

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)
MINE SAFETY AND HEALTH)
ADMINISTRATION (MSHA),) Docket No. KENT 2011-434
Petitioner,)
v.)
NALLY & HAMILTON ENTERPRISES,)
Respondent.)

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ISSUES	4
STATEMENT OF FACTS	5
THE JUDGE IS DECISION	8
ARGUMENT	
.....	10
STANDARD OF REVIEW	10
THE SECRETARY'S INTERPRETATION OF SECTION 77.1710	11
I. THE JUDGE ERRED IN VACATING THE CITATION	15
A. The Judge Erred In Rejecting the Secretary's Strict Liability Interpretation of Section 77.1710(i)	15
1. Section 77.1710(i) Requires That Miners Actually Wear Seatbelts Because the Phrase "Shall Be Required to Wear" Means Shall Be Required to Wear By the Standard, Not Shall Be Required By the Operator	15
2. In the Alternative, Section 77.1710(i) Requires Miners to Actually Wear Seatbelts Because the Phrase "Shall Be Required to Wear" Means That the Operator Shall Compel the Miner to Wear	19
3. The Mine Act's Strict Liability Scheme Further Supports the Secretary's Strict Liability Interpretation	20
4. MSHA's Rollover Protection Standard, 30 C.F.R. § 77.403-1(g), Further Supports the Secretary's Strict Liability Interpretation	22

5.	Even if the Standard Is Ambiguous With Regard to the Strict Liability Question, the Commission Owes Controlling Auer Deference to the Secretary's Interpretation ..	23
B.	Even Under the Commission's Interpretation of Section 77.1710, the Judge Erred in Vacating the Citation Because Nally & Hamilton's Evidence of Its Safety Rules and Enforcement Failed to Satisfy the Commission's Test	24
II.	THE JUDGE ERRED IN CONCLUDING THAT, IF A VIOLATION OCCURRED, THE SECRETARY FAILED TO PROVE THAT THE VIOLATION WAS S&S	26
III.	THE JUDGE ERRED IN FINDING THAT, IF A VIOLATION OCCURRED, THE OPERATOR WAS NOT NEGLIGENT	28
	CONCLUSION	30
	CERTIFICATE OF SERVICE	31

INTRODUCTION

This appeal and the associated appeal in Lewis-Goetz & Company, Inc., Docket No. WEVA 2012-1821, present the Commission with the challenge of choosing between two long-standing interpretations of 30 C.F.R. § 77.1710: the Secretary's and the Commission's. Section 77.1710 is MSHA's mandatory safety standard governing miners' use of personal protective equipment in surface coal mines. It states: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below." 30 C.F.R. § 77.1710 (emphasis added). It then lists personal protective equipment, including fall protection (at issue in Lewis-Goetz), seatbelts (at issue in this case), eye protection, protective clothing, gloves, hardhats, footwear, and life jackets, and identifies the circumstances under which each type of gear "shall be worn" by miners. See *id.*

The Secretary interprets Section 77.1710 to be a strict liability standard, i.e., a standard that is violated whenever a miner fails to actually wear the specified gear. For example, under the Secretary's interpretation of Section 77.1710(i), which addresses seatbelt use in vehicles where there is a danger of overturning and where roll protection is provided, the Secretary establishes a violation when he proves that a miner

failed to wear a seatbelt in a vehicle covered by the standard. The operator's efforts to require employees to wear seatbelts - whether through safety policies, training, or progressive discipline -are relevant to the operator's degree of negligence and the appropriate civil penalty, but are not relevant to determining whether a violation occurred.

In contrast, the Commission has interpreted Section 77.1710 to create an exception to the Mine Act's strict liability scheme. Under the Commission's interpretation of the standard, an operator avoids liability if it proves that (1) it has a safety system in place requiring miners to use protective gear; (2) the system includes site-specific guidelines and supervision on the subject of actual dangers; and (3) it adequately enforces the system. Southwestern Illinois Coal Corp., 5 FMSHRC 1672, 1674-67 (1983) ("Southwestern I"); Southwestern Illinois Coal Corp., 7 FMSHRC 610, 612-13 (1985) ("Southwestern II"). The Commission's interpretation is premised on reading Section 77.1710's phrase "shall be required to wear" to mean that the operator need only "require" the miner to wear the gear to satisfy its obligation under the standard.

In Southwestern I, the Commission rejected the Secretary's strict liability interpretation of the standard even though it ultimately ruled in the Secretary's favor on liability and concluded that the operator had failed to prove that its safety

policies and enforcement were adequate. 5 FMSHRC at 1676. Likewise, in Southwestern II, the Commission reversed the judge and entered summary decision in the Secretary's favor, again finding that the operator had failed to prove its affirmative defense. 7 FMSHRC at 612-13. Having received favorable rulings on liability in both cases, the Secretary had no reason or standing to challenge the Commission's contrary interpretation of Section 77.1710 in a Court of Appeals. See, **Mathias** v. WorldCom Technologies, Inc., 535 U.S. 682, 684 (2002) ("As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous."}).

Recently, however, in this case and in Lewis-Goetz, Commission administrative law judges vacated MSHA's Section 77.1710 citations, citing the Commission's decisions in Southwestern I and II. The Commission granted the Secretary's petitions for discretionary review. Consistent with his long-standing interpretation, the Secretary again advances the position that Section 77.1710 is a strict liability standard. The Commission therefore must again apply the traditional tools of regulatory interpretation, along with modern principles of Auer deference, to determine the validity of the Secretary's interpretation.

In this case, the MSHA inspector issued a citation to Nally

& Hamilton Enterprises ("Nally & Hamilton") alleging a violation

of 30 C.F.R. § 77.1710(i), MSHA's seatbelt standard for surface areas of underground coal mines, after an investigation into a rollover accident that occurred at the Nally & Hamilton Chestnut Flats Mine in Calvin, Kentucky. After a hearing, the judge vacated the citation, relying on the Commission's decision in Southwestern I.

The Secretary urges the Commission to reconsider its existing interpretation of Section 77.1710 and reverse the judge's ruling vacating the citation. The Secretary additionally urges the Commission to reverse the judge's alternative holdings by reinstating the Secretary's S&S and moderate negligence designations.

ISSUES

- I. Whether the judge erred in vacating the citation, specifically:
 - (a) Whether the judge erred in rejecting the Secretary's strict liability interpretation of 30 C.F.R. § 77.1710; and
 - (b) Whether the judge erred in concluding that Nally & Hamilton's safety rules and enforcement satisfied the Commission's Southwestern I and II test.
- II. Whether the judge erred in concluding that the violation, if reinstated by the Commission, was not S&S.

III. Whether the judge erred in concluding that the violation, if reinstated by the Commission, was not the result of the operator's negligence.

STATEMENT OF FACTS

The citation at issue arose out of an accident on April 21, 2010, in which a rock truck overturned at the Nally & Hamilton Chestnut Flats Mine. Dec. at 2. James Patterson, the driver of the truck, was not wearing a seatbelt at the time of the accident and sustained injuries that resulted in lost work days. Dec. at 2-3.

After the accident, MSHA Inspector Arthur Smith conducted an investigation into what had occurred. Dec. at 2. Inspector Smith understood from the operator's accident report that the accident had occurred at a dump site during the night shift around 4:00 a.m. Dec. at 2. Patterson was driving a 777D Caterpillar rock truck. Id. "Triple 7 D's" are large trucks capable of carrying up to 100 tons. Id. As Patterson was backing out the truck to dump a load, he veered too far to the right and drove over the berm. Id. The truck backed over the berm, rolled over on its right side, and came to a stop upside down, having rotated 180 degrees. Id.

On April 29, 2010, Inspector Smith examined the truck - which had since been moved from the accident site - and observed that the truck cab had a rollover protective structure that had

broken off during the accident. Dec. at 3. Smith met with the welders who were repairing the cab protector on the damaged truck and determined that the accident was not attributable to any truck defect. Id. Smith also checked the truck's seatbelt and determined that it was operational. Id.

Patterson was not at the mine during Smith's April 29 investigation because he was under doctor's orders at the time not to return to work. Dec. at 3. On May 3, 2010, Inspector Smith visited Patterson at his home. Id. Smith testified that he "asked [Patterson] about the accident, and we discussed when it happened and why it happened, how it happened. And I asked him, I said, were you wearing a seatbelt. He said, well, I won't lie to you. He said, no, I was not." Tr. at 40.

Two days later, Inspector Smith returned to the Chestnut Flats Mine to continue his investigation. Dec. at 3. Smith spoke with Mine Foreman Michael Lewis and informed him that he was going to issue a citation because the victim was not wearing a seatbelt at the time of the accident. Id. Smith testified that Lewis then told him that company policy required miners to wear seatbelts at all times while riding in mobile equipment. Id.

Inspector Smith issued Citation No. 8362516. The citation alleged that Nally & Hamilton violated 30 C.F.R. § 77.1710(i). Smith indicated on the citation that an injury had already occurred; that the injury resulted in lost workdays or

restricted duty; and that one miner was affected. Smith characterized the alleged violation as S&S. Smith also alleged that the violation was the result of Nally & Hamilton's moderate negligence. MSHA later proposed a penalty of \$52,500, and Nally & Hamilton timely filed a notice of contest.

On March 14, 2013, the parties presented documentary evidence and testimony at a hearing before the judge. The Secretary presented evidence that Patterson was not wearing a seatbelt when the accident occurred, and that the vehicle was equipped with rollover protection. Tr. at 16, 26, 40. The parties stipulated that the truck had overturned. See Sec'y's Prehearing Report at 2; Tr. at 14-15.

Nally & Hamilton did not dispute that Patterson failed to wear a seatbelt, or that the standard covered the vehicle Patterson was driving at the time of the accident. Nally & Hamilton instead presented evidence of its safety policy requiring employees to wear seatbelts and evidence of its enforcement of that policy. See Dec. at 7.

The parties agreed that the crux of their dispute was the proper interpretation of the standard. Counsel for the Secretary advocated for a strict liability interpretation, whereas Nally & Hamilton advocated for the judge to apply the Commission's interpretation of Section 77.1710 announced in

Southwestern Illinois Coal Corp., 5 FMSHRC 1672 {1983)
{ "Southwestern I"). See Dec. at 6-7.

THE JUDGE'S DECISION

The judge analyzed 30 C.F.R. § 77.1710{i) and concluded that under the plain language of the standard and the Commission's precedent in Southwestern I, the standard's language "imposes upon the operator a duty to require, not a duty to guarantee." Dec. at 9 {some emphasis omitted). The judge noted that the Commission has interpreted Section 77.1710's phrase "shall be required to wear" to mean that "operators must {1) establish a safety system requiring the wearing of the clothing or equipment; and {2) enforce the system diligently." Id. at 8 {citing Southwestern I, 5 FMSHRC at 1674-75).

The judge further concluded that Nally & Hamilton's policies and enforcement satisfied the Commission's interpretation of the standard. Dec. at 9-10. The judge noted that Nally & Hamilton maintains a safety policy that requires miners to wear seatbelts where equipment is equipped with roll-over protection systems; that the operator requires employees to sign a statement agreeing to the safety policies before beginning employment; that the operator has each miner revisit the safety policy every year at the company's annual retraining; and that Patterson signed off on the policy before starting

employment and every subsequent year at the annual retraining.
Dec. at 9.

The judge found it "noteworthy" that both MSHA Inspector Smith and Nally & Hamilton Safety Coordinator James Tracy Creech "agreed that it was not possible for a mine foreman or other supervisor, standing at ground level, to see whether a truck operator is wearing a seatbelt while sitting in the truck cab, which rises nearly 10 feet above ground level." Dec. at 9. The judge concluded from that testimony that there were no reasonable additional steps that Nally & Hamilton could have taken to ensure that Patterson was wearing his seatbelt. Id.

The judge also noted that the testimony showed one instance in which a miner was disciplined for failing to wear a seatbelt, and one instance in which an employee had an accident similar to Patterson's but was wearing a seatbelt and suffered no injuries. The judge concluded that those facts supported a finding that Nally & Hamilton diligently enforced its safety policy. Dec. at 10.

Though the judge vacated the citation, he also made alternative findings to the effect that, if the Commission were to depart from its existing precedent, he would find that the operator was not negligent and that the Secretary had failed to establish that the violation was S&S. Dec. at 10 n.10. He also stated that if the Commission determined that a violation occurred, he would assess a civil penalty of \$100, rather than

the \$52,500 penalty proposed by the Secretary after special assessment. Id.

ARGUMENT

STANDARD OF REVIEW

The Commission gives de novo review to an administrative law judge's conclusions of law. *Contractors Sand & Gravel, Inc.*, 20 FMSHRC 960, 967 (1998), rev'd on other grounds, 199 F.3d 1334 (D.C. Cir. 2000).

When a legal question turns on MSHA's interpretation of its own standard, the Commission and its judges must apply the deferential standard of review required by *Auer v. Robbins*, 519 U.S. 452 (1997), to MSHA's interpretation. If the standard is unambiguous, the standard's clear meaning is controlling. See *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (2000). On the other hand, if the standard permits more than one meaning, the Commission must defer to MSHA's interpretation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

The Commission reviews an administrative law judge's S&S determinations and negligence findings for substantial evidence. See *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281-82 (2010) (negligence); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1739 (2012) (S&S); see also 30 U.S.C. § 823(d)(2)(A)(ii)(I) (providing for

Commission's substantial evidence review of judges' "finding[s] or conclusion[s] of material fact"). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). "The substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision." Mid-Continental Resources, Inc., 16 FMSHRC 1218, 1222 (1994) (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-89 (1951)). If a judge fails to "analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision," the Commission should reverse. Id.

THE SECRETARY'S INTERPRETATION OF SECTION 77.1710

Section 77.1710 governs miners' use of personal protective equipment when working in a surface coal mine or in the surface work areas of an underground coal mine. It states in full:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

- (a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

- (b) Suitable protective clothing to cover the entire body when handling corrosive or toxic substances or other materials which might cause injury to the skin.
- (c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.
- (d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.
- (e) Suitable protective footwear.
- (f) Snug-fitting clothing when working around moving machinery or equipment.
- (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.
- (h) Lifejackets or belts where there is danger from falling into water.
- (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.

30 C.F.R. § 77.1710.

The Secretary has consistently interpreted Section 77.1710 to be a strict liability standard, i.e., to require that miners actually wear the requisite protective gear, rather than only directing that the operator require miners to wear it. MSHA's Program Policy Manual expresses the agency's strict liability

interpretation of Section 77.1710 in its narrative about subsections (c) and (g):

Paragraph (c) of this Section requires that miners wear gloves whenever they troubleshoot or test energized electric powers circuits or electrical equipment.

Paragraph (g) of this Section requires that safety belts and lines shall be worn at all times all miners working in positions where there is a danger of falling, except where safety belts and lines may present a greater hazard or are impractical. . . . The objective of this policy is to insure that miners working where there is a danger of falling are always protected.

V U.S. Dep't of Labor, MSHA, Program Policy Manual, Part 77, Subpart R at 208-09 (Feb. 2003} (emphasis added}. MSHA's interpretation of subsection (i}, which governs seatbelt use, is consistent with its interpretation of the other subsections. The strict liability interpretation has been in place without substantive changes since Volume V of the PPM was originally issued.

Moreover, the Secretary has argued his strict liability position in litigation even after the Commission adopted its conflicting interpretation in Southwestern I. See, Peabody Coal Corp., 6 FMSHRC 612, 625 (1984} ("The Secretary, in his post trial brief, is aware of the Commission decision in [Southwestern I]. But the Secretary claims the majority decision violates the long line of strict liability cases

imposed by the Act. Further, the Secretary argues that the minority view is more persuasive.").

Thus, both MSHA's policy manual and the Secretary's litigation position reflect that the Secretary has not acquiesced in the Commission's conflicting interpretation of Section 77.1710. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989) (discussing agency nonacquiescence with judicial decisions of the Courts of Appeals).

The policy underlying the secretary's strict liability interpretation is reflected in the many Commission and court decisions to consider other aspects of the Mine Act's strict liability scheme. Strict liability incentivizes operators under the Mine Act "to take all practicable measures to ensure the workers' safety." Allied Products Co. v. FMSHRC, 666 F.2d 890, 894 (5th Cir. 1982). In other words, as Congress recognized in enacting the Mine Act, "liability without fault . . . promote[s] the highest degree of operator care." Western Fuels-Utah, Inc., 10 FMSHRC 256, 261 (1988), aff'd on other grounds, 870 F.2d 711 (D.C. Cir. 1989).

I. THE JUDGE ERRED IN VACATING THE CITATION

A. The Judge Erred In Rejecting the Secretary's Strict Liability Interpretation of Section 77.1710(i)

The judge in this case, and the Commission in Southwestern I and II, erred in rejecting the Secretary's strict liability interpretation of Section 77.1710. The phrase "shall be required to wear" in Section 77.1710's introductory paragraph creates some ambiguity, but that ambiguity is easily resolved when one reads the standard as a whole and in light of the purpose and structure of the Mine Act. Reading the standard as a whole, the phrase "shall be required to wear" must mean either (1) that the miner shall be required to wear the gear by the standard, not by the operator; or (2) that the operator shall compel the miner to wear the gear. Both of these readings support the Secretary's strict liability interpretation because both make the standard's strict liability scheme clear. Moreover, even if the Commission concludes that the standard as a whole is ambiguous with regard to the strict liability question, controlling Auer deference is owed to the Secretary's permissible interpretation of the standard.

1. Section 77.1710(i) Requires That Miners Actually Wear Seatbelts Because the Phrase "Shall Be Required to Wear" Means Shall Be Required to Wear By the Standard, Not Shall Be Required By the Operator

Section 77.1710's introductory paragraph states that "Each employee . . . shall be required to protective clothing and

devices as indicated below." 30 C.F.R. § 77.1710 (emphasis added). Because the phrase "shall be required to wear" uses the passive voice, it does not resolve the question of by whom or what each employee shall be required to wear the protective gear: by the standard itself, or by the employer. See, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 128-29 (1977) (Federal Water Pollution Control Act, which used passive voice in describing effluent limitations, was ambiguous as to who was supposed to establish the limitation: the administrator or the permit issuer); see generally Anita S. Krishnakumar, Passive-Voice References in Statutory Interpretation, 76 Brook. L. Rev. 941, 943-44 (2011) (noting that four Supreme Court cases "stand for the uncontroversial presumption that a statute written in the passive voice leaves the identity of the relevant statutory actor indeterminate. . . . [and] creates interpretive ambiguity").

After the introductory paragraph, Section 77.1710 contains an enumerated list of personal protective equipment that miners must wear in various circumstances. The very first item in the list uses the phrase "shall be worn." See 30 C.F.R. § 77.1710(a) ("Protective clothing or equipment and face-shields or goggles s all be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.") (emphasis added). The phrase "shall be worn," like the phrase

"shall be required," uses the passive voice - but, unlike "shall be required," "shall be worn" *is* unambiguous because there *is* only one possible unnamed subject of the requirement: the miners. Thus, Section 77.1710's use of "shall be worn" *in* subsection (a) resolves the ambiguity *in* the introductory paragraph because it clarifies that miners shall wear the protective gear: it *is* not enough that the operator requires that miners wear it.

The subsequent subsections, including subsection (i), must be read *in* parallel with subsection (a). Employing parallel construction for an enumerated list is grammatically proper, and grammatically proper readings are favored when interpreting statutes and regulations. See, *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (construing a statute in accord with the grammatical "rule of the last antecedent").

Indeed, even though subsections (b) through (i) do not expressly repeat subsection (a)'s phrase "shall be worn," the repetition of the phrase throughout the enumerated list *is* implied:

- Subsection (c) implies the repetition of the phrase "shall be worn" throughout the enumerated list because that subsection includes an explicit exception to the requirement that miners wear protective gloves when handling materials or performing work which might cause

injury to the hands. See 30 C.F.R. § 77.1710(c) ("however, gloves shall not be where they would create a greater hazard . .") (emphasis added). The exception proves the existence of the rule.

- Subsection (g) also implies the repetition of the phrase "shall be worn" throughout the enumerated list because, in addition to the requirement that miners must wear safety belts and lifelines, it requires that "a second person shall tend the lifeline when bins, tanks or other dangerous areas are entered." 30 C.F.R. § 77.1710(g) (emphasis added). The elaboration similarly proves the existence of the rule because it would be illogical for the subsection to elaborate on a rule that does not exist.

Thus, the exception in subsection (c) and the elaboration in subsection (g) demonstrate that the only way to reconcile the ambiguous introductory paragraph with the enumerated list that follows it is to read "shall be required to wear" in the introductory paragraph to mean "shall be required to wear by the standard," not "shall be required to wear by the operator," and to read subsections (b) through (i) as implicitly incorporating subsection (a)'s phraseology of "shall be worn."

Similarly, the introductory paragraph must be read as referring to requirements imposed by the standard rather than by

the operator because the introductory paragraph must be interpreted to carry the same meaning throughout. See, *Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972) (The canon of *in pari materia* reflects that "a legislative body generally uses a particular word with a consistent meaning in a given context."). To read the introductory paragraph to mean that the standard merely imposes a duty on the employer to require the use of seatbelts, rather than imposing a strict-liability duty on the employer to ensure that all miners wear them, would be to give the words "shall be required to wear" in the introductory paragraph one meaning for subsection (a) and a different meaning for subsections (b) through (i) - a result that would be contrary to well-established canons of statutory and regulatory construction.

2. In the Alternative, Section 77.1710(i) Requires Miners to Actually Wear Seatbelts Because the Phrase "Shall Be Required to Wear" Means That the Operator Shall Compel the Miner to Wear

In the alternative, Section 77.1710(i) requires miners to actually wear seatbelts because the phrase "shall be required to wear" means that the operator shall require the miner to wear the protective equipment, and to "require" means to compel compliance to the point that every miner always wears the protective gear identified in the standard.

To "require," in the strong sense of the word, is to compel. See Webster's Third New International Dictionary 1929 (2002) (defining "require" as, inter alia, "to impose a compulsion or command upon (as a person) to do something," "[to] demand of (one) that something be done or some action taken," and "[to] enjoin, command, or authoritatively insist (that someone do something)").

If the ambiguity in Section 77.1710's introductory paragraph is resolved to mean that the operator must require each employee to wear, rather than to mean that the standard requires each employee to wear, the strong meaning of the word "require," i.e., to compel, must be used to reconcile the introductory paragraph with the enumerated list that follows. To give the word "require" a less forceful meaning - for example, to "instruct" - would be inconsistent with the meaning of the enumerated list, because the enumerated list states that the equipment "shall be worn," not that the operator shall instruct that it be worn. See 30 C.F.R. § 77.1710(a).

3. The Mine Act's Strict Liability Scheme Further Supports the Secretary's Strict Liability Interpretation

In addition to the textual support for the Secretary's interpretation, the purpose and structure of the Mine Act also support reading Section 77.1710 as a strict liability standard. The Commission and the courts have recognized that Congress

intended the Mine Act to operate as a strict liability scheme to maximize employer compliance with the Act and its mandatory safety and health standards. See, - *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (concluding that standard at issue imposed strict liability on mine operators and noting that "[o]ther circuits have similarly held that mine operators may be held liable for violations of mandatory safety rules under the Mine Act even if they did not have knowledge of facts giving rise to the violation."); *Allied Products Co. v. FMSHRC*, 666 F.2d at 894 (concluding that Congress intended to create a strict liability scheme to incentivize operators under the Mine Act "to take all practicable measures to ensure the workers• safety"); *Western Fuels-Utah, Inc.*, 10 FMSHRC at 261 ("In enacting the Mine Act, Congress formulated a national policy that mine operators were in the best position to further health and safety in the mining industry and that liability without fault would promote the highest degree of operator care.").

The Commission should interpret Section 77.1710 in harmony with the statute's strict liability orientation. See *Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.") (internal quotation marks omitted);

Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1414-15 (10th Cir. 1984) ("[A]ny ambiguity in the regulation disappears immediately when the statute is consulted.").

4. MSHA's Rollover Protection Standard, 30 C.F.R. § 77.403-1(g), Further Supports the Secretary's Strict Liability Interpretation

MSHA's safety standard requiring operators to provide certain mobile equipment with rollover protective structures further supports the Secretary's strict liability reading of Section 77.1710(i). See 30 C.F.R. § 77.403-1 {"rollover protection standard"}. After identifying the types of mobile equipment that must be provided with rollover structures, the rollover protection standard reiterates that miners must wear seatbelts while operating such equipment, stating: "Seat belts required by § 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped with (roll over protection systems] by § 77.403-1." 30 C.F.R. § 77.403-1(g).

Section 77.403-1(g) reinforces the Secretary's strict liability interpretation of Section 77.1710(i) in two respects. First, it reinforces the Secretary's interpretation that the standard itself, rather than the operator, "requires" miners to wear seatbelts, because it uses the phrase "seat belts required by § 77.1710(i)." Second, Section 77.403-1(g) emphasizes that miners must actually wear seatbelts under Section 77.1710(i) because it states that "seat belts . . . shall be worn."

(emphasis added). In other words, the only way to read Section 77.403-1(g) consistently with Section 77.1710(i) is to adopt the Secretary's strict liability interpretation of Section 77.1710.

5. Even if the Standard Is Ambiguous With Regard to the Strict Liability Question, the Commission Owes Controlling Auer Deference to the Secretary's Interpretation

Even if the Commission concludes that Section 77.1710 is ambiguous with regard to the question of strict liability, the Commission owes controlling Auer deference to the Secretary's interpretation. The Secretary's interpretation is neither "plainly erroneous" nor "inconsistent with the regulation." *Excel Mining*, 334 F.3d at 6. To the contrary, as discussed, the Secretary's interpretation of the standard is consistent both with the text and structure of the standard and with the purpose and structure of the Mine Act as a whole.

Moreover, given that the Secretary's interpretation has long been reflected in MSHA's Program Policy Manual as well as in his litigating positions before the Commission, there can be no doubt that it "reflect[s] the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 **U.S.** ---, 132 **S. Ct.** 2156, 2166 (2012) (internal quotation marks and citations omitted).

B. Even Under the Commission's Interpretation of Section 77.1710, the Judge Erred in Vacating the Citation Because Nally & Hamilton's Evidence of Its Safety Rules and Enforcement Failed to Satisfy the Commission's Test

Even if the Commission rejects the Secretary's strict liability interpretation of Section 77.1710, the judge still erred in vacating the citation because Nally & Hamilton failed to satisfy a critical component of the Commission's test in Southwestern I and II: the operator failed to prove that it adequately supervised employees to ensure compliance with the company's seatbelt rule.

Under the Commission's precedent, an operator can only escape liability for a miner's failure to wear the personal protective equipment identified in the standard if it can prove that (1) it has a safety system in place requiring miners to use the appropriate personal protective equipment; (2) the system includes site-specific guidelines and supervision; and (3) the operator adequately enforces the system. Southwestern I, 5 FMSRHC at 1674-67; Southwestern II, 7 FMSHRC at 612-13.

Supervision to ensure miners' compliance is an indispensable element of the Commission's test. See Southwestern I, 5 FMSHRC at 1672 (upholding citation where the Commission found an "absence of specific guidelines and supervision on the subject of actual fall dangers") (emphasis added); Southwestern II, 7 FMSHRC at 612 ("As in Southwestern I,

the present record reveals . . . too little hazard-specific guidance and supervision by the operator."} (emphasis added}.

The judge discounted the role of supervision in this case, concluding that there was nothing that Nally & Hamilton could have done to supervise whether its employees were wearing seatbelts when driving 7770 rock trucks. The judge explained:

[B]oth MSHA Inspector Smith and Nally & Hamilton's Safety Coordinator Creech agreed that it was not possible for a mine foreman or other supervisor, standing at ground level, to see whether a truck operator is wearing a seatbelt while sitting in the truck cab, which rises nearly 10 feet above ground level. Tr. 83, 126. It is no small matter to observe that, under these facts, no reasonable additional steps could have been taken to assure that its employee was wearing the seat belt for this vehicle, given the undisputed record that one could not tell from the ground if the lap belt was being worn.

Dec. at 9 (emphasis added}.

The judge's conclusion that no reasonable additional steps could have been taken to supervise seatbelt usage in the 777Ds is not supported by substantial evidence because it is contradicted by Safety Director Creech's own testimony. Creech testified that there were at least two ways in which a supervisor could check for employees' compliance with the seatbelt rule: the foreman could climb up to a position level with the cab of the truck, or the employee could open the door. See Tr. at 126 ("Q: Let me ask you this: Is it possible for a foreman to see into the triple 7D? A: No, not unless he climbs

up or the guy opens the door, and he can look through the door."). Thus, according to the testimony of Nally & Hamilton's own safety director, visual inspections were not impossible. Moreover, the steps that the company could have taken to supervise seatbelt usage are not so onerous that they could not have been performed, even if on an occasional basis.

Because Nally & Hamilton failed to establish an adequate level of supervision as part of its enforcement scheme, the operator failed to satisfy the Commission's own test. By vacating the citation, the judge improperly read the supervision component out of the Commission's test.

II. THE JUDGE ERRED IN CONCLUDING THAT, IF A VIOLATION OCCURRED, THE SECRETARY FAILED TO PROVE THAT THE VIOLATION WAS S&S

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 Commission's test for determining whether a violation is significant and substantial 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 significant and substantial, 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 822, 825 (1981)).

Assuming the Secretary prevails in establishing that Nally & Hamilton violated Section 77.1710(i), the judge erred in concluding that the Secretary failed to establish the remaining three elements under the Mathies test.

- Patterson was exposed to the discrete safety hazard of being physically unanchored inside the cab in the event of an accident or rollover when he operated the 777D rock truck without a seatbelt.
- It was not only "reasonably likely" that the hazard of being unanchored could result in an injury - a rollover and resulting injury did in fact occur, and Patterson missed several work days. See Dec. at 3 n.4 (noting Inspector Smith's testimony that he observed a "big round knot" on Patterson's back; that Patterson was hospitalized for several hours after the accident; and that Patterson missed "some work days" due to his injury).
- Likewise, it was not only "reasonably likely" that the injury would be of a "reasonably serious" nature - the

injury that Patterson suffered was in fact reasonably serious. Cf. S&S Dredging Co., --- FMSHRC ---, 2013 WL 3759791 (Jul. 2013) ("[M]uscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the purposes of the fourth element of the Mathies test."). Indeed, given that the truck rotated 180 degrees, there was a reasonable likelihood that Patterson's injury could have been even worse.

The judge therefore erred in concluding that the Secretary failed to establish that the violation, if one occurred, was properly designated S&S.

Indeed, though the judge made an alternative "finding" that the Secretary failed to prove the S&S designation, he did not state any reasons in support of his conclusion. See Dec. at 10 n.10. The judge's lack of explanation alone justifies reversal. See *Mid-Continental Resources, Inc.*, 16 FMSHRC at 1222; 29 C.F.R. § 2700.69 (judge's decision must include reasons or bases for the decision).

III. THE JUDGE ERRED IN FINDING THAT, IF A VIOLATION OCCURRED, THE OPERATOR WAS NOT NEGLIGENT

The judge also erred in concluding that, if a violation occurred, he would reduce the negligence from "moderate" to "no negligence." "No negligence" means that "(t]he operator

exercised diligence and could not have known of the violative condition or practice." 30 C.F.R. § 100.3(d) (Table X). "Low negligence" means that "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." Id. "Moderate negligence" means that "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id.

The judge's "no negligence" finding is not supported by substantial evidence because the safety director's own testimony -upon which the judge relied- contradicts the judge's finding. That testimony established that there were methods that Nally & Hamilton could have used to supervise whether a driver was wearing a seatbelt - but did not. Moreover, Nally & Hamilton could have done more to "constantly remind[]" employees of the need to wear seatbelts. See Reading Anthracite Co., 32 FMSHRC 399, 411 (2010) (ALJ Bulluck) (finding employer was moderately negligent where employee failed to wear seatbelt and "[t]he company failed to introduce any evidence showing that greater efforts were made to ensure that its drivers were constantly reminded of the necessity to use seatbelts, such as signage in the cabs of the trucks."). Thus, even if Patterson was arguably more negligent than Nally & Hamilton, the judge erred by finding that Nally & Hamilton was not negligent because there was

nothing else the company could have done to prevent the violation of Section 77.1710(i) and the resulting injury to the miner.

CONCLUSION

For the above reasons, the Secretary urges the Commission to reverse the judge's order vacating Citation No. 8362516, reinstate the S&S designation, reinstate the moderate negligence finding, and remand for the assessment of a civil penalty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, a copy of the foregoing petition for discretionary review was served by first-class U.S. mail on:

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