

ORAL ARGUMENT NOT YET
SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1464

CUMBERLAND COAL RESOURCES LP,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

ROBIN A. ROSENBLUTH
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, VA 22209-2296
Telephone: (202) 693-9333

CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASE

(A) Parties and Amici. All parties, intervenors, and amici appearing before the Federal Mine Safety and Health Review Commission and its administrative law judge and in this Court are listed in the brief for Cumberland.

(B) Rulings Under Review. References to the rulings at issue appear in the brief for Cumberland.

(C) Related Cases. This case has not previously been before this Court or any other Court. Counsel are unaware of any related cases currently pending before this Court or any other Court.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Br.	Brief for Cumberland
Commission	Federal Mine Safety and Health Review Commission
Ex.	Exhibit
J.A.	Joint Appendix
Judge	Administrative Law Judge
Mine Act or Act	Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 <u>et seq.</u>
MINER Act	Mine Improvement and New Emergency Response Act of 2006, PL 109-236, 120 Stat. 493 (2006)
MSHA	Mine Safety and Health Administration
SCSR	Self-contained self-rescuer
Secretary	Secretary of Labor
S&S	"Significant and substantial"
Tr.	Transcript of hearing held February 24, 2009, and February 25, 2009

STATEMENT OF JURISDICTION

The Secretary of Labor ("Secretary") is satisfied with the jurisdictional and standing statements set forth in Cumberland's brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether, in evaluating the "significant and substantial" nature of a violation of 30 C.F.R. § 75.380(d)(7)(iv)'s requirement regarding the location of lifelines, one must assume the occurrence of an emergency in which miners would need to use the lifeline to escape from the mine.

2. Whether Cumberland's assertion that the Commission committed reversible error by misapplying the Commission's Mathies test is unavailing.

3. Whether substantial evidence supports the Commission's finding that, assuming the occurrence of an emergency in which miners would need to use the lifelines, the violations of 30 C.F.R. § 75.380(d)(7)(iv) were "significant and substantial."

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to this brief beginning at A-1.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to assure compliance with the Act and with standards. 30 U.S.C. § 813(a). Section 104 of the Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814. Under Section 105(d) of the Act, a mine operator may contest a

citation, order, or proposed civil penalty before the Commission, an independent adjudicatory agency established under the Act to provide trial-type administrative hearings and appellate review in cases arising under the Act. 30 U.S.C. § 815(d). See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 789 (D.C. Cir. 2009).

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), states that a violation of "any mandatory health or safety standard" shall be designated "significant and substantial" ("S&S") if it is "of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard." Under Commission case law, a violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Div., National Gypsum Co., 3 FMSHRC 822, 825 (1981). See Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1085 (D.C. Cir. 1987) (citing National Gypsum).

Designation of a violation as S&S is a precondition for certain enhanced enforcement actions under the Mine Act. For instance, those violations that are both S&S and caused by an

"unwarrantable failure"¹ to comply will result in issuance of a Section 104(d)(1) citation, and subsequent unwarrantable failure violations will result in issuance of a Section 104(d)(1) withdrawal order and, potentially, Section 104(d)(2) withdrawal orders. 30 U.S.C. § 814(d). See RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 592-93 (D.C. Cir. 2001) (explaining the "D-chain" sequence of actions commenced by the issuance of a Section 104(d)(1) citation). In addition, an operator's record of S&S violations may result in a determination that it has exhibited a "pattern" of S&S violations. 30 U.S.C. § 814(e). See 30 C.F.R. Part 104 ("Pattern of Violations"). Once a mine operator is identified as a pattern violator, it is subject to the increased regulatory scrutiny and enhanced enforcement set forth in Section 104(e) of the Act, including mandatory issuance of withdrawal orders whenever new S&S violations are found. Ibid. Designation of a violation as S&S may also increase the size of the penalty assessed for the violation. See Wolf Run Mining Co. v. FMSHRC, 659 F.3d 1197, 1198 (D.C. Cir. 2011).

In 2006, responding to the occurrence of three multiple-fatality mine emergencies during which miners died because they

¹ An operator's failure to comply with a standard is "unwarrantable" if it is caused by "'aggravated conduct constituting more than ordinary negligence.'" RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 592 n.1 (D.C. Cir. 2001) (quoting Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)).

were unable to evacuate mines,² Congress enacted the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), which amended Section 316 of the Mine Act, 30 U.S.C. § 876. Section 2(3)(b)(E)(iv) of the MINER Act requires operators to provide flame-resistant directional lifelines in escapeways "to enable evacuation." MINER Act Section 2(3)(b)(E)(iv), PL 109-236 (S. 2803) (June 15, 2006), codified at 30 U.S.C. § 876(b)(2)(E)(iv).

Also in response to the emergencies, MSHA issued an Emergency Temporary Standard ("ETS") on emergency mine evacuations in March 2006. 71 Fed. Reg. 12252 (March 9, 2006). The ETS became a final rule on December 8, 2006. 71 Fed. Reg. 71430 (December 8, 2006).

The rule requires mine operators to provide each mine escapeway with a lifeline that is "[l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R.

² Specifically, in January 2006, 11 miners died because they could not escape after an explosion at the Sago Mine in Tallmansville, West Virginia. See 71 Fed. Reg. 12252, 12252-01 (March 9, 2006); MSHA's Report on the Sago Mine Disaster, Tallmansville, West Virginia, available at <http://www.msha.gov/Fatals/2006/Sago/sagoreport.asp> page 1. Also in January 2006, two miners died when they were unable to escape from a fire at the Aracoma Alma Mine No. 1 in Melville, West Virginia. See 71 Fed. Reg. at 12252-01. In May 2006, three miners died when they were unable to escape after an explosion at the Darby Mine No. 1 near Harlan, Kentucky. See MSHA's Fatal Accident Report on the Darby Mine Accident, available at <http://www.msha.gov/Fatals/2006/Darby/darbyreport.asp> page 1.

§ 75.380(d)(7)(iv). Each lifeline must be continuous from the working section throughout the entire length of each escapeway, made of durable material, and marked with reflective material every 25 feet. 30 C.F.R. § 75.380(d)(7)(i), (iii). See also 71 Fed. Reg. at 71436. In addition, each lifeline must be equipped with directional indicators showing the route of escape, indicators marking a branch line that is attached to the lifeline and leads to a cache of stored self-contained self-rescuers ("SCSRs"),³ and indicators marking a branch line that is attached to the lifeline and leads to a refuge alternative to be used if miners are unable to escape. 30 C.F.R. § 75.380(d)(7)(v), (vii).

B. Facts and Procedural History

Cumberland Coal Resources LP ("Cumberland") operates the Cumberland Mine, a large underground coal mine in Greene County, Pennsylvania. Between December 6, 2007, and December 11, 2007, MSHA cited Cumberland for four violations of 30 C.F.R.

§ 75.380(d)(7)(iv)'s requirement that lifelines be "[l]ocated in such a manner for miners to use effectively to escape."⁴ MSHA

³ 30 C.F.R. § 1714-4(c) sets forth requirements for storing SCSRs. SCSRs are portable oxygen sources for providing breathable air when the surrounding atmosphere lacks oxygen or is contaminated with toxic gasses.

⁴ 30 C.F.R. § 75.380(d) states in relevant part:

designated each of the violations S&S under Section 104(d)(1) of the Act. This proceeding presents the issue of whether the violations were properly designated S&S. The four violations were as follows.

(1). The No. 1 belt entry of the 5 Butt East section. On December 6, 2007, MSHA Special Investigator Thomas Whitehair inspected the lifeline in the No. 1 belt entry of the 5 Butt East Longwall section of the Cumberland Mine. J.A. 57, Tr. at 30-31.⁵ The No. 1 belt entry is the secondary escapeway for the 5 Butt East Longwall section. J.A. 60, Tr. at 41-42.⁶

The lifeline was hung from the roof and was located approximately seven feet, eight inches above the floor. The majority of the hooks used to hang the lifeline were four inches

Each escapeway shall be -

* * *

(7) Provided with a continuous, durable directional lifeline or equivalent device that shall be -

* * *

(iv) Located in such a manner for miners to use effectively to escape;

* * *.

⁵ At the time of the inspections, Investigator Whitehair had worked for MSHA in various capacities inspecting mines for approximately 20 years. Before working for MSHA, Whitehair had 14 years of coal mining experience. J.A. 56, Tr. at 27-28.

⁶ Mine operators are required to have two escapeways from working sections of the mine. 30 C.F.R. § 75.380(b)(1). The primary escapeway must be ventilated with intake air, i.e., air that has not ventilated a working face. J.A. 58, Tr. 33-34.

long and shaped like the letter J. J.A. 60-61, Tr. at 44-47. The J-hooks were attached to the roof at the top, were open on one side, and curved upward at the bottom to hold the lifeline. The hooks were not all pointed in the same direction and were spaced about fifty feet apart. J.A. 61, Tr. at 46-48. Investigator Whitehair also observed cables running perpendicular to and under the lifeline at several locations. 31 FMSHRC at 1157, J.A. 17; J.A. 65, 97, Tr. at 63-64, 192.

Investigator Whitehair testified that lifelines are used during emergencies when there is so much smoke that miners are totally blinded and have no sense of direction. J.A. 58, 59, 89, Tr. at 35, 37, 158. Whitehair testified that lifelines should be hung from breakaway hangers so that when they are pulled, they fall down. J.A. 58, Tr. at 35. He explained that lifelines are a guide that miners hold and follow to get out of the mine. He explained that miners should be able to slide their hands along the lifeline and should never have to take their hands off the lifeline during the escape. Id.

Investigator Whitehair testified that during an emergency in which a lifeline would be used, miners would be wearing SCSRs and would not be able to communicate verbally. J.A. 76, Tr. at 108. He explained that miners also would not be able to communicate by signalling to each other because there would be

too much smoke. Id. He testified that in such an emergency, miners would be "panicked, scared to death," and "anything that would hinder or prevent them from escape could be a real catastrophe." Id.

Investigator Whitehair testified that the height of the lifeline in the No. 1 belt entry made the lifeline very difficult to reach. J.A. 61, 63, 65, Tr. at 48, 53, 61-62. Whitehair testified that to reach the lifeline, miners might be able to use a tool. J.A. 89, Tr. at 158. He testified that to pull down the lifeline, a miner might be able to unhook the lifeline from one J-hook and then "flip" the lifeline out of the other hooks. 31 FMSHRC at 1157, J.A. 17 (citing J.A. 89, Tr. at 158). He explained, however, that the miner would have to flip the lifeline in multiple directions to get it out of the hooks. J.A. 61, Tr. at 48. Whitehair testified that it would take "considerable doing" and "a considerable amount of time" to "blindly try to flip [the lifeline] out of a hanger." 31 FMSHRC at 1158, J.A. 12 (citing J.A. 89, Tr. at 158-59). See also J.A. 61, Tr. at 48.

Whitehair also testified that in those places where a cable ran under the lifeline, the lifeline, when pulled down, would fall into the cable and make the lifeline difficult to follow. J.A. 65, Tr. at 64.

Based on his belief that the location of the lifeline would impede the ability of miners to reach and pull down the lifeline quickly during an emergency, Investigator Whitehair issued a citation alleging an S&S violation of Section 75.380(d)(7)(iv). Whitehair explained that he believed that because of the location of the lifeline, in the event of an emergency, it was reasonably likely that miners would not be able to escape and would eventually succumb to carbon monoxide poisoning. J.A. 67, Tr. at 69-71.

(2). The No. 2 track entry of the 5 Butt East section. On December 7, 2007, Investigator Whitehair inspected the lifeline in the No. 2 track entry of the Five Butt East Longwall section. The No. 2 track entry is the primary escapeway for the 5 Butt East Longwall section. 31 FMSHRC at 1158, J.A. 18; J.A. 68, Tr. at 76. The lifeline was hung from the roof and was located approximately seven-and-a-half feet above the floor. J.A. 73, Tr. at 95. Whitehair testified that he could not reach the lifeline in some areas, although he acknowledged that if he had walked in between equipment on the track and stood on the ballast, he might have been able to reach the lifeline in some places. J.A. 73-74, Tr. at 96-97, 100.

Investigator Whitehair observed pieces of large track equipment located underneath the lifeline for a distance of

about 450 feet. J.A. 74, Tr. at 99. The equipment included man trips, a rock duster, a pod rock duster, a transformer car, a power car, an emulsion car, a pump, and supply cars. Each piece of equipment was at least seven feet wide and between three and five feet high. J.A., 69-72, Tr. at 77-90. At various points, cables and waterlines, located approximately seven inches below the roof, ran perpendicular to and under the lifeline. 31 FMSHRC at 1159, J.A. 19; J.A. 75, 97, Tr. at 101-03, 192.

Emphasizing that miners using the lifeline would be in thick smoke, Investigator Whitehair testified that at some point during an evacuation, the lead miner using the lifeline to try to find his way out of the mine would run into one of the pieces of equipment. J.A. 75, Tr. at 101.⁷ He also testified that miners knowing that equipment was in the path of the lifeline would evacuate the mine more slowly to try to avoid running into the equipment. J.A. 94, Tr. at 180. He testified that a miner running into the equipment could be injured by the equipment and could fall. He also testified that the breathing bag on the miner's SCSR might rupture. J.A. 75, Tr. at 101. In addition, Whitehair testified that if the lifeline was pulled down on top of a piece of equipment, the lifeline could snag and become

⁷ Whitehair testified that miners are trained, in the event of an emergency, to meet in a pre-determined location, tether themselves together, and then pull down the lifeline. J.A. 58, Tr. at 35.

entangled in the equipment. 31 FMSHRC 1159, J.A. 19 (citing J.A. 75, Tr. at 101). See also J.A. 81, Tr. at 127.

Investigator Whitehair further testified that the cables and water lines running underneath the lifeline would prevent the lifeline from falling to the floor where it could be used. J.A. 75, Tr. at 102-104. He also testified that the cable and water line were hung from a type of hanger that would prevent miners from pulling the lifeline over to the walkway. J.A. 75, Tr. at 104-05. In addition, he testified that the positioning of the lifelines over the water lines and other cables would cause a miner to take his hand off of the lifeline to move around the cable. See J.A. 65, 93, Tr. at 64, 176. When asked why a miner could not then just "swing [his] arm back and forth" and find the lifeline, Whitehair testified, "I would hate to have my life depend on swinging my arms trying to find a lifeline." J.A. 93, Tr. at 176.

Based on his belief that the location of the lifeline would impede the ability of miners to quickly escape in an emergency, Investigator Whitehair issued a second citation alleging an S&S violation of Section 75.380(d)(7)(iv). Whitehair testified that he designated the violation S&S for essentially the same reasons that he designated the December 6, 2007, violation S&S -- i.e., that, in the event of an emergency, the location of the lifeline

would result in very serious injury. J.A. 76-77, Tr. at 108-110.

(3). The No. 2 track entry of the Eight Butt East section. On December 10, 2007, Investigator Whitehair inspected the lifeline in the No. 2 track entry of the Eight Butt East section, the primary escapeway for the section. 31 FMSHRC at 1160, J.A. 14; J.A. 78, Tr. at 115-16. The lifeline was hung approximately seven-and-a-half feet above the floor. J.A. 80, Tr. at 121. Whitehair testified that the only place that he could reach the lifeline was at its end. J.A. 80, Tr. at 122.

Various pieces of large equipment, including a man trip, five supply cars, and a rail car, were located underneath the lifeline for a distance of approximately 120 feet. J.A. 79-80, Tr. at 118-22. At the No. 35 crosscut, a water line ran perpendicular to and under the lifeline. 31 FMSHRC at 1160, J.A. 20; J.A. 80, 97, Tr. at 123, 192. For essentially the same reasons that he issued the citation on December 7, 2007, Whitehair issued a third citation alleging a violation of Section 75.380(d)(7)(iv). Whitehair testified that he designated the violation S&S for essentially the same reasons that he designated the December 6, 2007, and the December 7, 2007, violations S&S. J.A. 81-82, Tr. at 128-29.

(4). The No. 2 track entry of the Fifteen Butt East section. On December 11, 2007, Investigator Whitehair inspected the No. 2 track entry of the Fifteen Butt East section, the primary escapeway for the section. J.A. 82-83, Tr. at 132, 133. The lifeline was hung approximately seven-and-a half-feet above the floor. J.A. 83, Tr. at 133-34. For approximately 300 feet, the lifeline was located over track equipment, including a man trip, eight supply cars, and a rail car. 31 FMSHRC at 1160, J.A. 20; J.A. 83, Tr. at 133-35. For essentially the same reasons that he issued the citations on December 6, 2007, December 7, 2007, and December 10, 2007, Whitehair issued a fourth citation alleging a violation of Section 75.380(d)(7)(iv). Whitehair testified that he designated the violation S&S for essentially the same reasons that he designated the three other violations S&S. J.A. 84, Tr. at 139-41.

C. The Judge's Decision

The judge affirmed all four citations. In doing so, the judge accepted the Secretary's interpretation of Section 75.380(d)(7)(iv)'s requirement that lifelines be located in "such a manner for miners to use effectively to escape" as requiring that lifelines be located in a manner "to achieve the results of a quick escape in an emergency." 31 FMSHRC at 1156,

J.A. 16 (emphasis in original). Based on Investigator Whitehair's opinion that the location of each of the lifelines would impede the ability of miners to quickly escape in an emergency, the judge affirmed all of the citations. 31 FMSHRC at 1157-60, J.A. 17-20.

The judge, however, determined that all four violations were not S&S. In reaching his determination, the judge rejected the Secretary's argument that in evaluating the S&S nature of violations of standards like Section 75.380(d)(7)(iv) -- i.e., standards that come into play only in the event of an emergency -- one must assume the occurrence of the emergency. The judge concluded that the Secretary's approach was inconsistent with the Commission's Mathies test for determining whether a violation is S&S. 31 FMSHRC 1163-64, J.A. 22-24 and n.6 (citing Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984)).

The judge then found that the Secretary failed to establish the third element of the Mathies test, i.e., the Secretary failed to establish a reasonable likelihood that the hazard contributed to by the violation -- here, a delay in the evacuation of miners during an emergency -- was reasonably likely to occur. 31 FMSHRC at 1163, J.A. 23. In so doing, the judge found that the Secretary failed to prove that during continued normal mining operations, there was a reasonable

likelihood of a fire or explosion necessitating an evacuation.

Id.⁸

The Secretary filed a petition for discretionary review with the Commission seeking review of the judge's determination that the violations were not S&S. The Commission granted review.

D. The Decision of the Commission

Reversing the judge, the Commission unanimously held that the four violations of the lifeline standard were S&S. The Commission held that the judge erred in addressing the third element of the Commission's test for determining whether a violation is S&S set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), i.e., whether there was a reasonable likelihood that the hazard contributed to by the violation would result in injury. 33 FMSHRC at 2366, J.A. 36. In so doing, the Commission stated that, in analyzing the second Mathies element -- i.e., whether the violation contributed to a discrete safety hazard -- the judge correctly found that the hazard in this case was an increased risk of injury from miners not escaping quickly in an emergency. The Commission held that the judge therefore should have evaluated the third Mathies element by considering whether the relevant hazard -- miners not escaping quickly in an

⁸ The judge assessed a penalty of \$3000 for each of the violations. 31 FMSHRC at 1166, J.A. 26.

emergency -- was reasonably likely to cause injury. 33 FMSHRC at 2366, 2368, J.A. 36, 38. Instead, the judge improperly considered the reasonable likelihood of a fire or an explosion. Id. The Commission stated that the judge improperly conflated "hazard" with "violation" and thereby imposed an additional test not set forth in Mathies, i.e., whether there was a reasonable likelihood of an emergency. 33 FMSHRC 2366, J.A. 36.

In reaching its decision, the Commission determined that evacuation standards are different from other mine safety standards because they are "intended to apply meaningfully only when an emergency actually occurs." 33 FMSHRC at 2367, J.A. 37. The Commission agreed with the Secretary that she should be able to designate violations of evacuation standards as S&S without having to prove that there are conditions in the mine that are reasonably likely to cause a fire or an explosion. Id. The Commission stated that any other result would be inconsistent with Congress' enactment of the MINER Act and its emphasis on the importance of safe and effective mine evacuations in emergency situations. Id.

The Commission rejected Cumberland's argument that such an approach will result in evacuation standard violations always being S&S. 33 FMSHRC at 2369, J.A. 39. The Commission stated that, although in this case the violations were of such a nature

that they would cause miners to be delayed in escaping, a factfinder might not have found, if the violations had been minor, that the violations contributed to the hazard of miners being delayed in escaping. In that circumstance, the Commission stated, the second element of the Mathies test for S&S -- i.e., that the underlying violation contributed to a discrete safety hazard -- would not have been satisfied and the violations would not have been S&S. 33 FMSHRC at 2368, J.A. 38.

Citing Buck Creek Coal Co. v. FMSHA, 52 F.3d 133, 135 (7th Cir. 1995), the Commission rejected Cumberland's argument that, even in the context of an emergency, the violations in this case were not S&S because of the presence of fire suppression systems and carbon monoxide monitoring systems, miners' training, and the presence of the conveyor belt as an alternate lifeline. In so doing, the Commission noted that in Buck Creek the Court rejected the operator's reliance on additional safety measures as factors that would preclude an S&S finding. 33 FMSHRC at 2369, J.A. 39. The Commission stated that if redundant mandatory safety protections were a defense to a finding of S&S, it would lead to the anomalous result that every protection would have to be non-functional before an S&S finding could be made. Id.

Noting that the judge credited the inspector's testimony that in the event of a fire or explosion the lifeline violations would either prevent miners from using the lifelines or delay their escape, which "could result in a fatal injury due to carbon monoxide poisoning," and noting substantial evidence indicating that the hazard of being delayed or unable to escape during an emergency would result in injury of a reasonably serious nature, the Commission determined that the judge had effectively found that the third and fourth elements of the Mathies test were established -- i.e., that there was a reasonable likelihood that the hazard contributed to by the violations would result in an injury and that there was a reasonable likelihood that the injury would be of a reasonably serious nature. 33 FMSHRC at 2370, J.A. 40. Based on that determination, the Commission concluded that there was no reason to remand the case on the issue of whether the violations were S&S. Instead, the Commission reversed the judge, held that the four violations were S&S, and remanded the case for reassessment of penalties. Id.

E. The Judge's Decision On Remand

In light of the Commission's finding that the violations were S&S, the judge increased the penalty for each of the violations from \$3000 to \$4000. 33 FMSHRC at 2599, J.A. 45.

SUMMARY OF ARGUMENT

The Secretary interprets the "significant and substantial" language in Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to require the decisionmaker, in evaluating the S&S nature of a violation of a standard like Section 75.380(d)(7)(iv) that only comes into play in the event of an emergency, to assume the occurrence of the contemplated emergency. The Secretary's interpretation, unlike Cumberland's interpretation -- which would require the Secretary to establish the reasonable likelihood of the contemplated emergency -- is consistent with Congress' use of the terms "could" and "contribute" and the phrase "cause and effect" in describing S&S violations in Section 104(d)(1).

Indeed, the only logical approach in evaluating violations of standards like Section 75.380(d)(7)(iv), which only come into play in the event of an emergency, is to assume the occurrence of the emergency. Otherwise, violations of standards that have an especially high capacity for producing catastrophic injuries and death will have an especially low likelihood of being found to be S&S and being subject to enhanced enforcement under the Mine Act. Such an approach is inherently illogical and inconsistent with the purpose of the Mine Act, and should be rejected.

The Secretary's interpretation, unlike Cumberland's interpretation, is also consistent with the legislative history of the Act. In addition, the Secretary's interpretation is consistent with the subsequent history of the Act in which Congress, responding to the actual occurrence of emergencies in which miners were unable to escape from mines during emergencies, amended the Mine Act through the passage of the MINER Act, which specifically requires operators to provide lifelines. See 30 U.S.C. § 876(b)(2)(E)(iv).

Cumberland's assertion that the Commission misapplied its Mathies test for S&S in this case is unavailing because, regardless of the proper application of Mathies, the plain meaning of Section 104(d)(1) precludes an interpretation that would require the Secretary to establish the reasonable likelihood of an emergency. Moreover, even if the meaning of Section 104(d)(1) were not plain, and even if Cumberland were correct that the Commission misapplied Mathies, Cumberland's argument would fail because the Secretary's interpretation of an ambiguous statutory provision, not the Commission's interpretation, is entitled to deference. E.g., Secretary of Labor, MSHA v. National Cement Co. of California, 494 F.3d 1066, 1071 (D.C. Cir. 2007). In any event, the Commission's approach in this case is consistent with the Commission's Mathies test.

Finally, substantial evidence supports, and indeed compels, the Commission's finding that, assuming the occurrence of emergencies in which miners would need to use the lifelines, the violations in this case were S&S. In so finding, the Commission properly declined to consider evidence of redundant safety protections that were assertedly in place. Considering the redundant safety features would be inconsistent with assuming the contemplated emergency. It would also be inconsistent with the language of Section 104(d)(1) and with case law holding that the presence of redundant safety features is not a valid basis for determining that a violation is not S&S. E.g., Buck Creek Coal, Inc. v. FMSHA, 52 F.3d 133, 136 (7th Cir. 1995).

ARGUMENT

I.

STANDARDS OF REVIEW

A. Statutory Interpretation Under the Mine Act

This case presents the issue of whether, in evaluating whether a violation of Section 75.380(d)(7)(iv)'s requirement regarding the location of lifelines "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" within the meaning of Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), one should assume the occurrence of an emergency

necessitating an evacuation in which the lifeline would need to be used.

If the meaning of a statute is plain and unambiguous, the Court must "'give effect to the unambiguously expressed intent of Congress.'" Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (quoting Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984))). In determining whether the meaning of a statutory provision is plain and unambiguous, courts use all the traditional tools of statutory construction. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000), cert. denied, 532 U.S. 970 (2001); Bell Atlantic Telephone Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Those tools include the statutory text, the legislative history, the overall structure and design of the statute, and the purpose of the provision in question. Arizona Public Service, 211 F.3d at 1288; Bell Atlantic, 131 F.3d at 1047. See also City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003); Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997).

If the statute is silent or ambiguous with respect to the question presented, the Secretary's interpretation of the

provision is owed full deference and is entitled to affirmance as long as it is reasonable. Cannelton, 867 F.2d at 1435. Accord National Cement, 573 F.3d at 792; Excel Mining, 334 F.3d at 5. "In the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a * * * health and safety standard, and is therefore deserving of deference." Excel Mining, 334 F.3d at 6 (internal quotation marks and citations omitted). Accord Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 792 (D.C. Cir. 2009).

B. The Substantial Evidence Test

The Court reviews the Commission's factual findings under the substantial evidence test. If they are supported by substantial evidence, the Commission's findings are conclusive upon the Court. RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 599 (D.C. Cir. 2001) (citing 30 U.S.C. § 816(a)(1)). The Court must uphold the Commission's factual determinations if, on the record as a whole, "there is 'such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion.'" Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1431 (D.C. Cir. 1989) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Commission's factual

determinations "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." Western Air Lines, Inc. v. CAB, 495 F.2d 145, 152 (D.C. Cir. 1974) (citation omitted).

II.

IN EVALUATING WHETHER A VIOLATION OF SECTION 75.380(d)(7)(iv)'S REQUIREMENT REGARDING THE LOCATION OF LIFELINES IS S&S, ONE MUST ASSUME THE OCCURRENCE OF AN EMERGENCY IN WHICH MINERS WOULD NEED TO USE THE LIFELINE TO ESCAPE FROM THE MINE

Section 104(d)(1) of the Mine Act describes a "significant and substantial" violation as a violation that "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Secretary interprets the S&S language in Section 104(d)(1) to require the decisionmaker, in evaluating the S&S nature of a violation of a standard like Section 75.380(d)(7)(iv) that only comes into play in the event of an emergency, to assume the occurrence of the contemplated emergency. Thus, in evaluating the S&S nature of the Section 75.380(d)(7)(iv) violations in this case, the Secretary interprets Section 104(d)(1) to require the decisionmaker to assume the occurrence of an emergency in which miners would need to use the lifeline that was not "located in such a manner for miners to use effectively to escape." See 30 C.F.R. § 75.380(d)(7)(iv).

The Commission's test for determining whether a violation is S&S is set forth in Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). In Mathies, the Commission held that to establish that a violation is S&S, the Secretary must prove:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury; and
- (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies, 6 FMSHRC at 3-4 (citing Cement Div., National Gypsum Co., 3 FMSHRC at 825). The Commission's holding in this case that, in evaluating the S&S nature of violations of evacuation standards like Section 75.380(d)(7)(iv), "the applicable analysis under Mathies involves consideration of an emergency," and does not require the Secretary to prove the reasonable likelihood of that emergency, is consistent with the Secretary's interpretation of Section 104(d)(1). See 33 FMSHRC 2366, J.A. 36.

The Secretary's interpretation, unlike Cumberland's interpretation -- which would require the Secretary to establish the reasonable likelihood of an emergency requiring the use of the lifeline (e.g., Br. at 29) -- is consistent with Congress' use of the term "contribute" and the phrase "cause and effect"

in describing S&S violations in Section 104(d)(1). It is impossible to evaluate whether a violation of a standard that comes into play only in the event of an emergency "contributes" to the "cause and effect" of a hazard without assuming the occurrence of the contemplated emergency. Thus, in this case, it is impossible to determine whether the violations of Section 75.380(d)(7)(iv) significantly and substantially contributed to the cause and effect of the hazard in question -- miners being unable to escape quickly from a mine during an emergency in which miners would need to use the lifeline -- without assuming the occurrence of such an emergency. One cannot evaluate the manner in which something contributes to the cause of an event that arises only during a particular situation without assuming the occurrence of that situation. One also cannot evaluate the effect of something happening without first assuming that it has happened.

The Secretary's interpretation, unlike Cumberland's interpretation, is also consistent with Congress' use of the word "could" in Section 104(d)(1). Section 104(d)(1) describes an S&S violation as one that "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard * * * ." 30 U.S.C. § 814(d)(1) (emphasis added). A determination of

whether something “[c]ould have [caused a result] * * * looks at [the thing’s] intrinsic capacity to [cause the result].” United States v. Peterson, 538 F.3d 1064, 1072 (9th Cir. 2008) (internal quotation marks omitted). It does not, as would be required under Cumberland’s interpretation, require the factfinder to look at the thing’s “probability of causing [the result].” Id.

By its very nature, Section 75.380(d)(7)(iv) is designed to protect miners only in the event of a mine emergency necessitating an evacuation. Lifelines serve no purpose except in the event of an emergency necessitating an evacuation in which visibility is poor. Accordingly, the only logical approach in evaluating the S&S nature of a violation of Section 75.380(d)(7)(iv) is to assume that such an emergency has occurred. Violations of Section 75.380(d)(7)(iv) and other standards designed to protect miners in emergency situations must be analyzed in the context of the contemplated emergency; otherwise, violations of these critically important standards will rarely, if ever, be found to be S&S because the likelihood of the emergency occurring should always be remote. “So paradoxical a purpose should not be imputed to the Congress without very strong evidence that this was its intent.” UMWA v. FMSHRC, 671 F.2d 615, 625-26 (D.C. Cir. 1982). See also

Secretary v. Twentymile Coal Co., 411 F.3d 256, 261 (D.C. Cir. 2005) ("This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless"); Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1086 (D.C. Cir. 1987) (rejecting an approach that would result in violations of the Secretary's respirable dust standards never being deemed S&S because such a result would be inconsistent with Congress' clear intention that the "full use of the panoply of the Act's enforcement mechanisms [be used] to effectuate the goal of preventing respiratory disease") (internal quotations and citation marks omitted).

Under Cumberland's interpretation, under which violations of standards such as Section 75.380(d)(7)(iv) would rarely if ever be found to be S&S, violations that have an especially high capacity for producing catastrophic injuries and death would have an especially low likelihood of being found S&S. Such an approach is inherently illogical and inconsistent with the purposes of the Mine Act, and should be rejected. See Chemical Manufacturers Ass'n v. EPA, 919 F.2d 158, 165 (D.C. Cir. 1990) (rejecting as "anomalous at best" an interpretation that would have treated less stringently hazardous waste facilities which, by the terms of the statute, were meant to be treated more stringently); Twentymile Coal, 411 F.3d at 261 (rejecting an

interpretation that would promote untrained miners attempting work "when it is most dangerous"); Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1082 (10th Cir. 1998) (rejecting an interpretation that would have the "anomalous result" of protecting workers performing routine maintenance but not workers performing more dangerous, non-routine tasks).

The Secretary's interpretation, unlike Cumberland's interpretation, is also supported by the legislative history of the Mine Act. As this Court recognized in approving a presumption that violations of the Secretary's respirable dust standards are S&S, the legislative history of the Act reflects Congress' intent that all but technical violations be considered S&S. Consolidation Coal, 824 F.2d at 1086 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 31, reprinted in Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 619).

In addition, the Secretary's approach, unlike Cumberland's approach, is consistent with the subsequent history of the Mine Act. In 2006, in response to emergencies during which miners died because they were unable to escape from mines, Congress passed the MINER Act.⁹ In doing so, Congress recognized that

⁹ See note 1, *supra*.

escape is the first and preferred option in a mine emergency (S. Rep. 109-365 (S.2803), 109th Cong. at 6 (2006)) and emphasized the importance of providing miners with a method to assist them in locating and following an escape route. Id. at 7. Finding that "lifelines are likely the most common method for achieving this end" (id.), Congress specifically required operators to provide post-accident lifelines. MINER Act Section 2(3)(b)(E)(iv), PL 109-236 (S. 2803) (June 15, 2006). If violations of lifeline requirements can rarely if ever be found to be S&S, operators can repeatedly and carelessly violate those requirements without being subject to Section 104(d)'s (and Section 104(e)'s) increasingly severe sanctions.

Congress, responding to the actual occurrence of emergencies in which miners were unable to escape from the mine, recognized that usable lifelines are indispensable to saving miners' lives. Congress cannot have intended that violations of life-saving lifeline requirements be effectively immunized from the Mine Act's graduated enforcement scheme.

Indeed, under Cumberland's interpretation, virtually all violations of the requirements Congress added in the MINER Act could never be found to be S&S because virtually all of those requirements only come into play in an emergency.¹⁰ Thus, under

¹⁰ Section 2(3)(b)(A) of the MINER Act requires operators to

Cumberland's interpretation, an operator could have no evacuation system in place at all and be immune from enhanced enforcement under Section 104(d) (and Section 104(e)) of the Act, as long as the Secretary was unable to prove the reasonable likelihood of a fire or explosion or other emergency -- i.e., as long as the Secretary was unable to prove that the operator also violated one or more other standards protecting against the likelihood of an explosion or fire or other emergency. Such a result is fundamentally inconsistent with Congress' recognition of the critical need to protect miners in the event of an emergency, and should be rejected.

The Supreme Court has explained that "[o]ver time, * * * subsequent acts can shape or focus [a statute's] meanings. The 'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 143 (2000) (citing United States v. Fausto, 484 U.S. 439, 453 (1988)). Accordingly, the

have emergency response plans (30 U.S.C. § 876(b)(2)(A)), and Section 2(3)(b)(E) requires operators to have post-accident communication systems, post-accident tracking systems, post-accident breathable air, and post-accident lifelines, and to provide training in emergency procedures. 30 U.S.C. §§ 876(b)(2)(E)(i)-(v). Indeed, the very title of the MINER Act indicates that it was intended to improve miner protection in an emergency.

"specific polic[ies] embodied in [the MINER Act] should control [the] construction of [Section 104(d)(1)]" (FDA v. Brown, 529 U.S. at 143 (citing and quoting United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998))), and the Court should accept the Secretary's interpretation because, under that interpretation, violations of the lifeline requirements can be found to be S&S and be subject to the Mine Act's increasingly severe sanctions. See Consolidation Coal, 824 F.2d at 1086. See also Coles v. Penny, 531 F.2d 609, 615 (D.C. Cir. 1976) (declining to interpret Title VII in a manner that would eliminate a judicial remedy in a broad category of cases); Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 989 (9th Cir. 1995), cert. denied, 518 U.S. 1018 (1996) (rejecting an interpretation of the Clean Water Act that would immunize an entire body of violations from citizen suit).

Contrary to Cumberland's assertion, the fact that Congress did not change the Mathies test in passing the MINER Act does not mean that Congress' enactment of the MINER Act does not support the Secretary's interpretation. See Br. at 41. As discussed below, the Commission correctly determined that assuming the occurrence of the contemplated emergency is consistent with the Commission's Mathies test.

Even if assuming the contemplated emergency were inconsistent with the Mathies test, moreover, the reality is that because the MINER Act did not re-enact the entire Mine Act without change, "but simply enacted a series of isolated amendments to [provisions other than Section 104(d)(1) (and (e))], . . . `it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [Commission's interpretation of Section 104(d)(1) set forth in Mathies]." Public Citizen, Inc. v. U.S. Department of Health and Human Services, 332 F.3d 654, 668 (D.C. Cir. 2003) (citing and quoting Alexander v. Sandoval, 532 U.S. 275, 292 (2001)). In addition, because Cumberland has presented "no . . . evidence to suggest that Congress was even aware of [Mathies when it passed the MINER Act,] . . . [any] re-enactment [of Section 104(d)(1)] [would have been] without significance." Brown v. Gardner, 513 U.S. 115, 121 (1994). Accord Public Citizen, 332 F.3d at 669 (citing and quoting Brown).

III.

CUMBERLAND'S ASSERTION THAT THE COMMISSION COMMITTED REVERSIBLE ERROR BY MISAPPLYING THE COMMISSION'S MATHIES TEST IS UNAVAILING

Cumberland's primary argument on appeal is that the Commission misapplied the Commission's Mathies test in holding

that, to establish the S&S nature of the violations, the Secretary was not required to prove the reasonable likelihood of an emergency requiring miners to use the lifelines. See Br. at 28-42. Cumberland's argument is unavailing for multiple reasons.

First, even if Cumberland were correct that the Commission misapplied Mathies -- which, as discussed below, it is not -- that would not be a valid basis for vacating the Commission's decision. As set forth above, Congress' use of the term "contribute" and the phrase "cause and effect" in describing S&S violations in Section 104(d)(1) require the decisionmaker, in evaluating the S&S nature of a violation of Section 75.380(d)(7)(iv), to assume the occurrence of an emergency in which miners would need to use the lifeline. Accordingly, even if Mathies precluded such an assumption, Section 104(d)(1) should be interpreted to require such an assumption. See Secretary of Labor v. FMSHRC, 111 F.3d 913, 917 (D.C. Cir. 1997) (stating that it was unnecessary to consider whether an interpretation was inconsistent with the Commission's Mathies test for S&S when the interpretation flowed from the plain language of Section 104(d)(1)).

Similarly, as set forth above, Congress' use of the term "could" in describing S&S violations in Section 104(d)(1)

precludes an interpretation that would require the Secretary to establish the S&S nature of a violation of Section 75.380(d)(7)(iv) by first proving the reasonable likelihood of an emergency in which miners would need to use the lifeline. Accordingly, even if Mathies required proof of the reasonable likelihood of such an emergency, Section 104(d)(1) should be interpreted to preclude such a requirement. 111 F.3d at 917.

For similar reasons, there is no validity to Cumberland's assertion that the Commission's decision is inconsistent with Commission case law because, in finding that the violations were S&S, the Commission relied on the judge's finding that delay in escaping during an emergency "could" result in serious injury, rather than on a finding that delay in escaping "was reasonably likely" to result in serious injury, as required under Mathies. See Br. at 36. Regardless of whether, under Commission case law, establishing the S&S nature of a violation requires the Secretary to establish the reasonable likelihood of an injury, Congress' use of the term "could" in Section 104(d)(1) precludes such a requirement. United States v. Peterson, 538 F.3d at 1072 (a determination of whether something "could" have caused a result does not require the factfinder to evaluate the thing's "probability of causing" the result.)¹¹

¹¹ In any event, although it is true that the Commission has

Moreover, even if the Secretary's interpretation of Section 104(d)(1) did not reflect the provision's plain meaning, and even if Cumberland was correct that the Commission misapplied Mathies, Cumberland's argument would fail because the Secretary's interpretation of an ambiguous statutory provision, not the Commission's interpretation, is entitled to deference. E.g., Secretary of Labor, MSHA v. National Cement Co. of California, 494 F.3d 1066, 1071 (D.C. Cir. 2007); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463-64 (D.C. Cir. 1994)).

held that evidence that an injury "could" occur, "standing alone," is insufficient under Mathies to establish the S&S nature of a violation (see, e.g., Zeigler Coal Co., 15 FMSHRC 949, 953 (1993)), the Commission here relied on far more than the judge's finding that an injury "could" occur to support its finding that the hazard contributed to by the violations was reasonably likely to result in injury. See J.A. at 40 (noting that there was abundant evidence supporting the conclusion that the hazard of being delayed or unable to escape in an emergency is reasonably likely to result in serious injury) and 33 FMSHRC at 2365, J.A. 35 (pointing out that "[t]hrough the testimony of Inspector Whitehair, the Secretary presented abundant evidence regarding the likelihood of injury as a result of the identified hazard," and noting Whitehair's testimony "as to the severity of injuries that would result from such a hazard, and that they would be fatal"). See also J.A. 67, 76-77, 81-82, 84, Tr. at 69-71, 108-110, 128-29, 139-41 (in which Investigator Whitehair testified that he designated all of the violations S&S for the same reason, i.e., his belief that the location of the lifelines was reasonably likely to result in serious injury in the event of an emergency).

Indeed, as discussed infra, substantial evidence supports and compels the common sense conclusion that delay in evacuating a mine during an emergency in which a lifeline would be needed is reasonably likely to result in serious injuries or fatalities.

This principle is not altered by the fact that the Commission, which acts as a court, announced its interpretation under Mathies before the Secretary advanced her interpretation.¹² See National Cable and Telecommunications Ass'n v. Brand X Internet, 545 U.S. 967, 982-83 (2005) (explaining that "[w]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur"). See also Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 502 (3d Cir. 2008), cert. denied, 129 S.Ct. 2837 (2009) ("[I]n [National Cable], the Supreme Court left no doubt that if a court of appeals interprets an ambiguous statute one way, and the agency charged with administering that statute subsequently interprets it

¹² It should be noted, however, that the Secretary has long interpreted Section 104(d) (and Section 104(e)) to require that the occurrence of the contemplated emergency be assumed when evaluating the S&S nature of violations of standards that only protect miners in the event of an emergency. See, e.g., Manalapan Mining Co., 18 FMSHRC 1375 (1996) (a case in which the Commission evenly split on the issue).

Of course, even if the Secretary's position in this case represented a change in her interpretation, "[a] change in interpretation [] is no reason to withhold Chevron deference provided the agency explained the basis for its reconsidered view." National Cement Co. 573 F.3d at 793 (citing National Cable, 545 U.S. at 981-82). If the Secretary's approach represents a change, Congress' passage of the MINER Act provides a compelling reason for that change.

another way, even that same court of appeals may not then ignore the agency's more-recent interpretation").¹³

In any event, nothing in Cumberland's brief undercuts the Commission's conclusion that, under Mathies, the S&S nature of violations of Section 75.380(d)(7)(iv) should be evaluated in the context of the contemplated emergency and that the Secretary is not required to prove the likelihood of such an emergency. First, as the Commission noted, the Commission, in evaluating the S&S nature of violations of other evacuation standards, has not required the Secretary to establish the reasonable likelihood of an emergency. 33 FMSHRC at 2366, J.A. 36 (citing

¹³ It is true that in evaluating whether violations are S&S, this Court and other Courts of Appeals have applied the Commission's Mathies test. See Br. at 27-28, and cases cited therein. Contrary to Cumberland's suggestion, however, in none of those cases, and in no other Court of Appeals case, was the Mathies test directly challenged. Accordingly, there is no Court of Appeals precedent upholding the Mathies test. See, e.g., United Food & Commercial Workers Union, Local 1564 v. Albertson's, Inc., 207 F.3d 1193, 1199-2000 (10th Cir. 2000) (refusing to grant precedential weight to a jurisdictional question assumed but not explicitly decided by a prior panel, even though that jurisdictional issue was necessary to the holding in the prior case, and stating that "[i]n order for a decision to be given stare decisis effect with respect to a particular issue, that issue must have been actually decided by the court") (internal citation and quotation marks omitted); 18 Moore's Federal Practice, § 134.04[2] (3d ed. 2007) ("A decision of an appellate court constitutes a precedent only insofar as it determines some issue of law. For stare decisis to be applied, an issue of law must have been heard and decided. If an issue is not argued, or is argued but is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed in subsequent cases in which the same issue arises").

Maple Creek Mining, Inc., 27 FMSRHC 555, 563-654 and n.5 (2005); Rushton Mining Co., 11 FMSHRC 1432, 1437 (1989); Florence Mining Co., 11 FMSHRC 747, 756 (1989)).¹⁴

Moreover, contrary to Cumberland's argument (see, e.g., Br. at 31, 35), evaluating the S&S nature of a violation of a standard that only comes into play in the event of an emergency, in the context of that emergency, is not inconsistent with Commission cases holding that the S&S nature of a violation must be evaluated based on the particular facts of the cited condition. For instance, the Commission's S&S findings in this case are based on the judge's finding that "the violations

¹⁴ It is true, as Cumberland points out (Br. at 29), that in Consolidation Coal Co., 6 FMSHRC 189, 194-95 (1984), the Commission, using Cumberland's approach, found violations consisting of inoperative fire fighting equipment to be S&S based on the peculiar circumstances in that case -- the frequent use of welding equipment around combustible material in a welding shop. Consolidation Coal, however, did not involve an evacuation standard. Moreover, the issue of whether the emergency should have been assumed was not litigated in that case. As stated, the Commission evenly divided on the issue in Manalapan Mining, 18 FMSHRC at 1375.

Significantly, in later cases, Commission administrative law judges have routinely assumed the occurrence of the contemplated emergency in evaluating the S&S nature of violations that only come into play in the event of an emergency. E.g., Twentymile Coal Co., 29 FMSHRC 806, 811 (2007) (ALJ); American Coal Co., 29 FMSHRC 252, 263 (2007) (ALJ), aff'd on other grounds, 29 FMSHRC 941 (2007); Original Sixteen to One Mine, Inc., 27 FMSHRC 600, 609 (2005) (ALJ); Anderson Sand & Gravel, 21 FMSHRC 186, 191 (1999) (ALJ); M.A. Walker Co., 19 FMSHRC 1193, 1215 (1997) (ALJ); Harlan Cumberland Coal Co., 19 FMSHRC 911, 916-17 (1997) (ALJ), aff'd in part on other grounds and rev'd in part on other grounds, 20 FMSHRC 1275 (1998).

contributed to the hazard of miners not escaping quickly in an emergency" -- a finding that the judge made based on his consideration of "particular facts" surrounding the location of the lifelines, including substantial evidence showing that the violative conditions extended over a substantial distance, and that the nature of the violations was such that they could be expected to cause miners to become confused during an emergency and to be delayed in escaping. See 33 FMSHRC at 2368, 2370, J.A. 38, 40.

Thus, Cumberland's assertion that the Commission's approach is flawed because it relies on a "generic hazard" -- the hazard of being unable to escape quickly during an emergency -- rather than on the particular facts of the cited condition is inaccurate. See Br. at 31, 35. Contrary to Cumberland's assertion, the Secretary, to establish a violation of Section 75.380(d)(7)(iv) in the first place, must prove that a lifeline is located in a position where miners would be hindered or impeded from accessing it and using it to quickly escape. See 31 FMSHRC at 1156, J.A. 16. Accordingly, the hazard contributed to by a violation of Section 75.380(d)(7)(iv) --- not being able to escape quickly during an emergency -- is necessarily based on

the particular facts and circumstances of the violative condition.¹⁵

Also unavailing is Cumberland's assertion that the Commission's approach should be rejected because it will result in virtually all violations of evacuation standards being designated S&S -- a result that would, according to Cumberland, be inconsistent with the Commission's decision in National Gypsum. See Br. at 39 (citing National Gypsum, 3 FMSHRC at 824). Although it is true that in National Gypsum the Commission rejected an interpretation under which virtually all violations, except those that only pose a remote or speculative chance of injury or illness, would be S&S (National Gypsum, 3 FMSHRC at 824), an interpretation under which virtually all violations of evacuation standards would likely be designated S&S is not the same as an interpretation under which virtually all violations of all standards would be designated S&S.

In any event, as the Commission pointed out, even if viewed in the context of an emergency, not every violation of a standard that only comes into play in the event of an emergency

¹⁵ Under the Commission's approach, the question of whether violations of other evacuation standards satisfy the second prong of the Mathies test -- i.e., whether the violations contribute to the hazard of miners being unable to escape quickly in an emergency -- will also necessarily involve consideration of the particular facts surrounding the violative condition.

may be deemed to significantly and substantially contribute to a safety hazard. See, e.g., 33 FMSHRC at 2369, J.A. 39 (citing Rushton, 11 FMSHRC at 1436-37, in which the Commission held that a violation of an evacuation standard was not S&S because it did not contribute to the hazard of a miner not being able to escape quickly during an emergency situation). And although it may be true that evaluating the S&S nature of evacuation standard violations in the context of an emergency will likely result in the S&S designation of violations that will tend to significantly delay miners' ability to quickly escape during an emergency, designating as S&S violations that have the potential to produce catastrophic injuries and death is consistent with -- and indeed compelled by -- Congress' description of S&S violations as violations that are of a nature as "could significantly and substantially contribute to the cause and effect of a * * * hazard."

IV.

SUBSTANTIAL EVIDENCE SUPPORTS, AND INDEED COMPELS, THE COMMISSION'S FINDING THAT, ASSUMING THE OCCURRENCE OF EMERGENCIES IN WHICH MINERS WOULD NEED TO USE THE LIFELINES, THE VIOLATIONS WERE S&S

There is no merit to Cumberland's assertion that substantial evidence does not support the Commission's finding that, assuming the occurrence of an emergencies in which miners

would need to use the lifelines, the violations were S&S. See
Br. at 46.

A. The Commission Properly Declined To Consider Evidence of
Redundant Safety Protections

Cumberland asserts that the Commission's S&S finding is not supported by substantial evidence because the Commission did not consider evidence of redundant safety measures that assertedly were in place, including fire suppression systems on the track equipment, a carbon monoxide monitoring system in the belt entry, and a ventilation system that would have kept smoke away from the miners. Br. at 46. The assertion is unavailing for two reasons.

First, the assertion is unavailing because under the Secretary's interpretation (and the Commission's interpretation), the decisionmaker, when evaluating the S&S nature of a violation of a standard that only comes into play in the event of an emergency, assumes the occurrence of the contemplated emergency. In this case, the contemplated emergency is one in which there would be so much smoke that miners would be totally blinded, would have no sense of direction, and would need to use the lifeline to guide them out of the mine. J.A. 59, 89, Tr. at 37, 158-59. Such an emergency exists only if fire detection and fire suppression systems have failed to contain the fire, and the ventilation system has

failed to keep smoke away from the escapeway where the lifeline in question is located.

Similarly unavailing is Cumberland's assertion that the Commission erred by failing to consider evidence that, in the event of an emergency, it is unlikely that both escapeways from a section would be contaminated, and by failing to consider evidence that miners are trained to first look for an uncontaminated escapeway and to escape by riding track equipment out of the mine. Br. at 47. Assuming the occurrence of an emergency in which the lifeline in question would need to be used assumes the contamination of the escapeway in which the lifeline is located, and assumes that miners are unable to escape on track equipment.

More generally, the language of Section 104(d)(1) precludes consideration of redundant safety measures in evaluating the S&S nature of all violations -- not just violations of standards that only come into play in the event of an emergency. Whether the presence of redundant safety measures may reduce the likelihood of a hazard occurring is irrelevant to whether a violation "is of such nature as could significantly and substantially contribute to the cause and effect" of that hazard. See Secretary of Labor v. FMSHRC, 111 F.3d at 917. ("By focusing the decisionmaker's attention on `such violation'

and its `nature,' Congress has plainly excluded consideration of surrounding conditions that do not violate health and safety standards.")

Consistent with the language of Section 104(d)(1), the Seventh Circuit and the Commission have correctly held that in evaluating whether a violation is S&S, the presence of redundant safety features is not a valid basis for determining that a violation is not S&S. Buck Creek Coal, Inc. v. FMSHA, 52 F.3d 133, 136 (7th Cir. 1995) (rejecting an argument that the presence of a fire retardant belt, a fire suppression system, firefighting equipment and systems, and a ventilation system that would pull smoke away from miners detracted from a finding that a violation contributing to a fire hazard was S&S); Amax Coal Co., 18 FMSHRC 1355, 1359 n.8 (1996) (citing Buck Creek and holding that a judge properly "assigned no weight to evidence that [the operator's] redundant fire suppression system reduced the likelihood of serious injury"). As the Seventh Circuit recognized in concluding that an argument virtually identical to Cumberland's "defies common sense," "The fact that [the operator] has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the

significant dangers associated with coal mine fires." 52 F.3d at 136.

Cumberland is flatly wrong in asserting that allowing a mine operator to defend against an S&S designation by relying on its compliance with other standards requiring redundant safety features enhances miner safety by promoting compliance. See Br. at 45. If an operator is allowed to defend against the S&S designation of a violation of one standard by relying on its compliance with other standards requiring redundant safety protections, the operator will have little incentive to comply with the first standard because it will not be subject to enhanced enforcement sanctions for violating the standard. In contrast, if an operator cannot defend against an S&S designation by relying on its compliance with other standards, the operator will have an incentive to comply with all of the standards in question -- all of which are in place precisely because of the grave dangers associated with the hazard in question. An operator is not entitled to "extra credit" for complying with standards with which it is legally obligated to comply.

B. Assuming the Occurrence of Emergencies In Which Miners Would Need to Use the Lifelines, Substantial Evidence Supports, and Indeed Compels, the Commission's Finding that the Violations Were S&S

Cumberland argues that the Commission's finding that the violations in this case were S&S is not supported by substantial evidence because "even assuming a hypothetical fire * * *, the evidence shows that it is not reasonably likely that such an event would result in serious injury." Br. at 46. The argument fails for several reasons.

First, the argument misstates the Commission's Mathies test for violations of Section 75.380(d)(7)(iv). To find that a violation of Section 75.3880(d)(7)(iv) is S&S under the Commission's Mathies, one does not need to find that a hypothetical fire was reasonably likely to result in serious injury. Instead, as the Commission held in this case, to find that a Section 75.380(d)(7)(iv) violation is S&S, one must find (1) a violation of the standard (the first prong of the Mathies test), (2) that the violation contributed to a discrete safety hazard -- miners not being able to escape quickly in the event of an emergency (the second prong of the Mathies test), (3) that the hazard contributed to -- not being able to escape in the event of an emergency -- was reasonably likely to result in injury (the third prong of the Mathies test), and (4) that the injury was reasonably likely to be serious (the fourth prong of

the Mathies test). See 33 FMSHRC at 2366, J.A. 36 (“[T]he judge in this case should have determined whether there was a reasonable likelihood that the relevant hazard – miners not being able to escape quickly in an emergency situation – would cause [serious] injury.”) As the Commission held, substantial evidence supports, and indeed compels, all of the required Mathies findings.

Investigator Whitehair, whose testimony the judge accepted (see 31 FMSHRC at 1158, 1160. J.A. 18, 20), testified that during an emergency in which a lifeline would need to be used, miners are totally blinded and have no sense of direction. J.A. 58, 59, Tr. at 35, 37, 158-59. He testified that during such an emergency, miners would be “panicked, scared to death,” and “anything that would hinder or prevent them from escape could be a real catastrophe.” J.A. 76, Tr. at 108. He explained that miners using a lifeline should be able to slide their hands along the lifeline, and should never have to take their hands off the lifeline during the escape. J.A. 58, Tr. at 35.

1. The December 6, 2007, Belt Entry Violations

Investigator Whitehair testified that on December 6, 2007, the height of the lifeline in the No. 1 belt entry of the 5 Butt East Longwall section was approximately seven feet, eight inches, and was higher than he could reach for a distance of

approximately 6,660 feet. J.A. 59, 60, 62-63, 65, Tr. at 39, 43, 51-53, 61-62. He testified that the majority of hooks that were used to hang the lifeline were "J" hooks that were not all pointed in the same direction. J.A. 61, Tr. at 46-47. He testified that to reach the lifeline, miners might be able to use a tool and then try to blindly flip the lifeline out of the hooks. J.A. 61, 89, Tr. at 48, 158-59. He testified, however, that the process of getting the lifeline out of the hooks would take "a considerable amount of time" and effort. Id.

Whitehair further testified that cables and water lines ran underneath and perpendicular to the lifeline. J.A. 65, 97, Tr. at 63, 192. He testified that in those places where a cable ran under the lifeline, the lifeline, when pulled down, would fall into the cable, requiring the miner to take his hand off the lifeline, and making the lifeline difficult to follow. J.A. 65, Tr. at 64.

Whitehair explained that because of the length of the escapeway, the height of the lifeline, and the manner in which the lifeline was hung, he believed that in the event of a mine emergency during which miners would try to use the lifeline, miners would not be able to escape and would eventually succumb to carbon monoxide poisoning. J.A. 67, Tr. at 69-71. Investigator Whitehair's testimony plainly constitutes

substantial evidence that the violation contributed to the hazard of a miner being delayed or unable to escape during an emergency and that the hazard was reasonably likely to result in serious injury, and therefore that the violation was S&S. See Buck Creek, 52 F.3d at 135 (an MSHA inspector's testimony was all that was "necessary to support the common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present").

In addition to reiterating its assertion that the presence of redundant safety measures made it unlikely that miners would be required to use the lifeline (see Br. at 46) -- an assertion which, as set forth above, the Commission properly rejected -- Cumberland asserts that in the event of a fire, miners were unlikely to be hurt because they could use the belt structure to guide them out of the mine and could use the water line running along the belt as a directional indicator. Br. at 47.

Cumberland's assertion ignores testimony that miners are trained to use lifelines in emergencies. J.A. 58, Tr. at 35. Thus, even assuming that miners trying to escape who were unable to use the lifeline would know to try to use the belt structure and the water line instead -- and there is no evidence that they would -- the assertion ignores the reality that the miners'

escape would nevertheless be considerably delayed from first trying unsuccessfully to use the lifeline.

The assertion also ignores Investigator Whitehair's common sense testimony that because the water line, unlike the lifeline, did not have directional indicators, "in the stressful situation of trying to escape from a mine disaster," miners "trying to feel their way down a water line, it would be very easy to become confused and maybe turn around and go the wrong direction, because it's not going to tell them what direction they are going." J.A. 87, Tr. at 151. See also 71 Fed. Reg. at 71436 (the Secretary rejected a proposal that would have allowed belt structures or tracks to be used as lifelines because of her concern that operators could not attach tactile directional indicators to such structures, and because a conveyor belt structure used as a lifeline presents a significant potential hazard to escaping miners unless the belts are both de-energized and locked out).

In addition, the assertion ignores the fact that the water line, unlike the lifeline, did not have indicators that would guide miners to SCSR caches and to alternative refuges. See Section 75.380(d)(7)(vii)(A) and (B).

Finally, the assertion ignores undisputed evidence that the belt structure was not continuous throughout the secondary

escapeway: the belt structure continued outby in the belt entry, while the escapeway deviated from the belt entry and the #7 crosscut to the zero entry. J.A. 66, Tr. at 65-66, 227-28.

2. The December 7, 2007, December 10, 2007, and December 11, 2007, track entry violations

Investigator Whitehair testified that on December 7, 2007, the lifeline in the No. 2 track entry for the 5 Butt East Longwall was hung approximately seven-and-a-half feet above the floor. J.A. 73, Tr. at 95. He testified that he could not reach the lifeline in most areas, although he acknowledged that if he walked in between equipment on the track and stood on the ballast, he might have been able to reach it in some places. J.A. 73-74, Tr. at 96-7, 100. He observed large pieces of track equipment located underneath the lifeline for a distance of about 450 feet. J.A. 74, Tr. at 99. He also observed cables and water lines running below and perpendicular to the lifeline. J.A. 75, 97, Tr. at 101-04, 192.

On December 10, 2007, Investigator Whitehair observed that the lifeline in the No. 2 track entry of the Eight Butt East section -- the primary escapeway for the section -- was hung approximately seven-and-a-half feet above the floor. J.A. 78, 80, Tr. at 115-16, 121. He testified that the only place he could reach the lifeline was at its end. J.A. 80, Tr. at 122. He further testified that various pieces of large equipment were

located underneath the lifeline for a distance of approximately 120 feet. J.A. 79-80, Tr. at 119-22. In addition, he observed a waterline running underneath and perpendicular to the lifeline. J.A. 80, 97, Tr. at 123, 192.

On December 11, 2007, Investigator Whitehair observed that the lifeline in the No. 2 track entry of the Fifteen Butt East section -- the primary escapeway for the section -- was hung approximately seven-and-a-half feet above the floor. J.A. 82-83, at Tr. at 131-133. Except for the most inby end of the lifeline and in some areas between equipment that was on the track, Whitehair could not reach the lifeline. J.A. 84, Tr. at 137-38. For approximately 300 feet, the lifeline was located over large pieces of equipment. J.A. 83-84, Tr. at 133-35, 139-41.

Investigator Whitehair testified that during an evacuation where miners would be in thick smoke, because of the location of the lifelines over large pieces of equipment, the lead miner trying to find his way out of the mine could run into the equipment and be injured, and the miner's SCSR might rupture. J.A. 75, Tr. at 101. He also testified that the lifeline could snag and become entangled in the equipment. J.A. 75, Tr. at 101. In addition, he testified that miners who knew that there was equipment on the track that they could not see would

evacuate the mine more slowly to try to avoid running into the equipment. J.A. 94, Tr. at 180. He further testified that the position of the lifelines over the water lines and other cables would impede miners' ability to escape quickly. J.A. 65, 75-76, 93, Tr. at 64, 104-05, 176.

Investigator Whitehair testified that he designated all four of the violations S&S for essentially the same reasons -- that, in the event of an emergency, the location of the lifelines would result in serious injury. See J.A. at 67, Tr. at 69-71 (explaining that he designated the belt entry violation to be S&S because he believed that, in the event of an emergency, the location of the belt entry lifeline made it reasonably likely that miners would eventually succumb to carbon monoxide poisoning); J.A. 76-77, 81-82, 84, Tr. at 108-10, 128-29, 139-41 (explaining that he designated all of the violations S&S for essentially the same reasons). Investigator Whitehair's testimony plainly constitutes substantial evidence that the violations in the track entry were S&S. See Buck Creek, 52 F.3d at 135.

Despite Whitehair's testimony, Cumberland argues that substantial evidence does not support the Commission's findings that the violations in the track entries were S&S because there was evidence that the lifelines could be accessed in certain

places in the escapeways, either by standing on the equipment or by using pull-downs. Br. at 49-50. Cumberland's argument ignores Investigator Whitehair's testimony that a lifeline should be within reach at every point. J.A. 88, Tr. at 156. It also ignores the fact that the judge specifically found that there were no pull-downs in place. J.A. 19, n.4 (noting Safety Representative Konosky's acknowledgement that he was not sure that there were pull-downs in place during the relevant period). See Tr. at 236-37.

Cumberland's argument also defies common sense. Even if Cumberland were correct in assuming that in a highly stressful situation during which miners, blinded by smoke and trying to escape for their lives, could manage to climb on equipment or position themselves between equipment to access the lifelines -- an assumption that is highly questionable -- the inevitable delay that would result from a panicked miner trying to feel his way onto equipment or in between equipment plainly constitutes substantial evidence sufficient to support the S&S finding.

Moreover, Cumberland's argument is fundamentally flawed because it ignores the judge's finding, accepting Investigator Whitehair's testimony, that even if miners were successful in accessing the lifeline, the location of the lifelines would "tend to impede or hinder the escape of miners" because the lead

miner trying to find his way out of the mine could run into the equipment and be injured, the miner's SCSR might rupture, and the lifeline could snag and become entangled in equipment. 31 FMSHRC at 1159-60, J.A. 19-20 (citing J.A. 75, Tr. at 101).

CONCLUSION

For the reasons set forth above, the Court should affirm the Commission's finding that the lifeline violations in this case were S&S. The Secretary's approach of assuming the sort of emergency that makes lifelines necessary is supported, and indeed compelled, by the statute, by miner safety, and by simple common sense.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

/s/
ROBIN A. ROSENBLUTH
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, VA 22209-2296
Telephone: (202) 693-9333

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C), D.C. Cir. Rules 28(c) and 32(a)(1), I certify that this Brief for the Secretary of Labor contains 12,718 words as determined by WORD, the processing system used to prepare the brief.

/s/ _____

Robin A. Rosenbluth
Attorney

CERTIFICATE OF SERVICE

I certify that this Brief for the Secretary of Labor was served by sending a copy by electronic transmission and two copies by overnight delivery this ____ day of May, 2012, on:

Ralph Henry Moore, Esq.
Arthur M Wolfson, Esq.
Patrick W. Dennison, Esq.
Jackson Kelly PLLC
Three Gateway Center
401 Liberty Ave., Suite 1340
Pittsburgh, PA 15222

John T. Sullivan, Esq.
Federal Mine Safety and Health
Review Commission
601 New Jersey Avenue, N.W.
Suite 9500
Washington, D.C. 20001

Judith Rivlin, Esq.
Associate Counsel
United Mine Workers of America
International Headquarters
18354 Quantico Gateway Drive, Suite 200
Triangle, VA 22172-1779

____/s/_____
Robin A. Rosenbluth
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, Virginia 22209-2296
Phone: (202) 693-9347

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Section 104(d) of the Mine Act, 30 U.S.C. § 814(d)

(d)

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e)

e)

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(d) Each escapeway shall be--

(1) Maintained in a safe condition to always assure passage of anyone, including disabled persons;

(2) Clearly marked to show the route and direction of travel to the surface;

(3) Maintained to at least a height of 5 feet from the mine floor to the mine roof, excluding the thickness of any roof support, except that the escapeways shall be maintained to at least the height of the coalbed, excluding the thickness of any roof support, where the coalbed is less than 5 feet. In areas of mines where escapeways pass through doors, the height may be less than 5 feet, provided that sufficient height is maintained to enable miners, including disabled persons, to escape quickly in an emergency. In areas of mines developed before November 16, 1992, where escapeways pass over or under overcasts or undercasts, the height may be less than 5 feet provided that sufficient height is maintained to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient height is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher;

(4) Maintained at least 6 feet wide except--

(i) Where necessary supplemental roof support is installed, the escapeway shall not be less than 4 feet wide; or

(ii) Where the route of travel passes through doors or other permanent ventilation controls, the escapeway shall be at least 4 feet wide to enable miners to escape quickly in an emergency, or

(iii) Where the alternate escapeway passes through doors or other permanent ventilation controls or where supplemental roof support is required and sufficient width is maintained to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher, or

(iv) Where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to

escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher;

(5) Located to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners; and

(6) Provided with ladders, stairways, ramps, or similar facilities where the escapeways cross over obstructions.

(7) Provided with a continuous, durable directional lifeline or equivalent device that shall be--

(i) Installed and maintained throughout the entire length of each escapeway as defined in paragraph (b)(1) of this section;

(ii) Flame-resistant in accordance with the requirements of part 18 of this chapter upon replacement of existing lifelines; but in no case later than June 15, 2009;

(iii) Marked with a reflective material every 25 feet;

(iv) Located in such a manner for miners to use effectively to escape;

(v) Equipped with one directional indicator cone securely attached to the lifeline, signifying the route of escape, placed at intervals not exceeding 100 feet. Cones shall be installed so that the tapered section points inby;

(vi) Equipped with one sphere securely attached to the lifeline at each intersection where personnel doors are installed in adjacent crosscuts;

(vii) Equipped with two securely attached cones, installed consecutively with the tapered section pointing inby, to signify an attached branch line is immediately ahead.

(A) A branch line leading from the lifeline to an SCSR cache will be marked with four cones with the base sections in contact to form two diamond shapes. The cones must be placed within reach of the lifeline.

(B) A branch line leading from the lifeline to a refuge alternative will be marked with a rigid spiraled coil at least eight inches in length. The spiraled coil must be placed within reach of the lifeline (see Illustration 1 below).

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(e) Surface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine.