FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

April 30, 1998

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 94-944-R
	:	KENT 94-1052
TOPPER COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), involves an alleged significant and substantial (AS&S@) violation by Topper Coal Company, Inc. (ATopper@), of section 103(a) of the Mine Act, 30 U.S.C. ' 813(a),[1] for impeding a spot inspection for smoking

[1] Section 103(a) provides, in part:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [title] or other requirements of this [Act]. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . . In carrying out the requirements of clause[] . . . (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year . . . . The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this [Act], and his experience under this [Act] and other health and safety laws. For the purpose of making any inspection or investigation under this [Act], the Secretary, . . . or any authorized representative of the Secretary

materials.[2] Administrative Law Judge T. Todd Hodgdon concluded that Topper violated section 103(a) and that the violation was S&S, and assessed a $5,000 civil penalty. 17 FMSHRC 945 (June 1995) (ALJ). The Commission granted Topper=s petition for discretionary review (APDR@) challenging the judge=s conclusions. For the following reasons, we affirm, in result, the judge=s decision.

I.

Factual and Procedural Background

Topper operates the No. 9 underground coal mine in Knott County, Kentucky. Pet. for Assessment of Civil Penalty at 1. On May 19, 1994, Howard Williams, Elmer Hall, Jr., and Ronald Honeycutt, inspectors with the Department of Labor=s Mine Safety and Health

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> . . . , shall have a right of entry to, upon, or through any coal or other mine.

[2] Smoking materials are prohibited by section 317(c) of the Mine Act, 30 U.S.C. ' 877(c), which states:

> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

Administration (AMSHA@), arrived at the mine to conduct a spot saturation inspection for smoking materials. 17 FMSHRC at 946. The inspection was part of MSHA=s smoking prevention initiative, which was instituted in response to recent underground mine explosions caused by smoking. Tr. 116. Under the initiative, MSHA inspected 175 mines in Kentucky, Tennessee, Virginia, and West Virginia. Tr. 117.

The inspectors arrived during mid-shift so they would not be observed by the miners. Tr. 118. Upon entering the mine office, Inspector Hall told Gary Fields, the president of Topper, that they were there to conduct an inspection and instructed him not to telephone underground to alert the miners that they were coming. 17 FMSHRC at 946; Tr. 14-15, 68. Then Inspectors Hall and Honeycutt crawled into the mine to conduct the inspection[3] while Inspector Williams remained in the mine office to monitor the telephone. 17 FMSHRC at 946; Tr. 18-19, 68.

About 15 to 20 minutes after Inspectors Hall and Honeycutt went underground, Fields telephoned the working section and told a miner that Atwo federal inspectors@ were in the mine and that he wanted the miners to Awatch out and be careful.@ 17 FMSHRC at 946; Tr. 177. After hanging up, Fields explained to Inspector Williams that he was concerned that, absent the warning, the miners might not see the inspectors and might run over them with a shuttle car. 17 FMSHRC at 946; Tr. 19, 177-78.

Inspectors Hall and Honeycutt, about 20 to 25 minutes after going underground, intercepted two miners cleaning up accumulations around a belt. Tr. 85. They took the two miners to the working section and, with the assistance of the section foreman, gathered the remaining seven miners. Tr. 70, 71. The miners were then searched, but no smoking materials were found. 17 FMSHRC at 947; Tr. 71-72.

[3] The coal seam ranged from 36 to 42 inches high. Tr. 69. The inspectors crawled approximately 2,500 feet over 30 to 40 minutes to reach the working section. Tr. 70.

As a result of Fields= telephone call alerting the miners underground that the inspectors were coming, Inspector Williams issued Topper Citation No. 4243301, pursuant to section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), alleging a violation of section 103(a) for impeding the inspection. 17 FMSHRC at 946; Jt. Ex. 1, at 1.[4] The citation was later modified to increase the gravity of the violation to S&S, reflecting that it was Areasonably likely@ to cause injury or illness that could be Afatal,@ and to increase the level of negligence to Areckless disregard.@ Jt. Ex. 1, at 2. Topper contested the issuance of the citation. The Secretary subsequently proposed a civil penalty assessment of $8,500 for the alleged violation and Topper challenged the proposed assessment. 17 FMSHRC at 945.

Following an evidentiary hearing, the judge concluded that Topper violated section 103(a). *Id.* at 947-51. He based his determination on the Aright of entry@ provision in section 103(a), which he concluded prohibits impeding or interfering with an inspection. *Id.* at 947-50. The judge found that, by alerting the miners that the inspectors were coming, Fields obstructed the inspection. *Id.* at 950. He found that Fields had understood the inspectors= instructions not to call underground and he discredited Fields= testimony that he had called for safety reasons. *Id.* at 950-51. The judge reasoned that Fields had not expressed concern before calling, he did not need to identify the people entering the mine as Afederal inspectors,@ and his belief that the inspectors were already at the working section was inconsistent with his belief that there would be a safety purpose in alerting the miners to their arrival. *Id.*

In addition, the judge concluded that the violation was S&S. *Id.* at 951-53. He recognized that A[t]he problem with trying to assess this violation under the traditional criteria is that there is no way of knowing what the inspectors would have found if the miners had not been alerted to their presence.@ *Id.* at 952. He accepted the Secretary=s argument that A[t]he Secretary=s right of entry is the mechanism by which the entire Act is enforced@ and the denial of entry, directly or indirectly, is presumptively S&S because the inspector would be Aunable to determine the number and the type of violative conditions which pose serious hazards to miners working underground and to ensure that these hazards are eliminated.@ *Id.* (quoting S. Post-Hearing Br. at 10). The judge reasoned that Athe logical consequence of warning underground miners that inspectors are on their way underground would be for the miners to attempt to cover-up, dispose of, or even correct any violations of which they are aware.@ *Id.* at 953. He concluded that, when an inspection is impeded, Ait is reasonably likely that an S&S violation would have been discovered,@ and, thus, Athere is a presumption that the violation [of section 103(a)] is S&S.@

[4] In addition, two citations were issued for alleged violations of 30 C.F.R. ' 75.360 for failure to record a preshift examination and 30 C.F.R. ' 75.400 for failure to clean up coal and coal dust accumulations around a shuttle car. 17 FMSHRC at 947; Tr. 73-74; S. Br. at 4, 26. These charges are not part of this proceeding.

Id. He also found that Topper did not present any evidence to rebut the presumption. *Id.*

Finally, after considering the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), the judge assessed a $5,000 civil penalty against Topper. 17 FMSHRC at 955. He found that Topper was a small operator and that the violation was the result of high negligence, concluding that Fields= conduct was intentional and that there were no mitigating circumstances. *Id.* at 953-55.

II.

Disposition

A. Violation

Topper argues that it did not deny the inspectors the right to enter the mine or impede the inspection. PDR at 2; T. Br. at 4-5. It contends that 2 of the 10 miners, i.e., the miners working at the belt, were not aware that MSHA inspectors were coming underground, so they did not have the opportunity to dispose of any smoking materials. PDR at 2. Moreover, it asserts that, even if Fields had not alerted the miners to the inspectors= presence, some of them might have seen the inspectors gathering the other miners and would have had the opportunity to dispose of any smoking materials. T. Br. at 5. Topper argues that MSHA had no reason to suspect that its miners were smoking underground or that its smoking material search plan was inadequate. *Id.* at 6. It asserts that Fields was concerned about the safety of the miners and the inspectors. *Id.*

The Secretary responds that substantial evidence supports the judge=s finding that Fields= warning to the miners that inspectors were coming, contrary to the inspectors= instructions, impeded the inspection in violation of section 103(a). S. Br. at 8-20. She asserts that, in so doing, Fields eliminated the element of surprise, which the unannounced inspection was designed to ensure. *Id.* at 13. The Secretary states that, because smoking materials can be easily concealed, advance notice of an inspection can frustrate enforcement efforts. *Id.* at 9-11. In addition, she argues that miners have a strong incentive to conceal smoking materials because they can be held personally liable under section 110(g) of the Mine Act, 30 U.S.C. ' 820(g).[5] *Id.* at 12. Regarding the two miners working at the belt and the miners at the working section who might have seen the inspectors gathering miners, the Secretary argues that section 103(a) is violated whether an inspection is completely prevented or merely hindered. *Id.* at 14-15. In

[5] Section 110(g) provides:

> Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

addition, she asserts that the judge properly discredited Fields= testimony that, in telephoning underground, he was motivated by safety concerns. *Id.* at 16-17.

Although the focus of the judge=s decision and the parties= arguments is whether Topper violated the Aright of entry@ provision in section 103(a), we conclude that the Ano advance notice@ provision of section 103(a) is applicable to this case. Section 103(a) explicitly provides that Ano advance notice of an inspection shall be provided to any person.@ Here, the record indicates that the inspectors specifically instructed Fields not to notify the miners of their arrival. Tr. 15, 31-32, 67-68, 82-83, 105-06, 112, 173, 196-97. It is undisputed that Fields intentionally disregarded these instructions by calling underground to warn the miners that Afederal inspectors@ were coming. Tr. 173, 176-77, 196-97. Fields= warning of the inspection clearly is sufficient to establish a violation of the Ano advance notice@ language.

We do not accept Topper=s defense that the warning was provided solely due to Fields= concern that the unannounced inspection might cause injury to the miners or the inspectors. T. Br. at 6. The judge specifically discredited Fields= testimony that he had called for safety reasons. 17 FMSHRC at 950-51. A judge=s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1815, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). The judge soundly rejected Fields= excuse, and we find no basis to overturn his ruling on that issue.

Based on the foregoing, we conclude that substantial evidence[6] supports the judge=s determination that Topper violated section 103(a). Accordingly, we affirm, in result, the judge=s holding.

B. Penalty

Topper argues that, under MSHA=s penalty assessment regulations set forth in 30 C.F.R. Part 100, the violation was the result of only moderate negligence. PDR at 3; T. Br. at 8-9. It asserts that mitigating factors are that Fields was unaware of the reason for the inspection or the requirements of section 103(a), and that he was concerned about the safety of the miners and the inspectors. PDR at 3; T. Br. at 9. Moreover, noting that in *Cougar Coal Co.*, 17 FMSHRC 628 (Apr. 1995) (ALJ), a penalty amount of $1,000 was assessed under identical circumstances, Topper asserts that it is a smaller operator than Cougar and should be assessed a smaller penalty of $250. PDR at 4; T. Br. at 9-10.

The Secretary responds that substantial evidence supports the judge=s finding that the violation resulted from high negligence. S. Br. at 30. She asserts that Fields knew of the violation because he understood the inspectors= instructions not to call underground and recognized their desire to ensure the element of surprise in the inspection, but nevertheless deliberately disregarded those instructions. *Id.* In addition, the Secretary argues that there were no mitigating circumstances. *Id.* at 31.

[6] When reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. ' 823(d)(2)(A)(ii)(I). ASubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The Commission=s judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.[7] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984)). With regard to the criterion of negligence, the Commission has recognized that a finding of high negligence Asuggests an aggravated lack of care that is more than ordinary negligence.@ *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator=s intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992) (A*Consol Penalty Case*@). Here, we conclude that substantial evidence supports the judge=s penalty determination.

We find unavailing Topper=s argument that, under MSHA=s penalty assessment regulations set forth in 30 C.F.R. Part 100, the violation was the result of only moderate negligence. PDR at 3; T. Br. at 8-9.[8] We are unpersuaded by Topper=s argument that Fields= negligence was mitigated by the fact that he was unaware of the reason for the inspection or the requirements of section 103(a), and that he was concerned about the safety of the miners and the inspectors. PDR at 3; T. Br. at 9. Fields intentionally disregarded the inspectors= instructions not to call underground to alert the miners. 17 FMSHRC at 950. As the judge recognized, Fields= purported ignorance of the inspection=s purpose does not reduce the level of negligence because he knew that the inspectors did not want him to alert the miners. *Id.* at 954. Moreover, as we have explained, the judge explicitly rejected Fields= testimony that he had called for safety reasons.[9]

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[7] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator=s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator=s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

30 U.S.C. ' 820(i).

[8] It is well settled that the Commission is not bound by the penalty assessment regulations adopted by the Secretary. Rather, the Commission determines *de novo* the amount of the penalty based on the criteria of section 110(i). *Sellersburg*, 5 FMSHRC at 291, *aff=d*, 736 F.2d at 1152.

[9] With regard to Topper=s reference to the *Cougar* case, we note that Commission Procedural Rule 72, 29 C.F.R. ' 2700.72, provides that unreviewed administrative law judge decisions are not precedent binding upon the Commission.

Based on the foregoing, we conclude that substantial evidence supports the judge=s determination that the violation resulted from high negligence. Accordingly, we affirm the judge=s holding and penalty assessment.

C. Significant and Substantial

Topper argues the judge erred in concluding that Awhen an inspection is impeded there is a presumption that the violation is S&S.@ PDR at 2-3 (quoting 17 FMSHRC at 953). Citing *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), Topper contends that, in this case, there is no evidence that the alleged violation would have contributed to the hazard of explosion, which would be reasonably likely to result in injury. *Id.* at 2; T. Br. at 7-8. It points out that the mine has no history of methane liberation and, with respect to the two miners with whom there was no interference in the inspection, no smoking materials were found. PDR at 3; T. Br. at 7-8.

The Secretary responds that the judge properly determined that section 103(a) violations are presumptively S&S. S. Br. at 21-25. The Secretary contends that the violation is very serious because MSHA=s authority to inspect is essential to the enforcement scheme of the Mine Act. *Id.* at 21. She asserts that, under *Mathies*, a section 103(a) violation contributes to a measure of danger to the safety of miners because it impedes an inspection, thus increasing the likelihood that violations will go undetected and placing miners at greater risk of working in unsafe conditions, which in the course of continued mining operations would be reasonably likely to result in serious injury. *Id.* at 21-22. She contends that, because it is impossible Ain the vast majority of cases@ for MSHA to establish that it would have detected S&S violations if the inspection had not been impeded, it is Aonly fair@ to presume that the section 103(a) violation is S&S. *Id.* at 23-24. In addition, the Secretary argues that substantial evidence supports the judge=s finding that Topper failed to rebut the presumption that the violation was S&S. *Id.* at 25-29.

Three Commissioners agree that the violation is S&S. Chairman Jordan and Commissioner Marks vote to adopt the presumption that violations of the advance notice prohibition of section 103(a) are S&S. Commissioner Beatty votes to reject the presumption and concludes that the violation is S&S based on substantial evidence under the *Mathies* test. Commissioners Riley and Verheggen vote to reverse the judge=s S&S determination. The effect of this vote is that the judge=s S&S determination is affirmed in result. The separate opinions of the Commissioners on the S&S issue follow.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Marks, in favor of affirming the judge=s S&S determination:

Unannounced mine inspections are a fundamental component of the Mine Act=s statutory scheme. In discussing the importance of unannounced inspections under section 103(a), the Senate Report accompanying the passage of the Mine Act states:

> [I]t is important that . . . *no advance notice* of an inspection be given to any person. . . .
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> . . . .
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> . . . The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. . . . The Committee notes that despite the progress made in improving the working conditions of the nation=s miners under present regulatory authority, mining continues to be one of the nation=s most hazardous occupations. Indeed, *in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained*, a warrant requirement would seriously undercut this Act=s objectives.[1]

S. Rep. No. 181, 95th Cong., 1st Sess. 26-27 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources (ASenate Committee@ or ACommittee@), 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 614-15 (1978)

[1] In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court upheld a Fourth Amendment challenge to the warrantless inspection requirement of section 103(a), finding that ACongress could properly conclude: >[I]f inspection is to be effective and serve as a credible deterrent, unannounced . . . inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection.=@ *Id.* at 603 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

(A*Legis. Hist.*@) (emphasis added). The Committee expressly rejected the provision of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. ' 721 et seq. (1976), which permitted such advance notice. *Legis. Hist.* at 615.

The critical importance Congress attached to this prohibition is underscored by section 110(e) of the Mine Act, which provides that Aany *person* who gives advance notice of any inspection to be conducted under this [Act] shall, upon conviction, be punished by a fine of not more than $1,000 or by *imprisonment* for not more than six months, or both.@ 30 U.S.C. ' 820(e) (emphasis added). In contrast, violations of a mandatory health or safety standard must either be Awillfully@ committed by an operator or Aknowingly authorized, ordered, or carried out@ by a corporate Adirector, officer or agent@ to warrant criminal sanctions. *See* 30 U.S.C. ' 820(c), (d).

It is against this background that we turn to the question of whether the violation of section 103(a), based on the advance notice of the inspection, was appropriately designated S&S.

A. Employing a Presumption to Find Violations of Section 103(a) S&S

The S&S terminology is taken from sections 104(d)(1) and (e) of the Mine Act, 30 U.S.C. ' 814(d)(1), (e), which provide special consequences for violations that Acould significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . .@ The Commission has held that 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 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard **C** that is, a measure of danger to safety **C** 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) (approving *Mathies* criteria); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (same). The Commission also has held that an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

In this case, the judge acknowledged that the *Mathies* criteria did not provide an appropriate analytical framework for determining the seriousness of this violation. *See* 17

FMSHRC at 952. He concluded that it was appropriate to apply a presumption of S&S to violations of that part of section 103(a) prohibiting advance warning of inspections.[2] *Id.* at 953.

We agree that the *Mathies* criteria fail to provide a framework for determining the seriousness of such violations.[3] In this instance, it is impossible to determine the particular hazard Acontributed to by the violation.@ Due to the advance notice provided by the operator, MSHA was unable to determine the number and type of violative conditions to which the miners may have been exposed. MSHA=s inability to detect the violations prevents that agency from ensuring that the hazards associated with such violations are eliminated. The judge determined that it was appropriate to presume that, when an operator interferes with an inspection by providing advance warning, it is reasonably likely that an S&S violation would have been discovered. 17 FMSHRC at 953.

The judge=s approach is consistent with *Consolidation Coal Co.*, 8 FMSHRC 890 (June

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[2] A presumption is Aa rule of law, statutory or judicial, by which [the] finding of a basic fact gives rise to [the] existence of [a] presumed fact . . . .@ *Black=s Law Dictionary* 1185 (6th ed. 1990). A rebuttable presumption is one Athat can be overturned upon the showing of sufficient proof.@ *Id.* at 1186. Presumptions are created for reasons of fairness, public policy, procedural convenience, probability, or a combination of these reasons. *See* 2 *McCormick on Evidence* ' 343, at 454-55 (John W. Strong ed., 4th ed. 1992). They may be defeated by attacking the existence of the basic fact, introducing evidence contrary to the presumed fact (i.e., rebuttal), or both. *See generally id.* ' 344, at 460-76.

[3] Commissioner Marks agrees that an S&S presumption should be applied to this violation. In addition, for the reasons set forth in his concurring opinions in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission=s *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent.

1986), *aff=d*, 824 F.2d 1071 (D.C. Cir. 1987) (A*Consol Dust Case*@), in which a unanimous Commission adopted a presumption that all violations of the respirable dust standard, 30 C.F.R. ' 70.100(a), are S&S. *See also Twentymile Coal Co.*, 15 FMSHRC 941, 946 (June 1993) (reaffirming *Consol Dust Case* holding that any concentration of respirable dust over 2.0 mg/m^3 is presumptively S&S). In the *Consol Dust Case*, the Commission largely based the adoption of the presumption on the difficulty of proving the third element of *Mathies*. 8 FMSHRC at 898-99. We reasoned that it was impossible to prove that one incident of overexposure of respirable dust was reasonably likely to result in a respiratory illness, but in light of the Aunambiguous legislative declaration in favor of preventing any disability from pneumoconiosis@ and the serious nature of the health hazard involved, we determined that a violation of the respirable dust standard should be considered presumptively S&S. *Id.* at 897-99.

In *Manalapan Mining Co.*, 18 FMSHRC 1375, 1395-94 (Aug. 1996) (opinion of Chairman Jordan and Commissioner Marks), we recognized a presumption that violations of the preshift standard (30 C.F.R. ' 75.360(a)) are S&S. *Id.* at 1388-98 & n.10. The presumption was based on the premise that the preshift examination requirement is of Afundamental importance in assuring a safe working environment underground.@ *Id.* at 1393 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). We applied a presumption because of the difficulty of analyzing the violation under *Mathies*, as the failure to conduct a preshift examination deprived the inspector of any way to establish that specific hazards existed at the time the preshift examination should have taken place. *Id.* at 1393-94.

Considerations similar to those expressed in the *Consol Dust Case* and in our *Manalapan* opinion compel our conclusion that a presumption of S&S is warranted when an operator provides advance notice of an inspection. First, there is a difficulty of proof; it is impossible to determine what injuries were reasonably likely to occur because the operator informed the miners underground that inspectors were on the way. Second, the prohibition against advance notice involves a matter of deep-seated Congressional concern; Congress plainly intended that Mine Act inspections be unannounced because, like the respirable dust standard in the *Consol Dust Case*, Congress directly inserted the prohibition against advance notice into the Mine Act itself. *See* 8 FMSHRC at 896-97 (respirable dust standard was taken directly from section 202 of the Mine Act, 30 U.S.C. ' 842). Taking into account strong Congressional direction regarding respirable dust standards in affirming the Commission=s *Consol Dust Case* decision, the D.C. Circuit cited with approval the Commission=s reasoning that ACongress clearly intended the full use of the panoply of the Act=s enforcement mechanisms to effectuate [this Congressional goal], including the designation of a violation as a significant and substantial violation.@ 824 F.2d at 1086 (citing 8 FMSHRC at 897). The same holds true for violations of the advance notice provision. We conclude that, based on unambiguous Congressional intent, an advance notice violation also is presumptively S&S.[4]

We are reluctant to apply the *Mathies* test in the usual manner in cases involving advance notice of inspections because it allows operators to derive a legal advantage from the very lack of evidence concerning conditions in the mine that their own violation of the law created. When a party violates a statutory obligation, and the legal ramifications of the violation cannot be

[4] In dissent, Commissioners Riley and Verheggen state that a presumption is appropriate only Aunder extraordinary circumstances.@ Slip op. at 35. Even under this test, we believe that when an operator provides advance notice that an MSHA inspection is imminent, the difficulty of proof of concealed health hazards and the clear Congressional intent forbidding such advance notice warrant the presumption of S&S.

determined with certainty because of lack of evidence, it is only fair to resolve the uncertainty against the party committing the violation. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) (AThe employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk [of liability] because he

knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.@).

To ensure due process when a presumption is applied, it is Aessential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.@ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)) (upholding presumptions of disability due to pneumoconiosis under Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (ACoal Act@)). In addition, an administrative agency=s presumption must be consistent with the relevant statute. *Consol Dust Case*, 824 F.2d at 1084-86 (upholding Commission=s S&S presumption for violation of respirable dust standard as rational and consistent with Mine Act).

The presumption that a violation of the advance notice provision of section 103(a) is S&S satisfies these criteria. It is rational to assume that if an operator provides advance notice of an inspection (the proven fact), there is a reasonable likelihood that one of the many potential hazards commonly existing in mines will go undetected, and consequently unabated, and, in the course of continued mining operations, will be reasonably likely to result in serious injury (the presumed fact).[5]

Further, the presumption is rational because the very act of providing advance notice of an inspection makes it more likely that the operator has something to hide in the first place. In

[5] In this case, for example, the record shows that smoking materials, in particular, are easy to conceal because cigarettes, lighters, and matches are small items that can be buried under ribs, loose coal, or rock dust, or sent down a conveyor belt in a matter of seconds. Tr. 72-73, 122. Further, the record reflects that smoking plans are generally ineffective at keeping miners from carrying smoking materials underground because there are numerous ways to carry smoking materials without the operator=s knowledge. Tr. 49-50, 55, 98. Even Fields acknowledged that there is Ano way to stop@ miners from carrying smoking materials underground. Tr. 189. Fields himself admitted that if he was working underground and he had smoking materials and knew the inspectors were coming, he Awould probably hide it or get rid of it one way or the other.@ Tr. 190.

reviewing an analogous situation in *Smith v. District of Columbia*, 436 A.2d 53 (D.C. 1981), a challenge to the constitutionality of the District of Columbia=s ban on radar detectors, the D.C. Court of Appeals upheld the law and explained why radar detectors (similar to advance notice of inspections) may be presumed to be used to hide dangerous violations:

> The prohibition is intended to promote the public safety by aiding in the enforcement of highway speed limits through preventing drivers from anticipating the presence of police radar. The [Commissioners] must have assumed that drivers who use or possess radar detection devices will be more likely to violate the traffic laws . . . [and] to use them . . . in order to avoid speed limits and enforcement efforts.

Id. at 58-59 (alteration in original).

There is no credible reason why an operator would provide notice of an inspection, except to try to hide a violation. As the *Smith* court remarked in the parallel context of the challenge to the radar detector prohibition:

> Radar detectors have no utility other than aiding an illicit effort to drive in an irresponsible manner, evading society=s punishment for such conduct. . . . [T]he nexus between the prohibition of radar detectors and highway safety is obvious and evidences the rationality of the Commissioner=s [sic] enactment of the regulation.

Id. at 59 (footnote omitted).

In addition, the adoption of the S&S presumption with regard to violations of section 103(a) is consistent with the Mine Act. As we have already discussed, Congress recognized the critical role of unannounced inspections in combating safety and health hazards. *Legis. Hist.* at 614-15. The presumption is also clearly consistent with the criminal penalty provision of section 110(e).

For the foregoing reasons, rather than requiring the Secretary to prove all four elements of the *Mathies* test in cases involving violations of section 103(a), we adopt a presumption that all violations of the advance notice provision of section 103(a) are S&S. The presumption applies to all cases where advance notice is given in violation of section 103(a). Under the presumption, once the Secretary establishes a section 103(a) violation, the burden of producing evidence shifts to the operator. It then has an opportunity to rebut the presumption by adducing evidence that the violation is not S&S. *See, e.g., Consol Dust Case*, 8 FMSHRC at 899.

B. Application of the Presumption to Topper

After finding that the operator violated section 103(a) by giving advance notice of an inspection, the judge properly employed a presumption that the violation was S&S. 17 FMSHRC at 951-53. The judge then concluded that the operator failed to present sufficient evidence to rebut that presumption. *Id.* at 953. We agree. On appeal, Topper asserts only that providing advance notice of the MSHA inspection was not S&S because an explosion was not reasonably likely to occur, as the mine does not have a history of methane liberation and the two miners who were examined by MSHA inspectors were not in possession of smoking materials. T. Br. at 7-8. Topper failed to rebut the testimony of an MSHA witness that the mine could nonetheless produce methane. Tr. at 126. It points to no additional evidence to demonstrate that the advance notice did not create the potential for danger. Accordingly, we conclude that substantial evidence supports the judge=s determination that Topper failed to rebut the presumption and, consequently, we find the violation S&S.[6] Based on the foregoing, we would affirm the judge=s holding.[7]

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[6] Although Commissioner Beatty declines to apply a presumption, his S&S analysis is, in many ways, similar to ours. Almost every one of his reasons supporting an S&S determination in this case would be equally applicable to any violation alleging advance notice of an inspection in any mine. He notes that the safety hazard at issue here is Athe increased *likelihood* of smoking materials underground.@ Slip op. at 24 (emphasis added). He acknowledges that the hazard is created by Aan increased *potential* for unchecked smoking materials underground, thereby creating a reasonable likelihood of injury,@ *id.* at 27 (emphasis added), and recognizes that the hazard here is Athe *threat* of miners carrying and using smoking materials.@ *Id.* at 28 (emphasis added). Much of the record evidence to which he points in support of his holding is generalized and would apply universally. For instance, evidence showing that smoking materials are easy to conceal and that smoking control plans are often ineffective, *id.* at 24, would probably apply to all mines. Thus, we believe the differences between his analysis and ours are largely only semantic.

[7] Relying only on cases regarding the retroactive application of federal or state legislation or federal regulations, our dissenting colleagues, Commissioners Riley and Verheggen, assert that this case must be remanded if a presumption is applied. Slip op. at 35-36. We believe a remand is not necessary. Topper has had ample opportunity to rebut the Secretary=s presumption before both the judge and the Commission, and has chosen not to do so. For example, MSHA=s Mine Safety and Health Specialist Cheryl McGill testified at the hearing why the Secretary considered this violation to be S&S. Tr. 128, 156-58, 165. She testified that the operator=s advance notice made it reasonably likely that a fatality would occur because Awe no longer had the element of surprise@ and were unable Ato effectively determine whether or not smoking materials had been carried into that mine@ and, therefore, the agency was going to Aassum[e]@ that the miners had smoking materials that they had discarded at the time of the inspection. Tr. 156-57. In addition, the Secretary=s post-hearing brief, filed May 15, 1995, argued that the advance notice violation Ashould be *presumed* to be significant and substantial.@ S. Post-Hearing Br. at 10 (emphasis added). In its post-hearing brief, filed more than 10 days later on May 26, 1995, Topper never sought to rebut this presumption argument, nor did it even mention the presumption issue. *See* T. Post-Hearing Br. at 10-11. Topper also failed to move to reopen the record for the purpose of adducing evidence rebutting the presumption. Also, at the hearing, Topper had requested and was granted the right to file a reply brief (Tr. II 12-13), but by letter dated June 2, 1995, Topper

expressly informed the judge that it was not going to file a reply brief and that the Acase should be decided based upon the evidence introduced at trial and the original post-hearing briefs.@ Similarly, before the Commission, Topper did not attempt to rebut the presumption, even though it was fully aware that the judge had applied the presumption in finding S&S (17 FMSHRC at 951-53) and the Secretary was urging the Commission to adopt the presumption (S. Br. at 21-25). Nor does Topper ask the Commission for a remand to put on additional evidence rebutting the presumption. Therefore, we conclude that Topper was on notice that the Secretary was seeking a presumption that the advance notice violation was S&S, had an opportunity to rebut that presumption, and failed to do so.

C. The Legal Basis for Citing Mine Act Violations as S&S

Although the issue was neither raised nor briefed by the parties, our dissenting colleagues question the Secretary=s ability to cite Mine Act violations as S&S and are troubled by the ASecretary=s insistence on citing violations of provisions other than mandatory safety and health standards as S&S under section 104(a).@ Slip op. at 33. It is undisputed that the sections of the Act that refer to a violation as S&S also refer to Aa violation of any mandatory health or safety standard.@[8] A literal reading of such statutory language could lead, as our dissenting colleagues suggest, to the conclusion that Congress intended to preclude the Secretary from designating a violation as S&S, unless the standard that was violated fell within the statutory definition of a Amandatory health or safety standard.@

The Mine Act defines a mandatory health or safety standard as Athe interim mandatory health or safety standards established by [titles] II and III of this [Act], and the standards promulgated pursuant to [title] I of this [Act].@ 30 U.S.C. ' 802(*l*).[9] The Mine Act thus contains explicit safety standards and also empowers the Secretary, through rulemaking, to promulgate improved safety standards as experience and technology develop. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 9 (Jan. 1992) (A*SOCCO*@). The prohibition against advance warnings is contained in section 103(a) of title I. It is plainly illogical for a standard promulgated pursuant to title I of the Mine Act to be subject to more stringent enforcement than a prohibition inserted into that title by the drafters themselves. Congress deemed the advance warning prohibition so important that it expressly included it in the Act and made violators subject to potential criminal sanctions. If the Secretary can apply the full panoply of the Mine Act=s enforcement scheme to any regulation she promulgates pursuant to title I of the Act, surely she should be able to do the same regarding behavior that the lawmakers themselves took the trouble to prohibit. As the First Circuit has stated, A[i]t is . . . an established canon of statutory construction that a legislature=s words should never be given a meaning that produces a stunningly counterintuitive result **C** at least if those words, read without undue straining, will bear another, less jarring meaning.@ *United States v. O=Neil*, 11 F.3d 292, 297 (1st Cir. 1993).

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[8] The S&S references are found in sections 104(d)(1) and (e), 30 U.S.C. ' 814(d)(1), (e). These provisions allow the issuance of withdrawal orders when certain events have occurred involving repeated violations. An S&S designation is a necessary, but not the sole prerequisite for issuing a withdrawal order under either of these sections.

[9] This definition remained unchanged from the Coal Act. *See* 30 U.S.C. ' 802(*l*) (1976).

Our decision to accord this statutory prohibition in title I the same enforcement significance as a rule issued thereunder is consistent with prior court and Commission cases, which have explicitly declined to adopt a narrow construction of the statutory definition of Amandatory health or safety standard.@ In *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 401, 405 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976), the court rejected a literal reading of the Coal Act that would have permitted citations to be issued only for violations of Amandatory health and safety standards.@ In that case, the operator argued that, because a ventilation plan provision did not meet the statutory definition of a mandatory health or safety standard, the provision was unenforceable. 536 F.2d at 402. The court acknowledged that, under the plain meaning of the Coal Act, the operator was correct, but rejected such a Adeceptively simple resolution of the problem.@ *Id.* at 405. The court foresaw that Aa strict literal reading of the statute=s definition provision@ would render unenforceable many other protective provisions of the Coal Act that did not conform to the definition of a mandatory health or safety standard. *Id.* This was a Aresult@ that ACongress could have hardly intended@ since it Awould greatly impair the statute=s effectiveness as a tool for bringing about improvements in mine health and safety conditions.@ *Id.* Congress expressly approved the reasoning in *Ziegler* when it enacted the Mine Act. *Legis. Hist.* at 613.

In the *Consol Penalty Case*, 14 FMSHRC at 963-65, the Commission rejected an argument by the operator that the Secretary was without authority to propose civil penalties under section 110(a) of the Mine Act, 30 U.S.C. ' 820(a), for violations of Part 50 regulations because they were not Amandatory health or safety standards.@[10] Section 110(a) requires the Secretary to assess a civil penalty against A[t]he operator of a . . . mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act] . . . .@ 30 U.S.C. ' 820(a). The Commission stated that section 110(a), Aif read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards.@ *Consol Penalty Case*, 14 FMSHRC at 964. Rejecting this narrow view, the Commission adopted an approach that harmonizes sections 104(a), 105(a),[11] and 110(a), and concluded that civil penalties could be assessed for violations of any regulation promulgated under the Act, not just those meeting the definition of a mandatory health or safety standard. *Id.* at 964-65. The Commission held that each part of a statute should be construed in connection with other parts Aso as to produce a harmonious whole.@ *Id.* at 965 (citing 2A *Sutherland Statutory Construction* ' 46.05 (Singer 5th ed. 1992)). The Commission concluded that the Secretary=s interpretation, allowing civil penalties for violations of Part 50 regulations, Aadvance[d] the goals of the Act and maintain[ed] the importance of civil penalties as a deterrence.@ *Id.*[12]

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[10] Regulations contained in Part 50 of 30 C.F.R. pertain to ANotification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines@ and were promulgated under title V of the Act.

[11] 30 U.S.C. ' 815(a).

[12] Other cases have refused to accept restrictive interpretations of Mine Act provisions. For instance, in *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988), the operator

asked the court to vacate section 104(d)(1) withdrawal orders and citations, which were based upon an Ainvestigation,@ because that section only authorized citations for unwarrantable failure found Aupon any inspection.@ *Id.* at 54 (emphasis removed). The D.C. Circuit held, however, that A[t]he statute . . . resists such tidy construction,@ and ruled that the operator could be cited when an inspector investigates a site after the violation has occurred. *Id.* at 55; *see also Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987) (Commission has Aresisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose@).

In these cases, the D.C. Circuit and the Commission refused to restrict the Secretary=s enforcement power to conform to a literal reading of the statute. The Commission reasoned that Congress would not put enforcement mechanisms in place only to then prevent the Secretary from using them against certain classes of violations. We determined that Congress did not intend to designate only mandatory safety and health standards as subject to citations and penalties, because such a restriction would dilute the effectiveness of the Mine Act. These considerations also apply to the enforcement of section 103(a). Barring the use of certain statutory enforcement mechanisms for violations of this provision is inconsistent with other sections of the Act demonstrating the high priority Congress placed on the enforcement of the advance notice prohibition. *See* slip op. at 10.

Allowing the Secretary to designate these violations S&S is consistent with the legislative history of the Mine Act. The Senate Committee disapproved the Aunnecessarily and improperly strict view@ of S&S taken by the Commission=s predecessor, the Interior Board of Mine Operations Appeals, under the Coal Act in *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974). *Legis. Hist.* at 619. In *Eastern Associated,* the Board based its narrow reading of S&S, in part, on the Aexplicit restriction to infractions of the mandatory standard.@ 3 IBMA at 349. In effect, our colleagues seek to return us to the age of weak and watered-down safety enforcement described by the Senate Committee. *See Legis. Hist.* at 592 (ANumerous disasters in both coal and non-coal segments of the industry underscore those areas of inadequacy of our current law and the fact that the enforcement and administration of our current mine health and safety programs has failed to produce the level of protection for our nation=s miners which should be within the capacity of our current mine safety laws.@)

In fact, the terms Aviolations of the law@ and Amandatory health and safety standards@ are used interchangeably throughout the legislative history of the Mine Act. For example, when discussing the newly enacted training requirements contained in title I, 30 U.S.C. ' 825, the Senate Committee continually referred to this provision of the Act as a Amandatory safety and health training standard.@ *Legis. Hist.* at 637. The Senate Report also describes statutory language requiring the Secretary to issue citations for violations of the Act, or any standard, rule, order, or regulation, and immediately afterwards, in explaining the provision calling for the abatement of such violations, employs only the term Astandard.@ *Id.* at 618. Indeed, the legislative history indicates that unwarrantable failure designations apply to violations of the Act. The Senate Committee responsible for drafting the bill that became the Mine Act, in discussing unwarrantable failure closure orders, explained: A[t]he unwarrantable failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions *violative of the Act*.@ *Id.* at 619 (emphasis added). Of course, a withdrawal order under section 104(d)(1), 30 U.S.C. ' 814(d)(1), is triggered by a violation that is both S&S and unwarrantable. Therefore, if a violation of the Act can trigger a withdrawal order under this section, MSHA must have the authority to cite it as S&S as well as unwarrantable.

The dissent reasons that, since the S&S terminology appears only in sections 104(d)(1) and (e), and those provisions refer to mandatory health or safety standards, the Secretary is

precluded from attaching the S&S designation to a violation unless it involves a Amandatory health or safety standard.@ Slip op. at 31. However, our colleagues overlook the fact that section 104(a) is the source of the Secretary=s power to issue citations for alleged violations of the Act. Section 104(d) is not a separate basis for the issuance of citations independent from section 104(a). *Utah Power & Light Co.*, 11 FMSHRC 953, 956 (June 1989). As the Commission has held, Athe statutory language makes clear that >significant and substantial= and >unwarrantable failure= determinations by MSHA inspectors constitute special findings that are >includ[ed]= in any citation@ issued under the authority of section 104(a). *Id.* Thus, section 104(d) cannot and should not be read in isolation from section 104(a), which is exactly where our colleagues have gone astray.

Section 104(a) provides that a citation may be issued for violations of Athis [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act]@ and requires that it Adescribe with particularity the *nature* of the violation.@ 30 U.S.C. ' 814(a) (emphasis added). Section 104(d) requires an inspector to determine, among other things, whether the violation Ais of such *nature* as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.@ 30 U.S.C. ' 814(d) (emphasis added). The Commission has concluded that, construing sections (a) and (d) together, the required description of the nature of the violation cited under section 104(a) may include a finding by the inspector that the violation is S&S. *Consolidation Coal Co.*, 6 FMSHRC 189, 192 (Feb. 1984) (A*Consol*@). This holding was not expressly limited, as our colleagues incorrectly assert (slip op. at 33), to mandatory health or safety standards. Rather, the case simply never presented the question of whether violations of the Mine Act cited under 104(a) could be S&S.

The Commission has not restricted S&S findings to violations of mandatory health or safety standards in the past. *See SOCCO*, 14 FMSHRC at 15 (remanding for determination of whether violation of safeguard was S&S); *LJ=s Coal Corp.*, 14 FMSHRC 1225 (Aug. 1992) (remanding Part 50 violation for S&S analysis).[13] Our dissenting colleagues have provided us no

[13] The dissent is mistaken when it questions our reliance on *SOCCO* for the proposition that the Commission has found violations to be S&S, even when the underlying requirement did not constitute a mandatory health or safety standard. *See* slip op. at 33. *SOCCO* involved a safeguard that, because it was issued by the inspector without notice and comment rulemaking, did not fall under the statutory definition of a mandatory health or safety standard. Because of this distinction, mandatory standards are construed broadly in a way that effectuates their purposes whereas safeguards are construed more narrowly. 14 FMSHRC at 8. Thus, when the Commission has determined that a safeguard violation was S&S, the Commission has indeed extended the S&S designation to a requirement not falling within the definition of a mandatory safety or health standard. We note that our dissenting colleagues acknowledge that Athe Commission has traditionally viewed [a safeguard] as a mandatory safety standard@ (slip op. at 33), finding this less than literal reading acceptable. Yet they refuse to consider a statutory requirement analogous to a mandatory safety standard for the purpose of designating violations S&S.

basis for deviating from our precedent now. They suggest that it would have been more appropriate for the Secretary to have responded to the violative conduct by proposing an individual penalty against Fields under section 110(c) or resorting to criminal sanctions under section 110(e). Slip op. at 34. Unlike our colleagues, we see no need to second guess the Secretary=s choice of prosecutorial tools, and are troubled by their attempt to usurp the Secretary=s enforcement prerogative. The Mine Act bestowed upon the Secretary the authority to choose among the enforcement provisions of that statute. 30 U.S.C. '' 813, 814; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

Our colleagues= complaint merely serves to underscore the incongruity of their position. Why would Congress allow an operator to go to prison for a violation that the Secretary was precluded from designating S&S? By what logic would Congress not permit MSHA to utilize the withdrawal orders available in sections 104(d) and (e) to deter conduct that could subject the transgressor to the even more severe sanctions available to the Secretary under sections 110(c) and (e)? *See Chemical Mfrs. Ass=n v. EPA*, 919 F.2d 158, 165 (D.C. Cir. 1990) (rejecting as Aanomalous at best@ interpretation that would have treated less stringently hazardous waste facilities that, by terms of statute, were meant to be treated more stringently).

In declaring the S&S designation in this case to have no legal impact, our dissenting colleagues ignore the historical role that an S&S designation has played, as a practical matter, in Mine Act enforcement. The designation of S&S has served as the agency=s dividing line, separating the violations to be treated in a perfunctory fashion from those to be subjected to more individualized scrutiny. The D.C. Circuit recognized this fact of life in the *Consol Dust Case*, 824 F.2d 1071. In discussing the significance to be attached to a section 104(a) violation that was designated S&S, the court found that MSHA routinely applied a flat $20 penalty to non-S&S violations and excluded them from the operator=s history of violations.[14] The court noted that the A[d]esignation of [section 104(a)] violations as significant and substantial . . . is necessary if the more severe sanctions available under [section] 104(e) are ever to be applied.@ *Id.* at 1078. This differential treatment for 104(a) violations designated S&S led the court to conclude that the operator had suffered Aa cognizable injury under the Act@ and that the case was, therefore, ripe for review. *Id.* at 1079.

Our dissenting colleagues also fail to recognize that, if the Secretary availed herself of section 110(c) or criminal sanctions instead of utilizing an S&S designation, her evidentiary burden would be significantly greater. For example, if she attempted to prove a violation of section 110(c), as our colleagues suggest (slip op. at 34), she would need to produce evidence of a Aknowing@ violation. Furthermore, our colleagues= insistence that the Secretary could initiate criminal proceedings against an operator who provides advance notice ignores the fact that the

[14] The Secretary=s current practice is to apply a flat penalty of $50 to non-S&S violations, 30 C.F.R. ' 100.4, but the violations are now included in an operator=s history as a result of the ruling in *Coal Employment Project v. Dole*, 889 F.2d 1127, 1138 (D.C. Cir. 1989), that the policy of excluding such violations from an operator=s history itself violates section 110(i).

ultimate decision to prosecute such a case lies with the U.S. Attorney, not the Secretary. It also ignores the significant differences between the burden of proof in an S&S proceeding and the more stringent standard in a criminal case.

We must constantly keep in mind the fundamental purpose of the Mine Act **C** to improve the health and safety of our nation=s miners. The dissent=s interpretation of section 104 runs counter to, and effectively acts to defeat, this objective. As the Supreme Court has noted:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose and object to accomplish . . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress= intention . . . .

Public Citizen v. Department of Justice, 491 U.S. 440, 454-55 (1989).

As the Seventh Circuit has observed, A[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.@ *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) (quoting *St. Marys Sewer Pipe Co. v. Director of United States Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959) (discussing Coal Act). The dissent=s literal approach disregards this very basic tenet of statutory construction.

Based on the foregoing, we adopt the presumption that violations of section 103(a) are S&S and vote to affirm the judge=s holding.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioner Beatty, in favor of affirming the judge=s S&S determination on substantial evidence grounds:

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. ' 814(d), 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 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard **C** that is, a measure of danger to safety **C** 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) (approving *Mathies* criteria); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (same). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

While I share the concerns of Chairman Jordan and Commissioner Marks about the serious repercussions for enforcement of the Mine Act that could result if operators believe that they are free to impede an MSHA inspection without the risk of an S&S designation, and agree with the result they reach in upholding the judge=s determination that Topper=s section 103(a) violation was S&S, I reach this conclusion by applying the *Mathies* criteria to the evidence adduced in this case, rather than by applying a presumption. To this end, I share the views of Commissioners Riley and Verheggen that the application of an S&S presumption involving this type of violation is not necessary or warranted. In my view, there is substantial evidence to support a determination that Topper=s section 103(a) violation met all four elements of the *Mathies* test, and therefore was S&S.

Under the first criterion of *Mathies*, the violation at issue is the conduct of Topper President Fields in impeding the MSHA investigation by alerting the miners underground that two MSHA inspectors were on their way. Fields= actions were directly contrary to the specific instructions of the MSHA inspectors and in direct violation of the express language of section 103(a) of the Mine Act prohibiting advance notice of inspections.[1] *See* slip op. at 5.

[1] I expressly decline to address the argument advanced by Commissioners Riley and

The second element of *Mathies* requires finding a discrete safety hazard **C** that is, a measure of danger to safety contributed to by the violation. The safety hazard resulting from this violation is the increased likelihood of smoking materials underground because of MSHA=s inability to conduct an effective inspection for smoking materials. This is particularly important in the instant case because of the propensity of miners at Topper=s No. 9 mine to carry smoking materials underground, and their ability to conceal such materials. This conduct is well established by the record. First, the record indicates that smoking materials, in particular, are easy to conceal underground because cigarettes, lighters, and matches are small items that can be buried under ribs, loose coal, or rock dust, or sent down a conveyor belt in a matter of seconds. Tr. 72-73, 122. Further, the record reflects that smoking control plans enforced by operators are generally ineffective at keeping miners from carrying smoking materials underground because there are numerous ways miners can carry smoking materials without the operator=s knowledge. Tr. 49-50, 55, 98. Indeed, there is record evidence that miners at Topper=s No. 9 mine were discharged after they were found to have carried smoking materials underground. Tr. 180. This is a strong indication that Topper=s smoking control plan was not totally successful at eradicating the presence of smoking materials underground. Even Topper President Fields conceded that there was Ano way to stop@ miners from carrying smoking materials underground. Tr. 189. Moreover, Fields admitted that if he was working underground and had smoking materials and knew the inspectors were coming, he Awould probably hide it or get rid of it one way or the other.@ Tr. 190.

I also find that the above-described safety hazard, the unchecked presence of smoking materials underground, is reasonably likely to cause an injury-producing event, i.e., fire or explosion, satisfying the third element of the *Mathies* test. Where an operator impedes the inspection process of MSHA by providing advance notice to miners of an ensuing inspection, it is

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Verheggen that only violations of mandatory health and safety standards may be found to be S&S under section 104(d) of the Mine Act. *See* slip op. at 31-34. In my view, this issue is not properly before the Commission, since it was concededly not raised by Topper in its petition for discretionary review. Under the Mine Act and the Commission=s procedural rules, review is limited to the questions raised in the petition. 30 U.S.C. ' 823(d)(2)(A)(iii); 29 C.F.R. ' 2700.70(f). *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff=d mem.*, 81 F.3d 173 (10th Cir. 1996); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 & n.6 (D.C. Cir. 1983).

more likely than not that smoking materials will not be detected on the miners. Under these conditions, miners will develop a sense of security in carrying and utilizing smoking materials underground. In my view, this scenario, combined with the presence of combustible materials like coal, coal dust, and methane, creates a reasonable likelihood of an injury resulting from a fire or explosion.

Finally, I conclude that the fourth criterion of *Mathies* is established. Injuries resulting from a fire or explosion in an underground coal mine would be reasonably likely to be of a reasonably serious nature. Based on the foregoing, I conclude that the record in the instant case provides substantial evidence to support a determination that this violation was S&S.

In my view, an evidentiary-based determination that Topper=s violation of section 103(a) is S&S under the *Mathies* criteria is consistent with, and strongly supported by, prior S&S findings of the Commission in cases involving violations of prophylactic safety standards. In these cases, the Commission made S&S findings without the use of a presumption. For instance, in *Buck Creek Coal Co.*, the Commission applied the *Mathies* test to an operator=s failure to conduct a preshift examination in violation of 30 C.F.R. ' 75.360(a), and concluded that the violation was S&S. 17 FMSHRC 8, 13-14 (Jan. 1995). In *Buck Creek*, the Commission reversed the judge=s determination that the third element of *Mathies* had not been established, despite the absence of specific hazards disclosed upon examination of the area of the mine where miners had entered. *Id*. The Commission expressly declined to adopt the S&S presumption advocated by the Secretary. *Id*. at 14 n.9. *See also Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 461 (Mar. 1997) (violation of 30 C.F.R. ' 75.388 for failure to drill boreholes); *Manalapan*, 18 FMSHRC at 1381-83 (Commissioners Holen and Riley, concurring) (failure to conduct preshift examination); *but see Manalapan*, 18 FMSHRC at 1388-89 (Chairman Jordan and Commissioner Marks,

concurring) (recognizing S&S presumption where preshift standard violated).[2]

Like the preshift examination and borehole drilling requirements involved in those cases, section 103(a)=s inspection requirement and prohibition on advance notice are designed to ensure the timely detection of safety hazards and prevent the exposure of miners to those hazards. As Chairman Jordan and Commissioner Marks point out in their separate opinion (slip op. at 9), section 103(a)=s requirement for unannounced inspections is a prophylactic safety measure whose importance was explicitly recognized by Congress in its adoption of the Mine Act. In addition, Congress expressed particular concern about the hazards of smoking in underground mines by enacting section 317(c) to prevent smoking-related ignitions and explosions. *See* 30 U.S.C.

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[2] Although it has no binding precedential effect on the Commission (*see* 29 C.F.R. ' 2700.72), I am also persuaded by the reasoning employed by Commission Administrative Law Judge James Broderick in concluding that the failure to conduct a preshift examination was S&S in *Emerald Mines Corp.*, 7 FMSHRC 437 (Mar. 1985) (ALJ). Despite the obvious inability to determine the precise type of hazards that the preshift inspection might have disclosed, if conducted, Judge Broderick explained 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 mine contributes to A*a measure of danger to safety*@ which is reasonably likely to result in a reasonably serious injury.

Id. at 444 (emphasis added).

' 877(c). Section 317(c) of the Mine Act was based on an identical provision in the predecessor statute, the Coal Act. The section-by-section analysis of the Senate Report that accompanied the passage of the Coal Act notes:

> From 1952 through 1968, the Bureau of Mines records indicate that 28 actual and nine possible local gas ignitions or explosions were caused by workmen using smoking materials, matches, or lighters underground. In many cases, matches were used, in accordance with the practice at the mine, to light fuses. In others, matches were used to light cigarettes. As a result of the 37 occurrences, 38 men were injured, and 13 were killed.

S. Rep. No. 411, 91st Cong., 1st Sess. 51 (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 177 (1975). Further, Congress reinforced the prohibition against smoking by enacting section 110(g) of the Mine Act,[3] under which a civil penalty can be assessed directly against a miner for smoking or carrying smoking materials underground.

Based on my conclusion that an S&S finding can be upheld on substantial evidence grounds, I see no need to employ a presumption to achieve that result. In my view, the use of a broad-based presumption to determine whether Topper=s section 103(a) violation is S&S unduly complicates the analysis, and is contrary to the *Mathies* requirement that the S&S determination be based on Athe particular facts surrounding th[e] violation.@ *Mathies*, 6 FMSHRC at 3 (citing *National Gypsum*, 3 FMSHRC at 825); *see also Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (application of presumption is contrary to *Mathies* analysis based on careful examination of evidence surrounding violation).

I also believe that the Secretary has failed to develop a record in this case that establishes

[3] Section 110(g) provides: AAny miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission . . . .@ 30 U.S.C. ' 820(g).

a need for such a change in the law. In fact, there is no Commission precedent supporting the use of a presumption to establish S&S other than one case involving the respirable dust standards. In the *Consol Dust Case*, the Commission held that when the Secretary proves a violation of the respirable dust standard (30 C.F.R. ' 70.100(a)), Aa presumption arises that the third element of the significant and substantial test **C** a reasonable likelihood that the health hazard contributed to will result in an illness **C** 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 as it relates to development of respiratory diseases, including pneumoconiosis. A[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. In my view, the Secretary has not shown, in this case, a similar need for the use of a presumption in analyzing violations involving advance notice of an MSHA inspection, in particular the type of inspection involved in this case.[4] Thus, I decline to decide on the present record that, in determining whether an operator=s impedance of an MSHA inspection is properly designated as S&S, we should apply a presumption that shifts the burden of proof to the operator.

In my view, the position that the *Mathies* analysis is inadequate, or impossible to apply, when determining the S&S nature of this type of violation is based on overly restrictive interpretation of certain criteria **C** i.e., the concern that it is not possible to ascertain the specific hazards an inspector would have found if miners had not been alerted to the inspection. I believe that the act of impeding an MSHA inspection results in a hazard by creating an increased potential for unchecked smoking materials underground, thereby creating a reasonable likelihood of injury sufficient to satisfy the third element of the *Mathies* test, despite the inability to determine precisely the specific hazards the inspectors might have found if no advance warning was given. This analysis is consistent with the approach followed by the Commission in prior decisions. *See, e.g., Buck Creek*, 17 FMSHRC at 13-14; *Manalapan*, 18 FMSHRC at 1381-83 (Commissioners Holen and Riley, concurring); *see also Kellys Creek*, 19 FMSHRC at 461 (failure to drill boreholes). [5]

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[4] It is also significant that the presumption adopted in the *Consol Dust Case* covers only the third *Mathies* element, with other elements established through violation of the dust standard. In this case, however, the presumption advocated by the Secretary would be used to establish all four elements of the *Mathies* test.

[5] Chairman Jordan and Commissioner Marks assert that the difference between their analysis and mine is Alargely only semantic.@ Slip op. at 15 n.6. I respectfully disagree with my colleagues on this point, since I believe that the two lines of analysis differ significantly on two important points. First, the second element of *Mathies* requires that we find a discrete safety hazard **C** that is, a measure of danger to safety contributed to by the violation. My colleagues argue that *Mathies* does not provide the proper framework because Ait is impossible to determine the *particular hazard* >contributed to by the violation.=@ *Id.* at 11 (emphasis added). As I have explained, however, I do not believe it is necessary that we find a *particular hazard* upon which to predicate the *Mathies* analysis. Instead, in my view, it is sufficient that a Ameasure of danger to safety@ is created when MSHA inspections are thwarted by an operator=s advance notice. Support

for this approach can be found in prior Commission cases. *See Manalapan*, 18 FMSHRC at 1396 (Chairman Jordan and Commissioner Marks, concurring) (S&S determination should be based on Athe serious potential for harm that can confront miners@ as result of violation); *Emerald Mines*, 7 FMSHRC at 444 (failure to make required preshift examination in underground coal mine found to be S&S because it Acontributes to >*a measure of danger to safety*= which is reasonably likely to result in reasonably serious injury@) (emphasis added). Second, the presumption applied by my colleagues shifts the burden of proof to the operator to show that the violation was *not* S&S. In my view, this is a significant departure from the general rule that the burden of proving a violation, as well as its nature and characteristics, rests entirely with the Secretary.

As stated earlier, I am persuaded by the reasoning employed by Judge Broderick in *Emerald Mines*, where he held that the determination of the risk posed by this type of violation should not turn on the fortuitous circumstances that the unexamined area did not contain the hazardous conditions the exam was designed to detect:

> 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*?

7 FMSHRC at 444 (emphasis added). Applying Judge Broderick=s reasoning, the hazard in this case is not so much the actual discovery of smoking materials on a miners= person as the threat of miners carrying and using smoking materials without the fear of an unannounced smoking inspection by MSHA. Under this line of analysis, it follows that, contrary to the concern expressed by Chairman Jordan and Commissioner Marks (slip op. at 12), a presumption is not necessary to prevent an operator from deriving legal advantage from the lack of evidence concerning the hazards an inspector *might* have found if the investigation had not been impeded by advance notice. As Judge Broderick articulates, it is the failure to make the required examination, or in this case an inspection without advance notice, which contributes to Aa measure of danger to safety@ that is reasonably likely to result in a reasonably serious injury. *Id.*

Also, I find the application of an S&S presumption particularly troubling in this case because it appears that Topper never had an opportunity to adduce evidence at the hearing to attempt to rebut the presumption. As Commissioners Riley and Verheggen point out (slip op. at 35), the Secretary first argued for a presumption in her post-hearing brief, submitted after the close of the hearing. Therefore, at the time of the hearing, Topper had no notice that the Secretary would argue for application of an S&S presumption, and therefore no apparent reason to argue against application of the presumption or to introduce evidence that it could rely upon to rebut such a presumption. In these circumstances, I believe that it would be unfair to retroactively apply an S&S presumption and conclude that Topper failed to rebut the presumption. If such a presumption were to be applied in this case, I agree with Commissioners

Riley and Verheggen that it would be fair and equitable to remand the case to afford Topper a meaningful opportunity to rebut the presumption. *See* slip op. at 36.

On this point, I am also concerned about the circumstances under which this type of presumption may be rebutted and whether, as a practical matter, an operator will ever have a meaningful opportunity to rebut the presumption. If an operator is not afforded an opportunity to rebut the presumption, then the presumption is in effect an irrebuttable presumption, raising additional concerns about the fairness and propriety of its application in this and future cases. A>[P]ermanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments=@ because the Due Process Clause requires Aa more individualized determination.@ *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-45 (1974) (quoting *Vlandis v. Kline*, 412 U.S. 441, 447 (1973)).

In my opinion, if no smoking materials are found after advance warning of an inspection, as occurred in this case, the question becomes: how can the operator successfully rebut the presumption? Is it sufficient to elicit testimony from the MSHA inspector that he searched the miners in the area and found no smoking materials? If so, then the operator will likely be able to successfully rebut the presumption in virtually every case. To this end, the adoption of the Secretary=s proposed presumption may achieve a result contrary to that intended, thereby precluding a finding that an operator=s interference with an MSHA investigation is S&S.

Conversely, the operator may be required to elicit testimony from all miners present in the area inspected designed to show that they did not possess smoking materials at the time of the inspection in spite of the advance notice provided by the operator. This gives rise to another potential problem **C** the possibility that miners, after receiving the advance warning, may have concealed smoking materials and are thereafter reluctant to admit this fact because of their exposure to discharge under the operator=s smoking control plan and the threat of penalties under section 110(g). While we certainly cannot anticipate that miners or other witnesses will not testify truthfully at a hearing involving this type of violation, this type of situation could provide a strong inducement for miners to conceal the truth in order to protect their jobs and livelihood and avoid the imposition of penalties. Under this analysis, the Secretary may find herself in a posture where the operator is able to successfully rebut the presumption and no S&S determination is made.

Finally, I believe that the reliance of Commissioners Riley and Verheggen on the Aimpressive array of prosecutorial resources at [the Secretary=s] disposal@ to combat this type of Aextremely serious@ violation (slip op. at 36) is misplaced, at least for purposes of this case. In this case, the Secretary relied *only* upon the S&S designation, and the consequences that flow from it, as a prosecutorial tool for penalizing this violation.[6] As indicated above, I share the

[6] Commissioners Riley and Verheggen contend that no consequences flow from the S&S designation in this case based on their view that the S&S designation is only applicable to, and only carries enforcement consequences in connection with, violations of mandatory health and safety standards. Slip op. at 33-34, 36. Having declined to consider this issue on the ground that

concerns of Chairman Jordan and Commissioner Marks about the serious repercussions for enforcement of the Mine Act that could result if operators believe that they are free to impede an MSHA inspection without the risk of an S&S designation. In my view, these concerns are best rectified in this case by finding this violation to be S&S on substantial evidence grounds through application of the *Mathies* test.

Based on the foregoing, I vote to affirm the judge=s S&S holding on substantial evidence grounds.

Robert H. Beatty, Jr., Commissioner

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it is not properly before the Commission (*id.* at 24 n.1), I do not necessarily agree with the view of my colleagues that the S&S designation at issue in this case has no enforcement consequences or legal effect.

Commissioners Riley and Verheggen, in favor of reversing the judge=s S&S determination:

For the reasons set forth below, we find that, as a matter of law, the judge=s S&S finding in this case is in error. We therefore dissent from our colleagues= decisions affirming in result the judge=s S&S finding.

A. Whether the Judge Properly Found that the Violation Was S&S

Our colleagues have set forth two rationales for affirming the judge=s S&S determination in this case. The Chairman and Commissioner Marks would sidestep the Commission=s *Mathies* test and create a new presumption that violations of section 103(a) of the Mine Act are S&S. Slip op. at 12 (hereinafter, we refer to the opinion of the Chairman and Commissioner Marks as the Apresumption opinion@). They feel that Athe *Mathies* criteria fail to provide a framework for determining the seriousness of the violation[],@ and that Ait is impossible to determine the particular hazard >contributed to by the violation.=@ *Id.* at 11. Commissioner Beatty finds no such impediments to applying *Mathies*. He carefully weighs the evidence and finds that the record supports the judge=s conclusion that the violation was S&S. *Id.* at 23-26.[1]

All our colleagues, however, have glossed over a fundamental problem with the Secretary=s S&S allegation in this case. The first element of the *Mathies* test requires the Secretary to prove an Aunderlying violation of a *mandatory safety standard*.@ 6 FMSHRC at 3-4 (emphasis added). But here, the Secretary has proven a violation of a provision of the Mine Act that is not a mandatory safety standard. Her allegation of S&S thus fails to meet the first element of the *Mathies* test, and on this ground, the judge legally erred at the very threshold of his decision.

[1] In its brief, Topper appears to have assumed that the discrete safety hazard at issue is miners carrying smoking materials underground, which, in turn, would pose the hazard of a fire or explosion in the mine if such smoking materials were used underground. T. Br. at 7-8. Commissioner Beatty treats this as the hazard at issue, then analyzes whether the third and fourth *Mathies* elements have been met. Slip op. at 24-25. Were we to overlook the problems posed by the first *Mathies* criterion, we would join Commissioner Beatty=s opinion. In fact, we find that his analysis of the third element, especially, is eloquent proof of the continuing vitality of the *Mathies* test.

The S&S terminology appears only in sections 104(d)(1) and (e) of the Mine Act, both of which are limited in scope to violations of Amandatory health and safety standards.@ 30 U.S.C. ' 814(d)(1), (e). Section 104(a) of the Act, on the other hand, grants the Secretary the authority to cite violations of the A[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act].@ 30 U.S.C. ' 814(a). The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question in issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Here, by their plain terms, sections 104(d)(1) and (e) are limited in application to violations of mandatory health and safety standards. The Act thus limits the Secretary to citing violations as S&S only when such violations are of mandatory health and safety standards.

We do not, as argued in the presumption opinion, Aoverlook the fact that section 104(a) is the source of the Secretary=s power to issue citations@ by reading section 104(d) Ain isolation from section 104(a).@ Slip op. at 19. Instead, we begin with the axiomatic proposition that the Secretary=s power to cite mine operators for violations of the Act originates in section 104(a), which broadly covers violations of the A[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act].@ 30 U.S.C. ' 814(a). In various sections of the Act, Congress then set forth additional prosecutorial tools for the Secretary to use in connection with specific actors and offenses, such as sections 110(c) and (d) addressing individual civil and criminal liability, section 110(e) addressing advance notice of inspections, section 110(f)[2] addressing false statements made to the Secretary, and section 110(g) addressing smoking in mines. In section 104(d), Congress provided the Secretary with the power to make special findings in connection with one broad category of offenses, violations of mandatory health and safety standards, when such violations are Aof such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard@ or Acaused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards.@ Section 104(d) thus addresses only one category of violations enumerated in section 104(a): violations of mandatory health or safety standards.

Read *together*, sections 104(a) and (d) thus create a hierarchy of enforcement under which the Secretary can bring additional enforcement sanctions to bear on operators who violate mandatory health and safety standards. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (AThe Mine Act=s use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme.@). It is not irrational to infer that Congress created these additional separate enforcement sanctions beyond section 104(a) because it considered violations of mandatory health and safety standards as graver than, say, Part 50 reporting requirements, for which no such additional sanctions were created in section 104, any of the subsections of section 110, or any

[2] 30 U.S.C. ' 820(f).

other provision of the Act. Similarly, Congress considered advance notice of inspections so critical a violation that it created a separate provision of the Act providing for severe criminal sanctions. *See* 30 U.S.C. ' 820(e).

Although it is argued in the presumption opinion that it is illogical for section 103(a), the Act=s prohibition against interfering with inspections, to receive less enforcement significance than Astandards@ (slip op. at 16), Congress placed many Astandards@ in titles II and III of the Act, clearly designating them as *mandatory* health or safety standards. Congress then singled out such Amandatory health or safety standards@ in sections 104(d) and (e) as meriting different, more severe sanctions when an operator has violated them repeatedly. Similarly, Congress focused on advance notice violations as meriting different and very severe sanctions: criminal liability. 30 U.S.C. ' 820(e). The Act speaks for itself, and has its own internal logic. A bald assertion of illogicality, divorced from the specific context of the Act, means very little, and is in fact at odds with the plain meaning and logical structure of the Act.

In passing on a question similar to the one we raise here, the Commission has concluded that Athe required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding . . . that the violation is significant and substantial.@ *Consol*, 6 FMSHRC at 192. The holding of this *Consol* case, however, is limited to violations of mandatory health and safety standards cited as S&S under section 104(a) **C** whereas here, a violation of the Act has been cited as S&S under section 104(a). A *SOCCO* case is cited in the presumption opinion for the proposition that the ACommission has not restricted S&S findings to violations of mandatory health and safety standards in the past.@ Slip op. at 19 (citing *SOCCO,* 14 FMSHRC at 15). This citation is just plain wrong. *SOCCO* involved a violation of a safeguard, which the Commission has traditionally viewed as a mandatory safety standard. 14 FMSHRC at 8; *see also Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). We believe that the other case cited, remanding a Part 50 violation for an S&S analysis (slip op. at 19 (citing *LJ=s Coal Corp.*, 14 FMSHRC 1224)), was wrongly decided. We would acknowledge the implied point here, that the Secretary=s practice of citing as S&S violations of provisions other than mandatory safety and health standards appears to have stood the test of time. Only until now, however, in our opinion, because this practice is at odds with the Act. As the Supreme Court has held, the age of an agency interpretation of its enabling statute Ais no antidote to clear inconsistency with [the] statute.@ *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (striking down Department of Veterans Affairs regulation that had been on books for 60 years). As the Court noted, if an agency interpretation Aflies against the plain language of the statutory text, [this] exempts courts from any obligation to defer to it.@ *Id*.

We are also troubled by the policy implications of the Secretary=s insistence on citing violations of provisions other than mandatory safety and health standards as S&S under section 104(a). An S&S allegation in a section 104(a) citation does not trigger the sanctions of section 104(d). Nor can such an allegation be used to establish a pattern of violations of anything other than mandatory safety and health standards under section 104(e), which by its plain terms is limited to violations of mandatory health and safety standards. *See* 30 U.S.C. ' 814(e). A section

104(a) S&S designation is merely an allegation that a particular violation is serious. We thus believe that no legal consequences flow from such a designation that the Secretary could not more efficiently accomplish under her Part 100 civil penalty regulations,[3] including her broad discretion to impose special assessments (*see* 30 C.F.R. ' 100.5), or under the various provisions of section 110 of the Act aimed at specific violations. We believe that the Secretary has wasted her resources and those of the Commission by resorting to a term of art under sections 104(d) and (e) to measure the gravity of a section 104(a) violation.

A hue and cry is raised in the presumption opinion that we Aseek [a] return . . . to the age of weak and watered-down safety enforcement.@ Slip op. at 18. We believe, however, that it is the *Secretary* who has engaged in Aweak and watered-down safety enforcement@ by making an allegation of seriousness against Topper that has had absolutely no legal effect other than to prolong this litigation. The Secretary=s S&S allegation is nothing more than a shorthand description of the seriousness or gravity of the offense **C** it accomplishes *nothing else* and has no legal effect beyond its descriptive function.[4] Instead of making an empty gesture, the Secretary ought to have brought to bear sanctions based on clear statutory provisions, such as sections 110(c) and (e), that could have had real potential for deterring such violations in the future.

We agree with the presumption opinion that Athe fundamental purpose of the Mine Act [is] to improve the health and safety of our nation=s miners.@ Slip op. at 21. But we dispute the claim that our Ainterpretation of section 104 runs counter to, and effectively acts to defeat, [the Mine Act=s] objective.@ *Id.* In fact, it is the *Secretary=s* misguided use of S&S here that Adefeats@ the important objectives of the Mine Act because her S&S allegation essentially trivializes S&S insofar as the allegation lacks any legal effect. Moreover, the principle of liberal construction of remedial statutes does not give the Secretary or the Commission A>license . . . to disregard entirely the plain meaning of the words used by Congress.=@ *Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 844 (D.C. Cir. 1984) (quoting *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)).

The argument is made in the presumption opinion that we Aattempt to usurp the Secretary=s enforcement prerogative.@ Slip op. at 20. But one of the central missions of this Commission is to interpret the Mine Act and ensure that the Secretary has followed its dictates. Congress established the Commission to, among other things, Adevelop a uniform and

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[3] Even under the Secretary=s single penalty assessment regulation, 30 C.F.R. ' 100.4, she has broad discretion to assess a penalty based upon the unique circumstances of each case, notwithstanding whether a citation has been designated S&S.

[4] The Secretary=s S&S designation had no impact on the penalty assessed by the judge **C** he found Topper=s violation to be Avery serious@ and the result of high negligence without any reference to the S&S designation. 17 FMSHRC at 955. Nor does the S&S designation have any bearing whatsoever on the ruling announced above by the full Commission affirming the judge=s penalty assessment. Slip op. at 6-7.

comprehensive interpretation of the law . . . [to] provide guidance to the Secretary in enforcing the [Mine Act].@ *Nomination Hearing Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978). Congress explicitly charged the Commission Awith the responsibility . . . for reviewing the enforcement activities of the Secretary.@ *Id*. Whether the Secretary=s use of S&S allegations is consistent with the Mine Act, the question we examine here, Afall[s] squarely within the Commission=s expertise.@ *Thunder Basin*, 510 U.S. at 214.

B. Whether Violations of Section 103(a) Should Be Presumptively S&S

Although we have found that the judge erred as a matter of law in concluding that Topper=s violation of section 103(a) of the Mine Act was S&S on grounds other than those upon which he relied, we also reject the judge=s conclusion that the violation was presumptively S&S. On this question, we concur with the opinion of Commissioner Beatty. *See* slip op. at 26-29. In addition to the reasons he outlines why an S&S presumption should not be adopted in this case, we add only that it is well established that the burden of establishing S&S rests on the Secretary (*Mathies*, 6 FMSHRC at 3-4), except under extraordinary circumstances not found in this case.[5] *Cf. Manalapan*, 18 FMSHRC at 1378-83 (separate, non-binding opinion of Commissioners Holen and Riley).

We are also troubled that the scheme advanced in the presumption opinion would fail to afford Topper the opportunity to rebut a newly created presumption. As with any rebuttable presumption, a new presumption here would Ashift[] the burden of producing *evidence*@ from the Secretary to Topper. 2 *McCormick on Evidence* ' 343, at 454 (emphasis added). It follows that Topper would have to be afforded the opportunity to produce evidence to rebut any newly created presumption, rather than be held to arguments already made on a record already closed.

In determining whether Topper has had any opportunity to rebut the Secretary=s presumption, the focus must be on whether, in response to the Secretary=s allegations, Topper was able to build a record on which the judge could have entered a finding that the company either rebutted an S&S presumption or failed to meet its burden. The record is clear. Topper had no such opportunity because a presumption was not part of the theory of the Secretary=s case until after the record closed. No presumption appears on the face of the citation at issue. No presumption is mentioned in the Secretary=s pre-hearing submissions. No presumption was mentioned at trial.[6] No presumption was ever advanced as part of a motion to reopen the record.

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[5] In fact, the Commission has created only one such presumption, in the *Consol Dust Case* (8 FMSHRC 890).

[6] The closest the Secretary came at trial to arguing that a presumption should have been adopted was when her inspector testified that, in the words of our colleagues= opinion, Athe agency was going to >assum[e]= that the miners had smoking materials that they had discarded at the time of the inspection.@ Slip op. at 15 n.7. But this is a far cry from the sweeping presumption the Secretary urges upon us, which would have us presume that any of a vast myriad of violations exists. *See* S. Br. at 26-27.

The Secretary argued for a presumption *only after the hearing* in her post-hearing brief. Once it saw the point being argued in the Secretary=s post-hearing brief, Topper was under no obligation to respond because the Secretary bears the burden of proof.

We also reject the approach taken in the presumption opinion of applying a new presumption retroactively. As the Supreme Court has held, A[r]etroactivity is not favored in the law,@ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citations omitted), a maxim the Court has repeatedly reaffirmed. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. ___, 117 S. Ct. 1871, 1876 (1997); *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 895 (1996) (AThe presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption >is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.= . . . In both the civil and the criminal context, the Constitution places limits on the sovereign=s ability to use its law-making power to modify bargains it has made with its subjects.@); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (Awe apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary@). In its would-be application in this case, the Secretary=s presumption thus ironically runs afoul of a more fundamental presumption. The Secretary failed to advance her presumption in the adjudicatory proceeding in which the record of the case was made. Given a new presumption, the only fair and equitable way to apply it in the current proceeding would be to provide Topper an opportunity to make a record on which it could argue that it be exonerated of the Secretary=s S&S allegation.

C. Conclusion

In concluding that Topper=s violation was not S&S, we do not mean to suggest that the violation was not serious. In fact, this violation was extremely serious. Fields intentionally defied the express direction of the inspector not to alert the miners that inspectors were on their way to the working section. Such conduct is of the highest order of negligence. We believe, however, that the Secretary=s focus on S&S is misplaced. By fixating on S&S, the Secretary appears to have lost sight of the impressive array of prosecutorial resources at her disposal. As Commissioner Beatty states, A[i]n this case, the Secretary relied *only* upon the S&S designation, and the consequences that flow from it, as a prosecutorial tool for penalizing this violation.@ Slip op. at 29 (emphasis in original). But as we have pointed out, no consequences flow from it **C** it is merely an allegation of seriousness with no deterrent or any other legal effect. Topper=s violation of the Mine Act is essentially a square peg that simply cannot be forced into the round hole of S&S.

For the foregoing reasons, we find that the judge erred as a matter of law in concluding that Topper=s violation was S&S, and would thus reverse his S&S holding.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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