FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

June 20, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 92-783
UNITED STATES STEEL MINING COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Holen, Marks and Riley, Commissioners[1]

DECISION

BY: Jordan, Chairman; Holen and Riley, Commissioners

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), is before the Commission for the third time and raises the question of whether a violation by United States Steel Mining Company ("U.S. Steel") of a trolley wire transportation safeguard issued under 30 C.F.R. § 75.1403[2] was significant and substantial ("S&S").[3] In the decision now before us, Administrative Law Judge William Fauver concluded that the violation was S&S. 16 FMSHRC 1189 (May 1994) (ALJ). The Commission granted U.S. Steel's petition for discretionary review, which challenges the

[1] Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition.

[2] Section 75.1403, entitled "Other safeguards," provides:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

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

judge' s S &S determination. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

The facts of this case are fully set forth in the Commission's first decision in this matter, 15 FMSHRC 2445 (December 1993), and are summarized here. *Id.* at 2445-46. On May 23, 1989, James Bowman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued U.S. Steel a safeguard notice at its Gary No. 50 Mine, an underground coal mine in Wyoming County, West Virginia. *Id.* The notice required that, to prevent de-energizing of track equipment, all trolley wire be installed without excessive kinks, bends, and twists. *Id.* at 2446. It also required that the trolley wire be installed within a gauge where anti-swing devices could be used on all equipment. *Id.* On February 4, 1992, MSHA Inspector Gerald Cook[4] inspected the 5K track entry in a track-mounted jeep. *Id.* The trolley pole disengaged and caused the jeep to lose power 15 times. *Id.* Cook determined that the causes of the trolley pole disconnections were kinks in the wire and a wide gauge between the track and wire. *Id.* Inspector Cook issued U.S. Steel a citation for violation of the safeguard and designated the violation S&S. *Id.;* Gov't Ex. 1. U.S. Steel contested the violation and proposed civil penalty. 15 FMSHRC at 2446.

The judge rejected U.S. Steel's contention that the safeguard was invalid and found that the cited conditions violated the safeguard. 15 FMSHRC 452, 457 (March 1993) (ALJ). In concluding that the violation was S&S, the judge stated that the test was "whether the violation presents a substantial *possibility* of resulting in injury or disease . . . ." *Id.* at 456 (emphasis in original). The Commission granted U.S. Steel's petition for discretionary review, which challenged the judge's determinations that the safeguard was valid and that the violation was S&S.

The Commission affirmed the judge's ruling that the safeguard was valid and that U.S. Steel violated it. 15 FMSHRC at 2447-48. The Commission concluded, however, that the judge erred in his S&S analysis by applying a "substantial possibility" test. *Id.* at 2448. The Commission remanded the case for proper application of the third element of the S&S test set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), whether there was a *reasonable likelihood* that the hazard contributed to would result in an injury. 15 FMSHRC at 2448 (emphasis added).

On remand, the judge determined that "reasonable likelihood," as used in the third element of the *Mathies* test, does not mean proof that an injury was "more probable than not."

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[4] Inspector Gerald Cook is incorrectly identified in the transcript and by the judge as Earl Cook. *Compare* Tr. 51-52; 15 FMSHRC 452, 453 (March 1993) (ALJ); PDR at 2 (erroneous references to Earl Cook) *with* Gov't Ex. 1 (citation signed by Gerald Cook); S. Br. at 3 n.2 (noting erroneous references). Earl Cook was the U.S. Steel official to whom Inspector Bowman issued the notice to provide safeguard. Tr. 22; Gov't Ex. 3.

16 FMSHRC 829, 831-32 (April 1994) (ALJ). He certified this ruling for review by the Commission. *Id.* at 832-33. The Commission denied review and directed the judge to issue a final disposition pursuant to its remand instructions. 16 FMSHRC 1043, 1044 (May 1994).

In the decision on review, the judge rejected U.S. Steel's view that "reasonable likelihood" means "more probable than not." 16 FMSHRC at 1190. He concluded that an S&S violation is not to be defined "in terms of a percentage of probability." *Id.* at 1190-91(citation omitted). The judge concluded that violation of the safeguard was S&S, concluding that the reliable evidence supported Inspector Cook's testimony that, taken as a whole, the hazards presented by the violation made it reasonably likely that serious injuries would result. *Id.* at 1193.

II.

Disposition

U.S. Steel argues that, to satisfy the third *Mathies* element, the Secretary must prove that it was "more probable . . . than not" that the hazard contributed to by the violation will result in an injury. PDR at 5. U.S. Steel also argues that substantial evidence does not support the judge' s S &S determination. *Id.* In its view, the disconnection of a pole from the trolley wire does not contribute to a "discrete safety hazard,"[5] and it was not reasonably likely that the cited condition could result in an injury. *Id.* at 5-6.

The Secretary argues that the judge applied the "reasonable likelihood" element of *Mathies* and properly concluded the violation was S&S. S. Br. at 6-12. He emphasizes that the Commission has never held that "reasonable likelihood" requires a showing that it is "more probable than not" that injury or illness will occur. *Id.* at 7. He contends that such a construction is inconsistent with the Mine Act, its legislative history, and Commission case law. *Id.* at 7-12. The Secretary also argues that substantial evidence supports the judge's determination that the violation was S&S. *Id.* at 12-13.

Under the Commission's test, 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

[5] U.S. Steel thus also argues that the violation is not S&S because the Secretary failed to prove the second element of the *Mathies* test, i.e., whether there was a safety hazard contributed to by the violation. Review of the second *Mathies* element, however, is not before the Commission. U.S. Steel did not raise the second *Mathies* element in its first petition for review in this matter and the Commission remanded the proceeding to the judge only for proper application of the third element, 15 FMSHRC at 2448. The judge's jurisdiction was therefore limited to that issue. *See Ronny Boswell v. National Cement Co.*, 15 FMSHRC 935, 937 (June 1993).

FMSHRC 822, 825-26 (April 1981). In *Mathies*, 6 FMSHRC at 3-4, the Commission further explained:

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

See also Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988) (approving *Mathies* criteria). 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 (August 1985). The Secretary bears the burden of proving that a violation is S&S. *See, e.g.*, *Peabody Coal Co.*, 17 FMSHRC 26, 28 (January 1995), *citing Union Oil Co. of Cal.*, 11 FMSHRC 289, 298-99 (March 1989).

A. Whether the Judge' s S &S Analysis Was Erroneous

We agree with the judge that the third element of the *Mathies* test does not require the Secretary to prove it was "more probable than not" an injury would result. *See* 16 FMSHRC at 1190-93. The legislative history of the Mine Act indicates Congress did not intend that the most serious threat to miner health and safety, an imminent danger, be defined in terms of "a percentage of probability." S. Rep. No. 181, 95th Cong., 1st Sess. 38 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 626 (1978). We do not find error in the judge's conclusion that, because an S&S violation under the Mine Act is less serious than an imminent danger, it is also not to be defined in terms of percentage of probability. 16 FMSHRC at 1191. Furthermore, Commission precedent has not equated "reasonable likelihood" with probability greater than 50 percent. A "more probable than not" standard would require the Secretary, in order to prove a violation is S&S, to prove it is likelier than not that the hazard at issue will result in a reasonably serious injury. We reject such a requirement.

U.S. Steel relies on a judge's decision in *Texasgulf, Inc.*, 9 FMSHRC 748, 759-61, 763 (April 1987) (ALJ), to the effect that "reasonably likely" must be regarded as synonymous with "probable." PDR at 5. Although the Commission affirmed the judges's determination that the violation was not S&S, it did not endorse the judge's probability analysis. *Texasgulf, Inc.*, 10 FMSHRC 498, 500-04 (April 1988). The Commission specifically declined to revisit the S&S test, as set forth in *Nat'l Gypsum* and *Mathies*. *Id.* at 500 n.4.

Accordingly, we conclude that the judge did not err when he found that the term "reasonable likelihood" does not mean "more probable than not." 16 FMSHRC at 1193.

B. Whether Substantial Evidence Supports the Judge' s S &S Conclusion

We conclude substantial evidence supports the judge's determination that the violation was S&S.[6] Inspector Cook cited 15 hazardous locations. Gov't Ex. 1. The area in which the violation occurred was lower in height than other areas of the mine and was uneven, with grades and swags, increasing the likelihood of injuries resulting from a disconnected trolley pole. 16 FMSHRC at 1193. When a trolley pole disengages, the vehicle is deenergized, resulting in an immediate loss of lights, communication, and electrically powered brakes. *Id.* Much of U.S. Steel's equipment has electrically powered brakes. Tr. 15. Although the operator represents that its vehicles have a hydraulic brake backup system (PDR at 5), Inspector Cook testified that he had never seen a jeep with hydraulic brakes stop after the trolley pole disengaged. Tr. 102-03. Inspector Bowman similarly testified that he had issued many citations for failing hydraulic braking systems. Tr. 122. Further, a vehicle that lost its lights at a dip in the track would not be seen by drivers of other vehicles. 16 FMSHRC at 1193. A vehicle without communication would be unable to report its location to the dispatcher or request assistance. *See* Tr. 127; PDR at 5.

In addition, disengaged trolley poles can dislodge or strike rocks in the roof. 16 FMSHRC at 1193. The rocks may strike miners or cause sparks that could ignite methane. *Id. See also* Tr. 15, 58-59, 102. Inspector Bowman testified that this mine liberated approximately two million cubic feet of methane in a 24-hour period. Tr. 16. Moreover, the record indicates that disconnected trolley poles, even with anti-swing devices, are capable of causing injury, including breaking an arm, if a miner reaches out for the pole. Tr. 112, 119; *see also* Tr. 15.

We are unpersuaded by U.S. Steel's argument that an injury-producing event is not reasonably likely because the vehicle is deenergized for only 15 to 20 seconds until the operator replaces the pole. PDR at 5; Tr. 125. Taken together, the loss of brakes, lights, and

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[6] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

communication for even 15 to 20 seconds support the judge's conclusion that an injury was reasonably likely to occur. We reject U.S. Steel's argument that the violation was not S&S because Cook completed his journey through the mine without taking action to eliminate the hazard. PDR at 6. Immediate abatement of a violation is only required when the condition observed results in a withdrawal order. Citations, on the other hand, even those designated S&S, "fix a reasonable time for the abatement of the violation." 30 U.S.C. § 814(a). We also reject U.S. Steel's contention that the Secretary failed to prove the violation was S&S because he offered no evidence that anyone has ever been injured by a pole equipped with an anti-swing device disengaging from a trolley wire. PDR at 6. The fact that injury has been avoided in the past or in connection with a particular violation may be "fortunate, but not determinative." *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (February 1986).

III.

Conclusion

The judge did not err in applying the "reasonable likelihood" test set forth in the third element of *Mathies*, and substantial evidence in the record supports the judge's conclusion that the violation was S&S. Accordingly, we affirm the judge's determination that U.S. Steel's violation was S&S.

Mary Lu Jordan, Chairman

Arlene Holen, Commissioner

James C. Riley, Commissioner

Commissioner Marks, concurring in result:

My colleagues have concluded that the violation in issue was "significant and substantial," ("S&S"). I agree and concur in that result. However, I vigorously disagree with the majority's refusal to consider the core issue, i.e., that there is a compelling need to provide a clear, unambiguous interpretation of the statutory term "significant and substantial."

In reaching their conclusion, the majority has applied the so-called "*Mathies* test," which is an amplification of the *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822 (April 1981) decision, wherein the Commission enunciated its interpretation of S&S. After careful consideration of this matter I have concluded that the Commission majority in both *Nat'l Gypsum* and *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984) erred, and that the time for re-examination of this vital issue is long overdue.

The procedural history of this *U.S. Steel* case is, in many ways, illustrative and indicative of the chronic enforcement and adjudicative quagmire that has been spawned since the ill conceived *Nat'l Gypsum* decision was issued. The violation in this case was issued on February 4, 1992. Since that time, the case has been before the judge and Commission three times! In each instance the issue related to the third element of the *Mathies* test which requires the Secretary to prove that "a reasonable likelihood that the hazard contributed to will result in an injury." *Mathies*, 6 FMSHRC at 3-4.

Because that phrase is manifestly ambiguous, and because U.S. Steel argued for a different interpretation, the judge attempted to set forth a clarifying interpretation of both the statutory language and the Commission's decisions by posing "a practical and realistic question, whether the violation presents a substantial *possibility* of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is *more probable than not* that injury or disease will result." 15 FMSHRC 452, 456 (March 1993) (ALJ) (emphasis in original) (citations omitted). U.S. Steel objected and filed a petition for discretionary review, which was granted. The Secretary, however, considered the judge's formulation to be an attempt "to use more familiar language that reflected the Commission's practical application of the test." S. Br. at 18.

Clinging to the shopworn status quo, and apparently without revisiting the merits of the underlying problem, i.e., that the third *Mathies* element is seriously deficient, the Commission responded by concluding that the judge erred, and by instructing him to apply the "reasonable likelihood" *Mathies* standard. 15 FMSHRC 2445, 2448 (December 1993).

On remand the judge determined that the parties continued to be sharply divided in their interpretations of the third *Mathies* element and that "[T]he Commission has not resolved this issue." 16 FMSHRC 829, 830 (April 1994) (ALJ). He went further:

The parties' conflict is understandable because the term 'reasonable likelihood' may convey different meanings. To U.S. Steel, the word 'likelihood' governs, and the term 'reasonable likelihood' means 'more probable than not.' To the Secretary, the word 'reasonable' modifies 'likelihood' to mean a *reasonable potential*, not 'more probable than not.'

Id. The judge then proceeded to analyze that issue and concluded that "the term 'reasonable likelihood' as used in the *Mathies* test does not mean 'more probable than not.'" *Id.* at 832. Recognizing the importance of that ruling, the judge then took the unusual step of certifying his ruling to the Commission for interlocutory review. *Id*. at 832-33.

Regrettably, the Commission declined yet another opportunity to consider this important issue. The Commission refused to grant the review,[1] and directed the judge "to issue a final disposition, on the existing record, pursuant to the Commission's previous remand instructions." 16 FMSHRC 1043, 1044 (May 1994).

On remand, the judge quickly complied, reiterating his previous conclusions rejecting the "more probable than not" formulation urged by U.S. Steel and also concluding that the record supported the issuing inspector's conclusion that "the hazards presented by this violation made it reasonably likely that serious injuries would result." 16 FMSHRC 1189, 1193 (May 1994) (ALJ).

Once again U.S. Steel sought discretionary review seeking a ruling clarifying the meaning of the Commission's third *Mathies* element. U.S. Steel's arguments squarely raise the issue: *what does reasonable likelihood mean?* They urge a "more probable than not" meaning. PDR at 4-5. The Secretary defends the judge's rejection of the U.S. Steel argument. S. Br. at 6-7. Thus, the Commission is again presented with the opportunity to better explain, and more clearly interpret, the statutory term of "significant and substantial." Unfortunately, my colleagues have opted not to confront the obvious, which is, that the words used in the third *Mathies* element are not serving our nation's miners, the regulated, or the regulators very well. The majority has chosen to narrowly dispose of the controversy in this case and to pass on this opportunity to provide clear direction to all potential litigants as well as to the Commission's judges who have grappled with this issue since the Commission issued its two decisions.

Accordingly, I find it necessary to disassociate myself from such a resolution. In the past year-and-one-half, the Commission has reviewed several cases that raised the very same question:

[1] Although the Secretary opposed interlocutory review on procedural grounds, he explicitly stated that he "agrees with the judge that the legal issue presented is an important one." S. Opp'n at 3.

what does reasonable likelihood mean? Moreover, since *Mathies* issuance in 1984, approximately 47 Commission decisions involving S&S have been issued.[2] Of those 47 decisions, over 93% of the cases related to the **third** *Mathies* element. It must be emphasized that this high level of litigation has resulted, ***not from confusion regarding the meaning of the statutory terms***, but from the confusion created by the ***Commission's own terms*** which purport to set forth a framework for the uniform enforcement and adjudication of S&S violations. Notwithstanding the foregoing, in the twelve years that have passed since the issuance of *Mathies,* the Commission has responded by merely clutching to the same ineffective words. That "strategy" has failed. As such, I believe the reasonable and appropriate Commission response to this compelling indication of widespread confusion and uncertainty, is to end the pretense that no problem exists -- confront the problem and find language that interprets S&S in a clear, unambiguous way.

To that end I continue to believe that the wisest course of action would have been to defer decision in this case, and to have invited the litigants, as well as industry and union intervenors to fully brief and orally argue this vital issue with a view toward crafting a clear interpretation of S&S. Unfortunately, my colleagues did not support that approach. However, because the parties in this action continue to dispute the meaning of the third *Mathies* element, I render my present view on this issue. Notwithstanding the following, however, I remain ready and willing to consider the differing views of the aforementioned parties because I believe the S&S analysis can only benefit from such varied input.

As I indicted above, I have concluded that the Commission's present interpretation of the statutory term "significant and substantial" is wrong. My conclusion is based on several factors, not the least of which is the Mine Act itself and the compelling legislative history. Also of great assistance is the incisive and prescient dissent of Commissioner A.E. Lawson in the *Nat'l Gypsum* case.

Everyone agrees that the Act does not define the term "significant and substantial." Nor does the Act contain language that sets limitations on the breadth of the violations that are to be considered S&S, beyond the fact that Congress expressly stated that S&S violations do **not** include conditions that have been determined by the Secretary to constitute an imminent danger. 30 U.S.C. § 814(d)(1). Also of significance is the fact that the Act does not contain the disputed language found in the Commission's third and forth *Mathies* test, that requires the Secretary to prove that the violation in issue poses a **reasonable likelihood of serious injury.** That is a burden that the Congress expressly rejected!

Absent a determination that the meaning of S&S is clear on its face, a determination I am unwilling to make, the primary basis for determining Congressional intent includes an examination of the legislative history. In this case the evidence of that intent is clear and

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[2] Additionally, the number of S&S related petitions for discretionary review filed during this time period, but denied, is unknown because no record of denied petitions is maintained.

convincing. The S&S language in the Mine Act was taken directly from section 104(c)(1) of the predecessor Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), which had been the subject of important litigation before the Department of the Interior's Board of Mine Operations Appeals ("Board"). That litigation was expressly discussed in the Senate Committee Report accompanying the Mine Act. Thus, the intended meaning of S&S in the Mine Act is readily available and precisely set forth:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the 'gravity test' and has required that the violation be so serious so as to very closely approach a situation of 'imminent danger.' *Eastern Associated Coal Corporation*, 3 IBMA 331 (1974).
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> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in *Alabama By-Products Corp.*, 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1). The Board there held that 'an inspector need not find a risk of serious bodily harm, let alone death' in order to issue a notice under Section 104(c)(1). The Board's holding in *Alabama by-Products Corporation* is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when 'technical' violations do pose a health or safety danger to miners, and are the result of an 'unwarranted failure' the unwarranted failure notice will be issued.

S. Rep. No.181, 95th Cong., 1st Sess. 31 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 619 (1978) ("*Legis. Hist*.").

In the referenced, overruled *Eastern Associated Coal* case, the Board had concluded that violations designated S&S had to pose a "probable risk of serious bodily harm or death." 3 IBMA at 334. Subsequently, the Board reversed itself and concluded that the S&S terms:

> when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of *any* injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death.

Alabama By-Products, 7 IBMA at 94. As indicated, that holding was cited with approval in the

Senate Committee Report. *Legis. Hist*. at 619. The *Alabama By-Products* decision also contained a separate opinion by Administrative Judge Howard J. Schellenberg, Jr. wherein he concurred in result by expressly joining his colleagues in concluding that the Board's prior interpretation of section 104(c), as stated in *Eastern Associated Coal*, "was in error." 7 IBMA at 97. He then indicated "I would have preferred to adopt as a guideline, . . . that the pertinent phrase be interpreted to mean, 'a reasonable risk of danger to the safety or health of the miners.'" *Id.* His comment is important, because it draws a bright line on what *Alabama By-Products* did **not** hold!

Thus, in citing with approval the Board's *Alabama By-Products* holding, the task of determining Congressional intent regarding the meaning of S&S became rather straightforward. It clearly did **not** mean, as urged by Judge Schellenberg, "a reasonable risk of danger to the safety or health of the miners." 7 IBMA at 97. Yet that is essentially the formulation ultimately adopted by the majority in *Nat'l Gypsum*!

Apart from the Commission's failure or refusal to follow clear legislative direction, the *Nat'l Gypsum* interpretation of S&S is based on misguided concerns that were, and continue to be, unfounded. The majority expressed its serious concern that maintaining the *Alabama By-Products* interpretation of S&S, as urged by the Secretary, would result in almost all violations being charged as S&S. *Nat'l Gypsum*, 3 FMSHRC at 825. Commissioner Lawson dashed that concern by citing oral argument concessions that indicated that only 62% of all coal mine violations cited prior to consideration of the *Nat'l Gypsum* case were characterized as S&S. *Id.* at 835 (Lawson, A., dissenting). <u>During that time period the *Alabama By-Products* S&S rule of construction was in effect</u>!

The *Nat'l Gypsum* majority also expressed grave concern that by maintaining the *Alabama By-Products* S&S construction, future enforcement under section 104(e) of the Mine Act, 30 U.S.C. §814(e), would result in "continual shutdown" of the mines. *Id.* at 826-27. Commissioner Lawson exposed the hollowness of that concern by quoting the Secretary's position regarding the "pattern" violation authority under section 104(e):

> The Secretary hasn't issued a notice yet. The Secretary hasn't issued a withdrawal order based on a notice of pattern yet. We haven't got a case that presents that yet and I don't believe the Commission should engage in this unwarranted speculation that the *National Gypsum* invites you to do, that we will not be able to effectively administer the Act if this definition of significant and substantial is adopted.

Id. at 837 (Lawson, A., dissenting) (citations omitted). Those words were uttered approximately 16 years ago. However, they are no less accurate today, as I am unaware of any section 104(e) enforcement, and certainly have not seen any cases seeking review of a section 104(e) violation. But more to the point, is Commissioner Lawson's reaction to the majority's unfounded apprehension that an adverse effect upon section 104(e) enforcement would result from a continuation of the *Alabama By-Products* interpretation of S&S:

> What this demonstrates about the enforcement of section 104(e) of the Act may well raise one's eyebrows, but it can hardly be maintained, given this record, that any operator has reason to fear a 104(e) based closure of its mine. The adoption of all-encompassing rules to be applied to cases not yet--perhaps never--to be before us is both judicially premature and the unwise rendering of a judgment in a vacuum, before any experience or factual context exists within which to make such a decision. We should not promulgate rules for deciding non-existent cases which are not now and may never be before us.

Id. at 838 (Lawson, A., dissenting).

Indeed, 15 years after those words were written, they continue to have vitality. That demonstration of solid judgment and impressive 20/20 forward vision, is only surpassed by Commissioner Lawson's caution to the majority regarding the effects of their newly minted interpretation of S&S:

> As a foundation for meaningful analysis, I can discern no improvement which will result from this alteration of the existing procedure, and no benefit accruing to either the inspector, the miner, or the mine operator. Unless the production of litigation is our goal, I confess that I can ascertain no purpose to this redefinition.

Id. at 839-40 (Lawson, A., dissenting).

I am in total agreement with that insightful statement! The Commission's *Nat'l Gypsum/ Mathies* interpretation of S&S has neither clarified nor facilitated a uniform application of S&S. To the contrary, the present ambiguity only serves to fuel a constant stream of unnecessary litigation that results in a diminished level of Congressionally mandated protection to our nation's miners and puts an unacceptable financial strain on operators and the government. The recently decided *Power Operating Co.,* 18 FMSHRC 303 (March 1996), presents a vivid demonstration.

In that case, the Secretary cited Power Operating Company ("Power") for a violation of 30 C.F.R. § 77.1710(a) (1995)[3] and charged S&S. 18 FMSHRC at 304. The Department of Labor's Mine Safety and Health Administration ("MSHA") inspector observed a miner steam cleaning a rock truck with a device (steam jenny) that delivers water under high pressure. *Id.* The miner was not wearing goggles, and his face was splattered with black material that the inspector believed to be dirt and grease. *Id.* Power did not dispute the foregoing, but challenged

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[3] Section 77.1710(a) states:

> Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

the S&S charge. *Id.* The judge concluded the violation was not S&S. 16 FMSHRC 591, 607 (March 1994) (ALJ). Although he determined that an injury to the eye was reasonably likely to occur, he concluded that "the record does not establish any evidence regarding the level of severity of an injury occasioned by contact of the materials with an eye. *Id.* The Secretary appealed and the Commission ruled that the judge erred in failing to conclude that the injury to the eye was reasonably likely to be serious. 18 FMSHRC at 306. The Commission majority (myself included) relied upon testimony of the inspector, that had not been considered by the judge, which set forth the inspector's opinion as to the seriousness of the likely injury. *Id.* at 306-07. Although I had no difficulty concluding that the facts of that case clearly established a S&S violation, I do not believe that Congress ever intended or expected that inspectors, judges or Commissioners possess medical skills and knowledge sufficient to make such fine distinctiburdenoftheSecretary.[4] In my opinion that issue should never have been litigated -- it was not even a close call. However, because the existing interpretation of S&S provides room for the fly-specking myopia noted below, operators have effectively been encouraged to do so.

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[4] That all eye injuries are not *ipso facto* serious is evidenced by the Secretary's own regulations for the reporting of accidents, injuries, and illnesses set forth at 30 C.F.R., Part 50. Sections 50.20-3(a)(5)(i)&(ii) set forth the criteria for differentiating, for purposes of eye injuries, between first aid and medical treatment. First aid encompasses irrigation of the eye, removal of foreign material not imbedded in the eye, and the use of non-prescription eye medications. 30 C.F.R. § 50.20-3(a)(5)(i). Medical treatment encompasses removal of imbedded foreign objects, use of prescription medications, and other professional treatment. 30 C.F.R.
§ 50.20-3 (a)(5)(ii). First aid is characterized as 'one-time treatment, and any follow-up visit for observational purposes, of a *minor* injury' (emphasis added). 30 C.F.R. §50.2(g). It appears that the potential injury here could well fall into the category of eye injury characterized by the Secretary as *minor* (one requiring only first aid) and which need not even be reported to MSHA on its Mine Accident, Injury, and Illness Report Form 7000-1. 30 C.F.R. §§ 50.2, 50.20. Thus, I disagree with my colleagues that the only possible conclusion is that forcibly propelled 'dirt, grease or hot water striking the eye is reasonably likely to cause reasonably serious trauma.' Slip op. at 4.

Power Operating, 18 FMSHRC at 308 (Doyle, J., dissenting).

Interestingly, this precise problem was also anticipated by Commissioner Lawson.[5]

Enough is enough! Fairness dictates that we in the Commission better serve the interests of miners, mine operators and the Secretary of Labor. Therefore, I conclude that the interpretation of S&S, as understood and applied prior to the *Nat'l Gypsum* decision, should be restored. It was a faithful implementation of clear Congressional intent.[6]

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Marc Lincoln Marks, Commissioner

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[5] The majority's tampering will add to the statute words of limitation which will require every mine inspector to make judgments, not only as to the 'likelihood' of the effects of the hazard, and the 'reasonable[ness]' of that 'likelihood' but will as well demand medical predictions to be made as to whether a hazard will result in an injury or illness of a 'reasonably serious' nature. *Must the inspector henceforth determine, not only whether the roof is safe or unsafe, but whether the unconscious miner who is the victim of a roof fall has suffered 'merely' a concussion, or a fractured skull?* Would only the hazard in the latter case, under the majority's rationale, be one which is significant and substantial?

Nat'l Gypsum, 3 FMSHRC at 833 (Lawson, A., dissenting) (emphasis supplied).

[6] Notwithstanding this present conclusion, I restate that I remain open to revisit this issue after it has been thoroughly briefed and argued.