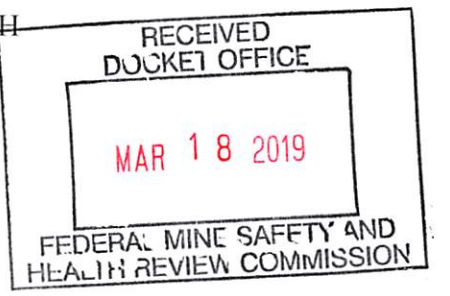
ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION



SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. NORTHSHORE MINING COMPANY Respondent.	)	Docket Nos. LAKE 2017-0224 LAKE 2017-0248

PETITION FOR DISCRETIONARY REVIEW

The Secretary of Labor (Secretary) petitions the Federal Mine Safety and Health Review Commission (Commission) to review the decision a Commission administrative law judge (ALJ) issued on February 13, 2019, in the above-captioned case. The Secretary seeks review of the ALJ's decision on the grounds that the decision is contrary to law and Commission rules and precedent and that substantial evidence does not support the decision. *See* 30 U.S.C. § 823(d)(2)(A)(ii); Commission Procedural Rule 70(c), 29 C.F.R. § 2700.70(c). Specifically, the Secretary seeks review of the part of the judge's decision vacating the "reckless" flagrant designation for Order No. 8897220, which MSHA issued for a violation of 30 C.F.R. § 56.11002.

ASSIGNMENTS OF ERROR

(1) The ALJ erred by requiring a higher negligence showing to establish the "reckless failure" component of a flagrant violation than is required to establish reckless disregard and unwarrantable failure.

(2) In evaluating the operator's conduct under a "conscious[] or deliberate[] disregard" standard, the ALJ impermissibly imposed a scienter requirement for reckless flagrant violations.

(3) The ALJ erred by determining that the operator's fall protection policy mitigated a reckless failure to eliminate the walkway violation.

(4) Even applying the erroneous legal standard the ALJ used, substantial evidence does not support the ALJ's finding that the violation was not a "reckless" flagrant.

STATEMENT OF FACTS

Northshore Mining Company (Northshore) is an iron ore mine located in Lake County, Minnesota. February 13, 2019 ALJ Decision (Dec.) at 2. The citation and order at issue in this case were issued following the September 7, 2016 failure of the east outer walkway of the 62/162 conveyor gallery at the mine's pellet processing plant. *Id.* A miner working on the walkway approximately 50 feet off the ground was injured when the walkway "violent[ly]" collapsed. *Id.* at 2, 4; Trial Transcript (Tr.) 58. The walkway was structurally compromised at the time of the accident. *Id.* at 8-9. Northshore knew for years that the walkway was not "structurally adequate for use," and despite this knowledge, failed to repair it and continued to direct miners to perform work from it. *Id.* at 2-4, 6, 9.

A. The Outer Walkways

The 62/162 conveyor gallery is a covered gallery with two conveyors: the 62 conveyor and the 162 conveyor. Dec. at 2. Iron that has been processed into pellets travels on the conveyors up to storage bins or back to the production yard. Tr. 315-16. A center walkway lies between the two parallel conveyors. *Id.* Along the outer side of the two conveyors lie two additional walkways: the east outer walkway and the west outer walkway. *Id.* The outer

walkways each rose to a height of approximately 72 feet and were four inches thick and comprised of two layers. Joint Stipulations (J. Stip.) 21; Tr. 241. The top layer was composed of plain concrete and the lower layer was composed of perlite concrete panels reinforced with wire mesh. Dec. at 5. Miners used the outer walkways to perform maintenance on the adjacent conveyor. Tr. 109-10, 116. Due to spillage from the conveyor, iron pellets would accumulate on the outer walkways to a thickness of 6-12 inches. Dec. at 3; Tr. 352. Northshore would direct miners to clean the pellets off the outer walkways. *Id.*

Deteriorating concrete caused holes in the 62/162 gallery walkways as early as 2009. Tr. 201. In 2013, a structural engineer employed by Northshore submitted work orders for the two outer walkways to address concrete panels falling from the undersides. Dec. at 5. However, Northshore prioritized work on another area of the plant and did not complete the necessary repairs on the outer walkways. *Id.* In 2015, Northshore hired an engineering firm to evaluate the condition of the deteriorating gallery walkways, including the outer walkways. *Id.* The engineering firm produced a report to Northshore detailing its observations and conclusions. Sec'y's Ex. 12; Dec. at 5-6. Specifically, the report noted that the engineers "[o]bserved damage . . . [that] included spalled concrete, delaminated concrete, debonded reinforcement and corroded reinforcement over large areas of the walkway slab underside." Sec'y's Ex. 12. The report also noted that the topping slab was "in poor condition and i[n] need of replacement due to the large surface cracking and heaving . . . ." *Id.* The engineers believed the damage was caused by the freeze-thaw cycle and water seeping into the space between the perlite slabs and the topping concrete. *Id.* The engineers concluded that "the deteriorated perlite slabs are compromised and provide little to no structural support" and that "[t]he heaving and cracked concrete topping slab is also compromised providing little to no structural support in the walkways as well as

presenting an uneven walking surface." *Id.* The report indicated that, while steel plate reinforcing previously had been installed in the center walkway, areas without such reinforcing (including the outer walkways) "may not contain adequate structural support for the use of these walkway areas." *Id.* The report concluded that, while the reinforced portions of the center walkway could withstand some limited "minor" use, the outer walkways "cannot be found to be structurally adequate for use." *Id.* The report warned Northshore that "it is necessary to ensure that the walking surface meets MSHA standards and to ensure that the structure is capable of handling its required load capacity." *Id.*

Northshore conveyed the report to management officials, including Matthew Zimmer and Roger Peterson, both of whom had managerial responsibility for maintenance and repairs of the walkways. *Id.* at 6-7. However, Northshore took no action to fix the walkways or discontinue their use. *Id.* at 6-7. Instead, Zimmer and Peterson instituted a fall protection policy for miners using the walkways. *Id.* at 6-7, 24-27. Nevertheless, fall protection was not always worn, nor was the policy consistently enforced. Tr. 51, 54, 57, 109, 110, 116-117, 119, 120-121, 194, 195-96. It was not possible for miners to be continuously tied off as they worked. Dec. at 7. In addition, miners were told to use fall protection only because of the potential slipping hazard that the iron pellets presented; miners were not told that the policy was instituted because the walkway was structurally compromised. *Id.* at 3.

In March 2016, because perlite concrete was falling from the underside of the walkways, Northshore had to erect barriers below the walkways to keep miners from being struck by the walkway material. *Id.* at 7. When parts of the walkways were clear of pellets, miners "could see daylight through the floor." Tr. 117. The mine's own permanent miners were more aware of the structural issues, felt it was too dangerous to use the outer walkways, and found alternate ways to

perform conveyor maintenance. Tr. 116-17. However, contract miners could not see the walkways under the pellets, did not see any hazard or warning signs on the walkways, and were not aware of problems with the walkways. Dec. at 3. Despite this, Northshore still took no action to fix the crumbling walkways, discontinue their use, or alert miners of the hazards, and continued to direct miners onto them. Dec. at 7.

B. The Collapse

On September 6 and 7, 2016, Evander King, an employee of contractor VanHouse Construction (VanHouse), received orders from Northshore to clean the east outer walkway. Dec. at 2-3. Mr. King, as well as the other contract miners at Northshore, was unaware that the walkway was structurally compromised. *Id.* at 3. Mr. King wore fall protection on the walkway, but was not continuously tied off because it was not possible to do so and because he was not instructed to be continuously tied off. *Id.* On September 7, 2016, Mr. King was hosing down the iron pellets at a height of approximately 50 feet when "the entire structure began to shake." Tr. 58-59. "[A]ll of a sudden sheets of thick, caked mud" and other "buildup around the structure began falling." *Id.* It was "violent" and "felt like an earthquake." *Id.* The falling debris "pummel[ed]" Mr. King's head, shoulders, and back. *Id.* Mr. King "held onto the hose," "jerked forward and curled in." *Id.* Once the shaking stopped and Mr. King could not feel anything hitting him anymore, he opened his eyes to find a hole in the floor immediately in front of him. *Id.* Through the hole, Mr. King saw a front-end loader approximately 50 feet down. *Id.* at 58-59. Mr. King waited briefly to make sure the accident was over, unclipped himself, and ran back up the ramp to safety. *Id.* Mr. King suffered a spinal injury and post-traumatic stress disorder, but fortunately escaped more serious injury or death. Dec. at 4.

C. MSHA's Investigation and Resulting Issuances

Following the collapse, MSHA conducted an investigation. Dec. at 5. Michael Superfesky, a civil engineer for MSHA, discovered that the mesh in the bottom perlite concrete layer of the walkway had detached or de-bonded from the perlite concrete. *Id.* at 9. The mesh is essential to the structure because it provides tensile strength, which is lacking in concrete. *Id.* Mr. Superfesky concluded that the load-carrying capacity of the walkway was significantly reduced as a result of this condition. *Id.* He concluded that the walkway was structurally deficient for use and that the walkway failed because of its poor condition. *Id.* He also concluded that fall protection does not mitigate against serious injury because serious injuries can still result if one needs to rely on fall protection during a structural collapse. *Id.*

Following the investigation, MSHA issued Order No. 8897220, a Mine Act § 104(d)(1) (significant and substantial (S&S) and unwarrantable failure) order alleging a violation of 30 C.F.R. § 56.11002.[1] MSHA designated the order as involving the operator's reckless disregard and as a "reckless" flagrant violation. MSHA also issued Citation No. 8897219, a § 104(d)(1) (S&S and unwarrantable failure) citation alleging a violation of 30 C.F.R § 56.20011 for failure to barricade or warn miners away from the damaged walkways.[2] MSHA designated this citation as involving the operator's reckless disregard as well. MSHA proposed penalties of $130,000 and $69,400 respectively. MSHA also issued civil penalty assessments against Matthew Zimmer

[1] 30 C.F.R. § 56.11002 states: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

[2] 30 C.F.R. § 56.20011 states: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required."

and Roger Peterson as agents, for the violation described in the reckless flagrant order, and proposed penalties of $4,300 and $4,500 respectively. Subsequently, Northshore and the two agents filed notices of contest. The matters were assigned to a Commission administrative law judge who consolidated the dockets for a single hearing.

THE JUDGE'S DECISION

Regarding Order No. 8897220, the ALJ upheld the violation and found that "ample evidence" demonstrated that the outer east walkway was not maintained in good condition. *Id.* at 10. The ALJ rejected Northshore's argument that fall protection was a mitigating factor because "fall protection is not a substitute for keeping the walkway in good condition." *Id.* The ALJ noted that fall protection "does not prevent the walkway from being dangerous." *Id.* The ALJ also found that the violation was S&S. *Id.* at 11-12. She found that even if tied off, a miner on a walkway that collapsed could hit his head, could injure his back or neck by hitting equipment below, or could be struck by falling cement, and concluded that the use of fall protection "does not mitigate the seriousness of the injury." *Id.* at 12.

Significantly, in evaluating the operator's negligence, the ALJ found that Northshore's failure to maintain the walkway "was the result of reckless disregard." *Id.* at 12-14 (citing the Commission's recent decision in *Lehigh Anthracite Coal*, 40 FMSHRC 273 (Aug. 2018)). The ALJ found that Northshore did nothing to correct the condition of the walkway or make it safer to use and that Northshore was reckless in continuing to allow and instruct workers to access the walkway, even with fall protection. *Id.* She found that "mine management knew of the condition of the area yet demonstrated indifference to the violation, thereby placing the miners in a hazardous position." *Id.* at 14.

The ALJ also found that the violation was an unwarrantable failure. *Id.* at 14-17. In particular, she found that "[w]hile the use of fall protection has some mitigating purpose, it does not correct the condition. Therefore, no effort was made to address the deteriorating walkway itself." *Id.* at 16. The ALJ found aggravating circumstances for each of the seven factors the Commission uses to evaluate unwarrantable failure violations: 1) the length of time the violation had existed (multiple years), 2) the extent of the violative condition (the violation was "extensive" and included the entire 300 feet on the east walkway plus the west walkway; workers were called upon to use the entire area), 3) whether the operator was on notice that greater efforts were necessary for compliance (the operator was on notice through miners' complaints and the engineering report), 4) the operator's efforts in abating the condition (the operator made no effort to abate the deteriorating walkway), 5) whether the violation posed a high degree of danger (it did), 5) whether the violation was obvious (it was), and 7) whether the operator knew of the existence of the violation (it did). Dec. at 14-17 (citing *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009) for the Commission's seven unwarrantable failure factors).

In discussing the agents' liability, the ALJ was particularly critical of the agents' use of fall protection to evade the requirement to fix the actual problem: the hazardous walkway. Dec. at 24-27. The ALJ found that "Zimmer and Peterson failed to act on the basis of the walkway information to protect safety and health." *Id.* at 27. Specifically:

> Following receipt of the [engineering] report, Zimmer and Peterson . . . decided that they would take no corrective action, but instead put the walkways on a list for later repair. More than a year later, when King and the contract crew were assigned to clean the outer walkway, nothing had been done to repair or maintain the walkways. Zimmer and Peterson did agree to require fall protection and instructed the supervisors regarding the need for fall protection on the outer walkways. However, they failed to repair or maintain the walkway. Fall protection was an inadequate solution to address the violative condition here; miners could not be tied off the entire time

> on the outer walkways and had to unclip their harnesses to move when performing maintenance on the conveyor belts and when hosing down the pellets. Both Zimmer and Peterson did not fully consider the importance of repairing the walkways or warning the miners of the deteriorated state of the walkways, and instead tried to work around the issue by implementing, rather badly, a policy of fall protection.

Dec. at 27. The judge found that the two agents engaged in a knowing violation of section 56.11002, and assessed a penalty of $4,000 against each agent. Dec. at 28.

Relatedly, the ALJ sustained Citation No. 8897219, including the S&S, reckless disregard, and unwarrantable failure designations. Dec. at 20-24. In finding reckless disregard, the judge found that "[t]he mine knew of the problem with the east walkway but took no steps to limit access and those actions demonstrate an indifference to a known violation." *Id.* at 28. She assessed a penalty of $60,000. *Id.*

However, the ALJ found that Order No. 8897220 was not a "reckless" flagrant violation under section 110(b)(2) of the Mine Act. *Id.* at 17-20. A "reckless" flagrant violation is "a reckless . . . failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). The ALJ found that all of these criteria were met except that Northshore's failure to make reasonable efforts to eliminate the known violation was not "reckless." *Id.* at 17.

More specifically, the ALJ stated that "[t]he mine's conduct amounts to reckless disregard when analyzed in the context of the negligence and unwarrantable failure frameworks, but the same conduct does not rise to the heightened recklessness contemplated by a flagrant designation." *Id.* at 19. The ALJ cited the Commission in *American Coal Co.*, 38 FMSHRC 2062 at 2069-2070 (Aug. 2016) for the proposition that "based on the heightened penalties available under the flagrant provision, the violations should be distinguishable from those

addressed under the S&S and unwarrantable failure provisions of the Act. . . . Thus, the 'reckless failure' component of a flagrant violation requires a higher negligence showing than that required under the unwarrantable flagrant analysis." *Id.*

The ALJ believed that the appropriate test is whether, "in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury." *Id.* (quoting *Stillhouse Mining, LLC*, 33 FMSHRC 778, 804 (Mar. 2011) (ALJ)).

The ALJ found that "Northshore failed to take steps that a reasonably prudent operator familiar with the mining industry would have taken to protect miners from the risks related to using the walkways in their deteriorated condition." Dec. at 19. However, the ALJ also found that Northshore "made some effort" by using fall protection. *Id.* She found that "there is no evidence to suggest a conscious or deliberate indifference to the risks on the part of the mine." *Id.* She found that Northshore believed, albeit wrongly, that fall protection would solve the problem with the walkways. *Id.* at 20. Thus, although she found that its conduct was "careless and indicative of reckless disregard," it was insufficient to meet the "heightened negligence showing" required for a reckless flagrant violation. *Id.* With the flagrant designation removed, the judge assessed a penalty of $60,000 for Order No. 8897220. Dec. at 28.

STANDARD OF REVIEW

The Commission reviews an ALJ's legal conclusions de novo. *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194 (Nov. 1999). When reviewing an ALJ'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); *Cumberland Coal Res., LP*, 28 FMSHRC 545, 551 n.10 (Aug. 2006). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "But in practice, the test involves more than this simple formulation conveys. It means that the Commission may not 'substitute a competing view of the facts for the view [an] ALJ reasonably reached.'" *Consolidation Coal Co.*, 20 FMSHRC 227, 238 (Mar. 1998) (quoting *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983)). "The fact that evidence exists in the record to support [the appellant's] position is not determinative. Rather, the Commission's review [is] statutorily limited to whether the ALJ's findings of fact were supported by substantial evidence." *Id.* The substantial evidence test may be satisfied by reasonable inferences drawn from indirect evidence as long as there is "a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 989 (Dec. 2006). Even the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y of Labor on Behalf of Wamsley v. Mut. Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996) (citing *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

ARGUMENT

I. The ALJ Misinterpreted the "Reckless" Flagrant Provision

The Mine Act does not support the imposition of a greater burden for proving a "reckless" flagrant than for proving other "reckless" conduct, such as "reckless disregard," or for proving unwarrantable failure, and no precedent suggests a greater burden is appropriate. The ALJ erred by requiring the Secretary to prove "heightened recklessness" by establishing that, "in

light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury." Dec. at 19.

Under the language of the statute, a "reckless" flagrant involves a reckless failure to make reasonable efforts to eliminate a known violation. *AmCoal*, 38 FMSHRC at 2067-68; 30 U.S.C. § 820(b)(2).[3] Although a "deliberate" or "intentional" failure to make such reasonable efforts certainly would qualify, the Commission has never interpreted the word "reckless" to require actual ill intent. *See Lehigh Anthracite Coal*, 40 FMSHRC 273, 283 (Apr. 2018) (listing with approval cases in which ALJs have found reckless disregard where the violation was motivated by a desire to avoid the loss of production). Rather, it is enough to show choices on the part of an operator not to correct the problem when the operator is aware of the potential serious consequences of those choices. *See, e.g., Spartan Mining Co., Inc.*, 30 FMSHRC 699, 722-23 (Aug. 2008) ("reckless disregard" appropriate when a supervisor permitted miners to continue working on a section after the mine fan stopped working, despite the supervisor's awareness that this condition exposed the miners to "an obvious danger and serious hazards").

The Restatement (Second) of Torts states that "recklessness" occurs when an "actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Restatement (Second) of Torts § 500 cmt. a (1965). The Secretary agrees this definition is appropriate in the context of "reckless" flagrant violations. Citing the Restatement, the Commission in *Lehigh*

[3] To date, the Commission has ruled only on flagrant violations designated by the Secretary as "repeated," *AmCoal*, 38 FMSHRC 2062; *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), and has not yet had an opportunity to address "reckless" flagrant violations.

Anthracite Coal held that "reckless disregard" (in the non-flagrant context) includes situations "where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk." 40 FMSHRC at 280. The Commission found reckless disregard appropriately described a situation in which "the level of negligence did not involve a conscious intention to cause harm to a miner, [but] it did involve a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to a miner." *Id.* at 283.

As discussed above, the ALJ cited the Commission's 2016 *American Coal* decision (regarding "repeat" flagrant violations) to justify a heightened negligence standard. However, in the language the ALJ cited, the Commission was not discussing the "reckless" factor. Rather, the Commission observed simply that the higher penalties available for the 2006 MINER Act's new class of flagrant violations must mean that something more is required for flagrants than is needed to establish other classes of violations (such as S&S and unwarrantable failure violations) for which the Mine Act provided already. "Otherwise, Congress could have simply increased the maximum amount at which a penalty can be assessed and avoided creating a new statutory classification of violation." *AmCoal*, 38 FMSHRC at 2069-70. The Commission stated that "the distinguishing characteristic of a flagrant violation is most evident in those terms of the provision that previously were not part of the Mine Act," pointing out that a key conceptual difference involves the failure to make reasonable efforts to eliminate a known violation. *Id.* at 2070.

Consistent with this framework, the Commission looked to existing Mine Act definitions and jurisprudence with respect to similar terms and phrases contained in the "flagrant" definition, such as "death or serious bodily injury." The Commission rejected the operator's argument that

a flagrant violation must have a potential for a greater degree of gravity than for an S&S non-flagrant violation. *Id.* at 2070.

Similarly, the word "reckless" is not a new Mine Act term or concept, and, in fact, the *American Coal* decision acknowledged the relevance of existing "unwarrantable failure" caselaw (including the concept of "reckless disregard") before distinguishing "flagrants" because of their "focus on violations known by operators and behavior indicative of a failure to address such violations." *Id.* at 2070. The *American Coal* decision does not support an argument that "reckless" means something different in the flagrant context and, in fact, suggests that "flagrant" phrases or terms that are the same or similar to those used elsewhere in the Mine Act should be interpreted similarly. The Secretary agrees.[4]

Here, although the ALJ's heightened test is not entirely clear, it appears that, rather than focusing on whether the operator made choices not to correct a known violations (or exhibited indifference in failing to correct a known violation), the ALJ erred by requiring that the operator exhibit "conscious[] or deliberate[]" disregard for the miners' life and health. The ALJ effectively imposed a scienter requirement where one does not exist in the statute and incorrectly imposed a higher negligence requirement than that required under common law and existing Mine Act caselaw.

[4] The Secretary believes that his interpretation comports with Commission precedent and that the language of the statute is clear. To the extent the language is ambiguous, the Secretary's interpretation is reasonable and is entitled to deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *The American Coal Co. v. FMSHRC*, 796 F.3d 18, 23 (D.C. Cir. 2015) (citing *Martin v. OSHRC*, 499 U.S. 144, 156-57 (1991)).

II. The ALJ Erred in Determining That the Operator's Fall Protection Policy Mitigated a Reckless Failure to Eliminate the Walkway Violation

The ALJ erred in finding that Northshore's "careless" use of fall protection to "solve the problem with the walkways" mitigated a finding of recklessness for purposes of the Mine Act's flagrant provision. *See* Dec. at 19-20.

First, Northshore's conduct satisfies the "reckless" flagrant under any interpretation of "reckless" because, as the judge herself acknowledged, Northshore made *no* efforts to eliminate the known violation. Dec. at 16 ("no effort was made to address the deteriorating walkway itself"). The ALJ erred by sanctioning the operator's use of fall protection as a "solution" to a structurally deficient walkway, *see* Dec. at 19, when section 110(b)(2) of the Mine Act explicitly and exclusively focuses on eliminating the violation. Quite simply, the only way to eliminate a violation of 30 C.F.R. § 56.11002's requirement that the walkways be "maintained in good condition" is to maintain the walkways in good condition. Fall protection policies in no way affect the maintenance of a walkway. *See generally Mullins & Sons Coal Co, Inc.*, 16 FMSHRC 192, 197 (Feb. 1994) (rock dusting is not an alternative method of complying with the clean-up requirements of § 75.400).

Second, even if the operator's efforts were directed at eliminating the known violation (which they were not), the Commission has held that "wholly inadequate efforts . . . undertaken in 'good faith' . . . do not reduce the level of negligence." *Lehigh Anthracite*, 40 FMSHRC at 282. That decision also held that "the subjective good faith of [] actions does not reduce negligence where such actions are based on an objectively unreasonable belief." *Id.* Here, the efforts were wholly inadequate because they did not address the underlying condition of the walkway and did not eliminate hazards associated with a fall from the walkway. It was not objectively reasonable to believe that fall protection would help maintain the walkway, was a

substitute for maintaining the walkway in good condition, or would protect miners fully if the walkway collapsed. Additionally, the ALJ's acknowledgement of the operator's deceptiveness in the reasons it gave contract miners for the fall protection (a pellet slip hazard) indicates that the fall protection policy was not undertaken in good faith. *See* Dec. at 3-4. The ALJ erred in considering the fall protection policy in any way in evaluating the operator's reckless failure to eliminate the violation for failure to maintain the walkway in good condition.

III. Even Applying the Erroneous Legal Standard the ALJ Used, Substantial Evidence Does Not Support the ALJ's Finding That the Violation Was Not a "Reckless" Flagrant

The ALJ's finding that Northshore's failure to make reasonable efforts to eliminate the violation was not "reckless" is not supported by substantial evidence. As early as 2009, the concrete walkways were deteriorating. Tr. 201. In 2013, Northshore's structural engineer submitted work orders for the outer walkways, but Northshore failed to make those repairs. Dec. at 5. By 2015, Northshore grew concerned enough about the walkways to hire an engineering firm to evaluate the walkways. *Id.* The engineers that Northshore itself selected told Northshore that the walkways were significantly damaged, provided "little to no structural support," and "cannot be found structurally adequate for use." Sec'y's Ex. 12; Dec. at 5-6. The engineers specifically warned Northshore that "it is necessary to ensure that the walking surface meets MSHA standards and to ensure that the structure is capable of handling its required load capacity" -- i.e., that the walkway be of substantial construction and maintained in good condition. Sec'y's Ex. 12; 30 C.F.R. § 56.11002. Nevertheless, Northshore and its managers took no action to repair the walkways or prohibit their use. Dec. at 6-7. Instead, Northshore and its managers continued to direct miners to use the walkways. *Id.* On September 7, 2016, the entirely foreseeable happened: one of the outer walkways collapsed causing a miner injuries. *Id.*

at 2-4. This indicates "conscious" or "deliberate" disregard of miner safety and of the mine's responsibility to abate known violations. *Id.* at 19.

In addition, although the judge erred in considering fall protection at all, the judge made a specific finding that injuries of equal severity were likely to occur even if the walkway collapsed while miners were wearing fall protection. Dec. at 12. Even if it were appropriate to consider fall protection in mitigation (which it is not), in this case the facts do not reasonably support any anticipated reduction in potential injuries to miners. No mitigation exists and the facts compel a finding that the violation was a "reckless" flagrant violation.

When an ALJ makes a legal error, the Commission generally remands the case for the ALJ to weigh the evidence under the correct legal analysis. However, "[w]hen the evidence presented on the record supports no other conclusion, remand is unnecessary." *Arnold Stone, Inc.*, 39 FMSHRC 1719, 1723 (Sept. 2017). In this case, the ALJ already found that the operator exhibited a negligence level of "reckless disregard" and found that the violation was an unwarrantable failure. That alone establishes as a matter of law that the operator was "reckless" for purposes of evaluating a "reckless" flagrant violation. And even under the ALJ's heightened negligence test, the facts conclusively establish that Northshore consciously and deliberately failed to make reasonable efforts to eliminate the known walkway violation. The Commission should find that the operator committed a "reckless" flagrant violation.[5] Remand for a new penalty assessment commensurate with a reckless flagrant violation is appropriate.

[5] If, however, the Commission finds that more substantive analysis is necessary, it should remand this case for the judge to evaluate in light of the appropriate legal test.

CONCLUSION

For the reasons above, the Secretary urges the Commission to grant the Secretary's petition for review, reverse the ALJ's finding on the "reckless" flagrant violation, find that the violation was a "reckless" flagrant violation, and remand to the ALJ for a new penalty assessment consistent with the flagrant designation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2019, a copy of the foregoing Petition for Discretionary Review was served by electronic mail on:

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