FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

August 30, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 93-646 KENT 93-884
MANALAPAN MINING COMPANY, INCORPORATED	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raises the issue of whether violations of three safety standards, 30 C.F.R. §§ 75.1101[1], 77.1109(c)(1)[2], and

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[1] Section 75.1101, entitled "Deluge-type water sprays, foam generators; main and secondary belt-conveyor drives," provides:

> Deluge-type water sprays or foam generators automatically actuated by rise in temperature, or other no less effective means approved by the Secretary of controlling fire, shall be installed at main and secondary belt-conveyor drives.

[2] Section 77.1109(c)(1), entitled "Quantity and location of firefighting equipment," provides:

> Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

75.360(a)[3] (1995), by Manalapan Mining Company, Inc. ("Manalapan"), were significant and substantial ("S&S").[4] Administrative Law Judge Avram Weisberger found that the three violations were not S&S. 16 FMSHRC 1669 (August 1994) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determinations.[5] For the reasons that follow, the judge's decision with respect to the first two S&S determinations stands as if affirmed, and the Commission reverses the third S&S holding with respect to the preshift violation.

I.

Factual and Procedural Background

Manalapan operates underground coal mines in Harlan County, Kentucky. This consolidated proceeding involved approximately 45 citations and orders that arose from inspections conducted by the Department of Labor's Mine Safety and Health Administration ("MSHA") of the Manalapan mines. The judge held evidentiary hearings in this proceeding on March 1-3, and April 26-28, 1994.[6] Three violations remain at issue involving Manalapan Mines No. 1 and No. 7 in Highsplint, Kentucky.

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[3] Section 75.360(a), entitled "Preshift examination," provides:

> Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a preshift examination.

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

[5] Manalapan also successfully filed a petition for review of two docket numbers that were part of this proceeding. The Secretary and Manalapan subsequently moved the Commission to approve their settlement of those matters and Manalapan sought to dismiss its appeal. The Commission remanded the motion to the judge (16 FMSHRC 2027, 2028 (October 1994)), and the judge subsequently granted the motion (16 FMSHRC 2308 (November 1994) (ALJ)). Accordingly, only the Secretary's petition is now before the Commission.

[6] "Tr. I" refers to the transcript for March 1, 1994; "Tr. II" refers to the transcript for March 2, 1994; "Tr. III" refers to the transcript for March 3, 1994; "Tr. IV" refers to the transcript for April 26, 1994; "Tr. V" refers to the transcript for April 27, 1994; and "Tr. VI" refers to the transcript for April 28, 1994.

A. Violations of Sections 75.1101 and 77. 1109(c)(1); Citation Nos. 3164716 and 3835998

1. Deluge Fire Suppression System

On February 22, 1993, MSHA Inspector Jim Langley visited Manalapan's No. 1 Mine. He observed that the belt drive for the mechanized mining unit number 006 was not provided with a deluge fire suppression system. 16 FMSHRC at 1691. A deluge fire suppression system consists of two parallel branch lines, approximately 50 feet long, with water nozzles at eight foot intervals. Tr. IV 132. The system is activated automatically by fire sensors and sprays the upper and lower sides of the top belt and the upper side of the bottom belt. *Id.* Inspector Langley issued a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging an S&S violation of section 75.1101. Gov't Ex. 49.

2. Fire Extinguisher

On June 28, 1993, MSHA Inspector Elmer Thomas conducted an inspection at Manalapan's No. 7 Mine. 16 FMSHRC at 1700. Inspector Thomas observed a front-end loader scooping up and loading coal into trucks. *Id.* at 1700-01; Tr. V 354. He determined that the loader lacked a fire extinguisher. 16 FMSHRC at 1700. Thomas issued a citation charging a violation of section 77.1109(c)(1) and designated the violation as S&S. Gov't Ex. 12A.

B. Violation of Section 75.360(a); Order No. 4238749 (Preshift Examination)

On April 20, 1993, at approximately noon, MSHA Inspector Adron Wilson was traveling to section 707 of Manalapan Mine No. 7 and observed four employees in the mine repairing a roof bolting machine. 16 FMSHRC at 1676, 1701; Gov't Ex. 7A. The men had entered the mine at approximately 8:00 a.m. Tr. V 397. No preshift examination had been performed before they entered the mine. 16 FMSHRC at 1701. At 12:05 p.m., the inspector issued an order, pursuant to section 104(d)(1) of the Mine Act, alleging a violation of section 75.360(a) for failure to perform the preshift inspection. *Id.*; Gov't Ex. 7A. The order was terminated at 12:40 p.m., after Allen Johnson, the mine superintendent, conducted a preshift examination and observed no hazardous conditions. 16 FMSHRC at 1702; Gov't Ex. 7A.

Manalapan challenged the citations and order, and the matters were consolidated for hearing. In his decision, the judge affirmed the citations with regard to the deluge fire suppression system and the fire extinguisher. 16 FMSHRC at 1691, 1700. He vacated the S&S designations, however. *Id.* at 1692-93, 1701. The judge found that the Secretary had shown only that potential fire sources were present and, therefore, had not proved an injury-producing event was likely to occur. *Id.* He assessed penalties of $2,000 for the lack of a fire deluge system, and $400 for the absence of a fire extinguisher. *Id.* at 1693, 1701. With regard to the operator's failure to conduct a preshift examination, the judge also affirmed the citation. *Id.* at 1701. He concluded, however, that the violation was not S&S, noting that the inspection conducted immediately after the order

revealed no hazardous conditions in the affected area of the mine. *Id.* at 1702. Finding that the violation resulted from aggravated conduct, the judge assessed a penalty of $3,000. *Id.*

II.

Disposition[7]

A. Deluge Fire Suppression System and Fire Extinguisher

Commissioner Holen and Commissioner Riley would affirm the judge's decision. Chairman Jordan and Commissioner Marks would vacate and remand the judge's decision. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

B. Preshift Examination

All Commissioners reverse the judge's determination that Manalapan's preshift violation was not S&S. All Commissioners remand for reassessment of penalties for this violation.

Chairman Jordan and Commissioner Marks would reverse on the ground that there is a presumption that violations of the preshift examination standard are S&S. Commissioner Holen and Commissioner Riley would reverse on the ground that substantial evidence does not support the judge.

III.

Separate Opinions of the Commissioners

Commissioners Holen and Riley, in favor of affirming in part and reversing in part the decision of the administrative law judge:

A. Deluge Fire Suppression System and Fire Extinguisher

The Secretary argues that, in analyzing the S&S designations of the two citations, the only logical approach is to assume the occurrence of a fire. He further asserts that, if violations of safety standards designed to respond to emergency situations are not analyzed in the context of the emergency having occurred, those violations only rarely will be found to be S&S. S. Br. at 10-15.

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[7] We direct the judge to correct a clerical oversight with respect to Docket No. KENT 93-882, which was settled, and to indicate that Citation No. 3003352 was vacated by the Secretary. *See* S. Br. at 6 n.5; Tr. IV 5.

Manalapan argues that the Secretary, in effect, seeks an irrebuttable presumption as to the occurrence of an emergency condition and that such a presumption violates the constitutional requirements of due process. *See* M. Br. at 7-16. Manalapan further asserts that the Commission may adopt such a presumption only through notice-and-comment rulemaking. *Id.* at 16-17. In response, the Secretary disagrees with Manalapan's contention that the use of a factual presumption in analyzing S&S designations of violations of emergency standards raises constitutional questions. S. Reply Br. at 1-9. The Secretary also argues in rebuttal that administrative agencies can adopt presumptions through case adjudication and are not constrained to do so by rulemaking. *Id*. at 9-12.

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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

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

We reject the Secretary's argument that the Commission, in determining whether there is a reasonable likelihood that a hazard would result in an injury, must presume the occurrence of an emergency, in the instant case a fire.[8] The Secretary bears the burden of proving that a violation is S&S. *See, e.g., Peabody Coal Co.* 17 FMSHRC 26, 28 (January 1995), *citing Union Oil of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). As the Secretary notes, "A presumption is a device for allocating the burden of proof and often shifts the burden of proof to the party opposing the presumption." S. Reply Br. at 2 (citations omitted). The Secretary urges the Commission to presume an emergency for an undefined and potentially large class of health and

[8] The Commission rejected on procedural grounds the Secretary's arguments in previous cases that it examine the S&S nature of violations in the context of the presumed occurrence of an emergency. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1314 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1304 (August 1992).

safety standards without indicating what situations under those standards would qualify as an emergency. We decline to modify the time-tested Commission precedent that guides our analysis of violations alleged to be S&S by adopting such a broad-based presumption.

Further, the Secretary has failed to develop a record that establishes the need for such a change in the law. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), the Commission held that, when the Secretary proves a violation of the respirable dust standard, 30 C.F.R. § 70.100(a), "a presumption arises that the third element of the significant and substantial test -- a reasonable likelihood that the health hazard contributed to will result in an illness -- has been established." 8 FMSHRC at 899. The Commission adopted the presumption because of the virtual impossibility of determining the contribution of a single incident of overexposure to respirable dust to the development of respiratory diseases, including pneumoconiosis. "[I]t is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease." *Id.* at 898. The Secretary has not shown here a similar need for the use of a presumption in analyzing violations of standards that address emergency situations. Indeed, the Secretary has prevailed in cases where the S&S designation of such standards has been challenged. *E.g., Consolidation Coal Co.*, 6 FMSHRC 189, 194-195 (February 1984) (violation of fire fighting equipment standard affirmed as S&S based on substantial evidence). Thus, we decline to decide on the present record that, in determining whether violations of certain standards are properly designated S&S, we should presume the occurrence of an emergency.

We note, moreover, an observation by the Secretary that appears to render his suggested S&S framework irrelevant to the deluge system violation:

> [E]ven assuming the occurrence of a fire, a violation of 30 C.F.R. 75.1101 might not be significant and substantial. For example, if other fire extinguishers were present, the failure to have a deluge-type fire suppression system might not result in a reasonable likelihood of serious injuries . . . .

S. Br. at 14 n.7. As Manalapan points out, Inspector Langley admitted that there were fire extinguishers located at the belt. M. Br. at 2, *citing* Tr. IV at 162-63. The Secretary's exception appears to fit the facts in this case.

As in previous cases in which the Secretary has asked the Commission to examine the S&S nature of a violation in the context of a presumed emergency, he has not argued that the judge's S&S findings are not supported by the record. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1318-19 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1306, 1310 (August 1992); *Shamrock Coal Co.*, 14 FMSHRC 1300, 1302 (August 1992). Thus, the Commission is precluded from reviewing those findings on a substantial evidence basis. Accordingly, we affirm the judge's determinations that Manalapan's violations of sections 75.1101 and 77.1109(c)(1) were not S&S.

B. Preshift Examination

The Secretary argues that the Commission should conclude that a failure to conduct a preshift examination is presumptively S&S. S. Br. 15-21. With respect to this violation, unlike the two preceding violations, the Secretary contends that the judge incorrectly applied the *Mathies* criteria; he notes that the judge relied on an inspection performed after the citation, which showed no hazardous conditions. S. PDR at 16-17.

Manalapan argues that the presumption the Secretary seeks violates due process because there is no rational connection between the violation and the presumption of reasonable likelihood of serious injury. M. Br. at 10-11. Manalapan further asserts that the presumption is arbitrary because it is contrary to the record facts. *Id*. at 11-12. Manalapan also points out that the Secretary did not raise his argument that the failure to conduct a preshift examination is presumptively S&S before the administrative law judge. *Id.* at 18.

We reject the Secretary's argument that the Commission should apply a presumption to the S&S designation of the citation involving Manalapan's failure to conduct the preshift examination. First, the Secretary did not raise his presumption argument to the administrative law judge. Section 113 of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides, "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." Commission precedent also prohibits consideration of new theories raised on appeal. *Beech Fork,* 14 FMSHRC at 1321, *citing Ozark-Mahoning Co.,* 12 FMSHRC 376, 379 (March 1990). *See also* 29 C.F.R. § 2700.70(d) (1995). We see no reason to ignore the Mine Act's statutory review provisions and depart from settled Commission precedent to reach the Secretary's belatedly-raised theory.

Again, the Secretary suggests a rebuttal to his proposed presumption that fits the facts of this case: "The mine operator may then rebut the presumption that hazards existed by producing evidence indicating that no hazards existed." S. Reply Br. at 5. Here, upon immediate examination after the violation, "no hazardous conditions were observed." 16 FMSHRC at 1702. Thus, adoption of the Secretary's proposed presumption may achieve a result contrary to that intended and preclude a finding of S&S for Manalapan's failure to conduct a preshift examination.

Viewing the record as a whole, we find it does not support the judge's finding that Manalapan's violation was not reasonably likely to result in an injury and thus that the Secretary had not proven the third element of the *Mathies* test. *Id.* Substantial evidence does not support

the judge's S&S determination.[9] In addition, the judge's analysis of mine conditions erroneously considered subsequent conditions as they existed when the operator abated the citation.

In concluding that Manalapan's failure to conduct a preshift examination was not S&S, the judge relied on the fact that, following the citation, the area involved was inspected "and no hazardous conditions were observed." 16 FMSHRC at 1702. The judge's reliance on post-citation events to vacate the S&S designation is incorrect as a matter of law. The question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations. *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985). Moreover, certain conditions that a preshift examination would disclose, such as methane or inadequate ventilation, are transitory in nature and the results of a subsequent inspection may have little relevance to conditions at the time of violation.

The Secretary's evidence showed that four miners entered the 707 section of the mine to perform maintenance and repair work on a roof bolter. 16 FMSHRC at 1701. The mine had been out of production for several days. Tr. V 415. Although two of the miners were certified inspectors, no preshift examination was performed. 16 FMSHRC at 1701-02. They were in the mine for four hours without such an inspection. *See* Tr. V 397, Gov't Ex. 7A. The miners' equipment included welding and cutting torches for their work on the roof bolter. Tr. V 370-71, 379-80. The roof bolter was energized. Tr. V 420. Inspector Wilson testified that, because the 707 section was adjacent to a section that had been mined previously, there was a possibility that the oxygen would be low or blackdamp (a mixture of carbon dioxide and nitrogen) would be present. Tr. V 389-90. Bottle samples also indicated that the mine liberated methane. Tr. V 391-92, 426. During idle periods, methane can build up, and other unforseen hazards can develop. *See Buck Creek Coal Co.*, 17 FMSHRC 8, 14 (January 1995).[10] Inspector Langley testified that the mine roof had a tendency to fall and that the mine had experienced several roof falls. 16 FMSHRC at 1701. In evaluating the presence of a hazard, the Commission has

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[9] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[10] In *Buck Creek*, Chairman Jordan was part of the majority, which concluded on substantial evidence grounds that a preshift violation was S&S. 17 FMSHRC at 14. Commissioner Marks, dissenting, concluded that Buck Creek's failure to conduct a preshift examination had not been proven to be violative. 17 FMSHRC at 18-19.

considered conditions on a mine-wide basis. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1614 (August 1994).

We also conclude that the fourth element of *Mathies* is established: injuries resulting from the hazards posed were reasonably likely to be of a reasonably serious nature. Accordingly, we reverse the judge's determination that the violation was not S&S. *See Buck Creek*, 17 FMSHRC at 14.

Conclusion

For the foregoing reasons, we affirm the judge's S&S determinations in Citation Nos. 3164716 and 3835998. We reverse his S&S determination in Order No. 4238749 and remand accordingly for penalty reassessment.

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Arlene Holen, Commissioner

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James C. Riley, Commissioner

Chairman Jordan and Commissioner Marks, in favor of vacating and remanding in part and reversing in part the decision of the administrative law judge:

A. Deluge Fire Suppression System and Fire Extinguisher

The Secretary alternates between the terms "presumption" and "assumption" in proposing his analytical framework for the fire suppression violations (*see* S. Br. at 7, 11, 13; S. Reply Br. at 1-4, 6-8) and couples that argument with his argument calling for a *presumption* of S&S as to all preshift violations. We see a significant distinction between the two forms of relief requested in this case and therefore have separately analyzed the issues.

Notwithstanding the Secretary's imprecision in describing the relief he seeks regarding the fire suppression violations, we conclude that the Secretary is merely urging the Commission to make a factual *assumption* when evaluating whether a fire suppression violation is S&S. The assumption sought is *not* regarding a fact that is in issue. The Secretary must still prove that there was no functioning deluge system or fire extinguisher and that the absence of the fire suppression equipment at the cited location creates a risk of a serious injury.[1] Nor is the assumption related to a legal issue, as was the case in *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987), wherein the Commission recognized a rebuttable presumption of S&S regarding violations of 30 C.F.R. § 70.100(a), the respirable dust standard. Rather, the assumption sought by the Secretary is to evaluate the effect of the violation under the circumstances and conditions in which the standard was intended to provide protection. In this case, where a fire deluge system was not provided and where a fire extinguisher was not provided, the assumption sought is the existence of a fire or explosion.

The judge determined that Manalapan violated section 75.1101 because the 006 section belt drive was not provided with a deluge fire suppression system. 16 FMSHRC at 1691. Among other facts, the judge accepted the MSHA inspector's testimony that: (1) numerous ignition sources existed at the cited location, including belt drives, rollers, belt boxes, cables, drive rollers and bottom rollers and (2) that the cited area also contained accumulated float dust and loose coal, float dust in the starter box, the absence of a sensor line and the absence of a fire hose. *Id.* at 1692. Notwithstanding the foregoing, the judge concluded "[A]lthough they (sic) were *potential* fire sources present, there is no evidence to predicate a conclusion that these sources were in such a physical condition as to render an ignition or explosion reasonably likely to have occurred." *Id.* at 1692-93 (emphasis in original). Therefore, he determined that the violation was not S&S.

[1] Notwithstanding Commissioner Marks' disagreement with the Commission's existing test in *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984) (*see U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996) (Marks, M., concurring)), this opinion is rendered within the existing *Mathies* framework of S&S analysis.

Regarding the violation of section 75.1109(c)(1), the judge determined that Manalapan had failed to equip its front-end loader with a portable fire extinguisher. 16 FMSHRC at 1700. The judge accepted the MSHA inspector's testimony that the loader was being used in an area that contained battery wires, oil hoses, brake lines containing combustible brake fluid, as well as combustible engine and hydraulic oil. *Id.* at 1701. Notwithstanding the foregoing, the judge concluded, "The record establishes the presence of only *potential* fire ignition sources. I thus find that it has not been established that the violation was significant and substantial." *Id.* (emphasis in original).

In reaching the foregoing negative S&S conclusions, the judge failed to address the Secretary's argument that consideration of the seriousness of fire suppression violations should be made within the context of the circumstances in which the required fire suppression equipment is to be used, i.e., in the event of a fire or explosion.

The Secretary has reiterated this position before the Commission. With respect to both violations, the Secretary stresses that the standards are designed to "provide protection only in the event of an emergency." S. Br. at 12. Therefore, the Secretary argues, the only logical approach in evaluating whether the violations pose an "S&S risk" is to assume that the contemplated emergency has already occurred." *Id.* at 11. Further, unless the analysis is based upon that assumption, "violations of these critically important standards will rarely if ever be found to be significant and substantial, because the likelihood of the emergency occurring should always be remote." *Id*. Underscoring his point, the Secretary notes, "Indeed, were there to be a fire at the belt conveyor drive, the failure to have a fire suppression system at that location would likely be an imminent danger." *Id.* at 11 n.6. Accordingly, the Secretary urges that in evaluating whether a violation of this type is S&S, the Commission should recognize that:

> *The likelihood of a fire or explosion occurring is not the relevant question*. Rather, the relevant question is, given the occurrence of a fire or explosion, whether the failure to have any fire suppression system . . . is reasonably likely to result in serious injuries or deaths that would not occur if a fire suppression system had been installed as required by the standard.

Id. at 13-14 (emphasis supplied).

If such an approach is adopted, the Secretary recognizes that:

> Assuming the occurrence of the underlying emergency, i.e., a fire or explosion, does not itself establish the Secretary's prima faci[e] case on the third element of the Commission's significant and substantial test [*Mathies*]. The Secretary is still required to demonstrate that, assuming the underlying emergency, the failure to have either a deluge fire suppression system on the coal carrying conveyor belt or

> a fire extinguisher on a front-end loader is reasonably likely to contribute to an injury under the circumstances presented by each case. Once the Secretary has established his prima faci[e] case, the *burden shifts*[2] to the mine operator to produce evidence that the violation will not result in an injury. The operator could meet this burden by showing that there were effective alternative means of combating the hazard addressed by the violation cited. In other words, the mine operator could rebut the presumption by proving that there were equivalent alternate fire suppression systems or equipment available. Whether any alternative fire suppression system or equipment was equivalent to the protections provided in the safety standard which was violated would be a matter for the judge to decide on the basis of all of the evidence.

S. Reply Br. at 6-7 (emphasis supplied).

We have considered the Secretary's argument and Manalapan's opposition to it and we conclude that the Secretary is entirely correct in arguing that the only logical way to evaluate the gravity or seriousness of a fire suppression violation is to consider the effect the violation would have in the event that the occasion for its use arises. This is, in our opinion, no different from the situation where an MSHA inspector alleges an S&S violation after determining that a truck is being operated without an emergency brake. In evaluating the seriousness of that violation we routinely consider the risk presented to the equipment operator and to the other miners working or traveling near the cited truck *should the need arise to use the emergency brake*. Clearly the truck can operate without the use of an emergency brake, just as the coal carrying belt and the end-loader functioned properly without the use of the fire suppression equipment. However, in gauging the seriousness of the violation, we consider what would happen if the truck, while being operated during continued mining operations, required the use of the emergency brake, i.e., if an emergency arose! *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Similarly, the Secretary urges that we apply that approach when evaluating the seriousness of a fire suppression violation. To do otherwise is to fail to recognize and adhere to the overriding mandate of the Mine Act -- to ensure that we construe the law in a fair way that provides the maximum protection to our nation's miners.

Regrettably, in rejecting the Secretary's position our colleagues do not appear to have recognized the logic of the argument. When distilled to the core, the reasons offered by Commissioners Holen and Riley for their rejection of the Secretary's call for an assumption are:

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[2] The Secretary's imprecision here and at page 2 of his reply brief must be clarified. Although the "burden shift[s]," it is NOT a shifting of the burden of proof. That burden always remains with the Secretary. The referenced shift to the operator to "produce evidence" relates to the *burden of going forward with evidence* intended to rebut the Secretary's evidence.

> (1) the Secretary urges the Commission "to presume an emergency for an undefined and potentially large class of health and safety standards without indicating what situations under those standards would qualify as an emergency;"
> (2) the Secretary's need for the presumption here is not like the need demonstrated in *Consolidation;*
> (3) the facts in this case "appear[] to render [the Secretary's] suggested S&S framework irrelevant to the deluge system violation."

Slip op. at 6.

For the reasons set forth below, we conclude that our colleagues' failure, or refusal, to adopt the Secretary's argument is grounded on irrelevancies and a misunderstanding of the Secretary's position.

Notwithstanding the vague perception of the issue offered by our colleagues, it is clear that the Secretary's argument relates to the *one* circumstance delineated in this case, i.e., the assumption of a fire or explosion when considering whether fire suppression violations are S&S. If our colleagues are troubled by the prospect that future cases may present the issue of *what constitutes a fire suppression violation*, or what type of equipment *constitutes fire suppression equipment*, that is irrelevant to this case and should not influence the disposition here. There seems to be no dispute by the parties that the cited equipment is fire suppression equipment.

The second basis set forth by Commissioners Holen and Riley for their rejection of the Secretary's call for the assumption of a fire or explosion is simply that this case is unlike the circumstances presented in *Consolidation.* "[T]he Secretary has failed to develop a record that establishes the need for such a change in the law." Slip op. at 6. Do our colleagues need some documentation demonstrating what happens when a belt fire occurs in a mine where there is no deluge fire suppression protection? Do they seriously doubt that the absence of that protection heightens the risk of injury and death to the miners exposed to that unprotected condition? We do not. Accordingly, we find this concern of our colleagues to be misguided and unfounded.

Finally, and most disturbing, our colleagues grossly misapprehend the Secretary's argument which aptly demonstrates that the assumption of a fire or explosion would not, by itself, establish that the violation is S&S -- that the operator would still have the opportunity to defend itself from the charge.

> [E]ven assuming the occurrence of a fire, a violation of [section] 75.1101 might not be significant and substantial. For example, if other fire extinguishers were present, the failure to have a deluge-type fire suppression system might not result in a reasonable likelihood of serious injuries [or deaths depending upon all of the circumstances surrounding the violation.]

Slip op. at 6, *quoting* S. Br. at 14 n.7.

In quoting the foregoing, our colleagues conclude that the Secretary's observation "appears to render his suggested S&S framework irrelevant to the deluge system violation." Slip op. at 6. With all due respect, our colleagues have failed to comprehend the argument and have completely inverted its purpose. We find the Secretary's description of how the assumption would be applied to be not only relevant, but also persuasive, in that it assures us that the adoption of such a framework would not be at the expense of fairness to all cited operators.[3]

For the foregoing reasons, we conclude that the assumption of a fire or explosion should be made when the Commission evaluates whether a fire suppression violation is S&S. In light of the above, we would vacate the judge's conclusions on these issues and remand for an analysis that applies the foregoing legal conclusions.

B. Preshift Examination

The Secretary argues that the Commission should conclude that a failure to conduct a preshift examination is presumptively S&S. S. Br. at 15-21. The Secretary further contends that the judge incorrectly applied the criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); he notes that the judge relied on an inspection performed after the citation, which showed no hazardous conditions. S. PDR at 16-17.

Manalapan argues that the presumption the Secretary seeks violates due process because there is no rational connection between the violation and the presumption of reasonable likelihood of serious injury. M. Br. at 10-11. Manalapan also asserts that the presumption is arbitrary because it is contrary to the record facts. *Id.* at 11-12. Manalapan also notes that the Secretary did not raise his argument that the failure to conduct a preshift examination is presumptively S&S before the administrative law judge. *Id.* at 18.

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[3] Manalapan argues that it is a violation of due process to assume the existence of a fire in determining whether the fire suppression violations were S&S. M. Br. at 7-16. We reject this assertion.

Manalapan's contentions regarding the fire suppression system violations are completely misplaced because the Secretary is not even asking us to create a presumption in this context. He is simply asking us to assume a fact -- the existence of a fire -- when examining the third element of the *Mathies* test (a reasonable likelihood that the hazard contributed to will result in an injury). The Secretary admits that this will not establish his prima facie case on the third element of the S&S test. S. Reply Br. at 6-7. He acknowledges that he would still be required to show that, assuming the fire, the failure to have a deluge system or fire extinguisher is reasonably likely to contribute to an injury. *Id*. The operator would of course have the opportunity to rebut this evidence by demonstrating that the violation will not result in injury. Accordingly, we find Manalapan's due process argument in this context inapposite.

We first address Manalapan's contention that we may not consider the presumption argument because the Secretary did not raise it before the administrative law judge. Although the Mine Act generally precludes us from reviewing issues not raised before the judge, there is an exception "for good cause shown." 30 U.S.C. § 823(d)(2)(A)(iii). Here, the "good cause" standard is met because the issue before us "raises a legal question fundamental in this and future cases." *Brennan v. Occupational Safety & Health Review Comm'n*, 511 F.2d 1139, 1143 n.4 (9th Cir. 1975). The question of whether a violation of the preshift standard is S&S comes before the Commission on a regular basis. Because, as we explain below, the traditional method of determining S&S is not appropriate for this particular type of violation, we must provide timely guidance on this question.

The Mine Act's bar against appellate review of issues not first decided by a trial judge is based on the need for "further factfinding where warranted" and the desire "to adequately develop the record." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637 (1978). We wholeheartedly embrace this principle. However, the question of whether or not to create this legal presumption does not require any additional factfinding. We can conceive of no additions to the record that are necessary for us to rule on this question. We are confident that the statutory provisions, legislative history, and the briefs submitted clearly suffice to make this determination.

Although generally bound by the same constraints, federal appellate courts have demonstrated a flexible approach in this area. *See, e.g., State of New Jersey, Dept. of Educ. v. Hufstedler*, 724 F.2d 34, 36 n.1 (3d Cir. 1983) ("[O]ur practice has been to hear issues not raised in earlier proceedings when special circumstances warrant an exception to the general rule. [citations omitted]. Since [the issue raised] is singularly within the competence of appellate courts and is not predicated on complex factual determinations, we will consider the . . . argument . . . ."); *R.R. Yardmasters of America v. Harris*, 721 F.2d 1332, 1337 (D.C. Cir. 1983) ("[B]ecause the issue . . . is one of law, requires no further factual development, has been fully briefed by both parties, and can be resolved beyond any doubt, we will exercise our discretion to address the issue."). Accordingly, because the issue is a legal one, to which Manalapan has fully responded, we agree to address it on the merits. *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984).

The S&S terminology is taken from section 104(d)(1) of the Act and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the

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

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

To evaluate the Secretary's request for a presumption that a failure to perform a preshift inspection is S&S, we first review the rationale underlying the establishment of presumptions by courts and administrative agencies. There are several reasons why courts and agencies create presumptions. Presumptions are created to remedy an imbalance due to one party's superior access to evidence, because of notions of probability (when a judge believes that proof of fact B makes the inference of the existence of fact A probable) or for social policy reasons. 2 Kenneth S. Broun et al., *McCormick on Evidence* § 343, at 454-55 (4th ed. 1992). Most presumptions are created for a combination of these reasons. *Id.*

The creation of a legal presumption is not a novel concept in mine litigation. For example, the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1994), contains a rebuttable presumption that a miner who worked for 25 years or more in a coal mine shall be entitled to black lung benefits unless it is established that he or she was not disabled due to pneumoconiosis. In rejecting a due process challenge to this presumption, the Third Circuit stated:

> By [enacting the presumption], Congress recognized the difficulties involved in diagnosing respiratory impairments due to coal mine employment and the problems inherent in proving survivors' claims. Congress acted rationally by enacting the rebuttable presumption contained in § 411(c)(5).

U. S. Steel Corp. v. Oravetz, 686 F.2d 197, 202 (3d Cir. 1982). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975) (upholding the constitutionality of sections of the Black Lung Benefits Act providing that a miner with 10 years' employment in the mine suffering from pneumoconiosis is presumed to have contracted the disease from his employment and that if a miner with 10 years' mining employment dies from a respiratory disease he or she is presumed to have died from pneumoconiosis).

The Commission itself embraced the concept that violations of certain standards may be presumptively S&S in its opinion in *Consolidation.* In *Consolidation*, the Commission held that, instead of requiring the Secretary to prove all four prongs of the *Mathies* test in every case involving a violation of section 70.100(a) (the respirable dust standard), it would institute a

rebuttable presumption that the violation is S&S. 8 FMSHRC at 899. The Commission based its creation of this presumption on "the nature of the health hazard at issue, the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners." *Id*. Similar policy and evidentiary concerns lead us to the conclusion that a presumption of S&S is warranted when an operator is cited for failure to conduct a preshift inspection.

The preshift inspection requirement is the linchpin of Mine Act safety protections. Without a timely preshift inspection, unwary miners may be sent into areas containing hazardous conditions. Congress explicitly acknowledged the importance of the preshift inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The Senate Report on the 1969 Coal Act emphasized the importance of these inspections, stating that "[c]hanges occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." S. Rep. 411, 91st Cong., 1st Sess. 57 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975) (*"Coal Act Legis. Hist."*).

Both the Senate Report and the Conference Report emphasized:

> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Coal Act Legis. Hist. at 183 and 1610.

In its recent 1996 revision of safety standards for the ventilation of underground coal mines, the Mine Safety and Health Administration acknowledged that:

> [t]he preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.

61 Fed. Reg. 9790 (1996).[4]

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[4] Prior to 1992, the preshift requirement was located at 30 C.F.R. § 75.303 and tracked the statutory language at 30 U.S.C. § 863(d)(1). In 1992, MSHA revised the safety standards for ventilation of underground coal mines. The preshift standard was redesignated at section

In a previous discussion of an earlier version of this standard, MSHA stated:

> An examination of these areas [to be preshifted] allows miners on the oncoming shift to be notified if hazards exist and allows corrective actions to be taken. In addition to methane accumulations and oxygen deficiency, other hazards that can be detected during the preshift examination are loose roof or ribs, water accumulation that affects air courses or escapeways, electrical hazards from trolley wires, and fire hazards from damaged or improperly operating belt conveyors.

57 Fed. Reg. 20893 (1992).

In its comment on the March 1996 final rule, MSHA acknowledged several accidents which occurred at least in part because the area in question received no examination or only an inadequate examination under the standards in effect at the time.[5] 61 Fed. Reg. 9798 (1996). MSHA noted that the preshift and supplemental exam requirements of the rule it was promulgating "would have served well to prevent these accidents." *Id.*

In *Emerald Mines Corp.*, 7 FMSHRC 437 (March 1985) (ALJ), Administrative Law Judge Broderick recognized the importance of the preshift examination in the arsenal of protections afforded to those working in the mines. In holding that the failure to conduct a preshift inspection was S&S, he stated that:

> [t]he whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal

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75.360(a) and, instead of one continuous paragraph, the requirements were separated into various subsections. The language was updated, and the areas to be examined were clarified and expanded. The 1996 revision further clarified the areas subject to the preshift requirement and the manner in which the examination is to be performed.

[5] These included explosions at Greenwich Collieries No. 1 Mine in February 1984, in which 3 miners were killed; the explosion at Day Branch Mine in 1994 where 2 miners died, and an ignition at the Loveridge No. 22 Mine in 1992 that burned 1 miner. 61 Fed. Reg. 9798 (1996).

MSHA also recognized that explosions at the Red Ash Mine in 1973, the Scotia Mine in 1976, the P&P Mine in 1977, the Ferrell #17 Mine in 1980, the Greenwich #1 Mine in 1984, and the Day Branch No. 9 Mine in 1994, were situations in which miners were sent into an area that had not been preshift-inspected. 61 Fed. Reg. 9794 (1996).

> mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury.

7 FMSHRC at 444.

This Commission has recently had occasion to pronounce the preshift requirement "unambiguous" and of "fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). Thus, the policy considerations, as articulated by Congress, MSHA and the Commission, lead us to conclude that an S&S presumption in this area is appropriate.[6]

Evidentiary considerations lead us to adopt the presumption as well. Violations of the preshift requirement generally do not fit the *Mathies* format because the mandatory safety standard is designed to detect and correct potential, unknown hazards, whereas the *Mathies* test demands evidence of demonstrated dangers which will likely result in serious injury. Arguably, under the *Mathies* test, the only way the Secretary should prevail in proving a preshift violation S&S is to present evidence that the operator's failure to conduct the required exam resulted in the miners being exposed to a hazardous condition. Only in this way could MSHA prove "a measure of danger to safety . . . contributed to by the violation" and demonstrate a "reasonable likelihood that the hazard contributed to will result in an injury." *Mathies*, 6 FMSHRC at 3-4.

Except on rare occasion, it is doubtful whether MSHA would be able to meet this evidentiary burden. Unless the inspector has examined the area himself and is waiting underground to greet the miners, he will not be in a position to describe the conditions that actually confronted the miners when they arrived in the area in question. Violations of the preshift requirements are generally discovered only after the miners are permitted to work in the unexamined area. Sometimes the violation is detected when the inspector decides to review the operator's preshift examination reporting book. *See, e.g.*, *Emerald Mines*, 7 FMSHRC at 442. Sometimes it is discovered when the inspector notices the lack of the examiner's initials in the underground area in question or, as here, when the inspector observes that the person who allegedly conducted the preshift exam did not have any of the proper examination equipment. Tr. V 372. By the time the inspector detects the violation, hours, days or even weeks may have passed and the conditions present at the time the inspector issues the citation may bear little resemblance to those present at the time the violation occurred. Moreover, there would be no way for MSHA to know if the lack of hazardous conditions at the time the violation is detected is a result of corrective actions the operator may have taken after miners entered the unexamined

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[6] Several state mining laws include preshift requirements that parallel the federal mandate. A review of the West Virginia mining statute, for example, reveals the singular importance of the preshift examiner or "fire boss." Adequate examinations by the fire bosses are considered so essential that while performing their duties the fire bosses "shall have no superior officers, but all the employees working inside of such mine or mines shall be subordinate to them in their particular work." W. Va. Code § 22A-2-21 (1994).

area. Because of these factors, inspectors will rarely be able to ascertain whether specific hazards existed at the time of the preshift violation.

Just as the Commission's respirable dust presumption is based on the fact that "the development of respirable dust induced disease is insidious, furtive and incapable of precise prediction" (*Consolidation*, 8 FMSHRC at 898), the failure to perform a preshift inspection will, in many cases, expose miners to potential serious hazards but yet deprive the inspector of any feasible way to establish that the specific hazards existed when the shift in question entered the mine. *See also Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 158 (1987) (when it enacted the statutory presumption in the Black Lung Act, "Congress was aware that it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal mine related, or that those diseases are in fact pneumoconiosis"). Similarly, in a case dealing with the unwarrantable failure aspects of a section 104(d) violation, the Commission held "[t]o read out of the Act the protections and incentives of section 104(d) because an inspector is not physically present to observe a violation while it is occurring distorts the force and blunts the effectiveness of section 104(d). We discern no warrant for such a formalistic approach." *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (September 1987).

Although the Secretary in this case was unable to adduce evidence of hazardous conditions awaiting the miners when they entered the No. 707 section, the Secretary did present evidence that the mine liberated methane, had a roof which could fall, and included a mined out area which could contain an oxygen-deficient atmosphere. In voting to reverse the judge, our colleagues have necessarily concluded that this evidence compels a finding that an injury producing event was reasonably likely to occur as a result of Manalapan's violation. We submit that the conditions relied on by our colleagues would apply to virtually any underground mine. Indeed these are the very conditions that the Secretary and Congress have cited in explaining the rationale for imposing the preshift requirements in the first place.

We take issue, not with our colleagues' finding of S&S, but with how they choose to reach their conclusion. We suggest that, in spite of their protestations to the contrary, our colleagues have for all practical purposes applied a presumption of S&S to violations citing a failure to conduct the preshift exam. If the Commission will uphold the Secretary's S&S designation because the mine is capable of liberating methane (even though the Secretary presented no evidence that the unexamined area contained methane, Tr. V 388, 420), and because the roof may be unstable (even though the Secretary presented no evidence that the roof in the unexamined area posed a hazard, *Id.*), and because adjacent mined out areas could contain dangerous atmosphere (even though the Secretary presented no evidence that such areas were actually oxygen-deficient or that miners were even likely to encounter the atmosphere, *Id.*), it is disingenuous to claim, as our colleagues do, that we are applying *Mathies*, which requires that the S&S determination be based on "the particular facts surrounding that violation . . . ." *Mathies*, 6

FMSHRC at 3 (citing *Nat'l Gypsum*, 3 FMSHRC at 825).[7] Thus, because of the inherent potential hazards existing in underground mining, we conclude that violations of the preshift standard are presumptively S&S. Moreover, to claim to decide this issue under *Mathies*, as our colleagues do, is to engage in a transparent fiction that can only foster more confusion.[8]

Our decision to apply a presumption of S&S to preshift violations does not end our inquiry. In the instant case, the judge vacated the Secretary's S&S determination because the inspection conducted immediately after the order revealed no hazardous conditions in the affected area of the mine. 16 FMSHRC at 1701-02. We must therefore address the issue of whether the operator can rebut the S&S presumption for preshift violations by evidence tending to prove that the area in question did not contain hazards when the miners entered it. Assuming the judge is allowed to consider the condition of the area at noon, we believe a reasonable mind might accept the demonstrated lack of hazards at that time as a basis for inferring that dangerous conditions did not exist when the miners entered the area four hours earlier. While it is true many hazardous conditions are transient in nature, a judge would not be unreasonable in inferring, for example, that a roof that was weak or unstable at 8:00 a.m. would not (without human intervention) appear safe at noon. Likewise, if a disruption in the ventilation had caused methane to accumulate at 8:00 a.m. then, unless the problem were corrected, it is reasonable to conclude that methane would be present in an even greater amount four hours later. A lack of methane and roof problems at noon could therefore provide a basis for inferring the lack of methane and roof problem at 8:00 a.m. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*,

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[7] Moreover, it is difficult to see how our colleagues can square their S&S analysis here with their recent holding in *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996), in which they restricted consideration of the S&S nature of a violation to surrounding circumstances which were themselves also violative. They refused to consider evidence of a massive accumulation in an inactive area because it did not constitute a violation. *Id*. at 511. Although a mine's ability to liberate methane, and its potential to contain unsafe roof and dangerous atmosphere are conditions which can pose hazards to miners, they are not necessarily violations. Indeed, one could argue that, by their holding today, our colleagues have overruled *Jim Walter Resources*, sub silentio.

[8] Although *Manalapan* has correctly cited the standard for a due process violation, it applied it incorrectly. We agree that due process is denied if a presumption does not have "some rational connection between the fact proved and the ultimate fact presumed, and [if] the influence of one fact from proof of another [is] . . . so unreasonable as to be a purely arbitrary mandate." M. Br. at 9-10, *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). In light of our extensive discussion regarding the importance of the preshift and its role in preventing accidents, *supra* at 17-18, we believe that it is clearly rational to assume that if an operator fails to conduct a preshift inspection (the fact proven), that there is a reasonable likelihood of serious injury to the miners, and thus an S&S violation (the fact presumed). We therefore find that this presumption does not violate due process.

11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v NLRB*, 305 U.S. 197, 229 (1938). True, the evidence of the conditions at noon would have to be weighed against MSHA's evidence regarding the mine's potential for methane liberation and the propensity of the roof to fall, but we are not able to say that the only conclusion a reasonable mind weighing all the evidence could reach is that an injury-producing event was likely to occur at the time the miners entered the area in question.

That being said, however, we agree with our colleagues that the judge's reliance on the condition of the area at noon is incorrect as a matter of law. We reach our determination not, as our colleagues conclude, because such evidence results from a "post-citation event[]" (slip op. at 8), but because allowing such evidence to rebut the S&S presumption would eviscerate the important prophylactic purpose behind requiring preshift examinations in the first place. Whether a preshift violation is S&S should be determined on the basis of the serious potential for harm that can confront miners when they enter an unexamined area of an underground mine. The risk associated with the operator's failure to preshift the area should be assessed not on the basis of the condition of the area itself but on the action of assigning miners to an unexamined area. Would we not assess the risk associated with playing Russian roulette by considering the potential for harm involved in holding a loaded gun up to one's head and pulling the trigger, rather than by considering what happened after the trigger was pulled? We conclude that the determination of risk to be accorded to a failure to conduct the preshift exam should not turn on the fortuitous circumstance that the unexamined area did not contain the hazardous conditions the exam was designed to detect.[9]

Excluding post-hoc evidence because of its potential to undermine the prophylactic purpose of the preshift exam is consistent with several provisions of the Federal Rules of Evidence that exclude certain types of evidence based mainly on policy considerations. For example, pursuant to Fed. R. Evid. 407, evidence of repairs made after an accident is not admissible as evidence of negligence before the accident. This is based on the policy that

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[9] This was the approach taken by Judge Broderick who, when he reviewed the S&S designation on a preshift violation, posed the following query:

> How does one evaluate the hazard to which the violation contributes? By what is disclosed on an examination of the area after the examination? Emerald contends that this is the test. But the hazard and the violation here involve, not the condition of the area as such, but rather the assigning of miners to work in an uninspected area. . . . Can it seriously be argued that failure to perform one of these examinations is not significant and substantial if a post-violation examination does not show hazardous conditions?

Emerald Mines, 7 FMSHRC at 444.

encourages potential defendants to fix hazardous conditions without fearing these actions will be used as evidence against them. 10 James W. Moore, *Moore's Federal Practice* § 407.02, at IV-152 (2d ed. 1996); 29 Am. Jur. 2d *Evidence* § 464, at 534 (1994). Similarly, Fed. R. Evid. 408 excludes evidence of settlement discussions to promote the public policy "favoring the compromise and settlement of disputes" (10 James W. Moore, *Moore's Federal Practice* § 408.01[9], at IV-167 (2d ed. 1996)) and to "foster full and free discussion and negotiations in order to encourage out-of-court settlements" (29 Am. Jur. 2d *Evidence* § 508, at 588 (1994)). Finally, Fed. R. Evid. 409 states that evidence of payment or promises to pay medical expenses is not admissible to prove liability for the injury. The rule is based on policy considerations and "humanitarian motives" (10 James W. Moore, *Moore's Federal Practice* § 409.02, at IV-176 (2d ed. 1996)), because to hold otherwise "would tend to discourage assistance to the injured individual" (29 Am. Jur. 2d *Evidence* § 480, at 560 (1994)). Accordingly, our refusal to take into account evidence concerning the lack of hazards in the relevant area in determining whether a failure to preshift is S&S is based on equally important policy concerns, as we articulated above.[10]

[10] To the extent the Secretary suggests that the presumption of S&S may be rebutted by evidence showing that hazards did not exist in the unexamined area (S. Reply Br. at 4-5), we reject such suggestion for the reasons enunciated above. To the extent the Secretary suggests that other theoretical bases exist for rebutting an S&S presumption (S. Br. at 19 n.11), we decline to issue a declaratory type opinion in this case.

Conclusion

In light of the forgoing, we would vacate and remand the judge's S&S determinations pertaining to Citation No. 3164716 and No. 3835998. We would reverse his S&S determination pertaining to Citation No. 4238749 and remand for reassessment of penalties.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner