Nos. 21-1334 and 21–1383

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United States Court of Appeals
For the Eighth Circuit

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Northshore Mining, Inc., Petitioner/Cross–Respondent

v.

Secretary of Labor,
Mine Safety and Health Administration,
Respondent/Cross-Petitioner,

v.

Roger Peterson, employed by Northshore Mining, Inc.;
Matthew Zimmer, employed by Northshore Mining, Inc.; and
Federal Mine Safety and Health Review Commission,
Cross–Respondents

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

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# Secretary's Cross–Principal Brief and Response Brief


Elena S. Goldstein
Acting Solicitor

April E. Nelson
Associate Solicitor

Archith Ramkumar
Counsel for Appellate Litigation

Rebecca W. Mullins
Attorney
U.S. Department of Labor
Office of the Solicitor
201 12th Street South, Ste. 401
Arlington, VA 22202
(202) 693–9345

## Summary of the Case

In 2016, one of two deteriorated elevated walkways failed at Northshore Mining's iron ore processing plant, injuring a miner. The Mine Safety and Health Administration (MSHA) cited the plant for the walkways' conditions and, because management knew of the conditions for years, designated the violation as flagrant for penalty assessment purposes under 30 U.S.C. 820(b)(2). It also proposed individual penalties against two managers under 30 U.S.C. 820(c).

In considering for the first time what constitutes recklessness in the flagrant context, the Federal Mine Safety and Health Review Commission (Commission) failed to focus on the key inquiry: Northshore's knowledge that the walkways violated MSHA's standards and its failure to make efforts to eliminate the violation. As for the managers' liability, the Commission erred in requiring proof that the managers had the authority to order the repair to the walkways when they could have kept miners off the walkway.

Because this case presents a matter of first impression and the parties have filed cross–petitions raising multiple legal issues, oral argument is appropriate. The Secretary requests thirty minutes to present argument.

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## Introduction

Northshore, a mine operator, knew for years that two elevated walkways at its iron ore processing plant were crumbling. In June 2015, management commissioned a third–party engineering report that concluded that the walkways were structurally inadequate and unsafe for use. For more than a year after receiving the report, Northshore ignored the report's findings and chose not to fix the deteriorating walkways. Instead, management required miners on the two walkways to wear fall protection in the hopes that it would stave off serious injury. But management did not instruct contract miners, who did not know about the report, to wear fall protection the entire time they were on the walkways. On September 7, 2016, with full awareness of the unabated danger, Northshore sent a group of unsuspecting contract miners to work on one of the two walkways.

That day, the walkway failed. Evander King was working on the walkway when he heard a loud bang and felt the structure begin to shake. Debris fell on him. Afterwards, he saw a hole appear in the floor of the walkway directly in front of him and could see fifty feet to the ground below. As a result of the accident, he suffered a spinal cord contusion, was diagnosed with post–traumatic stress disorder, and experienced sleep disturbances.

After investigating a complaint about the accident, MSHA issued two enforcement actions, one for failure to maintain the walkways in good condition

and another for failure to barricade the walkways. MSHA determined that the failure to fix the walkways constituted aggravated conduct and that the violation contributed to a mine safety or health hazard. In considering appropriate penalties, MSHA concluded that Northshore's reckless conduct merited a flagrant penalty designation under 30 U.S.C. 820(b)(2), which provides, in pertinent part, that "the term 'flagrant' … means [1] a reckless … failure to make reasonable efforts [2] to eliminate a known violation of a mandatory health or safety standard that …[3] reasonably could have been expected to cause death or serious injury." MSHA also concluded that Matthew Zimmer and Roger Peterson, section managers with authority to direct the workforce, were individually liable under 30 U.S.C. 820(c), which provides that "[w]henever a corporate operator violates a mandatory health or safety standard," "any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation" "shall be" liable.

The Commission agreed that Northshore engaged in aggravated conduct that significantly and substantially contributed to a mine safety or health hazard. But it disagreed with the proposed flagrant penalty designation and also disagreed that Zimmer and Peterson were personally liable. In reaching these conclusions, the Commission committed multiple legal errors.

First, the Commission incorrectly defined recklessness in the flagrant context to require proof that an operator consciously or deliberately disregarded

harm. Recklessness is a well–defined term requiring only that a person knowingly act or choose not to act – it does not require knowledge of the extent of the potential harm. Under that definition, Northshore's knowing failure to make efforts to fix the walkways was reckless.

Second, the Commission improperly considered whether the violation "reasonably could have been expected to cause" "death or serious bodily injury," 30 U.S.C. 820(b)(2) (the likelihood prong), when neither party raised that question in their petitions. It also erred by requiring the Secretary to prove that a specific hazard would be "expected" to cause death or serious injury. Under the correct legal test, substantial evidence supports the ALJ's decision that the Secretary satisfied the likelihood prong.

Third, the Commission erred in conditioning personal liability against Zimmer and Peterson on their ability to remedy the walkway violation. The correct analysis is whether the agents could have protected miners against known dangers and failed to. 30 U.S.C. 820(c) provides for individual liability against corporate agents who knowingly authorize or carry out a violation regardless of their authority to remedy the violation. Here, both men could have kept miners off the walkways but did not. So substantial evidence supports the ALJ's conclusion that Zimmer and Peterson were liable.

Finally, substantial evidence supports the ALJ's factual findings and credibility determinations that Northshore exhibited reckless disregard for miner safety and that its failure to comply with both safety standards was unwarrantable.

## Jurisdictional Statement

The Commission had jurisdiction because Northshore timely contested MSHA's enforcement actions. 30 U.S.C. 823(d). Zimmer and Peterson timely contested their penalty assessments. 30 U.S.C. 820(c).

The Commission issued its final decision on January 21, 2021. Both parties filed timely petitions for review with this Court on February 11, 2021 and February 17, 2021, respectively. This Court has jurisdiction under 30 U.S.C. 816(a), (b).

## Statement of the Issues

1. In order to impose a flagrant penalty, the Secretary must show an operator's reckless or repeated failure to make reasonable efforts to eliminate a known violation. Recklessness occurs when an actor knows relevant facts but does not appreciate the high danger of risk involved, although a reasonable person in the same position would do so. Northshore knew that its outer walkways were unsafe for use but failed to fix them.

   In considering recklessness:
   a. Did the Commission err in requiring proof that Northshore consciously or deliberately disregarded a danger to miners?
   b. Did the Commission err in concluding that Northshore was not reckless under 30 U.S.C. 820(b) because it instructed miners on the walkways to use fall protection, when fall protection did nothing to eliminate the known violation?

   Apposite Cases

*Farmer v. Brennan*, 511 U.S. 825 (1994)
*Sec'y of Labor v. Am. Coal Co.*, 38 FMSHRC 2062 (2016)
*Sec'y of Labor v. Lehigh Anthracite Coal*, 40 FMSHRC 273 (2018)

Apposite Statutory Provisions
30 U.S.C. 820(b)(2)

2. Another element of the flagrant analysis requires the Secretary to show that the violation "reasonably could have been expected to cause death or serious bodily injury." 30 U.S.C. 820(b). This language is nearly identical to the Federal Mine Safety and Health Act of 1977's ("Mine Act's" or "Act's") imminent danger definition at 30 U.S.C. 802(j). The ALJ found that the violation reasonably could have been expected to cause death or serious injury. The Commission reversed.

   a. The Mine Act limits Commission review to questions raised by the parties' petitions. Neither party petitioned for review of whether the deteriorated walkways reasonably could have been expected to cause death or serious injury. Did the Commission err in considering and ruling on this element?
   b. Did the Commission err in requiring proof that Northshore "expected" death or serious injury even though the Commission has never imposed a comparable requirement in other similar contexts?
   c. The ALJ found that Northshore reasonably could have expected the deteriorated walkways to cause death or serious injury. Does substantial evidence support this finding?

Apposite Cases
*Donovan on Behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983)
*Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259 (D.C. Cir. 2016)
*VP–5 Mining Co. v. Sec'y of Labor*, 15 FMSHRC 1531, 1535 (1993)

Apposite Statutory Provisions
30 U.S.C. 802(j)
30 U.S.C. 820(b)(2)
30 U.S.C. 823(d)(2)(A)(iii) and (B)

3. The Mine Act holds corporate agents who knowingly authorize, order, or carry out violations personally liable. Zimmer and Peterson were high–ranking managers at Northshore who had the authority to direct the workforce and whose job duties included ensuring miners worked safely. Both received the engineering report showing that the walkways were not safe for use absent repairs but nonetheless allowed miners to continue working on them. Did the Commission err in conditioning agent liability here on their ability to initiate repairs to the walkways?

   Apposite Cases
   *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358 (D.C. Cir. 1997)
   *Sec'y of Labor v. LaFarge Construction Mat'ls,* 20 FMSHRC 1140 (1998)
   *Sec'y of Labor v. Maple Creek Mining, Inc.,* 27 FMSHRC 555 (2005)
   *Sec'y of Labor v. Richardson*, 3 FMSHRC 8 (1981)

   Apposite Statutory Provisions
   30 U.S.C. 820(c)

4. The ALJ found that the enforcement actions at issue were the result of Northshore's reckless disregard and involved Northshore's unwarrantable failure to comply with a mandatory health and safety standard. Does substantial evidence support these findings?

   Apposite Cases
   *Mercier v. U.S. Dep't of Labor*, 850 F.3d 382 (8th Cir. 2017)
   *Pattison Sand Co., LLC v. Sec'y of Labor*, 688 F.3d 507 (8th Cir. 2012)
   *Emery Mining Corp. v. Sec'y of Labor*, 9 FMSHRC 1997 (1987)
   *Sec'y of Labor v. Lehigh Anthracite Coal*, 40 FMSHRC 273 (2018)

## Statement of the Case

### 1. Statutory Background

The Mine Act was enacted to improve safety and health in all of the nation's mines in order to protect the mining industry's "most precious resource – the

miner." 30 U.S.C. 801(a). The Act authorizes MSHA to issue citations and orders and propose civil penalties for violations of the Act. 30 U.S.C. 814(a), 820(a).

MSHA proposes and the Commission assesses penalties based on six statutory factors: (1) the operator's size; (2) the operator's history of previous violations; (3) whether the operator was negligent; (4) the gravity of the violation; (5) the operator's good faith in abating a violation; and (6) the effect of the penalty on the operator's ability to continue in business. 30 U.S.C. 815(b)(1)(B). The Act "creates a graduated enforcement scheme, with more severe penalties imposed for more severe violations." *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1084 (D.C. Cir. 1987). MSHA may propose a "regular" penalty assessment using the formula in 30 C.F.R. 100.3 that "mathematically converts findings regarding the six statutory factors into predetermined dollar values." *Am. Coal Co. v. FMSHRC*, 933 F.3d 723, 725 (D.C. Cir. 2019).

MSHA designates more serious violations as significant and substantial ("S&S") if they are "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. 814(d)(1). S&S designations focus on a violation's contribution to a hazard; an operator's negligence is irrelevant to this analysis. *Ibid.* MSHA's formula penalty tables are more likely to lead to higher penalties for S&S violations.

Some S&S violations also are unwarrantable failures to comply with safety and health standards. *Ibid*. An unwarrantable failure requires "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp. v. Sec'y of Labor*, 9 FMSHRC 1997, 2001 (1987). It is characterized by conduct that is "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Sec'y of Labor v. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (2000). The minimum penalty for an unwarrantable failure violation is $2,493, which is higher than the minimum penalty for S&S violations. 30 U.S.C. 820(a)(3)(A); 30 C.F.R. 100.4(a); 86 Fed. Reg. 2964, 2971 (Jan. 14, 2021).

In 2006, tragedies at the Sago, Alma, and Darby Mines killed nineteen miners. Shortly thereafter, Congress enacted the Mine Improvement and New Emergency Response ("MINER") Act to "enhance worker safety in our nation's mines." S. Rep. No. 109–365, at 1 (2006). In an effort to increase incentives for operators to correct violations proactively, Congress amended the penalty section of the Mine Act to create a new, more stringent category: a "flagrant" violation designation. Pub. L. No. 109–236, 120 Stat. 501 (2006). The Act defined a flagrant violation as a "[1] reckless or repeated failure to make reasonable efforts [2] to eliminate a known violation of a mandatory health or safety standard [3] that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. 820(b)(2).

This language drew on existing Mine Act and caselaw concepts. For example, under 30 U.S.C. 817(a), MSHA can withdraw miners from a mine site in the face of an imminent danger, defined as a condition "which could reasonably be expected to cause death or serious physical harm" before the operator can abate the condition. 30 U.S.C. 802(j). And under Commission caselaw, an S&S violation is, among other things, reasonably likely to result in "an injury or illness of a reasonably serious nature." *Sec'y of Labor v. Cement Div. Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (1981). And "reckless disregard" was a well–established negligence concept in Commission caselaw. See *Consolidation Coal*, 22 FMSHRC at 355; see also *Sec'y of Labor v. Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 283–84 (2018). But the flagrant provision's focus on an operator's failure to make efforts to eliminate a known violation was new.

Congress authorized MSHA to propose civil penalties of up to $220,000 for flagrant violations – a number that has risen to $274,175 to account for inflation. 30 U.S.C. 820(b)(2); 86 Fed. Reg. 2964, 2971 (Jan. 14, 2021).

A flagrant designation occurs only at the penalty assessment stage. Unlike citations and orders MSHA issues under 30 U.S.C. 814(a) and 814(d), the Mine Act contains no provision for an MSHA inspector to issue a citation or order for a flagrant violation. A flagrant violation is not a new type of enforcement action that adds to section 814's repertoire; the MINER Act simply added the option of

enhanced penalties for existing violations that an operator knows about and fails to eliminate. Thus, MSHA may designate S&S and unwarrantable failure violations as flagrant for penalty purposes if the operator failed to make efforts to eliminate a known violation.

Separately, corporate agents are liable for operator violations of mandatory health or safety standards if the agents "knowingly authorized, ordered, or carried out such violation." 30 U.S.C. 820(c).

**2. Factual Background**

Northshore is an iron ore mine in Lake County, Minnesota that processes iron ore pellets for use in steel production. J.A. 602. The plant's 62/162 conveyor gallery is an upward–sloping, elevated, covered gallery with two conveyors, a primary walkway between the conveyors, and an enclosed outer walkway on the east and west sides of the conveyor. *Ibid*. The conveyors and walkways rose to a height of approximately 72 feet. J.A. 720. The outer walkways were constructed of perlite panels reinforced with wire mesh fabric and a 1 ½ inch plain concrete topping. J.A. 605. Miners worked on the outer walkways changing idlers (belt support) on the conveyors every four to six weeks and cleaning accumulated iron ore pellets off the walkways. J.A. 48, 175, 620.

The perlite on all three walkways began deteriorating as early as 2009. JA 69. In 2010, Northshore stabilized the center walkway with steel plates but did not

reinforce either outer walkway. J.A. 605–06. In 2013, a Northshore engineer submitted a work order reporting falling concrete panels on the underside of the 62/162 gallery, including the outer walkways, to Daniel Scamehorn, the supervisor in charge of providing engineering services for the entire mine. J.A. 605. But Northshore did not repair the outer walkways, instead relegating the 62/162 gallery's condition to an item on a to–do list. *Ibid.*

In 2014, another miner submitted a work order concerning the 62/162 gallery. *Ibid*. In response, Scamehorn contacted the engineering firm Krech Ojard & Associates (KOA) to review the gallery, including the outer walkways. *Ibid.* Patrick Leow, a KOA engineer, visually assessed the gallery as part of KOA's assessment. *Ibid*. In June 2015, KOA submitted to Northshore a written report detailing its observations and conclusions. J.A. 497–50, 606.

The report was clear that the 62/162 gallery outer walkways were not safe. It described the concrete topping slab as being "in poor condition and in need of replacement due to the large surface cracking and heaving," and noted "debonded … and corroded reinforcement" in the underside of the walkways. J.A. 497. KOA found "that the deteriorated perlite slabs are compromised and provide little to no structural support," and further found that the concrete topping slab "was also compromised providing little to no structural support … [and] presenting an uneven walking surface." J.A. 498. It concluded that the outer walkways, which

did not have steel plate reinforcing, "may not contain adequate structural support" for use and "cannot be found to be structurally adequate for use." *Ibid.* KOA ultimately concluded that the two walkways were "not safe for personnel to be using until a repair has been completed" and recommended that Northshore restrict access to the walkways and replace both layers of the walkways. *Ibid.* The report specifically warned Northshore that "it is necessary to ensure that the walking surface meets MSHA standards and to ensure that the structure is capable of handling its required load capacity." *Ibid.* Northshore estimated the total cost of all the recommended walkway repairs to be $300,000. J.A. 51.

Based on a follow–up telephone conversation with Leow, Scamehorn testified that he believed Leow's main concern with the gallery was the cracking on the top concrete slab which created the danger of a "finite failure" of the floor if the cracks aligned a certain way. J.A. 157–58, 606. Leow explained that if the cracks connected, it would be like "falling through ice;" Scamehorn conceded that he was not sure whether the cracks could create a foot hole or something larger. J.A. 70, 162. Scamehorn shared the KOA report with Zimmer and Peterson. J.A. 606.

Zimmer was a Section Manager who coordinated and planned the maintenance repair work that took place in the 62/162 gallery. J.A. 624–25. In 2015 and 2016, Zimmer was responsible for directing the workforce. J.A. 625.

Peterson was a Section Manager for operations in the area that included the 62/162 conveyor gallery. J.A. 624. Peterson reviewed work orders, prioritized and directed maintenance work, and informed miners of changes in safety policies and procedures. J.A. 625. Both men were responsible for ensuring that miners worked safely and both had the responsibility to correct unsafe working conditions by, among other things, recommending discipline. J.A. 175, 183, 625.

Scamehorn, Zimmer, and Peterson determined they should implement a fall protection policy on the outer walkways. J.A. 606. Even after they instituted this policy, miners did not always use fall protection on the outer walkways. J.A. 619. Northshore made no efforts to repair the walkways and did not prohibit access to the walkways, barricade the walkways, or put up warning signs. J.A. 606.

Operations at the mine slowed between November 2015 and March 2016. J.A. 607. Shortly after operations fully resumed, miners complained that perlite concrete again was falling off the bottom of the conveyor gallery. *Ibid*. This prompted Northshore to barricade the area below the conveyor gallery so the material would not fall on miners. *Ibid*. But Northshore continued sending miners to work on the east outer walkway. J.A. 603.

On September 6, 2016, Northshore instructed a crew of contract workers, including King, to clean accumulated pellets off the east outer walkway. *Ibid*. It was covered in up to a foot of mud and accumulated pellets that impeded visibility

of the floor's conditions. *Ibid*. After receiving his work orders, King overheard Zimmer and John Gornik, a Northshore employee responsible for coordinating the day crew, discussing whether the contract workers needed to wear fall protection. J.A. 31, 603. When King questioned the need for fall protection on an enclosed walkway, Peterson replied that it was necessary in case the miners "slipped on the pellets" or got "caught in the conveyor." J.A. 603.

The contract miners received general instructions on how to put on a safety harness and tie off with the lanyard from the harness. *Ibid*. Contract miners did not understand that they needed to be tied off the entire time they worked on the outer walkways. J.A. 604. And Jared Conboy, who was responsible for training in Northshore's safety department, testified that he had no knowledge of how the fall protection policy was communicated to contract miners. J.A. 214–15. Moreover, miners could not be tied off continuously while cleaning pellets because they needed to change anchor points to move the pellets down the walkway. J.A. 33, 619.

The following day, September 7, 2016, King and his crew returned to finish cleaning the east outer walkway. J.A. 604. While King was hosing down iron pellets at a height of approximately 50 feet, "the entire structure began to shake." J.A. 34, 604. It was "violent" and "felt like an earthquake." J.A. 34. He crouched to shield himself from falling sheets of caked mud and buildup from around the

structure that "pummel[ed]" his head, shoulders, and back. J.A. 34, 604. Once the shaking stopped and material stopped hitting him, King saw a hole in the floor of the walkway immediately in front of him. J.A. 604. King waited briefly to make sure the accident was over, unclipped himself, and ran back up the ramp to safety. *Ibid*. As a result of the incident, he suffered a spinal contusion, was diagnosed with post–traumatic stress disorder, and experienced disrupted sleep. *Ibid.*

King filed a hazard complaint with MSHA. J.A. 605. MSHA Inspector Terrance Norman investigated the complaint. *Ibid*. He surveyed the gallery, interviewed miners and managers, and consulted with Michael Superfesky, a civil engineer with MSHA's technical support division. J.A. *Ibid*. Superfesky reviewed the KOA report and visually inspected the east outer walkway. J.A. 607, 609.

During the accident, a beam broke, the walkway dropped, rotating downward, and bolts sheared off from other supporting beams. J.A. 604. Superfesky observed significant deterioration of the east outer walkway that existed prior to the accident. J.A. 609. He explained that wire mesh is "essential" to reinforced concrete construction because it provides tensile strength, which concrete lacks. J.A. 80, 609. He said that once the mesh debonds from the concrete, the walkway's load–carrying capacity is reduced by as much as fifty percent. J.A. 609. Superfesky also observed "very wide and deep" cracking, which was evidence of accelerating deterioration. J.A. 80. He concluded the east outer

walkway was structurally deficient for foot traffic prior to the accident. J.A. 609. He noted the walkway had been approximately 4 inches thick, but because the 2.6–inch perlite layer was lost, the walkway was less than half as thick as it had been, reducing its strength. J.A. 79–81. According to Superfesky, that lost thickness and strength allowed the walkway slab to rotate downward when the supporting beam failed. J.A. 81, 149.

Superfesky found that the KOA report identified the same indicators of deterioration that he observed. J.A. 609. He found it telling that KOA did not assign a load rating for the outer walkways, particularly because the report specifically noted that this was one purpose of their analysis. J.A. 84. Superfesky explained that if an engineer is unable to quantify the load–carrying capacity of a structure, then the safe load is "zero" – "you have to stop all access." *Ibid*. Superfesky also explained that fall protection does not mitigate the severity of a serious, even fatal, injury when the hazard is a structural deficiency. J.A. 85, 609. Norman likewise explained that "[e]ven if tied off, [a] miner would be jolted and strike his head. He could hit equipment below and injure his back or neck, or cement could fall and hit the miner." J.A. 612.

MSHA issued a Mine Act section 104(d)(1) withdrawal order[1] alleging a violation of 30 C.F.R. 56.11002 for failing to maintain the outer walkways in good condition. MSHA issued this as an S&S and unwarrantable failure violation involving Northshore's reckless disregard for miners' safety. During the penalty assessment phase, MSHA also designated the order as flagrant – a reckless failure to make efforts to eliminate the known violation.

MSHA also issued an S&S and unwarrantable failure citation alleging a violation of 30 C.F.R. 56.20011 for failure to barricade or warn miners away from the damaged walkways. MSHA designated this citation as also involving the operator's reckless disregard. MSHA proposed penalties of $130,000 and $69,400 respectively, for the order and citation.

MSHA further issued civil penalty assessments against Zimmer and Peterson for knowingly failing to maintain the walkways in good condition and proposed individual penalties of $4,300 and $4,500, respectively. Northshore, Zimmer, and Peterson filed notices of contest, which were assigned to an ALJ who consolidated the dockets for a single hearing.

**3. ALJ Decision**

[1] When MSHA issues a withdrawal order, the operator must withdraw all miners from the affected area, except those necessary to eliminate the condition, until it abates the violation. See 30 U.S.C. 814(d)(1).

The ALJ "credit[ed] King's testimony that the three contract miners did not understand that they were to be tied off the entire time while working and while walking off the east walkway, primarily because they were told only that there was a slip hazard on the pellets." J.A. 604. She found that the miners were not always tied off. *Ibid*.

She also found that the walkway was not in good condition. She found Superfesky to be a credible and knowledgeable witness" whose opinion was "based on sound scientific principles and sound reasoning," J.A. 609, and found that Leow was not a "credible witness" because aspects of his testimony departed "from the written conclusions of the 2015 KOA report" he authored. J.A. 610.

The ALJ upheld the citation for failure to barricade and its S&S designation. She affirmed the reckless disregard designation, finding that the operator knew of the problems with the walkways but took no steps to limit access, demonstrating "indifference to a known violation." J.A. 622. She found that several aggravating factors supported the unwarrantable failure designation and assessed a penalty of $60,000 for the violation. J.A. 628.

The ALJ also upheld the walkway order and the S&S designation. J.A. 610–12. She considered Northshore's expert's opinion that the walkway would have shifted even had it been in brand new condition because the beam failure caused the accident. J.A. 610. But she credited "Superfesky's testimony that the condition

of the walkway was the primary reason for its failure," J.A. 614, and noted that the ultimate cause of the accident was irrelevant; the only relevant question was "whether the elevated walkway … was maintained in good condition." J.A. 610. She found that "ample evidence … demonstrate[d] that it was not." *Ibid*. Such evidence included the KOA report, the fact that miners had to use fall protection "because the floor was bad," and Inspector Norman's interviews, which revealed that maintenance workers would avoid walking on the east walkway when changing idlers. J.A. 610–11.

The ALJ next found that the violation was S&S, finding the east outer walkway's condition contributed to a fall hazard from the uneven surface, uncertain footing due to cracks or holes, and to the risk of a miner falling "50 feet to the area below" if the structure failed. J.A. 612. "[E]ach of the hazards," according to the ALJ, was "likely to result in serious injury," a conclusion unaltered by the "use of fall protection." *Ibid.* The ALJ emphasized that tied off miners could be jolted and strike their heads, hit equipment below and injure their backs or necks, or be struck by falling cement. *Ibid.*

The ALJ also found that Northshore's failure to maintain the east outer walkway constituted reckless disregard for miners' safety. J.A. 612–14. She found that "mine management knew of the condition of the area yet demonstrated indifference to the violation, thereby placing miners in a hazardous position." J.A.

614. The ALJ rejected the argument that the use of fall protection mitigated Northshore's recklessness, as "it was not made clear to the miners or the contractors how and when to tie off" and "on the day of the accident, the worker hosing down the pellets was not continually tied off." J.A. 613–14. She also noted that despite miners' complaints and the KOA report, "nothing was done to directly correct the condition of the walkway or make it safer to use." J.A. 613.

She further found that based on relevant aggravating factors, the violation was an unwarrantable failure. J.A. 614–17 (citing *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009)). Specifically, she found that (1) the violation had existed for several years, (2) it was extensive, (3) the mine was "on notice" of the deteriorating walkway, (4) the mine made "no effort" to fix the walkway, (5) the walkway's condition created a high degree of danger, (6) the violation was obvious, and (7) the KOA report made clear that the walkways were not safe for use. *Ibid*. And the ALJ reiterated that the use of fall protection did not "correct the condition" of the walkway and "no effort was made to address the deteriorating walkway itself." J.A. 616.

But the ALJ found that the walkway violation was not flagrant. J.A. 617–20. The ALJ found that the Secretary proved almost all of the flagrant criteria, including that Northshore knew about the violation and failed to make efforts to correct it, and that the violation reasonably could have been expected to cause

serious injury or death. J.A. 617–19. As in the S&S analysis, the ALJ found that the walkway's condition was likely to result in serious injury whether or not miners were tied off. J.A. 618–19.

But she found that the Secretary failed to prove that Northshore's failure to make reasonable efforts to repair the walkway was "reckless." J.A. 619. Specifically, the ALJ noted that "[t]he mine's conduct amounts to reckless disregard when analyzed in the context of the negligence and unwarrantable failure frameworks, but the same conduct does not rise to the heightened recklessness contemplated by a flagrant designation."*Ibid*. The ALJ cited the Commission's decision in *American Coal Co.*, 38 FMSHRC 2062, 2069–70 (2016), which held that because flagrant violations have heightened penalties, they necessarily differ from S&S and unwarrantable violations. That decision noted that the key difference was Congress's "forceful[] focus upon violations known by operators and behavior indicative of a failure to address such violations." *Id.* at 2070. But the ALJ interpreted the decision to mean instead that the reckless component of a flagrant violation "requires a higher negligence showing" than what is required in the "negligence and unwarrantable failure frameworks." J.A. 619.

Although in other parts of her decision she repeatedly acknowledged that fall protection was "an inadequate solution to address the violative condition," J.A. 627, the ALJ determined that Northshore's use of fall protection showed that it

"made some effort" and did not suggest a "conscious or deliberate indifference to the risks." J.A. 619. Thus, the ALJ found that the Secretary did not meet the "heightened negligence showing" required for a reckless flagrant violation. J.A. 620. The ALJ assessed a penalty of $60,000 for the walkway violation.

Regarding agent liability, the ALJ found that Zimmer and Peterson both knowingly violated 30 C.F.R. 56.11002 and assessed a penalty of $4,000 against each. J.A. 628. She noted that both men had the ability to direct the workforce and had responsibility to ensure that miners worked safely; they also were aware of the dangerous conditions outlined in the KOA report and could have "prohib[ited] use of the walkways" but did not. J.A. 625.

The ALJ was particularly critical of the agents' decision "to implement a fall protection policy" to evade the requirement to fix the hazardous walkway. *Ibid.* She noted that fall protection was "an inadequate solution" and that the men "decided that they would take no corrective action, but instead put the walkway on a list for later repair," which she found to be an inappropriate attempt to "work around the issue." J.A. 627. The ALJ also noted that the fall protection policy was implemented "rather badly" and that neither Zimmer nor Peterson made any effort even to "warn[] the miners of the deteriorated state of the walkways." *Ibid.*

**4. Commission Decision**

Northshore petitioned the Commission for review of the ALJ's conclusion that both violations involved Northshore's unwarrantable failures and constituted its reckless disregard for miner safety; Zimmer and Peterson appealed the ALJ's determination that they were individually liable. The Secretary petitioned for review of the ALJ's holding that the Secretary did not establish the reckless failure component of a reckless flagrant violation.

All three Commissioners found that substantial evidence supported the ALJ's unwarrantable failure and reckless disregard findings. J.A. 729, 742–45. The Commission noted that reckless disregard exists in "situations where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifference to, that risk." J.A. 744 (quoting *Lehigh Anthracite*, 40 FMSHRC at 280). The Commission found that Northshore "did not take any action to *abate* the violation prior to the accident in September 2016" and that fall protection "does not mitigate allowing a violation of a mandatory [standard] of which Northshore was specifically aware to continue unabated for fifteen months." *Ibid.* (emphasis in original). Put simply, "fall protection is not the maintenance of the walkways." J.A. 736.

But a divided Commission upheld the ALJ's finding that the Secretary did not establish a reckless failure in the flagrant context. J.A. 737. The Commission

found that a "distinction" exists between "reckless disregard" in the negligence context and "reckless failure" in a flagrant context. J.A. 744. The Commission held that recklessness in the flagrant context requires proof that an operator consciously or deliberately disregarded an expectation of death or serious injury. J.A. 742. And while the Commission held that Northshore's use of fall protection did not reduce its negligence in the reckless disregard context, it found that Northshore used fall protection "to mitigate the hazard," so Northshore did not exhibit the heightened recklessness the Commission required in the flagrant context. J.A. 736. The Commission also found it significant that Northshore did not "bury or hide the evidence" in the KOA report. *Ibid.*

Although neither party raised the issue in their petitions for review, the Commission also overturned the ALJ's holding that the violation reasonably could have been expected to cause death or serious injury. J.A. 737–41. The Commission concluded that "expected" in a flagrant analysis requires showing a greater probability than a reasonable possibility or a reasonable likelihood, and substantial evidence did not support the ALJ's conclusion that Northshore expected serious injury or death. J.A. 734–35.

Finally, the Commission reversed the ALJ's finding that Zimmer and Peterson personally were liable. J.A. 728. The Commission recognized that Zimmer supervised miners and oversaw repair efforts once they were initiated and

that Peterson was in charge of maintaining and repairing equipment. *Ibid.* Yet the Commission concluded that both men were not liable because they were "not in a position to initiate, create, or prioritize a plan to repair the outer walkways." *Ibid*.

Commissioner Traynor dissented in part. J.A. 747–71. He would have reversed the ALJ's ruling that the violation was not flagrant. J.A. 764. Commissioner Traynor noted that the majority's definition of reckless ignores the key distinction between intentional conduct described by words such as "conscious" and "deliberate" and the "unintentional, though highly negligent conduct described as 'reckless.'" J.A. 752. He found that "the Secretary establishes a 'reckless flagrant' violation with proof the operator acted with reckless disregard caused by its failure to eliminate dangerous violations." J.A. 748.

Commissioner Traynor further noted that "whether the violation reasonably could have been expected to cause death or serious bodily injury is not at issue in this appeal" because neither party's petition addressed this issue. J.A. 762, n.10. The majority's decision to reach this issue was, according to Commissioner Traynor, "*ultra vires*." *Ibid*; see also J.A. 749, n.4. He also believed that predicating 30 U.S.C. 820(c) liability on an agent's authority to make extensive structural changes "takes advantage of a company organizational chart as a defense to a serious violation." J.A. 768. Commissioner Traynor found the men had authority to protect miners from the walkway violation by keeping miners off the

walkway and would have upheld the ALJ's individual liability determinations. J.A. 764–71.

## Summary of the Argument

In 2006, in an effort to enhance miner safety, Congress created a flagrant designation that would enhance penalties for existing types of violations if they also involved operators' reckless or repeated failures to eliminate known violations. Northshore knew about the walkway violation for years and chose not to correct it. If Northshore's conduct is not a reckless failure to make efforts to eliminate a known violation, it is hard to imagine any scenario in which an operator's conduct would qualify.

In an effort to distinguish reckless flagrant violations from other Mine Act provisions, the Commission made several legal errors and established an almost impossibly high burden of proof for the Secretary. First, the Commission required proof that an operator "conscious[ly]" "disregard[ed]" "an expectation" of harm to miners. But just as in other contexts, an operator is reckless in the flagrant context if it has reason to know of relevant facts but does not appreciate the high degree of risk created by those facts. An operator need not be aware of the anticipated harm stemming from a violation that is the basis for a reckless flagrant penalty.

Next, the Commission exceeded its authority by considering whether the violation reasonably could have been expected to cause death or serious injury (the

likelihood prong) because neither party raised the issue in their petitions for review. It also erred in finding that "reasonably could have been expected" in the flagrant context demands proof of a greater probability of harm than the Mine Act's imminent danger provision with nearly identical language. It further misapplied the substantial evidence standard in overturning the ALJ's finding that the walkway's condition reasonably could be expected to result in serious harm.

The Commission also erred in overturning the ALJ's finding of agent liability against Zimmer and Peterson. It incorrectly conditioned liability on the agents' ability to repair the walkway. But based on the plain text of 30 U.S.C. 820(c) and Commission precedent, substantial evidence supports the conclusion that the men authorized or carried out the violation. Zimmer and Peterson were high–ranking members of management who knew about the deteriorating walkway and decided to institute a fall protection policy that left the walkway's poor condition intact. And neither Zimmer nor Peterson made any efforts to eliminate the walkways' dangers, such as shutting down operations, prohibiting miner access to the walkway, or escalating concerns to the engineering department.

Finally, substantial evidence supports the ALJ's findings that both violations were unwarrantable failures and the result of Northshore's reckless disregard for miners' safety. Northshore's contrary arguments ask this Court to parse evidence *de novo* rather than review the ALJ's findings for substantial evidence.

## Standard of Review

This Court reviews *de novo* the Commission's legal conclusions. See *Pattison Sand Co., LLC v. Sec'y of Labor*, 688 F.3d 507, 512 (8th Cir. 2012).

It reviews the ALJ's finding of fact for "substantial evidence on the record considered as a whole." *Ibid*. Substantial evidence means "more than a scintilla but less than a preponderance." *Ibid.* This Court is precluded from "reweigh[ing] evidence presented to the ALJ," *id.* at 514, and "give[s] great deference to an ALJ on … credibility determination[s]." *Bussen Quarries, Inc. v. Acosta*, 895 F.3d 1039, 1045 (8th Cir. 2018).

In conducting substantial evidence review, this Court should, like the D.C. Circuit, independently review the ALJ's factual findings for substantial evidence, while reviewing the Commission's application of the substantial evidence test—a legal conclusion—*de novo*. See *Sec'y of Labor v. Knight Hawk Coal*, *LLC*, 991 F.3d 1297, 1306 (D.C. Cir. 2021).

## Argument

### I. Northshore's failure for years to maintain the outer walkway was a reckless flagrant violation.

#### A. The Commission erred in defining recklessness as an operator's conscious or deliberate disregard of serious bodily injury or death.

### i. The reckless flagrant provision requires only that an operator knows or should know to make reasonable efforts to eliminate a known violation.

The Commission required the Secretary to prove that Northshore "consciously or deliberately disregard[ed]" an expectation of death or serious bodily injury to demonstrate that Northshore acted recklessly in failing to remedy the walkway violation. J.A. 733, 742. Nothing supports this heightened recklessness standard. Reckless means reckless; the Secretary need prove only that an operator "has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so." Restatement (Second) of Torts § 500 cmt. a. (1965).

The statute is clear. A reckless flagrant violation involves a reckless failure to make reasonable efforts to eliminate a known violation. 30 U.S.C. 820(b)(2). Congress chose the word "reckless" rather than "conscious," "deliberate," "intentional," or, in the case of a neighboring subsection, "willful[]." 30 U.S.C. 820(d). There is a key distinction between intentional conduct described by words such as "conscious" and "deliberate" and the "unintentional, though highly negligent conduct described as 'reckless.'" J.A. 752 (Traynor, J., dissenting).

The text does not require proof that an operator expected serious harm in order to establish recklessness. Reckless modifies the phrase "failure to make reasonable efforts." 30 U.S.C. 820(b). So under the statute, an operator is reckless

if it knows, or should know to ameliorate a known violation, but fails to make reasonable efforts to fix the violation. The Secretary need not prove that Northshore subjectively anticipated the likelihood or severity of harm stemming from the walkway violation. Instead, at a minimum, the Commission should have examined whether Northshore should have known that its failure to repair walkways that were "not safe for personnel to be using," J.A. 498, likely would result in death or serious injury. Removing this "should have known" component, in conjunction with the Commission's decision to define recklessness based on a violation's resultant harm, makes it nearly impossible for the Secretary to prove a reckless flagrant designation.

The Secretary's interpretation is consistent with how recklessness is defined in other areas of the law. The Restatement (Second) of Torts provides that recklessness occurs when an actor has knowledge of facts but "*does not realize or appreciate the high degree of risk involved*, although a reasonable man in his position would do so." Restatement (Second) of Torts § 500 cmt. a. (1965) (emphasis added).[2] "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." *Id.* cmt. f, at 590.

[2] The Commission relied on the Third Restatement instead of the Second, J.A. 733, but the differences between the definitions are immaterial. The Third Restatement recognizes that a "person acts recklessly in engaging in conduct if the person knows of the risk of harm created by the conduct or *knows facts that make the risk obvious to another in the person's situation* . . ." Restatement (Third) of Torts § 2

The Commission has adopted this definition in non–flagrant contexts, finding that reckless disregard occurred where "the level of negligence did not involve a conscious intention to cause harm to a miner, [but] it did involve a conscious choice to take actions with knowledge of facts that would disclose to a reasonable foreman an unjustifiably high risk of potentially fatal injury to miner." *Lehigh Anthracite*, 40 FMSHRC at 283; *id.* at 282 ("[E]ven accepting the Judge's factual finding that [the foreman] did not appreciate the obviously high degree of risk present, a reasonably prudent person in his position would have done so."). That definition also is consistent with how civil recklessness is defined elsewhere: the "law generally calls a person reckless who … fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). The Commission previously never has interpreted recklessness as requiring actual ill intent.

The Commission defined recklessness differently in an attempt to differentiate reckless flagrants from S&S and unwarrantable failure violations. See J.A. 730–31. But flagrant violations' distinguishing features have nothing to do with defining recklessness differently. Commission precedent instead explains well

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(Am. Law. Inst. 2010) (emphasis added). As Commissioner Traynor pointed out, to the extent the definitions are inconsistent the Third Restatement's definition was published after Congress enacted the flagrant provision, so "it cannot be used to understand the plain meaning of a law enacted in 2006." J.A. 753 n.7.

what makes a flagrant designation unique. In response to an operator's assertion that "a flagrant violation must have a potential for a greater degree of gravity than that of an S&S non–flagrant violation," the Commission first observed that "something more than an S&S finding is necessary before a violation can be found to be flagrant," as otherwise, Congress would not have "creat[ed] a new statutory classification of violation." *Am. Coal Co.*, 38 FMSHRC at 2069–70.

But the operator's argument that gravity must be greater did "not necessarily follow" because the "distinguishing characteristic of a flagrant violation is most evident in those terms … that previously were not part of the Mine Act," namely "the language targeting a '[1] repeated or reckless failure [2] to make reasonable efforts to eliminate a known violation.'" *Id.* at 2070. Congress's "express[] and … forceful[] focus upon violations known by operators and behavior indicative of a failure to address such violations" "are what distinguish the flagrant provision," "not the degree of danger posed by a violation." *Ibid.*

*American Coal*'s holding follows from section 820(b)'s clear text: unlike flagrant violations, neither S&S nor unwarrantable violations require evidence that an operator failed to make efforts to eliminate a known violation. *American Coal* does not support the Commission's conclusion that recklessness must be heightened in the flagrant context. J.A. 732, 744. Instead it makes the opposite point: the key new element is that the Secretary must show that operators

recklessly or repeatedly failed to make reasonable efforts to eliminate known violations.

Illustrating how far the Commission deviated from the accepted definition of recklessness, the majority's definition of recklessness elevates the *mens rea* necessary to prove a reckless flagrant beyond what is required to prove Mine Act criminal willfulness, punishable by imprisonment for up to a year. 30 U.S.C. 820(d); J.A. 756–57 (Traynor, J., dissenting); *United States v. Jones*, 735 F.2d 785, 789–90 (4th Cir. 1984) (affirming jury instruction that defined a "willful violation" of the Mine Act as including "[r]eckless disregard," which "means the closing of the eyes to … the requirements of a mandatory safety standard, which … the defendant should have known and had reason to know [about] at the time of the violation"). Even in the criminal willfulness context, the Secretary need not prove that the operator expected or intended resulting serious harm.

Because the Commission erred, this Court should, at a minimum, remand with instructions to evaluate Northshore's recklessness based on the correct legal definition of recklessness.

**ii. Applying the correct definition of "reckless," Northshore committed a reckless flagrant violation.**

But remand is "futile" because "application of the correct legal standard could lead to only one conclusion." *Union Pac. R.R. Co. v. U.S. Dep't. of Homeland Sec.,* 738 F.3d 885, 901 (8th Cir. 2013). Under the correct definition of

"reckless," the facts lead to only one outcome: Northshore knew or should have known to "eliminate" the "known" walkway violation. 30 U.S.C. 820(b)(2). The KOA report "plainly concluded" that the walkways were not safe, J.A. 745, and the report and miners' complaints gave the company actual knowledge of the walkway's unsafe condition. Based on that report, Northshore knew that both of the walkways' layers were compromised, that they could not "be found to be structurally adequate for use," and that they "[were] not safe for personnel to be using until a repair [was] completed." J.A. 498. Northshore also knew that miners could fall through the floor. J.A. 158, 162.

Despite this, Northshore made no efforts to eliminate the known violation. J.A. 616. The operator waited until after an accident occurred and King was injured before it took *any* action to repair the walkway. J.A. 744. Northshore's failure for years to take any action to maintain the walkway, while continuing to direct miners to work on it, was manifestly reckless.

The Commission found Northshore's decision to require fall protection was "an effort to mitigate the hazard." J.A. 736. But it concedes that fall protection did *nothing* to eliminate the known violation – a poorly maintained walkway. See J.A. 744. And the Commission has held that "wholly inadequate efforts . . . undertaken in 'good faith' . . . do not reduce the level of negligence." *Lehigh Anthracite,* 40 FMSHRC at 282; see also *Sec'y of Labor v. Mach Mining, LLC*, 36 FMSHRC

2533, 2543 (2014) (ALJ) ("[an examiner's] efforts neither *prevented* nor *corrected* the hazardous condition.") (emphasis in original)), *aff'd* 809 F.3d 1259, 1265 (D.C. Cir. 2016). And "subjective good faith" does not reduce an operator's negligence if its actions are based on "an objectively unreasonable belief." *Lehigh Anthracite*, 40 FMSHRC at 282. Here, any belief Northshore had about the efficacy of fall protection was objectively unreasonable because fall protection did nothing to fix the walkway and was wholly inadequate.

The fall protection was inadequate for two reasons. First, miners could sustain serious, even fatal, injuries while using fall protection. J.A. 609, 612. Superfesky explained that fall protection is designed to be used as a secondary, not primary, means of protection in the event of an inadvertent fall. J.A. 85, 148. Second, miners were not always tied off. The incomplete reasons Northshore gave contract miners for requiring fall protection (a pellet slip hazard) suggest that Northshore did not implement the fall protection policy in good faith. J.A. 604 (finding that the contract miners "did not understand that they were to be tied off the entire time … primarily because they were told only that there was a slip hazard on the pellets."); J.A. 31. Northshore did not ensure that contract miners unfamiliar with the walkway understood that they needed to be tied off the entire time they were on the walkway to avoid falling through the decrepit floor. J.A. 198.

The Commission gave Northshore credit for "not attempt[ing] to bury or hide the evidence" in the KOA engineering report. J.A. 736. But Northshore hid this evidence from the contract miners. And the report put Northshore on clear notice of the danger to miners. Confronted with inescapable conclusions in an engineering report it commissioned, Northshore's inaction begs the question: if its conduct is not reckless, what is?

### B. The Commission erred in analyzing whether the violation reasonably could have been expected to cause death or serious bodily injury.

#### i. The Commission should not have considered this issue because neither party raised it in their petitions.

The Act limits Commission review to questions raised by the parties' petitions and to issues the Commission raises *sua sponte* by an affirmative vote of two Commissioners. 30 U.S.C. 823(d)(2)(A)(i) and (B); *Donovan on Behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 (D.C. Cir. 1983) ("The Mine Act explicitly recognizes . . . that the 'review authority of the Commission' is dictated by section 823(d)(2)"). Indeed, the Commission's own procedural rules limit its review to these narrow circumstances. 29 C.F.R. 2700.70(g). And when, as here, the Commission grants a party's petition for discretionary review, it "shall not raise or consider additional issues" unless it notes in an "order" that the ALJ's decision

is "contrary to law or Commission policy" or the case presents "a novel question of policy." 30 U.S.C. 823(d)(2)(B).

In this case, neither party's petition alleged errors relating to whether the violation reasonably could have been expected to cause death or serious injury. The Secretary petitioned only for review of errors in the ALJ's definition of recklessness. J.A. 655–56. Northshore did not mention any aspect of the ALJ's flagrant analysis in its petition. See J.A. 630–54. Nor did the Commission issue an order directing review on this element. Yet, for the first time in its Commission reply brief, Northshore argued that the ALJ erred in finding that the walkway substantially caused or reasonably could have been expected to cause death or serious bodily injury.

Because Northshore first raised that issue in its reply brief, the issue was not properly before the Commission. See *Sec'y of Labor v. Sunbelt Rentals, Inc.*, 42 FMSHRC 16, 2020 WL 508744, at *5 (2020) (refusing to consider an issue that an operator raised for the first time in its reply brief); *Id.* at *5–*6 ("[T]he Mine Act limits the Commission's appellate authority to those issues that were raised in the PDR …. Here, Sunbelt did not raise the Appointments Clause issue in its PDR (or in its opening appellate brief)."); see also *Knight Hawk*, 991 F.3d at 1311–12 (concluding that 30 U.S.C. 816(a)(1) was a jurisdictional bar to considering

arguments not made before the Commission). And nothing prevented Northshore from raising this issue in its PDR.

Although Commissioner Traynor noted that this portion of the Commission's decision was *ultra vires*, J.A. 749, n.4, J.A. 762, n.10, the majority did not respond to him or acknowledge the express statutory limit in section 823(d)(2). The Commission exceeded its statutory authority by examining this issue, and the ALJ's decision on the issue should stand.

**ii. The Commission created a new and incorrect legal test to assess whether death or serious bodily injury reasonably could have been expected to occur.**

Even if the Commission properly reached this issue, its analysis is wrong. It found that the Secretary must prove (1) "whether it is reasonably 'expected' that an identified hazard will occur" and, if so, (2) "whether occurrence of the hazard would be 'expected' to cause death or serious bodily injury." J.A. 734. This test contains two legal errors.

First, the Commission erred in requiring the Secretary to identify a specific hazard. Reckless flagrants require that the violation reasonably could have been expected to result in serious harm; they do not require the Secretary to identify a particular hazard that would cause the harm (that requirement is instead part of the S&S analysis). The Commission's efforts to identify the particular hazard the decrepit walkway posed were unnecessary and misguided.

Second, the Commission erred in finding that the Secretary's burden in proving that a violation "reasonably could have been expected" to cause death or serious bodily injury "is not satisfied by a reasonable *possibility* or even a reasonable *likelihood* (as that term is construed in the Mine Act)." J.A. 735 (emphasis in original). Rather, the Commission required proof that Northshore had an "expectation" of the serious harm the violation would cause. J.A. 741. But Congress used language in the flagrant provision that is "identical" to the Mine Act's imminent danger definition "except for the use of the word 'bodily' in place of 'physical.'" J.A. 735; see 30 U.S.C. 802(j) ("'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm . . ." before the operator can abate the condition). And "Congress made clear that an imminent danger is not to be defined 'in terms of a percentage of probability that an accident will happen.'" *VP–5 Mining Co. v. Sec'y of Labor*, 15 FMSHRC 1531, 1535 (1993); see also *Sec'y of Labor v. Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (1991) ("To support a finding of imminent danger, the inspector must find that the hazardous condition has a *reasonable potential* to cause death or serious injury . . .") (emphasis added). Because the likelihood prong of the flagrant analysis is functionally identical to the imminent danger definition, the Commission should have analyzed the language the same way. It should not have

required a specific probability that death or serious bodily injury will occur. J.A. 735.

The Commission's legal test is also at odds with its treatment of a similar issue in the S&S context. "Congress, when it enacted the MINER Act and the flagrant provision, may have been looking to established Mine Act principles, such as the Commission's interpretation and application of S&S . . . ." *Am. Coal Co.*, 38 FMSHRC at 2068. Language similar to the likelihood prong of the flagrant analysis exists in the Commission's S&S caselaw.

The Commission has held that an S&S violation is reasonably likely to result in reasonably serious injury or death. See *Sec'y of Labor v. Mathies Coal Co*., 6 FMSHRC 1, 3 (1984). In the S&S context, "reasonable likelihood" is "something less than 'more probable than not.'" *Mach Mining*, 809 F.3d at 1267 (quoting *Amax Coal Co*., 19 FMSHRC 846, 848–49 (1997)). Likewise, the reckless flagrant's "reasonably could have been expected" requirement similarly should mean something less than "more probable than not."

In fact, in a recent decision, the Commission affirmed an ALJ's S&S finding on the basis that the hazard "could reasonably be expected" to cause injury. *Sec'y of Labor v. Consol Penn. Coal Co., LLC*, PENN 2018–0169 at 10 (Apr. 29, 2021), *available at* https://www.fmshrc.gov/decisions/commission/COMMd_4192021-PENN%25202018-0169.pdf. It did not require the Secretary to prove that the

hazard was "expected" to cause the injury. The Commission's recent endorsement of nearly identical language in the S&S context that mirrors the statutory flagrant definition underscores its similar treatment of the two provisions in terms of likelihood of injury.

The Commission should have framed the legal question as whether substantial evidence supported the ALJ's finding that the violation – an unsafe and deteriorating walkway –presented a reasonable potential for death or serious bodily injury. Its requirement of "expected" harm is irreconcilable with the Commission's treatment of virtually identical issues in both the S&S and imminent danger contexts.

### iii. Substantial evidence supports the ALJ's decision that the deteriorating walkway reasonably could have been expected to cause death or serious bodily injury.

If this Court concludes the Commission properly reached this issue it should, at a minimum, remand the issue to the Commission to analyze under the correct legal test. But under the correct legal test, the facts lead to only one conclusion: substantial evidence supports the ALJ's findings. For this reason, this Court should decide the issue.

On the day of the east outer walkway's failure, miners were working approximately 50 feet above ground. J.A. 604. The KOA report described the walkway as having "heaving and cracked concrete topping" and "little to no

structural support." J.A. 498. And Leow indicated that if someone were walking over the cracks in the concrete and the cracks connected, it would be like "falling through ice." J.A. 162. Contract miners working on the outer walkway were not told of the walkway's deteriorating, perilous condition, so they had no reason to ensure they were tied off 100 % of the time they were on an enclosed walkway. J.A. 603–04, 625. Further, they could not observe personally the floor's condition, because the walkway was covered in up to twelve inches of mud and taconite pellets. J.A. 612. For these reasons, the miners would not be able to avoid the walkway's hazards.

The ALJ noted both that the walkway was next to a moving conveyor and that "the condition of the walkway would cause it to give way." J.A. 612. She thus reasonably concluded that the walkway's condition could have been expected to cause death or serious bodily injury if miners fell on the walkway, fell against the moving conveyor or fell 50 feet "through to the ground below." J.A. 618. And she noted that, "[i]n the event a miner only put a leg through the hole, a serious injury would still likely occur." J.A. 621.

The Commission determined that substantial evidence did not support the ALJ's findings that Northshore could have expected the floor to dislocate or fail. J.A. 739. But the Commission erred by substituting its own factual findings for the ALJ's; it was constrained to reviewing those findings for substantial evidence. See

30 U.S.C. 823(d)(2)(A)(ii)(1); *Knight Hawk*, 991 F.3d at 1306 ("[T]he only 'question' relating to the factual findings of an ALJ that the Commission can consider is whether those findings are supported by substantial evidence.").

For example, the Commission credited Northshore's expert testimony over the Secretary's expert testimony on this point and discounted Superfesky's testimony without even referring to the ALJ's findings. J.A. 738–39. In reviewing Superfesky's testimony *de novo*, it ignored relevant aspects of Superfesky's testimony. For example, the Commission criticized Superfesky's physical investigation as being limited to "below the walkway," J.A. 738, but overlooked the fact that Superfesky's investigation also relied on the KOA report, J.A. 84, which was based on observations "from the gallery interior and exterior." J.A. 497. Moreover, Superfesky did not enter the gallery because MSHA restricted him from going inside the gallery for his safety. J.A. 79, 149. Similarly, the Commission assailed Superfesky for being unaware that "large portions of the slab remained intact" after the accident, J.A. 739, but did not address Superfesky's testimony explaining that "break strength" is different from "thickness," and that the walkway's lost thickness was the reason it failed. J.A. 247, 297.

In any event, the ALJ, as trier of fact, is in a far better position to assess credibility and testimony. *Pattison Sand*, 688 F.3d at 514. She considered Northshore expert's opinion that the walkway would have shifted like it did when

the beam failed even if the walkway been in brand new condition. J.A. 610. Yet the ALJ was persuaded by Superfesky's competing opinion that, had the walkway been maintained, it would not have shifted in the manner that it did when the beam failed, but instead would have cracked. J.A. 47, 609–10, 614. She also credited Superfesky's testimony that "the condition of the walkway was the primary reason for its failure." J.A. 614. She found Superfesky to be a credible and knowledgeable witness whose testimony was based on sound reasoning and scientific principles. J.A. 609.

Other evidence the ALJ cited supports her conclusion that the deteriorating walkway reasonably could have been expected to give way in some manner. The KOA report determined that the outer walkways could not "be found structurally adequate for use" and "were not safe for personnel to be using." J.A. 606, 611. Also, Superfesky presented photographs which revealed that the cracks in the walkway had existed for some time. J.A. 607–08.

Further, substantial evidence supports the ALJ's finding that fall protection did not mitigate the risk of serious injury. J.A. 619. Miners did not always use fall protection while working on the walkway, *ibid*, a finding the Commission recognized as amply supported by record testimony. J.A. 740. And Inspector Norman and Superfesky both testified that, even while tied off, miners could suffer serious injuries such as striking their heads or hitting equipment. J.A. 609, 612.

Indeed, despite wearing fall protection at the time of the walkway failure, King incurred a spinal cord contusion that required medication and physical therapy. J.A. 604.

In sum, this Court should affirm the ALJ's findings on the likelihood prong.

### C. This Court should defer to the Secretary's reasonable interpretation of the statutes it enforces.

If this Court concludes that the statutory terms "reckless" or "reasonably could have been expected" in the flagrant provision are ambiguous, it should defer to the Secretary's reasonable interpretations of those terms.

This Court must "give effect to the unambiguously expressed intent of Congress." *Pattison Sand Co.*, 688 F.3d at 512 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The Secretary believes the statutory provisions are clear. But to the extent they are ambiguous, the Court should defer to the Secretary's reasonable interpretations embodied in his litigating position. *Ibid*. "Because the Act gives enforcement authority to the Secretary while vesting adjudicatory authority in an independent body [the Commission], the Secretary's litigation position before the Commission is entitled to deference because it 'is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a . . . health and safety standard.'" *Ibid.* (quoting *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)). For this reason,

when the Secretary and Commission differ over a term's meaning, the Court should defer to the Secretary. See *Excel Mining,* 334 F.3d at 6.

The Secretary's interpretation of the term "reckless" is reasonable. It is consistent with how that term is defined in other areas of the law. This definition also "enhance[s] worker safety in our nation's mines," S. Rep. No. 109–365, at 2, by holding accountable operators like Northshore who choose not to correct a known violation of a mandatory health or safety standard.

Likewise, the Secretary's interpretation of the likelihood prong of the flagrant test also is reasonable, as that interpretation is congruent with how the Commission has defined similar terms in the S&S and imminent danger contexts.

## II. The Commission erred in overturning the ALJ's findings that Zimmer and Peterson were liable; the agents were in a position to protect miner safety and health and failed to do so.

The ALJ used the correct legal test when evaluating section 110(c) liability by considering whether Zimmer and Peterson knew the walkways were in poor condition but failed to act to protect worker safety and health. J.A. 624. Substantial evidence supports her factual findings.

Section 110(c) provides that, when a corporate operator violates a mandatory health or safety standard, an agent of the corporation "who knowingly authorized, ordered, or carried out such violation" shall be subject to civil penalties. 30 U.S.C. 820(c). Both men are agents by virtue of the supervisory responsibilities they held.

J.A. 624, 626. Therefore, the Secretary need prove only that these agents "authorized, ordered, or carried out" the violation in order to establish liability.

In interpreting the statute, longstanding Commission precedent interprets the term "knowingly" as requiring only that the Secretary show an agent was "in a position to protect employee safety and health" and failed "to act on the basis of information that [gave] him knowledge or reason to know of the existence of a violative condition." *Sec'y of Labor v. Richardson*, 3 FMSHRC 8, 16 (1981); see also *Sec'y of Labor v. LaFarge Construction Mat'ls,* 20 FMSHRC 1140, 1149 (1998) (affirming agent liability where a foreman had "actual knowledge of loose materials" atop a surge bin but failed to take available measures to remove material before allowing miners to enter the bin). Section 110(c) liability "is generally predicated on aggravated conduct constituting more than ordinary negligence" but does not require that an agent engage in willful conduct. *Sec'y of Labor v. Matney, employed by Knox Creek Coal Co.*, 34 FMSHRC 777, 783 (2012). The Secretary supports this definition of "knowingly," and the D.C. Circuit has extended *Chevron* deference to this definition. See *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363–64 (D.C. Cir. 1997). Under this test, substantial evidence supports the ALJ's liability findings.

Both Zimmer and Peterson directed maintenance work at the mine. J.A. 625. They were also in a position to protect employee safety and health, testifying that

their job duties included the responsibility to ensure miners worked safely. J.A. 175, 183. Further, both had "actual knowledge" of the dangerous walkways, *LaFarge*, 20 FMSHRC at 1149, because they were aware of the KOA report that deemed the walkways unsafe for use absent repairs. J.A. 625. Yet they made a conscious decision "to implement a fall protection policy" that had no impact on the walkway's condition. *Ibid.* In doing this, they "subjected miners to an unsafe and unsound work area." J.A. 626. They "decided that they would take no corrective action" for more than a year and allowed contract workers to clean the outer walkways without providing the workers any warning of the walkway's condition. J.A. 627.

Both men admitted having the power to direct the workforce. See J.A. 526, 530. So they could have kept miners off the walkway but failed to do so. Peterson testified that if he was "concerned about something," he could "actually recommend discipline." J.A. 183. And both men could have memorialized the fall protection policy in writing, posted warnings that fall protection was essential, or followed up on a work order they authorized that specifically noted the need to "[v]erify the floor is safe." J.A. 280, 626. They did none of those things.

The Commission majority did not discuss whether Zimmer and Peterson "knowingly authorized, ordered, or carried out [the] violation." 30 U.S.C. 820(c). Nor did the majority assess whether Zimmer and Peterson were "in a position to

protect employee safety" and failed to do so. *Richardson*, 3 FMSHRC at 16. Instead the Commission focused on a test with no textual basis: whether the agents were "in a position to initiate or prioritize repairs" to the outer walkways. J.A. 728.

In framing the issue this way, the Commission relied on its decision in *Maple Creek Mining, Inc.* in which it declined to impose section 820(c) liability on agents who lacked authority to "take necessary remedial action" to keep an escapeway clear of water, such as redesigning a pumping system or constructing an alternative walkway. 27 FMSHRC at 569. The dissent in *Maple Creek* characterized the majority's new test as a "sleight–of–hand transformation of the longstanding section [820](c) case precedent" that the Secretary must prove simply that an agent be in a position to protect employee safety and health which "does not necessarily require [an agent to have] the authority to make extensive structural changes." *Id.* at 571–72 (Jordan, J., concurring and dissenting).

The Commission's decision is inconsistent with prior well–established section 820(c) caselaw imposing liability on corporate agents who are in a position to protect employees and fail to. It also is inconsistent with the plain text of the statute, which imposes liability on agents who "authorized, ordered, or carried out" the violation. 30 U.S.C. 820(c). Congress did not require that agents liable under section 820(c) also have the authority and ability to rectify personally the violation at issue.

*Maple Creek* also is distinguishable. In *Maple Creek* the Commission balanced two agents' lack of authority to take remedial action with other factors, including that both men "consistently" reported the water accumulations to management and that neither were responsible for maintaining the escapeway where water accumulations existed. 27 FMSHRC at 569–70. "On balance," the Commission in *Maple Creek* concluded that the agents were not liable. *Id.* at 569. Here, on the other hand, the Commission did not balance any competing considerations, instead treating the "in a position to remedy the violation" inquiry as a rigid precondition to agent liability. The Commission did not, for example, consider Zimmer and Peterson's control over the gallery area and the miners on the walkways, their lack of effort to encourage walkway repairs, and whether the agents generally were in a position to protect employee safety and health. The Commission's holding thus strayed far from the text of section 820(c) and its own precedent. See J.A. 727 ("Importantly, here, a violation of section [820](c) *requires* that the agent must be 'in a position' to remedy the condition at issue, in order for section [820](c) liabilities to attach." (emphasis added)).

The Commission's test, predicating section 110(c) liability on an agent's authority to make extensive structural changes, "takes advantage of a company organizational chart as a defense to a serious violation." J.A. 768 (Traynor, J., dissenting). The Commission concluded that neither Zimmer nor Peterson were

liable because neither had the ability to authorize a $300,000 repair of the walkway. J.A. 728. But individuals with authority to authorize such repairs, such as Scamehorn, are so high in the corporate hierarchy that likely they lack specific knowledge about the violation's danger to miners. Under the Commission's holding, individuals who have the requisite knowledge of danger to miners might evade agent liability based on a lack of authority to repair equipment, and individuals who possess the necessary authority to spend money on equipment repair might evade liability based on lack of knowledge of the danger to miners. That result would vitiate section 820(c).

Because the Commission used an incorrect legal test to evaluate Zimmer and Peterson's liability, remand to the Commission is appropriate. But under the correct test, the facts lead to only one outcome: substantial evidence supports the ALJ's findings of agent liability. For this reason, this Court should decide this issue.

Zimmer and Peterson "failed to act on the basis of the walkway information to protect worker safety and health." J.A. 627. Both men assigned and directed the workforce. J.A. 625. Although they were aware of the KOA report, they "decided that they would take no corrective action." J.A. 627. The men authorized or carried out the violation by implementing that decision and allowing miners to work on the unsafe walkways despite having the authority to keep miners off the walkway. See

J.A. 626; *Sec'y of Labor v. Steen Construction, Inc.*, 14 FMSHRC 1125, 1131 (1992) ("[The agent] knowingly authorized miners to move large metal machinery near energized high–voltage power lines, yet failed to ensure that adequate precautionary measures were taken to prevent the hazards associated with that procedure."). Zimmer and Peterson engaged in aggravated conduct by subjecting miners to "an unsafe and unsound work area." J.A. 626.

## III. Substantial evidence supports the ALJ's unwarrantable failure and reckless disregard findings.

This Court should affirm the ALJ's factual findings if substantial evidence supports them. As discussed, substantial evidence is "more than a scintilla but less than a preponderance." *Pattison Sand,* 688 F.3d at 512. This Court does not "reweigh evidence presented to the ALJ," but instead simply considers whether a "reasonable mind" could have reached the same conclusions. *Id*. at 514; see also *Knight Hawk*, 991 F.3d at 1308 ("Substantial–evidence review is highly deferential to the agency fact–finder, requiring only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). This Court evaluates whether the Commission erred in applying the substantial evidence test to the ALJ's factual findings.

### A. **Northshore failed to maintain the outer walkways in good condition**.

As an initial matter, although Northshore petitioned the Commission for review of whether it committed a violation at all, the Commission declined review. J.A. 718, n.1. And while Northshore does not appear to appeal directly the fact of the violation, Northshore Br. 3–4, it nonetheless argues that determining the outer walkways' conditions is "critical" and a "threshold issue." *Id.* at 31–32. Substantial evidence supports the ALJ's finding that Northshore failed to maintain the outer walkways in good condition. J.A. 611.

Northshore first claims that the Secretary "presented no evidence with respect to the actual condition of the concrete walkway." Northshore Br. 34. This is untrue. The KOA report repeatedly describes the deteriorating condition of the concrete walkway as having "large surface cracking and heaving," "heaving and cracked concrete topping slab," and "heaving concrete top coat." J.A. 497–98. The ALJ thus correctly observed that "KOA found the perlite slabs, *as well as the concrete*, were compromised and provided little to no structural support." J.A. 606 (emphasis added); *id.* at 611 ("The KOA report … indicates that the walkways were not safe for personnel to use until repaired."). And Norman and Superfesky each examined the KOA report, which informed the conclusions that both witnesses reached. J.A. 55, 84.

Northshore relies on this Court's holding in *Bussen Quarries, Inc.* for the proposition that this Court may overturn an ALJ's findings when they are not

supported by substantial evidence. Northshore Br. 39–40 (citing 895 F.3d 1039). But in *Bussen,* this Court found that substantial evidence did not support the ALJ's decision where the Secretary presented *no* "actual evidence" for how a pump cart arrived at its observed location. 895 F.3d. at 1046. That is entirely different from the present case in which the KOA report alone supports the ALJ's decision.

Northshore next argues that the ALJ should have disregarded the KOA report because of purported ambiguity over the meaning of the report's recommendation to "restrict" access to the outer walkways and its "qualified language" that the walkways "**may** not contain adequate support." Northshore Br. 38, 42–44, 55 (emphasis in original). But the Commission correctly applied the substantial evidence test, finding that the report "plainly concluded that the walkways '*are not safe for personnel to be using until a repair has been completed.'"* J.A. 745 (emphasis in original). The unambiguous report also emphasized the poor condition of the walkway by warning Northshore that the outer walkways "[could not] be found to be structurally adequate for use," extinguishing any doubt as to the structural adequacy of the outer walkways. J.A. 498. Northshore attempts to "create ambiguity where none exists." *Gohagan v. Cincinnati Ins. Co.*, 809 F.3d 1012, 1017 (8th Cir. 2016).

Despite Northshore's arguments to the contrary, Northshore Br. 43–44, substantial evidence also supports the ALJ's decision to accept the language of the

KOA report over testimony of Leow, its author. J.A. 610. The ALJ determined that Leow's testimony departed "dramatically" from the written conclusions in his 2015 report authored less than a month after Leow examined the walkways. *Ibid.* She reasonably weighed the evidence and credited a contemporaneous written report over contradictory after–the–fact witness testimony. An ALJ's credibility determination is entitled to "great deference." *Mercier v. U.S. Dep't of Labor*, 850 F.3d 382, 390 (8th Cir. 2017). As the Commission noted, the ALJ's decision not to credit Leow's testimony was "reasonable given the clear tension between the plain language of the report and Leow's testimony." J.A. 745, n.24. And this Court does not "reweigh evidence presented to the ALJ." *Pattison Sand*, 688 F.3d at 514. Northshore's insistence that the ALJ erred in not accepting Leow's explanation, Northshore Br. 43–44, requires this Court to do just that.

But even if the ALJ was required to credit Leow's testimony, substantial evidence supports finding a violation because Leow himself testified that the outer walkways had problems. Specifically, he observed "heaving or potential heaving to cause [the concrete] to kind of bust up or separate from the perlite" and testified that the walkway would continue to deteriorate over time. J.A. 167, 169. Further, in discussing his follow–up telephone conversation with Leow, Scamehorn testified that Leow was concerned that cracks forming in the upper concrete could align and cause a finite floor failure. J.A. 157, 606. It was reasonable for the ALJ

to find that these cracks and the possibility of a finite floor failure evidenced a walkway in unsafe condition.

Northshore claims that poor lighting and lack of steel reinforcement on the outer walkway limited Leow's observations and prevented him from rendering an opinion as to the walkways' strength or condition. Northshore Br. 37–38. But if an engineer cannot quantify the load–carrying capacity of a structure, then the safe load is "zero" – "you have to stop all access." J.A. 84; *id.* at 609 (ALJ finding that Superfesky was "a credible and knowledgeable witness"). Further, if Northshore believed that these conditions seriously limited Leow's ability to evaluate the walkway, it is curious that it used Leow's report as a basis for implementing fall protection. J.A. 168, 606. And Leow never testified that the lighting impaired his analysis.

In an effort to downplay the outer walkways' dilapidated condition, Northshore also argues that evidence related to the condition of the perlite is irrelevant because "[t]he perlite is not, in and of itself, the walkway." Northshore Br. 35. But 30 C.F.R. 56.11002 required Northshore to maintain the entire elevated walkway in good condition. And, as Northshore acknowledges, the perlite layer is a component of the outer walkway. Northshore Br. 33. Thus, evidence of the corroded perlite layer is evidence of the outer walkways' poor condition.

Superfesky testified that the perlite layer contained fabric mesh that provided reinforcement in both directions. J.A. 80, 609. He noted that the mesh had debonded from the perlite, eliminating the tensile strength, and reducing the load–carrying capacity of the walkway by as much as fifty percent. *Ibid*. This lost tensile strength accelerated the deterioration of the concrete topping, while the degraded perlite caused the walkway to lose thickness and strength. J.A. 80–81, 149. As discussed, the ALJ credited Superfesky's testimony, finding him "to be a credible and knowledgeable witness" whose testimony was based on sound scientific principles supported by photographic evidence. J.A. 609.

Northshore suggests that the Commission "rejected" Superfesky's testimony. Northshore Br. 29, 46. But the portion of the Commission's decision Northshore cites (J.A. 738–39) is the majority's analysis of whether the violation could be expected to cause serious harm under the flagrant provision, as opposed to whether Northshore violated the walkway standard at all. The Commission did not mention Superfesky's testimony in upholding the ALJ's unwarrantable failure and reckless disregard determinations, instead relying extensively on the KOA report. J.A. 742–45. In any event, as discussed, the Commission overstepped its bounds by evaluating Superfesky's testimony *de novo* without discussing the ALJ's credibility assessment of Superfesky. J.A. 738; see Section I(B)(iii), *supra*. Northshore likewise fails to apply the substantial evidence standard by asking this

Court to discard the ALJ's credibility findings and reweigh Superfesky's testimony. Northshore Br. 34–36.

Moreover, Northshore's own witnesses acknowledged that the condition of the perlite raised the concern that the walkway's structural integrity was compromised. J.A. 211. Scamehorn acknowledged that rebar was no longer embedded in the perlite layer, which diminished the strength it provided to the walkway. J.A. 160. Further, Northshore's decision to reinforce the center (but not the outer) walkway with steel due to the deteriorated perlite and implement a fall protection policy on the fully enclosed outer walkways belies its argument that the perlite's condition is unimportant. J.A. 69. "Indeed, Northshore must agree" that the walkways posed a slip, trip, or fall hazard "lest it would not have instituted fall protection." J.A. 739.

Northshore also argues that the fact that the concrete in the walkway was difficult to remove when the walkway was dismantled after the accident shows that Northshore maintained the walkway in good condition. But the ALJ considered the evidence to support this argument, specifically David Franseen's testimony that the concrete walkway was mainly intact when it was dismantled and that the ultimate cause of the accident was a beam failure. J.A. 610. Yet the ALJ noted that Franseen's testimony, which was an "expert opinion as to the cause of the September 7 accident," was not "definitive evidence" of the separate question "of

the condition of the walkway itself." *Ibid*. Stated differently, the relevant standard concerns only the condition of the walkway, so whether the September 7 accident was caused by a "failure of [a] beam" is immaterial to "the condition of the walkway." *Ibid.* As to the condition of the walkway, the ALJ relied on direct evidence regarding the walkway's condition, such as the KOA report and eyewitness testimony. *Ibid.* Northshore claims that the ALJ "essentially ignored the testimony of Mr. Franseen," Northshore Br. 36, yet does not discuss the ALJ's rationale as to why she found his testimony to be of limited probative value. Franseen readily admitted that in analyzing the cause of the accident, his observations of the walkway were "secondary" as he was "really not focused on the walkway." J.A. 208.

### B. Substantial evidence supports the ALJ's finding of reckless disregard.

Substantial evidence likewise supports the ALJ's finding that Northshore's failure to maintain the outer walkways in good condition was the result of its reckless disregard.[3] Reckless disregard is "the closing of the eyes to or deliberate

[3] The Commission found that Northshore waived the ALJ's reckless disregard and unwarrantable failure findings for the failure to barricade citation by failing to separately address them. J.A. 729 The Secretary agrees that Northshore failed to preserve these issues on appeal. Regardless, as Northshore admits, Northshore Br. 4, n.4, *id.* at 27-28, 51, its reckless disregard and unwarrantable failure arguments for both violations are identical. Therefore, the Secretary's response applies to both the citation and the walkway violation order.

indifference toward the requirements of a mandatory safety standard . . . .” *Jones*, 735 F.2d at 790. Consistent with the ordinary meaning of recklessness, as discussed, it includes “situations where an operator knows or has reason to know of facts which create a high degree of risk of physical harm, and deliberately proceeds to act, or fails to act, in conscious disregard of, or indifferent to, that risk. *Lehigh Anthracite*, 40 FMSHRC at 280 (citing Restatement (Second) of Torts § 500 cmt. a). “[W]holly inadequate efforts,” even when undertaken in good faith, do not mitigate a reckless disregard finding. *Id.* In assessing operator negligence, judges “consider the totality of the circumstances holistically”; “a single mitigating circumstance does not *per se* reduce an operator’s negligence.” *Sec’y of Labor v. Brody Mining, LLC*, 37 FMSHRC 1687, 1702–03 (Aug. 2015).

Northshore obtained the KOA report in June 2015 after having received prior complaints about the condition of the outer walkways. J.A. 613. The report put Northshore on notice that the “outer walkways were unsafe and therefore a serious violation of a mandatory safety standard.” J.A. 745. And while the ALJ recognized that the mine was idled from November 2015 to March 2016, J.A. 607, Northshore Br. 17, 29, 54, Northshore took no corrective action for the six months between production resuming and the September 2016 walkway failure.

Northshore argues that its fall protection policy is a “significant mitigating factor” that “removes” its actions from the category of reckless disregard.

Northshore Br. 45. But legally, "a single mitigating circumstance" does not necessarily reduce its negligence. *Brody Mining*, 37 FMSHRC at 1703. That is particularly true where, as here, the allegedly mitigating circumstance has nothing to do with the "requirements" of the "mandatory safety standard," *i.e.*, the condition of the walkway. *Jones*, 735 F.2d at 790. For that reason, the Commission has correctly recognized that "[i]n order to reduce the level of negligence, the operator's actions would have to *correct* the hazardous condition." *Lehigh Anthracite*, 40 FMSHRC at 282 (emphasis added). Here, as the Commission pointed out, Northshore "did not take any action to *abate* the violation." J.A. 744 (emphasis in original). Fall protection "does not mitigate allowing a violation of a mandatory [standard] of which Northshore was specifically aware to continue unabated for fifteen months." *Ibid*.

Factually, substantial evidence supports the ALJ's conclusion that Northshore's implementation of fall protection was "wholly inadequate" and did not mitigate its negligence. *See Lehigh Anthracite*, 40 FMSHRC at 280; J.A. 613–14 ("[I]t was not made clear to the miners or the contractors how and when to tie off."). Northshore claims that "Lehtinen instructed the crew on how to be tied off the entire time they were along the outer walkway." Northshore Br. 48 (emphasis in original). The record tells a different story:

> Q. What I'm asking is whether you gave a specific instruction or statement that be sure that you are tying off the whole time that you're on this walkway?
> A. I don't recall putting it exactly that way, be sure that you're tied off the entire time. As they all had fall protection and they were told to be tied off, I guess I assumed it was up to them.

J.A. 198. The ALJ thus found that Lehtinen asked miners to tie off, but also "credit[ed] King's testimony that the three contract miners did not understand that they were to be tied off the entire time … primarily because they were told only that there was a slip hazard on the pellets. I find that there were times when they were not tied off while standing or walking on the conveyor walkway." J.A. 604. And King explained that in order to clean the pellets, he had to unclip to move anchor points, preventing him from being tied off the "entire time" he was on the outer walkway. J.A. 33, 603. The ALJ's conclusion was therefore reasonable and this Court should not reweigh King's and Lehtinen's testimony.

The record also contains other evidence that Northshore did not ensure contract miners were properly trained to use fall protection, J.A. 213, 215, that miners did not wear fall protection the entire time they worked on the outer walkways, J.A. 46–49, 68, 622, and that miners could still suffer serious injury while wearing fall protection. J.A. 609. For instance, another miner, Steve Floen, indicated that miners sometimes worked on outer walkways without "always" being tied off. J.A. 607. Northshore argues that the ALJ should not have considered the inspector's testimony about Floen's statements, Northshore Br. 51,

but the Commission's procedural rules expressly permit hearsay testimony. *See* 29 C.F.R. 2700.63(a). Further, Floen provided largely identical statements to Inspector Norman and Special Investigator Hautamaki. J.A. 68, 504. The statements' similarities reinforce their reliability.

Therefore, substantial evidence supports the ALJ's finding of reckless disregard.

### C. Substantial evidence supports the ALJ's unwarrantable failure finding.

The ALJ reasonably found that Northshore's failure to repair the walkway was an unwarrantable failure. The Commission has long held that "unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC at 2001. It is characterized by conduct that is "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Consolidation Coal Co.*, 22 FMSHRC at 353. In analyzing whether conduct is an unwarrantable failure, the ALJ considers all relevant facts to determine if aggravating or mitigating circumstances exist. *IO Coal*, 31 FMSHRC at 1350. Aggravating factors include: (1) the length of time that the violation existed; (2) the extent of the violative condition; (3) whether the operator was placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative conditions; (5) whether the violation was obvious; (6) whether it posed a high degree of danger; and (7) the operator's

knowledge of the violation. *See id.* at 1350–51. The ALJ has discretion to determine which of these factors are more relevant or important under the specific circumstances. *Id.* at 1351. So the ALJ's unwarrantable failure determination is entitled to two levels of deference: (1) deference to specific factual findings; and (2) deference to the ALJ's balancing of the unwarrantable failure factors.

Here, the ALJ determined that there were no mitigating factors, cited to evidence supporting her finding for each aggravating factor, and reasonably concluded that the aggravating factors together constituted an unwarrantable failure. J.A. 614–17. The Commission agreed that substantial evidence supported the ALJ's finding that "the clear weight" of her analysis demonstrates an unwarrantable failure. J.A. 743. Northshore does not attack the ALJ's balancing of the unwarrantable failure factors, but instead repeats the same substantial evidence arguments it makes throughout its brief to rebut the ALJ's findings on these factors. Northshore Br. 53–55. As discussed, those arguments are meritless.

This Court should affirm the ALJ's and the Commission's reckless disregard and unwarrantable failure findings.

## Conclusion

The Court should grant the Secretary's petition for review, reverse the Commission's decision that Northshore did not commit a reckless flagrant violation, and find that it did. Alternatively, it should remand this issue to the

Commission for analysis under the appropriate legal test. It also should reverse the Commission's holding that Zimmer and Peterson are not subject to liability and affirm the ALJ's finding of agent liability. Alternatively, it should remand this issue to the Commission for analysis under the appropriate legal test. Finally, it should affirm the ALJ's and the Commission's reckless disregard and unwarrantable failure findings.

Respectfully submitted,

Elena S. Goldstein
Acting Solicitor

April E. Nelson
Associate Solicitor

Archith Ramkumar
Appellate Counsel

Rebecca W. Mullins
Attorney
U.S. Department of Labor
Office of the Solicitor
Division of Mine Safety & Health
201 12th St. S., Ste. 401
Arlington, VA 22202
202.693.9345

Attorneys for the Secretary of Labor

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Jason Riley
Office of General Counsel
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., NW Suite 520 N
Washington, D.C. 20004

R. Henry Moore
Counsel for Northshore Mining, Inc., Matthew Zimmer, and Roger Peterson
Fisher & Phillips, LLP
301 Grant Street, Suite 4300
Pittsburgh, PA 15219

/Rebecca W. Mullins