

April 2023

## Dismantling the Mine Act

William B. Moran

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### Recommended Citation

William B. Moran, *Dismantling the Mine Act*, 125 W. Va. L. Rev. 813 (2023).

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**DISMANTLING THE MINE  
ACT<sup>1</sup>**

*William B. Moran<sup>2</sup>*

*When foxes are in charge of the hen house, they will behave as foxes do.*

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<sup>2</sup> The author is a federal administrative law judge who presides over Mine Act litigation. As such, the article is an opinion piece representing the views of the author only in his personal capacity and should not be construed in any manner as representative of perspectives held by the Federal Mine Safety and Health Review Commission or the United States government.

Over the past two years, some commissioners with the Federal Mine Safety and Health Review Commission have issued a number of decisions having the effect of weakening the Federal Mine Safety and Health Act. Along with these deleterious decisions, it is impossible to ignore that they come with significantly reduced penalties. Congress did not intend these adverse results and, with regard to penalties, it expressly stated that civil penalties were to be sufficiently impactful so as to make non-compliance more expensive than obeying the safety and health requirements.

### I. ESSENTIAL BACKGROUND INFORMATION

The Federal Mine Safety and Health Act of 1977 (“Mine Act”),<sup>3</sup> applies to all types of mining, whether involving surface or underground activity. Broadly speaking, mining is divided into two categories: (1) coal; and (2) metal and nonmetal, with the latter capturing all mining other than coal. The Mine Act and its amendments came about, as did the preceding federal laws addressing mine safety and health, in the wake of mine disasters. The 1977 Mine Act followed an explosion in 1968 in Farmington, West Virginia at the Consol No. 9 coal mine, which claimed 78 lives; a fire in 1972 at the Sunshine silver mine in Idaho, killing 91 miners; and a coal slurry dam failure, killing 125 at the Buffalo Creek Hollow in West Virginia.<sup>4</sup>

The 1977 Mine Act was a watershed for mine safety, as Congress removed the Department of the Interior from such oversight. Congress recognized that Interior’s conflicting mandates, developing the country’s natural resources while simultaneously being charged with protecting miners’ safety and health, were incompatible. Consequently, the Department of Labor was given an undivided mission: protect the Nation’s miners.<sup>5</sup>

Following those events, more mining disasters ensued in 1981, 1984, 1986, 1989, 1992, and 2001.<sup>6</sup> Then, in 2006, 12 miners died following an

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<sup>3</sup> 30 U.S.C.A. §§ 801–966 (West 2023).

<sup>4</sup> *Mine Disaster: 1968 Farmington Explosion Anniversary*, MINE SAFETY & HEALTH ADMIN., <https://www.msha.gov/mine-disaster-1968-farmington-explosion-anniversary> (last visited Mar. 9, 2023); *Sunshine Mine Disaster: 50 Years Later*, MINE SAFETY & HEALTH ADMIN., <https://www.msha.gov/sunshine-mine-disaster-50-years-later> (last visited Mar. 9, 2023); *Buffalo Creek Mine Disaster 50th Anniversary*, MINE SAFETY & HEALTH ADMIN., <https://www.msha.gov/buffalo-creek-mine-disaster-50th-anniversary> (last visited Mar. 9, 2023).

<sup>5</sup> See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977) (amending the Federal Coal Mine Health and Safety Act of 1969 into the Federal Mine Safety and Health Act of 1977).

<sup>6</sup> *Historical Data on Mine Disasters in the United States*, MINE SAFETY & HEALTH ADMIN., <https://arlweb.msha.gov/MSHAINFO/FactSheets/MSHAFCT8.htm> (last visited Mar. 11, 2023).

explosion at the Sago mine in West Virginia, and another five died from an explosion at the Darby mine in Kentucky.<sup>7</sup> More federal safety and health legislation resulted. The Mine Improvement and New Emergency Response (“MINER”) Act of 2006 amended the Mine Act with the purpose of providing greater protections for underground miners and to improve emergency preparedness.<sup>8</sup> Still, the bloodshed continued in 2010, with 29 miners dying in the Upper Big Branch Mine disaster in West Virginia.<sup>9</sup>

The purpose of this review is to illustrate the many fronts upon which the Mine Act is being dismantled by certain Commissioners serving on the Mine Safety and Health Review Commission (“FMSHRC”). Established by the 1977 Mine Act, the Mine Review Commission is an independent adjudicatory agency that provides administrative trial and appellate review of legal disputes arising under that Act. Three commissioners and then, after one commissioner’s term ended, two members of the Commission have been the authors of this conservative tilt in Commission decisions. The Trio are Marco Rajkovich, William Althen, and Michael Young. Mr. Rajkovich began his term as a Commissioner on March 25, 2019, at which time he was named as Chairman of the Commission.<sup>10</sup> One day after President Biden was inaugurated, Mr. Rajkovich was replaced as Chairman by Arthur Traynor.<sup>11</sup> Mr. Young’s term as a Commissioner concluded as of August 2020. With but *one week* before President Biden’s inauguration, then Chairman Rajkovich appointed two new judges to the Commission. These came at a time of a very low caseload at the Commission. The appointment of judges at the Commission is a whole other serious matter but beyond the scope of this article.

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<sup>7</sup> Frank Langfitt, *A Bitter Saga: The Sago Mine Disaster*, NPR (Jan. 7, 2006 at 12:01 P.M.), <https://www.npr.org/2006/01/07/5134307/a-bitter-saga-the-sago-mine-disaster>; Associated Press, *Explosion at Kentucky Mine Kills 5 Workers*, N.Y. TIMES (May 21, 2006), <https://www.nytimes.com/2006/05/21/us/21mine.html>.

<sup>8</sup> Miner Act, Pub. L. No. 109-236, 120 Stat. 493 (2006); *see also* MINER Act, MINE SAFETY & HEALTH ADMIN., <https://www.msha.gov/miner-act#:~:text=The%20Mine%20Improvement%20and%20New,miners%20and%20improve%20emergency%20preparedness> (last visited Mar. 11, 2023).

<sup>9</sup> Chris Lawrence, *Remembering Upper Big Branch a Decade Later*, METRO NEWS (Apr. 5, 2020 at 1:59 P.M.), <https://wvmetronews.com/2020/04/05/remembering-upper-big-branch-a-decade-later/>; *Historical Data on Mine Disasters in the United States*, *supra* note 6.

<sup>10</sup> Marco M. Rajkovich, Jr, *Sworn in as Chairman*; William I. Althen and Arthur R. Traynor III *Sworn in as Commissioners*, FED. MINE SAFETY AND HEALTH REV. COMM’N (Mar. 25, 2019), <https://www.fmsshrc.gov/about/news/marco-m-rajkovich-jr-sworn-chairman-william-i-althen-and-arthur-r-traynor-iii-sworn>.

<sup>11</sup> William K. Doran & Margaret S. Lopez, *President Biden Appoints New FMSHRC Chair*, OGLETREE DEAKINS (Feb. 1, 2021), <https://ogletree.com/insights/president-biden-appoints-new-fmsshrc-chair/>.

The analysis of the wayward conclusions reached by these Commissioners does not come about solely from this author's particular opinion of the issues. Rather, it also takes into account the dissenting Commissioners' observations of the deficiencies in the views reached by those Commissioners. Further, this review does not include every miner-adverse decision by these Commissioners—there are others. One should also bear in mind that, in reviewing cases from recent years, none of the decisions from this group of Commissioners could be described as pro-mine safety and health.

## II. THE MINE ACT IS REMEDIAL LEGISLATION

Before addressing the areas representing an erosion of the laws intended to protect miners, who are described in the Mine Act as the mining industry's "most precious resource," and for whom their health and safety must be the first priority, it is important to understand that the Nation's mine health and safety laws constitute *remedial legislation*.<sup>12</sup> That is a meaningful term, as such legislation is to be liberally construed to effectuate its purpose. One also needs to consider that the Mine Act and prior mine safety statutes had but one goal in mind—the safety and health of miners. Therefore, unlike the National Labor Relations Act, a pro-labor legislative Act, and the competing legislative agenda presented by the Labor Management Relations Act, a pro-management act, the Mine Act has no competing legislative concerns to straddle.<sup>13</sup> Its sole concern is to protect miners' safety and health. Acting through the Mine Safety and Health Administration ("MSHA"), the Secretary of Labor ("Secretary") enforces the Mine Act. "Regulations" or as they are more frequently called, "standards," set forth the mining safety and health requirements.

## III. AVENUES FOR THE DISMANTLEMENT OF THE MINE ACT

### A. *Shrinking Mine Act Jurisdiction*

The jurisdiction of the Mine Act is broad. It applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in

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<sup>12</sup> 30 U.S.C.A. § 801(a) (West 2023). See *Remedial*, Black's Law Dictionary (11th ed. 2019) ("intended to correct, remove, or lessen a wrong, fault or defect").

<sup>13</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C.A. §§ 151–169) (providing private-sector employees with organizational and collective action rights); Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (amending the National Labor Relations Act to provide ore restrictions on union activities and authorizing state "right-to-work" legislation).

such mine shall be subject to the provisions of this chapter.”<sup>14</sup> As explained below, a mine is similarly broadly defined.

1. *KC Transport, Inc.*

The Mine Act specifically provides that it covers “equipment . . . used in, or to be used in, or *resulting from*” mining processes.<sup>15</sup> This jurisdictional language is not new. Under the 1969 Coal Act, “coal mine” was defined as meaning

an area of land and *all* structures, facilities, machinery, tools, *equipment*, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, *used in*, or to be used in, or *resulting from*, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.<sup>16</sup>

The 1977 Mine Act employed the same language while extending it to “coal or other mine” and thereby covering *all* mines.<sup>17</sup>

In *KC Transport Inc.*,<sup>18</sup> Commissioners Rajkovich and Althen vacated the two violations involved, holding that MSHA did not have jurisdiction over KC Transport’s trucks *when* those trucks were at KC’s parking lot.<sup>19</sup> That sounds simple enough, but context is important. First, the inspector was not wandering around the area. He traveled to the KC parking lot in order to locate trucks for which he had previously issued citations while those trucks *were* on Ramaco properties proper.<sup>20</sup> The inspector’s purpose was to issue terminations of those earlier-issued citations.<sup>21</sup> It was then, at the parking lot, that he discovered two more violations.<sup>22</sup> Both of the new citations were issued for two trucks not being

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<sup>14</sup> 30 U.S.C.A. § 803 (West 2023).

<sup>15</sup> 30 U.S.C.A. § 802(h)(1)(C) (West 2023) (emphasis added).

<sup>16</sup> Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 3(h), 83 Stat. 742, 744 (emphasis added) (codified as amended at 30 U.S.C.A. § 802(h)) (emphasis added).

<sup>17</sup> 30 U.S.C.A. § 802(h) (West 2023) (emphasis added).

<sup>18</sup> 44 F.M.S.H.R.C. 211, No. WEVA 2019-0458, 2022 WL 1063652, at \*1 (Apr. 5, 2022).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 212.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

blocked against motion.<sup>23</sup> Moreover, KC stipulated that, if found that MSHA had jurisdiction, it admitted to both violations.<sup>24</sup>

The KC parking lot is on land owned and controlled by the Ramaco Mine.<sup>25</sup> The parking lot was accessed only through Ramaco's private mine haul road.<sup>26</sup> That private road connected five coal mines and a mine preparation plant, all of it owned by Ramaco.<sup>27</sup> To reach that parking lot, one had to travel down the mine's private haul road.<sup>28</sup> Mr. Rajkovich and Mr. Althen conceded that the road, the five mines, and the preparation plant were all covered by the Mine Act.<sup>29</sup> Using Ramaco's haul road, KC's trucks regularly hauled coal from those five mines.<sup>30</sup>

In reversing the administrative law judge's determination that MSHA had jurisdiction over KC Transport, those commissioners admitted that the Respondent trucking company provided coal hauling services to Ramaco Resources from the five coal mines.<sup>31</sup> In fact, the parties stipulated that the cited trucks were *regularly used* to haul coal from Ramaco's mines.<sup>32</sup> Thus, it is not true that KC's trucks were simply a trucking company which was coincidentally located near some mines.

It is noteworthy that the definition of a mine includes not just "an area of land from which minerals are extracted" but also "private ways and roads appurtenant to such area."<sup>33</sup> Dissenting Commissioner, Chairman Traynor, addressing a decision by the Federal Court of Appeals for the Sixth Circuit, which was relied upon by Mr. Rajkovich and Mr. Althen, *Maxxim Rebuild Company v. FMSHRC*,<sup>34</sup> noted that KC's lot was not "one-step removed" from a

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 211 n.1.

<sup>25</sup> *Id.* at 212.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 228 (Traynor, Comm'r, dissenting).

<sup>28</sup> *Id.* at 211 (majority opinion).

<sup>29</sup> *Id.* at 220.

<sup>30</sup> *Id.* at 212.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 232 (Traynor, Comm'r, dissenting) (emphasis added).

<sup>33</sup> 30 U.S.C.A. § 802 (West 2023).

<sup>34</sup> 848 F.3d 737 (6th Cir. 2017). Mr. Rajkovich and Mr. Althen also pointed to *Office of Workers Compensation Programs v. Ziegler Coal Co.*, 853 F.2d 529 (7th Cir. 1988), a Black Lung case, as support for their position, but the Sixth Circuit in *Office of Workers Compensation Programs v. Consolidation Coal Co.*, 884 F.2d 926, 932–33 (6th Cir. 1989), also a Black Lung case, did not buy into their view of *Ziegler*, holding that decision "completely reads the 1977 amendment to the definition of the term 'miner' out of the Act," noting that the legislative history

mine, but rather adjacent to the mine haul road, a road that one cannot access without passing the operator-controlled gate, beyond which point it was Ramaco's private road.<sup>35</sup> At the time that the citations were issued, those trucks were operated exclusively at Ramaco's mine facility. In fact, as noted, citations had been issued when KC's trucks were at a Ramaco mine and the inspector was performing a follow-up to those citations at KC's lot.<sup>36</sup>

The Chairman observed that while the majority tried to take refuge to the Occupational Safety and Health Act ("OSHA"), they well knew that inspectors under OSHA have no similar mandatory inspection frequency to that of MSHA.<sup>37</sup> While Mr. Rajkovich and Mr. Althen asserted that OSHA would be there for safety issues,<sup>38</sup> that agency has no workplace inspection requirement comparable to MSHA's obligation to inspect surface facilities twice a year.<sup>39</sup>

Chairman Traynor also highlighted that Congress stated that "what is considered to be a mine and to be regulated under this Act [is to] be given the broadest possibl[e] interpretation."<sup>40</sup> Further, prior Mine Review Commission cases have held that jurisdiction is to be determined by the equipment's *function*, not its *location*.

Although Mr. Rajkovich and Mr. Althen referred to the Sixth Circuit's decision in *Maxxim*, that case is not instructive for several reasons. To start, one should be informed that the Sixth Circuit only has jurisdiction over cases arising out of Kentucky, Michigan, Ohio, and Tennessee. That means its decision in *Maxxim* does not apply to cases from other states. The *KC Transport* case, being located in West Virginia, is under the Fourth Circuit, not the Sixth.

Apart from the inapplicability of the *Maxxim* decision to a case arising out of West Virginia, the language in that Sixth Circuit decision does not suggest that the facts in *KC Transport* would be outside of coverage under the Mine Act. The Sixth Circuit's own words show quite the contrary. *Maxxim* involved a

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of the 1977 amendments shows that Congress deliberately sought to expand the coverage of the Act and include miners who were not formerly within its protection.

<sup>35</sup> *KC Transp., Inc.*, 44 F.M.S.H.R.C. at 232 (Traynor, Comm'r, dissenting).

<sup>36</sup> *Id.* at 232–33.

<sup>37</sup> *Id.* at 235.

<sup>38</sup> *Id.* at 222 (majority opinion).

<sup>39</sup> Compare 30 U.S.C.A. § 813(a) (West 2023) (requiring MSHA to inspect surface mines at least twice a year), with 29 U.S.C.A. § 657 (West 2023) (providing no mandatory frequency of inspections), and *Occupation Safety and Health Administration (OSHA) Inspections*, OSHA (Aug. 2016), <https://www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf>. See also *KC Transp., Inc.*, 44 F.M.S.H.R.C. at 235 (Traynor, Comm'r, dissenting).

<sup>40</sup> *Id.* at 230 (Traynor, Comm'r, dissenting) (quoting S. REP. NO. 95-181, at 14 (1977)).



manufacturing and repair shop of mining equipment.<sup>41</sup> It did not haul coal as KC Transport did. The Sixth Circuit held that operations that manufacture or repair mining equipment are different “*from the mines that use that equipment.*”<sup>42</sup>

Further, the Sixth Circuit, citing none other than the Fourth Circuit, noted that the Mine Act “is ‘tailored to the dangers that arise from the handling of coal’ and other minerals, not the generic dangers of *making* mining equipment.”<sup>43</sup> Making its view unmistakably clear, the Sixth Circuit concluded it to be “[f]ar better . . . [to] limit the agency’s jurisdiction to locations and equipment that *are part of or adjacent to extraction, milling, and preparation sites.*”<sup>44</sup> To be covered by the Mine Act, the equipment must be part of, that is to say, connected to, a working mine. And in using that description the Sixth Circuit expressly noted that, per the Mine Act, a coal or other mine includes *private ways and roads appurtenant to such area, and equipment resulting from* the work of extracting such minerals from their natural deposits.<sup>45</sup> That Court acknowledged that the Act covers even such attenuated things as tailings ponds and retention dams, thereby emphasizing the *resulting from* wording used in the Act’s coverage.<sup>46</sup>

In other words, the Mine Act clearly covered the activities of KC Transport with its coal hauling. Thus, the majority, by comparing KC’s activities as indistinguishable from an operation making tools and equipment used in mining, employed the classic straw man argument. There is no suggestion in the *Maxxim* decision that the coal hauling is to be parsed out to a “*you’re covered, now you’re not covered*” approach, effectively an “olly olly oxen free” analysis, depending on what the trucks were doing at a given moment because that would be inane. Rather, *KC Transport* meets the Sixth Circuit’s own test because its trucks were regularly used to haul coal from the Ramaco mines and deliver it to the preparation plant. In contrast, the shop in *Maxxim* had no such mining activity; it only built and repaired mining equipment and did this at a site that was not adjacent to, nor part of, a working mine.

One might say, “Who cares?” The answer is that many mine fatalities involve powered haulage. For example, as Chairman Traynor noted, from October 1 to December 13, 2021, five of the ten total fatal injuries at mines

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<sup>41</sup> *Maxxim*, 848 F.3d at 738–39.

<sup>42</sup> *Id.* at 743 (emphasis added) (quoting *Power Fuels, L.L.C. v. Fed. Mine Safety & Health Rev. Comm’n*, 777 F.3d 214, 217 (4th Cir. 2015)).

<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> *Id.* at 744 (emphasis added).

<sup>45</sup> *Id.* at 740, 742 (emphasis added).

<sup>46</sup> *Id.* at 740.

during this time period involved powered haulage.<sup>47</sup> Specific to the standard invoked in the KC citations, on October 19, 2021, a mine's mechanic died when a haul truck's dump body fell on him.<sup>48</sup> MSHA determined that the fatality occurred because the mine operator did not make sure that the equipment was blocked against motion.<sup>49</sup> The effect of the decision by Mr. Rajkovich and Mr. Althen in *KC Transport* is that when those trucks are in the KC parking lot, they will be in a MSHA free zone, immune from enforcement under the Mine Act. Their decision has broader, jurisdictionally limiting, implications beyond the particular facts in that case.

*B. Undermining the Mine Act's Strict Liability Standard for Violations*

The Mine Act is a "strict liability" statute. That term means that liability for violations exists *without regard to fault*.<sup>50</sup> Put another way, a mine operator will be held liable if a violation of a mandatory standard occurs *regardless of the level of fault*. The civil penalty imposed for a violation is a matter distinct from the principle of strict liability. Of significance, it is not just the Mine Review Commission that has routinely affirmed this principle—several courts of appeals have applied strict liability to violations of mine safety and health standards.<sup>51</sup>

In *Doe Run*,<sup>52</sup> a miner died when 175 tons of rock collapsed onto the scaling machine he was operating.<sup>53</sup> The administrative law judge hearing the case upheld the two violations charged, but decided that neither was "significant and substantial" and that the negligence for both was low.<sup>54</sup>

Ignoring the well-established strict liability standard, Commissioners Rajkovich, Althen, and Young held that a very different standard should apply to determining whether a violation was established at metal and nonmetal

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<sup>47</sup> *KC Transp., Inc.*, 44 F.M.S.H.R.C. at 234 (Traynor, Comm'r, dissenting).

<sup>48</sup> *Id.* at 234. *See also* MINE & HEALTH SAFETY ADMIN., U.S. DEP'T OF LAB., REPORT OF INVESTIGATION (Oct. 19, 2021), [https://www.msha.gov/sites/default/files/Data\\_Reports/Fatals/Enforcement/2021/October%2019%2C%202021%20-%20Final%20Report.pdf](https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Enforcement/2021/October%2019%2C%202021%20-%20Final%20Report.pdf).

<sup>49</sup> *See also* MINE & HEALTH SAFETY ADMIN., *supra* note 48.

<sup>50</sup> *See Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Liability that does not depend on proof of negligence or intent to do harm.").

<sup>51</sup> *See* *Asarco, Inc.-Northwestern Mining Dep't v. Fed. Mine Safety & Health Rev. Comm'n*, 868 F.2d 1195 (10th Cir. 1989); *see also* *Stillwater Mining Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 142 F.3d 1179 (9th Cir. 1998).

<sup>52</sup> *Doe Run Co.*, 42 F.M.S.H.R.C. 521 (2020).

<sup>53</sup> *Id.* at 523.

<sup>54</sup> *Id.* at 525.

mines—to wit: the reasonably prudent person test.<sup>55</sup> By inserting that test, metal nonmetal mines can assert a lack of knowledge, foreseeability or negligence to defeat the violation itself, not just the appropriate penalty to be imposed.<sup>56</sup>

Employing this new review standard, the majority did the judge one better by vacating both violations upon applying their new “reasonably prudent person” test in place of strict liability.<sup>57</sup> One of the standards alleged to have been violated requires the use of ground support where ground conditions, or mining experience in similar ground conditions at the mine, indicate that it is necessary.<sup>58</sup> Importantly, Doe Run admitted that ground support was necessary.<sup>59</sup> When it is found to be necessary, the support system is to be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.<sup>60</sup> The other standard alleged to have been violated is titled “location for performing scaling.”<sup>61</sup> It requires that scaling shall be performed from a location which will not expose persons to injury from falling material, or provide other protection from falling material.<sup>62</sup>

The majority stated that strict liability only comes into play after violations of the cited standards have first been established.<sup>63</sup> And here, they held that the mine operator did not have sufficient notice to know that the condition or practice constituted a violation of the cited safety standards.<sup>64</sup> As they put it,

the Commission, with the widespread approval of the courts of appeals, has applied the ‘reasonably prudent person test’ to determine whether a violation has occurred. In other words, the inquiry is whether the standard prescribed the obligation with *sufficient specificity* to provide an operator with adequate notice of the requirements for compliance under the facts of the case.<sup>65</sup>

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<sup>55</sup> *Id.* at 537.

<sup>56</sup> *Id.* at 566 (Traynor, Comm’r, dissenting).

<sup>57</sup> *Id.* at 542–44 (majority opinion).

<sup>58</sup> *Id.* at 521 (citing 30 C.F.R. § 57.3360).

<sup>59</sup> *Id.* at 535 n.20.

<sup>60</sup> 30 C.F.R. § 57.3360 (West 2023).

<sup>61</sup> 30 C.F.R. § 57.3201 (West 2023); *Doe Run Co.*, 42 F.M.S.H.R.C. at 521.

<sup>62</sup> § 57.3201.

<sup>63</sup> *Doe Run Co.*, 42 F.M.S.H.R.C. at 531.

<sup>64</sup> *Id.* at 541–42.

<sup>65</sup> *Id.* at 527 (emphasis added).

However, an examination of the cases they cite, *Walker Stone Co. v. Secretary of Labor*,<sup>66</sup> *Stillwater Mining Co. v. FMSHRC*,<sup>67</sup> and *Freeman United Coal Mining Co. v. FMSHRC*,<sup>68</sup> do not support their claim. For example, in *Walker Stone*, which involved a fatality associated with a metal/nonmetal standard, but decided at an earlier time in the Commission's decisional history, the Tenth Circuit, in upholding the Commission's decision, held that for a standard addressing repairs of machinery or equipment, breaking up rocks which were obstructing a crusher constituted *repairs*.<sup>69</sup> The Circuit noted that "[t]he Commission's interpretation of the standard is consistent with the safety promoting purposes of the Mine Act," and that the Act should be liberally construed to accomplish its remedial purposes.<sup>70</sup> Continuing, the Circuit held that "regulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require."<sup>71</sup> Applying that test, the standard cited in *Doe Run* provided fair notice of what was required.

Avoided by the majority, the Circuit spoke to the other side of the precision needed in providing notice of a standard's requirement, observing that it "recognize[d] that regulations cannot specifically address the infinite variety of situations which employees may face and that by requiring regulations to be too specific, we open loopholes, allowing conduct which the regulation is intended to address to remain unregulated."<sup>72</sup> Thus, the Tenth Circuit put in perspective *and rejected* *Walker Stone's* position as "premised on a departure from the well-established principle that an employer is liable for the acts of its employees without regard to the employer's fault."<sup>73</sup>

Similarly, in *Stillwater*, another fatality case involving a metal and nonmetal safety standard violation, the Ninth Circuit echoed the same view as that in *Walker Stone*.<sup>74</sup> Faced with a general safety regulation prohibiting use of

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<sup>66</sup> 156 F.3d 1076, 1083 (10th Cir. 1998).

<sup>67</sup> 142 F.3d 1179, 1182 (9th Cir. 1998).

<sup>68</sup> 108 F.3d 358, 362 (D.C. Cir. 1997).

<sup>69</sup> *Walker Stone Co.*, 156 F.3d at 1082–84.

<sup>70</sup> *Id.* at 1082 (citing *Joy Techs., Inc. v. Sec'y of Lab.*, 99 F.3d 991, 997–97 (10th Cir. 1996)).

<sup>71</sup> *Id.* at 1083–84 (citing *Freeman United Coal Mining Co. v. F.M.S.H.R.C.*, 108 F.3d 358, 362 (D.C. Cir. 1997)).

<sup>72</sup> *Id.* at 1083.

<sup>73</sup> *Id.* at 1085.

<sup>74</sup> *Stillwater Mining Co.*, 142 F.3d at 1179.

equipment beyond its design capacity, the mine argued that the standard did not encompass failure of a gate chute assembly.<sup>75</sup> To that contention, the Circuit Court responded that “Stillwater fails to recognize, however, that ‘specific regulations cannot begin to cover all of the infinite variety of . . . conditions which employees must face, and that by requiring regulations to be too specific courts would be opening up large loopholes allowing conduct which should be regulated to escape regulation,’” and the Court reminded that safety legislation “is to be liberally construed to effectuate the congressional purpose.”<sup>76</sup> Last, the Circuit noted the Mine Act “imposes ‘a kind of strict liability on employers to ensure worker safety.’”<sup>77</sup>

Dissenting Commissioner Mary Lu Jordan observed that Commission case law holds that liability is established upon determining whether the ground was controlled and whether the miner was exposed to injury from falling material.<sup>78</sup> Rejecting the majority’s contention that the standards cited didn’t clearly express the mine operator’s obligations, Jordan observed that the words clearly and plainly require controlling the ground in places where persons work or travel, and ensuring that where scaling is performed, falling material will not harm miners.<sup>79</sup> 175 tons of rock falling on the miner demonstrates that did not happen here.<sup>80</sup>

The language of these two standards is not difficult to grasp. 30 C.F.R. § 57.3360 provides that,

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.<sup>81</sup>

In a similarly uncomplicated fashion, 30 CFR § 57.3201 provides that, “Scaling shall be performed from a location which will not expose persons to injury from

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<sup>75</sup> *Id.* at 1182–83.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1184 (quoting *Miller Mining Co. v. Fed. Mine Safety & Health Rev. Comm’n*, 713 F.2d 487, 491 (9th Cir. 1983)).

<sup>78</sup> *Doe Run Co.*, 42 F.M.S.H.R.C. 521, 546 (2020) (Jordan, Comm’r, dissenting).

<sup>79</sup> *Id.* at 550.

<sup>80</sup> *Id.* at 523, 546.

<sup>81</sup> 30 C.F.R. § 57.3360 (West 2023).

falling material, or other protection from falling material shall be provided.”<sup>82</sup> Plainly, the requirements for both are not obscure or puzzling.

For the ground support standard, the operator determined that ground control support was needed and was employing it, an act of admission that such support was needed.<sup>83</sup> In fact, the area the victim was working under had six-foot long roof bolts.<sup>84</sup> While the majority believed the cited standard provided insufficient notice of its requirements, the operator, by its own conduct installing roof bolts, certainly understood. However, indisputably and tragically, it was not sufficient to control the ground.

As for the safe scaling requirement, the 175 tons of material which collapsed onto the victim’s scaling machine demonstrates that the scaling was performed from a location which exposed him to the falling material. As Commissioner Jordan noted, those possessing ‘common intelligence’ would not need to have to guess about the requirements for these standards.<sup>85</sup>

One also needs to understand that applying strict liability does not end the inquiry. The penalty imposed must take into account the negligence involved, if any.<sup>86</sup> Instances where negligence is not present or low will result in significantly reduced penalties. That’s what happened here, at least until the majority vacated both citations, with the judge reducing the ground support violation penalty from \$18,271 to \$10,300 and the safe scaling location violation from \$5,503 to \$3,100, producing a 43% reduction in the total penalty.<sup>87</sup>

In the legislative history, Congress expressed that the protections of the Mine Act are to apply to *all* mines and the Commission has recognized this uniformity of treatment in its decisions.<sup>88</sup> Commissioner Jordan observed that both of the cited regulations require roof support sufficient to prevent an injurious roof fall.<sup>89</sup> Mine operators are, therefore, informed of these requirements and, consequently, a roof fall resulting in a fatality fails to meet them. Jordan also noted that the liability without fault principle had been applied

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<sup>82</sup> 30 C.F.R. § 57.3201 (West 2023).

<sup>83</sup> *Doe Run Co.*, 42 F.M.S.H.R.C. at 551 (Jordan, Comm’r, dissenting).

<sup>84</sup> *Id.* at 523 (majority opinion).

<sup>85</sup> *Id.* at 550 (Jordan, Comm’r, dissenting).

<sup>86</sup> *Id.* at 554.

<sup>87</sup> *Doe Run Co.*, 40 F.M.S.H.R.C. 1165, 1216–17 (2018) (ALJ).

<sup>88</sup> See S. REP. NO. 95-181, at 12–13 (1977) (clarifying that the “principal feature of the [Mine Act] is the establishment of a single mine safety and health law applicable to the entire mining industry”); *Doe Run Co.*, 42 F.M.S.H.R.C. at 549–50 (Jordan, Comm’r, dissenting) (providing an overview of Commission precedent).

<sup>89</sup> *Doe Run Co.*, 42 F.M.S.H.R.C. at 550 (Jordan, Comm’r, dissenting).

previously in metal/nonmetal cases.<sup>90</sup> Dissenting Commissioner, Chairman Traynor, concurred with the points made by Ms. Jordan, adding that fall of ground has historically been a leading cause of injuries and deaths in metal and nonmetal mines.<sup>91</sup> The impact of the majority's decision, he noted, adds operator fault and foreknowledge as new elements of proof necessary to establish the violations.<sup>92</sup> While he agreed that those aspects have their place, they are to come into play only in determining the appropriate penalty, not whether a violation occurred.<sup>93</sup>

Thus, the majority's decision created a two-tier system, conceding strict liability exists for coal mine violations, but contending that the "reasonably prudent person" test applies for metal/nonmetal mines where the standard doesn't provide notice of the duty imposed. Congress did not intend for such a dual test for Mine Act violations; strict liability is to apply for all mining.

### C. *Inhibiting the Issuance of 103(k) Orders*

The Mine Act provides for the issuance of safety orders, familiarly known as "k" orders.<sup>94</sup> To understand these specialized orders, one needs to know two things from the start: the *purpose* of a 103(k) safety order and the *definition* of an "accident."

Titled, "*Safety orders*," the Act provides for these "k" orders by instructing that "[i]n the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary," meaning federal mine inspectors, when present, "*may issue such orders as [deemed] appropriate to insure the safety of any person in the coal or other mine.*"<sup>95</sup> Congress even expressed its intent regarding these orders stating that the provision "is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders."<sup>96</sup>

*The definition of an "accident."* The Commission has clearly expressed that, where "k" orders are involved, the term "accident" is not limited to the use of that term as set forth in 30 C.F.R. § 50.2(h). Instead, an "accident" in this context includes an injury to any person. Section 103(k) provides the Secretary with the authority to issue a control order in the event of an accident.<sup>97</sup> According

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<sup>90</sup> *Id.* at 546–48.

<sup>91</sup> *Id.* at 554 (Traynor, Comm'r, dissenting).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 30 U.S.C.A. § 813(k) (West 2023).

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> S. REP. NO. 95-181 at 29; Pocahontas Coal Co., 38 F.M.S.H.R.C. 157, 162 (2016).

<sup>97</sup> *See* 30 U.S.C.A. § 813(k) (West 2023).

to the statutory text at section 103(k) of the Act, an ‘accident’ includes a mine explosion, mine ignition, mine fire, or mine inundation, *or injury to, or death of, any person.*<sup>98</sup> Consistent with the remedial purpose of the Mine Act, section 3(k) is to be construed expansively and in deference to the Secretary’s reasonable interpretation.

In *M-Class Mining*,<sup>99</sup> the Commission Trio vacated a section 103(k) order holding that it was not established that an “accident” had actually occurred.<sup>100</sup> Though the order was later terminated, but not vacated, they held that the matter was not moot.<sup>101</sup> The core facts prompting the MSHA inspector to issue the “k” order were that a miner had been working in the mine when he experienced a headache, dizziness, chest pains, a rapid heart rate, and difficulty breathing.<sup>102</sup> The miner was administered oxygen and evacuated by ambulance to the local hospital where the treating physician diagnosed him with carbon monoxide poisoning.<sup>103</sup> The local police department then received a report from a doctor at the hospital that a miner had suffered carbon monoxide poisoning at the mine.<sup>104</sup> As that made out an injury to a person, an accident had occurred.<sup>105</sup> The doctor recommended that the mine be shut down.<sup>106</sup> The police then called MSHA’s hot-line, reporting the doctor’s information.<sup>107</sup> Following that, an MSHA inspector arrived at the mine and, relying on the doctor’s call, issued a “k” order, with the effect of suspending operations in the area at issue.<sup>108</sup>

Given those events, it was plain that the MSHA inspector’s decision to issue the section 103(k) order was rationally based, relying on the information then available to him.<sup>109</sup> Some two and a half hours after issuing the “k” order, the inspector, upon not finding any high levels of carbon monoxide, modified the “k” order, permitting normal operations to resume.<sup>110</sup> The next day, the order was modified again, this time to remove the mine compressor to ensure that it

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<sup>98</sup> 30 U.S.C.A. § 802(k) (West 2023) (emphasis added).

<sup>99</sup> 42 F.M.S.H.R.C. 491 (2020).

<sup>100</sup> *Id.* at 491.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 492–93.

<sup>103</sup> *Id.* at 492.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 492–93.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 493.



was not a source of carbon monoxide.<sup>111</sup> Finding that the compressor did not present a carbon monoxide hazard, the order was terminated.<sup>112</sup>

The majority found fault with the judge's determining that an "accident" had occurred because his determination was based upon what MSHA thought *at the time of the issuance of the order*.<sup>113</sup> However, as will be explained, the information before MSHA *at the time* is exactly the point. Instead, they held that whether there had been an accident has to be determined by whether an accident had "actually occurred," meaning an *ex post facto* analysis.<sup>114</sup> On that premise, they maintained that terminating the order was insufficient.<sup>115</sup> Instead, they held that such an order must be vacated if it is subsequently determined that no accident occurred.<sup>116</sup> Citing no authority, they also raised the specter that, if not vacated, the Secretary could later modify the "k" order to allege a violation of a safety or health standard.<sup>117</sup>

They asserted that, without vacating the "k" order, an adverse effect to a mine operator results, in that it could affect the operator's repeat violation history.<sup>118</sup> As explained below, that is incorrect. They maintained that, upon subsequently determining that there was no accident, and then having the "k" order vacated, it could not then be used later as a basis for a citation that would be part of the operator's repeat violation history.<sup>119</sup> Under their theory, the "k" order could not then be used to affect future penalties assessed against the operator. While, as presented by the threesome, the "k" order presented a potential adverse future impact to the mine operator unless it was vacated, the supposed harm they foresaw does not exist.

They also expressed that the term "accident" has been given an overly broad definition but they acknowledged that the gravamen of an accident is that it must arise from a condition, practice or *occurrence* at a mine.<sup>120</sup> However, they maintained that when an initial belief turns out to be incorrect and no "accident," as *they* defined that term, occurred, MSHA should vacate the order

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 502–07.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 497.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 499–502.

rapidly to permit resumption of the mine operations.<sup>121</sup> Apparently, by their perspective, a two and a half hours' suspension of mining, which was limited to the affected area, was not a rapid resumption.

The dissenting Commissioners noted that the majority admitted that the section 103(k) order did not allege a violation of any health or safety standard and, contrary to their speculation, the Secretary does *not* use the issuance of a section 103(k) order for any of the progressive enforcement mechanisms under the Mine Act, such as penalty proposals, nor is it considered in a mine's history of violations in any future proposed penalty assessments.<sup>122</sup> In short, the majority's premises were all unfounded.

Importantly, Commissioner Traynor pointed out that the majority's analysis overlooked that "review of the issuance or modification of a section 103(k) order looks to *whether the agency's discretionary decision was reasonable based on the facts known to the inspector at the time the decision was made.*"<sup>123</sup> Accordingly, the dissenters maintained that in reviewing such orders the Commission should not engage in retrospective second-guessing of the issuance of the "k" order by examining information the Secretary learned only *after* the decision was made.<sup>124</sup> The dissenters also noted that requiring the Secretary to provide proof that an injury occurred and how the injury occurred is not a requirement to establish that there was an accident.<sup>125</sup> In that regard the dissenters observed that the Eighth Circuit Court of Appeals has held that the term 'accident' is to be interpreted expansively and that, as the definition employs the words "accident *includes,*" the term should be interpreted expansively and thus it is not to be limited to the types of accidents listed.<sup>126</sup>

The majority's wrangling over the need to vacate a "k" order, after it is subsequently determined that the safety or health concern has been dispelled, misses the entire purpose such orders. Such orders are issued in accordance with the facts available at the moment, triggering the provision's prophylactic purpose. The dissenters reminded the threesome of the facts which generated this order. When the inspector issued the "k" order, the information he had at that time was that a miner was working in the mine in close proximity to a diesel motor's exhaust fumes when he then experienced a headache, dizziness, chest

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<sup>121</sup> *Id.* at 506.

<sup>122</sup> *Id.* at 509 (Jordan, Comm'r, dissenting); *id.* at 515 (Traynor, Comm'r, concurring in part and dissenting in part) (joining Part A of Comm'r Jordan's dissent).

<sup>123</sup> *Id.* at 515 (Traynor, Comm'r, concurring in part and dissenting in part) (emphasis added).

<sup>124</sup> *Id.* at 516–18

<sup>125</sup> *Id.* at 518.

<sup>126</sup> *Id.* (citing *Pattison Sand Co. v. Fed. Mine Safety & Health R. Comm'n*, 688 F.3d 507, 512–13 (8th Cir. 2012)).

pains, a rapid heart rate, and difficulty breathing.<sup>127</sup> He was given oxygen and evacuated by ambulance to the local hospital, where the treating physician diagnosed him with carbon monoxide poisoning.<sup>128</sup> The dissent also noted that the inspector acted reasonably after issuing the order, as he quickly modified it to permit a return to normal mining in the affected section, but he wisely prevented continued use of the compressor until it was evaluated for a potential carbon monoxide hazard.<sup>129</sup>

Thus, the “k” order came about in the wake of a miner being hospitalized and, when the inspector then arrived at the mine, he acted prudently upon not finding any elevated carbon monoxide levels, as he quickly permitted normal operations to resume at the mine. Given the circumstances, the inspector also employed sound judgment by prohibiting further use of the compressor, as it was the only identified possible source of carbon monoxide. Commission case law also instructs that review of a “k” order, its scope, and any subsequent modification to the order, is under an “abuse of discretion” standard and this is applied by looking at the facts and information *available to the inspector at the time his discretionary decision is made*.<sup>130</sup>

Given the facts, it is difficult to discern the majority’s real concern, other than not liking “k” orders being issued when it is later determined that a suspected hazard did not present itself. At bottom, it appears that the threesome’s view is nothing more than classic Monday morning quarterbacking. The adverse safety impact of this view is that it could operate to make inspectors hesitate before issuing “k” orders, a result clearly contrary to the provision’s purpose. Waiting until all the results are in is antithetical to the purpose of such orders.

An important postscript, the U.S. Court of Appeals for the D.C. Circuit vacated the majority’s decision, holding that the case *was* moot, remarking “[t]hat a member of the public could look at M-Class’s compliance history, notice that there was a terminated § 103(k) order and conclude ‘*something* occurred at that mine that affected the health and safety of miners,’ is no more than a thinly-veiled reputational harm argument.”<sup>131</sup> The Circuit Court noted “neither the Mine Act nor the precedent cited by the Commission [majority] and

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<sup>127</sup> *Id.* at 519.

<sup>128</sup> *Id.* at 517.

<sup>129</sup> *Id.* at 515.

<sup>130</sup> *Id.* at 516–17.

<sup>131</sup> *Sec’y of Lab. v. M-Class Mining, L.L.C.*, 1 F.4th 16, 22. (D.C. Cir. 2021) (emphasis in original) (quoting *M-Class Mining, L.L.C.*, 42 F.M.S.H.R.C. 491, 510 (2020)).

M-Class indicates that a § 103(k) order, once terminated, can serve as the basis for a later citation or enforcement action or be modified after termination.”<sup>132</sup>

*D. Diminishing the Secretary of Labor’s Authority Over Mine Ventilation Plans*

Mine ventilation plans are important both for safety and health. For those reasons, Congress intended that such plans control methane and respirable dust. The control of methane is to prevent explosions. Methane concentrations in mine atmospheres between five and 15 percent are explosive.<sup>133</sup> Historically, such explosions have instantly taken hundreds of miners’ lives. A recent example, in April 2010, 29 miners died from a methane explosion at the Upper Big Branch mine in West Virginia.<sup>134</sup> The threat from respirable dust is more subtle. Pneumoconiosis, or as it is more familiarly known, “Black Lung,” slowly suffocates miners’ lungs, killing their respiratory capability.<sup>135</sup>

*Knight Hawk Coal*,<sup>136</sup> addressed a mine’s ventilation plan. As noted, the purpose of a ventilation plan is to control methane and respirable dust so that the mine is effectively ventilated.<sup>137</sup> To that end, the Mine Act requires that every underground coal mine adopt a ventilation plan which is suitable to the conditions and the mining system of the mine.<sup>138</sup> The plans must be approved by the Secretary of Labor.<sup>139</sup> The Act is very plain about the Secretary’s role and authority for this subject, requiring that the plan

and revisions thereof [be] suitable to the conditions and the mining system of the coal mine and *approved by the Secretary*

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<sup>132</sup> *Id.*

<sup>133</sup> See OFF. OF SURFACE MINING RECLAMATION & ENF’T, U.S. DEP’T OF LABOR, TECHNICAL MEASURES FOR THE INVESTIGATION AND MITIGATION OF FUGITIVE METHANE HAZARDS IN AREAS OF COAL MINING 5 (2001).

<sup>134</sup> See *Executive Summary*, MINE SAFETY & HEALTH ADMIN. (2010), [https://www.msha.gov/sites/default/files/Data\\_Reports/Fatals/Coal/Upper%20Big%20Branch/ExecutiveSummary.pdf](https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Coal/Upper%20Big%20Branch/ExecutiveSummary.pdf) (describing that the main cause of the Upper Big Branch Mine Explosion was the accumulation of methane gas, which exploded and triggered a coal dust explosion).

<sup>135</sup> *Health Hazard Information Card HH-39: Black Lung*, MINE SAFETY & HEALTH ADMIN., DEP’T OF LAB., <https://www.msha.gov/sites/default/files/Alerts%20and%20Hazards/HH%20Cards/HH-39%20Black%20Lung.pdf> (last visited March 13, 2023).

<sup>136</sup> *Knight Hawk Coal, L.L.C.*, 42 F.M.S.H.R.C. 435 (2020).

<sup>137</sup> *Id.* at 445.

<sup>138</sup> 30 U.S.C. § 863(o); 30 C.F.R. § 75.370.

<sup>139</sup> *Knight Hawk Coal, L.L.C.*, 42 F.M.S.H.R.C. at 435 (citing 30 U.S.C.A. § 863(o) (West 2023)).

shall be adopted by the operator . . . [which] plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, *such additional or improved equipment as the Secretary may require*, the quantity and velocity of air reaching each working face, *and such other information as the Secretary may require* . . . [and is to] be reviewed by the operator and the Secretary at least every six months.<sup>140</sup>

In *Knight Hawk*, the Secretary, through MSHA, contended that there were deficiencies in the operator's plan, revoked it, and issued a technical citation for operating without an approved plan.<sup>141</sup> Commissioners Rajkovich, Althen, and Young affirmed the decision of an administrative law judge holding that MSHA's revocation of the mine's ventilation plan was arbitrary and capricious.<sup>142</sup> In doing so, they acknowledged that Section 303(o) of the Act mandates that operators adopt a ventilation plan "suitable to the conditions and the mining system of the coal mine *and [to be] approved by the Secretary*."<sup>143</sup> Noting the Mine Act itself does not define "suitable," the three applied the dictionary definition as "adapted to a use or purpose."<sup>144</sup> Determining that the Secretary did not *satisfactorily explain* why the operator's plan was unsuitable, the three held that, at a minimum, the Secretary would need to set forth how harms might plausibly result from the level of airflow in perimeter cuts.<sup>145</sup> Perimeter cuts are used in 'retreat mining.'<sup>146</sup> To help prevent mine roofs from falling, pillars are left for support.<sup>147</sup> The pillars are significant, as they involve leaving behind 40–60% of the coal seam.<sup>148</sup> However, in retreat mining, those pillars are reduced or removed as mining backs out, or 'retreats,' and the roof collapses.<sup>149</sup> Thus, perimeter cuts are those made in the coal pillars around the perimeters of mined-out areas.<sup>150</sup>

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<sup>140</sup> 30 U.S.C.A. § 863(o) (emphasis added).

<sup>141</sup> *Knight Hawk Coal, L.L.C.*, 42 F.M.S.H.R.C. at 435.

<sup>142</sup> *Id.* at 436, 453.

<sup>143</sup> *Id.* at 445 (citing 30 U.S.C.A. § 863(o) (West 2023)).

<sup>144</sup> *Id.* (quoting *Canyon Fuel Co., L.L.C. v. Sec'y of Lab.*, 894 F.3d 1279, 1288 (10th Cir. 2018)).

<sup>145</sup> *Id.* at 445–46, 451–52.

<sup>146</sup> *Id.* at 436.

<sup>147</sup> *Id.* at 436 n.6; R. Kayne, *What is Retreat Mining?*, ABOUT MECHS. (Jan. 30, 2023), <https://www.aboutmechanics.com/what-is-retreat-mining.htm>.

<sup>148</sup> Kayne, *supra* note 147.

<sup>149</sup> *Id.*; *Knight Hawk Coal*, 42 F.M.S.H.R.C. at 25–26.

<sup>150</sup> *Knight Hawk Coal*, 42 F.M.S.H.R.C. at 436–37.

The majority held that the Secretary had to show how the failure to make airflow evaluations in those worked out areas and how the mine's lack of specific airflow direction information throughout the mine entries created risks.<sup>151</sup> In support of their view, the three made note that "there was an existing framework satisfactorily used for years conforming to applicable regulations—one that effectively monitored airflow through a worked-out area while limiting the examiner's exposure to obvious deteriorating conditions over time."<sup>152</sup> They concluded that the Secretary had not provided the necessary explanation as to why that plan was unsuitable.<sup>153</sup> To establish that a plan was unsuitable, the Secretary must show that it did not comply with the substantive requirements of 30 C.F.R. § 75.334(b) or demonstrate that it created plausible dangers of a methane buildup.<sup>154</sup>

Dissenting Commissioners Traynor and Jordan countered that the record evidence in fact established that MSHA's District Manager did not act in an arbitrary and capricious manner when disapproving the mine's proposed ventilation plan, but equally as important, they objected to the majority's creation of a new legal standard in reaching that conclusion.<sup>155</sup> The new standard blocked MSHA from requiring additional information in a proposed ventilation plan unless it could establish "plausible harm" in the mine's plan.<sup>156</sup> That conclusion, the dissenting Commissioners concluded, is plainly inconsistent with Commission precedent and the Mine Act.<sup>157</sup> The dissenting Commissioners pointed to Commission case law holding that MSHA must show that the District Manager considered the relevant data and with that offer a reasonable rationale for rejecting the proposed ventilation plan.<sup>158</sup> Thus, they noted that the test should only require a showing that MSHA did not act arbitrarily and capriciously, nor otherwise abuse its discretion.<sup>159</sup> In issuing the technical violation, MSHA met this standard by identifying five deficiencies with the operator's ventilation plan.<sup>160</sup> Among those deficiencies were MSHA's determinations that the plan lacked adequate air directional information and its overall conclusion that the

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<sup>151</sup> *Id.* at 448–49, 452.

<sup>152</sup> *Id.* at 452.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 454 (Traynor & Jordan, Comm'rs, dissenting).

<sup>156</sup> *Id.* at 457.

<sup>157</sup> *Id.* at 454, 457.

<sup>158</sup> *Id.* at 457.

<sup>159</sup> *Id.* at 459.

<sup>160</sup> *Id.* at 457–59.

deep cuts were not adequately ventilated.<sup>161</sup> Accordingly, after conducting a survey that demonstrated that airflow was inadequate in some areas, MSHA required further information from the operator.<sup>162</sup> As the determination by the District Manager to include further information was reasonable and based on the facts and the mandatory safety standards, the requirement was not arbitrary and capricious.<sup>163</sup>

For those reasons, the dissent concluded that the majority's requirement that the Secretary's discretion is constrained by his ability to connect a regulatory requirement to a plausible harm is flatly inconsistent with prior case law.<sup>164</sup>

Importantly, the dissent noted that in *Peabody Coal Co.*,<sup>165</sup> the Commission rejected the mine operator's assertion that the Secretary should be required to prove that the hazard addressed by a new plan provision *either exists or is reasonably likely to occur*.<sup>166</sup> As the dissent noted, that decision is consistent with § 303(o) of the Mine Act which gives the District Manager the discretion to approve ventilation plans and to require information deemed to be appropriate.<sup>167</sup>

In the face of this statutory requirement, the majority nevertheless held the Secretary *does not have the discretion* to require information to be included in a ventilation plan *unless* the Secretary connects that requirement to some plausible harm to miners from a ventilation-related hazard.<sup>168</sup> As such, the majority concluded that the Secretary must provide a fact-based explanation showing that the operator's plan could expose miners to unsafe or unhealthful conditions.<sup>169</sup> The majority's burden-shifting turned the Act's ventilation plan requirement upside down. This new burden goes beyond the Secretary showing that its decision was not arbitrary and capricious. Now it is *the Secretary*, not the mine operator, that must demonstrate that its denial of a ventilation plan is satisfactorily explained.

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<sup>161</sup> *Id.* at 442 (majority opinion); *id.* at 455 (Traynor & Jordan, Comm'rs, dissenting).

<sup>162</sup> *Id.* at 441–42 (majority opinion); *id.* at 454–55, 457 (Traynor & Jordan, Comm'rs, dissenting).

<sup>163</sup> *Id.* at 459 (Traynor & Jordan, Comm'rs, dissenting).

<sup>164</sup> *Id.* at 457.

<sup>165</sup> 18 F.M.S.H.R.C. 686, 690 (1996).

<sup>166</sup> *Knight Hawk Coal*, 42 F.M.S.H.R.C. at 457.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 452.

<sup>169</sup> *Id.* at 445–46 (majority opinion).

Although the majority's view was upheld on appeal before the Court of Appeals for the D.C. Circuit, it was a narrowly circumscribed decision.<sup>170</sup> This is because that court's decision was focused on the administrative law judge's arbitrariness determination, not on the majority's articulation of the arbitrary and capricious standard.<sup>171</sup> The court concluded that it "accord[ed] great deference to the ALJ's credibility determinations, which provide[d] substantial evidence for the conclusion that the smoke test results were inconsistent and the Secretary ignored disagreements among MSHA survey team members regarding the results."<sup>172</sup>

Some other comments about the decision are in order. Although the appellate court stated that the Mine Act requires the Secretary, acting through an MSHA district manager, to negotiate mine-specific roof-support and ventilation plans with representatives of the companies that operate the mines,<sup>173</sup> nowhere does the word negotiate appear in the ventilation provision of the Act.<sup>174</sup> Instead, the applicable subsection provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this subchapter. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.<sup>175</sup>

Other circuits have taken a more deferential view of the Secretary's authority, describing the process as one where a "mine operator obtains approval by submitting a written plan to, and usually engaging in discussions with, district managers."<sup>176</sup> That Circuit presented an extensive historical review of the federal mining law, expressing:

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<sup>170</sup> Knight Hawk Coal, 991 F.3d 1297 (D.C. Cir. 2021).

<sup>171</sup> *Id.* at 1305–06.

<sup>172</sup> *Id.* at 1311.

<sup>173</sup> *Id.* at 1300.

<sup>174</sup> See 30 U.S.C.A. §§ 862, 863 (West 2023).

<sup>175</sup> 30 U.S.C.A. § 863(o) (West 2023).

<sup>176</sup> Mach Mining, L.L.C. v. Sec'y of Lab., 728 F.3d 643, 644 (7th Cir. 2013).



the use of a de novo standard to review such secretarial refusals runs into a substantial statutory barrier. Use of such a de novo standard of review in the ventilation plan situation would undermine—substantially—the specific statutory language of 30 U.S.C. § 863(o) that the implemented plan must be one approved by the Secretary, not by the Commission. This statutory provision makes clear that the Secretary’s role of approving the plan is not really an enforcement role susceptible to de novo review, but rather a role imbued with a legislative or policy-making dimension to ensure that the plan is reflective of the public interest in mine safety. As we have noted earlier, in its earliest acknowledgment of the use of the “technical violation” approach to review secretarial denials, the Senate Committee specifically “caution[ed]” that “the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan.” That warning was embodied in section 863(o). We therefore cannot accept Mach’s argument that the foregoing analysis is basically a “policy argument.”<sup>177</sup>

The Seventh Circuit therefore agreed that the Secretary’s decision to withhold approval of a ventilation plan is reviewed under the abuse of discretion standard.<sup>178</sup> Supporting the view that the D.C. Circuit’s opinion in *Knight Hawk* is of limited effect, that Circuit itself took note in *Prairie State Generating Co.*<sup>179</sup> approvingly of the Seventh Circuit’s decision in *Mach Mining*.<sup>180</sup>

#### *E. Eliminating Meaningful Review of Settlement Motions*

In the Mine Act, Congress required that “[n]o proposed penalty which has been contested before the Commission under § 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission.”<sup>181</sup> Accordingly, motions to settle a case are to be presented to the Commission for approval.<sup>182</sup> Such motions are first presented to administrative law judges.<sup>183</sup> This was a new and unique regulatory provision and it came about because Congress was concerned about settlements under the prior mining

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<sup>177</sup> *Id.* at 657–58 (quoting S. REP. NO. 95–181 at 25 (1977)).

<sup>178</sup> *Id.* at 658.

<sup>179</sup> *Prairie State Generating Co. v. Sec’y of Lab.*, 792 F.3d 82 (D.C. Cir. 2015).

<sup>180</sup> *Id.* at 91–92.

<sup>181</sup> 30 U.S.C.A. § 820(k) (West 2023).

<sup>182</sup> 29 C.F.R. § 2700.31(a).

<sup>183</sup> § 2700.31(g).

law.<sup>184</sup> It spoke directly to the issue, finding that excessive compromising in penalties for safety and health violations reduced the effectiveness of penalties as an enforcement tool.<sup>185</sup> For that reason, it bestowed upon the Commission the authority to review settlement agreements in order to guarantee that settlements occurred transparently and, among other reasons, to make sure that penalties were sufficient to convince mine operators to comply with the Act's safety and health requirements.<sup>186</sup>

At first, the Commission took the legislative direction to heart. For example, in *Black Beauty Coal Co.*,<sup>187</sup> it forcefully spoke of its role in settlement motions, noting that the judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest.<sup>188</sup> Working under that guidance, the judge rejected the settlement motion in *The American Coal Co.*,<sup>189</sup> in which the parties sought a 30% across the board reduction for each of the 32 alleged violations in the case, while leaving the original gravity and negligence findings undisturbed.<sup>190</sup> With no legitimate basis offered for the uniform reduction in the penalties, and the Secretary asserting the reductions were "appropriate in light of the parties' interest in settling this matter amicably," the motion was rejected.<sup>191</sup> The author's decision was lauded, at least at first, with the Commission stating it "affirm[ed] in all respects the Judge's denial of the motion to approve settlement."<sup>192</sup>

From there, the case went to the United States Court of Appeals but, before any decision was issued, the parties agreed to have the case returned to the Commission.<sup>193</sup> Once returned, the Commission took a very different perspective about settlement motions, deciding that the motion should be approved after all.<sup>194</sup> In reaching its new conclusion, the Commission formulated a test for judges to apply when presented with settlement motions.<sup>195</sup> Containing three requirements, the first two are elemental. Rather obviously, the motion

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<sup>184</sup> S. REP. NO. 95-181, at 44-45 (1977).

<sup>185</sup> *Id.* at 44.

<sup>186</sup> *Id.* at 45.

<sup>187</sup> 34 F.M.S.H.R.C. 1856 (2012).

<sup>188</sup> *Id.* at 1862.

<sup>189</sup> 35 F.M.S.H.R.C. 515 (2013) (ALJ).

<sup>190</sup> *Id.* at 515.

<sup>191</sup> *Id.*

<sup>192</sup> *Am. Coal Co.*, 38 F.M.S.H.R.C. 1972, 1973 (2016).

<sup>193</sup> *Am. Coal Co.*, 40 F.M.S.H.R.C. 983, 985 (2018).

<sup>194</sup> *Id.* at 993.

<sup>195</sup> *Id.* at 987.

must state the penalty amount originally proposed by the Secretary and then present the new amount the parties have agreed to pay.<sup>196</sup> Ostensibly, the third requirement requires ‘facts’ in support of the new, reduced penalty the parties have agreed to pay in settling the matter.<sup>197</sup> However, ‘facts’ as used by the Commission here do not mean things that are known or proved to be true, nor does the term mean something that has actual existence, nor need it contain information presented as having objective reality.<sup>198</sup> Put plainly, if the parties were to agree that the moon is made of cheese, it’s a *fact* that they made such a statement, though the assertion does not mean that it is at all true, nor is there a requirement that such facts be verifiable.

Understandably, with such a “test” to be applied by judges when presented with settlement motions, the approval rate has been 99.96%.<sup>199</sup> Aside from that statistic, disconcerting approvals have resulted. For example, in a recent case before the author, the Secretary sought a 91% penalty reduction where an operator failed to provide required safety training within 90 days of a miner becoming employed. Some nine months after the miner’s employment had begun, he still had not received the required training. That was bad enough, but less than a week later, another miner at the mine received permanently disabling entanglement injuries. That miner had not received the required ‘new task’ training.<sup>200</sup> Given that there were two failures to provide the required safety training in a week, it was perplexing that the Secretary agreed to the enormous reduction.

Yet, the motion met the Commission’s “test” and judges are not permitted to make reasonable inquiries about such motions when the test is met. In fact, in reviewing the decisions issued by these conservative commissioners, they have never picked up for review a settlement motion *approval* to determine its appropriateness.<sup>201</sup> The Commission has the power to do so, through its *sua sponte* review authority.

Underscoring this virtual 100% approval rate for settlements, in the rare instances post-*American Coal* when a judge has denied a settlement motion, the Commission has reversed those decisions, approving the settlements by applying its “test.” One example is illustrative. In *American Aggregates of Michigan*,<sup>202</sup>

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 989–91.

<sup>199</sup> Perry Cnty. Res., 44 F.M.S.H.R.C. 501, 505 n.3 (2022) (ALJ).

<sup>200</sup> CSI Sands, YORK 2022-0036, (FMSHRC Aug. 2022).

<sup>201</sup> 29 C.F.R. §2700.71

<sup>202</sup> 42 F.M.S.H.R.C. 570 (2020).

Commissioners Rajkovich, Althen, and Young addressed a judge's denial of a settlement motion.<sup>203</sup> Involved was the mine operator's admitted failure to provide a miner with required new miner training.<sup>204</sup> The three held that the Judge failed to apply the correct standard for consideration of settlement proposals and that the proposed settlement was fair, reasonable, appropriate under the facts, and in the public interest; and, with those conclusions, approved the settlement, which reduced the penalty from \$2,007 to a mere \$132.00, a 93% drop in the penalty.<sup>205</sup>

Commissioners Traynor and Jordan dissented, contending that unless there was abuse of discretion by the judge, a settlement motion denial should be affirmed.<sup>206</sup> Abuse of discretion applies when there is no evidence to support the decision or if it is based on an improper understanding of the law.<sup>207</sup> The dissenters noted that Congress required such health and safety training in the Mine Act, underscoring its importance by declaring that a miner who has not received it, is "a hazard to himself and to others" and is to be immediately withdrawn from the mine and barred from re-entering it until the required training has been received.<sup>208</sup>

In a recurring theme of this article, the dissenters also spoke to the practical effect of a \$132.00 penalty, noting the obvious—a miniscule penalty cannot deter mine operators from future violations of safety standards.<sup>209</sup> Revealing how far afield the majority was willing to go to support their decision that the settlement was acceptable, the dissent concluded that the threesome had supplanted the judge's usual role, by commenting that the untrained miner was working in an open area, away from the danger of active mining equipment and that the miner had received *other* training.<sup>210</sup> That the miner was, *at that moment*, away from danger was beside the point, as was their remark that *other* training, from OSHA, had been received.<sup>211</sup> Those expressions had the aroma of arguments that one would expect from the mine operator, not the Commission. The Mine Act requires its own training and does not allow operators to substitute

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<sup>203</sup> *Id.* at 570–71.

<sup>204</sup> *Id.* at 573.

<sup>205</sup> *Id.* at 576–81.

<sup>206</sup> *Id.* at 582 (Traynor & Jordan, Comm'rs, dissenting).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 584 (quoting 30 U.S.C.A. § 814(g)(1) (West 2023)).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 585–86.

<sup>211</sup> *Id.*

other training.<sup>212</sup> Equally troubling to the dissenters was the majority invoking a legal argument that the parties did not make—that the operator was in compliance, because he was working under the supervision of a driller.<sup>213</sup> Thus, the majority substituted their own view of the hazard involved at that moment, inserted OSHA training in place of MSHA's, and determined that the presence of a driller effectively erased the training requirement for the miner.<sup>214</sup>

That the trio's view in *American Aggregates* was not simply a one-off event was demonstrated the same day with their opinion in *Hopedale Mining*.<sup>215</sup> As with *American Aggregates*, the majority reversed the judge's denial of the settlement and approved it on their own.<sup>216</sup> Four violations of the underground coal mine's ventilation plan were involved in that case.<sup>217</sup> In total, those violations were initially assessed at \$18,093, but the settlement motion sought to reduce the penalty to \$3,339, an 81.5% reduction.<sup>218</sup> The majority expressed that the settlement was fair and reasonable and, therefore, it should have been approved.<sup>219</sup>

Again, Commissioners Traynor and Jordan voiced their objections, bluntly remarking that the majority essentially adopted the motion's self-serving presentation of select facts and legal conclusions and then employed a de novo determination to approve the settlement instead of applying the abuse of discretion test.<sup>220</sup> Long-established Commission law is that a judge's evidentiary and penalty determinations are not overturned absent an abuse of discretion.<sup>221</sup>

Given the all-but-certain approval of settlement motions, the inability of judges to make reasonable inquiry about the motions, and the frequent dramatic reductions in the penalties in the settlements, can it be realistically contended that the settlement review process, as applied by the Commission, is consistent with Congress' intention in creating this unique settlement review provision?

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<sup>212</sup> See 30 U.S.C.A. § 814(g)(1) (West 2023) (mandating that miners receive safety training required pursuant to § 825); § 825 (establishing the requirements for the training of miners in safety measures relating to their employment); 30 C.F.R. §§ 46, 48.

<sup>213</sup> *Am. Aggregates of Mich.*, 42 F.M.S.H.R.C. at 586 (Traynor & Jordan, Comm'rs, dissenting).

<sup>214</sup> *Id.*

<sup>215</sup> 42 F.M.S.H.R.C. 589 (2020).

<sup>216</sup> *Id.* at 589.

<sup>217</sup> *Id.* at 589–90.

<sup>218</sup> *Id.* at 590.

<sup>219</sup> *Id.* at 601–02.

<sup>220</sup> *Id.* at 604–05. (Traynor & Jordan, Comm'rs, concurring in part and dissenting in part).

<sup>221</sup> *Id.* at 613–14.

*F. Making “Significant and Substantial” Violations Far More Difficult to Establish*

A “significant and substantial” or “S&S” violation has been used by Congress for a long period of time to apply to more serious mine safety and health violations. Appearing more than 50 years ago, in the 1969 Coal Act, it provided:

[i]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard,*” that finding is to be included in the notice of the violation.<sup>222</sup>

Other than expanding its application to all mines, the same language was employed in the 1977 Mine Act.<sup>223</sup>

At least by the words employed by Congress in those Acts, it was reasonable to visualize an S&S violation as one which, by *contributing* to a mine hazard, moves closer to the hazard’s actual occurrence. The statute’s words do not require that the violation *cause* the hazard, but rather that it need only *contribute* to it happening. That is, a showing that the violation cited made matters worse by adding to a confluence of events, making the occurrence of an actual hazard more likely.

Although the meaning of the words employed by Congress were plain, in 1984, the Commission expounded on its meaning, creating four elements to establish an S&S violation.<sup>224</sup> They require: (1) proving that a safety or health standard has been violated; (2) that the violation *contributed* to a discrete safety hazard—that is, a measure of danger to safety; (3) that there is a *reasonable likelihood* that the hazard *contributed* to will result in an injury; and (4) that such injury will be of a reasonably serious nature.<sup>225</sup>

Subsequently, the Commission modified its test, making the establishment of an S&S violation more onerous, stating that by “contributing,” it now had to be shown there was a reasonable likelihood of the occurrence of

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<sup>222</sup> Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 104(c)(1), 83 Stat. 742, 751 (codified as amended at 30 U.S.C.A. § 814(d)(1)) (emphasis added).

<sup>223</sup> Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, sec 201, § 104(d)(1), 91 Stat. 1290, 1301 (codified as amended at 30 U.S.C.A. § 814(d)(1)).

<sup>224</sup> Mathies Coal Co., 6 F.M.S.H.R.C. 1, 3–4 (Jan. 6, 1984).

<sup>225</sup> *Id.*

the hazard itself.<sup>226</sup> That did not end the modifications to the S&S test because the Commission Trio, moving a long way from the original *Mathies* formulation, then stated in *Peabody Midwest Mining, LLC*,<sup>227</sup> that the violation must be shown to be reasonably likely *to cause* the occurrence of the hazard.<sup>228</sup>

More alarming than the new, more stringent, required showing were the circumstances that the three commissioners believed warranted application of their new requirement.

*Peabody Midwest* involved an established violation of § 316(b) of the Mine Act.<sup>229</sup> That section includes “Emergency Response Plans” (“ERP”).<sup>230</sup> Refuge chambers are included within such plans.<sup>231</sup> The mine conceded that it violated that section of the Act by having one of its refuge chambers placed in direct line of sight of the working face, but it challenged the judge’s determination that the violation was “significant and substantial.”<sup>232</sup> The majority reversed the judge’s finding that it was S&S.<sup>233</sup>

The core of their holding that the violation was not S&S rested upon there being two refuge chambers with one of the refuge chambers being properly located in a crosscut and capable of housing 20 miners.<sup>234</sup> Though the Emergency Plan required *two* rescue chambers, the three held that the Secretary did not introduce sufficient evidence to show that more than 20 miners would be on the section at the time of any plausible explosion.<sup>235</sup> Therefore, they concluded, the Secretary did not demonstrate that the second rescue chamber was necessary, as the one chamber could accommodate 20 miners and the Secretary

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<sup>226</sup> Newtown Energy, Inc., 38 F.M.S.H.R.C. 2033, 2038 (Aug. 2016).

<sup>227</sup> 42 F.M.S.H.R.C. 379 (2020).

<sup>228</sup> *Id.* at 382–83.

<sup>229</sup> *Id.* at 379.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*; “Refuge chambers are movable chambers that are either made of steel or have tents that inflate from a steel skid. They may potentially save the lives of miners during an underground mine emergency by providing breathable air, food, water, and a safe environment for up to 96 hours.” Katherine A. Margolis, Catherin Y. Kingsley Westerman & Kathleen M. Kowalski-Trakofler, *Underground Mine Refuge Chamber Expectation Training: Program Development and Evaluation*, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH <https://www.cdc.gov/niosh/mining%5C/UserFiles/works/pdfs/umrce.pdf> (last visited Apr. 14, 2023).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 388–89.

<sup>235</sup> *Id.*

didn't show it was reasonably likely that there would be more than that number of miners needing refuge at the time of any plausible explosion.<sup>236</sup>

Under the majority's holding, God help it if an additional miner, beyond the maximum of 20 miners, happened to be the unlucky 21<sup>st</sup> miner present, because the refuge chamber's maximum capacity could not accommodate him. Thus, under their detached analysis, safely distant from any personal exposure or need to resort to a rescue chamber themselves, they turned their focus away from the violative rescue chamber, which was in direct line of sight of the working face and therefore, directly in line if an explosion were to occur. The Commission avoided considering the fact that the ERP required *not one, but two*, such rescue chambers.<sup>237</sup> One, non-violating chamber, they concluded, was enough, as the Secretary did not prove that more than 20 miners would need to use a chamber, and in effect, determining that the second chamber was superfluous, at least for analyzing whether the violation was significant and substantial.<sup>238</sup>

The dissenting Commissioners, Traynor and Jordan, cast doubt upon the mine operator's contention that there would never be more than 20 miners in the area, so one refuge chamber was sufficient.<sup>239</sup> They took issue with that claim as not being supported by the record.<sup>240</sup> This contention was not merely their personal take, as they remarked that the facts found by the judge did not support the mine operator's claim that there would never be more than 20 miners in need of using the rescue chamber.<sup>241</sup> In fact, it was admitted that during a "hot seat change," which is when one equipment operator ends his shift and the next shift miner immediately takes his place on the equipment, there would be more than 20 miners in the area.<sup>242</sup> On top of that, an employee of the mine operator conceded that two rescue chambers were needed because more than 20 miners could be at the working face on a given shift.<sup>243</sup> The S&S analysis is to be evaluated in the context of continued normal mining operations and, for a violation of this nature, it is to be viewed in the context of an occurrence of the emergency contemplated by the standard.<sup>244</sup> That being the case, the analysis

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 392. (Traynor & Jordan, Comm'rs, dissenting).

<sup>238</sup> *Id.* at 388–89 (majority opinion).

<sup>239</sup> *Id.* at 392–93 (Traynor & Jordan, Comm'rs, dissenting).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 394–97.



must assume that the emergency, here an explosion, has occurred and at step 3 of the S&S analysis, it must be assumed that the hazard, brought about by insufficient shelter space, has occurred.<sup>245</sup>

The *Peabody Midwest* decision changes the “contributes to” features of Steps two and three of an S&S violation analysis, substituting *cause* in their place, a very different and much heightened requirement. Accordingly, now it’s goodbye to Congress’s words that the violation “contribute to a hazard” and hello to requiring that it “cause the hazard.” This amounts to a sea change for establishing that a violation is significant and substantial.

As mentioned at the outset of this article, one would be naïve to not realize that money is involved in these matters. Civil penalties for violations of safety and health violations are not tax deductible,<sup>246</sup> so reducing the amount of a civil penalty decreases the mine operator’s tax liability. In *Peabody Midwest*, the majority’s remand for the judge to recalculate the penalty, now with the S&S aspect gone, produced a \$15,000 drop in the fine, from \$50,000 to \$35,000.<sup>247</sup> *Peabody Midwest* would not be the last assault by those commissioners on a judge’s finding that a violation was S&S.

In *Consol Pennsylvania Coal Co.*,<sup>248</sup> there was a violation of the safety standard requiring that power wires and cables are to be insulated adequately and fully protected.<sup>249</sup> That exact requirement appears in the Mine Act itself.<sup>250</sup> There was no dispute that there was a live, 480-volt, electric cable, which was not insulated adequately and not fully protected.<sup>251</sup> That cable was suspended from the ceiling of an entry by a “J-hook”.<sup>252</sup> Although the violation was upheld, Commissioners Rajkovich and Althen reversed the administrative law judge’s finding that the violation was “significant and substantial.”<sup>253</sup> It is interesting, and revealing, that the majority did not call them “J-hooks,” but instead employed the description “insulated and locked hooks” five times in its decision and by using that description, they bought into the Respondent’s description of

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<sup>245</sup> *Id.* at 397.

<sup>246</sup> *See* 26 C.F.R. § 1.162-21.

<sup>247</sup> *Peabody Midwest Mining, L.L.C.*, 42 F.M.S.H.R.C. 663, 666 (Aug. 12, 2020).

<sup>248</sup> 44 F.M.S.H.R.C. 37 (2022).

<sup>249</sup> *Id.* at 37.

<sup>250</sup> 30 U.S.C.A. § 865(l) (West 2023).

<sup>251</sup> *Consol Pa. Coal Co.*, 44 F.M.S.H.R.C. at (Traynor, Comm’r, concurring in result, in part, and dissenting).

<sup>252</sup> *Id.* at 51 (Traynor, Comm’r, concurring in result, in part, and dissenting).

<sup>253</sup> *Id.* at 45 (majority opinion); *id.* at 46 (Althen, Comm’r, concurring).

the hook.<sup>254</sup> Yet, the judge, who is charged with making the credibility determinations, only described them as J-hooks.<sup>255</sup>

Chairman Traynor, in dissent, took issue with the route taken by the two Commissioners comprising the majority with their finding that the violation was not a S&S violation.<sup>256</sup> The Chairman noted that the duo engaged in a *de novo* review, substituting their credibility determinations for those of the administrative law judge, and by doing so, they sidestepped the well-established rule that such substitutions are only appropriate under an abuse of discretion standard.<sup>257</sup> Absent an abuse of discretion, deference is to be paid to the credibility determinations made by the judge, not to be usurped by an appellate body.<sup>258</sup>

Further, the revised penalty is to be reassessed by the judge, applying the six statutory penalty criteria contained in § 820(i) of the Act.<sup>259</sup> This has long been the Commission's protocol. There is sound reason for this practice, as the judge has had the opportunity to hear the testimony and view the witnesses, conditions which ordinarily mean that she is in the best position to make credibility determinations.<sup>260</sup> In fact, the Commission has expressly declined to usurp a judge's credibility determinations, calling such a request as nothing more than a request for the Commission to reweigh the evidence, and noting that it declined to accept such an invitation from a mine operator.<sup>261</sup> To make sure that their non-S&S holding could not be monetarily circumvented, the majority, under the guise of "judicial economy" then assessed their own civil penalty, dropping the fine by 60%, from \$2,487 to \$1,000.<sup>262</sup>

Chairman Traynor pointed out that the majority had used this evasion before, usurping the judge's authority to first impose the civil penalty upon a remand.<sup>263</sup> In *Solar Sources Mining*,<sup>264</sup> the same commissioners considered there to be unique circumstances for inserting their own penalty in place of the judge's

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<sup>254</sup> *Id.* at 38 (majority opinion).

<sup>255</sup> *Id.* at 53 (Traynor, Comm'r, concurring in result, in part, and dissenting).

<sup>256</sup> *Id.* at 51.

<sup>257</sup> *Id.* at 51–52.

<sup>258</sup> *Id.* at 52.

<sup>259</sup> *Id.* at 57 (quoting 30 U.S.C.A. 820(i)).

<sup>260</sup> *See, e.g., In re Contests of Respirable Dust Sample Alteration Citations*, 17 F.M.S.H.R.C. 1819, 1878 (1995).

<sup>261</sup> *Knox Creek Coal Corp.*, 38 F.M.H.S.R.C. 1914, 1924 (2016).

<sup>262</sup> *Consol Pa. Coal Co.*, 44 F.M.H.S.R.C. at 44 (majority opinion).

<sup>263</sup> *Id.* at 57–58 (Traynor, Comm'r, concurring in result, in part, and dissenting).

<sup>264</sup> 43 F.M.H.S.R.C. 367 (2021).

role to first make that determination,<sup>265</sup> the difference being that in *Consol Pennsylvania*, they described the variance as attributable to judicial economy.<sup>266</sup>

G. *Finding a Route to a Desired Result: Lowering Penalties by Discarding ‘Special Assessments.’*

In an earlier decision concerning the same *Solar Sources* litigation,<sup>267</sup> over which the author was the presiding judge, that matter involved an accident when a dump truck broke through a berm and went over an embankment falling some 47 feet and landing upside down into a slurry pit.<sup>268</sup> A berm is a pile or mound of material capable of restraining a vehicle, installed at locations, including dumping sites, to prevent overtravel. Escaping what would have been almost certain death, the driver jumped from the truck seconds before it went over the embankment, but he was seriously injured.<sup>269</sup> After a hearing, the judge, upon finding a violation of the safety standard, assessed a penalty of \$68,300.<sup>270</sup> This was the same penalty amount sought by the Secretary of Labor, a figure arrived at through a process known as a “special assessment.”<sup>271</sup> Special assessments allow the Secretary to seek a larger penalty where the circumstances of a violation warrant it.<sup>272</sup>

Penalties under the Mine Act are based upon consideration of six statutory criteria established by Congress. Those criteria are: (1) the operator’s history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator’s ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.<sup>273</sup> Each criterion is to be considered, though some, such as the negligence and gravity involved, for obvious reasons, figure more prominently in determining a penalty.<sup>274</sup>

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<sup>265</sup> *Id.* at 372 n.6.

<sup>266</sup> *Consol Pa. Coal Co.*, 44 F.M.H.S.R.C. at 44 (majority opinion).

<sup>267</sup> *Solar Sources Mining, L.L.C.*, 40 F.M.S.H.R.C. 462 (2020) (ALJ).

<sup>268</sup> *Id.* at 462.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 496.

<sup>271</sup> *Id.* at 464.

<sup>272</sup> 30 C.F.R. § 100.5.

<sup>273</sup> 30 U.S.C.A. §§ 815(b)(1)(B), 820(i) (West 2023).

<sup>274</sup> *See* 30 C.F.R. § 100.3(d), (e).

Admitting that there was a violation, Commissioners Rajkovich, Althen, and Young found fault with the judge's analysis regarding two of the penalty criteria: the operator's history of violations and the operator's actions related to attempting to achieve rapid compliance after notification of a violation.<sup>275</sup> They considered the analysis of those two criteria to have been insufficient. On that basis, the three "remand[ed] the case to the Judge to complete his penalty criteria findings and reassess a penalty."<sup>276</sup>

To understand the majority's decision, it is necessary to briefly explain two types of penalties available for violations under the Mine Act. These are known as "regular assessments" and "special assessments," with the significant difference being a larger penalty may be sought by the Secretary for the latter. Acclaiming the regular assessment process, the three noted that a judge must explain any divergence from a penalty derived under that—lower penalty resulting—process, but they held that no such deference is due by a court when the Secretary seeks a special assessment.<sup>277</sup>

Two Commissioners dissented from the majority's decision.<sup>278</sup> Commissioner Traynor observed that the issues addressed by the three were not even part of the appeal, a departure from the normal review process.<sup>279</sup> That significant flaw aside, the Commissioner noted that the majority imposed a new requirement: that support for a judge's penalty assessment must now be substantial and considerable, a higher standard than the proper consideration of the penalty criteria.<sup>280</sup>

In her dissent, Commissioner Jordan remarked that the penalty imposed by a judge is reviewed under an abuse of discretion standard.<sup>281</sup> Commissioner Jordan also observed that the two factors the majority objected to as inadequately addressed—the operator's demonstrated good faith in attempting to achieve compliance after notification of the violation and its history of violations—were in fact addressed in the judge's decision.<sup>282</sup>

The upshot of the majority's decision was that, for regular penalty assessments, in effect lower penalties, a judge must explain any substantial

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<sup>275</sup> Solar Sources Mining, L.L.C., 42 F.M.S.H.R.C. 181, 187–88, 202 (2020).

<sup>276</sup> *Id.* at 202.

<sup>277</sup> *Id.* at 197.

<sup>278</sup> *Id.* at 203–10 (Traynor, Comm'r, concurring in part and dissenting in part); *id.* at 211–19 (Jordan, Comm'r, dissenting).

<sup>279</sup> *Id.* at 203–04 (Traynor, Comm'r, concurring in part and dissenting in part).

<sup>280</sup> *Id.* at 207.

<sup>281</sup> *Id.* at 211 (Jordan, Comm'r, dissenting).

<sup>282</sup> *Id.* at 212.

divergence in the penalty from that proposed by the Secretary.<sup>283</sup> However, where a judge diverges from a special assessment, no such explanation is needed.<sup>284</sup> While dressed up, the difference between the approach to be followed by a judge under regular and special assessments procedures is really about the monetary penalty which results, an observation Commissioner Jordan recognized.<sup>285</sup>

The Commission's decision in *Solar Sources* had a postscript. Upon remand, the judge, following the majority's instructions, acted independently of the special assessment and applied the required analysis said to be missing in the initial decision for the operator's history of violations and its actions related to attempting to achieve rapid compliance after the violation.<sup>286</sup> The court then concluded that a penalty of \$69,000 was appropriate.<sup>287</sup>

When before the Commission for a second time, now with Commissioners, Rajkovich and Althen comprising the majority, as the third Commissioner's term had ended, the two determined anew that the judge erred again in his penalty analysis.<sup>288</sup> The result of the Commission review was to reduce the penalty by 42% to \$40,000.<sup>289</sup>

At odds with their enormous penalty reduction, the Commission made profound concessions about penalties, acknowledging that in drafting the penalty provision of the Mine Act, Congress's primary purpose was to encourage mine operator compliance with the safety and health requirements and that such penalties were to be significant enough to have a deterrent effect, and further, that Commission judges are to have broad discretion in assessing civil penalties with the purpose of encouraging operator compliance.<sup>290</sup>

Despite those admissions, the two Commissioners concluded that the judge did not sufficiently credit the operator for its low history of violations and for its good faith abatement.<sup>291</sup> As noted, this translated into a \$29,000.00 reduction in the penalty. Thus, those two factors, of the six to be considered, took away, at 42%, an amount approaching half of the penalty imposed by the

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<sup>283</sup> *Id.* at 184 (majority opinion).

<sup>284</sup> *Id.* at 189–98.

<sup>285</sup> *See id.* at 208–09 (Traynor, Comm'r, concurring in part and dissenting in part).

<sup>286</sup> *Solar Sources Mining, L.L.C.*, 42 F.M.S.H.R.C. 329, 343–53, 358–60 (2020) (ALJ).

<sup>287</sup> *Id.* at 365–66.

<sup>288</sup> *Solar Sources Mining, L.L.C.*, 43 F.M.S.H.R.C. 367 (2021).

<sup>289</sup> *Id.* at 367, 380–81.

<sup>290</sup> *Id.* at 369–70.

<sup>291</sup> *Id.* at 371.

judge, a result which worked to the detriment of the more significant factors of negligence, gravity, and the size of the business.

Commission Chairman Traynor dissented on the basis that the two-member majority made *de novo* findings on the history of violations and good faith criteria, actions which ran contrary to prior Commission review practices when reviewing a judge's penalty determinations.<sup>292</sup> The long-standing practice had been that a judge's penalty assessment is to be overturned only where there has been an abuse of discretion.<sup>293</sup> Given the enormous monetary reduction, it may be fair to speculate whether the objective of the exercise by the majority was ultimately about the money. As the Chairman expressed it, the effect of their decision was to strip away a layer of political insulation from the penalty assessment process by taking that process out of the hands of life-tenured Judges and transplanting it to a Commission made up of political appointees serving six-year terms.<sup>294</sup>

#### IV. UNWARRANTABLE FAILURE, INDIVIDUAL LIABILITY, AND FLAGRANT VIOLATIONS

The Mine Act has provisions addressing the most egregious violations. These include "unwarrantable failures," penalties against individuals who are part of mine management,<sup>295</sup> and "flagrant violations."<sup>296</sup> Unwarrantable failures involve "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act."<sup>297</sup> It has been described as intentional misconduct, indifference, and a serious lack of reasonable care.<sup>298</sup>

Penalties against individuals are brought under § 110(c) of the Mine Act, which provides that a corporate "agent . . . who knowingly authorized, ordered, or carried out [a] violation" may be subject to individual liability.<sup>299</sup> It need only be shown that the individual knowingly acted, not that the individuals knowingly violated the law.<sup>300</sup>

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<sup>292</sup> *Id.* at 383 (Traynor, Comm'r, dissenting).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 384.

<sup>295</sup> 30 U.S.C.A. § 814(d)(1) (West 2023).

<sup>296</sup> 30 U.S.C.A. §§ 814(d), 820(b), (c) (West 2023).

<sup>297</sup> Emery Mining Corp., 9 F.M.S.H.R.C. 1997, 1997 (1987).

<sup>298</sup> Rochester & Pittsburgh Coal Co., 13 F.M.S.H.R.C. 189, 194 (1991).

<sup>299</sup> 30 U.S.C.A. § 820(c) (West 2006).

<sup>300</sup> Am. Coal Co., 38 F.M.S.H.R.C. 2062, 2106 (2016).

Flagrant violations are new. In the wake of fatal accidents at three mines,<sup>301</sup> Congress enacted the Mine Improvement and New Emergency Response (“MINER”) Act.<sup>302</sup> Under § 8(a) of that Act, Congress instituted the “flagrant violation.”<sup>303</sup> It provides for enhanced penalties to deter repeated or reckless failures to eliminate known dangerous violations.<sup>304</sup> Congress defined a flagrant violation as “a reckless or repeated 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.”<sup>305</sup>

*Northshore Mining Co.*<sup>306</sup> involved a deteriorated conveyor walkway which was elevated 50 feet above ground level.<sup>307</sup> The requirements of the violated standard are not difficult to understand. In relevant part, it requires that “[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and *maintained in good condition.*”<sup>308</sup>

A miner was working on the walkway when it collapsed.<sup>309</sup> He was injured, receiving a spinal cord contusion, which required physical therapy. Had he not been wearing fall protection his injuries would likely have been worse. The judge upheld the “unwarrantable failure” and “reckless disregard” charges, as well as the individual liability charge against two management individuals but determined that the violation was not flagrant.

Commissioners Rajkovich and Althen affirmed the judge’s determination that, while the standard was violated, it was not a flagrant violation. The two Commissioners then went further, dismissing the penalties against the management individuals. One was a section manager, responsible for monitoring such equipment, while the other was responsible for maintenance

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<sup>301</sup> “The year 2006 began with the tragic loss of 12 miners at the Sago Mine in West Virginia, followed closely by the deaths of two miners at the Alma Mine, also in West Virginia; and some 4 months later by the deaths of 5 miners at the Darby Mine in Harlan County, Kentucky. The death toll in the first 5 months of the year was nearly 50 percent higher than the entire previous year.” S. REP. NO. 109-365, at 2 (2006).

<sup>302</sup> Pub. L. No. 109-236, 120 Stat. 493 (2006).

<sup>303</sup> 30 U.S.C.A. § 820(b)(2) (West 2006).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> 43 F.M.S.H.R.C. 1 (2021).

<sup>307</sup> *Id.* at 5–6.

<sup>308</sup> 30 C.F.R. § 57.11002 (emphasis added).

<sup>309</sup> *Northshore Mining Co.*, 43 F.M.S.H.R.C. 1, 30 (2021) (Traynor, Comm’r, concurring in part and dissenting in part).

of the conveyor. In their determination, the two Commissioners held that “[t]he evidence [did] not show that the condition of the walkway . . . was reasonably expected to cause reasonably serious bodily injuries to miners.”<sup>310</sup> However, in reaching that conclusion, they added an element to their analysis by considering that the miner was wearing fall protection.<sup>311</sup> Because the miner had that fall protection, they held that the expectation for the occurrence of a hazard which would result in death or serious bodily injury was not present.

The dissent took issue with the majority’s conclusion that the violation was not flagrant and their view that the two operator’s agents were not individually liable.<sup>312</sup>

Having issued previous decisions on the subject, the Commission was not writing on a blank slate when explaining what constitutes a reckless flagrant violation. As applied in the *Northshore* case, the question was whether a reckless failure to make reasonable efforts to eliminate a known hazard requires not just reckless conduct but proof of intentional conduct, that is to say, an operator’s intent to cause harm.<sup>313</sup> Put differently, is a showing of reckless conduct sufficient or must the Secretary also prove the conduct was done with conscious or deliberate disregard for an expectation of death or bodily injury?<sup>314</sup>

#### A. *The Flagrant Violation Issue*

The dissent from Commissioner Traynor challenged the duo’s conclusion that to prove a flagrant violation the Secretary of Labor must show that the mental state of the operator was such that the “failure to eliminate the violation was done with a ‘conscious’ or ‘deliberate’ expectation of death or bodily injury, rather than simply a ‘reckless’ disregard for such danger.”<sup>315</sup> Such a test amounts to requiring a mental state tantamount to establishing homicide.<sup>316</sup> Accordingly, the dissent held that reckless behavior does not require showing that the behavior was intentional.<sup>317</sup> Intentional conduct is distinct from reckless conduct.<sup>318</sup> The dissent held that the statutory language is plain and unambiguous

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<sup>310</sup> *Id.* at 22.

<sup>311</sup> *Id.* at 22–24.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 32.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 30 (Traynor, Comm’r, concurring in part and dissenting in part).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 34.

<sup>318</sup> *Id.* at 35.



and even if, for the sake of argument, it was considered to be ambiguous, deference is owed to the Secretary of Labor's reasonable interpretation of the term. Thus, the dissent rejected the majority's idea that the Secretary must show that the "operator's failure to eliminate a known safety violation was done *with a deliberate purpose or conscious understanding* that such failure is expected to cause serious injury or death."<sup>319</sup> Instead, in using the word *reckless*, Congress was speaking to an operator's "reckless failure to eliminate known dangerous violations, even where [there is] no proof of the operator's conscious expectation of serious injury or death."<sup>320</sup> The dissent noted that requiring "a deliberate or conscious expectation of harm in order to demonstrate recklessness" means showing the operator's *intent* to act recklessly, a view which excludes indifference.<sup>321</sup>

The dissent also spoke to the adverse impact resulting from the majority's strained interpretation—by their holding that the engineering report, informing that access to the walkway should be restricted, was not an outright prohibition on access, and therefore no reckless disregard was shown.<sup>322</sup> The dissent then said the quiet part out loud:

in the absence of high penalties associated with flagrant violations [which can reach in the neighborhood of \$271,000], some operators might be tempted to roll the dice by putting off safety repairs, knowing that non-flagrant penalties are capped at approximately \$74,000 and thus might be much less costly than the repair itself. This was precisely the situation that Congress wanted to address by providing meaningful penalties under the Act.<sup>323</sup>

In that respect, the dissent noted Congress wanted meaningful penalties, expressing in the Mine Act's legislative history that "[m]ine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions."<sup>324</sup> It is perhaps telling that the majority found there was reckless disregard and unwarrantable behavior while managing to simultaneously hold that the violation was not flagrant. It is also quite odd to say that somehow the operator's use of fall protection amounts to mitigation, impacting the analysis of whether the operator

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<sup>319</sup> *Id.* at 33 (emphasis added).

<sup>320</sup> *Id.* at 34 (underlining in original).

<sup>321</sup> *Id.* at 39.

<sup>322</sup> *Id.* at 46.

<sup>323</sup> *Id.* at 46.

<sup>324</sup> *Id.* at n.13.

was reckless. Such a consideration turns the focus away from the operator's failure to eliminate the violation. It also is disquieting that the two-member majority effectively utilized a "reserve parachute" style analysis, admitting that although being 50 feet up when a walkway collapses is not so good, the miner was wearing fall protection, so no worries.

The dissent added that even under the majority's unwarranted and new definition of reckless, as applied to a flagrant violation, the facts still established such a violation.<sup>325</sup> This was evidenced by the "written engineering report outlining the dangers of the walkway and an operator's deliberate choice to put essential repairs for the walkway on the *to do* list."<sup>326</sup> The accident occurred in September 2016, but the operator was informed by 2013 of the need to repair the walkways and the mine's own commissioned report about the poor condition of the walkway did not spur action even ten months later when the accident occurred.<sup>327</sup> This constitutes "the type of operator conduct Congress was trying to deter by including the flagrant penalty language in the Miner Act."<sup>328</sup>

#### V. THE INDIVIDUAL LIABILITY ISSUE, PURSUANT TO SECTION 110(C) OF THE MINE ACT.

Per § 110(c), the Mine Act provides for liability against individuals "[w]henever a corporate operator violates a mandatory health or safety standard . . . [under circumstances where a] director, officer, or agent of such corporation [] knowingly authorized, ordered, or carried out such violation."<sup>329</sup> Such an individual is subject to the same penalties as the mine.<sup>330</sup>

Although the judge found that two high-ranking managers at the mine violated the individual liability provision, the majority in *Northshore Mining* reversed that determination.<sup>331</sup> They did so in the face of the individuals' *knowledge* of the hazard, as evidenced by the engineering report which alerted them that that the walkways were not safe for use until a repair has been completed.<sup>332</sup> Effectively, an admission that they appreciated the risk is the required use of fall protection, showing their awareness of the hazard.<sup>333</sup>

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<sup>325</sup> *Id.* at 44.

<sup>326</sup> *Id.* (emphasis added).

<sup>327</sup> *Id.* at 45.

<sup>328</sup> *Id.*

<sup>329</sup> 30 U.S.C.A. § 820(c) (West 2023).

<sup>330</sup> 30 U.S.C.A. § 820(c) (West 2006).

<sup>331</sup> *Northshore Mining Co.*, 43 F.M.S.H.R.C. at 2.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 48.

Although the two managers tried to pass off the blame and responsibility on the mine's engineering department, they had the authority to stop work on the patently dangerous walkway.<sup>334</sup> In fact, the two managers admitted they had the authority to shut down operations *for any reason*.<sup>335</sup>

If circumstances such as those in *Northshore Mining* do not establish individual liability, it is hard to conjure what would meet the Commission majority's test for individual liability. Of significance, the Court of Appeals for the Eighth Circuit recently reversed the duo on *every point*.<sup>336</sup>

## VI. CONCLUSION

It is plain that the eight areas, as discussed in the Commission decisions recounted above, establish a pattern which is antithetical to Congress's safety and health objectives for miners. Although one might take issue with the criticisms in one instance or another regarding the discussed decisions by the conservative commissioners, as a whole those decisions demonstrate a revealing pattern of the anti-miner safety and health developments at every turn. In short, taking issue with one or two tiles in a mosaic does not distort the nature of the resulting overall picture of an overall animus. Nor is this sample of decisions an exclusive list of the pro-mine operator/anti-miner safety and health decisions issued by those commissioners,<sup>337</sup> as they have displayed an unconventional standard for review of mine operator default cases and an expansive view of the scope of evidence permitted to be introduced in temporary reinstatement cases.

It is hard to brush aside the conclusion that the decisions reached by these commissioners evince a consistent Mine Act animus. Viewing these cases *in toto*, and their consistent pattern of their outcomes, one could reasonably conclude that the results were preordained, with the effort being directed to fashioning a rationale to support it.

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Northshore Mining Co. v. Sec'y of Lab.*, 46 F.4th 718, 739 (8th Cir. 2022).

<sup>337</sup> A recent decision by the United States Court of Appeals for the D.C. Circuit, *Sec'y of Lab. v. Westfall Aggregate and Materials*, No. 22-1088, slip op. (D.C. Cir. Apr. 7, 2023), is yet another example. It involved a motion by Westfall to reopen a final order some eight years after a penalty assessment was deemed a final order. The two-member Commission majority of Mr. Rajkovich and Mr. Althen held that Westfall claimed not to have received a written citation for the assessment of a civil penalty and that the Secretary failed to provide sufficient evidence of a citation. *Westfall*, slip op. at 3. The Circuit Court held that neither claim by those Commissioners was supported by the record and, in a clear rebuke, stated that the two-members "clearly ignored the facts and arguments presented by Westfall. Instead, [they] sua sponte purported to resolve this case on grounds that were not raised or litigated by the parties and pursuant to findings not supported by the record. This is the antithesis of reasoned decision-making." *Id.* at 12 (emphasis added).

To avoid decisions that counter the Congressional purposes, the Federal Mine Safety and Health Review Commission should never be composed of those who, by their work background, signal that their decisions will be likely to weaken those objectives. As noted at the outset, the Mine Act is distinct from other labor laws because those who interpret its provisions, and the safety and health standards promulgated under it, do not have to weigh conflicting Congressional goals. Under the Mine Act, the guiding objective is supposed to be solely about outcomes which further, not diminish, miners' safety and health.

While every mine operator is entitled to strong legal representation for all manners of Mine Act related violations, as the examples in this article demonstrate, those lawyers whose careers were made defending mine operator interests should not then be appointed to the Commission because their perspectives undermine the Mine Act's clear Congressional purpose. This is not to say that all Commissioners should come from a labor-friendly background, but the goal should be to have at least two such Commissioners looking out for our Nation's miners with the other members filled by individuals with a truly neutral background.