

ORAL ARGUMENT NOT YET SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

**SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION,**

Petitioner

v.

**CONSOLIDATION COAL COMPANY;
FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,**

Respondents.

**ON PETITION FOR REVIEW FROM THE
FEDERAL MINE SAFETY & HEALTH COMMISSION**

**BRIEF OF RESPONDENT
CONSOLIDATION COAL COMPANY**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

1. Parties and Amici

All parties who appeared before the Federal Mine Safety and Health Review Commission and before this Court are accurately listed in the Brief filed by the Secretary of Labor.

2. Rulings under Review

References to the rulings at issue herein accurately appear in the Brief filed by the Secretary of Labor.

3. Related Cases

This case has not previously been before this Court or any other Court. Counsel is unaware of any related cases pending before this Court or any other Court.

CORPORATE DISCLOSURE STATEMENT

At the time of the mine safety violation which is the subject of this proceeding, Consolidation Coal Company was a Delaware Corporation and was the owner of the Buchanan No. 1 mine located in Buchanan County Virginia. At that time, Consolidation Coal Company was wholly owned by Consol Energy, Inc., a Delaware corporation. At the present time, Consolidation Coal Company and the Buchanan No. 1 coal mine are no longer owned by Consol Energy, Inc.

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GLOSSARY

The following abbreviations and acronyms are used in this Brief:

ALJ: Administrative Law Judge Priscilla Rae

Consol: Consolidation Coal Company

Commission: Federal Mine Safety and Health Review Commission

JA: Designates references to the Joint Appendix

Mine Act: The Federal Mine Health and Safety Act of 1977, 30 U.S.C. §801 et seq.

MSHA: Mine Safety and Health Administration

Review Commission: Federal Mine Safety and Health Review Commission

The Secretary: Secretary of Labor, Mine Safety and Health Administration

JURISDICTIONAL STATEMENT

An accurate statement of jurisdiction required for this Court to consider and ultimately decide this matter is set forth in the Brief filed by the Secretary of Labor.

STATEMENT OF THE ISSUES PRESENTED

The issues which Consol believes need to be addressed by this Court are as follows:

1. Whether the October 22, 2015 ALJ decision is supported by substantial evidence and, therefore, should be affirmed by this Court.
2. Whether this Court has the authority to consider arguments raised by the Secretary that were not raised before the ALJ.
3. Whether the October 22, 2015 ALJ decision is in accordance with established law.

STATUTES AND REGULATIONS

All of the applicable statutes and regulations necessary for adjudication of this matter are set forth in the Brief filed by the Secretary of Labor.

STATEMENT OF THE CASE

This case involves Citation No. 8189820 (the “Citation”) issued on July 14, 2011 at Consol’s Buchanan No. 1 mine (the “Mine”). The Citation alleged that Consol violated 30 C.F.R. § 75.220(a)(1) by failing to comply with the Mine’s approved Roof Control Plan by taking a 26-foot cut when adverse roof conditions were present. (JA, pg. 127). The Mine’s Roof Control Plan limited cut depths to 20

feet, when adverse roof conditions were present. (JA, pg. 134). MSHA Inspector William Ratliff (“Ratliff”) designated the Citation as “significant and substantial” (“S & S”), reasonably likely to cause fatal injuries to at least 2 miners. (JA, pg. 127).

A hearing before the ALJ was held on November 18, 2014 in Kingsport, Tennessee. On October 22, 2015, the ALJ entered her decision affirming the issuance of the Citation; however, the ALJ found that the condition cited was unlikely to result in an injury and was not S & S. (JA, pg. 29, 43). The ALJ assessed a civil penalty in the amount of \$1,500.00 for the Citation. (JA, pg. 29, 45).

MSHA timely sought review of the October 22, 2015 ALJ decision before the Review Commission. On September 14, 2017, the Review Commission issued its decision, with two Commissioners voting to affirm the ALJ decision and two Commissioners voting to overturn the ALJ decision. This appeal followed.

STATEMENT OF RELEVANT FACTS

I. The Citation

Ratliff issued the Citation on July 14, 2011 for a violation of 30 C.F.R. 75.220(a)(1). (JA, pg. 127, 103) As a part of his inspection, Ratliff travelled to the 17 Right section of the mine where he observed what appeared to be a deep cut in the crosscut between #3 and #2 entry. (JA, pg. 103) He also noted adverse roof

conditions. (Id.). Ratliff noted that the roof had partially collapsed and Consol's employees had already begun bolting the un-supported roof. (JA, pg. 111, 113). Ratliff waited until the roof was bolted prior to entering into the area to conduct his measurements. (JA, pg. 103).

Upon examination of the area, Ratliff noted that there were two bolts that had been cut out on the left side of the plate, so he conducted his measurements from the next full row of bolts. (JA, pg. 104) From this last full row of bolts to the corner where the #3 crosscut cut into the #2 entry was 26 foot. (Id.) Ratliff indicated that the cut would be approximately 23.5 feet to the corner. (Id.) Ratliff cited a violation of the roof control plan because he believed that the cut exceeded 20 feet. (Id.)

Ratliff was concerned about the roof breaking through the adverse conditions back to an area where the miners were working. (JA, pg. 106) He acknowledged that any such miners would have been underneath bolted top. (Id.) He felt that the potential injury would be a fatal injury to at least two miners. (Id.)

Ratliff acknowledged that in the normal cutting sequence of finishing a cross-cut, you would have 28 feet of exposed rook between the bolts in the #2 entry and the second row back from where the cut started. (JA, pg. 108) Ratliff also acknowledged that the miner operator, while taking the cut, would stand

approximately 50 feet from the cutting heads on the miner, making him at least 27 feet outby the cut, in a bolted area. (Id.)

In the cited area, Consol was installing 6-foot roof bolts, which were longer than normal to address the adverse roof conditions. (JA, pg. 111) The bolts were also resin bolts and Ratliff did not see any evidence of return glue coming out of the holes which would signify large cracks in the roof. (Id.) The area in question was also being bolted on a “tighter pattern” and extra bolts were being added between the normal rows of roof bolts to increase roof support. (JA, pg. 124)

II. The ALJ Decision

After hearing all of the evidence, the ALJ made a fact-based determination as to whether or not the condition cited by Ratliff was reasonably likely to lead to a serious physical injury. In arriving at her determination that the condition cited was not S & S, the ALJ properly considered evidence that at the time of the roof fall and prior to the roof bolting of the area, no miners were within 20 feet of the cited area. The ALJ also considered the fact that the area was already being bolted at the time Ratliff arrived at the scene and Ratliff observed the roof bolting prior to entering into the area to conduct measurements. Based upon these factual findings, the ALJ concluded that the condition cited in the Citation was not S & S.

III. The Review Commission Decision

The Secretary timely appealed the ALJ decision to the Review Commission. At the Review Commission, the Commissioners were evenly split, 2 to 2, as to whether or not the ALJ decision should be affirmed. The Commissioners voting to affirm the ALJ (the “Affirming Commissioners”) found that the ALJ decision was supported by substantial evidence and was in accordance with law. (JA, pg. 7 -14) In fact, the Affirming Commissioners listed eleven separate factual findings made by the ALJ which supported her determination that the condition cited in the Citation was not S & S. (JA, pg. 13 -14) The Affirming Commissioners found that it would be improper to re-weigh the evidence, as requested by the Secretary. (JA, pg. 14)

The two Commissioners voting to reverse the ALJ (the “Reversing Commissioners”) found that the ALJ decision was not supported by substantial evidence. (JA, pg. 20 – 22) In so finding, the Reversing Commissioners determined that the ALJ failed to consider testimony that the roof fall in the extended cut would affect the supported roof behind the extended cut. (JA, pg. 21) The Reversing Commissioners then went on to determine that at least one miner, the continuous miner operator, stood a few feet from the last row of bolts every ten

minutes to check methane levels.¹ (Id.) Relying upon this determination, the Reversing Commissioners then concluded that “a miner within a few feet of a rock fall is reasonably likely to be injured”. (Id.) The two Reversing Commissioners also considered arguments not raised by the Secretary and concluded that the ALJ improperly considered redundant safety measures and the exercise of miner caution in her S & S analysis.

SUMMARY OF ARGUMENT

Consol requests that the well-reasoned opinion of the ALJ, finding that the roof control violation cited in the Citation was not S & S, be affirmed by this Court. The ALJ conducted a proper analysis of the evidence offered at trial, followed existing law and issued a decision clearly supported by substantial evidence.

Contrary to the Secretary's assertions, the ALJ did not improperly base her decision that the Citation was not S & S upon improper factors, such as redundant safety measures or assumptions of employee safety. The ALJ simply reviewed all of the relevant factors in conducting her S & S analysis and determined that the roof control violation, based upon those facts, was not reasonable likely to result in

¹ The evidence of record establishes that the miners used a 28-foot probe to conduct methane checks, keeping them well more than a “few feet” from the last row of bolts while checking methane levels. (JA, pg. 112)

a serious physical injury. As such, her determination that the Citation was not S & S, was proper and in accordance with law.

ARGUMENT

I. S & S Analysis

Whether a violation is significant and substantial (“S & S”) is determined under the familiar test in *Mathies Coal Company*, 6 FMSHRC 1, (January 1984). There must be a violation of a mandatory safety standard, the violation must contribute to a safety hazard, there must be a reasonable likelihood of an injury and the prospective injury must be of a reasonable serious nature. *Id* at 3-4.

A S & S violation is described in Section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. 30 U.S.C. § 814(d)(1). A violation is properly designated S & S “if based upon 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 serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The most disputed of the factors, the third element of the S & S criteria, is the only element at issue herein. The third element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125,

1129 (August 1985). This determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). The third element essentially outlines the Secretary's responsibility to prove the dangerousness of a violation based upon a fact-intensive analysis of the specific circumstances of the violation.

II. Standard of Review

In reviewing the Review Commission's findings of fact, the Mine Act imposes upon the reviewing court the same standard that governs the review of ALJ findings of fact by the Review Commission; that being a determination of whether or not the findings are support by substantial evidence on the record considered as a whole. 30 U.S.C. § 816(a)(1); *see also* 30 U.S.C. § 823(d)(2)(A)(ii)(I), (setting the "substantial evidence" standard for Review Commission review of ALJ Decisions); *Chaney Creek Coal Corp. v. FMSHRC*, 866 F.2d 1424, 1431 (D.C. Cir. 1989). In reviewing substantial evidence questions, the reviewing court is to determine whether there is "such relevant evidence as a reasonable mind might accept as adequate to support (the judge's) conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938). The legal conclusions of the ALJ are reviewed de novo. *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

The Secretary suggests that because there was no majority decision from the Review Commission in this instance, that this Court should review the ALJ decision. Consol has no objection to this position.

III. The ALJ's S & S Determination is Supported by Substantial Evidence, and Must be Affirmed by This Court.

The Secretary's assertion that this alleged violation was reasonably likely to lead to a significant physical injury has no basis in fact and is not supported by the evidence in this case. Ratliff based his S & S allegation on his belief that the adverse roof conditions could result in the roof breaking through the adverse conditions back to an area where the miners were working. (JA, pg. 106) The ALJ properly considered the factual evidence surrounding this assertion/belief and determined that it was not reasonably likely to happen. (JA, pg. 42-43) As a result, the ALJ's finding that the third prong of the *Mathies* analysis had not been met is supported by the evidence of record.

As set out in the Affirming Commissioners' decision, the ALJ made at least eleven separate findings which supported her determination that the cited condition was not S & S. (JA, pg. 13-14) Each and every one of those factual findings were supported by substantial evidence of record and cannot be disturbed on appeal. As explained by the Affirming Commissioners, while a different judge, considering those same facts, may have decided the S & S issue differently, it would be improper to re-weigh the evidence. Similarly, it would be improper for this Court

to review the factual findings made by the ALJ and conduct a re-weighing of the evidence to arrive at a different S & S determination.

From Review of the Secretary's Brief, it appears that the Secretary cannot point to any particular finding made by the ALJ that is not supported by substantial evidence. The Secretary meekly argues that the ALJ decision is not supported by substantial evidence without providing any specifics. The Secretary argues that it was improper for the ALJ to consider as relevant evidence, redundant safety measures and miner's exercise of caution in her S & S analysis. However, the Secretary fails to address the at least nine other findings made by the ALJ, which would overwhelmingly support the ALJ's finding that the cited condition was not S & S.

IV. It is Improper for this Court to Consider Arguments Not Raised Before the ALJ.

In his Petition for Discretionary Review filed with the Review Commission, the Secretary, for the first time argued that it was improper for the ALJ to consider redundant safety features as a part of her S & S analysis and that it was improper for the ALJ to assume that miners would exercise caution. The Secretary presented neither of those arguments in his Post Hearing Brief before the ALJ. Because those arguments do not intertwine with the factual determinations of the ALJ as to whether or not a roof fall would break back into a bolted area injuring a miner, consideration of those arguments is improper and may not serve as a ground for

reversal of the ALJ decision. 30 U.S.C. § 823(d)(2)(A)(iii); *Black Beauty Coal Co.*, 37 FMSHRC 687, 693-94 (April 2015). The Review Commission has similarly held that it was barred from considering a different S & S theory than was presented before the ALJ. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316 (Aug. 1992). These new arguments should not be considered by this Court and the Secretary's request that the ALJ decision be vacated, based upon those new arguments, should be denied.

V. The ALJ Did Not Erroneously Consider Redundant Safety Measures in Her S & S Analysis.

In the event this Court considers the new arguments raised by the Secretary, Consol asserts that the new arguments would not serve as a ground for reversal of the ALJ decision. The Secretary alleges that the ALJ committed an error of law when she considered as a part of her S & S analysis the fact that miners who would come into the area of the violation to perform roof bolting would be protected from serious injury by the ATRS system. The Secretary argues that the ATRS system is a "redundant safety measure" and, therefore should not have been considered by the ALJ in her S & S analysis. However, by its very nature, the ATRS system is not a "redundant safety measure"; instead, it is the primary safety measure for roof bolters who are performing their work in installing roof bolts.

The Merriam-Webster dictionary defines "redundant" as "repeating something else and therefore unnecessary; exceeding what is necessary or normal;

superfluous.” This definition is consistent with prior Commission ruling on redundant safety measures, which are additional safety measures, not the primary protection for miners such as the ATRS system on a roof bolting machine. In reviewing this issue, the Affirming Commissioners correctly pointed out that “the basic notion of redundant safety measures is that when the primary safety measures fail, we do not count on secondary – that is, redundant – safety measures that must come to life (such as sprinklers) to attenuate the danger”. (JA, pg. 15)

In this case, the roof had already partially fell into the cited area. The ALJ concluded that an injury was unlikely to occur because there were no miners exposed to the hazard at the time of the violation. She further concluded based upon as many as eleven different factors, that it was unlikely that a roof fall would continue out into supported areas where miners would be located, causing injury. The ALJ simply found that while the miners were conducting roof bolting operations in the cited area, they would not be placed in harm’s way because of the ATRS system on the roof bolting machine.

The roof bolting of un-supported areas in coal mines is something that takes place many times throughout the day. Each time that a cut of coal is taken from the face area of the mine, an area of un-supported roof is left. The roof bolting machines then move into the area to install roof bolts, supporting the roof in that area. In order for the miners who are performing roof bolting operations to be

protected from falling roof, the roof bolting machine is equipped with an ATRS system which places hydraulic pressure on the roof until the bolts can be installed, permanently supporting the area.

Upon review of the cases cited by the Secretary, it is apparent that the ALJ did nothing improper in her consideration of the miner's use of the ATRS system. The Secretary asserts that cases cited stand for the position that the S & S inquiry focuses on "the nature of the violation" and that "because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry". However, contrary to the Secretary's arguments, the ALJ focused her S & S inquiry on the nature of the violation and simply determined that in this instance no one was exposed to the area of danger, making it unlikely that a serious physical injury would result from the violation, thus the violation was not S & S.

It is also important to note that Ratliff watched the miners bolt the area using the roof bolting machine and ATRS system until it was completed, so that he could travel into the area to complete his measurements. Surely, the Secretary's own representative would not have allowed the miners to conduct this work if he believed that the bolting of the area would have reasonably resulted in injury to miners.

VI. The ALJ Did Not Erroneously Consider That Miners Would Exercise Caution in Her S & S Analysis.

Once again the Secretary has taken factual findings made by the ALJ and tried to somehow twist them into legal determinations in order to get a *de novo* review by first the review Commission, and now this Court. Simply stated, the ALJ merely concluded that no miners would be in an area at the time of the violation where they would have been exposed to the hazard of adverse roof conditions. This is a factual finding that is clearly supported by substantial evidence and must be affirmed.

Adoption of the Secretary's argument would basically result in every violation being S & S, because the ALJ would have to conclude that in every instance miners would intentionally place themselves in danger, even when the training, experience and general intelligence taught them otherwise. In this case, there is not one single statement in the ALJ decision where she indicates that she relied upon miners exercising caution as a part of her S & S analysis and ultimate determination. The ALJ simply relied upon the testimony and the evidence submitted at trial to arrive at her conclusion that no one would be exposed to the hazard which resulted from the adverse roof condition and the roof fall.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests that this Court affirm the well-reasoned decision of the ALJ in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: February 21, 2018

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 21st day of February, 2018, I caused this Brief of Respondent to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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