Oral argument not yet scheduled

No. 17-1219

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION,

Petitioner,

v.

CONSOLIDATION COAL COMPANY and
FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION,

Respondents.

On Petition for Review of a Decision of the
Federal Mine Safety and Health Review
Commission

Secretary of Labor's Brief

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties and amici

The parties who appeared before the Federal Mine Safety and Health Review Commission are the Secretary of Labor and Consolidation Coal Company. No amici appeared.

The parties in this Court are the petitioner, the Secretary, and the respondents, the Commission and Consolidation Coal Company. No amici are participating in this case.

2. Rulings under review

The Secretary seeks review of the Commission's decision in *Consolidation Coal Co.*, FMSHRC Nos. VA 2012-42 and VA 2013-192, which was issued on September 14, 2017, and is reported at 39 FMSHRC 1737 (Sept. 2017). The Commission evenly divided about whether to affirm Commission Administrative Law Judge Priscilla M. Rae's decision. The judge's decision was issued on October 22, 2015, and is reported at 37 FMSHRC 2396 (Comm'n ALJ Oct. 2015).

3. Related cases

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

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 3

STATUTORY BACKGROUND 4

STATEMENT OF FACTS 5

1. Roof control in underground coal mines 5

2. The inspection and citation 8

3. The judge's decision 11

4. The Commission's decision 12

SUMMARY OF ARGUMENT 15

STANDING 17

ARGUMENT 17

1. The S&S test 17

2. Because there is no Commission majority decision, the Court should review the judge's decision. 20

3. The judge erred by considering redundant safety measures in the S&S analysis. 21

A. It was legal error for the judge to consider redundant safety measures 25

B. The judge erred by taking redundant safety measures into account when determining whether the violation was S&S. 25

C. There is no distinction between "primary" and "secondary" safety measures for S&S purposes 30

4. The judge erred by assuming that miners would exercise caution. 33

5. If the Court concludes that the issue in this case is whether substantial evidence supports the judge's decision, the Court should still set the judge's decision aside 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Buck Creek Coal, Inc. v. MSHA,
52 F.3d 133 (7th Cir. 1995) 22, 23, 24, 32

Consolidation Coal Co. v. FMSHRC,
824 F.2d 1071 (D.C. Cir. 1987) 19

Cumberland Coal Res., LP v. FMSHRC,
515 F.3d 247 (3d Cir. 2008) 20

* *Cumberland Coal Res., LP v. FMSHRC*,
717 F.3d 1020 (D.C. Cir. 2013) 16, 21, 22, 23, 30, 31, 32

Ford Motor Co. v. Interstate Commerce Comm'n,
714 F.2d 1157 (D.C. Cir. 1983) 21

Knox Creek Coal Corp. v. Sec'y of Labor,
811 F.3d 148 (4th Cir. 2016) 19, 21, 24, 32

Mach Mining, LLC v. Sec'y of Labor,
809 F.3d 1259 (D.C. Cir. 2016) 25, 37

Pa. Elec. Co. v. FMSHRC,
969 F.2d 1501 (3d Cir. 1992) 20

Plateau Mining Corp. v. FMSHRC,
519 F.3d 1176 (10th Cir. 2008) 20

Prairie State Generating Co. LLC v. Sec'y of Labor,
792 F.3d 82 (D.C. Cir. 2015) 6, 25

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 21

Sec'y of Labor, MSHA v. Excel Mining, LLC,
334 F.3d 1 (D.C. Cir. 2003) 20

* Authorities upon which we chiefly rely are marked with asterisks.

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111 F.3d 913 (D.C. Cir. 1997) 21, 22, 23, 25, 26, 31

Thunder Basin Coal Co. v. Reich,
510 U.S. 200 (1994) 4, 5

United Mine Workers of Am., Int'l Union v. Dole,
870 F.2d 662 (D.C. Cir. 1989) 5, 6, 7

Western Fuels-Utah, Inc. v. FMSHRC,
870 F.2d 711 (D.C. Cir. 1989) 36

Statutes

30 U.S.C. § 801(a) 4

30 U.S.C. § 801(c) 4

30 U.S.C. § 811(a) 4

30 U.S.C. § 813(a) 4

30 U.S.C. § 814(a) 4, 5

30 U.S.C. § 814(d) 4, 5

30 U.S.C. § 814(d)(1) 17, 22, 25

30 U.S.C. § 815(a) 4, 5

30 U.S.C. § 815(d) 1

30 U.S.C. § 816 1

30 U.S.C. § 816(a)(1) 17, 37

30 U.S.C. § 816(b) 2, 17

30 U.S.C. § 820(a) 4

30 U.S.C. § 823 5

30 U.S.C. § 823(a) 20

30 U.S.C. § 823(d) 1

30 U.S.C. § 823(d)(2) 5

30 U.S.C. § 823(d)(2)(A) 1

30 U.S.C. § 862 6

30 U.S.C. § 862(a) 6

Federal Mine Safety and Health Act of 1977,
30 U.S.C. § 801 *et seq.* 4

Regulations

29 C.F.R. § 2700.8(c) 1

30 C.F.R. § 75.202(b) 7, 29, 34

30 C.F.R. § 75.209 ..... 7, 26

30 C.F.R. § 75.220 6

30 C.F.R. § 75.220(a)(1) 10, 26

30 C.F.R. §§ 75.200–215 6

Federal Mine Safety and Health Review Commission Decisions

* *Black Beauty Coal Co.*,
38 FMSHRC 1307 (June 2016) 16, 21, 31, 32

Brody Mining, LLC,
37 FMSHRC 1687 (Aug. 2015) 21, 25, 32

C F & I Steel Corp.,
4 FMSHRC 595 (Comm'n ALJ Apr. 1982) 27

Consolidation Coal Co.,
6 FMSHRC 34 (Jan. 1984) 6, 18

Eagle Nest, Inc.,
14 FMSHRC 1119 (July 1992) 33

Elk Run Coal Co.,
27 FMSHRC 899 (Dec. 2005) 18

Great W. Elec. Co.,
5 FMSHRC 840 (May 1983) 33, 35

Mathies Coal Co.,
6 FMSHRC 1 (Jan. 1984) 5, 17, 18

Nacco Mining Co.,
3 FMSHRC 848 (Apr. 1981) 36

* *Newtown Energy, Inc.*,
38 FMSHRC 2033 (Aug. 2016) 16, 25, 33, 34

Pa. Elec. Co.,
12 FMSHRC 1562, 1563–65 (Aug. 1990) 20

Stanford Mining Co.,
8 FMSHRC 1460 (Comm'n ALJ Sept. 1986) 27

U.S. Steel Mining Co.,
6 FMSHRC 1834 (Aug. 1984) 33

Western Fuels-Utah, Inc.,
10 FMSHRC 256 (Mar. 1988) 36

White Cnty. Coal Corp.,
9 FMSHRC 1578 (Sept. 1987) 36

Other Authorities

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Fed. R. App. P. 26(a)(3)(A) 2

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https://arlweb.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp 35

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S. Rep. No. 95-181 (1977) 6

Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354 (Jan. 27, 1988) 7

GLOSSARY

AR	Citations to the Administrative Record
Commission	Federal Mine Safety and Health Review Commission
Consol	Consolidation Coal Company
JA	Citations to the Joint Appendix
Judge	Commission Administrative Law Judge Priscilla M. Rae
Mine Act	Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor, Mine Safety and Health Administration

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this petition for review of a decision of the Federal Mine Safety and Health Review Commission under Section 106 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 816. The Commission had jurisdiction over the case under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d), 823(d).

The administrative law judge's decision in this case was issued on October 22, 2015. AR 1155. The Secretary filed a petition for discretionary review of the judge's decision with the Commission on November 23, 2015, within the 30-day period established by Section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A). AR 1172; *see also* 29 C.F.R. § 2700.8(c) (due dates for Commission pleadings extended to the first day that is not a Saturday, Sunday, or federal holiday). The Commission granted the petition for discretionary review on November 30, 2015, and issued its decision on September 14, 2017. AR 1258. The Commission was evenly divided about whether to affirm the judge's decision; the split allowed the judge's decision to stand as if affirmed. The Secretary filed a petition for review with this Court on October 16, 2017, within the 30-day period established by Section 106 of the Mine

Act. 30 U.S.C. § 816(b); *see also* Fed. R. App. P. 26(a)(3)(A) (time for filing extended to the first day that is not a Saturday, Sunday, or legal holiday).

STATEMENT OF THE ISSUES

Consol operates the Buchanan Mine #1, an underground coal mine in Virginia. MSHA inspected the mine and issued a citation alleging that a cut Consol made in the mine roof was too long and exposed miners to deadly roof falls. MSHA designated that violation as being "significant and substantial" (S&S), but a Commission judge found that the violation was not S&S.

1. The Commission and this Court have repeatedly held that redundant safety measures are irrelevant to determining whether a violation is S&S. The judge found that this violation was not S&S, reasoning that miners were unlikely to be injured by the violation because they would be protected from a roof fall by other equipment and are prohibited from walking or working under unsupported roof. Did the judge err by considering those redundant safety measures?
2. The Commission has long held that whether miners exercise caution is irrelevant to the S&S analysis. The judge found this violation was not S&S in part because she assumed miners would not go under unsupported roof. Did the judge err by assuming that miners would exercise caution?

STATUTORY BACKGROUND

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, was enacted to improve safety and health in all of the Nation's mines in order to protect the mining industry's "most precious resource—the miner." 30 U.S.C. § 801(a). Congress stressed that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." *Id.* § 801(c). That sense of urgency was grounded in the history of "[f]requent and tragic mining disasters [that] testified to the ineffectiveness of then-existing enforcement measures." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209–10 (1994).

The Mine Act authorizes the Secretary of Labor, acting through the Mine Safety and Health Administration, to promulgate mandatory safety and health standards, to conduct inspections of mines, to issue citations and orders for violations of the Act or mandatory standards, and to propose civil penalties for those violations. 30 U.S.C. §§ 811(a), 813(a), 814(a), 814(d), 815(a), 820(a). MSHA may issue citations under

Section 104(a) or 104(d) of the Mine Act, depending on the nature and severity of the violation. *See id.* §§ 814(a), (d). MSHA designates more serious violations as "significant and substantial" (S&S) if they "significantly and substantially contribute to" a hazard. *See, e.g.*, *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (articulating a four-element test the Secretary must satisfy to prove that a violation is S&S).

Mine operators may contest citations or orders before the Federal Mine Safety and Health Review Commission. 30 U.S.C. § 815(a). The Commission is an independent adjudicatory agency established to provide trial-type administrative hearings and appellate review in cases arising under the Mine Act. *Id.* 823; *Thunder Basin*, 510 U.S. at 204. Commission administrative law judges conduct initial hearings, and parties may seek discretionary review of adverse decisions from the Commission. 30 U.S.C. § 823(d)(2).

STATEMENT OF FACTS

1. Roof control in underground coal mines

Mine roofs are inherently dangerous, and roof falls are a leading cause of death in underground mines. *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 664 (D.C. Cir. 1989); *Prairie State*

Generating Co. LLC v. Sec'y of Labor, 792 F.3d 82, 84 n.1 (D.C. Cir. 2015). Inadequately-supported roofs or ribs can collapse, injuring miners—often fatally—and making other hazards and injuries more dangerous or severe. *See UMWA v. Dole*, 870 F.2d at 664. And "even good roof can fall without warning." *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984). That is why "Congress, the Secretary of Labor, the industry, and [the] Commission" recognize roof falls to be "one of the most serious hazards in mining." *Id.* at 37 n.4.

Because of that danger, mine operators must comply with a set of general statutory mandates and safety standards governing roof control. 30 U.S.C. § 862; 30 C.F.R. §§ 75.200–215. Mine operators must also develop and follow an MSHA-approved, mine-specific roof control plan in every underground coal mine. 30 U.S.C. § 862(a); 30 C.F.R. § 75.220. Roof control plans supplement the "nucleus" of general requirements with "whatever unique measures [are] necessary to address the unique attributes of a particular mine." *UMWA v. Dole*, 870 F.2d at 669 (emphasis removed); S. Rep. No. 95-181, at 25 (1977) ("Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and

potentially multifaceted problems as ventilation, roof control and the like."). Plan provisions are enforceable as mandatory standards: a violation of the plan constitutes a violation of the standard that requires the plan. *See UMWA v. Dole*, 870 F.2d at 671.

MSHA standards and mines' roof control plans require redundant safety measures to protect miners from roof falls. This case involves two MSHA standards and two provisions of the mine's roof control plan. One standard requires mine operators to use Automated Temporary Roof Support (ATRS) systems in conjunction with various mining activities. 30 C.F.R. § 75.209. ATRS systems are "are usually composed of one or more hydraulically-actuated cylinders with a bar, ring, or other support device that can be lifted and pressed against the mine roof" and are used to "provide temporary roof support for persons who would otherwise be exposed to unsupported roof during the process of installing roof supports." *Safety Standards for Roof, Face and Rib Support*, 53 Fed. Reg. 2354, 2355, 2363 (Jan. 27, 1988). The other standard generally prohibits anyone from working or traveling under unsupported roof. 30 C.F.R. § 75.202(b).

This case also involves two provisions of the mine's roof control plan. One provision prohibits any cut longer than 20 feet when there is "any detectable condition which is known to indicate the presence of adverse roof conditions." JA 134. The plan also requires additional roof bolts[1] to be installed in a tighter pattern (*i.e.*, closer together) in adverse conditions. JA 124, 137.

2. The inspection and citation

Consol operates the Buchanan Mine #1, a large underground coal mine in Buchanan County, Virginia. JA 132. The mine's roof control plan limits cuts to 20 feet if the mine shows "[a]ny detectable condition which is known to indicate the presence of adverse roof conditions." JA 134.

On July 14, 2011, MSHA Inspector Gregory Ratliff visited the mine to investigate an unrelated complaint. JA 103. Robert Baugh, a Consol safety inspector, accompanied him. JA 118. During the

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[1] A roof bolt is "[a] long steel bolt inserted into walls or roof of underground excavations to strengthen the pinning of rock strata. It is inserted in a drilled hole and anchored by means of a mechanical expansion shell that grips the surrounding rock at about 4 ft (1 m) spacing and pins steel beams to the roof." Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 469 (2d ed. 1996).

inspection, Inspector Ratliff saw miners installing roof bolts in a crosscut that they were developing between the No. 3 and No. 2 entries.[2] JA 103, 106. The cut seemed to exceed the roof control plan's 20-foot limit. JA 103. The cut had punched through to the No. 2 entry, and part of the roof had collapsed; two of the bolts in the last row of permanent roof support had been damaged. JA 105, 113, 119. After the inspection, Baugh investigated the roof fall and concluded that it had damaged most of the bolts; another bolt had been damaged by the continuous mining machine. JA 119, 186.

Inspector Ratliff saw adverse conditions in the area, including cracks in the roof, cracks in test holes from the previous cut, and partial roof falls. JA 104, 106. He checked the test holes in the previous cut and found evidence of additional cracks in the mine roof. JA 104. Inspector Ratliff also saw that rock had fallen from the deep cut and from the cut that preceded it. JA 104, 106. Between 29 and 36 inches of rock had

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[2] Entries are the main tunnels driven into rock to mine coal. Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 189 (2d ed. 1996). Crosscuts are smaller tunnels driven perpendicular to, and between, the main entries to connect them. *Id.* at 133.

fallen from the roof on the left side of the deep cut; up to 42 inches had fallen from the right side. JA 106.

After the miners finished bolting the deep cut, Inspector Ratliff measured it. JA 103–04. The roof control plan specifies that cuts are measured from the last row of permanent roof bolts to the end of the cut. JA 133. Inspector Ratliff took two measurements: one from the last permanent row of roof bolts, and because two of the bolts in that row were damaged, another one from the previous row. JA 104. The cut measured 23.5 feet from the row with damaged bolts and 26 feet from the row of intact bolts. *Id*.

It was undisputed at the hearing that adverse conditions existed, so that Consol could only take cuts up to 20 feet. Consol Safety Inspector Baugh acknowledged that adverse conditions were apparent when he and Inspector Ratliff arrived at the crosscut, JA 123, and Consol Mine Foreman Terry Hamilton testified that he would not have knowingly taken a 22- or 23-foot cut in that area. JA 114.

Inspector Ratliff issued Citation No. 8189820, alleging that Consol had violated its roof control plan (and therefore had violated 30 C.F.R. § 75.220(a)(1)) by making a cut that was too deep. JA 103–04, 127–28.

He designated the violation as being S&S, concerned that a roof fall caused by the deep cut in adverse conditions could break back through the roof bolts. JA 106, 127. Rock weighing 150 pounds per square foot could fall from a height of seven feet, injuring or killing miners in the area. JA 106.

3. The judge's decision

Consol contested the citation, and a Commission administrative law judge held a hearing and issued a decision. *See* JA 29–45.

The judge found that adverse conditions existed; that Consol was limited to a cut of 20 feet; and that the cut Consol made measured between 22 and 23.5 feet. JA 42. The judge found that Consol violated its roof control plan, and that the violation contributed to the hazard of a roof fall "occurring due to the extended span of unsupported roof at an intersection." JA 42. But the judge found that the violation was not S&S because the Secretary had not proven that a roof fall was reasonably likely to result in serious injury. JA 42–43.

To support that finding, the judge reasoned that miners would likely not work in the affected area "because they work a substantial distance back from the unsupported roof and are not permitted to enter

the 'red zone' beyond the next-to-last row of bolts." JA 42. She also reasoned that a miner performing gas checks (conducting routine monitoring of the mine's atmosphere) would not go beyond the next-to-last row of bolts, and that any miners going beyond that point would be protected by the supplemental roof support of the ATRS or the upward pressure of the continuous miner's ripper head on the roof. JA 42. The judge reasoned that the tighter bolting pattern in the cited area "decreased the likelihood that a roof fall originating in the extended cut would be able to spread into or significantly affect the bolted roof areas behind it." JA 42. Finally, the judge reasoned that the hazardous conditions would not have exposed miners to danger for a lengthy period of time because the unsupported roof was already being bolted by the time that Inspector Ratliff arrived. JA 42–43.

4. The Commission's decision

The Secretary appealed to the Commission, arguing that the judge improperly relied on redundant safety measures and assumed that miners would exercise caution. Two Commissioners voted to affirm the

judge's decision, and two voted to reverse. That split allows the judge's decision to stand as if affirmed.[3]

Acting Chairman Althen and Commissioner Young voted to affirm, reasoning that substantial evidence supports the judge's decision. JA 6–14. They also rejected the Secretary's argument that the judge erred by considering redundant safety measures and assuming that miners would not go under unsupported roof (*i.e.*, would exercise caution). JA 14–15. They did not explain why they rejected the Secretary's argument that the judge assumed miners would exercise caution. *See* JA 14–16.

Rejecting the Secretary's argument that the judge considered redundant safety measures, Acting Chairman Althen and Commissioner Young asserted that not all safety standards are redundant. JA 14–15. They suggested that there is a distinction between "primary safety measures" and "secondary—that is redundant—safety measures" that "come to life . . . to attenuate the danger" created when a "primary" safety measure fails. JA 15. They did

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[3] As explained in Section 2 of the argument, the split also means that the decision on appeal to this Court is the judge's decision.

not cite any case to support that purported distinction. *See* JA 15–16. They asserted, first, that roof bolts are "the primary safety measure" for roof support generally. JA 15. They also asserted that the ATRS is the "primary" safety measure that protects miners while they bolt the roof, and that the ATRS is "a required and accepted" safety measure, so that it was relevant to evaluating the likelihood of injury from a roof fall. JA 16.

Commissioners Jordan and Cohen voted to reverse the judge. They concluded that substantial evidence did not support the judge's decision because, in part, the judge's factual findings were inconsistent: her finding that the violation was not S&S ignored other evidence (including the fact that roof fall had damaged the last row of bolts) that she had previously credited. JA 20–21. They also concluded that the judge did not fully consider evidence that miners worked near the edge of the unsupported roof and so were reasonably likely to be injured. JA 21.

Commissioners Jordan and Cohen also concluded that the judge erred by ignoring "settled law" that redundant safety measures are irrelevant to the S&S analysis. JA 24–27. They noted that all of the

safety measures the judge believed made injury not reasonably likely—miners not going under unsupported roof, miners being protected by the ATRS system, and the tighter roof bolting pattern—are required by other MSHA standards or the mine's roof control plan. JA 24–25. They also rejected any distinction between "'primary' safety measures that prevent an incident and 'secondary' safety measures that seek to control a danger once it occurs," noting that such a distinction has no precedential support. JA 25 (collecting cases). They explained that many standards may be aimed at preventing the existence of or reducing the severity of the same hazard, but that the S&S analysis focuses only on the particular violation—not on those redundant safety measures. JA 27.

Finally, Commissioners Jordan and Cohen concluded that the judge erred by relying on miners' exercise of caution to support her finding that the violation was not S&S. JA 27 (collecting cases).

SUMMARY OF ARGUMENT

This case involves two well-established principles: that, when determining whether a violation of an MSHA standard is S&S, judges should neither consider redundant safety measures nor assume that

miners will exercise caution. *See, e.g.*, *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1027 (D.C. Cir. 2013); *Black Beauty Coal Co.*, 38 FMSHRC 1307, 1312–14 (June 2016); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2044 (Aug. 2016). The judge in this case did both, so the decision should be set aside and remanded for the judge to conduct an S&S analysis that is based on relevant considerations.

The judge erred by concluding that it was not reasonably likely that miners would be injured because they would be protected by the ATRS, were not permitted to work or travel under unsupported roof, or would be protected by a tighter roof bolting pattern. Those are redundant safety measures that the judge should not have considered.

The judge also erred by assuming that miners would exercise caution. She concluded that miners were not reasonably likely to be injured because they are not permitted to work or travel under unsupported roof. But judges may not assume that miners will act cautiously, and whether miners would do so (or actually did so in this case) is irrelevant to the S&S analysis.

STANDING

Under Section 106(b) of the Mine Act, the Secretary has standing to appeal the Commission's decision allowing the judge's decision to stand. 30 U.S.C. § 816(b). The Secretary has been adversely affected by the Commission's final order, which effectively affirmed the judge's vacating the S&S designation associated with Citation No. 8189820 that MSHA issued under the Mine Act. *See id.* § 816(a)(1).

ARGUMENT

1. The S&S test

The Mine Act requires the Secretary to designate a violation of a mandatory health or safety standard as "significant and substantial" (S&S) when the violation "is 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).

The Commission has developed a four-step test for evaluating whether a violation is S&S. *See Mathies*, 6 FMSHRC at 3–4. To establish that a violation is S&S under *Mathies*, the Secretary 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 injury; and (4) a reasonable likelihood that that injury in question will be of a reasonably serious nature.

Id.

When evaluating whether a roof control plan violation is S&S, and specifically whether the Secretary has satisfied the third prong of *Mathies*, the Commission has focused on whether miners would have been exposed to a roof fall, if one occurred. *Elk Run Coal Co.*, 27 FMSHRC 899, 907 (Dec. 2005) (vacating non-S&S finding and remanding for judge to evaluate "whether any miner on any shift would have been exposed to the hazard arising out of the violation, so as to create a reasonable likelihood of injury"); *Consolidation Coal Co.*, 6 FMSHRC at 38 (affirming S&S finding for violation of roof control plan, and noting that "[h]ad a roof fall occurred, there is a reasonable likelihood of injury" because miners were exposed to the hazard).

When the judge heard this case, controlling Commission precedent held that, at the third *Mathies* step, "the Secretary [must prove] a

reasonable likelihood the hazard contributed to will result in an event in which there is an injury." JA 31 (internal quotation omitted).[4]

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[4] There have since been two relevant developments in the law. First, the Fourth Circuit adopted the Secretary's interpretation of the third *Mathies* element. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–63 (4th Cir. 2016) (explaining that the third step of the Mathies analysis assumes the existence of the relevant hazard). The Fourth Circuit also opined on the second Mathies step, suggesting that it "requires a showing that the violation is at least somewhat likely to result in harm." *Id.* at 163.

The Commission then issued a split decision interpreting the Fourth Circuit's opinion regarding the second step of *Mathies*, without the benefit of the Secretary's views—*i.e.*, without determining whether the Secretary's interpretation merits deference. *See Newtown*, 38 FMSHRC at 2040 n.13. Three Commissioners held that the Secretary must prove, at the second *Mathies* step, that a hazard is reasonably likely to occur, and that the Fourth Circuit did not intend to articulate a different test. *Id.* at 2038–39. Two Commissioners disagreed and opined that the second *Mathies* step requires the violation "to be 'at least somewhat likely to result in harm . . . .'" *Id.* at 2051–52 (Comm'rs Jordan and Cohen, dissenting) (quoting *Knox Creek*, 811 F.3d at 162).

Exercising his own authority to interpret the Mine Act, and in agreement with the dissenting Commissioners in *Newtown*, the Secretary interprets Section 104(d)(1) as requiring that an S&S violation be of such a nature that it "could" result in a safety hazard. That interpretation is consistent with Mine Act's text and legislative history, which shows that Congress did not intend for it to be particularly difficult to prove that violations are S&S. *See Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1085 (D.C. Cir. 1987); *Knox Creek*, 811 F.3d at 163. It is also consistent with the Fourth Circuit's suggestion that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek*, 811

2. Because there is no Commission majority decision, the Court should review the judge's decision.

The Commission holds that, when it is evenly divided about whether to affirm a judge's decision, the effect of that division is to allow the judge's decision to stand as if affirmed.[5] *See, e.g.*, *Pa. Elec. Co.*, 12 FMSHRC 1562, 1563–65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). Because there is no Commission majority decision in cases like those, the Commission has not articulated a rationale subject to judicial review; courts have therefore reviewed the judge's decision, not the Commission's decision. *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1191 (10th Cir. 2008); *Cumberland Coal Res., LP v. FMSHRC*, 515 F.3d 247, 252 & n.9 (3d Cir. 2008). That rule is grounded in *SEC v. Chenery Corp.*, which explains that a reviewing

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F.3d at 162. And it is consistent with the Commission's understanding of the second step of the *Mathies* test up until *Newtown*. *See, e.g.*, *Musser Eng'g*, 32 FMSHRC 1257, 1280 (Oct. 2010) (stating that, at step two, "[t]here is no requirement of 'reasonable likelihood'"). The Secretary's interpretation is entitled to deference, *see Sec'y of Labor, MSHA v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003), and the Secretary urges the Court to accept it.

[5] The Commission has five members, 30 U.S.C. § 823(a), but when it decided this case, only four were serving.

court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." 332 U.S. 194, 196 (1947).

Although this Court has not yet addressed this question, it should follow the Tenth Circuit's and Third Circuit's approach: when there is no Commission majority opinion, it should review the judge's decision. *Cf. Cumberland Coal*, 717 F.3d at 1027 (noting that split Commission decisions are non-precedential); *Ford Motor Co. v. Interstate Commerce Comm'n*, 714 F.2d 1157, 1163 (D.C. Cir. 1983) (divided vote of the full Interstate Commerce Commission left the decision of a lower Division as the Commission's final judgment).

3. The judge erred by considering redundant safety measures in the S&S analysis.

The Commission and this Court have repeatedly held that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Cumberland Coal*, 717 F.3d at 1029 (quoting *Sec'y of Labor, MSHA v. FMSHRC (Jim Walter Res.)*, 111 F.3d 913, 917 (D.C. Cir. 1997)); *Black Beauty*, 38 FMSHRC at 1312–14; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *see also Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek Coal, Inc. v. MSHA*, 52

F.3d 133, 136 (7th Cir. 1995). The judge, however, found that the violation in this case was not S&S because miners would be protected from a roof fall by other safety equipment or rules. That finding was error, and the Court should set that finding aside.

In *Jim Walter Resources*, this Court held that the text of the Mine Act "plainly exclude[s] consideration of surrounding conditions that do not violate health and safety standards" when determining whether a violation is S&S. 111 F.3d at 917. The Court held that the language of Section 104(d)(1), which requires the Secretary to designate a violation as S&S if "*such violation* is of *such nature* as could significantly and substantially contribute to the cause or effect of a coal . . . mine safety or health hazard," does not say "such violation together with surrounding circumstances that do not violate health and safety standards." *Id.* (quoting 30 U.S.C. § 814(d)(1)) (emphasis in original). The Court explained that "surrounding conditions are not part of 'such violation[s],] nor do they affect the 'nature' of those violations," so other conditions cannot be taken into account in the S&S analysis. *Id.*

This Court reaffirmed that principle in *Cumberland Coal*, 717 F.3d at 1028–29. In that case, MSHA issued citations alleging that four

lifelines (which mark the designated routes miners would use to escape the mine during an emergency) in one of the mine operator's mines were defective, and that the violations were S&S because they could delay miners' escape, subjecting them to carbon monoxide poisoning. *Id.* at 1022. The Commission affirmed the S&S designations, and the mine operator appealed. *Id.* at 1024–25. The operator argued that the Commission should have considered "evidence of preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely." *Id.* at 1028. The Court rejected that argument, emphasizing that the S&S inquiry focuses on "the nature of the violation," and that "[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry." *Id.* at 1029 (quoting *Jim Walter Res.*, 111 F.3d at 917, and citing *Buck Creek*, 52 F.3d at 136).

Practical concerns also support treating redundant safety measures as irrelevant to the S&S analysis. In *Buck Creek*, the Seventh Circuit affirmed an S&S violation related to accumulations of explosive coal dust, accepting that the dust could be ignited and that the

resulting fire could injure miners. 52 F.3d at 134–35. The court rejected evidence about the mine's fire detection, suppression, and rescue systems, explaining that considering that evidence "defies common sense":

> The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires.

Id. at 136. In other words, the existence of redundant safety measures does not practically show that a particular violation is not S&S.

And finally, policy concerns support treating redundant safety measures as irrelevant to the S&S analysis. In *Knox Creek*, the Fourth Circuit rejected an argument that "compliance with some mandatory safety standards could preclude an S&S finding for the violation of an entirely separate mandatory standard." 811 F.3d at 162. The court explained that "if mine operators could avoid S&S liability . . . by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply," and that such a result "would make such standards 'mandatory' in name only." *Id.* (internal quotation omitted). Mine operators should not be permitted to

hide behind compliance with some safety standards to avoid liability for significant and substantial violations of others.

A. It was legal error for the judge to consider redundant safety measures.

The Court reviews the Commission's legal conclusions *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263 (D.C. Cir. 2016). It was legal error for the judge to consider redundant safety measures in the S&S analysis. *See, e.g.*, *Newtown*, 38 FMSHRC at 2044 (holding that a judge's reliance on irrelevant evidence in the S&S analysis is legal error); *Brody Mining*, 37 FMSHRC at 1691 (holding that judge erred by basing an S&S conclusion on the presence of redundant safety measures); *cf. Prairie State*, 792 F.3d at 93–94 (describing as "legal error" a judge's purported failure to consider relevant evidence).

B. The judge erred by taking redundant safety measures into account when determining whether the violation was S&S.

The S&S analysis focuses on the violation alleged in the citation. *See* 30 U.S.C. § 814(d)(1) (focusing on "such violation" of a mandatory MSHA standard); *Jim Walter Res.*, 111 F.3d at 917 (noting Section 104(d)(1)'s focus on "such violation"). In this case, the violation was the

deep cut prohibited by the mine's roof control plan. JA 127–28 (citation issued for a violation of 30 C.F.R. § 75.220(a)(1)). The judge's S&S analysis should have focused on that violation, and the judge erred by considering redundant safety measures.

First, the judge erred by finding that the deep cut was less dangerous because the mine was using an ATRS system. MSHA requires mine operators to use ATRS systems to protect miners while they install permanent roof support. 30 C.F.R. § 75.209. That standard is one of many redundant roof control standards that, in conjunction with roof control plans, are aimed at preventing roof falls. It is also unquestionably an important standard that protects miners every day—but it is not the standard that was violated in this case. The ATRS system is therefore not part of "such violation" that is allegedly S&S; instead, it is a redundant safety measure that is irrelevant to the S&S analysis. *See Jim Walter Res.*, 111 F.3d at 917. The judge erred by basing her S&S findings, in part, on the mine's use of "supplemental roof support." JA 42.

That legal principle is supported by the reality that accidents happen even when ATRS systems are in use: the system might not be

properly positioned; it might not be flush against the roof; miners could work outside its protection; or it simply might not be able to protect miners from a roof fall. *See, e.g.*, *Stanford Mining Co.*, 8 FMSHRC 1460, 1461 (Comm'n ALJ Sept. 1986)[6] (miner killed by roof fall after ATRS was depressurized to allow miner to adjust other roof supports); *C F & I Steel Corp.*, 4 FMSHRC 595, 599 (Comm'n ALJ Apr. 1982) (finding that a roof fall could cause the permanent (supported) roof to collapse, and that "[t]he ATRS . . . would not protect the miners in any fashion because the rock was being hinged by the edge of the permanent roof support. If anything the ATRS canopy contributed to the toppling motion of the rock."); MSHA, *Report of Investigation - Fatal Roof Fall Accident - February 20, 2015*, https://arlweb.msha.gov/fatals/coal/2015/final-reports/final-c15-02.pdf 2, 6 (June 17, 2015) (miner killed by roof fall between last row of bolts and ATRS, and ATRS was not properly contacting the roof to provide support) (last visited Jan. 8, 2018); MSHA, *Report of Investigation - Fatal Fall of Roof Accident - November 10, 2014*,

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[6] Commission judges' decisions are not precedential, *see* 29 C.F.R. § 2700.69(d), but they are persuasive.

https://arlweb.msha.gov/fatals/coal/2014/final-reports/final-c14-14.pdf 9 (Mar. 5, 2015) (miner killed by roof fall when ATRS was not properly positioned) (last visited Jan. 8, 2018); MSHA, *Report of Investigation - Fatal Roof Fall Accident - March 13, 2013*, https://arlweb.msha.gov/FATALS/2013/ftl13c07.pdf 3, 11 (July 10, 2013) (miner killed by rock fall when he was positioned partially outside the ATRS and "[t]he rock fell in such a manner that the Automatic Temporary Roof Support (ATRS) could not prevent it from hitting [the miner].") (last visited Jan. 8, 2018). And in July 2008, a miner was killed by a roof fall in the Buchanan Mine #1 even though an ATRS system was in use. Tr. 240; MSHA, *Report of Investigation - Fatal Fall of Roof Accident - July 25, 2008*, https://arlweb.msha.gov/FATALS/2008/ftl08c18.pdf (Feb. 12, 2009) (last visited Jan. 8, 2018). Those accidents are practical illustrations of why redundant safety measures are irrelevant to the S&S analysis: other safety measures do not eliminate the risk posed by a hazard.

Second, the judge erred by finding that the tighter bolting pattern used in the area made a roof fall less likely. The mine's roof control plan requires a tighter bolting pattern in adverse conditions, JA 124, 137, so

it is a redundant safety measure. The tighter pattern may provide additional roof support, but it is a safety measure wholly separate from the prohibition on deep cuts, and it is irrelevant to the question of whether the deep cut in this case was an S&S violation. The judge erred by basing her S&S finding, in part, on the bolts' "supplemental roof support." JA 42.

The roof fall that occurred in this case shows why that legal principle is important. Even though the roof was bolted to the near end of the deep cut, the roof still collapsed and broke back through one row of bolts. JA 113–14, 119. The evidence that the deep cut could have broken back through the permanent roof bolts, and in fact *had* done just that, shows that redundant safety measures like roof bolts do not eliminate the risks posed by another hazard.

Finally, the judge erred by finding that miners were unlikely to be injured because they were not likely to be near or under unsupported roof.[7] MSHA prohibits anyone from working or traveling under unsupported roof (with limited exceptions). 30 C.F.R. § 75.202(b). That

[7] The assumption that miners would not venture under unsupported roof is also irrelevant, as explained below in Section 4, because whether miners exercise caution is irrelevant to whether a violation is S&S.

standard is one of many complementary standards designed to prevent injuries caused by roof falls, but it is not the standard that was violated in this case. Because the prohibition on venturing under unsupported roof is a safety measure required in addition to the prohibition on deep cuts in adverse roof conditions, it is a redundant safety measure that is irrelevant to the S&S analysis of the deep cut.

C. There is no distinction between "primary" and "secondary" safety measures for S&S purposes.

Two Commissioners suggested that, for S&S purposes, there is a distinction between "primary" safety measures (those that prevent a hazard from existing) and "secondary" safety measures (those that control a hazard once it exists). *See* JA 14–16. In their view, secondary safety measures are irrelevant, while primary safety measures can be taken into account. *See id.* They cited no authority for making that distinction—and this Court and the Commission have already rejected any such distinction. *See Cumberland Coal*, 717 F.3d at 1028–29; *Black*

Beauty, 38 FMSHRC at 1313–14. This Court should do so again in this case.[8]

In *Cumberland Coal*, this Court held that "redundant safety measures have nothing to do with the violation, [so] they are irrelevant to the significant and substantial inquiry." 717 F.3d at 1029. The Court did not limit that holding to "secondary" safety measures. The Court also explained that the Mine Act "plainly exclude[s] consideration of surrounding conditions that do not violate health and safety standards." *Id.* (citing *Jim Walter Res.*, 111 F.3d at 917). That is, all surrounding conditions—not just some of them—are irrelevant to the S&S analysis.

And more specifically, in *Cumberland Coal*, the Court confirmed that both "primary" and "secondary" safety measures are irrelevant. The operator in that case argued that the Commission should have considered "evidence of preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—in other words, should have considered "secondary" and "primary" safety measures. 717 F.3d at

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[8] Although the Court reviews the judge's decision, it should also decline to adopt two Commissioners' purported distinction between "types" of redundant safety measures.

1028. The Court rejected that argument, holding that the evidence was irrelevant. *Id.* at 1029. That holding shows that *all* other safety measures are irrelevant to the S&S analysis.

The Commission has correctly given that rule a broad interpretation, holding that it "appl[ies] to all safety measures without qualification or exception"—a result it reached unanimously. *Black Beauty*, 38 FMSHRC at 1313 (discussing *Brody Mining*, 37 FMSHRC at 1691). A purported distinction between "primary" and "secondary" safety measures cannot be reconciled with that holding.

The Fourth and Seventh Circuits have taken the same approach: neither has distinguished between "primary" and "secondary" safety measures, and both have recognized that redundant safety measures, without qualification, are irrelevant to the S&S analysis. *See Buck Creek*, 52 F.3d at 136; *Knox Creek*, 811 F.3d at 162 (citing *Cumberland Coal*, 717 F.3d at 1029).

In sum, no authority supports distinguishing between "primary" safety measures (which would be relevant to the S&S analysis) and "secondary" ones (which would not). Accepting that distinction would mark a dramatic departure from decades of settled law, create

unnecessary confusion about what safety measures are relevant, and reduce incentives for mine operators to comply with *all* mandatory safety standards. The Court should reject that distinction and reaffirm the settled rule that all redundant safety measures are irrelevant to the S&S analysis.

4. The judge erred by assuming that miners would exercise caution.

The Commission has also held that whether miners would exercise caution is irrelevant to the S&S analysis. *Newtown*, 38 FMSHRC at 2044; *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123–24 (July 1992). That is because "the hazard continues to exist regardless of whether caution is exercised." *Newtown*, 38 FMSHRC at 2044 (quotation omitted). And, "[w]hile miners should, of course, work cautiously," that does not eliminate mine operators' statutory obligation to prevent unsafe and unhealthful conditions. *Id.* (quotation omitted). Similarly, the Commission has held that "relying on the skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior.'" *Id.* (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) and *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)).

The judge in this case found that the violation was not S&S in part because she assumed that miners would not venture under or near unsupported roof—that is, that miners would act cautiously. It was legal error for the judge, in the S&S analysis, to consider whether miners would act cautiously. *Newtown*, 38 FMSHRC at 2044; *Eagle Nest*, 14 FMSHRC at 1122. The Court reviews that error de novo, *see Mach Mining*, 809 F.3d at 1263, and should set the judge's finding based on that error aside.

The judge's analysis is based on the safety practices and policies that miners are technically required to observe:

> [Miners] . . . are *not permitted* to enter the 'red zone' . . . The continuous miner operator *normally* stands at least 20 feet back from the last row of bolts and *is not permitted* to go beyond the next-to-last row of bolts . . . Miners *generally are not allowed* underneath the last row of bolts except to extend ventilation . . . or to operate the roof bolting machine . . .

JA 42 (emphasis added). But what miners are trained or required to do is irrelevant to the S&S analysis. *Newtown*, 38 FMSHRC at 2044.

Requiring miners to remain under supported roof undoubtedly promotes safety (and is required by MSHA, *see* 30 C.F.R. § 75.202(b)), but miners are fallible human beings, and they may inadvertently venture under unsupported roof. *See Great W. Elec. Co.*, 5 FMSHRC at

842 ("Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions"). Testimony in this case underscores that reality: on cross-examination, Consol's attorney asked Inspector Ratliff whether he had ever been disciplined for going under unsupported roof. Although Inspector Ratliff denied receiving discipline, he acknowledged that he had *accidentally* gone under unsupported roof during his 24 years in the mining industry. JA 108–09.

The judge's assumption that miners will exercise caution is erroneous not just legally, but also wrong practically. Although miners may be prohibited from going under unsupported roof, the fact remains that they still do so. For example, in 2010, MSHA determined that miners' going under unsupported roof remained such a significant problem that MSHA highlighted the problem in a Special Emphasis Initiative. *See* MSHA, *Fatality Prevention - Rules to Live By*, https://arlweb.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp (last visited Jan. 5, 2018).

MSHA's fatality investigations also reveal that miners may misunderstand roof control policies or engage in mining practices that

place them under unsupported roof. *See, e.g.*, MSHA, *Report of Investigation - Fatal Roof Fall Accident - March 13, 2013*, https://arlweb.msha.gov/FATALS/2013/ftl13c07.pdf 11 (July 10, 2013) (miners were required to position themselves under unsupported roof while installing rib bolts); MSHA, *Report of Investigation - Fatal Fall of Roof Accident - July 25, 2008*, https://arlweb.msha.gov/FATALS/2008/ftl08c18.pdf 5, 7 (Feb. 12, 2009) (ATRS foot extended beyond the ATRS support beam, so miners could not cross in front of the ATRS without going under unsupported roof).[9]

Commission precedent also recognizes that miners may go under unsupported roof, despite policies, instructions, and standards prohibiting them from doing so. *See, e.g., Western Fuels-Utah, Inc.*, 10 FMSHRC 256 (Mar. 1988), *aff'd*, 870 F.2d 711 (D.C. Cir. 1989) (imposing strict liability on operator when a rank-and-file miner ventured under unsupported roof); *White Cnty. Coal Corp.*, 9 FMSHRC 1578, 1582 (Sept. 1987) (recognizing that miners travel under unsupported roof, but are unlikely to do so in front of an MSHA inspector); *Nacco Mining Co.*, 3 FMSHRC 848, 848–49 (Apr. 1981)

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[9] This fatality occurred at the Buchanan Mine #1.

(affirming judge's finding that section foreman traveled 10-12 feet under unsupported roof when he was fatally injured by a roof fall).

In sum, although MSHA standards and mine policies require miners to behave cautiously, the "inherent vagaries of human nature" prevent miners from always doing so. And even more importantly, whether they do so is irrelevant to the S&S analysis.

5. If the Court concludes that the issue in this case is whether substantial evidence supports the judge's decision, the Court should still set the judge's decision aside.

As explained above, it was legal error for the judge to consider redundant safety measures and to assume that miners would exercise caution. But if the Court concludes that the issue in this case is whether substantial evidence supports the judge's decision, the Court should still set the decision aside. *See* 30 U.S.C. 816(a)(1). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion." *Mach Mining*, 809 F.2d at 1263. The key word in that definition is "relevant." Because redundant safety measures are not relevant to whether a violation is S&S, and because miners' exercise of caution is not, either, the judge's factual findings based on those measures are not supported by substantial

relevant evidence. The Court should therefore set the judge's decision aside and remand it for the judge to conduct an S&S analysis considering relevant evidence.

CONCLUSION

The judge's decision in this case ignored two important and well-established principles: that, when determining whether a violation is S&S, judges should neither consider redundant safety measures or assume that miners will exercise caution. The judge in this case did both. The Court should grant the Secretary's petition for review, set aside the judge's finding that the violation was not S&S, and remand the case for the judge to conduct an S&S analysis considering only relevant facts.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

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s/ Emily C. Toler

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on January 22, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Emily C. Toler