-4, 6 (Jan. 2015); *Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001).

Because the separate standards impose different obligations, two negligence analyses are required. *Sierra Rock Products*, 37 FMSHRC at 6. For example, an operator may show low negligence on a ground control violation in diligently working to control the ground, but high negligence on a scaling violation by permitting miners to scale under unsupported roof or in adverse conditions. Or an operator may show high negligence by failing to implement basic ground control practices, while diligently prohibiting miners from scaling in adverse conditions. The evidence of negligence associated with one violation is not necessarily probative of, and is certainly not dispositive of, the negligence associated with another. *See id.* at 4 ("The relative significance of a fact or circumstance may change when different violative conduct is at issue").

## III.

## Conclusion

I would affirm the Judge's ruling that Doe Run violated the two standards, and I would remand the case for a determination regarding whether the violations were S&S, for a ruling on the level of negligence for each violation, and for the assessment of penalties.

Mary Lu Jordan, Commissioner

Commissioner Traynor, dissenting:

The Doe Run Company operated the Fletcher Mine, a lead and zinc mine in Missouri. Unlike coal mine operators, who are required to obtain MSHA approval of comprehensive mine-specific plans for controlling the roof in their mines, the Doe Run Company mined without an MSHA approved roof control plan. MSHA's regulations gave Doe Run wide discretion to determine where in the mine ground support systems were necessary, along with full responsibility to ensure such systems are "designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks." 30 C.F.R. § 57.3360. This is an especially serious responsibility, given "[f]all of ground has historically been a leading cause of injuries and deaths in metal and nonmetal mines." *Safety Standards for Ground Control at Metal and Nonmetal Mines*, 51 Fed. Reg. 36,192, 36,192 (Oct. 8, 1986). Unfortunately, on January 21, 2015, miner John Hoodenpyle was operating a mechanical scaler when a massive slab of rock fell from the roof of the Fletcher mine and crushed him to death.

Following the accident, MSHA issued two citations that were adjudicated in the decision on review. The Judge below appropriately concluded that because the Mine Act imposes strict liability, the tragic failure of Doe Run's ground control systems to "control the ground" where Hoodenpyle was working established a violation of section 57.3360. The Judge also determined the accident that killed Hoodenpyle established a violation of the regulation requiring that "[s]caling shall be performed from a location which will not expose persons to injury from falling material." 30 C.F.R. § 57.3201.

The Judge's decision finding Doe Run violated both standards flows from our foundational precedents firmly establishing that Mine Act regulations are promulgated and enforced in a strict liability framework. The majority attempts an end-run around this authority by misapplying the "reasonably prudent person" test in order to introduce operator fault and foreknowledge as additional elements of proof necessary to establish the violations.[1] But in our strict liability framework, operator fault, foreknowledge and other inquiries into negligence are irrelevant to the question of whether a violation occurred and are only to be considered when determining what penalty, if any, shall be assessed for the violation. It is from this fundamental error – and particularly the harm it will do to enforcement of ground control obligations in metal and nonmetal mines – that I very emphatically dissent.

[1] The "reasonably prudent person" doctrine is traditionally used by the Commission and originated as a tool to determine whether a safety standard provides the objectively reasonable mine operator notice of the prohibition or requirement of a safety standard to the extent required by due process. *Ideal Cement Co.*, 12 FMSRHC 2409, 2416 (Nov. 1990) ("whether a reasonably prudent person familiar with the mining injury and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."). The test is rooted in the constitutional right to due process in connection with the deprivation of property. *See The American Coal Co.*, 38 FMSHRC 2062, 2112 (Aug. 2016) (Comm'r Althen, dissenting (explaining "[i]t is elementary that due process requires that a party must receive fair notice before being deprived of property.")).

However, I find error in other parts of the Judge's analysis. For instance, the Judge inappropriately comingled his analyses of whether the discrete violations were "significant and substantial" ("S&S"). Furthermore, the Judge erred in summarily concluding that the operator demonstrated a low level of negligence without providing a supporting rationale. While I would affirm that the standards at issue were violated, these errors would require remand.

**I.**

**Mine Act Safety Standards Only Function Properly and As Intended If Operators Are Held Strictly Liable Without Regard for Fault or Foreknowledge.**

It is well established that mine operators are universally liable for all violations that occur at their mine without regard to fault or foreknowledge of the violative conditions. 30 U.S.C. § 820(a); *see also Wake Stone Corp*., 36 FMSHRC 825, 827 (Apr. 2014) ("Imposing strict liability under the Mine Act is not optional — it is mandatory."); *see, e.g.*, *Ames Constr., Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012) (holding that the Mine Act imposes strict liability for violations which occur at a mine without regard to an operator's fault); *Asarco, Inc., NW Mining Dept. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989) ("the plain meaning of . . . section 110(a) is that when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty"); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982) ("it is a common regulatory practice to impose a kind of strict liability on [a mining] employer as an incentive for him to take all practicable measures to ensure workers' safety, the idea being that the employer is in a better position to make specific rules and to enforce them than the agency is"); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (affirming operator liability under the Mine Act without regard to fault).

As part of a strict liability framework, every Mine Act regulation "imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979)*; see also Nally & Hamilton Enter. Inc.*, 33 FMSHRC 1759, 1764 (Aug. 2011); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (holding that Mine Act regulation "imposes strict liability on mine operators . . . regardless of whether the operator has knowledge" of hazard); *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998) ("[k]nowledge and culpability, however, are not relevant to the determination of whether there was a violation. As we have observed, the FMSHA imposes 'a kind of strict liability on employers to ensure worker safety'") (citation omitted); *Allied Products*, 666 F.2d at 894 ("If the act or its regulations are violated, it is irrelevant whose act precipitated the violation or whether or not the violation was found to affect safety; the operator is liable."). Following Congress, courts have reinforced that we have consistently recognized "the inherent danger of mines, and held any failure to comply with a regulation under the Act would result in a citation to the operator . . . . [T]here are no exceptions for fault, only harsher penalties for willful violations." *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 491 (9th Cir. 1983) (*citing Allied Products*, 666 F.2d at 893–894).

## II.

## Exempting the Standards at Issue From Strict Liability Enforcement Dangerously Undermines Ground Control Regulation of Metal and Non-Metal Mines.

The majority's refusal to apply the regulations at issue in a manner consistent with strict liability dangerously undermines regulation of ground control in metal and non-metal mines. In order to fully appreciate this danger, it is necessary to understand how the regulatory framework requiring ground control in metal and non-metal mines is significantly different than the plan-based framework that governs roof control in coal mines.

Underground *coal mine* operators are required to mine in accordance with a roof control plan approved by the local MSHA district manager – "suitable" to the prevailing geological conditions and mining systems – and abide by generally applicable roof support standards in Part 75. *See* 30 U.S.C. § 862(a). These comprehensive and specially-tailored coal mine roof control plans mandate minimum specifications for ground support systems, e.g., bolt length, bolting patterns. "[A] violation of the requirements in the plan constitutes a violation of the Act." *UMWA Int'l Union v. Dole*, 870 F.2d 662, 667 & n.7 (D.C. Cir. 1989) ("[t]he requirements of these plans are enforceable as if they were mandatory standards") (quoting S. Rep. No. 95-181, at 25 (1977) *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978)); *see e.g.*, *Consolidation Coal Co.*, 39 FMSHRC 1737 (Sept. 2017).

In contrast, "the Mine Act imposes no similar obligation [to mine in accordance with a mandatory mine-specific roof control plan] upon underground metal and non-metal mines." *See Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016). There are no comprehensive plan requirements or regulations governing roof control in metal and non-metal mines. Instead, metal and nonmetal operators have been accorded considerable discretion to design, install, and maintain support systems provided that the operator *performs* its obligation *to control the ground*.[2] *See* 51 Fed. Reg. at 36,195 ("[Section 57.3360] does not specify the type of ground support system to be used, only that *it control the ground*."); *id.* at 36,192 ("The standards are *performance-oriented*, but are sufficiently specific to provide the mine operator with the necessary guidance.") (emphases added).

Metal and non-metal mine operators are not subject to the detailed mine-specific ground control plans the Secretary requires for underground coal mines. Instead, Mine Act regulations

[2] While these regulatory schemes are significantly different owing to historic differences between the original the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("Coal Act") and the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977)("Metal Act"), operators of *all* underground mines share a common obligation to control the ground in places where miners work or travel. 30 C.F.R. §§ 57.3360, 75.202(a); *see Nally & Hamilton Enter.*, 38 FMSHRC 1644, 1650 (Jul. 2016) ("The Senate Report on the Mine Act notes that the Coal Act was more comprehensive in scope and reach than the Metal Act. ").

give them wide discretion and ultimate responsibility as to where and how they control the ground.[3] The majority's failure to interpret the standards at issue consistent with the strict liability framework in which they were promulgated relieves metal and non-metal operators of this responsibility, and an incentive, for ensuring their miners are only working in areas where the operator can control the ground. Judge Richard Posner described this incentive in an oft-cited strict liability case:

> By making the actor strictly liable – by denying him in other words an excuse based on his inability to avoid accidents by being more careful – we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.

*Indiana Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990).

## III.

## The Plain Requirements of the Standards at Issue Were Violated.

The two safety standards at issue are plain. As discussed more fully below, the operator violated both. Whether the operator – or the objective reasonably prudent miner – knew or could have known of the ground control failure is totally irrelevant to our inquiry into whether the regulations have been violated.[4] In this case, these questions are only appropriate in the context of the negligence inquiry involved in penalty assessment and review of the S&S designations.

### A. Section 57.3360 Plainly Requires That When Ground Support is Necessary Mine Operators Must Provide Sufficient Support to Continuously Control the Ground in Places Where Miners Work and Travel.

The safety standard at 30 C.F.R. § 57.3360 states that "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate

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[3] Doe Run's unilaterally developed internal ground control policy provided loose guidance to its miners rather than specifying, for example, when a tighter bolting pattern or longer bolts would be required. DR Ex. F at 2 ("In general a 5 x 5 pattern is sufficient for intersections, however some ground conditions may dictate a tighter spacing . . . [H]istoric ground control difficulties may dictate the use of longer fixtures. Spot bolting or pattern bolting may be necessary in areas where ground control problems or geologic structures dictate.").

[4] Here, there is no cause for the reasonably prudent person test. Due process is unquestionably satisfied as all five Commissioners apparently agree that the meaning of standards is plain. *See* slip op. at 16. And when the language in a regulation "is clear, it follows that the standard provides fair notice . . . ." *See Bluestone Coal Corp*., 19 FMSHRC 1025, 1031 (June 1997).

that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks . . . ."

The language of the standard is clear. "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 meaning would lead to absurd results." *Jim Walter Res., Inc*., 28 FMSHRC 983, 987 (Dec. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987).

The first sentence of the standard establishes a predicate – ground support shall be used *where* conditions or experience indicate that it is necessary.[5] The design of the standard accounts for the variety of mining environments at issue in underground metal and nonmetal mines. For instance, not all underground metal and nonmetal mines provide roof bolt ground support. Tr. 391; *e.g.*, *White Pine Copper Div., Copper Range Co*., 5 FMSHRC 825, 832-33 (May 1983). It is undisputed that in this case ground support was necessary. Counsel for Doe Run conceded that experience had indicated that roof bolting – a form of ground support – was necessary. Oral Arg. Tr. 13 ("Doe Run made the decision that ground support is necessary.").[6] And roof bolt ground support was installed in a portion of the fall area.

The second sentence of the standard plainly states that its requirements are conditioned on whether the operator has determined that ground support is necessary.[7] "*When ground support is necessary*, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel." 30 C.F.R. § 57.3360 (emphasis added). The

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[5] The majority completely ignores the standard's conditional language *and* the plain requirements imposed in the second sentence in their purported plain meaning interpretation. Accordingly, the majority's interpretation is erroneous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (holding that a cardinal principle of interpretation is to give effect, if possible, to every clause or word).

[6] The majority finding that "experience indicated that [ground support] . . . was *not* necessary" is thus directly contradicted by counsel for Doe Run. Slip op. at 14 (emphasis in original).

[7] The majority asserts that the question of whether ground support is necessary should be resolved by the application of a subjective version of the reasonably prudent person test, substituting its own interpretation of the regulation for that of the Secretary, who urges consideration of multiple factors relating to ground conditions and mining experience referenced in three of our prior decisions. S. Br. at 24-25. *See also* 51 Fed. Reg. at 36,195 ("Under the final rule, ground conditions and mining experience are the criteria for determining if support is required."). Unlike the majority, I would accord due deference to the Secretary's interpretation were the necessity of ground control at issue in this case. But it is not. Here, we already have the answer to this inquiry, as all parties agree that ground support was necessary and some ground support was deployed in the area where the accident occurred.

requirements of the second sentence are thus triggered when the operator uses ground support. Each substantial term in the standard plainly states what an operator must do to comply in those circumstances where ground support is necessary.

"[T]he Commission has consistently construed [the term] 'maintain' in relation to other standards to require a continuing functioning condition." *Nally & Hamilton*, 33 FMSHRC at 1763. In *Nally & Hamilton*, the Commission recited this history:

> In *Lopke Quarries*, the Commission, in affirming the judge's finding of a violation, examined Webster's definition of "maintained" and determined that based on its plain meaning, "the inclusion of the word 'maintain' in the standard . . . incorporates an ongoing responsibility on the part of the operator . . . ." 23 FMSHRC at 707-08. *See also Alan Lee Good*, 23 FMSHRC at 996-98 (affirming the judge's finding that, because the regulation required that braking systems on equipment be "maintained in a functional condition," and the operator conceded that the parking brake was inoperative, the evidence established that there was a violation of the cited standard); *Peabody Coal Co*., 1 FMSHRC 1494, 1495 (Oct. 1979) (finding that a violation of section 77.404(a) was established where the operator admitted the presence of a hydraulic leak and, therefore, admitted that the forklift was not maintained in "safe operating condition"); *Jim Walter Res*., 19 FMSHRC at 1765-66 (affirming a judge's finding that a "monitor was not being 'maintained' in 'proper operating condition,"' as required by 30 C.F.R. § 75.342 where the operator intentionally routed air believed to contain methane on a path that would prevent methane monitor detection).

*Id.* Thus, clearly the requirement that ground support be "*maintained* to control the ground in places where people work or travel" requires that the ground is controlled in a continuing functioning condition.[8]

The standard also requires that the support be "designed" and "installed" to control the ground. The term "design" is defined in Webster's Dictionary as "used as a basis for anticipating practical problems and solving them at an engineering stage." *Webster's Third International Dictionary* 612 (1986). The term "install" is defined as "to set-up for use or service." *Id*. at 1171. In this instance, the common dictionary definition of the terms is

[8] As Commissioner Jordan explains in her dissent, the requirement to "control" the ground in places where persons work or travel is plain and presents no cause for application of a reasonably prudent miner test. Slip op. at 28-30. It prompts but one question: was the ground controlled? *See, e.g.*, *Clintwood Elkhorn Mining Co*, 35 FMSHRC 365, 370 (Feb. 2013) ("'It is obvious that the driver here lost control of his truck . . . . Mine operators are strictly liable for violations such as this' . . . . This is where the analysis should have ended."); *see also Premier Elkhorn Coal Co*., 38 FMSHRC 1587, 1591-92 (July 2016) (same).

consistent with surrounding language and purpose of the standard. *See Akzo Nobel Salt, Inc*., 21 FMSRHC 846, 852 (Aug. 1999) ("It is a cardinal principle of . . . regulatory interpretation that words that are not technical in nature 'are to be given their usual, natural, plain, ordinary, and commonly understood meaning."). Thus, the ordinary and uncomplicated meaning of these terms cumulatively require that when ground support has been determined to be necessary, a mine operator must provide sufficient support to continuously control the ground in places where miners work and travel.[9] Therefore, if the ground falls in an area where a miner works or travels, the operator is strictly liable. This is true regardless of whether the operator could have foreseen the fall, whether the operator's or miners' conduct contributed to the fall, or whether the fall actually placed any person in danger.

This plain meaning interpretation is consistent with a similar safety standard applicable to underground coal mines, 30 C.F.R. § 75.202(a) ("[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."). In *Jim Walter Resources, Inc*., 37 FMSHRC 493, 495 (Mar. 2015), the Commission held that "under the plain language of [section 75.202(a)] and the strict liability approach governing Mine Act violations, the Secretary . . . need only show (1) that the roof fall occurred in an area where persons work or travel and (2) that the roof was not supported to protect persons from hazards related to falls."[10] The majority attempts to distinguish *JWR* on the ground that it involved an underground coal mine and the metal/non-metal mine operators must have the "flexibility to deal with the conditions as they see fit." Slip op. at 12. But this wide flexibility only works to improve safety when it is exercised within a regulatory framework that imposes strict liability on operators to create the "incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident." *Am. Cyanamid Co.*, 916 F.2d at 1177.

The majority misconstrues the Commission's use of the "reasonably prudent person" test in *Asarco, Inc*., 14 FMSHRC 941, 948 (June 1992). Slip op at 17-18. *Asarco* involved a roof

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[9] Because the contested provisions of the standard are plain and clear, there is no due process notice issue to address. The plain meaning of common ordinary usage language in the standard's language provides adequate notice to mine operators. *See Dynamic Energy, Inc*., 32 FMSHRC 1168, 1172 (Sept. 2010); *Jim Walter*, 28 FMSHRC at 988 n.6.

[10] In *JWR*, the Commission acknowledged that its holding was inconsistent with the interpretation articulated in *Canon Coal*. *JWR*, 37 FMSHRC at 496 n.7 ("we decline to follow the *Canon* decision."); *cf. Canon Coal Co*., 9 FMSHRC 667, 668 (Apr. 1987) ("the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person . . . would have provided in order to meet the protection intended by the standard."). Accordingly, Commissioners Althen's and Nakamura's expressions of their hesitation to ignore *Canon Coal* in *JWR* are simply *dicta*. The *only* principled manner in which to read *JWR* is that it established a new interpretation of section 75.202(a) – overturning *Canon Coal*. *See JWR*, 37 FMSHRC at 498 (Comm'r Cohen, concurring).

fall and two alleged violations of 30 C.F.R. § 57.3401 ("designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed . . . ."). The Commission applied the "reasonably prudent person" doctrine to consider whether the operator had *notice* that the standard at section 57.3401 prohibited exclusive reliance on its preferred method of testing the roof. The test was appropriately used to confirm the regulated community did not have constitutional notice of the requirements of the standard, not to interpret into those requirements a defense against violations committed without fault or foreknowledge.

Asarco argued that it reasonably believed that using a jumbo drill to vibrate the roof totest for loose ground satisfied the safety standard's requirements. The Commission agreed, concluding that the Secretary did not demonstrate that a "reasonably prudent person familiar with the mining industry would have recognized that a jumbo drill could not be used effectively to test for loose ground." *Asarco*, 14 FMSHRC at 945-46, 949-50. Section 57.3401 neither provided a methodology for testing nor had the Secretary provided any supplemental guidance in his Program Policy Manual. *Id*. at 947. Furthermore, witnesses for the operator and the Secretary testified that using a jumbo drill to vibrate the roof to test for loose ground was a common practice in the industry. *Id*. at 948-49. Accordingly, the Commission concluded that the Secretary's regulation failed to provide Asarco with adequate notice. *Id*. at 949-50.[11]

Section 57.3360 on the other hand is sufficiently specific to notify the operator of its obligation: to control the ground in places where people work and travel. Accordingly, the issue in the case at hand is fully distinguishable from the Commission's consideration of what the ambiguous term "test" in section 57.3401 requires.[12]

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[11] *Asarco* also concerned two alleged violations of 30 C.F.R. § 57.3200 which provides that "[g]round conditions that create a hazard to persons shall be taken down or supported *before* other work or travel is permitted in the affected area." (emphasis added). My colleagues in the majority contend that they interpreted the standard under a reasonably prudent person test. Slip op. at 17. This is incorrect. Instead, the Commission relied on the plain ordinary meaning of the term "before" to hold that the Secretary must prove that there was "a reasonably detectable hazard before the ground fall." *Asarco*, 14 FMSHRC at 951 (emphasis in original). The Commission concluded that the evidence the Secretary introduced of the roof conditions *after* the occurrence of the roof fall was not substantial evidence to support the Judge's finding of a violation because the specific language of the safety standard requires evidence of a problem *before* the fall. In fact, despite my colleague's mischaracterization, slip op. at 17-18, the only time the Commission referenced the "reasonably prudent person" test in discussing section 57.3200 was in reference to the prior finding that the mine operator did not have notice that a jumbo drill did not comply with the testing requirements of section 57.3401.

[12] The majority reads the opinion in *Asarco* to imply the question of whether an operator had notice sufficient to support imposition of a civil penalty consistent with constitutional due process is controlling on the preliminary interpretive question of whether the operator violated the regulation. This is error, as explained in a D.C. District Court opinion recounting the historic development and application of the due process notice requirement in the regulatory context:

In addition, my colleagues inaccurately claim that *Amax Chemical Co*., 8 FMSHRC 1146 (Aug. 1986), supports their erroneous application of the reasonably prudent person test. Slip op. at 18. Notably, *Amax* neither contains the phrase "reasonably prudent person" nor does it concern an issue of regulatory interpretation. Rather, *Amax* concerns whether substantial evidence supports the Judge's finding of a violation of 30 C.F.R. § 57.3-22 (1984) (a now defunct safety standard which required loose ground to be taken down or adequately supported). The Commission concluded that substantial evidence supported the Judge's determination. However, the Commission wrote further to clarify that while ground that makes a "drummy" sound when struck with a hammer suggests that the ground is loose, it does not establish that the ground is loose *per se*. 8 FMSHRC at 1148-49. My colleagues in the majority extrapolate this evidentiary ruling beyond all recognition.

The majority's reliance on *White Pine Copper Div*., 5 FMSHRC at 825, is similarly misplaced. Slip op. at 18-19. In fact, *White Pine* illustrates how far my colleagues have strayed from Commission precedent. The case involved a prior roof control standard, 30 C.F.R. § 57.3-20 (1984), that required "[g]round support shall be used if the operating experience of the mine, or any particular area of the mine, indicates that it is required." 5 FMSHRC at 825.

My colleagues ignore that "[t]he only question before the Commission [in *White Pine*] [was] whether the particular conditions of the cited area required roof support, not which type of roof support." *Id*. at 835, n.19. The Commission held that once the operator determines that ground support is necessary in an area, the safety standard requires that the operator use "sufficient" support to "protect[ ] miners against roof falls." *Id*. at 837. In the case at hand, because counsel for Doe Run conceded that ground support was necessary and Doe Run had actually come to the same conclusion by installing ground support measures in the accident area,

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> While it is clear that the notice requirement is not limited to the criminal realm, it also has not been applied to limit agencies' interpretations in all contexts. Nearly all of the cases applying the "fair notice" doctrine concern an agency's imposition of a penalty against a private party and, moreover, formulate the doctrine in terms of penalties.

*Arkansas Dep't of Human Servs. v. Sebelius*, 818 F. Supp. 2d 107, 120–21 (D.D.C. 2011). Even if in *Asarco* we had explicitly departed from traditional application of the due process inquiry, that holding would have been superseded by numerous cases explicitly recognizing interpretation of a regulation to determine whether it was violated is not contingent on the due process analysis used to determine whether a civil penalty may be imposed. *See*, *e.g.*, *id.*; *Berwind Natural Res. Corp*., 21 FMSHRC 1284, 1328 (Dec. 1999) ("[A]n agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty."); *Consol Buchanan Mining Co., LLC v. Sec'y of Labor*, 841 F.3d 642, 651 (4th Cir. 2016), as amended (Nov. 23, 2016) ("[Operator] had fair notice that the failure to replace defective shutoff valves raised the possibility of sanctions, and MSHA is therefore not barred from seeking civil penalties in connection with this violation.").

the only question before us is whether that support was sufficient.[13] My colleagues twist themselves in analytical circles in an attempt to relieve the operator of the imposition of any legal obligation of sufficiency.

Here, the Judge found that the occurrence of the roof fall – which crushed a miner to death – violated Doe Run's obligation to control the ground in a place where miners work or travel. 40 FMSHRC 1165, 1209-1210 (July 2018) (ALJ). I affirm this conclusion.[14] Whether or not Doe Run demonstrated negligence in using a 5 x 5 split-set bolting pattern at the site of the RC3PO northeast fall area, is the type of inquiry that is confined to the section 110(i) penalty criteria.[15]

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[13] Like Doe Run's counsel, my colleagues acknowledge Doe Run used ground support measures at the location where the accident occurred, emphasizing "[t]hat is precisely what Doe Run did here – apply ground support in the location *where* it was necessary." Slip op. at 9 (emphasis in original). But the ground support Doe Run applied failed to control the ground where it was applied.

[14] Even if Mine Act regulations were not created in a strict liability framework – a notion contrary to the plain text of the statute and decades of precedent – and I joined the majority in applying a reasonably prudent person test to inject foreknowledge and negligence into the analysis, I would not be able to conclude that the record compels the conclusion that no violation occurred, the standard that must be met in order to reverse the Judge. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary only when record supports no other conclusion). For example, the Secretary argued that test holes should have been drilled in the fall area. Vernon Roark, the roof bolter, testified that he had not been trained how to drill test holes and did not drill test holes. Tr. 465-66, 473-74. A second roof bolter, Sam McCabe, told Van Dorn that he did not drill test holes either. Tr. 386. The Secretary also presented evidence regarding loose rock in the area and prior roof falls. Tr. 292-93; S. Br. at 26. The Judge made no finding regarding the roof bolters' failure to drill test holes.

[15] My colleagues have injected the concept of negligence into the analysis of whether an operator was strictly liable for a violation of a safety standard, demonstrating a fundamental misunderstanding of how the Mine Act operates. It is well established that mine operators are to abide by mandatory safety standards, and if the standard is violated the operator is liable, regardless of foreknowledge, negligence or fault. 30 U.S.C. § 820(a); *Peabody Coal Co.*, 1 FMSHRC at 1495; *Nally & Hamilton*, 38 FMSHRC at 1651. Only when assessing a civil penalty for the violation does the Judge consider if the operator was negligent in violating the standard. *See Nally & Hamilton*, 38 FMSHRC at 1651 (citing *Asarco*, 868 F.2d at 1997) ("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."); *see also KenAmerican Res., Inc.*, 42 FMSHRC 1, 8 n.16 (Jan. 2020) (consideration as to whether the operator was negligent in violating the standard is "appropriately confined to the penalty assessment for the violation."). Notably, the Commission has found a violation of a safety standard even when the operator was not negligent. *Nally & Hamilton*, 38 FMSHRC at 1652 (affirming the Judge's "no negligence" finding); *see also* 30 C.F.R. § 100.3(d) (the Secretary can issue a citation alleging "no negligence"). In the case at

## B. Section 57.3201 Plainly Requires that Scaling be Performed From a Location That Does not Expose Miners to Injury From Falling Material.

The safety standard at section 57.3201 provides that "[s]caling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided." 30 C.F.R. § 57.3201. The requirements of this standard are clear – scaling work shall be performed outside the zone of danger of any potential fall of ground or adequate protection shall be provided.[16] "[A] 'safe' location is one which will not expose persons to injury from falling material." 51 Fed. Reg. at 36,194.

It is beyond dispute that Hoodenpyle was scaling from a location where he was exposed to injury. Counsel for the Secretary has alleged that Doe Run violated the standard based on the location of the scaler. S. Post-Hr'g Br. at 21. Doe Run vigorously contested this allegation before the Judge below, but mounted no supported defense that it complied with the standard by providing "other protection from falling material." In any event, it is tragically incontrovertible that the structures on Mr. Hoodenpyle's scaler did not protect him from falling material caused by failure of his employer's ground control system.[17] Thus, the fact of his injury alone, without more, is sufficient to establish a violation of the regulation.

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hand, the Judge found that Doe Run demonstrated a low level of negligence. 40 FMSHRC at 1212.

[16] The majority finds the Commission's decision in *Asarco* controlling. Slip op. at 17. However, in *Asarco*, the Commission determined that the standard was directed at ground conditions as they appeared before a roof fall based on the inclusion of the term "before" in the safety standard. *See supra* slip op. at 40, n.12. Thus, the language of the standard compels a focus on the operator's foreknowledge. Section 57.3201's directives are distinct and do not contain the term "before" or other similar language requiring an inquiry into foreknowledge or any other aspect of a negligence inquiry. Accordingly, the attempted analogy falls flat.

[17] I agree with Commissioner Jordan that the word "protection," which is not at issue in this case, does not introduce ambiguities requiring an exception to the principles of strict liability. Slip op. at 32. *See Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) ("We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault."). The majority declines to apply a strict liability interpretation of the standard, claiming it "requires the operator to use its experience and judgment in providing alternative fall protection that a reasonably prudent operator would provide under the mining conditions," slip op. at 17, even though the plain language of the standard reads, "protection from falling material shall be provided" and the facts indicate Hoodenpyle was not protected from falling material.

Despite appearing to find that the language of section 57.3201 is "plain" and therefore no deference was owed the Secretary's interpretation, the majority also holds that purported ambiguities in the word "location" and the phrase "other protection" require use of the "reasonably prudent person" test. Slip op. at 15-16, 21-22. If the words of the regulation are plain, there is no cause for application of the reasonably prudent person test of whether the objectively reasonable operator had notice of the requirements of the regulation. If the standard contains ambiguities, of course we must consider whether the Secretary's interpretation is reasonable.[18] My colleagues have instead chosen to interpret the terms themselves so as to open the gates to a "reasonably prudent person" Trojan horse, concealing within it operator defenses – lack of fault, foreseeability and foreknowledge – that do not belong in a strict liability analysis.

My colleagues in the majority note that routine practice had demonstrated that Hoodenpyle's position in the cab was a safe location. Slip op. at 22. But there is absolutely no basis in the text of the regulation or our strict liability law to speculate about Hoodenpyle's subjective knowledge of the likelihood of a roof fall or the reasonableness of his choices or conduct.[19] Indeed, "the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue." *Canon Coal Co*., 9 FMSHRC at 668*; see also Lehigh Anthracite Coal*, 40 FMSHRC 273, 282 (Apr. 2018); *Stillwater*, 142 F.3d at 1182 (the "appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.").

[18] The majority opinion does not address our duty to defer to the Secretary's reasonable interpretation of regulatory language. Do they find the terms of these regulatory standards plain? If not, and they conclude the terms are ambiguous, where is their analyses of whether the Secretary's interpretations are "plainly erroneous or inconsistent with the regulation?" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019). Where is any discussion of our duty of deference?

[19] My colleagues flatly claim without elaboration that "any discussion of the record evidence on the safe past practices that led Hoodenpyle to make the decisions he did" is an objective and not subjective analysis. Slip op. at 22. This is patently incorrect. Establishing what is "reasonable" by reference to an actual individual miner or operator's prior behavior – e.g., where they had located the scaler in the past without incident – rather than what the hypothetical "reasonably prudent miner" would have done is unquestionably applying a subjective rather than objective test. This distortion of the test begs the question of reasonableness, by improperly using Hoodenpyle and/or Doe Run's prior conduct as a benchmark of "reasonable" conduct, rather than using the hypothetical objectively reasonable person. This subjective analysis is inappropriate, even in the context of the appropriate application of the reasonably prudent person test on the question of whether due process permits a penalty (let alone the preliminary question of whether a strict liability interpretation of the regulatory terms establishes a violation in the first place).

Inquiry into whether an individual operator or miner was aware of potentially violative conditions is nothing more than an examination of whether that person was negligent. Yet the majority uses just such an inquiry to reach the (counterfactual) conclusion that the violation must be vacated because the scaler's location did not contribute to the "reasonable likelihood of an injurious roof fall onto Hoodenpyle." Slip op. at 22. This distorted application of an altered "reasonably prudent person test," unsupported by any coherent discussion of our strict liability precedents, is just a backdoor inquiry into the operator's subjective knowledge of the violations, their foreseeability and the operator's degree of fault. It is being used not to faithfully interpret and apply the text of the regulation, but rather to add "lack of knowledge, foreseeability or fault" (negligence) as a new supra-textual defense available to any operator cited under what was promulgated as a strict liability regulation.

Once a violation is established, the Judge considers the operator's negligence only in setting a penalty for the violation.[20] 30 U.S.C. § 820(i). "[A] finding on operator negligence is only necessary when the Commission assesses a penalty." *Sunbelt Rentals, Inc*., 42 FMSHRC 16, 40 (Jan. 2020) (Chair Rajkovich, concurring( citing 30 U.S.C. § 820(i))).

If this decision were remanded to the Judge for a reassessment of negligence, he may reasonably conclude again that Doe Run demonstrated a low level of negligence or even that Doe Run was not negligent in permitting the miner to scale at this location. To that end, MSHA inspector Jeremy Kennedy conducted a routine inspection of this area the day before the accident and reported that the roof appeared to be free of adverse conditions and the bolts flush to the back. Similarly, Bob Ridings, a geologist employed by Doe Run, traveled in the area hours

[20] The D.C. Circuit recognized that the Mine Act separates analysis of liability from negligence in *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 713 (D.C. Cir. 1989). Section 104 of the Act imposes liability on an operator for violations of mandatory standards, *id.* at 716 ("the statute necessarily implies that a violation can exist even without an act on the operator's part"), and a civil penalty is imposed based on whether or not the operator was negligent, *id*. (drawing a distinction between "negligent violations and non-negligent violations"). My colleagues cite *Western Fuels-Utah* in an effort to justify their improperly injecting a reasonably prudent person theory of liability in lieu of strict liability, slip op. at 9, when in fact the D.C. Circuit's discussion of operator liability and negligence entirely undercuts my colleagues' approach. The majority confuses the concept of *strict* liability, a mandatory aspect of our interpretation of the standards at issue here, with the separate concept of *vicarious* liability for the acts of agents or supervisors, which is the primary issue addressed in *Western Fuels-Utah* and most of the cases listed in the majority opinion's footnote 14. Slip op. at 10.

My colleagues claim numerous controlling cases mandating strict liability interpretation on the question of whether Mine Act standards are violated that are cited throughout this dissent are not "relevant to the initial task of interpreting a Mine Act standard to determine an operator's obligations under it and *whether* a violation even occurred." Slip op. at 10 (emphasis in original). But strict liability is the only proper way to determine whether the terms of the standards alone – ruling out questions of negligence, fault and foreseeability – establish a violation.

before the ground fall and testified that the bolts "looked good." Tr. 689. Tom Welch, a loader operator, traveled in under the last row of bolts and testified that "everything looked fine." Tr. 519.

On the other hand, there is also evidence that suggests Doe Run was negligent in permitting the miner to scale from the location where the accident occurred. He was seated inside the cab of the scaler, approximately 60 feet from the face. Hoodenpyle's scaler was located at the outermost limits of Doe Run's discretionary ground control policy. S. Ex. 7 at 1 ("[s]caling will begin 60' back from the face"). He was seated under the last row of bolts. Approximately 50 feet of unbolted ground was between that row of bolts and the face. S. Ex. 12 at 4-5. The diagram at Secretary's Exhibit 12, at 5, depicts the mechanical scaler outstretched, using the full 40 foot range of the boom to scale. S. Ex. 8 at 6. Most of the roof fall at issue occurred in the unbolted area (75% of the ground fall) and the fall extended back, ripping the last row of bolts out as well (25% of the ground fall).[21]

Doe Run was not drilling test holes to determine the conditions of the ground, in order to determine whether it was appropriate to bolt in a tighter pattern or to switch to stronger resin bolts. Tr. 294. In fact, Vernon Roark the roof bolter testified that he had not been trained on how to use the equipment required to drill a test hole and accordingly, did not drill one to test the ground.[22] Tr. 465-66, 473-74.[23] Furthermore, Doe Run management provided no mechanism for miners to communicate the result of a test hole to management. Tr. 59, 184-85. There was even testimony that other roof falls had occurred, but MSHA was not able to locate those areas upon investigation. Tr. 292-93. In the absence of adequate examination practices, a reasonable fact finder could determine that Doe Run was negligent in permitting the miner to scale in this location because reasonable care had not been taken to determine if this location was safe to continue the use of routine practices.

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[21] As a corrective action, MSHA recommended new roof control procedures which would limit the amount of unbolted ground between the last row of bolts and the face, to ensure a safe location for scaling operations. 40 FMSRHC at 1175 (citing Tr. 203); Tr. 310. This new policy also requires the uses of the stronger resin bolts within 30 feet of the face in areas of disrupted bedding in breccia zones. S. Ex. 8 at 6. The Secretary believes that "limit[ing] distances for unbolted areas will ensure a safe location for scaling operations." *Id*. at 7. Under the new procedures, in areas of disrupted bedding, a scaler could not be seated under the last row of bolts, with approximately 50 feet of unbolted ground in front of him, as Hoodenpyle was in this case.

[22] A test hole demonstrates what type of rock the ground is made up of. Tr. 48-49. The jumbo drill creates a percussion that has different sounds depending upon the condition of the rock. Tr. 49. The test hole is drilled deeper than a hole for a bolt, which means the miners get a better sense of the strata above. Tr. 121. A test hole could be three or four feet deeper than a hole drilled for a roof bolt. Tr. 121.

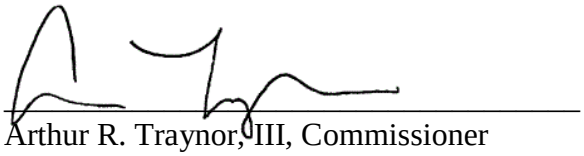
[23] My colleagues ignore that Roark testified that he did not know how to drill a test hole, when they find that the record is devoid of evidence that test holes had not been drilled. Slip op. at 21.

I decline to fully marshal the above referenced evidence to robustly examine or come to a conclusion on the question of whether Doe Run was negligent in violating the requirements of section 57.3201. That is the Judge's job. I draw upon the contrast in the record evidence as an illustrative tool to demonstrate how the evidence at issue is relevant to determining Doe Run's culpability. Because the determination of negligence is the responsibility of the Judge, I take no position as what the outcome should be if the issues of negligence associated with each violation were remanded.

## IV.

## Conclusion

In conclusion, I would affirm the Judge's ruling that Doe Run violated the two strict liability standards and would remand the case for a determination of whether they were S&S and for a ruling on the level of negligence exhibited in connection with each violation. However, because the standards impose different obligations – one imposing an obligation to control the ground where necessary and the other requiring that scaling be performed from a safe location – the Judge would need to conduct a separate S&S analysis and a separate negligence analysis for each. *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 6 (Jan. 2015); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1315 n.11 (June 2016).



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