

On Appeal to the Commission

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)	
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent,)	Docket Nos. WEST 2011-1351-M
)	WEST 2011-1153-M
v.)	
)	
SMALL MINE DEVELOPMENT,)	
)	
Petitioner.)	

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUES

1. Whether the judge properly accepted the Secretary's interpretation of 30 C.F.R. § 57.1105(a) as requiring mines during exploration and development to have either two escapeways or one escapeway and a method of refuge.
2. Whether the judge properly determined that Small Mining Development's violation of Section 57.1105(a) was significant and substantial.

STATEMENT OF THE CASE

A. Factual Background

Newmont Gold owns and operates the Vista Mine, an underground gold mine near Winnemucca, Nevada. Dec. at 1; Tr. at 10. On June 7, 2011, MSHA Inspector Merlin McMullen conducted an inspection of the mine. Dec. at 3. At that time, the mine consisted of one exploration drift that was approximately 16 feet wide and 16 feet tall. Dec. at 3; Tr. at 22, 24, 34. It is undisputed that the drift was the mine's only escapeway and that there was no refuge chamber underground. Dec. at 2.

Small Mine Development ("SMD"), the primary contractor on site, was performing exploration and development work at the mine to determine whether the gold ore body was mineable. Dec. at 1, 2; Tr. at 22, 24. Timberline Drilling, another contractor, was performing diamond drilling for core sampling at the mine. Tr. at 24; 125.

During the relevant period, three SMD miners worked at the mine on two 12-hour shifts, seven days a week. Dec. at 3; Tr. at 25. Inspector McMullen testified that miners had been working underground at the mine since March 2011. Tr. at 32. SMD, which was responsible for driving the drift, performed drilling, blasting, bolting, and shotcreting operations at the mine,

hailed explosives in and out of the mine, and hauled mucking material to the surface. Dec. at 3; Tr. at 24-25, 122.

Brian Engelson, SMD's Assistant Manager, testified that each blast advanced the face approximately 8 to 22 feet. Dec. at 4; Tr. at 130. On June 7, 2011, the drift was approximately 1000 feet long and had been blasted past the fourth crosscut. Dec. at 3; Tr. at 26. Inspector McMullen testified that at the time of the inspection, the first crosscut was "basically empty," the second crosscut had a diamond drill station in it, and the third crosscut was also "basically empty." Tr. at 27. MSHA Assistant District Manager Kevin Hirsch testified that a refuge area could have been placed in the open crosscuts. Tr. at 85.

Inspector McMullen observed an altering forklift and a dump truck travel out of the mine portal. Tr. at 27. He also observed numerous pieces of equipment on the surface of the mine, including a dump truck, a fuel truck, a powder, truck, and a mucker. Tr. at 28. The majority of the equipment was diesel-powered. Tr. at 23, 29. Inspector Mullen testified that all of the equipment except for the fuel truck was brought underground. Tr. at 29. Assistant Manager Engelson agreed that diesel equipment, including a dump truck, a powder truck, a mucker, a roof bolter, a haul truck, and a jumbo were brought underground. Dec. at 4; Tr. at 141-42, 147. Inspector Mullen testified that the equipment ranged in size from six to twelve feet wide. Dec. at 14; Tr. at 29.

Inspector McMullen also observed a refuge chamber sitting on the surface of the mine. Tr. at 31. McMullen testified that Newmont asked SMD to put the chamber underground at the completion of the project for use by the diamond drillers. Tr. at 39. McMullen declined to go underground on June 7 because he believed that it was unsafe. Tr. at 27. He explained that it

was unsafe because there was only one escapeway and no underground refuge chamber, and miners were working a thousand feet underground. Tr. at 27.

Based on his observations, Inspector McMullen issued a citation alleging a violation of 30 C.F.R. § 57.11050(b) consisting of having only one escapeway and not having a refuge chamber. Before the hearing, the judge granted the Secretary's motion to amend the citation to allege, in the alternative, a violation of 30 C.F.R. § 57.11050(a).¹

Inspector McMullen designated the violation to be significant and substantial ("S&S"). McMullen testified that he believed that it was reasonably likely that fatal injuries would occur as a result of the violation. Tr. at 32, 33. He explained that a ground fall could occur from drilling, core drilling, equipment vibration, or changes to the airflow from the ventilation system. Tr. at 33. He explained that if a ground fall blocked the one escapeway out of the mine, the mine typically would lose ventilation. Tr. at 34. McMullen explained that because there was no refuge chamber, the chances of survival would be "very limited." Id.

¹ 30 C.F.R. § 57.11050 states:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

(b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

MSHA Assistant District Manager Hirsch agreed that the violation was S&S. Dec. at 15. Hirsch testified that although he had not been to the Vista Mine, he has inspected mines within five miles of the area. Tr. at 74, 75. He testified that ground conditions in the general location of the Vista Mine were very poor and that he would expect the geological formation in the general location of the Vista Mine to be similar to the Vista Mine's geological formation. Id. Hirsch testified that there had been numerous ground failures at other mines in the general location of the Vista Mine and that some of those failures resulted in fatalities. Tr. at 74-75.

In addition to an emergency caused by a ground failure, Inspector McMullen explained that large equipment that has a tendency to blow hydraulic lines and have electric fires was coming into and going out of the mine daily. Tr. at 33. McMullen explained that if there was a fire on the equipment, miners could not get past the equipment and out of the mine. Tr. at 33.

Inspector McMullen testified that most of the equipment that was used underground was diesel-powered. Dec. at 14; Tr. at 29. Assistant District Manager Hirsch testified that it is highly probable that diesel-powered equipment will catch fire underground. Dec. at 15; Tr. at 78-79. Inspector McMullen testified that he was aware of two incidents in which mines in the Winnemucca area had to be evacuated due to equipment problems. In the first, an electrical fire on a forklift required evacuation. Dec. at 14; Tr. at 36. In the second, a blown hydraulic line on a mucker required evacuation. Id. McMullen explained that in the event of a fire on a piece of equipment, if there were no refuge chamber, miners would have to rely on their self-rescuers to try to survive the smoke. Tr. at 34.

B. The Judge's Decision

The judge accepted the Secretary's interpretation of Section 57.11050(a) as requiring mines during exploration and development to have either two escapeways or one escapeway and a

method of refuge. The judge stated that based on the text, the regulatory history, and the purpose of the standard, she tended to agree that the plain meaning of the standard matched the Secretary's interpretation. She nonetheless found that the standard was ambiguous, and held that the Secretary's interpretation was entitled to full deference. Dec. at 10-13.

In doing so, the judge rejected SMD's assertion that the Secretary's interpretation was not entitled to deference because it had changed. Dec. at 12. The judge found that the record contained no history of the Secretary changing his interpretation or taking inconsistent enforcement actions. Dec. at 12. The judge also determined that two Program Information Bulletins ("PIBs") issued by the Secretary before the citation in this case was issued were "entirely clear" as to the Secretary's interpretation. Dec. at 12.

In finding that the Secretary's interpretation is consistent with the language of the standard, the judge stated that the text and the structure of subsection (a) of the standard expresses a general requirement for two escapeways, and, in the event of only one escapeway, an additional requirement for a method of refuge. Dec. at 10, 13. The judge also found that the last sentence of subsection (a) provides an exception to the two-escapeway requirement during exploration and development and that the standard does not expressly address the need for a method of refuge in the exploration or development phase. Dec. at 10.

The judge determined that interpreting the refuge requirement to apply whenever there is no secondary escapeway is consistent with Congress' recognition that two methods of escape or survival are of "utmost importance to miner safety." Dec. at 10 (citing and quoting Akzo Nobel Salt, Inc., 21 FMSHRC 846, 853 (1999), vacated on other grounds, 212 F.3d 1301, 1304 (D.C. Cir. 2000)). The judge determined that the purpose of the refuge requirement is to provide miners an alternative means of escape or survival should the primary means be compromised,

and that requiring a method of refuge when only one escapeway is present enhances miner safety. Dec. at 13. Having determined that the Secretary's interpretation is consistent with the language of the standard and the purpose of the Act and the standard, the judge concluded that the Secretary's interpretation is reasonable and deserving of acceptance. Ibid.

The judge also affirmed the Secretary's designation of the violation as significant and substantial ("S&S"). In doing so, the judge determined that the analytic framework used by the Commission in evaluating the S&S nature of evacuation standards in Cumberland Coal Resources, LP, 33 FMSHRC 2357, 2367 (2011), appeal docketed, No. 11-1464 (D.C. Cir. Nov. 29, 2011), logically applies to the violation in this case. Dec. at 15-16. Accordingly, the judge held that evaluation of the S&S nature of the violation involved consideration of an emergency.

Noting that miners worked at the mine around the clock, performing drilling, blasting, bolting, and shotcreting and operating mobile equipment, the judge found that miners were routinely exposed to the mine atmosphere and accompanying risks. The judge also accepted the Secretary's witnesses' testimony that unexpected roof falls and equipment fires occur in mines near the Vista Mine. Dec. at 16. The judge found that given the size of the equipment, if there were a fire, miners would have little room to maneuver up the drift past the equipment and out of the mine. Ibid.

Recognizing that, in the event of an emergency that blocked the single escapeway and compromised the ventilation, miners would be at the mercy of the elements, including fire, smoke, lack of breathable air, and lack of water, the judge found that without a method of refuge, miners' means of survival would be extremely limited such that one would reasonably expect fatal injuries. Ibid. Accordingly, the judge affirmed the S&S designation. Ibid.

ARGUMENT

I.

THE JUDGE PROPERLY ACCEPTED THE SECRETARY'S INTERPRETATION OF 30 C.F.R. § 57.11050(a) AS REQUIRING MINES DURING EXPLORATION AND DEVELOPMENT TO HAVE EITHER TWO ESCAPEWAYS OR ONE ESCAPEWAY AND A METHOD OF REFUGE

A. Standard of Review

It is well established that if a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. Exportal Ltda. v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, that is the meaning of the provision, and the sole function of the courts is to enforce the language as written. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (“when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms”) (internal citation and quotation marks omitted.)) In determining whether a regulation's or a statute's meaning is plain, a reviewing body should apply all the traditional tools of construction, including both the particular regulatory language at issue and the language and design of the regulatory scheme as a whole. See City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003), and Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997) (both involving construction of a statute); National Wildlife Federation v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997), and Cannelton Industries, Inc., 26 FMSHRC 146, 151 (2004) (both involving construction of a regulation). In addition, a reviewing body must examine the intent of the drafters and the purpose of the regulation. Amax Coal Co., 19 FMSHRC 470, 474 (1997).

It is also well established that if a regulation's meaning is not plain, an adjudicatory body should give great deference to the interpretation of the agency entrusted with enforcing the regulation, and the agency's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the regulation. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 534 (D.C. Cir. 2004); Bigelow v. Department of Defense, 217 F.3d 875, 877 (D.C. Cir. 2000), cert. denied, 532 U.S. 971 (2001).

In this case, the Secretary's interpretation of the standard is consistent with the language of the standard and the purpose of the standard. As a result, it must be accepted.

B. The Present Case

Section 57.11050 states:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

(b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

The first sentence of subsection (a) requires every mine to maintain two escapeways. The second sentence of subsection (a) requires a method of refuge while the second escapeway is being developed. The third sentence of subsection (a) creates an exception to the two-escapeway requirement during exploration or development. Subsection (b) requires a method of refuge in addition to separate escapeways whenever miners cannot reach the surface through at least two

separate escapeways within an hour. See Dec. at 9. Thus, the standard read as a whole contemplates that, if the mine does not have a second escapeway that is completed and adequate, it must have a method of refuge.

It is true, as SMD points out (Br. at 9), that the standard states that the mine must have a method of refuge if a second escapeway is being developed and does not explicitly state that the mine must have a method of refuge if the operator, during exploration or development, chooses not to develop a second escapeway. It is a "fundamental canon" of statutory construction, however, "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Department of the Treasure, 489 U.S. 803, 809 (1989). The overall structure of the standard establishes that the standard requires mines during development to have a method of refuge when the mine only has one escapeway. The standard's focus on second escapeways that are being developed is easily explained: the standard recommends, and effectively contemplates, that a second escapeway will be developed.² To require a method of refuge when there is no completed escapeway because a second escapeway is still being developed, and not to require a method of refuge when there is no completed escapeway because a second escapeway is not even being developed, would produce the absurd result of treating effectively identical situations differently. Such a result must be rejected. See UMWA v. FMSHRC, 651 F.2d 615, 625-626 (D.C. Cir.), cert. denied, 451 U.S. 927 (1982) (rejecting as "paradoxical" an interpretation that would have treated differently mine inspections which, for the purposes of the Mine Act, were similar); NRDC v. EPA, 907 F.2d 1146, 1156

² Indeed, in this case SMD Assistant Manager Engelson acknowledged that SMD knew that it was "going to be going back into th[e] mine once they got a mine plan" and that SMD would need a refuge chamber at that time. Tr. at 139.

(D.C. Cir. 1990) (rejecting as an "anomaly" an interpretation that would have treated differently substances which, for the purposes of the statute in question, were equally hazardous).

Critically, the standard states only that, during exploration or development, a mine is not required to have a second escapeway; it does not state that, during exploration or development, a mine is not required to have two methods by which miners can reach safety. The statement that the mine is not required to have a second escapeway is not tantamount to a statement that the mine is not required to have two methods by which miners can reach safety. An approach under which the mine is not required to have a second escapeway during exploration or development makes sense: exploration and development are preliminary steps -- i.e., they may never actually result in production mining -- and it makes sense not to require a second escapeway to be constructed when it is not certain that production mining will ever occur. In contrast, an approach under which miners engaged in exploration or development have no second method by which they can reach safety makes no sense. The self-evident purpose of the standard is to ensure that miners have a method of survival during an emergency, even if one escapeway is damaged. See Akzo Nobel Salt, Inc., 21 FMSHRC at 854. When a second escapeway is not present, the refuge area serves that purpose. An approach under which miners do not have a second method of survival should be rejected because it is fundamentally inconsistent with that purpose.

The Secretary's interpretation, unlike SMD's interpretation, is also supported by the fact that the standard specifically recommends that, during exploration and development, the mine have a second escapeway, but does not recommend that, during exploration and development, the mine have a method of refuge if the operator chooses not to have a second escapeway. Given the focus of the standard on providing miners two methods of survival during an emergency, logic

dictates that if, as SMD asserts, the standard did not require either a second escapeway or a method of refuge during exploration and development, the standard would not merely recommend a second escapeway during exploration and development; it would also recommend a method of refuge in mines whose operators chose, during exploration and development, not to have a second escapeway. The fact that the standard does not recommend a method of refuge in such mines indicates that the standard requires a method of refuge in such mines.

In short, the standard contemplates that, in all circumstances, the mine must have two methods by which miners can reach safety: either two escapeways that are completed and adequate, or one escapeway that is completed and adequate and one method of refuge. An interpretation that would exempt a mine from the two-method requirement, and expose miners to heightened danger, simply because the mine chose not to develop a second escapeway during exploration and development is absurd and should be rejected. UMWA v. FMSHRC, 651 F.2d at 625.³

Not only is the Secretary's interpretation consistent with the language of the standard, the overall design of the standard, and the self-evident purpose of the standard; it is also consistent with the history of the Mine Act and the standard.

As the judge recognized (Dec. at 10), reading Section 57.11050 to require mines during exploration and development that do not have two escapeways to have a method of refuge is consistent with the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor statute to the Mine Act. The Senate Report accompanying the Coal Act stated:

³ Contrary to SMD's assertion (Br. at 10), the Secretary's (and the judge's) interpretation do not improperly read the "exploration and development exception in subpart (a) . . . out of the standard." Under the Secretary's (and the judge's) interpretation, that exception is given effect because it permits operators not to have a second escapeway during exploration and development.

Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternative route is provided to the surface. As recently as March 1968, 21 men at a salt mine lost their lives because a second escapeway was not provided.

S. Rep. No. 91-411, 91st Cong., 1st Sess. 83 (1969), reprinted in 94th Cong., 1st Sess., Senate Subcommittee on Labor, Committee on Labor and Public Welfare, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 209 (1975) (emphases supplied). Thus, in passing the Coal Act, Congress recognized that workers in underground metal and nonmetal mines need two methods of survival during an emergency. Although having a second escapeway is the preferred method, as the judge recognized, a refuge area serves the same purpose as a second escapeway: it provides an alternative means of survival should the primary means of escape be compromised. Accordingly, reading the standard to require a method of refuge when there is no second escapeway is consistent with the history of the Mine Act. SMD's interpretation, which would leave miners in mines with only one escapeway unprotected in the event of an emergency compromising that escapeway, is inconsistent with the history of the Act..

The Secretary's interpretation is also consistent with the history of the standard. The standard was originally promulgated on February 25, 1970, by the Secretary of the Interior as 30 C.F.R. § 57.11-50 under Section 6(a) of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 725(a) (1976). 35 Fed. Reg. 3675 (February 25, 1970). As originally promulgated, the standard stated:

Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other or a method of refuge shall be provided when only one opening to the surface is possible.

35 Fed. Reg. at 3675. As SMD acknowledges, under the standard as originally promulgated, SMD would have been required to have a method of refuge at the Vista Mine. See Br. at 7.

As reflected in the standard's regulatory history, in February 1971, the Metal and NonMetal Mine Safety Advisory Committee (the "Advisory Committee") recommended changing the earlier version of the standard to add: "A method of refuge shall be provided while a second opening to the surface is being developed" -- the same language that appears as the second sentence in the current rule. See Ex. J (DOL 0448).⁴ A report dated April 15, 1971, on the Advisory Committee's actions explained the reason the Advisory Committee proposed the change:

[The] standard has been criticized because it apparently permits a refuge to be used in place of a second escapeway.

The Committee considered the problem at its February meeting. They recognized that in some circumstances such as shaft development and exploration, only one opening to the surface is possible. The Committee reworded the standard as follows:

57.11-50 Mandatory. Every mine shall have two separate properly maintained escapeways to the surface which are so positioned that damage to one shall not lessen the effectiveness of the other. A method of refuge shall be provided while a second opening to the surface is being developed.

The report went on to explain:

The revised wording makes it clear that a refuge chamber cannot be used as a substitute for a second opening to the surface except when a second opening is not possible such as during exploration or development work, and that eventually a second escapeway to the surface must be developed.

Ex. J (DOL 442).

On December 17, 1971, the Secretary of the Interior proposed the rule recommended by the Advisory Committee. 36 Fed. Reg. 24044, 24045 (Dec. 17, 1971). The drafters of the proposed

⁴ Section 6(a) of the Metal Act required the Secretary to develop and revise, after consultation with advisory committees, and promulgate health and safety standards.

rule -- which in all relevant parts is identical to the first two sentences of current Section 57.11050(a)⁵ -- thus plainly intended to require mines during exploration and development to have a method of refuge if they did not have a second escapeway. Contrary to SMD's position, the drafters did not intend the second sentence of the current standard to suggest that a method of refuge is not required during exploration and development.

After the Rule was formally proposed in the Federal Register, a Report of Actions dated July 1972 stated the Advisory Committee recommended promulgating the proposed standard as a final rule because:

It was felt that this standard is better than the promulgated standard, because it recognizes that the refuge area should serve as a temporary expedient. The Committee suggested that the Bureau Steering Committee study and define the technique and application of "refuge area." The Committee agreed that, while two escapeways are practical and attainable, this is not always the answer. It is universally accepted that there be available for reasons of safety more than one method of access and egress from any underground mine operation where it is possible to meet the requirement.

Ex. J (DOL 434).

The standard, as it is currently written, was proposed on January 28, 1977. See 42 Fed. Reg. 5546, 5560 (Jan. 28, 1977). The Notice of Proposed Rulemaking expressly stated that the proposed standard was recommended by the Advisory Committee. See 42 Fed. Reg. at 5546 (indicating that standards recommended by the Advisory Committee were indicated by the letters "MNMSAC" and at 5560 (including the "MNMSAC" designation for the standard). The

⁵ The only textual differences between the rule as proposed in December 1971 and the first two sentences of current Section 75.11050(a) is that the first sentence of the current rule includes the phrase "or more" between the word "two" and the word "separate," the current rule includes the phrase "from the lowest levels" between the word "surface" and the word "which," and the current rule includes a comma between the word "separate" and the word "properly."

standard was promulgated as proposed on October 31, 1977. See 42 Fed. Reg. at 57038.⁶

Although the standard, as promulgated in 1977, included language in addition to the two sentences that were proposed in 1971, nothing in the additional language can reasonably be read as detracting from the intention of the Advisory Committee that mines during exploration and development that only have one escapeway have a method of refuge.

The language added to the standard in 1977 included what is now the third sentence of subsection (a) of the standard and what is now subsection (b) of the standard. The third sentence of subsection (a) -- "A second escapeway is recommended, but not required, during the exploration or development of an ore body" -- merely reflects the drafters' recognition that, at times, a second escapeway is not possible during exploration and development, even though it is recommended. Nowhere does the third sentence of subsection (a) indicate that a method of refuge does not have to be provided when there is no second escapeway. As already stated, subsection (b) provides that when a mine has two escapeways, if one of the escapeways is inadequate to protect miners because it is too far away, the mine must also have a method of refuge. Nothing in subsection (b) can be read to indicate that a refuge area does not have to be provided when there is no second escapeway at all.

⁶ Section 301(b)(1) of the Mine Act (the transfer provision), 30 U.S.C. § 961(b)(1), provided that mandatory standards promulgated by the Secretary of the Interior under the Federal Metal and Nonmetallic Mine Safety Act which were in effect when the Mine Act became effective "remain[ed] in effect as mandatory ... standards" under the Mine Act until the Secretary issued revised standards.

Thus, the history of the standard plainly reflects the drafters' intent to require mines during exploration and development to have either two escapeways or one escapeway and a method of refuge.

To avoid this history, SMD suggests that the Secretary's interpretation is undercut by the fact that between the time the Secretary of Interior in December 1971 proposed amending the standard with language that in all relevant respects is the same as the first two sentences of the current standard, and the time the standard was promulgated in 1977, the Advisory Committee considered amending the standard to require escapeways to be within "1000 feet horizontally or 300 feet vertically of each working face." See Br. at 7. According to SMD, the contemplated language "clearly allowed for a miner's needing to travel some distance from the face before reaching the escapeway" "with no distinction for exploration/development mining." Id. (citing Ex. J (DOL 413-415, 422)). Contrary to SMD's suggestion, the fact that the Advisory Committee considered, and rejected, language that would have provided for two escapeways at all times, without any exception for mines in exploration and development, in no way undercuts the conclusion that the Secretary of the Interior ultimately decided to promulgate a standard containing language that was intended to require mines during exploration and development to either have two escapeways or to have one escapeway and a method of refuge. If anything, the fact that the Advisory Committee considered requiring all mines to have two escapeways merely underscores its intent that all mines have two methods of survival in an emergency, whether or not the mine is in exploration or development.

Nor is there any merit to SMD's assertion that if the Secretary of the Interior had intended the Secretary's interpretation, he would either have left the 1970 language in place or merely promulgated the standard as proposed in December 1971. See Br. at 7. As the regulatory history

indicates, one of the reasons for amending the standard was that the standard, as originally promulgated, had been criticized because it “permit[ted] a refuge to be used in place of a second escapeway” and the drafters wanted to make clear that “a refuge chamber c[ould] not be used as a substitute for a second opening to the surface except when a second opening [was] not possible such as during exploration or development work” Ex. J (DOL 442). Moreover, as already stated, the final rule added the third sentence to what is now subsection(a) of the standard, making clear the Secretary of the Interior's preference for two escapeways. As already stated, given the focus of the standard on providing miners two methods of survival during an emergency, logic dictates that if the standard did not require either a second escapeway or a method of refuge during exploration and development, the added language would also recommend a method of refuge in mines whose operators chose, during exploration and development, not to have a second escapeway. It does not. In addition, the final rule also added a second paragraph-- what is now subsection (b) -- to the standard. As already stated, that paragraph provides that when two escapeways are not adequate because one is too far from the face, the mine must also have a method of refuge, highlighting the drafters’ intent that mines always have two adequate methods of survival available -- an intent that supports the Secretary's interpretation of the standard and does not support SMD's.

SMD’s assertion that the Secretary’s interpretation is not due full deference because her interpretation has changed (see Br. at 10-14) is both legally and factually flawed. As already stated, the history of the standard makes clear the Secretary of the Interior’s interpretation, from the inception, that mines during exploration and development must have either two escapeways or one escapeway and a method of refuge.

Consistent with that interpretation, on February 28, 2007, the Secretary issued Program Information Bulletin P07-04, which was distributed to, inter alia, metal and nonmetal mine operators and made available on MSHA's website. See Gov't Ex. 6. The PIB expressly stated that its purpose was to "to re-emphasize to the metal and nonmetal mining industry the requirements for escapeways to the surface and for refuge areas." Gov't Ex. 6 at 1. The first paragraph of the PIB's "information" section stated that every mine

is required to provide miners with two separate escapeways. . . . Until the second escapeway is established a refuge area must be provided. A secondary escapeway is recommended but not required during exploration and development. The means that mine areas awaiting establishment of a second escapeway or areas of exploration or development must have at least one escapeway and one method of refuge if miners cannot reach the surface by two separate escapeways.

Gov't Ex. 7 (emphases added). The "summary" section of the PIB likewise stated: "In mines with only one escapeway, those developing a second escapeway or in exploration or development, miners must have access to a refuge area." Gov't Ex. 6 at 2. The PIB was re-issued on June 4, 2009, and was re-distributed to the mining community and published on MSHA's website, where it is still available. See Gov't Ex. 7; <http://www.msha.gov/regs/complian/PIB/2009/pib09-09.asp>.⁷ As the judge found, the PIB is "entirely clear as to the Secretary's interpretation." Dec. at 12.⁸ Accordingly, even if the

⁷ The PIB does not have an expiration date.

⁸ SMD unpersuasively relies on a section of the PIB, which indicates that refuge areas must be located so that they can be reached within thirty minutes after miners leave their workplace, to suggest that the Secretary's interpretation has been inconsistent. SMD asserts that this language renders the PIB ambiguous on the issue in this case because, in "a portal mine with a drift running underground and no shaft," like the Vista Mine, the refuge area could be located on top of the mine and be accessible within thirty minutes. Br. at 12. By its terms, however, the section of the PIB on which SMD relies applies to subsection (b) of the standard and, therefore, only applies when a mine has two escapeways that both cannot be reached within one hour by every

Secretary's interpretation of the standard was not clear at the time the standard was promulgated, it was clear by the time the Secretary published the PIB.⁹

Finally, even if the Secretary's interpretation were not clear from the history of the standard and from the PIB, that would not undercut the conclusion that the Secretary's interpretation is due full deference. As the judge found, there is "no relevant history of the Secretary's inconsistent enforcement actions in the record" (Dec. at 12), and the Secretary's interpretations advanced before the Commission are entitled to full deference. Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5 (D.C. Cir. 2003). See also Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141, 1146-47 (7th Cir. 2001) ("the apparent lack of contemporaneity between the promulgation of the regulation and the Secretary's interpretation of it does not affect the high level of deference we owe to the Secretary.")

There is no merit to SMD's reliance on the testimony of SMD Safety Director Michael Drussel, a former MSHA inspector, that while he was working as an MSHA inspector, an unnamed MSHA supervisor told Drussel that if a mine had only one escapeway and no refuge area, "as long as it's [exploration and development] there's nothing we can do about it," to suggest that the Secretary's interpretation has been inconsistent and is not owed deference. See Br. at 4, 10. The judge specifically found, based on Drussel's demeanor and evasive answers at

underground miner. And even if subsection (b) applied to mines with one escapeway, the argument would be inherently illogical. If a mine consists only of a drift through which miners can reach the surface in less than thirty minutes, there is no issue of miners not reaching the escapeway within one hour.

⁹ Nor, as SMD asserts (Br. at 12), is the Secretary's Program Policy Manual ("PPM") (Ex. I) or an earlier version of the PPM (Ex. H) inconsistent with the Secretary's interpretation. Nothing in the PPM or the earlier version of the PPM states that a mine that only has one escapeway during exploration and development is not required to have a method of refuge.

the hearing, that Drussel was not a credible witness. Dec. at 15.¹⁰ And even if Drussel's testimony were credible on this point, that would not be a basis for withholding full deference to the Secretary's interpretation in this case. The asserted interpretation of an unnamed supervisor (or of a former MSHA inspector) is not an interpretation of the Secretary.¹¹ Deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to individual agency employees. Sereno Labs, Inc. v. Shalala, 158 F.3d 1313, 1321 (D.C. Cir. 1998). The fact that there may be internal disagreement over the meaning of a statute does not diminish the deference owed the agency's interpretation. Id.; Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 742 (8th Cir. 2001) (holding that an Associate Solicitor's memorandum did not rise to the level of an informal agency pronouncement, much less a formal agency action that could bind the government). See also San Luis Obispo Mothers For Peace v. United States Nuclear Regulatory Comm'n, 789 F.2d 26, 33 (D.C.Cir.1986) (en banc) (holding that the "position of an agency's staff, taken before the agency itself decided the point, does not invalidate the agency's subsequent application and interpretation of its own regulation")

Also devoid of merit is SMD's suggestion that the Secretary's interpretation is not entitled to full deference because Assistant District Manager Hirsch testified that, for feasibility reasons, he does not enforce the method of refuge requirement until a mine with only one escapeway has two open crosscuts. See Br. at 13. Contrary to the premise of SMD's suggestion, the issue of whether Hirsch's interpretation of the standard as allowing him not to enforce the method of

¹⁰ It is true that the judge made this finding while discussing Drussel's testimony concerning ground conditions at the mine. See Dec. at 15. There is no indication, however, that the finding did not apply to his testimony in general.

¹¹ Indeed, Drussel acknowledged on cross-examination that MSHA headquarters had not conveyed that interpretation to him. Tr. at 117.

refuge requirement until mining reaches a second open crosscut is not before the Commission. Nor is the issue of whether Hirsch's policy represents the Secretary's policy. See Sereno Labs, 158 F.3d at 1321. There is no dispute in this case that, at the time of the citation, it was feasible for the Vista Mine to have a method of refuge.

Finally, SMD's assertion that the Secretary's interpretation cannot be accepted because the evidence in this case concerning the risks of not having a refuge chamber at the Vista Mine was speculative or theoretical is both legally and factually incorrect. See Br. at 14-16. The argument is legally incorrect because to enforce a standard the Secretary is not required to establish that the violation created a hazard at the mine in question. See, e.g., Westmoreland Coal Co., 7 FMSHRC 1338, 1341 (1985) (holding that a defense that application of a standard diminishes safety is only viable if the operator proves that (1) the hazards of compliance are greater than non-compliance; (2) alternative means of protecting miners are unavailable; and (3) a modification proceeding under section 101(c) of the Act would not have been appropriate). If a defense that application of a standard will diminish safety is not viable, then a fortiori a defense that the application of the standard will not increase safety because the violation does not create a hazard is not viable. In any event, as detailed below, the Secretary's evidence concerning the hazards created by the violation was neither speculative nor theoretical.

II.

THE JUDGE PROPERLY DETERMINED THAT SMD'S VIOLATION OF SECTION 57.11050(a) WAS SIGNIFICANT AND SUBSTANTIAL

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 822, 825 (1981)). Contrary to SMD’s argument (see Br. at 16), in Musser Engineering, Inc. and PBS Coals, Inc., 32 FMSHRC 1257, 1280-81 (2010), the Commission made clear that to satisfy the third element of Mathies, the Secretary is not required to "prove a reasonable likelihood that the violation itself will cause injury". Id. Accord Black Beauty Coal Co., 34 FMSHRC 1733, 1739 (2012); Cumberland Coal Resources 33 FMSHRC at 2365-66. Instead, to establish the third element of Mathies, the Secretary is required to prove a reasonable likelihood that the hazard contributed to by the violation will cause injury. Id.

In Cumberland, the Commission made clear that in evaluating the S&S nature of evacuation standards that only come into play in the event of an emergency, one must assume the occurrence of the emergency. 33 FMSHRC at 2366. Assuming the occurrence of the contemplated emergency is consistent with the language of Section 104(d)(1) of the Act, which describes an S&S 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). 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.¹² Assuming the occurrence of

¹² To the extent Section 104(d)(1) of the Mine Act is ambiguous on the issue of whether one must assume the contemplated emergency, the Secretary's interpretation is owed full deference and is entitled to affirmance as long as it is reasonable. Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 792 (D.C. Cir. 2009); Secretary of Labor v. Excel Mining,

the contemplated emergency is consistent with the language and the purpose of the Act; SMD's half-hearted attempts to distinguish this case from Cumberland (see Br. at 17-18) identify no meaningful reason not to apply the Cumberland approach here.

As the judge correctly recognized, the logic of Cumberland applies equally to the method of refuge violation in this case. MSHA's standards require refuge areas to be made of fire-resistant construction, to be large enough to accommodate the normal number of miners working in the area, and to be provided with compressed air lines, waterlines, suitable handtools, and stopping materials. 30 C.F.R. § 57.11052. In addition, refuge areas must have a method of communication with the surface that is independent of the mine power supply. 30 C.F.R. § 57.11054. A requirement for a method of refuge thus comes into play only if there is an emergency during which miners cannot escape the mine and need to be protected from adverse conditions such as lack of breathable air or potable water. Just as an evacuation requirement serves no purpose except in the event of an emergency where miners need to evacuate the mine to escape from adverse conditions, so a method of refuge requirement serves no purpose except in the event of an emergency where miners cannot escape and need to use the method of refuge to protect themselves from adverse conditions. For purposes of applying Cumberland, an evacuation requirement and a method of refuge requirement are two sides of the same coin: they set forth two alternative responses to exactly the same kind of emergency.

LLC, 334 F.3d 1, 5 (D.C. Cir. 2003). "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 National Cement, 573 F.3d 788 at 792.

Applying Mathies in this case, the evidence plainly supports the judge's finding that the violation was S&S. As discussed above, the Secretary established the first prong of Mathies -- an underlying violation of a safety standard.

The Secretary also establishes the second prong of Mathies -- the violation contributed to a safety hazard, that is, a measure of danger.

Inspector McMullen and Assistant District Manager Hirsh identified two types of emergencies in which an area of refuge would be needed at the Vista Mine: a ground fall that blocked the escapeway, and an equipment fire in the escapeway that prevented miners from going around the equipment and getting out of the mine. See Tr. at 32, 33, 34, 74-75. Inspector McMullen, whose testimony the judge credited (see Dec. at 16), explained that a ground fall could result from drilling, core drilling, equipment vibration, or changes to the airflow from the ventilation system. Tr. at 33. McMullen testified that SMD performed drilling and blasting at the mine. Dec. at 3; Tr. at 24-25. Timberland Drilling was performing drilling for core sampling at the mine. Tr. at 24, 125. Large pieces of equipment were also used underground. Tr. at 27, 28, 141-42.

Assistant District Manager Hirsch testified that, although he had not been to the Vista Mine, he had inspected mines within five miles of the area. Tr. at 74. Hirsch testified that ground conditions in the general location of the Vista Mine were very poor and that he would expect the geological formations in the general location of the Vista Mine to be similar to the Vista Mine's geological formation. Id. Inspector McMullen testified that if a ground fall blocked the one escapeway out of the mine, the mine typically would lose ventilation. Tr. at 34. McMullen explained that because there was no refuge chamber, the chances of survival would be "very limited." Id. Hirsch testified that there had been numerous ground failures at other mines in the

general location of the Vista Mine and that some of those failures resulted in fatalities. Tr. at 74-75. The judge found that Inspector McMullen and Assistant District Manager Hirsch “convincingly testified” that unexpected roof falls occur at mines throughout the District and in close proximity to the Vista Mine. Dec. at 16.

In addition to an emergency caused by a ground failure requiring miners to use an area of refuge, Inspector McMullen explained that large, and mostly diesel, equipment that has a tendency to blow hydraulic lines and catch fire was coming into and going out of the mine. Tr. at 27-29, 33, 37-38. Assistant District Manager Hirsch testified that it is highly probable that diesel-powered equipment will catch fire underground. Dec. at 15; Tr. at 78-79. Consistent with Hirsch’s testimony, McMullen testified that he was aware of two incidents in which mines in the Winnemucca area had to be evacuated due to equipment problems. Dec. at 14; Tr. at 36. As the judge found, Inspector McMullen and Assistant District Manager Hirsch “convincingly testified” that equipment fires occur at mines throughout the District and near the Vista Mine. Dec. at 16.

Inspector McMullen testified that the pieces of equipment brought underground by SMD ranged in size from six to twelve feet wide. Tr. at 29. McMullen explained that if there was a fire on the equipment, miners could not get past the equipment. Tr. at 33. Consistent with Inspector McMullen's testimony, the judge found that the size of SMD's equipment left little room for miners to maneuver past equipment. Dec. at 16. McMullen explained that if there was a fire on the equipment, miners would have to remain underground and, if there were no refuge chamber, would have to rely on their self-rescuers to get away from the smoke and survive. Tr. at 34. All of this evidence compels the conclusion that the violation contributed to the hazard of miners, in the event of an emergency where miners could not evacuate the mine to escape from adverse conditions, being exposed to those conditions. The evidence also compels the

conclusion that the evidence of such a hazard occurring at the Vista Mine was neither speculative nor theoretical: it was very real.

The Secretary also established the third and fourth Mathies prongs -- a reasonable likelihood that the hazard contributed to by the violation would result in serious injury or death. As already stated, Inspector McMullen testified that if the escapeway were blocked and miners had to remain underground, miners who had no area of refuge would have to rely on their self-rescuers to get away from the smoke and survive. Tr. at 34. MSHA standards require that a "1-hour self-rescue" device be made available to all underground personnel. 30 C.F.R. § 57.1503. Inspector McMullen testified that if the ventilation was compromised by a ground fall, the likelihood of survival would likewise be very limited. Tr. at 34. He further testified that it was reasonably likely that miners would suffer fatal injuries. Tr. at 32, 33.

Substantial evidence thus plainly supports the judge's finding that were an emergency necessitating an evacuation because of adverse conditions to occur and block the drift, miners would not have the alternative means of escape or survival that the standard contemplates, and a trapped miner would be at the mercy of the elements, including, fire, smoke, lack of breathable air, and lack of water. See Dec. at 16. Substantial evidence also supports the judge's finding that without a method of refuge, "miners' means of survival would be extremely limited such that one would reasonably expect fatal injuries to be sustained." See ibid.

SMD argues that the judge's S&S finding is not supported by substantial evidence because there was no basis for concluding that, in the event of an emergency, the air hose or the vent tubing would suffer any damage that would prevent the use of compressed air, or that the water line would be damaged so that it was not able to provide potable water. Br. at 18. The argument is legally erroneous because, in considering the S&S nature of the violation, one must assume the

kind of emergency contemplated by the standard, i.e., an emergency in which miners need a method of refuge because of adverse conditions. See Cumberland, 33 FMSHRC at 2367. In any event, contrary to the premise of the argument, Inspector McMullen testified that if a ground fall blocked the one escapeway out of the mine, the mine typically would lose ventilation. Tr. at 34. McMullen testified that if there were no refuge chamber, miners would have to remain underground and rely strictly on their self-rescuers for survival. Tr. at 34. McMullen testified further that the chances of survival in that situation were “very limited,” and that it was reasonably likely that fatal injuries would occur as a result of the violation. Tr. at 32, 34. In addition, the argument ignores the evidence, discussed above, that miners would need the refuge area not only in the event of a ground fall that compromised the ventilation system, but also in the event of an equipment fire, to protect them from contaminated air or fire. Finally, the argument overlooks the fact that the refuge area would have a communication system that would facilitate miners' ability to be rescued quickly.

SMD also asserts, without record support, that because the air and water lines to a refuge chamber run along the same drift as the ventilation, if the ventilation were compromised, there would also be no air or water coming to the refuge area. Br. at 19. Even if there were record support for this assertion, it would still not be a valid basis for vacating the S&S designation. Like SMD's argument that if there were a ground fall miners would not need a method of refuge because they could use the air line or the vent hose, the argument overlooks evidence that miners would need the refuge area not only in the event of a ground fall but also in the event of an equipment fire. It also ignores the fact that the refuge area's communication system would facilitate miners' ability to be rescued quickly.

Also unavailing is SMD's assertion that miners would not be affected by smoke from an equipment fire that blocked the escapeway because all the equipment had fire suppression systems and extinguishers and any fire would be "quickly suppressed." See Br. at 18, 19. In analyzing the S&S nature of the violation, one must assume the kind of emergency contemplated by the standard, i.e., an emergency in which miners would need a method of refuge because of adverse conditions. In addition, the argument is inconsistent with well-established case law holding 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").

SMD's reliance on the testimony of Assistant Mine Superintendent Engelson, that, if there was a ventilation failure, one could use the vent bag at the end of the ventilation tubing as a refuge area is unpersuasive. See Br. at 19. Noting that on cross-examination Engelson acknowledged that the vent bag was not a refuge area and did not have water lines, suitable hand tools, or stopping materials, and noting that Engelson did not know whether the vent bag was gas-tight, the judge properly rejected Engelson's assertion. Dec. at 15 (citing Tr. at 140-41).

SMD's argument that the judge erred in finding that the violation was S&S because there has never been an unplanned ground fall at the Vista Mine and the lack of a refuge area was

therefore not reasonably likely to contribute to serious injury fails for a number of reasons. See Br. at 17.

First, as set forth above, the Secretary is not required to establish that the violation is reasonably likely to result in serious injury; she is only required to establish that the hazard to which the violation contributes is reasonably likely to result in serious injury. Musser Engineering, 32 FMSHRC at 1280-81, Cumberland Coal, 33 FMSHRC at 2365-66.

Second, it is well established that to establish the S&S nature of a violation, the Secretary is not required to prove that the hazard in question has already occurred at the mine. See New Warwick Mining Co., 18 FMSHRC 1568, 1576 (1996) (operator's "argument that there is no evidence an explosion has ever occurred in a transfer station is not dispositive"); Ozark-Mahoning Co., 8 FMSHRC, 190, 192 (1986) (in a case involving a driller failing to wear safety glasses, the fact that the driller had so far avoided serious injury did not establish that an accident was not reasonably likely). Evidence that the mine had not previously been cited for ground control problems is a particularly inappropriate basis for concluding that the violation was not S&S in this case because development of the Vista Mine did not begin until sometime after February 23, 2011, and MSHA did not inspect the mine until the inspection in this case was conducted in June 2011. See SMD Ex. A; Tr. at 22.

Finally, the argument ignores the fact that, as set forth above, the evidence establishes that an area of refuge was necessary not only to protect miners from ground falls, but also to protect miners from equipment fires.

CONCLUSION

For the foregoing reasons, the Commission should affirm the judge's decision in this case in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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